IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC-00-1155
L.T. CASE NO. 99-230 & 99-874

ARTHUR P. STRAHAN, Individually and d/b/a STRAHAN MANAGEMENT, et al.,

Petitioners,

-vs-

DEWEY L. GAULDIN,

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

KNUDSON & McGREAL, P.A.
1824 S. Fiske Blvd., Suite 2
Rockledge, FL 32955
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (561) 686-8010
Attorneys for Respondent

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PREFACE

This is a Petition to review the Fifth District's opinion based upon an alleged direct conflict with other appellate decisions. Petitioners were the Defendants in the trial court and Respondent was the Plaintiff. Herein the parties will be referred to by proper name as they stood in the trial court. The following symbols will be used:

(R) - Record-on-Appeal

(SR) - Supplemental Record-on-Appeal

(A) - Respondent's Appendix

STATEMENT OF THE CASE

A. Overview

Defendant Strahan, the only person involved in loading a 300 pound jukebox onto the back of a pickup truck, lost control of the jukebox and it went flying out of the truck and hit Plaintiff, a pedestrian on the sidewalk. Strahan admitted that something he did caused him to lose control of the jukebox, he simply did not know exactly what that was. Neither did Plaintiff, who had his back to the pickup truck and never saw the jukebox falling. Both parties speculated as to what had occurred. Since neither party knew why Strahan lost control of the jukebox, the jury was instructed on *res ipsa loquitur*. Not only was the instruction proper, but if it had not been given, the court would have been required to direct a verdict against Strahan on negligence.

Giving the *res ipsa loquitur* instruction was harmless, at best.

The joint Offer of Judgment to Defendants was valid since the other Defendants were only vicariously liable for Strahan's negligence.

B. Procedural History

Plaintiff, Dewey Gauldin, filed a lawsuit for damages against Defendant, Arthur Strahan, Jr., for negligently loading a jukebox onto the back of a truck so as to lose control of the jukebox causing it to fall from the truck and strike Plaintiff, causing him serious injuries (R1 45-48). Plaintiff also sued Defendants, Arthur Strahan and Patricia Strahan, as owners of the truck and as sole proprietors of Strahan Management, and Strahan Music, Inc., alleging that Strahan, Jr. had been acting within the scope and course of his employment with those Defendants (R1 45-48).

Defendants' Answer admitted that Strahan, Jr. had been acting within his employment (R1 60). Although Defendants raised Plaintiff's comparative negligence as an affirmative defense (R1 60-62), at trial, Strahan, Jr. admitted that Plaintiff had done nothing to contribute to the accident, and therefore the court directed a verdict in Plaintiff's favor on that issue (R9 565,591).

Because neither party knew why Strahan, Jr. had lost control of the jukebox, the court gave a *res ipsa loquitur* instruction. The jury found Strahan, Jr. negligent (R4 619), and awarded Plaintiff $6,828.10 for past medicals; $35,000 for past lost earnings or earning ability; $23,050 for future medicals; $84,000 for future lost earning ability;

$10,000 for past non-economic damages; and $40,000 for future non-economic damages, for a total of $198,878.10 (R4 619-21).

The trial court found Plaintiff's offer of judgment valid, and awarded Plaintiff attorney's fees, enhanced by a multiplier, which both parties' experts agreed was appropriate.

The Fifth District agreed that this case was one of those rare instances where a *res ipsa loquitur* jury instruction was proper, since neither party knew why Strahan, Jr. had lost control of the jukebox stating "basic common sense tells us that jukeboxes do not normally fly out of stationary pickup trucks absent some negligence on the part of the one in control...." STRAHAN v. GAULDIN, 756 So.2d 158, 160 (Fla. 5th DCA 2000). The Fifth District also agreed that the undifferentiated offer of judgment to all Defendants was valid, since the other Defendants were vicariously liable only for Strahan, Jr.'s negligence. However, the Court incorrectly ruled that a multiplier was inappropriate, citing to a lack of evidence that the relevant market required a multiplier to obtain competent counsel, *Id*. at 161-62. The Court overlooked the fact that both sides' experts had agreed that a multiplier was appropriate, and therefore Plaintiff had no need to present evidence to establish entitlement to a multiplier.

STATEMENT OF THE FACTS

Plaintiff, a 36 year old roofing contractor, was injured on October 1, 1991, when

he and a co-worker, James Bailey, were inspecting a complaint of a leaking roof at the Beach Shack in Cocoa Beach, Florida (R8 353). They had been up on the roof of the building, but could find no leaks (R7 290,353). They then proceeded to walk around the building looking for cracks in the stucco (R7 290,353). While standing on the sidewalk in front of the Beach Shack, they saw Defendant Strahan, Jr. loading a 300 pound jukebox onto a pick-up truck about six feet away (R7 290,302-03,354;R9 557-58). The truck was backed into a 45 degree parking space, with its rear-end facing the sidewalk (R7 302-03;R9 559). Bailey asked Strahan, Jr. if he needed some help, but he said, "no" (R7 291,354).

Strahan, Jr. pulled the jukebox onto a lift attached to his truck, and pressed a lever which raised the lift to the level of the truck's tailgate and bed (R7 354;R9 566). The lift had no straps or ropes to secure the jukebox (R9 560). Strahan, Jr. then began pulling the jukebox onto the bed of the truck.

At that point, Plaintiff and Bailey returned to looking for cracks in the building (R7 291,354). They had their backs to the truck, looking straight at the wall (R7 302-03,354). Bailey saw the jukebox falling from the truck out of the corner of his eye, and he grabbed Plaintiff's shoulder and spun him around to try to get him out of the way of the jukebox (R7 355). Notwithstanding Bailey's efforts, the jukebox hit Plaintiff hard in the right hip and slammed him into the concrete wall (R7 291-92,304,355). Bailey testified that Plaintiff was obviously "shook up." Plaintiff, whom Bailey

testified "wasn't the complaining type," said "he had his bell rung," but he thought he was okay, although he felt weird (R7 293-94, 308,356).

It is undisputed that Plaintiff did not see the jukebox falling (R7 302). He testified he **did not** see it "start to fall" nor "how it began to fall" (R8 531). On deposition, Plaintiff testified that after the jukebox had already hit him, he saw Strahan, Jr. sitting in the bed of the truck (R7 356; R8 532). From that fact, he concluded that Strahan, Jr. slipped on grease and fell, which shoved the jukebox out of the truck (R7 356; R8 532). It is obvious that this was an after-the-fact conclusion Plaintiff drew from what he saw **after** the jukebox had already hit him (R8 532). He had no actual knowledge of what caused the jukebox to come out of the truck.

Strahan, Jr., was working for his parents' business that repaired and delivered jukeboxes and other amusements to different businesses. He had moved thousands of pieces of heavy equipment and had never had anything fall off the back of the truck (R9 567-68). On this occasion Strahan, Jr. was exchanging jukeboxes at the Beach Shack (R9 556). He admitted that the jukebox he was removing was under his exclusive control (R9 563). He got it on the lift, and raised the lift to the level of the tailgate and bed of the truck (R9 561-62). Strahan, Jr. grabbed two handles on the back of the jukebox, tilted it and began pulling it onto the truck's bed (R9 561-62).

As he was doing so, Strahan, Jr. went to rotate the jukebox when "for some reason" the bottom "kicked out" and the jukebox slipped back onto the tailgate (R9

569). **He had no idea** what caused the bottom to kick out (R9 564). Strahan, Jr. admitted that **"something" in the way he moved the jukebox caused it to get out of his control,** but **he had no idea** what caused that to occur (R9 564-65). He stated that "obviously" **something he did in moving the jukebox caused it to fall because "there was nobody else there"** (R9 565).

Strahan, Jr. dropped the jukebox backwards to try to balance it, but because of the jukebox's angle, he ended up with one hand on the jukebox (R9 564). The weight of the jukebox was too much for him, so he had to let go. (R9 564-65). The 300 pound jukebox went tumbling out of the pick-up truck. While Strahan, Jr. testified that "to the best of his knowledge" the jukebox did not hit Plaintiff (R9 566),[1] he admitted he did not know whether it had hit him or not, because he was paying attention to the jukebox, not to Plaintiff (R9 566-67). He also admitted Plaintiff had done nothing to cause or contribute to the accident (R9 565).

Defendants incorrectly state that Strahan, Jr. testified that the smoother surface of the truck bed "might have allowed the bottom to kick out." What he said was "I'm assuming that," but "I have no idea" and "I'm not sure" (R9 564).

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[1]/Bailey, of course, testified that he saw the jukebox hit Plaintiff (R7 291), and a photograph of Plaintiff's bruise caused by his being hit by the jukebox was placed into evidence (Pltf's Ex#6).

Plaintiff's Injuries

Although Plaintiff thought he was okay at the accident scene, the following morning he had a bad pain in his neck and upper back, radiating into his shoulder (R8 419). He went to the emergency room that day, October 2, 1991. X-rays and the emergency room physician's report revealed a compression fracture of the fourth thoracic vertebra and degenerative disc changes at C5-6 (R6 158). Plaintiff was unable to work 7 to 10 days, and he was subsequently treated by a chiropractor, Dr. Kirchofer, from October 1991, through April 1992 (R6 226;R8 540). Plaintiff did not think the treatments were helping that much, so he stopped seeing the chiropractor (R8 420). He felt he was spending money and getting nowhere (R8 423-24). Instead of continuing treatment, Plaintiff began doing less physical work in his roofing business by letting Bailey, who worked for him, do more of it (R7 280; R8 420).

Plaintiff began seeing another chiropractor, Dr. Kevin Ditinick, on March 5, 1993, because of low back complaints as a result of kicking in a door (R8 375). Dr. Ditinick attributed Plaintiff's back pain to aggravation of a pre-existing condition (R8 414). Although he felt Plaintiff's first two visits were the result of the door kicking incident (R8 398), Dr. Ditinick testified that Plaintiff's subsequent visits from March 22 1993, to April 19, 1993, and from May 29, 1998, to August 17, 1999, were for neck and back pain caused by the accident (R8 389-91,408-10). Plaintiff stopped seeing Dr. Ditinick in 1993 and did not return for further treatment until 1998 because he was

not getting much relief for the money it was costing him (R8 423-24). Although Plaintiff did not initially tell Dr. Ditinick about the accident, Dr. Ditinick said Plaintiff did subsequently do so (R8 411). Plaintiff testified he did not necessarily tell doctors he saw about the accident, because he was just interested in obtaining relief from his pain (R8 540-41). Dr. Ditinick causally related his treatment of Plaintiff to the trauma caused by the accident (R8 410).

Dr. Ditinick's 1993 x-rays of Plaintiff's neck revealed severe degenerative disc changes at C4-5, C5-6 and C6-7 (R8 385-86). These discs were 90% degenerated with osteoarthritic spurring and retrolisthesis, whereas the x-rays taken at the emergency room after the 1991 accident only showed degenerative changes at C5-6 (R8 381,385-86,401). Dr. Ditinick explained that trauma accelerates degenerative changes (R8 415). He attributed Plaintiff's substantial degenerative disc changes between the 1991 and 1993 x-rays to the trauma of the 1991 accident (R8 387). The changes were too fast to be normal degeneration (R8 386). It would usually take 15 to 20 years, not 17 months as here, to see this kind of degeneration, i.e., going from one to three herniated discs (R8 388). In his opinion, the trauma of the accident caused the significant degenerative disc changes after the 1991 accident (R8 388).

Dr. Ditinick acknowledged that the heavy labor Plaintiff had performed over the years would cause some degenerative disc changes (R8 405,424-25), but they would have been reflected in the 1991 x-rays. The degenerative disc changes between the

1991 accident and 17 months later when Dr. Ditinick saw Plaintiff in 1993, were not caused by Plaintiff's job or normal aging, but were the result of the trauma of the accident (R8 414,416). Repetitive bending, lifting and stooping such as the type Plaintiff expended in his work, would not accelerate degenerative disc changes to the extent they occurred over the 17-month period (R8 416). In Dr. Ditinick's opinion, the trauma from the accident both aggravated and accelerated pre-existing degenerative disc changes in Plaintiff's neck (R8 392,405-06).

Dr. Ditinick gave Plaintiff a permanent impairment rating of 20%, 15% related to the neck and 5% to the back (R8 391). He did not think Plaintiff should perform heavy labor, including roofing, because it would aggravate his neck condition (R8 392-3). Dr. Ditinick restricted Plaintiff to lifting 50 pounds (R8 393).

Dr. Frank Alvarez, a neurologist Plaintiff saw on July 22, 1998, confirmed that the x-rays taken at the emergency room in 1991 showed a compression fracture in Plaintiff's back at T4, which was caused by the jukebox accident (R6 218-21). The x-rays also showed relatively mild degenerative disc changes in Plaintiff's neck at C5 and C6 only (R6 173-74,213-14,216-17),[2] which pre-existed the accident (R6 215-17).

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[2]/Defendants incorrectly state at page 3 of their brief that Dr. Alvarez testified that the 1991 emergency room x-rays showed degenerative disc changes at C4-5, 6-7, citing to T173-74. In fact, his testimony at those pages was that the 1991 x-rays showed degenerative disc changes only at C5-6. Dr. Ditinick agreed (R8 385-86), and Defendants' own expert, Dr, Seig, did not dispute that fact (R8 496-97).

Thereafter, according to Dr. Alvarez, there was a rapid progression in Plaintiff's degenerative disc changes from 1991 to the time he was seen by Dr. Ditinick in 1993 (R6 179-80). A review of Dr. Ditinick's x-rays showed that in 1993, Plaintiff had a crushed vertebrae at T4 and advanced degenerative disc changes (herniated discs) at C3-4, 4-5, 5-6, and 6-7 (R6 179,183-8,193,206). Dr. Alvarez would not expect this type disc progression over a 17-month period absent a traumatic event (R6 179-80,191-92). In his opinion, the degenerative disc changes from 1991 to 1993 were caused by the trauma Plaintiff received in the accident, except for a pre-existing portion of the changes at C5-6 (R6 239,241-42,252-53).

According to Dr. Alvarez, the current x-rays showed a spinal column of someone 60 to 65 years old, not 44 years old (R6 190-91). In his opinion, the trauma of the accident was a substantial contributing cause to acceleration of the degenerative disc changes in Plaintiff's neck (R6 193). The symptoms Plaintiff was having, (neck and upper back pain radiating down his arms, hands and sides; very restricted neck movement, loss of mobility, and loss of strength, numbness and tingling down his arms and legs) were related to his neck condition (R6 159,193-94; R8 430). Dr. Alvarez felt that Plaintiff was at greater risk than average if he sustained additional trauma to his neck (R6 194). Within the next 10 to 20 years he would probably need surgery costing $12,000 to $30,000 to prevent the spinal column from becoming pinched and causing paralysis (R6 193,197-98,214). Plaintiff also needed to be

examined every 6 to 12 months to keep a check on his condition, costing $50 to $100 a visit (R6 199,201). Dr. Alvarez thought the Plaintiff should avoid strenuous activities and should not work as a roofer (R6 200-03). He gave Plaintiff a 15% permanent impairment rating as a result of his neck problems related to the accident and a 2% permanent impairment as a result of the fracture in his back, also related to the accident, for a total of 17% impairment rating(R6 206,252-54).

Plaintiff saw Dr. Duane Seig, an orthopedic surgeon whom Defendants hired to examine him, on April 7, 1998. Dr. Seig performed 10 to 15 examinations for defense firms a month, and had done a lot of work over the years for the law firm representing these Defendants (R8 506-07). He found final stages of degenerative disc disease in Plaintiff's neck, which he described as collapsed discs at C4-5, C5-6 and C6-7, and for which he gave Plaintiff a 10% permanent impairment rating (R8 474-78,486,502-03). Dr. Seig admitted this condition caused reduced mobility and pain (R8 504). According to Dr. Seig, Plaintiff's compression fracture at T4 was a potentially very dangerous condition, because it could pinch the spinal cord and make Plaintiff a paraplegic (R8 480-81). He admitted that Plaintiff's advanced degenerative disc problems and his compression fracture presented "serious problems" (R8 508).

In Dr. Seig's opinion, the compression fracture was an old injury, not caused by the 1991 accident (R8 485). He emphasized the fact that the radiologist's report had not expressed an opinion as to whether the compression fracture was new or old

(R8 499). However, Dr. Seig admitted that the emergency room doctor had discussed the compression fracture under the section of his emergency room notes labeled as "diagnosis" rather than "history" (R8 500, Pltf's Ex#1). Dr. Seig also admitted that a doctor's "diagnosis" refers to the condition the doctor is seeing the patient for that day, not something that is months or years old (R8 500).

Dr. Seig opined that the accident caused nothing more than a strain or sprain, a soft tissue injury to Plaintiff's neck, which was superimposed upon his pre-existing degenerative disc disease (R8 486). In his opinion, Plaintiff's degenerative disc condition was related to the heavy work he had performed for years (R8 474-79). However, Dr. Seig did not dispute the fact that the 1991 x-rays indicated there were only degenerative disc changes at C5-6, and therefore he had to acknowledge that, "apparently", Plaintiff's work had not caused much damage to his neck (R8 496-97). Nonetheless, his opinion was that the degenerative disc changes since the accident were compatible with the normal progression of Plaintiff's disc disease (R8 477-80).

Dr. Seig admitted that trauma can cause acceleration in the degenerative disc process (R8 497). He could not say that the jukebox incident did not have an effect on the progression of Plaintiff's degenerative changes, although he thought it was minimal (R8 487). Dr. Seig could not apportion the amount of those changes related to the accident (R8 496). He did not feel surgery was necessary, although he did think Plaintiff should be careful not to re-injure his neck (R8 488-90). Plaintiff was at

greater risk if he had any further trauma to his neck (R8 499), and so he should avoid any activity that might further injure his neck ,such as roofing work (R8 499). Dr. Seig expected Plaintiff's neck problems to get worse (R8 512).

Plaintiff's Loss of Wage Earning Capacity

Plaintiff was a "country boy" from North Carolina who never graduated from high school. He had worked with his hands or at physical labor all his life (R7 318-28). At the time of the accident, he was operating a roofing business that he had begun in 1985 (R7 329). His company sprayed polyurethane material on roofs to insulate and waterproof them, and only nine companies in Florida were qualified to insulate roofs in this manner (R7 280,332-37). Prior to the accident, Plaintiff did all the spraying. This required him to drag a 200 foot long hose across the roofs of buildings, drape the hose over his shoulder and spray with pressure of 1,500 psi (R7 284-86). He also had to roll 55 gallon drums of foam weighing 500-700 pounds (R7 282,337-41). Before the accident, Plaintiff was able to do this work with no problem (R7 283,337). A videotape used for sales purposes in his business showed him spraying the polyurethane foam before the accident (Pltf's Ex#5). It showed that he had been fully capable of handling everything required of that job. Plaintiff, who was described as a "real go-getter," had worked very hard in his business, and from 1985 to 1990, he had built his company's gross receipts up to a $250,000 (R7 288,351).

After the accident, Plaintiff could no longer continue spraying the polyurethane foam, because it was too strenuous and caused too much pain (R8 421-22). He had to allow Bailey to do a lot more spraying (R7 298-99;R8 421). Finally, Plaintiff sold his business in 1992 for $6,500, because he was unable to do the foam spraying and he was also going through a bad divorce (R7 346-47;R8 422-23). He stayed with the purchaser for six months to further train Bailey, who became the purchaser's employee (R7 347).

Plaintiff started a new conventional roofing business in 1993, because he thought it would be easier than foam roofing. He found it was even more physically demanding, because they used nail guns to apply the shingles (R8 422-23). Plaintiff's neck and back pain limited what he could do, and over time it allowed him to do less and less physical work (R8 422-23,426,430-31). His condition continued to deteriorate and got progressively worse (R8 426). Plaintiff had to hire someone to do the work he would normally perform on the roofs (R8 423-24). All of the doctors, including Defendants' expert, agreed that Plaintiff should not be doing roofing work (R8 393;R6 200-03; R8 499). Plaintiff primarily became the clean-up man for his company's roofing jobs, performing minor jobs on the ground (R8 423-24,430-31). He only occasionally went up on a roof (R8 430-31).

At the time of trial, Plaintiff was still running his business and still going to work, because he had no other choice (R8 430,446-67). He had no other training or

schooling (R8 447). Plaintiff admitted that he was scared to death of becoming paralyzed, but he had to work (R8 429,447).

Plaintiff's Actual Loss of Earnings

Plaintiff proved his lost wages in two different ways. First, he lost $10,000 a year in income from not being able to work as a polyurethane foam sprayer. The doctors all agreed that he could no longer do that type roofing work (R6 200-03;R8 393,499). Bailey, who had gone to work as a foam sprayer for the company that purchased Plaintiff's business, was making $30,000 a year (R7 290). Obviously, if the injuries Plaintiff had received in the accident had not prevented Plaintiff from continuing to work as a polyurethane sprayer, he could have gone to work for that company when he sold his business to them. Even at the time of trial, the company was hiring sprayers to do the work Plaintiff had previously done as a sprayer (R7 289-90). Accordingly, the jury could have concluded that Plaintiff, who was only making $20,000 at the time of trial, was losing about $10,000 a year as a result of not being able to work as a polyurethane foam sprayer (R8 436,546).

Alternatively, Plaintiff proved a $10,000 a year loss of income from not being able to operate his foam roofing business. Before the accident, Plaintiff's salary and other personal expenses paid by his company, totaled $33,989: $13,342 in income, $14,628 in vehicle expenses, $4,000 in meals and entertainment, and $2,019 in

depreciation (R7 52). After the accident, Plaintiff was forced to sell his polyurethane roofing business, because he could no longer do that work. He started a conventional roofing business, and made very little in 1993 and 1994 (R8 431-34). However, in 1995, 1996, and 1997, Plaintiff began doing roofing for a particular general contractor making about $20,000 a year, but he had no other company benefits (R8 434,436,546). Plaintiff's post-accident income was $10,000 less than his pre-accident income and benefits. While Defendants claim Plaintiff made less before the accident ($13,000 a year versus $20,000 after the accident), that argument ignores the other pre-accidents benefits being paid by Plaintiff's company, which had to be considered, and which give him a total, pre-accident, income of $33,000. Plaintiff's income and benefits were reduced by at least $10,000 a year.

SUMMARY OF ARGUMENT

The court did not err in giving a *res ipsa loquitur* jury instruction under the facts of this case. The two-pronged test was met here because the jukebox was under Strahan, Jr.'s exclusive control, and this accident would never have occurred if he had exercised proper care in moving the jukebox. Moreover, giving the instruction was harmless since the court should have directed a verdict against Strahan, Jr. on liability in any event. The jury instructions on negligence, agreed to by Defendants, also did not instruct the jury on two different liability standards.

The jury's damage award is not contrary to the manifest weight of the evidence. Each element of damages awarded by the jury is fully supported by the evidence.

The Fifth District correctly held that Plaintiff's joint Offer of Judgment was valid because Strahan, Jr. was the only Defendant actively negligent, and all other Defendants were vicariously liable only for his negligence. However the court incorrectly held that a multiplier should not have been utilized, where both parties' experts agreed a multiplier was appropriate.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GAVE A *RES IPSA LOQUITUR* JURY INSTRUCTION AND UPHELD THE VALIDITY OF THE OFFER OF JUDGMENT

A. The *Res Ipsa Loquitur* Instruction Was Proper Under These Facts

The *res ipsa loquitur* jury instruction was proper under the facts of this case. No one knew, except Strahan, Jr., exactly why he lost control of the jukebox. Plaintiff had his back turned to the truck, so he did not see what happened. And, Strahan, Jr. claimed he did not know why he lost control of the jukebox. So there was no testimony as to exactly why the accident occurred, which is why the trial gave the *res ipsa loquitur* jury instruction. However, regardless of the fact that no one could explain why Strahan, Jr. allowed the jukebox to go flying out of the truck onto Plaintiff,

the very fact that he did so should have entitled Plaintiff to a directed verdict on negligence in any event.

While Defendants say there were there witnesses to the accident, there was really only one witness and that was Strahan, Jr., and he did not know exactly why he lost control of the jukebox. Defendants also incorrectly state that there were two versions of how the accident occurred. In fact, there was only Strahan, Jr.'s version of how it occurred, but not why it occurred.

Defendants quote Plaintiff's after-the-fact conclusion regarding what happened at the time of the accident. Defendants fail to tell the Court that when Plaintiff testified that he "saw what happened," he made it clear that he was referring to what he concluded after "the jukebox had already hit me" (R8 532). Obviously, he could not have seen what actually happened at the time of the accident, because it is undisputed that he was facing the wall with his back to the truck. (R7 302-03,354). He testified that he did not see the jukebox start to fall nor how it fell (R8 531). Nor did Strahan, Jr. testify that "maybe the wheels got caught on something" (Petitioners' brief p.22). He testified that he had no idea what caused the jukebox's bottom to kick out (R9 564). He said he was "assuming" the difference in surfaces between the lift and the truck's bed may have allowed it, but "I'm not sure" (R9 564). The bottom line is that Plaintiff and Bailey had their backs to the truck and did not see what caused the jukebox to fall, and Strahan, Jr., the only one who would possibly know why it fell,

had "no idea" why it fell. Plaintiff and Strahan, Jr.'s explanation of potential causes did not warrant denial of a *res ipsa loquitur* instruction. LORD v. J. B. IVEY & CO., 499 So.2d 12, 13 (Fla. 1st DCA 1986).

Defendants incorrectly state that nothing prevented Plaintiff from examining the truck or the jukebox. In fact, Plaintiff requested production of the jukebox and the truck. Both the truck and jukebox had been disposed of, and Defendants could not even furnish the year, make, model or dimensions of the jukebox (A5) [See CAUSEWAY MARINA, INC. v. MANDEL, 276 So.2d 71 (Fla. 3d DCA 1973), where the court held that *res ipsa loquitur* was applicable where the defendant had discarded evidence which was never available to the plaintiff for inspection].

The court correctly gave a *res ipsa* jury instruction in this "flying jukebox case."[3] *Res ipsa loquitur* means "the thing speaks for itself." It is a rule of evidence that permits, but does not compel, an inference of negligence where the injury-causing instrumentality is under the management and control of the defendant, and the accident is such as in the ordinary course of events does not happen if those who have the management and control use proper care. MARRERO v. GOLDSMITH, 486 So.2d 530, 531 (Fla. 1986); WOLPERT v. WASHINGTON SQUARE OFFICE CENTER, 555 So.2d 382, 383 (Fla. 3d DCA 1989). *Res ipsa* shifts the burden of going forward

[3]/Defense counsel advised the court that counsel for both sides referred to this case as the "flying jukebox case" (R9 722).

with the evidence to the defendant to attempt to show that he was in no manner responsible for the accident. STANEK v. HOUSTON, 165 So.2d 825, 827-88 (Fla. 2d DCA 1964); WAITE v. JACKSON'S BYRONS ENTERPRISES, 254 So.2d 28 (Fla. 3d DCA 1971). The central question involved in the use of *res ipsa loquitur* is whether the incident more probably resulted from the defendant's negligence than from some other cause. GOODYEAR TIRE & RUBBER CO. v. HUGHES SUPPLY, INC., 358 So.2d 1339, 1341-42 (Fla. 1978). How can it be otherwise here? In the ordinary course of events, this accident would never have happened without negligence on the part of the one in control, Strahan, Jr.

In GOODYEAR TIRE & RUBBER v. HUGHES SUPPLY INC., Id. at 1341-42, this Court set forth the *res ipsa loquitur* doctrine as follows:

> ...It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that 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.
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> * * *
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> The initial burden is on the plaintiff to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor. (Emphasis added).

Subsequent District Court cases interpreted GOODYEAR as holding that *res ipsa loquitur* only applied if there was no direct proof of negligence. Eight years after

GOODYEAR was decided, this Court explained in MARRERO v. GOLDSMITH, supra, that it never intended its GOODYEAR decision or its decision in CITY OF NEW SMYRNA BEACH UTILITIES COMMONS v. McWHORTER, 418 So.2d 261 (Fla. 1982) to be interpreted as holding that *res ipsa loquitur* only applied where there was no direct evidence of negligence available. The Court stated (486 So.2d at 532):

> If a case is a proper *res ipsa* case in other respects, the presence of some direct evidence of negligence should not deprive the plaintiff of the *res ipsa* inference. There comes a point, however, when a plaintiff can introduce enough direct evidence of negligence to dispel the need for inference. According to Prosser:
>
> > Plaintiff is of course bound by his own evidence; but proof of some specific facts does not necessarily exclude inferences of others. When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant railroad has somehow been negligent. When the plaintiff goes further and shows that the derailment was caused by an open switch, the plaintiff destroys any inferences of other causes; but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but considerably strengthened. If the plaintiff goes further still and shows that the switch was left open by a drunken switchman on duty, there is nothing left to infer; and if the plaintiff shows that the switch was thrown by an escaped convict with a grudge against the railroad, the plaintiff has proven himself out of court. It is only in this sense that 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*. (emphasis added)
>
> Prosser and Keaton §40 (footnote omitted).
>
> * * *
>
> ...Neither Goodyear nor McWhorter stand for the proposition that by introducing "any direct evidence of negligence" the plaintiff thereby forfeits a *res ipsa* instruction if it is otherwise applicable. Use of the term "where direct proof of negligence is wanting" should be interpreted in light of Professor Prosser's vanishing inference. This interpretation does not require that there be a complete absence of direct proof.

In a later opinion, this Court once again addressed the applicability of the doctrine of *res ipsa loquitur* in McDOUGALD v. PERRY, 716 So.2d 783 (Fla. 1998), which involved a spare tire flying out from its cradle underneath a truck, becoming airborne and crashing into a following vehicle's windshield. The Court stated that District Court cases had misread and interpreted too narrowly the Court's GOODYEAR opinion. The Court reiterated that an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause. Id. at 785. The Court stated that GOODYEAR and the Court's other cases permit latitude in the application of *res ipsa* when the facts of an accident in and of themselves establish that, but for the failure of reasonable care by the person or entity in control of the injury producing object or instrumentality, the accident would not have occurred. Id. at 785. The Court referred to comments in section 328D of the

Restatement (Second) of Torts (1965) that *res ipsa loquitur* applies to falling objects. The Court concluded that *res ipsa* applied to a flying spare tire since common sense dictated an inference that a spare tire will stay with the truck, unless there is a failure of reasonable care by the person or entity in control of the truck. Id. at 786. "Thus an inference of negligence comes from proof of the circumstances of the accident." Judge Anstead concurred, citing an 1863 falling barrel case which held that where a person is injured by something falling upon him from the defendant's premises, the circumstances of the accident give rise to an inference of negligence.[4]

This Court rejected the defendant's contention that *res ipsa loquitur* was inapplicable because the plaintiff failed to prove that direct evidence of negligence was unavailable. The Court also rejected the defendant's contention that the plaintiff failed to establish an inference of negligence, because other possible explanations existed to explain the failure of the chain holding the spare tire. The Court concluded that such **speculation would not defeat the application of *res ipsa loquitur***, so long as the evidence allowed reasonable people to infer that negligence, "more likely than not" was the cause of the accident, stating:

> The plaintiff is not required to eliminate with certainty all other possible causes or inferences.... All that is required is evidence from which reasonable persons can say that on the whole it is more likely that there

[4]/Like the falling barrel case, Plaintiff was injured by something falling upon him from Defendants' truck.

> was negligence associated with the cause of the event than that there was not. (Emphasis added)

In BARDY v. SEARS, ROEBUCK & CO., 443 So.2d 212, 215 (Fla. 2d DCA 1983), the Second District likewise held that a plaintiff is entitled to a *res ipsa* instruction if it appears "more likely than not" that the probable cause of the accident was the defendant's negligence.

In this case, the Defendants' argument below and on appeal is that there was direct evidence of Strahan, Jr.'s negligence, and therefore a *res ipsa* instruction was inapplicable. However, the above cases indicate that this Court has clearly held that the presence of some direct evidence of negligence does not deprive a plaintiff of a *res ipsa* inference. [See also LORD v. J. B. IVEY & CO., 499 So.2d 12, 13 (Fla. 1st DCA 1986), where the First District held, based upon MARRERO, that the trial judge "applied the wrong legal standard" when he ruled that GOODYEAR required an absence of direct proof of negligence in order to give a *res ipsa* instruction.] Accordingly, the fact that Plaintiff could prove that the jukebox fell while Strahan, Jr. was moving it did not prove why it fell. As this Court held in McDOUGALD, mere proof of the circumstances of the accident, as here, does not defeat application of *res ipsa loquitur*.

None of the witnesses could testify exactly **why** Strahan, Jr. lost control of the jukebox. Bailey could not testify **why** the jukebox fell, or what Strahan, Jr. did to

make it fall, because he had his back to the truck prior to seeing the jukebox fall out of the corner of his eye (R7 302-03,354). Plaintiff also had his back to the truck and did not see the jukebox fall (R7 302;R8 531). After the jukebox hit him, he saw Strahan, Jr. sitting in the bed of the truck (R7 356;R8 532). From that fact, Plaintiff concluded in his deposition, that Strahan, Jr. slipped on grease in the bed of the truck and fell, which shoved the jukebox out of the truck (R7 356;R8 532). Obviously, this was supposition on Plaintiff's part since he based it on what he saw after the accident (R7356;R8 532).

Strahan, Jr., who admitted he had exclusive control of the jukebox, also did not know **why** the jukebox got out of his control. He testified that "for some reason" the bottom of the jukebox "kicked out" (R9 569), but he had "no idea" and was "not sure" what caused it to do so (R9 564). He admitted, however, that "something" in the way he moved the jukebox caused it to get out of his control and fall, but again he had "no idea" what caused that to occur (R9 564-65).

The evidence presented in this case simply revealed the circumstances of the accident. No evidence could be presented of any first-hand knowledge as to **why** Strahan, Jr. lost control or management of the jukebox. As this Court held in McDOUGALD, supra, the fact that a plaintiff presents some evidence that the defendant was negligent, where he does not furnish a full and complete explanation of the occurrence, does not deprive the plaintiff of the benefit of *res ipsa loquitur*.

The issue is not whether there was some direct evidence of Strahan, Jr.'s negligence. The issue is whether the two-pronged test espoused by this Court was met, and it clearly was here. First, Strahan, Jr. admitted at trial (R9 563), and defense counsel admitted at the hearing on Defendants' Motion for New Trial (R1 6) that the jukebox was in Strahan, Jr.'s exclusive control or management. The second prong of the test was also met, i.e., this accident would not, in the ordinary course of events, have occurred without the negligence of Strahan, Jr. A jukebox does not ordinarily fall or fly from a pick-up truck and strike a pedestrian on the sidewalk unless someone has been negligent. This jukebox would not have fallen from the pick-up unless Strahan, Jr. failed to exercise the proper care in controlling the jukebox while moving it. But for Strahan, Jr.'s negligence, this accident would never have occurred. The fact that Strahan, Jr. testified that he had moved heavy equipment thousands of times, without incident, shows that ordinarily this maneuver can be safely done (R9 567-68), if properly done. The circumstances of this accident give rise to an inference that "more likely than not" Strahan, Jr.'s negligence in moving the jukebox was the cause of the accident, since the accident is not one that would ordinarily occur unless there was negligence on the part of the one in control. The jury could clearly infer that there was a greater likelihood that the accident was due to Strahan, Jr.'s negligence than to some other cause. The burden of going forward with the evidence shifted to Strahan, Jr. to show that he was not responsible for the accident. That was something he could not

do. In fact, he admitted that something he did in moving the jukebox caused it to get out of his control and fall (R9 T564-65). Accordingly, *res ipsa* instruction was properly given and the jury properly came to the only result that it could come to in this case, with or without the instruction.

This case is not unlike McDOUGALD, supra, and numerous other "flying" or "falling" object cases where *res ipsa loquitur* has been applied: DEVEAUX v. McCRORY CORP., 535 So.2d 349 (Fla. 3d DCA 1988) (a sweeper stored on a shelf inaccessible to customers fell on a store customer); CHEUNG v. RYDER TRUCK RENTAL, INC., 595 So.2d 82 (Fla. 5th DCA 1992) (a wheel struck a passing motorist); CARDINA v. KASH N' KARRY FOOD STORES, 663 So.2d 642 (Fla. 2d DCA 1995) (a case of produce stocked five feet high on a pallet fell on an invitee in the defendant's storeroom, and there was no evidence the invitee touched the pallet); CORTEZ ROOFING, INC. v. BAROLO, 323 So.2d 45 (Fla. 2d DCA 1975) (a roll of carpet fell on plaintiff from a rack in the defendant's warehouse/showroom); KULCZYNSKI v. HARRINGTON, 207 So.2d 505 (Fla. 3d DCA 1968) (the plaintiff was walking by a pick-up truck and a ladder fell off and hit him).[5]

This case is also akin to STANEK v. HOUSTON, 165 So.2d 825 (Fla. 2d DCA

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[5]/In GOODYEAR, this Court, in footnote 12, disapproved CORTEZ ROOFING v. BAROLO, supra, and KULCZYNSKI v. HARRINGTON, supra, to the extent they conflicted with GOODYEAR. Subsequently, however, the Court retreated from GOODYEAR in MARRERO and McDOUGALD.

1964), where the defendants' truck went out of control and struck a parked automobile and building. The driver of the vehicle had no explanation for how the collision occurred, except that "the steering wheel felt like it done come free" and the truck went "out of control." The court held that *res ipsa* was applicable since the truck was in the exclusive control of defendants, plaintiff did nothing to cause the accident, the accident would not have occurred if defendants had used due care in inspecting the truck, and defendants presented no evidence to show proper care to prevent failure in the truck's steering mechanism. Just as *res ipsa* applies when a truck under the defendants' exclusive control goes "out of control," it also applies when a jukebox under the Defendant's exclusive control goes "out of control."

The Defendants cannot have it both ways. They argued below that they were entitled to a directed verdict because Plaintiff could not prove that Strahan, Jr. did anything wrong. On the other hand, Defendants argued that Plaintiff had sufficient direct evidence of Strahan, Jr.'s negligence to disallow a *res ipsa* instruction.

On appeal, Defendants' argument is just as disingenuous. Defendants admit repeatedly throughout their brief that Strahan, Jr. testified that "he" did <u>something</u> to cause the jukebox to fall while it was in his exclusive possession, although he had "no idea" what that <u>something</u> was. Strahan, Jr., the person in control of moving the jukebox, was the only person who could have known what that <u>something</u> was because Plaintiff and Bailey had their backs to the truck. Even though Strahan, Jr. did

not know what that something was, Defendants incredulously argue that Plaintiff should have been able to prove what that something was, thus making a *res ipsa* instruction unavailable. In fact, Defendants' argument only emphasizes why the *res ipsa* instruction was warranted. Strahan, Jr. admitted that he did something that caused the accident, although he did not know exactly what he did wrong; and, Plaintiff and Bailey did not see what he did wrong. Under there circumstances, the *res ipsa* instruction was clearly appropriate.

Defendants incorrectly state at page 1 of their brief that the trial judge believed "that there was no evidence of negligence" In fact, he believed only that there was no direct proof of what specific negligent act Strahan, Jr. committed. This was clear at the hearing on the Motion for New Trial, when Defendants argued that the *res ipsa* jury instruction should not have been given, because the parties had testified to "how the accident happened" (R1 11). In response, the trial judge stated that the standard in determining whether a *res ipsa* instruction should be given was not based on whether a plaintiff could prove the circumstances of "how the accident occurred," as Plaintiff had been able to do here (R1 24-25). Rather, the judge said the issue was whether the Plaintiff was able to present direct proof of negligence, i.e., exactly what the negligent act of Strahan, Jr. was (R1 24-27). Since the judge found no "direct evidence" of any specific act of negligence, he correctly concluded that a *res ipsa* instruction was appropriate (R1 26-27).

The cases cited in Defendants' brief support the giving of a *res ipsa* instruction in this case, except for PLOETZ v. BIG DISCOUNT PANEL CENTER, INC., 402 So.2d 64 (Fla. 4th DCA 1981) and MONFORTI v. K-MART, INC., 690 So.2d 631 (Fla. 5th DCA 1997), which are distinguishable. In MONFORTI, the shelf on which boxes of file folders which fell on plaintiff had been stacked, was accessible to customers and, therefore, was not in the exclusive control of the defendant. PLOETZ relied upon this Court's GOODYEAR decision for the proposition that direct proof of negligence deprives a plaintiff of the benefit of *res ipsa*. That case was decided before this Court's decisions in MARRERO and McDOUGALD, which held that GOODYEAR did not stand for that proposition, and that direct evidence of negligence does not deprive a plaintiff of a *res ipsa* inference.

The *res ipsa loquitur* instruction in this case was proper under MARRERO and McDOUGALD. The jury was properly allowed to infer that the jukebox could have been safely moved if it had been properly moved. Moreover, allowing the jury to draw that inference, if it found the circumstances so warranted, was necessary to counter counsel for Defendants' argument to the jury that Plaintiff could not prove what Strahan, Jr. did wrong (R9 699).

1. <u>Giving the "*Res Ipsa*" Instruction Was Harmless</u>

Giving the *res ipsa loquitur* jury instruction was harmless since the court erred in denying Plaintiff's motion for directed verdict on liability in any event (R9 589).

Strahan, Jr. undertook to remove the jukebox from the Beach Shack, and in doing so he owed a duty to move the jukebox in a reasonably safe manner so as not to injure others in the immediate vicinity. Obviously, moving the jukebox could be done safely if proper care was used. Strahan, Jr. himself testified that he had moved thousands of pieces of heavy equipment without ever having a piece fall from the pick-up truck (R9 567-68). While Strahan, Jr. did not know exactly what caused him to lose control of the jukebox, he admitted that something in the way he moved the jukebox caused it to get out of his control and fall (R9 564-65). He stated that this was "obviously" true, since "there was nobody else there" (R9 565). This testimony warranted directing a verdict against Strahan, Jr. on liability. Regardless of whether anyone knew exactly what Strahan, Jr. did to cause the jukebox to get out of his control, Strahan, Jr. admitted that <u>something he did</u> in the way he moved the jukebox <u>caused it to get out of his control</u> and fall (R9 564-65). This was an admission of negligence, and justified a directed verdict against Strahan, Jr. on liability.

In light of the fact that Strahan, Jr. admitted he was at fault, the trial court was faced with the option of granting Plaintiff's motion for directed verdict on liability, or denying the motion and allowing the *res ipsa* instruction. Choosing the latter option was more favorable to Defendants since it allowed them the opportunity to present evidence to rebut the inference of negligence, which they were unable to do. In KENYON v. MILLER, 756 So.2d 133, 136 (Fla. 3d DCA 2000), the court held that

a *res ipsa* instruction should not be given where there is conflicting evidence or inferences as to whether the defendant was negligent. Here, there was no evidence or inference that Strahan, Jr was not negligent. Even his own testimony showed that he was negligent (moving the jukebox in a manner to allow it to get out of his control), even though he could not say exactly what he had done wrong. Plaintiff was either entitled to a *res ipsa* instruction or a directed verdict on liability.

The real issues in this case were causation and damages. While Defendants refused to admit liability, they barely spent any time on that issue at trial. All counsel for Defendants did was get Strahan, Jr. to testify, by leading questions, that the fact that the jukebox got out of his control was "sudden and unexpected" and "without warning" (R9 569). In fact, Defendants' responsibility for the accident was so clear that defense counsel barely touched upon "liability" in closing argument. His only mention of liability is contained on one page and two lines (R9 698-99) of his 31-page closing argument (R9 675-706). He argued that Strahan, Jr. had no prior knowledge that the jukebox would get out of control, in line with his "sudden and unexpected" testimony, therefore "it was just an accident...not negligence" (R9 699).

That argument provided no legal defense to Strahan, Jr.'s obvious failure to exercise due care in controlling and managing the jukebox while moving it. Defendants never pled sudden emergency as a defense. Moreover, the sudden emergency doctrine, which holds that one confronted with a sudden emergency is not held to the

same degree of care otherwise expected,[6] is inapplicable here. The doctrine is not available to excuse a defendant claiming its benefits when the emergency has been created or contributed to by his own negligence. ELLWOOD v. PETERS, 182 So.2d 281 (Fla. 1st DCA 1966). A defendant cannot depend on the theory of sudden emergency when his own negligent action brings such emergency into existence, since to recognize the right of such defendant to escape liability under circumstances would be to reward him for his own negligence. SEITNER v. CLEVENGER, 68 So.2d 396 (Fla. 1954).

This is not a case that should ever be retried on liability. Whether anyone knew exactly what Strahan, Jr. did wrong, the fact is he admitted the jukebox was under his exclusive control, that no one else was involved, that Plaintiff did nothing wrong, and that something he did in moving the jukebox caused it to get out of his control and fall. Whether that calls for a *res ipsa loquitur* instruction or a directed verdict, it is obvious that Plaintiff's injury would never have occurred if due care had been exercised in moving the jukebox. The accident would never have occurred in the absence of Strahan, Jr.'s negligence in losing control of the jukebox.

B. No Repetition in Jury Instructions/Waiver and Estoppel

The jury was not instructed on two different standards for finding Defendants

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[6]/TURNER v. CITY OF TALLAHASSEE, 566 So.2d 871, 872 (Fla. 1st DCA 1990).

negligent. The standard jury instruction on negligence did nothing more than define "negligence" for the jury. In other words, the jury was first instructed that negligence is the failure to use reasonable care under the circumstances (R9 120). The jury was then instructed on *res ipsa loquitur*, which is merely a rule of evidence, not a substantive rule of law, that allows the jury to draw an inference of negligence as a result of the circumstances surrounding the accident. The jury was instructed that if it found that the circumstances were such that in the ordinary course of events, this accident would not have happened in the absence of negligence and that the jukebox was in Strahan, Jr.'s exclusive control, it could infer that he was negligent (R9 720-21). That inference could be accepted or rejected by the jury. KEYES v. TALLAHASSEE MEM. REG. MD. CTR., 579 So.2d 201 (Fla. 1st DCA 1991). Whether the jury chose to draw an inference of negligence or not, an instruction on legal cause was also properly given. Obviously, even an inference of negligence must be the cause of Plaintiff's damages. Accordingly, the jury instructions were proper. Additionally, Defendants never objected below that the jury instructions were repetitious or imposed two different liability standards. Rather, Defendants **agreed** below that the general negligence jury instruction (Standard Jury Instruction 4.1) should be given along with the *res ipsa* instruction (Standard Jury Instruction 4.6) (R9 602-03), and also **agreed** that the legal causation jury instruction should be given (Standard Jury Instruction 51(a)) (R9 603). Having agreed to the giving of these instructions below, Defendants

are estopped to complain for the first time on appeal that the instructions set forth different standards for finding Defendants negligent.

C. Plaintiff's Offer of Judgment Was Valid

Defendants' argument that Plaintiff's Offer of Judgment was void because it "did not list how much money was to be paid by each Defendant" has no merit. Both sides agreed below that Strahan, Jr. was the only party actively negligent, and that all other Defendants were vicariously liable only for his negligence. For example, Plaintiff's Amended Complaint alleged that Strahan, Jr. was an agent or employee of the other Defendants, and that he had been acting within the scope and course of his employment in loading the jukebox onto the pick-up truck that was owned by Defendants (R1 45-46). Defendants' Answer admitted that Strahan, Jr. was acting within the scope and course of his employment at the time of the accident (R1 60). Defendants' Pretrial Stipulation agreed that only the negligence of Strahan, Jr. need be determined by the jury (R2 199), and also agreed that Defendants owned the truck (R2 198). Plaintiff and all Defendants had an equal number of peremptory challenges indicating that all Defendants were treated as one party (R2 385;SR729). The parties agreed for the jury to be instructed that the other Defendants were vicariously liable for Strahan, Jr.'s negligence in loading the jukebox onto the truck, and that if Strahan, Jr. was not negligent, none of the Defendants were liable (SR719-20). The parties also agreed on a verdict form which asked the jury to only determine the negligence of

Strahan, Jr. (R9 635-36,726;SR731-34). Post verdict, the parties agreed the judgment could be entered against all Defendants jointly and severally (SR730).

At the attorney's fee hearing, the trial judge confirmed that both sides had agreed pretrial, during trial and post-trial that no one except Strahan, Jr. was actively negligent, and that the other Defendants were vicariously liable only for his negligence (SR726-35,770-72). Accordingly, the judge concluded that there would have been no way to allocate an offer of judgment between the Defendants because, as the parties had agreed, if Strahan, Jr. was liable, the other Defendants were equally liable (SR772). The judge properly concluded that requiring apportionment of an offer of judgment between different defendants did not apply to vicarious liable defendants, as here (SR772).

The trial judge's reasoning was correct. Plaintiff's Offer of Judgment was valid under both §768.79, Fla. Stat. and Fla.R.Civ.P. 1.442. In CROWLEY v. SUNNY'S PLANTS, INC., 710 So.2d 219 (Fla. 3d DCA 1998), the Third District held that a joint offer of judgment to two defendants was valid where they were both represented by the same attorney, one defendant was vicariously liable for the other defendant and there was no conflict of interest between the defendants and their insurance companies. The Court stated (710 So.2d at 220-21):

> Joint offers of judgment by, or to, two or more defendants are valid. See Bodek v. Gulliver Academy, Inc., 702 So.2d 1331, 1332 (Fla. 3d DCA 1997). Even though the Crowleys' offers of judgment did not

> name Sunny's and Perez individually, the general offers made to the defendants were valid under §768.79. See id. Both these defendants were represented by the same attorney; there was no conflict of interest between the defendants and the insurance company representing both defendants. In fact, the insurance company was paying if either defendant was held liable. Furthermore, Sunny's and Perez were jointly and severally liable for any judgment when the offers were made; Sunny's was vicariously liable for the fault attributable to Perez.

As in CROWLEY, here the Defendants were represented by the same attorney and there was no conflict of interest between them because everyone agreed that all the other Defendants were vicariously liable for the fault attributed to Strahan, Jr.

Following CROWLEY, the Fourth District held that an undifferentiated offer by two plaintiffs to two defendants, where one was vicariously liable for the other's negligence, was valid. SAFELITE GLASS CORP. v. SAMUEL, 771 So.2d 44 (Fla. 4th DCA 2000). The Court stated that Rule 1.442(c)(3), which requires that a "joint proposal shall state the amount and terms attributable to each party" was designed to obviate future conflicts as to the effect of an offer upon offerees. The Court found no detriment to the Defendant-offerees in that case since one was vicariously liable for the other. The Court stated (Id. at 45-46):

> The defendant/offerees in this case were not joint tortfeasors with potentially different degrees of fault and competing interests. ...This was not a case where the tortfeasors were entitled to evaluate the offer independently based on "their individual liability situations. ...Safelite was vicariously liable for Haughton's negligence. Both defendants had the same lawyer. The offer's lack of apportionment between Safelite and Haughton did not prevent a meaningful evaluation of the offer. ...There was no harmful error in the proposal's failure to allocate damages

> between two defendants whose interests were so unified under a theory of vicarious liability.

The Fourth District also found that it was irrelevant that the plaintiffs did not specify the division of damages between themselves in their offer. The Court saw the lack of such apportionment as "a matter of indifference" to the defendants. It was not an obstacle to settlement for the vicariously liable defendants, because if they accepted the offer, they were entitled to be released by both plaintiffs. Judge Polen wrote a concurring opinion, which stated (Id. at 46):

> As the committee notes to rule 1.442(c)(3) reveal, the rule was enacted to conform with *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), which deals with dividing the exposure of various joint tortfeasors based on their respective percentages of fault. As amended, the joint proposal requirements allow one of several joint tortfeasors to independently evaluate the offer based on that tortfeasor's individual liability before deciding whether to accept same. It, thus follows that failure to follow the joint proposal requirements of this rule is "a harmless technical violation" as to those defendants like Safelite and Haughton in the present case, who are not joint tortfeasors...

Likewise, in DANNER CONSTRUCTION CO. v. REYNOLDS METALS CO., 760 So.2d 199 (Fla. 2d DCA 2000), the Second District held that a joint offer of judgment by two vicariously liable defendants was valid, stating (Id. at 202):

> ...[w]e conclude that where a joint offer is made by the defendants in a case, the failure to specify the amount to be contributed by each may be harmless if the theory for the two defendants' joint liability does not allow for apportionment under section 768.81, Florida Statutes (1997). This circumstance typically exists in cases where one defendant is vicariously liable for the negligence of another.

The above cases apply here where Defendants' liability could not be apportioned between them, since all the other Defendants were vicariously liable for Strahan, Jr.

Two cases provide a good illustration of why an undifferentiated offer is invalid where the defendants have separate liability, unlike here, TWIDDY v. GUTTENPLAN, 678 So.2d 488 (Fla. 2d DCA 1996) and C&S CHEMICALS, INC. v. McDOUGALD, 754 So.2d 795 (Fla. 2d DCA 2000). In TWIDDY, a joint offer made by two defendants with separate liability made to a single plaintiff was held invalid. The joint offer made it impossible to determine the amount attributable to each defendant in order to determine whether the judgment against each defendant was 25% less than each defendant's offer. C&S held that an undifferentiated offer by a plaintiff to two defendants with separate liability was invalid, because the lack of apportionment between the offerees prevents them from evaluating the offer independently based upon their individual liability situations. Here, unlike TWIDDY and C&S CHEMICALS, since the other Defendants' only liability was vicarious liability for Strahan, Jr., they had no "individual liability situations" that required them to evaluate the offer independently.

The cases relied upon by Defendants, SPRUCE CREEK DEV. CO. OF OCALA, INC. v. DREW, 746 So.2d 1109 (Fla. 5th DCA 1999), UNITED SERVICES AUTOMOTIVE ASSOCIATION v. BEHAR, 752 So.2d 663 (Fla. 2d DCA 2000),

and FLIGHT EXPRESS v. ROBINSON, 736 So.2d 796 (Fla. 3d DCA 1999) either support Plaintiff's position or they are distinguishable. FLIGHT EXPRESS held that a joint offer by two defendants to a single plaintiff was valid. The Court reasoned that while there is good reason to require a division of amounts to be paid to each of several offerees in a settlement proposal, the amount which each of several offerors contributes to the proposed settlement can make no difference to the offeree or otherwise affect its efficacy in any practical way. Although the 1996 amendment to Rule 1.442(c)(3) did not apply to the offer made in FLIGHT EXPRESS, the Court referenced the amended rule in a footnote and cited the committee note explaining that the amendment was enacted "to conform with FABRE v. MARIN, 623 So.2d 1182 (Fla, 1993) which deals with dividing the exposure of various parties based on their respective percentages of fault." FLIGHT EXPRESS, 736 So.2d at 797 n.1. Thus, the court concluded, the amended rule is designed to obviate future conflicts as to the effect of an offer upon defendants-offerees and, therefore, "failure to follow the rule as to offerors must be considered merely a harmless technical violation which did not affect the rights of the parties." Id.

In SPRUCE CREEK, a joint and unapportioned offer of judgment was made by two plaintiffs to a single defendant. The Fifth District reversed the trial court's ruling that the offer was void for having failed to separate the offer for each plaintiff. Citing to FLIGHT EXPRESS, the Court reasoned that "[t]he lack of apportionment

between claimants is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants." 746 So.2d at 1116.

BEHAR is distinguishable because it involved a joint offer made by a defendant to a husband and his wife, who had a consortium claim. Since that claim is a separate and distinct claim from that of the husband, the offer was invalid. ALLSTATE INDEMNITY CO. v. HENGSON, 25 Fla.L.Weekly D2431 (2d DCA October 11, 2000) held likewise.

Defendants' reliance upon McFARLAND & SON, INC. v. BASEL, 727 So.2d 266 (Fla. 5th DCA 1999) is also misplaced. That case involved multiple defendants who had separate liability. The plaintiff sued a driver for negligent operation of his employer's 18-wheel car carrier. He sued the employer not only for its vicarious liability for the driver's negligence, but also for its own independent negligence in hiring, training and supervising the driver. Additionally, plaintiff sued the estate of the negligent driver of the vehicle in which he was riding. The Fifth District found that the plaintiff's undifferentiated offer of judgment to all defendants was invalid. The Court noted that Rule 1.442(c)(3) was amended in 1996 to conform to FABRE v. MARIN, supra, which dealt with dividing the exposure of defendants with separate liability according to their respective percentages of fault. Since each of the defendants in that case were separately liable, the lack of apportionment made it impossible to evaluate the offer as to each defendant based on their different liability situations.

The very purpose expressed by the Fifth District for requiring an offer to set forth an amount tied to each particular defendant's separate liability does not apply here, where the defendants have no separate liability. There was no basis upon which the Plaintiff could allocate a portion of a settlement offer to the Defendants who are vicariously liable only. For that reason, the Fifth District in the present case distinguished its prior McFARLAND decision, stating:

> We do not agree with the Strahans that *McFarland* controls the result in this case. An important difference between *McFarland* and the instant case is that in *McFarland*, liability, pursuant to the allegations of the complaint, could be allocated on the basis of fault among each of the defendants. In *McFarland*, there were separate issues relating to the negligence of each [defendant].... In contrast, the complaint in the instant case alleged only the negligent act of Arthur P. Strahan, Jr. The other defendants were included in the complaint only under theories of vicarious liability. Unlike the plaintiff in *McFarland*, Gauldin could not logically apportion his offer among the Strahans because each of the individual defendants were liable for the entire amount of damages. Because of that joint and several liability, none of the individual defendants were adversely affected by the joint offer....

Neither FLIGHT EXPRESS, SPRUCE CREEK, BEHAR nor McFARLAND concerned the situation presented here – a joint offer to multiple defendants with vicarious liability, rather than separate liability. The Fifth District correctly held that a joint offer to vicariously liable defendants is valid, in line with CROWLEY, SAFELITE GLASS and DANNER CONSTRUCTION, supra.

The only error the Fifth District made in ruling on the offer of judgment issue was in concluding that a multiplier was not appropriate. The Court found that there

was an absence of proof that the relevant market required a multiplier. The Court obviously overlooked the fact that the experts for both sides agreed that a multiplier was appropriate in this case, thus obviating any requirement that Plaintiff present evidence justifying the use of a multiplier (SR758-59,797). Since Defendants' expert agreed below that a multiplier was appropriate, Defendants were bound by that testimony and estopped to claim otherwise. BEHM v. D.O.T., 292 So.2d 437, 440 (Fla. 4th DCA 1974), approved 336 So.2d 579. Defendants raised for the first time on appeal that a multiplier was not appropriate, and the Fifth District ignored case law that is legion that an issue not preserved below cannot be raised on appeal. MURPHY v. CITY OF PORT ST. LUCIE, 666 So.2d 879 (Fla. 1995); McGURN v. SCOTT, 596 So.2d 1042 (Fla. 1992); CLARK v. DPR, 463 So.2d 328 (Fla. 5th DCA 1985); SPARTA STATE BANK v. PAPE, 477 So.2d 3 (Fla. 5th DCA 1985).

Moreover, implicit in the opinion of both experts that a multiplier was appropriate was that all factors, including a relevant market need for a multiplier, existed in this case. The experts did not have to explain the factors supporting their opinion that a multiplier was appropriate, since the Evidence Code allows them to render an opinion on an ultimate issue of fact without having to provide the underlying basis therefor, unless specifically asked. §§90.705 Fla. Stat. Here, since both experts agreed that a multiplier was appropriate, they obviously also agreed that the relevant market required a multiplier in order to obtain competent counsel. Defendants did not

cross-examine Plaintiff's expert about the basis for his opinion that a multiplier was appropriate, since their own expert agreed that a multiplier was appropriate. The only issue the judge had to decide was the size of the multiplier, in light of the 1.5 to 2.0 range agreed to by both parties' experts.

The Fifth District should have at least remanded the attorney's fee issue so that Plaintiff would have an opportunity to present evidence to justify a multiplier, since it was agreed to by Defendants below and attacked for the first time on appeal.

POINT II

THE JURY'S VERDICT WAS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE

There is no merit to Defendants' contention that the jury's verdict was contrary to the manifest weight of the evidence. The experts on both sides agreed that Plaintiff had three levels of collapsed discs in his neck, and a compression fracture in his back. They simply disagreed on whether the accident caused those conditions. Plaintiff's experts testified that x-rays taken at the time of the 1991 accident showed that the effect of Plaintiff's 21 years of heavy labor was only mild degenerative changes at one level, C5-6. Seventeen months later, Plaintiff's condition had progressed to the final stages of disc degeneration at three levels, which Plaintiff's experts said could only have been caused by the accident. Defendants' experts simply disagreed. Based on

this conflicting testimony, the issue of causation was for the jury. HUNT v. PALM SPRINGS GENERAL HOSPITAL, 352 So.2d 582 (Fla. 3d DCA 1977).

Since the jury believed Plaintiff's experts on causation, the damage award was fully supported by the evidence. Defendants are doing nothing more than rearguing their version of the evidence, which they already argued to the jury, and which the jury rejected. The jury's individual awards for the different elements of damages, and the damage awards taken as a whole, are fully supported by the evidence:

Plaintiff's Medical Expenses

Plaintiff's past medical bills that were placed into evidence supported the jury's award of $6,828.10 (R9 666). The award of $23,050 for future medical expenses was supported by Dr. Alvarez's testimony that Plaintiff would probably need surgery in the future, which would cost $12,000 to $30,000, and he would need to be examined every six months or once a year, costing $50 to $100 a visit (R6 193,197-99,201,214).

Plaintiff's Past and Future Lost Earnings and Earning Capacity

Defendants' argument that Plaintiff made more after the accident is both inaccurate and ignores the fact that Plaintiff was entitled to recover for loss of earning capacity in addition to lost earnings. The purpose of an award for loss of earning capacity is to compensate a plaintiff for loss of the capacity to earn income, not actual

loss of earnings. McELHANEY v. UEBRICH, 699 So.2d 1033, 1035 (Fla. 4th DCA 1997); W.R. GRACE & CO. v. PYKE, 661 So.2d 1301 (Fla. 3d DCA 1995); MULLIS v. MIAMI, 60 So.2d 174 (Fla. 1952); RENUART LUMBER YARDS, INC. v. LEVINE, 49 So.2d 97 (Fla. 1950); 17 Fla. Jur2d Damages §49.

A jury can award damages for loss of earning capacity, even though a plaintiff is allegedly earning more at the time of trial than he was prior to the accident, where the plaintiff is unable to perform the work he used to perform, and needs the help of others to do the work he used to perform. COX v. SHELLEY TRACTOR & EQUIPMENT, INC., 495 So.2d 841 (Fla. 3d DCA 1986); HUBBS v. McDONALD, 517 So.2d 68 (Fla. 1st DCA 1987); LONG v. PUBLIX SUPER MARKETS, INC., 458 So.2d 393 (Fla. 1st DCA 1984). The measure of damages for lost earning capacity takes into consideration not only before and after earnings, but also the plaintiff's impairment, age, health, habits, occupation, surroundings, etc. W.R. GRACE & CO.-CONN. v. PYKE, supra, at 1302; 17 Fla. Jur.2d Damages §50.

In this case, the evidence showed that prior to the accident, Plaintiff was able to perform all the strenuous work required by his polyurethane roof spraying business. After the accident he could no longer perform the tasks required by that business. He also could not perform the tasks required by the conventional roofing company, which he began after the accident. He had to hire someone to perform the job he usually performed. At the time of trial, Plaintiff rarely went up on roofs anymore, and was

relegated to working as a clean-up man on the ground. Not only did the doctors agree that Plaintiff should no longer work as a roofer, but they also did not think he should engage in any strenuous activity, which is the kind of work Plaintiff, who had no high school diploma, had been engaged in all his life. Plaintiff's earning capacity, past and future, for heavy labor was clearly impaired as a result of the accident.

Accordingly, the jury's award of $84,000 for future loss of earning capacity was supported by the evidence. The jury's verdict indicated that the award was for 21 years, the number of work years Plaintiff had left. Dividing the award of $84,000 by the 21 years of Plaintiff's future work life, the jury awarded $4,000 per year for loss of earning capacity to age 65. That award was clearly not excessive considering the tremendous impairment to Plaintiff's earning capacity.

The jury's award of $35,000 for past lost earnings and earning capacity from 1991 to 1998 (seven years) was likewise supported by the evidence. As discussed supra, at pages 15-16, Plaintiff sustained a $10,000 a year reduction in income by not being able to work as a polyurethane sprayer and/or by being relegated to operating a conventional roofing business rather than a foam spray roofing business.

Past and Future Non-Economic Damages

The jury awarded $10,000 as past non-economic damages and $40,000 for future non-economic damages. Those awards were not excessive. Plaintiff and his

doctors testified to the pain, disability, physical impairment, etc., that Plaintiff had experienced during the seven years since the accident. An award of $10,000 for those seven years was not excessive. The future award of $40,000 was also not excessive. As a result of the accident, Plaintiff had collapsed discs at three levels in his neck and a compression fracture of his mid-back. Even Defendants' expert admitted that these were "serious conditions." The compression fracture could result in Plaintiff becoming a paraplegic in the future if the condition was not closely watched, and an operation would have to be performed sometime in the future. Dr. Ditinick gave Plaintiff a 20% impairment rating (R8 391). Dr. Alvarez gave him a 17% impairment rating (R6 252-54;R7 302). Plaintiff's life expectancy was 30.5 years (R9 577), and therefore the award in future non-economic damages was about $765 a year. Considering the extent of Plaintiff's injuries and disability received as a result of the accident, that award was not excessive.

Without question, the individual awards for the different damage elements, and the awards taken as a whole, were supported by the evidence. Accordingly, the court did not err in refusing to grant Defendants a new trial based upon their contention that the total damage award was contrary to the manifest weight of the evidence.

CONCLUSION

Based upon the foregoing, the underlying Final Judgment and the Attorney's

Fee and Cost Judgment entered in favor of Plaintiff and against Defendants should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to: BARTON W. HOGREVE, ESQ., Jack, Wyatt, Tolbert & Turner, P.A., 1499 S. Harbor City Blvd., Suite 201, Melbourne, FL 32901; and RICHARD A. SHERMAN, ESQ., Richard A. Sherman, P.A., Suite 302, 1777 South Andrews Avenue, Ft. Lauderdale, FL 33316, by mail May 23, 2001.

James I. Knudson, Esq.
Jerry D. McGreal, Esq.
KNUDSON & McGREAL, P.A.
1824 S. Fiske Blvd., Suite 2
Rockledge, FL 32955
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (561) 686-8010
Attorneys for Respondent

By:_____
EDNA L. CARUSO
FL BAR NO. 126509

By:_____
JERRY D. MCGREAL
FLA. BAR NO. 211613

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Brief of Respondent is Times New Roman 14pt.