IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1155

Florida Bar No. 184170

ARTHUR P. STRAHAN, Indiv., and d/b/a STRAHAN MANAGEMENT, PATRICIA STRAHAN, Indiv., and d/b/a STRAHAN MANAGEMENT, ARTHUR P. STRAHAN, JR., Indiv., and STRAHAN MUSIC, INC.,

Petitioners,

vs.

DEWEY L. GAULDIN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON THE MERITS

ARTHUR P. STRAHAN, Indiv., and d/b/a STRAHAN MANAGEMENT, PATRICIA STRAHAN, Indiv., d/b/a STRAHAN MANAGEMENT, ARTHUR P. STRAHAN, JR., Indiv., and STRAHAN MUSIC, INC.,

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(With Appendix)

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II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE THE VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; AND A NEW TRIAL AND/OR REMITTITUR SHOULD HAVE BEEN GRANTED.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

STATEMENT OF THE FACTS AND CASE

A. Overview

Arthur Strahan, Jr. was in the process of loading a jukebox, when he could not hold onto it, the jukebox slid out of the truck, onto the sidewalk and injured the Plaintiff. Because there was no evidence of negligence, the judge instructed the jury it could infer the Defendant was negligent, under a res ipsa loquitur instruction. Clearly, since the judge believed there was no evidence of negligence presented at trial, a verdict should have been directed for Strahan, or at the very least, the jury should have weighed the evidence and come to its own conclusion, without the res ipsa instruction. Not surprisingly, after multiple negligence instructions, the jury found the Defendant negligent; it awarded almost $200,000 in damages; and then the judge awarded the Plaintiff over $145,000 in attorney's fees, under an invalid Proposal of Settlement.

The Decision in Strahan v. Gauldin, 756 So. 2d 158 (Fla. 5th DCA 2000)(A 1-5) is in direct and express conflict and misapplies the res ipsa loquitur law in this Court's decisions in McDougald v. Perry, 716 So. 2d 783 (Fla. 1998); Marrero v. Goldsmith, 486 So. 2d 530 (Fla. 1986); City of New Smyrna Beach Utilities Commission v. McWhorter, 418 So. 2d 261 (Fla. 1982); and Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978); holding that a res ipsa loquitur instruction should be used only in rare circumstances; like an accident involving an unattended flying

object; and where the plaintiff has demonstrated an inaccessibility to the evidence of how the occurrence happened. This jukebox case involves an ordinary negligence situation.

The jury was given two negligence instructions, followed by a concurrent cause instruction, which prejudicially overemphasized this aspect of the case, in direct and express conflict with this Court's holdings in Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. 1952) and Dowling v. Loftin, 72 So. 2d 283 (Fla. 1954).

Finally, in direct and express conflict with established Supreme Court law, the Fifth District affirmed an Offer of Judgment made in clear violation of Fla. R. Civ. P. 1.442 and TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995); which require that the provisions of Rule 1.442 must be strictly applied. The court found that an undifferentiated Offer to multiple offerees, i.e., all the Defendants, was still valid, even though Rule 1.442 requires an apportionment of the amounts as to each party. The court found that vicariously liable defendants are synonymous and unified with active tortfeasors, so it is impossible to comply with Rule 1.442 in these situations.

This Court has jurisdiction to resolve all the conflict and 1) quash the Fifth District's decision and order a new trial, without a res ipsa instruction; and/or 2) limit res ipsa cases to only one negligence instruction; and 3) void the Plaintiff's Offer of Judgment and enforce Rule 1.442 as written and intended.

B. Specific Facts

The Plaintiff's first witness was Dr. Alvarez, a neurologist, who saw him one time, seven years after the incident (T 155-158). He testified that the Plaintiff, a roofer, told him he was involved in an accident in October of 1991, when he was struck by a jukebox, which fell off a truck, which hit him on the right hip and hurled him against a wall, hitting his left shoulder and left hip (T 158). He went to the emergency room the next day and the x-rays showed degenerative changes in his neck and a T4 compression fracture in his spine (T 158-159). He received no treatment in the emergency room and then subsequently went to a chiropractor and received no treatments for three years and then was treated six months before seeing the neurologist (T 159). The emergency room diagnosed the Plaintiff with a T4 thoracic compression fracture, slipped discs and degenerative changes at C4-5, 6-7 (T 173-174). He testified that the x-rays of the Plaintiff's spine looked like somebody who was 60 or 65 years old (T 198). He had very advanced degeneration from 1991 to 1998 (T 191-192). The doctor testified that the October 1, 1991 accident was a substantial contributing cause of the acceleration of the Plaintiff's preexisting degenerative changes in his neck (T 193-194). In addition, in the next 10-20 years the Plaintiff would need some type of neck surgery (T 193-194). The surgery could run anywhere from $12,000 to $30,000; and would not get rid of his pain, or make his neck normal (T 198). The doctor testified that the

Plaintiff would not need any follow-up studies or blood work and had to avoid activities where he could get hurt, or strenuous activities like lifting something heavy (T 200-201). He would need semi-annual or annual visits at $50 to $100 each and there was no medication to help him (T 201). The T4 condition was permanent and the Plaintiff had to avoid vigorous use of his arms, neck or shoulders (T 201-202). These restrictions would still allow him to work as a roofer (T 203). Dr. Alvarez found that the accident caused a aggravation of a preexisting condition and the Plaintiff would continue to have pain (T 204). The Plaintiff could not engage in his former occupation of body work or auto mechanic (T 204-205). Dr. Alvarez gave him a 15% permanency based on his herniated disc and 2% for his compression fracture (T 206-207).

On cross-examination, Dr. Alvarez testified that the Plaintiff did not complain of neck pain when he went to the ER, just of upper back pain; the ER records show the past history of neck injury from when the Plaintiff dove head first into the sand when he was 15; the diving accident did cause some degenerative change; but he thought these were made worse by the accident (T 213-229). He did not see any neck x-rays, or MRIs taken of the Plaintiff before the accident; the 1991 x-rays showed normal alignment of the spine, no fractures or subluxation, preexisting degenerative changes at C5-6; osteophyte formation; bilateral encroachment at C5-6; and the ER doctor could <u>not</u> determine if the T4 compression fracture was acute (recent) or

chronic (old); but Dr. Alvarez believed, 7½ years later, that he could state that in 1991, the T4 was acute and not chronic. In his report a month before trial, he too had found that the T4 compression fracture could have preexisted the accident, but changed his mind at trial. The Plaintiff had prior bilateral carpal tunnel syndrome related to a fall in 1976; in the early 1980's had surgery on both hands; he missed no work due to this alleged accident; he did not tell the doctor he had to sell his business because of the accident; he saw his first chiropractor off and on until April of 1992; he saw chiropractor, Ditinick, the following year in 1993; and had back pain after kicking in a door (T 213-229).

Dr. Ditinick's records did not reflect anything about any kind of an accident in 1991, nor any treatment for any accident (T 229). The Plaintiff treated with Dr. Ditinick for a year, then did not go back to see him again until 1998 (T 230).

Most of Dr. Alvarez's neurological exam of the Plaintiff was normal. Dr. Alvarez admitted that the Plaintiff's history of prolonged manual labor was consistent with the development of long standing degenerative changes (T 245). Dr. Alvarez testified that originally he had diagnosed the Plaintiff with lumbar strain due to the 1991 accident, but after further investigation decided it was probably related to him later kicking the door; and nothing related to any lumbar sprain to the October 1991 incident (T 250). He also could not relate any of the degenerative changes and complaints of

low back to the 1991 accident (T 251-252). Based on the history given by the Plaintiff, the doctor said his neck condition was aggravated by the 1991 accident (T 252-253).

The next witness was James Bailey, who described his job of working along with the Plaintiff in spraying polyurethane on roofs and the process that was involved (T 279-286). The Plaintiff was the salesman for the roofing business; which he sold in 1992, the year after the incident (T 288-289). On October 1, 1991, he and the Plaintiff went out to Beach Shack in Cocoa Beach; because the roof was leaking (T 290). They had been up on the roof and could not find anything wrong, so they stood on the sidewalk examining the walls (T 290). A man was loading a jukebox on to a pick-up truck by himself and he and the Plaintiff asked him if he needed help, but he said no (T 290-291). They continued looking at the wall and out of the corner of his eye, he saw the jukebox falling and he got out of the way and he tried to grab the Plaintiff and get him out of the way, as well (T 291). The jukebox fell out of the truck and hit the Plaintiff in the right hip area knocking him against the wall (T 291). He asked the Plaintiff if he was okay and he said he was alright (T 292). They continued to work that day and a few days afterwards, he saw a large bruise on his hip and took a picture of it at the Plaintiff's request (T 292). Bailey testified that the Plaintiff's business had decreased from 1990 to 1991 because of his divorce, which made the Plaintiff depressed (T 293). Bailey was not

aware of any medical care or treatment that the Plaintiff received due to the accident in October of 1991 (T 293-294). Gauldin never told Bailey that he had to sell the business due to any injuries from the 1991 jukebox incident (T 301-302). After the accident, they did not talk to the manager of Beach Shack, did not fill out any incident reports; they did not call the police to file an auto accident report; and they continued to work every day thereafter (T 305-306). Bailey also did not tell the Defendant that the jukebox had hit the Plaintiff (T 307).

Gauldin moved to Florida in the early 1980's, he learned to become a roofer and he and his father started their own business in 1985 (T 328-329). The Plaintiff sold his business in 1992 for $6,500, even though he paid $25,000 for this equipment (T 346-347). He started a whole new business six months later doing regular roofing (T 347-348). In 1991, the year of the incident, his net profit dropped from $13,342 to $5,205 (T 352). He clarified the fact that the drop to $5,205 was due to his divorce and not the accident; and his divorce devastated him (T 352-353).

He too described the accident and the fact that Mr. Strahan was putting the jukebox on the lift gate of the pick-up truck and they asked him if he needed some help and he said no. The Defendant put the jukebox on the lift, pulled it into the back of the pick-up truck and then the Plaintiff did not hear, or notice anything, because he was looking at cracks in the wall for leaks (T 354). Bailey pulled

him out of the way of the jukebox, when it fell out of the back of the pick-up truck; the jukebox caught him on the right hip hitting him pretty hard and shoved him into the concrete wall, but he did not fall (T 355). Gauldin said that Bailey had been trying to stop the jukebox from falling on to the hood of a car and after he was hit by the jukebox, he told Bailey he felt a little weird, but he did not think he was hurt (T 356).

The Plaintiff's testimony was interrupted to present the testimony of Dr. Ditinick, who began treating the Plaintiff in March of 1993 for low back pain, due to him kicking a door (T 374-375). The doctor adjusted the Plaintiff's back, put a lift in his shoe and began treating him later for neck pain and not low back (T 377-378). The doctor found a severe degenerative cervical disc condition in his neck, starting at C2-3 and continuing through 6-7 (T 379-381). He had spurring and retrolisthesis and his exam found far more degenerative changes than the limited ones the Plaintiff had in October of 1991 (T 382-386). The doctor gave him a permanent impairment of 20% of the whole body, with 15% related to the neck and 5% to the low back (T 391-392).

On cross-examination, the doctor admitted that the Plaintiff never gave him any history regarding any jukebox incident and agreed that the first two visits were for Gauldin's low back injury condition and were not in any way related to the 1991 accident (T 398). When the Plaintiff came back in March of 1993 complaining

of neck pain, he still said nothing about the 1991 jukebox accident (T 399-400). Gauldin also did not tell Dr. Ditinick about any compression fracture in his mid-back, nor did he have any mid-back complaints (T 401). The doctor testified that the cervical and lumbar spine x-rays showed advanced degenerative changes and again admitted that the only history, the Plaintiff gave him, was kicking the door (T 404). Dr. Ditinick testified that the heavy manual labor, like roofing could cause these advanced degenerative changes and continued stress on the spine would make the progression of the changes increase (T 405-406). The Plaintiff came back to see Dr. Ditinick three and a half years later in May of 1998; again, he still did not tell the doctor about being hit by the jukebox (T 407). He had no neck pain, just standard low back pain (T 408). However, the doctor testified that all of his treatment of the Plaintiff in 1998 was related to the 1991 jukebox incident (T 410).

The trial continued with the direct exam of the Plaintiff. He described how weird he felt after being hit by the jukebox; the tremendous pain he had all over his body; the visit to the ER; his treatment with Dr. Kirchofer; difficulty in working; and while he attributed selling his business to his divorce, he also said that he had to sell his business because he could not foam spray anymore and he had to let Mr. Bailey do that work (T 418-422). He testified his condition was deteriorating all along, especially from 1993 to 1997, when he went to Orlando to find out what was going on with his back

and his neck (T 426). Due to the various diagnostic testing done and other testing he had to forego to work in the Bahamas (T 426-428). The Plaintiff went to see Dr. Seig, the defense IME, which scared him to death (T 428-429). Recreationally, he likes to hunt, play golf and ride in his airboat (T 439).

Next, Dr. Seig testified, out of turn, describing his background as an orthopedic surgeon, frequency of doing compulsory physical exams, his litigation history; and described the Plaintiff's history of being hit on the right side by a jukebox, which knocked him into a wall (T 450-464). The Plaintiff had been treated by two chiropractors with no significant improvement and he received no treatment from any other physicians (T 464). Even though his condition improved to a large extent after the accident, there has been no significant change in his condition for the past two years (T 465-466). The doctor described his physical exam of the Plaintiff; discussed the x-rays he took of the Plaintiff on the day of the exam; and his finding that the condition of the Plaintiff's neck demonstrated degenerative changes of a long-standing type nature (T 468-478). The T4 fracture also appeared to be either a congenital abnormality, or an old fracture (T 475). The progression of the degenerative changes seen in the Plaintiff could be do to his long history of repetitive trauma, such as heavy manual labor, which also causes arthritis to increase faster (T 478-480). It was improbable that the 1991 incident aggravated the Plaintiff's preexisting carpal

tunnel syndrome (T 484-485); the T4 compression fracture was an old condition and not related to the 1991 incident, because he did not have symptoms to indicate an acute or new fracture at the time of the 1991 incident, or in the ER (T 485-486). The third diagnosis was advanced degenerative disc disease, with a soft-tissue sprain or strain of the neck, superimposed on this preexisting degenerative disc disease (T 486). The future treatment for the Plaintiff would include use of anti-inflammatories, cervical traction, heating pads, etc., because his degenerative disc disease is progressive (T 488). He had no findings that there are any indication of any type of surgical intervention due to the 1991 accident; it was medically improbable that the 1991 jukebox incident produced a permanent injury in the Plaintiff, nor was a significant factor in him developing degenerative disc disease (T 489-490).

On cross-examination, Dr. Seig testified there was nothing showing any neck problem before October 1, 1991 in the Plaintiff; Gauldin had been a roofer doing heavy work from 1983-1991, but only had degeneration at C5-6 so his work was not tearing up his neck. He testified that severe upper thoracic pain was consistent with a fresh compression fracture, which would be a permanent injury; and the Plaintiff's degenerative neck condition was permanent (T 501-502).

The testimony of Dewey Gauldin continued with the defense cross-examination (T 529). Like Bailey, he testified that at the time of the incident in 1991 he filled out no report; did not call

the police; had no one take any statements; and said he did not see the jukebox start to fall from the back of the pick-up (T 529-531). He was impeached with his deposition testimony explaining the accident:

> ...(Gauldin) "No. I saw what happened. He (Strahan) slipped in the back of the greasy truck, fell down and that is what shoved the jukebox out."
>
> (T 532).

He again testified in his best year ever, his take home pay was $12,399, which was in 1990 when he got divorced (T 532-534). He continued to work after the jukebox incident; and in the past two years he had earned approximately $30,000, making triple what he had prior to the accident (T 534-537). He admitted that up to six months before trial, he had been airboating a couple of times a week, hunting, fishing, he was able to bend over, to work, to do his roof job and he could carry up to 40 or 50 pounds (T 537-538). He got in and out his truck, went up and down ladders, did different roofing jobs, shoveled, etc. (T 538-540). He admitted he did <u>not</u> tell his treating physicians about the jukebox incident (T 541-542).

The Defendant, Arthur Strahan, testified on the day in question he was doing independent contractor work for his father, in the music and coin operated equipment business (T 556-557). He had gone out to the Beach Shack to swap one jukebox for another. He had already taken one into the store and was hauling another one out (T 557). He testified that the jukebox was about four feet high and weighed about

250 pounds and he rolled the jukebox out to put it on the lift of his truck (T 557-559). The truck was approximately two and a half to three feet from the ground and the lift was out on the sidewalk (T 559). There was no apparatus to hold the jukebox during the lifting (T 560-561). The Defendant put the jukebox on the lift, raised the lift and manually attempted to pull the jukebox into the bed of the truck (T 561-562). There were two handles in the back of the jukebox and he was pulling on one side first, because he wanted to back it against the driver's side so he could strap it in (T 562). He had done this maneuver approximately 20 times before; and he did not recall anyone asking him if he needed help (T 562-563). He handled the job himself, so the jukebox was in his exclusive control and when he went to rotate the jukebox, for some reason, the bottom kicked out (T 563-564). On the outer deck there was a tracking surface and when the jukebox got to the smoother surface, this might have allowed the bottom to kick out; and he tried to drop it back, to balance it and he could not hold the jukebox with one hand, so he had to let go of it (T 564). Something in the manner he moved the jukebox made it get out from his control and caused it to fall; and the Plaintiff did not do anything to contribute to the way the jukebox fell out of the truck (T 565).

On cross-examination, Mr. Strahan testified that he moved big pieces of equipment like dryers and jukeboxes several times a day and nothing had ever fallen off his pick-up truck before and he had never

had any problems putting things on and off the lift gate (T 568-569). He never seen a lift gate with a tie down device on it and that what happened with the jukebox was sudden and unexpected (T 569). After the incident, nobody came up to him to tell him that the jukebox had squashed the Plaintiff; Bailey and the Plaintiff were just milling around; no one spoke to him at all after the jukebox came crashing down; the manager did not ask him to do an incident report; and virtually nothing happened (T 571-572). He then testified that when the jukebox fell out of the truck it did not hit the car next to it, but just ended up resting on the rubber bumper of the fender (T 573). After the reading of the mortality tables, the Plaintiff rested (T 577).

The Defendant moved for a directed verdict on liability stating that the evidence was that this was a sudden and unexpected accident and there was no expert testimony regarding negligence (T 578). The Plaintiff responded with two scenarios to get to the jury: 1) based on the Plaintiff's testimony that there was grease on the floor of the truck; the Defendant fell and the jukebox slid out; or 2) based on Strahan's testimony he was moving it and lost control of the jukebox (T 579). Gauldin was going to ask for a res ipsa instruction because the jukebox was under the exclusive control of the Defendant, he lost control of it, so there was enough evidence to go to the jury (T 579). The defense Motions were denied (T 580). The Defendant rested (T 582).

The judge announced that this was a res ipsa case, but additionally, there was sufficient evidence to avoid a directed verdict and with the res ipsa instruction, the jury still could find no negligence on the part of the Defendant (T 588-596).

The Defendant objected to the res ipsa instruction and the concurrent cause instructions (T 597). There was no other cause involved; and this was not a situation where something fell out of the sky; here there was actually hands-on contact with the jukebox; and the judge stated "I think the fact that the instrumentality that caused the injury is identifiable does not pull it out of res ipsa" (T 597; 601-602). The objections were overruled (T 602).

At closing argument, the Defendant again objected to the res ipsa jury instruction; especially since there were three eye witnesses to exactly what happened to the Plaintiff (T 632-634). Again, the judge disagreed, finding the res ipsa instruction was required in the case (T 634-635). The jury was given the following res ipsa instruction:

> If you fine[sic] that the circumstances of the occurrence was such that in the ordinary course of events it would not have happened in the absences 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.
>
> (T 720-721).

The jury was also given the standard negligence instruction and a concurrent cause instruction (T 720-722). Therefore, negligence

was addressed in a total of three separate instructions (T 720-722).

The jury returned a Verdict finding negligence on the part of the Defendant; and awarding a total of $198,878.10 (T 737-739).

C. Proposal for Settlement

The Plaintiff's Complaint and Amended Complaint were filed against nine different Defendants consisting of Mr. and Mrs. Strahan, Arthur P. Strahan, Jr., individually and doing business as Strahan Management and Strahan Music (R 40-42; 45-48). The Plaintiff's Complaint alleged that five of the Defendants owned and operated the motor vehicle on the date of the accident, inferring vicarious liability for any negligence of the driver, Arthur P. Strahan, Jr.; and also alleged that four of the Defendants were vicariously liable as the employers of Arthur Strahan, because he was acting within the course and scope of his employment at the time of the accident (R 40-42; 45-48). The Plaintiff filed a single Rule 1.442 Proposal for Settlement as to all the Defendants, in their various capacities for a single amount of money:

RULE 1.442 PROPOSAL FOR SETTLEMENT
(Rev. 1/1/97)...

> (a) Plaintiff, DEWEY L. GAULDIN is the party making the proposal and the parties to whom the proposal is being made are Defendants, ARTHUR P. STRAHAN, Individually and d/b/a Strahan Management, PATRICIA M. STRAHAN, Individually and d/b/a Strahan Management, ARTHUR P. STRAHAN, JR. Individually, and STRAHAN MUSIC, INC....
>
> * * *

> (d) The total amount of the proposal is the sum of FIFTY THOUSAND NINE HUNDRED AND 00/100 ($50,000.00,[sic]) DOLLARS and there are no nonmonetary terms of the proposal with the exception of the conditions set forth Paragraph (c) hereinabove; and...
>
> (2/29/99 Plaintiff's Exhibit #2).

The Plaintiff then moved for attorney's fees pursuant to § 768.79 and Rule 1.442 (R 628-629). The Defendant objected to the Motion on the basis that the joint proposal was in direct violation of the newest version of Rule 1.442 and the entire matter was argued at the beginning of the hearing on the Plaintiff's Motion for Attorney's Fees (H2 1-22).

The judge decided that the Fifth District had written language that was far too broad in its McFarland, infra, decision which had to be corrected; it did not distinguish between vicariously liable defendants or any other defendants; admitted that under McFarland, it would invalidate the Plaintiff's Proposal; but held that the requirements of Rule 1.442(c)(3) could not apply in a vicarious liability situation (H2 56-59). The judge entered a Final Judgment awarding $145,104 in attorney's fees for 241.84 hours, at $300 an hour, with a 2.0 multiplier (R 685-688). The Fifth District affirmed the trial court on each issue, except the use of the multiplier, without the requisite evidence. Strahan, supra. Each side sought conflict review in this Court and the Defendant's Petition was

accepted.

SUMMARY OF ARGUMENT

The Decision in Strahan is in direct and express conflict and misapplies, the law in this Court's decisions in McDougald, Marrero, McWhorter and Goodyear; which hold that a res ipsa loquitur instruction should be used only in rare circumstances; like elevator drops and flying barrels; and cases where the plaintiff has demonstrated an inaccessibility to the evidence of how the occurrence happened. This jukebox case involves an ordinary negligence situation. Not only was the jury given an improper res ipsa instruction, the jury was also given the standard negligence instruction, which overemphasized this aspect of the case, followed by a concurrent cause instruction. This resulted in more direct and express conflict, with this Court's holding in Lithgow and Dowling. Giving an improper res ipsa instruction can not be considered harmless error, and coupled with repetitive negligence instructions, there is no question the Defendant was deprived of a fair trial, which led to the excessive Verdict. The conflict must be resolved and a new trial ordered with a single standard negligence instruction.

Needless to say, it would have been virtually impossible for the jury to find no negligence on the part of the Defendant; even though there was no evidence of negligence, as recognized by the trial court. The law announced by this Court in its res ipsa cases

has been misapplied by the Fifth District to create new law in Strahan, such that res ipsa can now be applied to virtually any negligence case, where the plaintiff has no direct evidence that the defendant was negligent. Clearly, this direct and express conflict confers jurisdiction on this Court to review the Opinion in Strahan and to quash it and order a new trial with proper instructions.

In direct and express conflict with established Supreme Court law, the Fifth District affirmed a proposal for settlement which violated Rule 1.442 and TGI Friday's. This Court requires that the provisions of Rule 1.442 be strictly applied; but the Fifth District found that an undifferentiated Offer to multiple offerees, the 9 Defendants, was still valid; even though Rule 1.442 requires an apportionment of amounts as to each party.

The Rule is clear and unambiguous in its language and must be strictly construed, yet the District Courts are all over the place in applying it; creating exception after exception and conflict among and within the Districts. Strahan gives this Court the opportunity to resolve the conflict; and enforce the Rule as written. Strahan must be quashed, the Proposal voided and the Final Judgment for fees reversed.

The judge in this case directed a verdict on the comparative negligence of the Plaintiff, instructed the jury they could infer negligence, gave an additional instruction on negligence, followed by a concurrent cause instruction and all of this clearly combined to

deprive the Defendant of a fair trial and resulted in the excessive Verdict, for aggravation of a preexisting condition.

In the present case the Verdict is out of proportion to the damages claimed by the Plaintiff and clearly reflected an award based on the repetitive and misleading jury instructions. Therefore the Verdict is both excessive and not based on the evidence at trial and a new trial or remittitur should have been granted. This Court must reverse and grant a remittitur or a new fair trial, with proper instructions, after quashing Strahan.

ARGUMENT

I. THERE IS DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION IN STRAHAN AND THE DECISIONS OF THIS COURT IN McDOUGALD; MARRERO; McWHORTER; GOODYEAR; LOFTIN; DOWLING; AND THIS COURT HAS JURISDICTION TO RESOLVE THE CONFLICT; QUASH THE DECISION BELOW AND VOID THE PROPOSAL FOR SETTLEMENT.

A. Direct and Express Conflict with Res Ipsa Loquitur Cases

The law applied in this case, and affirmed by the Fifth District in Strahan, is in direct and express conflict with decisions out of this Court regarding the application of res ipsa loquitur; and the bar on repetitive jury instructions. To date, not a single case has addressed the question of whether both negligence instructions are to be given in a res ipsa loquitur case, or not. In Strahan, a total of three negligence instructions were given. The jury instruction issue is really academic, because this simply is not a situation involving the application of res ipsa loquitur and Strahan must be quashed and a new trial ordered. The danger in the Strahan opinion is that any time a plaintiff cannot prove negligence on the part of the defendant, instead of the defendant receiving a directed verdict, the plaintiff can receive, a res ipsa loquitur instruction and win, anyway. Three people witnessed this accident. This was not an unattended object, flying through the air, that suddenly appeared and injured the plaintiff. This is not the rare res ipsa loquitur

case, where a barrel rolls out of a second story window, with no witnesses and no idea of how it happened, causing injury to the plaintiff. McDougald, supra, citing, Bryne v. Boadle, 2 Hurlet & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

A classic res ipsa loquitur situation is found in Marrero, supra, where the plaintiff underwent surgery for hemorrhoids and eye cyst removal and ended up with an injury to her arm. As stated in Marrero, the doctrine of res ipsa loquitur is applied when the plaintiff could not possibly prove negligence, but the injury would not have occurred in the absence of negligence. A surgery patient who wakes up to find a sponge in their abdomen; a motorist driving down the street and struck by a flying tire; a pedestrian struck by a flying ladder; a passenger injured in a sudden elevator drop; are the classic examples of when the res ipsa loquitur instruction is given. These unattended, unexplained incidence require an inference of negligence against the defendant, mainly because the plaintiff is totally incapable of proving any negligence, or even how the accident happened.

In the present case, however, there were three witnesses and two different versions of how the accident occurred and this was an ordinary, standard negligence case.

The Plaintiff's version of the accident was:

> ...(Gauldin) "No. I saw what happened. He slipped in the back of the greasy truck, fell down and that is what shoved the jukebox out."

(T 532).

On the other hand, Mr. Strahan said there was no grease and maybe the wheels got caught on something. There was sufficient direct eye witness testimony in this case for the issue of negligence to go to the jury, with a single standard negligence instruction.

There was nothing preventing the Plaintiff from examining the truck, examining the jukebox, or hiring an expert to explain how a jukebox should be properly loaded and unloaded. At trial, the Plaintiff and his lay witness even testified that they offered to help the Defendant to load the jukebox onto the truck. This is not a situation where the Plaintiff was at a complete loss at to how to prove negligence. The Plaintiff, the Defendant and the eyewitness were all clearly aware of what was going on, as the Defendant tried to load the jukebox into the truck.

South Florida Hospital Corporation v. McCrea, 118 So. 2d 25 (Fla. 1960), involved a classic res ipsa situation, where the plaintiff went into surgery and came out of surgery with fractures she did not have prior to surgery. The plaintiff's theory was that she was negligently permitted to fall in the recovery room under anesthesia, while she was under the exclusive custody and control of the hospital. McCrea, 26. The case went to the jury with a res ipsa instruction and a jury found for the plaintiff. McCrea, 26. McCrea discussed the fact that evidence of specific negligence, which does not clearly and definitely show the cause of the injury, or

unsuccessful attempts to prove specific negligence, does not deprive the plaintiff of the benefits of the doctrine of res ipsa. McCrea, 28-29.

Unlike the situations where the patient wakes up and finds themselves injured and therefore the res ipsa instruction is proper, like the cases reported in McCrea; in the present case the Defendant testified that the position he was in, made it impossible for him to hold on to the heavy jukebox with one hand and therefore he had to let it go, allowing it to fall out on the sidewalk. The Plaintiff said the Defendant slipped on grease and this caused the jukebox to fall. Whether the accident was due to negligence, or not, was a standard jury question, with a single jury instruction.

In one of the frequently referred to Supreme Court cases, application of res ipsa was denied, in a situation involved a tire blow-out. Goodyear, supra. In Goodyear the Court refused to allow res ipsa to be used because the blow-outs could occur in the absence of negligence on the part of the manufacturer; and because the use of the negligence inference was inappropriate where the facts surrounding the incident were discoverable and provable. Goodyear, 1342. This Court noted that the use of the res ipsa loquitur instruction in the exploding tire case, where the plaintiff neither satisfied the essential elements of the document, nor "demonstrated an inaccessibility to evidence of the occurrence," was allowing the trial judge to put the finishing stroke on the plaintiff's case to

determine the defendant was negligent. Goodyear, 1340. Without the res ipsa instruction, the jury below, could have found the Defendant negligent for having a greasy truck bed, which caused the jukebox to slip; or that the Defendant should have known he could not contain a 250 pound object on wheels with one hand; or that the Defendant did nothing wrong and this was just an accident. This was a routine negligence case and should have been tried as such.

The Fourth District, relying on the decision in Goodyear, held that it was appropriate to refuse to give a res ipsa loquitur instruction, where the plaintiff died after the hospital put him in a chair and he fell out of the chair. Benigno v. Cypress Community Hospital, Inc., 386 So. 2d 1303 (Fla. 4th DCA 1980). The Fourth District found that res ipsa loquitur applied when the direct evidence of negligence was unavailable to the plaintiff, due to the unusual circumstances of the incurring incident; but where the plaintiff had put on numerous witnesses, including experts, it was not a res ipsa case. Benigno, 1304.

Along the same lines in Ploetz v. Big Discount Panel Center, Inc., 402 So. 2d 64 (Fla. 4th DCA 1981), the court again found that a res ipsa instruction was properly denied, where stacked wood panels fell on the plaintiff in the store. In that case, the plaintiff had her back to the wood panels which fell on her. Her husband had taken a sheet of the paneling and stacked it on the outside of the store so he could load it in his automobile. He testified that the store's

personnel stacked the paneling at the doorway, but part of the paneling was actually outside. As he was moving his car, he saw the panels move forward and backward and then strike his wife. Ploetz, 65. Based on this evidence, the Fourth District held that res ipsa was properly denied, as it was a doctrine of extremely limited applicability, which had been improperly extended beyond its intended parameters. Ploetz, 65.

The next Supreme Court case was McWhorter, supra, where once again the Supreme Court found that the refusal to give a res ipsa instruction was proper; noting that with the restricted nature of the doctrine, a trial court should never lightly provide this inference of negligence. This Court stated that the res ipsa instruction could not be given unless the plaintiff had showed that what occurred was a phenomena, which does not ordinarily happen in the absence of negligence, as the probable cause, in the light of past experience and that the defendant is the probable actor. The Court noted that injury standing alone does not ordinarily indicate negligence; and where the plaintiff had failed to show that direct evidence of the negligence was unavailable, or that the accident or incident would not have occurred absence negligence, there was no basis for the instruction. McWhorter, 262-263.

This Court next addressed the denial of a res ipsa instruction in Marrero, supra, where the plaintiff underwent surgery for hemorrhoids and removal of a cyst from her eyelid and following

surgery ended up with numbness, weakness and pain in her left arm. The Court relied on the California decision, which discusses the classic res ipsa situation, in reversing and holding Marrero to the facts of that particular case:

> The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of res ipsa loquitur is properly applicable to the case before us.
>
> ....
>
> The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant

> or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.
>
> Id. at 689, 690 (citations omitted). We are convinced the California result is the fairer one in the unconscious patient situation. Perhaps there are other instances when the customary control requirement should be similarly relaxed, but for now we are unprepared to hypothesize and expressly limit our holding to the facts presented.
>
> Marrero, 533, citing Ybarra v. Spangard, 154 P. 2d 687, 689, 690 (1944)

Marrero was one of the major cases relied on by the Plaintiff to convince the trial judge that res ipsa was required in this case; but where there was direct evidence presented on how the accident occurred, it was more than sufficient to remove any justification for the use of res ipsa, even under the standard set forth in Marrero.

The Third District in Wolpert v. Washington Square Office Center, 555 So. 2d 382 (Fla. 3d DCA 1989), found that res ipsa was properly available to a plaintiff in the classic situation where there was an unexplained elevator drop and injury to the plaintiff. The court reviewed elevator cases and found that the unattended elevator cab cases, resulting in the unexplained fall of the elevator, were the type that res ipsa loquitur was particularly applicable to; because elevators simply did not fall, in the absence

of some negligence on the part of the elevator company. Wolpert, 383.

The court in Monforti v. K-Mart, Inc., 690 So. 2d 631 (Fla. 5th DCA 1997) held that the doctrine of res ipsa loquitur did not apply when a shelf above the plaintiff collapsed and she was struck by boxes of folders, noting that the doctrine of res ipsa had extremely limited applicability. In that case, the plaintiff was standing next to a K-Mart employee who was hanging file folders on a shelf above the merchandise in which the plaintiff was interested. The clerk then moved down the isle, the plaintiff walked over to the shelf, squatted down to look at some other merchandise, when a box of file folders fell from the shelf striking her in the head. The employee, on the other hand, said that she had absolutely nothing to do with the shelf or file folders and was only aware of the accident when she heard the noise. The employee did observe that the shelf had collapsed and the brackets holding the shelf were bent. Monforti, 632. The jury decided the case in favor of K-Mart and the plaintiff appealed, claiming that the refusal to give a res ipsa instruction was reversible error. The court found that the refusal was correct where the doctrine had extremely limited applicability; the plaintiff could not show that the instrumentality was in the exclusive control of the defendant; nor that the accident would not normally occur but for negligence on the part of one in control. Monforti, 633. The Fifth District also pointed out that the doctrine only applied where

direct proof of negligence was unavailable and because of the absence of evidence that the instrumentality was in exclusive control of the defendant, this Court found no need for a res ipsa instruction, citing to Ploetz and Benigno for the principle that where there is substantial evidence presented, the instruction is not proper. Monforti, 633.

The latest decision from this Court is McDougald, supra, which held that the doctrine of res ipsa loquitur could apply in a flying tire case. The situation there was that a spare tire escaped from a cradle underneath a truck, became airborne and crashed into the plaintiff's windshield. The Court held that on the basis of common experience and general knowledge, this was not the type of thing that would not occur in the absence of negligence. This Court reversed and approved the Fifth District's application of res ipsa loquitur, in the circumstances of wayward automobile wheel accidents. McDougald, 784. The Court explained that in rare instances, an injury may permit an inference of negligence coupled with sufficient showing of its immediate and precipitating cause. McDougald, 785. While Goodyear and other cases permitted latitude in the application of a common sense inference of negligence based on the facts of an accident, the Court went on to caution:

> ...On the other hand, our present statement is not to be considered an expansion of the doctrine's applicability. We continue our prior recognition that *res ipsa loquitur* applies only in "rare instances."

Restatement (Second) of Torts s 328D cmts. c-d (1965).

McDougald, 785.

Regarding the application of Goodyear, for the proposition that res ipsa does not apply where the facts surrounding the incident are discoverable and provable, the Court noted that in Goodyear the plaintiff was in possession of the product and it was in the best position to determine the alleged cause of the accident. In McDougald, the chain and securing device for the tire were in the exclusive possession of the defendants and were not preserved and furthermore this was not the basis for the refusal to find res ipsa loquitur to be applicable. McDougald, 786-787.

In the present case there was absolutely nothing preventing the Plaintiff from looking at the jukebox, or its wheels and examining the truck to substantiate in his greasy truck bed theory. This clearly is not the flying tire, flying barrel, elevator drop, or patient waking up with a sponge in their abdomen type case, that requires a res ipsa loquitur instruction. If Gauldin was walking by the truck and a totally unattended jukebox simply flew out of the truck and hit him, that would be the classic res ipsa case; but that is not what happened below. Nor did the Plaintiff ever show that he had no access to the jukebox, the truck, expert testimony, or anything else, to prove that the Defendant was negligent in losing his grip on the jukebox, allowing the jukebox to roll out of the truck, and hit the Plaintiff.

The Fifth District agreed that the jukebox sliding out of the back of the truck is an event that usually does not occur in the absence of negligence, requiring both the res ipsa and the standard jury instruction on negligence, relying on this Court's decision in McDougald. Strahan, 160. However, such a conclusion could be reached in virtually every intersection collision, rear end accident, etc. Res ipsa instructions are not given in those standard, ordinary negligence cases. The Fifth District has taken the principles announced in McDougald and this Court's other decision involving res ipsa and expanded them so that now it applies to virtually any type of negligence case. The bottom line is that because the Plaintiff cannot prove negligence on the part of the Defendant, the Plaintiff was given the benefit of a jury instruction that pre-supposed negligence, followed by the standard jury instruction on negligence and then a concurrent cause instruction, over the Defendant's repeated objections.

Needless to say, it would have been virtually impossible for the jury to find no negligence on the part of the Defendant; even though there was no evidence of negligence, as recognized by the trial court. The law announced by this Court in its res ipsa cases has been misapplied by the Fifth District to create new law in Strahan, such that res ipsa can now be applied to virtually any negligence case, where the plaintiff has no direct evidence that the defendant was negligent. Clearly, this direct and express conflict

confers jurisdiction on this Court to review the Opinion in Strahan and to quash it and order a new trial with proper instructions.

It is important to note that improperly giving a res ipsa instruction cannot be considered harmless error and mandates reversal. Kenyon v. Miller, 756 So. 2d 133 (Fla. 3d DCA 2000) (res ipsa loquitur instruction requested by patient in a medical malpractice suit improperly permitted jury to disregard conflicting expert testimony; giving this instruction was reversible error); Wal-Mart Stores, Inc. v. Rogers, 714 So. 2d 577 (Fla. 1st DCA 1998)(error in giving unsupported res ipsa loquitur instruction cannot be deem harmless); Metropolitan Dade County v. St. Claire, 445 So. 2d 614 (Fla. 3d DCA 1984)(a court should never lightly provide this inference of negligence; the giving of a res ipsa loquitur instruction, which erroneously shifted the burden of proof, cannot be considered harmless).

The trial court abused its discretion, when it gave the unsupported res ipsa instruction and the affirmance by the Fifth District must be quashed and a new trial ordered.

B. Direct and Express Conflict on Repetitive Jury Instructions

There is also direct and express conflict between the Strahan decision and the Supreme Court's decisions in Loftin and Dowling, which hold that repetition in jury instructions unnecessarily emphasizes a particular rule of law, advantageous to one of the parties and results in a miscarriage of justice; requiring that the judgment be reversed and set aside. This is a question of first impression regarding the repetitive jury instructions, when the res ipsa loquitur situation is involved.

Below, over the Defendant's repeated objections, both the res ipsa instruction and the standard negligence instruction were given to the jury, followed by a concurrent cause instruction, which clearly put undue emphasis on this portion of the Plaintiff's case and virtually guaranteed a finding of negligence against the Defendant, which led to the excessive Verdict for Strahan. As pointed out by the Third District in Marks v. Mandel, 477 So. 2d 1036 (Fla. 3d DCA 1985), where the jury was instructed on the ordinary standard of care and then received additional instruction on the same standard, which was confusing and misleading, a new trial is required. The jury was instructed on the inference of negligence, shifting the burden of proof to the Defendant; then it was given a different standard for finding negligence; and then was given a third negligence instruction on concurrent cause, which presupposes some

evidence of other negligence, other than the Defendant's. Giving two instructions with different standards to be met to impose negligence, was unquestionably confusing and misled the jury. This Court should hold that in a res ipsa loquitur case, only the res ipsa instruction is given and not two or more instructions that allow the jury to find the defendant negligent.

Repetition in jury instructions is not permitted, since repetition serves only to give undue emphasis. Florida Power & Light Co. v. Robinson, 68 So. 2d 406 (Fla. 1953). It is reversible error to give jury instructions which involve a frequent repetition of the defendant's duty to the plaintiff or two different standards under which a jury could find the defendant negligent. Lithgow, supra; Shaw v. Congress Building, Inc., 113 So. 2d 245 (Fla. 3d DCA 1959)(giving repetitive charges on the issue of contributory negligence was undue emphasis, requiring reversal, noting that the Supreme Court has put aside such undue emphasis in a number of cases); Dowling, supra, (where the Supreme Court stated that it was quite true that in many cases charges contained repetitions in them and at times such repetitions may unnecessarily emphasize a particular rule of law advantageous to one of the parties; it is frequently true that the record and particularly the charges requested by one party or the other, discloses an "over-trial" of a case and where such conditions resulted in a miscarriage of justice, the judgment should be reversed and set aside); Marks, supra, (where

the court held that having instructed the jury on the standard of reasonable ordinary care, the trial court committed reversible error by then giving additional instructions on ordinary care which were confusing and misleading); Southwestern Insurance Company v. Stanton, 390 So. 2d 417 (Fla. 3d DCA 1980)(instruction which tends to confuse rather than enlighten jury is cause for reversal, if it may have mislead jury and cause them to arrive at conclusions that otherwise they would not have reached); Metropolitan Dade County v. Brill, 414 So. 2d 626 (Fla. 3d DCA 1982)(where a jury in a civil action is given an incorrect instruction or one not applicable to the facts, together with correct instructions, reversal is mandated when a miscarriage of justice occurs where instructions may reasonably have confused or mislead the jury).

It would seem that giving a concurrent cause instruction, over the Defendant's objection, meant that there was sufficient evidence of negligence to go to the jury, without a res ipsa instruction. With negligence addressed in three separate instructions, under a shifting burden of proof, the jury could only be confused, believing it had to find the Defendant negligent.

It is respectfully submitted that in cases where a res ipsa instruction is proper, that should be the only negligence instruction given. Strahan presents an opportunity for the Court to resolve the direct and express conflict; quash the Opinion below; and order only one negligence instruction to be given in res ipsa cases.

C. Direct and Express Conflict on Proposal for Settlement

The third basis for direct and express conflict, is the Fifth District's ruling that the Offer of Judgment in this case was valid, even though it admittedly violated Fla. R. Civ. P. 1.442(c)(3). Strahan, 161. The single Plaintiff, Gauldin, made an Offer of Judgment to the multiple Defendants (9) in the amount of $50,000. The Defendants moved to strike the Offer on the basis that the rule required that such a joint proposal must state the amount and terms attributable to each party. The Fifth District distinguished its own decision in McFarland & Son, Inc. v. Basel, 727 So. 2d 266 (Fla. 5th DCA), rev. den., 743 So. 2d 508 (Fla. 1999), which held that the single offer jointly to three defendants was void. The Fifth District found that McFarland involved defendants, who were sued under different theories of liability. Therefore, the plaintiff could allocate the offer on the basis of fault, among each of the defendants. Strahan, 161. The court found that because all of the groups of Defendants were liable for the entire amount of damages, a single undifferentiated Offer to all of them was still valid. Strahan, 161.

Arthur Strahan was sued for his individual liability; and his parents were sued individually and as his employers and his parents were sued as the truck owners and two corporations were sued. The Fifth District found the Plaintiff was incapable of apportioning his

Proposal, because each Defendant was liable for the entire amount of damages.

When Rule 1.442(c)(3) was amended by this Court, it was fully aware of the fact that many negligence cases involve variously liable defendants. If such a "vicariously liable defendant" exception were to exist, the Court certainly could have written it into the Rule, but it did not. There is no such exception in the clear language of Rule 1.442. This Court's decision in TGI Friday's, supra, holds that the procedural requirements in Rule 1.442 are controlling over offers of judgment. The language in Rule 1.442 is mandatory: "a joint proposal **shall** state the amount in terms attributable **to each party**." Because this fee statute is in derogation of common law, it is strictly construed and the failure to require the Plaintiff to adhere to the mandatory provisions in Rule 1.442 created further direct and express conflict.

Since a general Verdict was returned in a single amount against all named Defendants, it was impossible for the trial court to assess whether the Proposal for Settlement was met as to all individual Defendants and exceeded by the required 25%. Twiddy v. Guttenplan, 678 So. 2d 488 (Fla. 2d DCA 1996).

§ 768.79 requires that an offer of judgment be specific and unconditioned in order to be enforceable. Martin v. Brousseau, 564 So. 2d 240 (Fla. 4th DCA 1990); Bush Leasing, Inc. v. Gallo, 634 So. 2d 737 (Fla. 1st DCA 1994). The purpose of § 768.79 is to serve as a

penalty, if the parties do not act reasonably and in good faith in settling lawsuits. Goode v. Udhwani, 648 So. 2d 247 (Fla. 4th DCA 1994). It cannot be said that the Plaintiff acted in good faith by filing an undifferentiated joint Offer of Judgment to all Co-Defendants, such that the Co-Defendants would have to guess how the Plaintiff meant to settle the case.

The Offer of Judgment was timely filed under Fla. R. Civ. P. 1.442, but the Plaintiff did not set forth an amount certain, he wished to settle his case for, against each of the Co-Defendants. Government Employees Insurance Company v. Thompson, 641 So. 2d 189 (Fla. 2d DCA 1994)(while a joint offer of judgment may not be invalid per se, the nature of any offer and its validity and enforceability may be factors pertaining to whether the offer was made in good faith); Twiddy, supra, (while a joint offer pursuant to § 768.79 is not invalid per se, it may be found invalid by reason of the nature of the offer and its validity and enforceability against the offering party).

The joint Proposal for Settlement was void under Rule 1.442, which mandates that any joint proposal state the amount and terms attributable to each party, so that each party can evaluate their ability to settle the case:

> **Rule 1.442. PROPOSALS FOR SETTLEMENT.**
>
> **(c) Form and Content of Proposal for Settlement.**

> (1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.
>
> (2) A proposal shall:
>
> (A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;
>
> (B) identify the claim or claims the proposal is attempting to resolve;
>
> (C) state with particularity and relevant conditions;
>
> (D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
>
> (E) state with particularity the amount proposed to settle a claim for punitive damages, if any;
>
> (F) state whether the proposal includes attorney fees and whether attorney fees are part of the legal claims; and
>
> (G) include a certificate of service in the form required by rule 1.080(f).
>
> (3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

Because the entire purpose of the settlement Rule is to allow each Defendant to fairly and accurately evaluate the Plaintiff's Proposal, so that the case can be settled early on and avoid unnecessary litigation and costs, it is expressly mandatory that the Offers be in an amount certain, for certain claims, as to each named

individual party. This is clearly set forth in Rule 1.442 and without question the joint Proposal filed in this case was in violation of this Rule and was void. The Order and fee award must be reversed.

It is completely established that the procedural aspects of Rule 1.442 control the offer of judgment statute, § 768.79. While § 768.79 provides a substantive right to recover attorneys' fees, only the Florida Supreme Court, through its Rules of Civil Procedure, can set forth the means and methods of enforcing that substantive right, which it does under Rule 1.442. TGI Friday's, supra, (the procedural portions of § 768.79 are superseded by Fla. R. Civ. P. 1.442); Timmons v. Combs, 608 So. 2d 1 (Fla. 1992)(Fla. R. Civ. P. 1.442 controls procedural aspects of § 768.79 and § 45.061); State Department of Transportation v. Daystar, Inc., 674 So. 2d 754 (Fla. 4th DCA 1996)(there was no period in which there was no applicable procedures governing offers of judgment).

The Defendant asserted below that McFarland, supra, was directly on point and held that where a joint offer to co-defendants failed to comply with the offer of judgment rule, it was void. McFarland involved a situation where Queen was driving an 18-wheeler, owned by McFarland, which collided with a car driven by Jean Basel, containing her husband, Mark, as a passenger. Jean Basel was killed and her husband was seriously injured. Mark filed an offer of judgment to McFarland, Queen and the representative of Jean Basel for

a single amount of $2,000,000. McFarland, 269-270. Post-trial the plaintiffs moved for fees and costs pursuant to § 768.79. The defendants moved to strike the motion and argued that the offer of judgment violated Rule 1.442(c)(3), requiring that proposals made by or to parties and by or to any combination of the parties, properly identify those parties and any joint proposal must state the amount in terms attributable to each party. McFarland, 270. The offer to McFarland did not comply with the rule, since it was directed not only to McFarland and Queen, but to the representative of Jean Basel's estate and no separate amount attributed to any of those defendants. The Fifth District stated:

> In order to give effect to rule 1.442(c)(3), a general offer to a group of defendants without assigning each defendant a specific amount must be held to lack the particularity required by the rule. The rule was amended in 1996, the Committee Note informs, in order to conform the rule to *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), *receded from on other grounds, Wells v. Tallahassee Memorial Regional Medical Center*, 659 So.2d 249 (Fla.1995). *Fabre* held that subsection 768.81(3) requires that judgment should be entered against each liable party on the basis of that party's percentage of fault. While obviously a plaintiff making an offer of judgment cannot know the percentage of fault to assign each defendant to whom it proposes settlement, the rule requires that a specific amount be set forth as to each defendant, thus eliminating the possibility of a joint and several-type settlement which leaves the defendants in limbo and opens the door to continued litigation between the defendants. Accordingly, the trial court correctly denied Plaintiff's motion for fees and costs under their offer of judgment.

McFarland, 270.

In Spruce Creek Development Co. of Ocala, Inc. v. Drew, 746 So. 2d 1109 (Fla. 5th DCA 1999) the Fifth District held that a offer from multiple plaintiffs to a single defendant was valid. The plaintiffs, Mr. and Mrs. Drew offered to settle the case against the single defendant, Spruce Creek for $1 million dollars. After trial, the Drews attempted to enforce the offer of judgment and the defendant claimed that the offer was void, because it failed to comply with Rule 1.442(c).

The offer apparently did not identify the applicable Florida law, § 768.79, Fla. Stat. (1995), nor did it state the amount in terms attributable to each party, as required in section (c)(3). The court found that the offer was still valid even if it failed to mention the statute, because it cited the Rule instead. Spruce Creek, 1116.

Regarding the fact that the offer was made without apportionment, the court noted that there was only one defendant and it was a matter of indifference how the claimants/payees apportioned the money paid by the single defendant. Spruce Creek, 1116. In Strahan there were multiple defendants; the driver, Arthur; his mother and father individually as car owners; his mother and father individually as employers; his mother and father doing business as Strahan Management; and the corporate defendant, Strahan Music, Inc.

To hold that a single Offer to multiple defendants is valid without apportionment to each offeree was in conflict with Spruce Creek.

In Spruce Creek, the Fifth cited to Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999), just as it did in Strahan. There seems to be conflict with Flight Express and the holding in Strahan.

As noted above, several defendants or offerees subject to a single proposal for settlement should be able to evaluate the proposal, as to each set of defendants, or as to each defendant individually. For example in an ordinary automobile accident case, a car owner, who is sued because he or she is vicariously liable, may want to accept an offer of settlement and not be involved in the litigation against the tortfeasor/driver. Under Strahan, however, a single offer to multiple defendants, where some of the defendants are only vicariously liable is valid; even though the vicariously liable defendants have no idea what portion or amount of the settlement offer applies to them.

In United Services Automobile Association v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000), an offer of judgment was held defective, when it was made by one defendant to two plaintiffs. The plaintiffs were husband and wife and the wife had only her derivative loss of consortium claim. Even though her claim was derivative, the court still held that under the Rule, there had to be a division in the amount and terms attributable to each party. The single amount offer

was made to the husband and wife and the offer was held void. Behar, 655.

The court noted that Mrs. Behar's claim was only derivative, but still was a separate claim entitling her to be able to evaluate the offer for purposes of settlement. The court distinguished Spruce Creek and found that the offer was invalid, because it was based on a single offeror, making an undifferentiated offer to multiple offerees. Behar, 655. In the present case, the Plaintiff made a single undifferentiated Offer to multiple offerees, the nine Defendants, and yet the court held that such an Offer is still valid, creating more conflict.

In Allstate Indemnity Company v. Hingson, 25 Fla. L. Weekly D2431 (Fla. 2d DCA October 11, 2000) the court voided a single offer to joint plaintiffs/offerees, relying on Behar and certifying conflict with Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000).

Danner Construction Company, Inc. v. Reynolds Metal Company, 760 So. 2d 199, 202 (Fla. 2d DCA 2000) held an offer by two defendants, one of which was vicariously liable, to a single plaintiff was valid, without apportioning the amount to be paid by each defendant; noting that it did not agree that such lack of apportionment by offerors was always a harmless technical violation, like those found in Spruce Creek and Flight Express. It also pointed out that lack of apportionment of amount to be paid to several offerees does void a proposal, citing Behar.

Safelite Glass Corporation v. Samuel, 25 Fla. L. Weekly D2326 (Fla. 4th DCA September 27, 2000) held that a joint offer by multiple plaintiffs to two defendants, one of which was vicariously liable was valid; as there was no conflict in interests between the defendants; and if they accepted the proposal they would be released by both plaintiffs; relying on Strahan and McFarland. To access the fees the court added together the two separate verdicts, to obtain a single total judgment, which exceeded their joint proposal by 25% and fees were awarded.

The Rule is clear and unambiguous in its language and must be strictly construed, yet the District Courts are all over the place in applying it; creating exception after exception and conflict among and within the Districts. Strahan gives this Court the opportunity to resolve the conflict; and enforce the Rule as written. Strahan must be quashed, the Proposal voided and the Final Judgment for fees reversed.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE THE VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; AND A NEW TRIAL AND/OR REMITTITUR SHOULD HAVE BEEN GRANTED.

The jury awarded almost $200,000 to the Plaintiff in a situation where the alleged accident was never reported to the Defendant, to the Defendant's company, no incident report was filled out, no police report, no report was made to the building owner; and the Plaintiff never told his treating physicians he was injured by the jukebox. The Plaintiff treated for about eight months for a neck injury, where the records show extensive degenerative disc disease preexisting the accident. The Plaintiff stopped treating for several years and then began treating again for a low back injury due to kicking in a door, which had nothing to do with the jukebox incident. The Plaintiff's low back injuries and carpal tunnel syndrome were admitted by his own physicians to be unrelated to the jukebox incident. Therefore, based on aggravation of his preexisting neck condition, the jury awarded almost $200,000. This was clearly contrary to the manifest weight of the evidence; especially where Gauldin's take home pay was approximately $12,000 a year and this actually increased after the accident, when the Plaintiff sold his business and went in to the regular roofing business. The Plaintiff, who had a very physical job both before and after the accident, missed a week of work in seven years, allegedly due to the accident. There was significant impeachment regarding the T4 compression

fracture, whether it was there, whether it was related to the accident or had any effect on the Plaintiff, etc. The possibility of surgery would be at least 20 years away, and only if the Plaintiff had continuing problems. The failure of the Plaintiff's business was completely unrelated to the jukebox incident, as the Plaintiff admitted, the Plaintiff continued to work at a more strenuous type of roofing, and made more money after the accident then he did prior to the accident.

The minimal amount of treatment for his neck condition; the severe extensive degenerative condition of his neck prior to the incident; the lack of treatment for many years; the Plaintiff's lack of documentation that he missed any time off from work; etc.; establishes that the $200,000 Verdict in this case was contrary to the manifest weight of the evidence and must be reduced, or a new trial granted.

The judge in this case directed a verdict on the comparative negligence of the Plaintiff, instructed the jury they could infer negligence, gave additional instruction on negligence, followed by a concurrent cause instruction and all of this clearly combined to deprive the Defendant of a fair trial and resulted in the excessive Verdict, for aggravation of a preexisting condition.

There is no doubt that the Verdict in this case was excessive and against the evidence. The Verdict was completely out of proportion to the damages claimed; it was shocking and justifies the

wisdom of the Florida legislature and the Florida Supreme Court in vesting the trial court with the duty to grant a new trial or remittitur.

A. Remittitur

The trial judge is invested with the power to grant a remittitur. This power and duty was affirmed by the Florida Supreme Court in the case of Adams v. Wright, 403 So. 2d 391 (Fla. 1981). In 1977 the Florida legislature passed the remittitur/additur statute and added one for non-auto torts in 1986. § 768.79, Fla. Stat. (Supp. 1986).

In Salazar v. Santos (Harry) & Co., Inc., 537 So. 2d 1048 (Fla. 3d DCA), rev. denied, 544 So. 2d 200 (Fla. 1989), the court held that an award of $850,000 to each child was unreasonable and excessive for the death of their father in an auto accident; and a remittitur was required. See also, Bennett v. Jacksonville Expressway Authority, 131 So. 2d 740 (Fla. 1961)(excessiveness of verdict valid reason for granting a new trial).

A case which affirmed the trial judge's grant of a remittitur was Fordham v Carriers Insurance Company, 370 So. 2d 1197 (Fla. 4th DCA 1979). In that case a verdict was entered for $450,000 and the trial judge ordered a remittitur to $165,000, which remittitur was sustained by the Fourth District.

It should be noted that the damages in that case, to quote the decision were as follows:

> This case involves an automobile accident. The plaintiff's face, arm, and shoulder were dragged along the rock imbedded shoulder of a road and his face, at that time, turned into a pulp....
>
> Fordham, 1198.

With those injuries the court affirmed a remittitur to $165,000. A remittitur certainly is in order in the present case on the damages awarded to Gauldin, who has extensive preexisting conditions, hardly missed a day of work and increased his income threefold after the accident.

The Third District granted its own remittitur in the case of Washwell, Inc. v. Morejon, 294 So. 2d 30 (Fla. 3d DCA 1974). In that case a lady at a laundromat put her arm into the washing machine to retrieve a rug. The machine was defective, such that it did not shut off when she opened the door, but kept spinning and when she put her arm inside the machine it twisted her arm completely off. The jury awarded $383,000 and the Third District granted a remittitur down to $150,000. Another case where a remittitur was affirmed on appeal was Haendel v. Paterno, 388 So. 2d 235 (Fla. 5th DCA 1980).

In University Community Hospital v. Martin, 328 So. 2d 858 (Fla. 2d DCA 1976), the plaintiff, a quadriplegic when admitted to the hospital, fell on the floor when his hospital bed gave way. The jury awarded $350,000. The court held the verdict was excessive, reversed and stated that it was a sympathy award due to the plaintiff's prior condition.

Food Fair Stores, Inc. v. Morgan, 338 So. 2d 89 (Fla. 2d DCA 1976), was another case where it found a verdict of $75,000 grossly excessive for compensatory damages. The court went on to point out that a remittitur is proper where the verdict has no reasonable basis:

> An appellate court must act with great restraint in review of jury awards in tort actions. The very paucity of decisions of this court granting remittiturs attests to our reluctance to encroach upon the jury's role or upon the judgment of the trial court in denying requests for remittiturs. But where, as here, we determine there is no reasonable basis for the award, it is necessary for us to act to relieve a defendant from an obviously excessive verdict. Morgan, 91-92.

See also, Erickson v. Liestner, 324 So. 2d 208 (Fla. 3d DCA 1975), where the court stated that it must not refuse to act to relieve the injustice of an excessive verdict.

In the present case it would appear that there is no doubt that a remittitur or new trial is in order. The Verdict is out of proportion to the damages sought and the evidence.

It is clear that the Verdict in this case meets the criteria set out in the remittitur statute and it must be reduced, or a new trial granted.

B. New Trial

In the present case the Verdict is out of proportion to the damages claimed by the Plaintiff and clearly reflected an award based on the repetitive and misleading jury instructions. Therefore the

Verdict is both excessive and not based on the evidence at trial and a new trial or remittitur should have been granted. This Court must reverse and grant a remittitur or a new fair trial, with proper instructions, after quashing Strahan. See, Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145 (Fla. 1980); Ford Motor Company v. Kikis, 401 So. 2d 1341 (Fla. 1981); Staib v. Ferrari, Inc., 391 So. 2d 295 (Fla. 3d DCA 1980); Equitable Life Assurance Society v. Fairbanks, 400 So. 2d 550 (Fla. 4th DCA 1981).

CONCLUSION

There is direct and express conflict between Strahan and this Court's decisions in McDougald, Marrero, McWorther, Goodyear, Lithgow, Dowling, TGI Friday's and Rule 1.442. Strahan must be quashed and a new trial ordered, with the standard negligence jury instruction given. The Jury's Verdict was excessive and contrary to the evidence, due in part to the improper, repetitive, negligence instructions requiring a new trial. The Plaintiff's Proposal for Settlement, approved in Strahan, violated this Court's law creating conflict and it must be voided and the fee Judgment reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of March, 2001 to:

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