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IN THE FLORIDA SUPREME COURT

Case No. 91,595
L.T. Case No.: 96-02758

On Discretionary Review Of The Decision
Of The Second District Court Of Appeal

LAWRENCE D. McDOUGALD,
Petitioner,

v.

HENRY D. PERRY and C & S CHEMICALS, INC., a foreign corporation,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

Petitioner, Lawrence D. McDougald, ("Mr. McDougald"), submits this Reply to the Answer Brief of the Respondents, Henry D. Perry and C & S Chemicals, Inc. The Answer Brief has two central themes, which are that: (1) the doctrine of res ipsa loquitur does not apply under the facts presented; and, (2) Mr. McDougald did not present adequate proof of his expected losses arising from his injuries. The Respondents also raise a number of new issues for the first time on appeal, which -- as discussed below -- this Court should not consider because the Respondents failed to file a cross-appeal.

A. The Doctrine of Res Ipsa Loquitur Applies To Tires That Detach Or Dislodge From Motor Vehicles

The Respondents fail to distinguish in a meaningful way the circumstances under which res ipsa loquitur applies and the facts at issue. First, the Respondents claim that the doctrine does not apply because the spare tire at issue was not attached to an axle, and, instead, was placed in a rack attached to the undercarriage and secured by a chain. This distinction is a trivial one. The cases that apply the doctrine to "wayward wheel" situations are not based on the fact that the dislodged wheels had been attached to axles rather than to undercarriages. Instead, they are based on the common sense inference that a vehicle's wheels or tires -- whether those on an axle or those attached to the vehicle's undercarriage -- do not detach themselves in the ordinary course of events absent negligence. As this Court stated in Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., the doctrine of res ipsa

loquitur "provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting" and where the "accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control." 358 So. 2d 1339, 1341-42 (Fla. 1978). Spare tires are integral and necessary components of motor vehicles, just like the tires they are designed to replace. Whether they are affixed to vehicles via an axle or otherwise is irrelevant because in either case their detachment from vehicles is the type of unexpected circumstance to which the concept of res ipsa loquitur applies.

In this regard, the res ipsa loquitur doctrine is based, in part, on a judicial policy of permitting (but not compelling) a rebuttable inference of negligence under certain circumstances where it may be difficult for one party to obtain evidence to demonstrate the other's negligence. Here, the Respondents were in the superior position -- vis-a-vis motorists such as Mr. McDougald -- to oversee the maintenance and safety of the spare tire and its restraining mechanism, and to retain such evidence after an incident to demonstrate a lack of negligence. Contrary to the Respondents' assertions, those who control the instrumentalities that cause injury are far more likely to have access to evidence that might disprove their negligence in these situations compared to injured motorists who lack such access.

Second, a jury could reasonably conclude that the incident at issue would not have ordinarily occurred absent negligence. Tires

-- spare or otherwise -- do not ordinarily detach from vehicles unless some lack of attentiveness or care is present. This "common sense" conclusion does not require weighty evidence, unique expertise, or substantial experience with motor vehicles and their wheels. Instead, the jury was permitted to conclude that the unusual nature of the incident (combined with the unusual manner and means by which the spare tire was secured with a nut and bolt) was sufficient to permit an inference of negligence in light of the incident that occurred.

The Respondents suggest that the "incident could be due to reasons other than negligence, such as vandalism or debris on the road." [AB 12] This type of speculation does not defeat the applicability of the doctrine. Instead, the jury was entitled to apply the doctrine in light of the evidence that the Respondents controlled the vehicle at issue and that the failure of the safety chain and the ejection of the spare tire were unusual events that rarely occur absent disregard for safety.

In this regard, the Respondents entirely overlook that the failure of the safety chain is precisely the type of event that supports a res ipsa loquitur instruction. If, as Respondents contend, the safety chain and its nut, bolt and washer are presumed to have functioned properly [AB 28], the chain should not have come apart in the ordinary course of events absent negligence. The inference of negligence is particularly appropriate under these circumstances because direct evidence of negligence is lacking. This point is demonstrated by the testimony of Mr. Perry, the

person most familiar with the chain and its maintenance. When asked how the bolt mechanism could have slipped through the chain link, he stated: "That, I don't know." [T 258] Mr. Perry could only point out that the link had been stretched for some unstated reason thereby allowing the bolt to slip through the link. [T 258] Because Mr. Perry -- the party in the best position to control and oversee the chain's maintenance -- could provide no more than equivocal testimony about how the chain's failure occurred, it is unreasonable that Mr. McDougald -- the party least able to explain the chain's failure -- bear the evidentiary burden of providing direct evidence of negligence under these circumstances. Instead, the res ipsa loquitur doctrine applies by providing a common sense, but rebuttable, inference of negligence where direct evidence of negligence is wanting.

Notably, the Respondents provide a number of hypothetical causes for how the tire could have come loose from its rack, but they fail to cite to any evidence in the record to support such speculation. Even Mr. Perry did not speculate as to such remote causes. Further, each of their improbable conjectures is based on a situation in which a plaintiff would probably lack the ability to obtain evidence to prove negligence. For example, the Respondents claim that "road debris" could have "affected the chain's integrity" and thereby been a basis for Mr. McDougald to have proven negligence. But it is unclear how an injured party, such as Mr. McDougald, could ever obtain evidence of such an event. In

contrast, those who control the instrumentalities that cause injuries are in far better positions to obtain such evidence.

Third, the Respondents unknowingly demonstrate the applicability of the doctrine by, first, recognizing that it applies to "unusual circumstances" and, second, by admitting that the incident at issue was so unusual that no one had ever heard of a similar incident. [AB 18, 21] The Respondents strongly emphasize the fact that the witnesses who testified had "never heard of a similar incident." [AB 18] But their assertion merely proves the legal point that the doctrine should be used cautiously and applied only to the uncommon situation -- such as the one at issue -- that the Respondents readily acknowledge is unusual.

Fourth, the existence of some evidence of negligence does not preclude the use of a res ipsa loquitur instruction. This Court made this point clearly in Marrero in stating that the "presence of some direct evidence of negligence should not deprive the plaintiff of the res ipsa inference." Marrero v. Goldsmith, 486 So. 2d 530, 532 (Fla. 1986) This Court emphasized that the res ipsa loquitur doctrine "does not require that there be a complete absence of direct proof," nor does it require that a plaintiff negate all other inferences. Id. If a plaintiff has direct and full proof demonstrating negligence, the inference permitted by the res ipsa loquitur doctrine becomes unnecessary. As this Court stated in Marrero:

> It is only . . . when the facts are known there is no inference, and res ipsa loquitur simply vanishes from the case. On the basis of reasoning such as this, it is quite generally agreed that the introduction of some

> evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish a full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur.

486 So. 2d at 532 (citing PROSSER & KEATON, LAW OF TORTS, § 40 (5th Ed. 1984)). As such, the existence of some evidence upon which the jury could have relied to infer negligence by the Respondents does not undermine the use of the res ipsa loquitur instruction in this case.

Incredibly, the Respondents claim that the safety chain's failure is not evidence of negligence and that a res ipsa loquitur instruction amounts to "strict liability" under these circumstances. Specifically, the Respondents state that "because the tire came out of its rack, partly as a result of the failure of the safety chain, [it] [sic] cannot in and of itself be adequate evidence of negligence." [AB 28] As Respondents must admit, the failure of the safety chain is the type of event that should not occur absent negligence (particularly in light of the testimony that the chain is subjected to pre-trip inspections). Further, the Respondents' fear of "strict liability" is empty because the res ipsa loquitur doctrine merely permits a jury to infer negligence that can be rebutted with evidence to the contrary.

In this regard, a final point that bears re-emphasis is that the standard res ipsa loquitur instruction does not compel the jury to infer negligence. Fla. Std. Jury Instr. 4.6 (1998); Marrero, 486 So. 2d at 531 (the "doctrine of *res ipsa loquitur* permits, but does not compel, an inference of negligence under certain

circumstances."). To the contrary, the standard instruction states:

> If you find that the circumstances of the occurrence were such that, in the ordinary course of events, it would not have happened in the absence of negligence, . . . and that the instrumentality causing an injury was in the exclusive control of the defendant at the time it caused the injury, . . . ***you may infer*** that the defendant was negligent unless, taking into consideration all of the evidence in the case, you conclude that the occurrence was not due to any negligence on the part of the defendant.

Fla. Std. Jury Instr. 4.6 (1998) (emphasis added). The jurors were given this standard instruction, [T 661-663] which -- as the emphasized language indicates -- did not compel that they find the Respondents negligent or to even infer negligence. Instead, the jurors were free to reject an inference of negligence if, for example, they determined that such an incident ordinarily would not arise from negligence or that the issue of control was lacking. The Respondents were free to argue that the elements of res ipsa loquitur were not present and thereby avoid the inference. In addition, the standard instruction permitted the Respondents to persuade the jury that they were not negligent, even if the jury had concluded that an inference of negligence was warranted.

B. Mr. McDougald Presented Adequate Proof of His Loss Of Future Earning Capacity

Much of the Respondents' Answer Brief is devoted to rearguing the evidence that the jury assessed in awarding damages to Mr. McDougald for his losses attributable to his reduced future earning capacity. The Respondents do so despite acknowledging that damages "for loss of any future earning capacity" are designed to "compensate a plaintiff for the loss of capacity to earn income." [AB 29] The Respondents claim, however, that Mr. McDougald did not establish his loss of future earning capacity with enough certainty. As such, it is the quantum of evidence that Respondents contest, and not Mr. McDougald's right to losses attributable to his diminished future earning capacity.

In this regard, the Respondents fail to acknowledge that Mr. McDougald presented sufficient evidence to establish his loss of future earning capacity by introducing evidence of his age, health, occupation, surroundings, and earning capabilities before and after the incident. Each of these items form the basis for an award of damages for lost future earning capacity, which the Respondents recognize as appropriate for the jury to consider. [AB 29]; *see also* W. R. Grace & Co. v. Pyke, 661 So. 2d 1301, 1302 (Fla. 3d DCA 1995).[1]

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[1] The court in W.R. Grace stated:

> Once sufficient evidence is presented, the measure of damages is the loss of capacity to earn by virtue of any impairment found by the jury and the jury must base its decision on all relevant factors including the plaintiff's age, health, habits, occupation, surroundings, and earnings before and after the injury.

The Respondents' primary contentions seem to be that Mr. McDougald's testimony regarding his hunting and guide service was speculative and that he failed to present a "yardstick" or other standard to measure his diminished future earning capacity. [AB 29-34] It is clear, however, that Mr. McDougald simply presented evidence of the diminishment of his own future earning capacity -- as measured by the surrogate of anticipated lost profits from his hunting and guide business. [T 516-18] The Respondents admit that this measure of damages is permissible. Specifically, the Respondents state that "*[e]vidence of the loss of prospective profits of a business is one measure of the earning ability of a plaintiff.*" [AB 30] (emphasis added). This is precisely what Mr. McDougald did. At trial, Mr. McDougald made clear that he was not claiming "lost profits" or specific losses of wages. [T 516] Instead, he merely sought to demonstrate the extent of his reduced future earning capacity by proxy through evidence of lost profits.

In this context, Mr. McDougald presented sufficient evidence to enable a jury to determine his damages for loss of future earning capacity within a reasonable degree of certainty. As stated in his Initial Brief, the evidence at trial showed that -- based upon his own past experiences and dealings -- Mr. McDougald could have earned between about $20,000.00 to $25,000.00 annually year by arranging and conducting hunting trips. He presented evidence as to the scope and nature of past hunting trips, the

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661 So. 2d at 1302 (citations omitted).

number of clients who had attended, and the amount of money that he would collect. [T 181-190, 194-203, 213] He testified as to the percentage (10-12% of what clients paid for referrals) that he could expect. [T 201] He made calculations based upon his likely expenses, the number of hunters he would take out, what payments would be made for the hunts, and his estimates of the number of hunts per year. [T 202-03] This information collectively provided the jury with a reasonable basis upon which to award damages in the amount of $45,000.00, which was lower than the amount that Mr. McDougald's testimony could have supported.

Admittedly the amount of Mr. McDougald's loss due to a reduction of his future earnings capacity is difficult to demonstrate with precision. This Court, however, has stated that the "[u]ncertainty of the amount or difficulty of proving the amount of damages with certainty will not be permitted to prevent recovery" on a claim for future losses. Twyman v. Roell, 166 So. 215, 218 (Fla. 1936). In Twyman, which is the seminal case on so-called "yardstick" measures of damages, this Court recognized that if substantial damages exist, "the impossibility of proving its precise limits is no reason for denying substantial damages altogether." Id.

In following its holding in Twyman, this Court in W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348 (Fla. 1989) stated that damages for lost profits are recoverable if "there is some standard by which the amount of damages may be adequately determined." Id. at 1351. Although the Respondents

claim that Mr. McDougald failed to prove his damages for loss of future earning capacity with "reasonable certainty," it is apparent from the evidence presented that his ability to engage in his planned hunting and guide service was substantially diminished. This Court in neither Twyman nor W.W. Gav required that a claimant, who lacks a track record of profits, put on extensive empirical evidence as to the expected profits to be generated. Instead, it merely required that there be " some standard" for calculating damages, which Mr. McDougald provided through his testimony.

Finally, the Respondents suggest that Mr. McDougald's loss of future earning capacity was not the result of his injuries. As Mr. McDougald testified, his permanent injuries greatly affected his physical capabilities and substantially reduced his ability to generate earnings from his business activities. [T 174-190] For this reason, the jury had a fully adequate basis upon which to conclude that the injuries to Mr. McDougald diminished his future earnings capabilities.

C. The Respondents Remaining Issues Should Be Stricken Or Ignored Because They Are Improperly Raised

The Respondents raise three issues in their Answer Brief that were not raised or addressed in Mr. McDougald's Initial Brief, and were not discussed in the Second District's opinion. [AB 37-50] The Respondents also seek affirmative relief related to such issues, [e.g., AB 33 n.4] and include factual recitations underlying such issues. [e.g., AB 3]. Because Respondents did not file a notice of cross-appeal, these three issues (along with their

related requests for affirmative relief and factual recitations) exceed the scope of the issues raised in the Initial Brief and are properly stricken or ignored. State Dep't of HRS v. Craft, 596 So. 2d 503 (Fla. 2d DCA 1992) (striking "two additional issues not raised or addressed in the initial brief" where no cross-appeal had been taken). As the Fourth District has stated:

> Finally, we grant the appellant's motion to strike a portion of the appellee's answer brief. The appellee did not file a notice of cross appeal yet there were arguments in the answer brief demanding affirmative relief. The answer brief went well beyond the scope of the appellant's initial brief. The appellee thereby violated Florida Rules of Appellate Procedure 9.110(g) and 9.210(c).

A-l Racing Specialties, Inc. v. K & S Imports of Broward County, Inc., 576 So. 2d 421, 422 (Fla. 4th DCA 1991). Although conflict jurisdiction enables this Court to resolve a case on the merits, it does not permit consideration of issues that the Respondents could not have raised without having filed a notice of cross-appeal. In addition, this Court should not exercise its conflict jurisdiction to extend to issues that the lower appellate court did not even address in issuing the opinion under review. As such, this Court should strike or ignore the additional issues that the Respondents have raised as well as the affirmative relief sought and factual recitations presented.

CONCLUSION

Based upon the foregoing, Appellant, Lawrence D. McDougald, requests that the decision of the Second District be reversed with instructions to enter judgment in accordance with the jury's verdict.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been served by U.S. Mail this 19th day of May, 1998 to: Douglas M. Fraley, Esq., 501 East Kennedy Boulevard, Suite 1225, Tampa, Florida 33602.

Attorney

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