ORIGINAL

FILED

IN THE SUPREME COURT OF FLORIDA

JUN 08 2000

CASE NO. 00-1155

CLERK, SUPREME COURT
BY

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.,

Petitioner,

vs.

DEWEY L. GAULDIN,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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.

(With Appendix)

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DISTRICT COURT OF APPEAL
FIFTH DISTRICT

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TABLE OF CITATIONS

REFERENCES

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POINT ON APPEAL

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 **TGI FRIDAY'S AND THIS COURT HAS JURISDICTION TO RESOLVE** THE **CONFLICT AND QUASH THE DECISION BELOW FOR A NEW TRIAL AND TO VOID THE** OFFER **OF JUDGMENT.**

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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.

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STATEMENT OF THE FACTS AND CASE

The facts relevant to the three issues causing the direct and express conflict with this Court's decisions and Rule 1.442 are summarized in the Fifth District's opinion:

> Gauldin was injured when, without assistance, Arthur P. Strahan, Jr. attempted to load a juke box upon the bed of a pickup truck equipped with a rear power liftgate. Strahan had successfully raised the liftgate with the juke box on it, but the box then slid off the truck and hit Gauldin. Strahan, who had loaded equipment into trucks many times, described to the jury how he was attempting to load this juke box the moment before he lost control:
>
> > A. At this point the lift is up with the deck. It is like a continuous deck now. It matches up with the deck of the truck. I went to rotate it and for some reason the bottom kicks out.
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> > **Q.** What causes the bottom to kick out?
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> > A. I have no idea. I'm assuming that the outer deck, the one that it was on, had chicken tracks on it and was keeping it. When it got on the smoother surface, it may have allowed it - I'm not sure when it kicked out, I had to drop back to balance it. I stopped its movement at the time, but I couldn't prevent it from going further.
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> Strahan speculated that perhaps the wheels on the juke box caught on something, but he was unable to explain the loss of control although he was the sole person in control of the juke box just prior to its conversion into the missile that allegedly struck Gauldin. ...
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> Prior to trial, Gauldin extended an offer of judgment in the amount of $50,000 to the Strahans collectively. Florida Rule of Civil Procedure 1.442(c)(3) states:
>
> A proposal may be made by or to any

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ARGUMENT

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 TGI FRIDAY'S AND THIS COURT HAS JURISDICTION TO RESOLVE THE CONFLICT AND QUASH THE DECISION BELOW FOR A NEW TRIAL AND TO VOID THE OFFER OF JUDGMENT.

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 have to be given in a res ipsa loquitur case, or not. That question should be academic, because this simply is not a situation involving the application of res ipsa loquitur. The danger in the Strahan opinion is that now any time a plaintiff cannot prove negligence on the part of the defendant, instead of the defendant receiving a directed verdict, the plaintiff can argue for, and receive, a res ipsa loquitur instruction and win, anyway. Three people witnessed this accident; this is not an unattended object flying through the air suddenly appearing and injuring a plaintiff. This is not the standard res ipsa loquitur case where a barrel rolls out of a second story window with no witnesses and no idea of how that 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

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> 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.
>
> (Emphasis added). The Strahans, citing to McFarland & Son, Inc. v. Basel, 727 So.2d 266 (Fla. 5th DCA 1999), rev. denied, No. 95,408 (Fla.Sept. 15, 1999), claim that the trial court should not have awarded fees because Gauldin failed to allocate an amount for which he was willing to settle with respect to each of the co-defendants. ...
>
> Strahan, D666.

The Fifth District found that, in the absence of any evidence of negligence, the res ipsa loquitur instruction was proper and this was one of those rare cases requiring it. Strahan, D666. The court found that all the other Strahan Defendants were vicarious and jointly and severally liable for Arthur Strahan's negligence. Therefore, the Plaintiff could not apportion his Offer of Judgment, thus, the Offer was valid and enforceable. Strahan, D666. The Motions for Rehearing and Rehearing En Banc and to certify the case to this Court were all denied. This Court has jurisdiction to resolve the direct and express conflict and quash the opinion below.

SUMMARY OF ARGUMENT

The Decision in Strahan v. Gauldin, 25 Fla. L. Weekly D666 (Fla. 5th DCA, March 17, 2000) is in direct and express conflict and misapplies the law set forth 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);

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and Goodyear Tir & Rubb r Co. v. Hughes Supply, Inc., 358 so. d 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 juke box case involves an ordinary negligence situation. However, the jury was given two negligence instructions, which overemphasized this aspect of the case, in direct and express conflict with this Court's holding in Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. **1952)** and Dowling v. Loftin, 72 So. 2d 283 (Fla. **1954).** Also 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 holds that the provision of Rule 1.442 must be strictly applied; but the court found that an undifferentiated Offer to multiple offerees, i.e., the Defendants, was still valid, even though Rule **1.442** requires and apportionment of the amount to be paid to each party.

As both sides are seeking review in this Court, it is respectfully submitted that this Court has jurisdiction to review the Opinion below, resolve the direct and express conflict, clarify the multiple jury instruction issue, confirm when res ipsa loquitur should be used, and reaffirm that Rule **1.442** language **is** mandatory and there is no exception for offers made to multiple vicariously liable defendants. Strahan must be quashed and a new trial ordered.

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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 have to be given in a res ipsa loquitur case, or not. That question should be academic, because this simply is not a situation involving the application of res ipsa loquitur. The danger in the Strahan opinion is that now any time a plaintiff cannot prove negligence on the part of the defendant, instead of the defendant receiving a directed verdict, the plaintiff can argue for, and receive, a res ipsa loquitur instruction and win, anyway. Three people witnessed this accident; this is not an unattended object flying through the air suddenly appearing and injuring a plaintiff. This is not the standard res ipsa loquitur case where a barrel rolls out of a second story window with no witnesses and no idea of how that 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

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Marrero, supra, where the plaintiff underwent surgery for hemorrhoids and an 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. An unconscious plaintiff who wakes up to find a sponge in their abdomen; or the motorist driving down the street and was struck by a flying tire; or a pedestrian who was struck by a flying ladder; are the classic examples for which the res ipsa loquitur instruction is given. These unattended, unexplained incidences require an inference of negligence against the defendant, mainly because the plaintiff is totally incapable of proving any negligence or how the accident happened. In the present case, however, there were three witnesses and two different versions of how the accident could have occurred and this was an ordinary, standard negligence case. There was nothing preventing the Plaintiff from examining the truck, examining the juke box, or hiring an expert to explain how a juke box 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 juke box onto the truck. This is not a situation where the Plaintiff was at a complete loss at to how to prove negligence. Another classic example of a res ipsa situation is McDougald, supra, where a spare tire escaped from a cradle underneath a truck, became airborne and crashed into the plaintiff's windshield. In Goodyear, this Court refused to allow res ipsa loquitur in a tire blowout case, because it was possible

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that the tires could have malfunctioned in the absence of negligence and the facts surrounding the incident were discoverable and provable. Goodyear, 1342. In the present case, the facts surrounding the evidence were discoverable and provable and the Plaintiff simply did not do that; but that is not to say he was entitled to a res ipsa loquitur instruction. As held in Goodyear, the plaintiff is not entitled to a res ipsa loquitur instruction if the essential elements have not been met and the plaintiff has not demonstrated an inaccessibility to the evidence of the occurrence. Goodyear, 1340. The Fifth District also ignored this Court holdings in McWhorter, that a trial court should never lightly provide this inference of negligence in light of the restricted nature of the doctrine and that injury, standing alone, does not ordinarily indicate negligence. McWhorter, 262-263.

If Gauldin was walking by the truck and a totally unattended juke box simply slid 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 juke box, the truck, expert testimony, or anything else, to prove that the Defendant was negligent in losing control, allowing the juke box to roll out of the truck, and hit the Plaintiff. Res ipsa loquitur did not apply and Strahan must be quashed to resolve the direct and express conflict.

Apparently, the Fifth District has found that the juke box sliding out of the back of the truck is an event that usually does not occur in the absence of negligence, requiring both the

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res ipsa and the standard jury instruction on negligence, relying on this Court's decision in McDougald. Strahan, D666. 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 is given the benefit of a jury instruction that pre-supposes negligence and then a standard jury instruction on negligence on top of that. Needless to say, it would be 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, such that res ipsa can 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.

B. Direct and Express Conflict on Double 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

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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, both the res ipsa instruction and the standard negligence instruction were given to the jury, 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 below. 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 was required. Below, the jury was instructed that it had to infer the negligence and then was given a different standard for finding negligence. Giving two instructions with different standards to be met to impose negligence, was unquestionably confusing and misled the jury. At the very least, this direct and express conflict should be resolved by this Court, such that in a res ipsa loquitur case, only the res ipsa instruction is given and not two instructions that allow the jury to find the defendant negligent.

C. Direct and Express Conflict on Offer of Judgment

The final basis for a direct and express conflict, is the Fifth District's ruling that the Offer of Judgment in this case

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was valid, even though it admittedly violated Fla. R. Civ. P. 1.442(c)(3). The single Plaintiff, Gauldin, made an Offer of Judgment to the multiple Defendants 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 had to state the amount in 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 1999), rev. denied, No. 95,408 (Fla. September 15, 1999), which held that the single offer to three defendants, jointly, was void. The Fifth District found that McFarland involved defendants who were sued under different theories of liability and the plaintiff could allocate the offer on the basis of fault among each of the defendants. Strahan, D666. The lower court found that because all of the groups of Defendants were liable for the entire amount of damages, a single Offer to all of them was valid. Strahan, D666. Arthur Strahan was sued for his individual liability; and his parents were sued individually and as his employers, his parents were sued as the truck owners, the two corporations were sued. The Fifth District found the Plaintiff was incapable of apportioning his Offer, 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 Courts'

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decision in TGI Friday's, 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 provision in Rule 1.442 created further direct and express conflict.

CONCLUSION

This Court has jurisdiction to review the decision in Strahan, based on the direct and express conflict with the decisions from this Court and Rule **1.442**; the decision in Strahan must be quashed and a new trial ordered with the single standard negligence instruction given, and Offer of Judgment voided.

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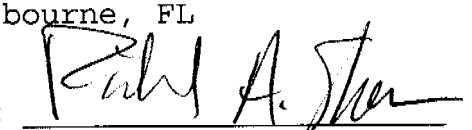
By: 
Richard A. Sherman

INDEX TO PETITIONER'S APPENDIX

We find no error in the award of permanent alimony, but reverse the automatic future increases in that alimony based upon termination of child support obligations. See *Swanston v. Swanston*, 746 So. 2d 566 (Fla. 5th DCA 1999); *Umstead v. Umstead*, 620 So. 2d 1074 (Fla. 2d DCA 1993); *Spanogle v. Spanogle*, 376 So. 2d 249 (Fla. 5th DCA 1979); *Reid v. Reid*, 365 So. 2d 1050 (Fla. 4th DCA 1978). The better approach would be to consider the respective financial situations of the parties in the future as each child's emancipation occurs. *See Stock v. Stock*, 693 So. 2d 1080 (Fla. 2d DCA 1997).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. (HARRIS, J. and ORFINGER, M., Senior Judge, concur.)

* * *

Torts—Negligence—Res ipsa loquitur—Where plaintiff was injured when juke box which was being loaded onto truck by defendant with power liftgate did off truck and hit plaintiff, trial court properly instructed jury on res ipsa loquitur—Jukebox falling from bed of pickup truck during process of loading, and causing injury to nearby pedestrian, is not type accident which would occur but for failure to exercise reasonable care—Attorney's fees-Court properly awarded attorney's fees to plaintiff under offer of judgment statute although plaintiff did not allocate amount for which he was willing to settle with respect to each co-defendant, where complaint alleged negligence of one defendant and vicarious liability of other defendants so that each defendant was liable for entire amount of damages—Error to apply multiplier in award of attorney's fees where there was no evidence that counsel could not have beeu retained but for multiplier

ARTHUR P. STRAHAN, etc., et al., Appellants, v. DEWEY L. GAULDIN, Appellee. 5th District. Case Nos. 5D99-230 & 5D99-874. Opinion Filed March 17, 2000. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: Richard A. Sherman and Rosemary B. Wilder of Richard A. Sherman, P.A., Fort Lauderdale, and Scott Turner of Jack, Wyatt, Tolbert & Thompson, P.A., Melbourne, for Appellants. Jerry D. McGreal and James I. Knudson of Knudson & McGreal, P.A., Rockledge and Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, for Appellee.

(PETERSON, J.) Arthur P. Strahan, Patricia Strahan, Arthur P. Strahan, Jr., and Strahan Music Inc. (collectively "the Strahans") appeal the final judgment granted to Dewey L. Gauldin for damages that resulted when a juke box fell out of a pickup truck and injured him. The Strahans contend that the trial court erred in instructing the jury on *res ipsa loquitur*, awarding Gauldin fees pursuant to the offer of judgment statute, and by applying a multiplier to those fees.

I. *RES IPSA LOQUITUR* INSTRUCTION

Gauldin was injured when, without assistance, Arthur P. Strahan Jr. attempted to load a juke box upon the bed of a pickup truck equipped with a rear power liftgate. Strahan had successfully raised the liftgate with the juke box on it, but the box then slid off the truck and hit Gauldin. Strahan, who had loaded equipment into trucks many times, described to the jury how he was attempting to load this juke box the moment before he lost control:

> A: At this point the lift is up with the deck. It is like a continuous deck now. It matches up with the deck of the *truck*, I went to rotate it and for some reason the bottom kicks out,
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> Q: What causes the bottom to kick out?
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Strahan speculated that perhaps the wheels on the juke box caught on something, but he was unable to explain the loss of control although he was the sole person in control of the juke box just prior to its conversion into the missile that allegedly struck Gauldin.

Notwithstanding Strahan's own inability to reach a conclusion as to the cause of the accident, the Strahans argue that Gauldin's testimony in a discovery deposition constituted direct evidence of negligence that should have prevented the trial court from instructing the jury on *res ipsa loquitur*. At trial, Gauldin testified that his back was to Strahan's loading activity and that he was facing the opposite direction when he was struck. In an earlier deposition, however, Gauldin testified, "No, I saw what happened, he slipped up in the back of the greasy truck, fell down and that is what shoved the juke box out." He also testified that because he did not appreciate the extent of his injuries. he did not inspect the truck bed at the time of the accident.

We do not believe that Gauldin's speculation that the accident occurred through Strahan's negligence rendered the *res ipsa loquitur* instruction improper in this case. Basic common sense tells us that juke boxes do not normally fly out of stationary pickup trucks absent some negligence on the part of the one in control or an intervening act of God.

Justice Wells set forth the status of *res ipsa loquitur* in Florida jurisprudence in *McDougald v. Perry*, 716 So. 2d 783 (Fla. 1998). McDougald suffered injuries when a 130 pound spare tire came out of its cradle as Perry drove his tractor trailer over railroad tracks. The opinion recognizes that some actions do not require experts to tell a jury that events do not usually occur in the absence of negligence. The court reached the conclusion that the spare tire escaping from the cradle and crashing into McDougald "is the type of accident which, on the basis of common experience and as a matter of general knowledge, would not occur but for the failure to exercise reasonable care by the person who had control of the spare tire." 716 So. 2d 783, 786. We likewise conclude that a juke box falling from the bed of the pickup truck during the process of loading, and causing injury to a nearby pedestrian, is not the type of accident which, on the basis of common experience and as a matter of general knowledge, would occur but for the failure to exercise reasonable care. In so ruling, we find this case to be, as *McDougald* notes, one of those rare instances where the doctrine of *res ipsa loquitur* should be applied.

II. OFFER OF JUDGMENT

Prior to trial, Gauldin extended an offer of judgment in the amount of $50,000 to the Strahans collectively. Florida Rule of Civil Procedure 1.442(c)(3) states:

> 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.*

(Emphasis added). The Strahans, citing to *McFarland & Son, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999), rev. *denied*, No. 95,408 (Fla. Sept. 15, 1999), claim that the trial court should not have awarded fees because Gauldin failed to allocate an amount for which he was willing to settle with respect to each of the codefendants.

In *McFarland*, the plaintiff was injured in an automobile accident and sued the driver of the automobile in which the plaintiff was a passenger, sued the driver of the other vehicle, and sued the employer of the driver of the other vehicle. The complaint against the employer alleged negligent hiring and/or training. The plaintiff made a single offer of judgment to all three defendants jointly. This court agreed with the trial court's decision not to award fees because the offer made to the three defendants did not state the amount of the offer attributable to each party.

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 driver and the negligence of the employer of one of the drivers in hiring, training and supervising him. In contrast, the complaint in the instant case alleged only the negligent act of Arthur P. Strahan, Jr. The other defendants, Strahan's parents and Strahan Music, Inc., and Strahan Management, 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. *c.f. Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3d DCA 1999) (lack of apportionment of defendants' offer did not affect plaintiff's ability to consider it). Accordingly, we conclude that the trial court was correct in finding Gauldin's offer of judgment valid.

III. AWARD OF ATTORNEY'S FEES

The Strahans urge that there was an absence of sufficient findings of fact by the trial court to support the use of a multiplier in calculating the amount of attorney's fees awarded to Gauldin. The multiplier applied in this case was 2.0 and resulted in an award of fees to Gauldin's attorney of $145,000, an amount in excess of 73 percent of the verdict.

We note that no evidence was presented that Gauldin's counsel could not have been retained but for a multiplier. *See Bell v. U.S.B. Acquisition Co.*, 734 So. 2d 403 (Fla. 1999) ("The importance of this policy consideration is highlighted by the fact that the very first factor listed in *Quanstrom* for courts to consider in determining if a multiplier should be utilized in tort and contract cases is whether the relevant market requires a contingency fee multiplier to obtain competent counsel.") Nor, perhaps, could there have been any such testimony, as Judge Schwartz suggests in a footnote to *Gonzales v. Veloso*, 731 So. 2d 63 (Fla. 3d DCA 1999):

> *Quarere:* Whether any such showing can ever be made, and thus whether a multiplier is ever appropriate, when fees are awardable only when a reasonable offer is not accepted under § 768.79, an eventuality which obviously cannot be anticipated when counsel is obtained.

Gonzales at 64, n.2.

Gauldin retained his counsel before any promise of either a multiplier or a fee in excess of that which the ethical rules normally allow. The idea of the use of the multiplier was born in this case only after Strahan rejected a settlement offer of $50,000. The multiplier provides an incentive to a lawyer to represent a client in a case in which few lawyers would venture. The potential use of a multiplier in calculating a fee aids an injured person having a tenuous case to secure competent counsel and improves access to our system of justice. The United States Supreme Court has cautioned, however, that the use of a multiplier can also have the negative social cost of encouraging claimants with non-meritorious claims. *City of Burlington v. Dague*, 503 U. S. 557, 563 (1992). We conclude that the multiplier was improperly applied in this case where there was an absence of any evidence indicating that a premium was necessary to obtain competent counsel.

In summary, we affirm the judgment for damages but vacate the award of attorney's fees. We remand to the trial court for the calculation and award of a reasonable attorney's fees without the use of a multiplier.

AFFIRMED IN PART, REVERSED IN PART; REMANDED. (SHARP, W., and HARRIS, JJ., concur.)

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[1]*See also* Justice Anstead's concurring opinion in *McDougald* that cited to the well-known 1863 case of *Byrne v. Boadle*, 2 Hurlet & C. 722, 159 Eng. Rep. 299 (Ex. 1863), in which a pedestrian was struck by a barrel which fell from a window of the defendant's flour business.

* * *

Criminal law—Restitution—Trial court had no jurisdiction to enter restitution order while appeal was pending—Because trial court reserved jurisdiction to enter restitution order at time of sentencing, hearing after notice is given may be held to require restitution after mandate in appeal has issued

RALPH MORIARTY, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 5D99-2051. Opinion Filed March 17, 2000. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The trial court entered restitution orders against Ralph Moriarity but after Moriarity filed a notice of appeal of his judgment and sentence. We vacate the restitution orders because the trial court lost jurisdiction to enter the orders while the appeal was pending. *See Kern v. State*, 726 So.2d 353 (Fla. 5th DCA 1999).

Although Moriarity has prevailed on this issue at this time, his victory may not prove to be permanent. The trial court reserved jurisdiction to enter a restitution order at the time of sentencing and included the reservation in the judgment. Therefore, a timely hearing after notice is given may be held to require restitution after the mandate in this appeal has issued.

RESTITUTION ORDER VACATED. (COBB and PETERSON, JJ., concur. GRIFFIN, J., concurs specially, with opinion.)

(GRIFFIN, J., concurring specially.) Notwithstanding the long apparently unbroken line of cases supporting our decision, which I am bound to follow, I do not see why the lower court is divested of jurisdiction to enter a restitution order while an appeal of the judgment is pending. Section 960.292, Florida Statutes (1999), seems to contemplate continuing jurisdiction and there appears to be no good reason why the power to enter such orders is tolled while the case is in the appellate court. Such an order has no effect on our appellate jurisdiction. By making the court delay conducting the restitution hearing until after the appeal, we only make matters more difficult for the victims, the judge, the prosecutor and the defendant. I simply do not agree with *Hart v. State*, 516 So. 2d 58 (Fla. 2d DCA 1987), which appears to be a leading source of this view. Another source is *Gonzalez v. State*, 384 So. 2d 57 (Fla. 4th DCA 1980), but that case dealt with the modification of a sentence.

* * *

Criminal law—Sentencing—Downward departure—Error to impose downward departure on basis of defendant's health problems in absence of evidence that specialized treatment was required or that any required treatment could not be provided by Department of Corrections—Error to impose downward departure sentence on basis of defendant's age where defendant was 48 years old at time of sentencing

STATE OF FLORIDA, Appellant, v. PAUL THOMPSON, Appellee. 5th District. Case No. 5D99-2114. Opinion filed March 17, 2000. Appeal from the Circuit Court for Sumter County, Hale R. Stancil, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Marry G. Jolley, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Janet Brook Goodrich, Assistant Public Defender, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) Appellee was charged by information with and pled guilty to felony driving while license cancelled, suspended or revoked in violation of section 322.34(2), Florida Statutes. Because of an extensive prior felony record, the lowest permissible prison sentence based on the guidelines was 64.5 months. The trial judge departed downward and sentenced appellee to a prison term of 36 months. The state appeals and we reverse.

At the sentencing hearing appellee provided the court with a physician's letter stating that appellee was a non-insulin diabetic and that he had sciatica. He also indicated that he had heart problems and that he took oral medications to correct these various health problems. Section 921.0026(2)(d), Florida Statutes (1999), permits downward departures where a defendant requires specialized treatment for a physical disability and the defendant is amenable to such treatment. No evidence was presented to the trial court that specialized treatment was required, or that any required treatment could not be provided by the Department of Corrections. *See, State v. Abrams*, 706 So. 2d 909 (Fla. 2d DCA 1998).

The trial court also referred to appellee's age as a basis for departure. Appellee was 48 years old at the time of sentencing. Section 921.0026(2)(k) provides a reason for departure where "... (a)t the time of the offense the defendant was too young to appreciate the consequences of the offense." At 48, defendant hardly qualifies as a youthful offender. Neither was there any evidence before the trial court to indicate that defendant could not appreciate the consequences of his offense. The sentence is reversed and the cause remanded for imposition of a guidelines sentence.

REVERSED and REMANDED. (THOMPSON, J., concurs. GRIFFIN, J., dissents without opinion.)

* * *

Appeals—Insurance—Award of attorney's fees to medical provider after medical provider filed suit against insurer and insurer paid claim during pendency of litigation—Discretionary review of order of county court certifying question of great public importance—Case transferred to circuit court where county court order was not an order staying rendition, or an order containing findings of fact, conclusions of law, and a concise statement of the issues of great public importance

SUPERIOR INSURANCE COMPANY, Appellant, v. DAVID A. LIBERT, M.D., etc., et al., Appellees. 5th District. Case No. 5D99-2389. Opinion filed March 17, 2000. 9.160 Appeal from the County Court for Orange County, Jerry

mium check payable to RLI INSURANCE COMPANY." Further, the application itself was titled: "RLI INSURANCE COMPANY PERSONAL UMBRELLA APPLICATION." RLI's company name is similarly prominent on *the* Collados' 1989 renewal application, as was the caption on *the* top page displaying Pliego's "RLI Agent Number 2020" and "J R Insurance" as the "RLI Agent." [14]

CONCLUSION

[5] In summary, we hold that under the provisions of section 626.342(2), Florida Statutes (1989), as well as Florida's common law, civil liability may be imposed upon insurers who cloak unaffiliated insurance agents with sufficient indicia of agency to induce a reasonable person to conclude that there is an actual agency relationship.[15] We are unable to determine conclusively, however, the state of the record and evidence as it pertains to the issues of whether the actions of the insurance company here bring it within the operation of section 626.342(2) and whether Pliego, while acting in the capacity of an agent for RLI, was in receipt of such information as would create an estoppel. For those reasons we remand to the district court for determination of whether issues of fact remain to be adjudicated.

Accordingly, we quash the decision under review, approve *Gaskins*, and remand this case to the Second District for further proceedings consistent herewith.

It is so ordered.

HARDING, C.J., and OVERTON, SHAW, KOGAN and WELLS, JJ., concur.

14. *Cf. T & R Store Fixtures, Inc. v. Travelers Ins. Co.*, 621 So.2d 1388, 1389 (Fla. 3d DCA 1993) (finding that "mere acceptance by the insurer of prior premium payments transmitted by the broker on its checks" did not have legal effect of signaling insured that its insurance broker had actual or apparent authority to collect premiums as an agent of the insurer).

Lawrence D. McDOUGALD, Petitioner,

v.

Henry D. PERRY and C & S Chemicals, Inc., Respondents.

No. 91595.

Supreme Court of Florida.

Sept. 4, 1998.

After accident in which spare tire came out of cradle underneath truck trailer and struck windshield of following vehicle, following vehicle's driver brought personal injury action against tractor-trailer driver and employer. Following jury trial, the Circuit Court, Polk County, Susan W. Roberts, J., entered judgment for driver. The District Court of Appeal, Parker, C.J., 698 So.2d 1256, reversed and remanded with directions. Driver appealed. The Supreme Court, Wells, J., held that doctrine of res ipsa loquitur could apply.

Decision of District Court of Appeal quashed and case remanded with directions.

Anstead, J., filed a concurring opinion.

1. Negligence ⇐121.3

Having spare tire escape from cradle underneath truck, resulting in tire ultimately becoming airborne and crashing into following vehicle's windshield, was type of accident which, on basis of common experience and as a matter of general knowledge, would not occur but for failure to exercise reasonable care by person who had control of spare tire, such that doctrine of res ipsa loquitur could apply.

15. In reaching this conclusion, we are also mindful of the general rule that forfeitures of insurance policies are disfavored in Florida. *Johnson*, 52 So.2d at 815; *accord Boca Raton Community Hosp. v. Brucker*, 695 So.2d 911, 912 (Fla. 4th DCA 1997); *LeMaster v. USAA Life Ins. Co.*, 922 F.Supp. 581, 585 (M.D.Fla.1996).

2. Negligence ⇐121.2(7)

To have doctrine of res ipsa loquitur apply, 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 was negligence associated with the cause of the event than that there was not.

Hank B. Campbell and Christine C. Daly of Lane, Trohn, Bertrand & Vreeland, P.A., Lakeland, and Raymond Ehrlich and Scott D. Makar of Holland & Knight, Jacksonville, for Petitioner.

Douglas M. Fraley and Margie I. Fraley of Fraley and Fraley, P.A., Tampa, for Respondent.

WELLS, Justice.

We have for review *Perry v. McDougald*, 698 So.2d 1256 (Fla. 2d DCA 1997), which conflicts with **Cheung *v.* *Ryder Truck Rental,*** Inc., 596 So.2d 82 (Fla. 5th DCA 1992). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Lawrence McDougald sued Henry Perry and Perry's employer, C & S Chemical, Inc., (collectively referred to as respondents), for personal injuries sustained in an accident which occurred on July 26, 1990, on U.S. Highway 60 West, in Bar-tow, Florida. On July 26, McDougald was driving behind a tractor-trailer which was driven by Perry. The trailer was leased by C & S from Ryder Truck Rentals, Inc. As Perry drove over some railroad tracks, the 130-pound spare tire came out of its cradle underneath the trailer and fell to the ground. The trailer's rear tires then ran over the spare, causing the spare to bounce into the air and collide the windshield of McDougald's Seep Wagoneer.

The spare tire was housed in an angled cradle underneath the trailer and was held in place by its own weight. Additionally, the tire was secured by a four to six-foot long chain with one-inch links, which was wrapped around the tire. Perry testified that he believed the chain to be the original chain that came with the trailer in 1969. Perry also stated that, as originally designed, the chain was secured to the body of the trailer by a latch 'device. At the time of the accident, however, the chain was attached to the body of the trailer with a nut and bolt.

Perry testified that he performed a pretrip inspection of the trailer on the day of the accident. This included an inspection of the chain, although Perry admitted that he did not check every link in the chain. After the accident, Perry noticed that the chain was dragging under the trailer. Perry opined that one of the links had stretched and slipped from the nut which secured it to the trailer.[1] The judge instructed the jury on the doctrine of ***res ipsa loquitur.*** The jury subsequently returned a verdict in McDougald's favor.

On appeal, the district court reversed with instructions that the trial court direct a verdict in respondents' favor. The district court concluded that the trial court erred by: (1) not directing a verdict on the issue of negligence; (2) instructing the jury on *res ipsa loquitur;* and **(3)** not directing a verdict on the issue of past and future loss of earning capacity. *Perry v. McDougald,* ***698*** So.2d 1256, 1258 (Fla. 2d DCA 1997). We granted McDougald's petition for review to resolve the conflict in the application of the doctrine of *res ipsa loquitur.*[2] For the reasons expressed herein, we quash the decision below and approve the Fifth District's application of ***res ipsa loquitur*** to the circumstances of a wayward automobile wheel accident.

This Court discussed the applicability of the doctrine of *res* **ipsa** loquitur in *Marrero* v. ***Goldsmith,*** 486 So.2d 530 (Fla.1986); **City** *of* ***New Smyrna Reach, Utilities Commission,*** *v. McWhorter,* 418 So.2d 261 (Fla.1982); and *Goodyear* **Tire & *Rubber Co. v.*** Hughes *Sup-*

1. Perry testified that the last time he saw the chain was when he left the trailer at a repair shop in Waycross, Georgia. As the district court opinion notes, however, spoliation of evidence was not an issue in this case.

2. We decline to address the other issues raised by the parties.

ply, Inc., 358 So.2d 1339, 1341 (Fla.1978). In *Marrero,* we stated:

> Res ipsa loquitur is a Latin phrase that translates "the thing speaks for itself." Prosser and Keaton, ***Law of Torts*** *§ 39* (5th ed.1984). It is a rule of evidence that permits, but does not compel, an inference of negligence under certain circumstances. "[T]he doctrine of *res ipsa loquitur* is merely a rule of evidence. Under it an inference may arise in aid of the proof." *Yarbrough* ***v. Ball U-Drive System,*** *48* So.2d 82, 83 (Fla.1950). In ***Goodyear,*** a products liability case, we explained the 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.
>
> Goodyear, 358 So.2d at 1341–42, (footnotes omitted).

Marrero, ***486*** So.2d at 531.

In concluding that it was reversible error for the trial court to give the *res* ipsa *loquitur* instruction, the Second District determined that "McDougald failed to prove that this accident would not, in the ordinary course of events, have occurred without negligence by the defendants." *McDougald,* ***698*** So.2d at 1259 (citing Goodyear). The court explained that, "[t]he mere fact that an accident occurs does not support the application of the doctrine." ***Id*** In support of the Second District's conclusion, respondents cite to *Burns* ***v. Otis Elevator Co.,*** 550 So.2d 21 (Fla. 3d DCA 1989), in which the Third District stated:

> To prevail at trial, plaintiff must still present sufficient evidence, beyond that of the accident itself, from which the jury may infer that the accident would not have occurred but for the defendants' breach of due care.

Id. at 22. Respondents assert that this language means that *res* **ipsa** *loquitur* did not apply in this case because "there was no expert or other testimony or evidence that the failure of the safety chain and the spare tire's exit onto the roadway would not ordinarily occur in the absence of [respondents'] negligence." Answer Brief of Respondents at 19.

The Second and Third Districts misread and interpret too narrowly what we stated in Goodyear. We did not say, as those courts conclude, that "the mere fact that an accident occurs does not support the application of the doctrine." Rather, we stated:

> An **injury** ***standing alone,*** *of course, ordinarily does not* ***indicate negligence. The doctrine*** *of* ***res*** *ipsa loquitur* ***simply*** *recognixes* ***that in rare*** **instances an** *injury may permit* ***an*** *inference of negligence if* ***coupled with*** a ***sufficient showing*** **of** ***its*** *immediate, precipitating* ***cause.***

Goodyear, 358 So.2d at 1342 (emphasis added). Goodyear and our other cases permit latitude in the application of this common-sense inference 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. 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."

The following comments in section 328D of Restatement (Second) of Torts (1965) capture the essence of a proper analysis of this issue:

> *c.* ***Type*** *of* event. The first requirement for the application of the rule stated in this Section is a basis of past experience which reasonably permits the conclusion that such events do not ordinarily occur unless someone has been negligent. There are many types of accidents which commonly occur without the fault of anyone. The fact that a tire blows out, or that a man falls down stairs is not, in tbe absence of anything more, enough to permit the conclusion that there was negligence in inspecting the tire, or in the construction

of the stairs, because it is common human experience that such events all too frequently occur without such negligence. On the hand there are many ***events,*** such as those of objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trams or the explosion of boilers, where the conclusion is at least permissible that such things do not usually happen unless someone has been negligent. To such events res ipsa loquitur may apply.

d. Basis of conclusion. In the usual case the basis of past experience from which this conclusion may be drawn is common to the community, and is a matter of general knowledge, which the court recognizes on much the same basis as when it takes judicial notice of facts which everyone knows. It may, however, be supplied by the evidence of the parties; and expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some **actions** for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion. On the other hand there are other kinds of medical malpractice, as where a sponge is left in the. plaintiffs abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.

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

[1] We conclude that the spare tire escaping from the cradle underneath the truck, resulting in the tire ultimately becoming airborne and crashing into McDougald's vehicle, is the type of accident which, on the basis of common experience and as a matter of general knowledge, would not occur but for the failure to exercise reasonable care by the person who had control of the spare tire. As the Fifth District noted, the doctrine of *res ipsa loquitur* is particularly applicable in wayward wheel cases. Cheung; *see also Guerra v. W.J.* **Young** *Constr.* ***Co.,*** 165 So.2d 882 (La.Ct.App.1964); *Dearth v.* ***Self; 8*** Ohio App.2d 33, 220 N.E.2d 728 (1966); *Wilson v. Spencer,* 127 A.2d 840, 841 (D.C.1956) ("Thousands of automobiles are using our streets, but no one expects the air to be filled with flying hubcaps."). We do not agree with respondent that ***Cheung*** can be properly distinguished on the basis that in *Cheung* the escaped tire was attached to the axle, whereas in this case the escaped tire was a spare cradled underneath the truck. Rather, common sense dictates an inference that both a spare tire carried on a truck and a wheel on a truck's axle will stay with the truck unless there is a failure of reasonable care by the person or entity in control of the truck. Thus an inference of negligence comes from proof of the circumstances of the accident.

[2] Furthermore, we do not agree with the Second District that McDougald failed to establish this element because "[o]ther possible explanations exist to explain the failure of the chain." *McDougald,* 698 So.2d at 1260. Such speculation does not defeat the applicability of the doctrine in this case. As one commentator has noted:

> 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 was negligence associated with the cause of the event than that there was not.

W. Page Keeton, et ***al.,*** *Prosser* ***and Keaton*** **on** ***the Law of Torts,*** **§** ***39,*** at 248 (5th ed.1984).

Respondents also contend that the res *ipsa* instruction was inapplicable because McDougald failed to prove that direct evidence of negligence was unavailable. Respondents cite to Goodyear for the proposition that *res ipsa* is not applicable where "the facts surrounding the incident were discoverable and provable." This statement from Goodyear was made in a products liability tire blow-out case in which the plaintiff was in possession and control of the injury-causing device. In that case, the plaintiff, who was in possession of the product alleged to have been negligently manufactured, was in the best position to determine the alleged

cause of the accident. Thus, the *res ipsa* inference was not applicable. Here, unlike *Goodyear,* we find that there was insufficient evidence available to McDougald. The likely cause of this accident, the chain and securing device, were in the exclusive possession of respondents and were not preserved. Moreover, this was not the basis upon which the Second District held ***res ipsa*** *loquitur* to be inapplicable.

Accordingly, we quash the decision below, and remand this case with directions that the district court reinstate the trial court's judgment as to respondents' liability based upon the jury's verdict and for further proceedings consistent with the district court's decision on issues related to damages.

It is so ordered.

HARDING, C.J., and OVERTON, SHAW, KOGAN and PARIENTE, JJ., concur.

ANSTEAD, J., concurs with an opinion.

ANSTEAD, Justice, concurring.

I fully concur in the majority opinion, and write separately to note that this case presents a classic scenario whereby an aged appellate opinion giving rise to a legal doctrine in the distant past still illuminates and informs today's society. The thread of common sense in human experience ties today's decision to an opinion voiced by Baron Pollock in the 1863 decision in *Byrne* **v.** *Boadle,* 2 Hurlet & C. 722, 259 Eng. Rep. 299 (Ex. 1863). In ***Byrne*** a pedestrian was struck by a barrel which fell from a window of the defendant's flour business. In reversing a directed verdict against the plaintiff, Pollock declared for the Court:

> We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff, The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly **ascertain** from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

We can hardly improve upon this explanation for our decision today. The common law tradition is alive and well.

Jeremiah JOHNSON, Petitioner,

v.

STATE of Florida, Respondent.

No. 91328.

Supreme Court of Florida.

Sept. *4,* 1998.

Application for Review of the Decision of the District Court of Appeal-Direct Conflict

also indicate a legislative intent to grant gain time to the prison punishment of all offenders, whether by the historic straight sentence, the now authorized split sentence, or probation which contains a condition of imprisonment. There is now little difference between the latter two. The defendant is in jail. His freedom is curtailed. If, indeed, the purpose for jail as a condition of probation is to give the defendant a taste thereof, that taste should include the rewards of good time off to the same extent that his cellmate serving a straight sentence has. It was never intended, or even contemplated, that probation would be a more severe punishment than incarceration in a state institution. This is the effect, however, when a sentencing judge can sentence one to one year in county jail with no reduction in time for good behavior. Thus, we now hold that a probation order which includes incarceration as a condition thereof becomes a sentence for the purpose of earning gain time under section 951.21. Van Tassel, having earned the ordinary gain time of five days per month for his 364 days, was entitled to be discharged.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur.

Pamela MARRERO, Petitioner,

v.

Malcolm G. GOLDSMITH, M.D., et al., Respondents*

No. 65400.

Supreme Court of Florida.

Jan. 23, 1986.

Rehearings Denied May 5, 1986.

Patient brought medical malpractice action to recover for numbness and pain which developed in her arm after surgery unrelated to her arm. The Circuit Court, Dade County, Robert H. Newman, J., entered judgment in favor of doctors, and patient appealed. The District Court of Appeal, 448 So.2d 543, affirmed. On application for review for direct conflict of decisions, the Supreme Court, Shaw, J., held that patient, who presented expert medical evidence that her injury was of a type which ordinarily did not occur in the absence of negligence, was entitled to rely upon inference of negligence arising from application of doctrine of res ipsa loquitur, where doctors in question did not each possess exclusive control of patient's body at all times at which patient's injury may have occurred, and patient was in no position to prove which doctor or combination of doctors caused her injury to an area of her body remote from site of surgery.

Quashed and remanded.

Ehrlich, J., filed concurring opinion in which Adkins and Shaw, JJ., concurred.

McDonald, J., filed dissenting opinion in which Boyd, C.J., and Overton, J., concurred.

1. Negligence ⇐121.2(9)

"Res ipsa loquitur" is a rule of evidence which permits, but does not compel, an inference of negligence under certain circumstances.

See publication **Words and Phrases** for other judicial constructions and definitions.

2. Negligence ⇐121.2(5)

If case is proper in other respects for application of res ipsa loquitur, presence of some direct evidence of negligence does not deprive plaintiff of the res ipsa inference; however, there comes a point at which plaintiff can introduce enough direct evidence of negligence to dispel the need for the inference.

3. Physicians and Surgeons ⇐18.60

Patient, who presented expert medical evidence that her injury was of a type

which ordinarily did not occur in the absence of negligence, was entitled to rely upon inference of negligence arising from application of doctrine of res ipsa loquitur, where doctors in question did not each possess exclusive control of patient's body at all times at which patient's injury may have occurred, and patient was in no position to prove which doctor or combination of doctors caused her injury to an area of her body remote from site of surgery.

Edward A, Perse, of Horton, Perse and Ginsberg, and Alldredge and Gray, Miami, for petitioner.

Robert M. Klein, of Stephens, Lynn, Chernay and Klein, Miami, for Malcolm G. Goldsmith, M.D.

John Edward Herndon, Jr., of Thornton and Herndon, P.A., Miami, for' William Brewster, M.D.

Evan J. Langbein, of Evan J. Langbein, and Alan E. Greenfield, P.A., Miami, for Constantine Kitsos, M.D.

SHAW, Justice,

This medical malpractice action, *Marrero v. Goldsmith, 448* So.2d 543 (Fla. 3d DCA 1984), is before us due to express and direct conflict with ***South*** Florida ***Hospital*** *Corp. v. McCrea,* 118 So.2d 25 (Fla.1960). We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

Plaintiff underwent surgery with Dr. Brewster administering general anesthesia, Dr. Goldsmith performing a hemorrhoidectomy, followed by Dr. Kitsos performing an abdominal dermolipectomy and removing a cyst from her eyelid. Following surgery plaintiff complained of numbness, weakness and pain in her left arm, which was diagnosed as bracial plexapathy. She sued the three doctors and the hospital fox damages. She produced expert medical testimony that this type of injury is one that ordinarily does not occur in the absence of negligence and that it was probably caused by incorrect arm positioning during surgery, The doctors testified that they knew of nothing unusual happening during the surgery. Plaintiff's requested jury instruction on res ipsa loquitur was denied by the trial court. The hospital settled before submission of the issue of its liability to the jury and the jury found no liability on the part of the doctors.

The district court affirmed, stating that res ipsa loquitur was inapplicable because the plaintiff presented expert testimony regarding the defendanta' alleged negligence. It cited this Court's decision in ***Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.,*** 358 So.2d 1339 (Fla.1978), as precluding a res ipsa instruction unless direct proof of negligence is wanting.

111 Res ipsa loquitur is a Latin phrase that translates "the thing speaks for itself." Prosser and Keaton, ***Law of Torts*** § 39 (5th ed. 1984). It is a rule of evidence that permits, but does not compel, an inference of negligence under certain circumstances. "[T]he doctrine of *res ipsa loquitur* is merely a rule of evidence. Under it an inference may arise in aid of the proof." *Yarbrough* ***v. Ball U-Drive System, Inc.,*** 48 So.2d 82, 83 (Fla.1950). In Goodyear, a products liability case, we explained the 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.

Goodyear, 358 So.2d at 1341-42, (footnotes omitted).

In finding res ipsa loquitur inapplicable, the Court in ***Goodyear*** relied on three factors: 1) ***there*** was sufficient direct evidence of negligence available to the extent that "the facts surrounding the incident were discoverable and provable"; 2) the occurrences of tire blowouts after the tires

had been driven 4,000 to 9,500 miles were not the type of accidents that "speak for themselves" unaided by plaintiffs' circumstantial evidence; and 3) the tire companies did not have exclusive control at the times of the plaintiffs' injuries.

In *McCrea,* we determined that there was no conflict in a decision of this Court with the proposition that "[a] plaintiff is not precluded from resorting to the doctrine of res ipsa loquitur merely because he introduces evidence of specific negligence attributable to the defendant." 118 So.2d at 28 (italics removed). On the contrary, we determined that it was harmonious with this Court's decisions in *West Coast Hospital Association v. Webb,* 52 So.2d 803 (Fla. 1951) and *McKinney Supply Co. v. Orvitz,* 96 So.2d 209 (Fla.1957). 118 So.2d at 31.

[2] 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 the 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 inference 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.

Prosser and Keaton § 40 (footnotes omitted).

Since Goodyear we had occasion to decide *City of New Smyrna Beach Utilities* Commission *v. McWhorter,* 418 So.2d 261 (Fla.1982). In *McWhorter* an accumulation of paper.of unknown origin caused an obstruction in the city's sewer line, which in turn caused a blockage in the system and flooding of the plaintiff's house. We cited *Goodyear* and stated that the McWhorters could benefit from the doctrine of res ipsa loquitur only if they could show that: 1) direct evidence of the city's negligence was unavailable; 2) the line ordinarily would not have become obstructed and the sewage ordinarily would not have flooded their home absent negligence by the city; and 3) the main sewer line and all that entered it was under the exclusive control of the city. We found that the McWhorters failed to allege or prove any of these elements, thus precluding the giving of a res ipsa instruction. 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.

[3] In the present case the plaintiff presented expert medical evidence that her injury is of a type that ordinarily does not occur in the absence of negligence. The difficult question presented is whether, in

the interests of justice, we should slavishly adhere to the exclusive control element normally requisite to res ipsa application or whether we should relax the control element. It is quite clear that under traditional res ipsa loquitur analysis the defendant doctors in this case cannot be said to have each possessed exclusive control at all times when plaintiff's injury may have occurred. Yet the patient is in no position to prove which defendant or combination of defendants caused her injury to an area of her body remote from the site of surgery, because she was unconscious when it occurred. We are persuaded that the fairest course to take under these particular circumstances is to allow the plaintiff to go to the jury with the benefit of a res ipsa loquitur instruction. We agree with the reasoning of the California Supreme Court in the landmark case of *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944):

> 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.

We find no merit in petitioner's second point. Accordingly, the decision below is quashed and the cause remanded for proceedings consistent herewith.

It is so ordered.

ADKINS and BARKETT, JJ., concur.

EHRLICH, J., concurs with an opinion, in which ADKINS and SHAW, JJ., concur.

1. The application of res ipsa loquitur in *Ybarra* has been criticized and disparagingly referred to as "California res ipsa." O.C. Adamson, Medical Malpractice: Misuse of Res Ipsa Loquitur, 46 Minn.Law Rev. 1043 (1962). We obviously agree with a different perspective. E. Wayne Thode, The Unconscious Patient: Who Should Bear the Risk of Unexplained Injuries to a Healthy Part of His Body?. 1969 Utah Law Rev. 1.

McDONALD, J., dissents with an opinion, in which BOYD, C.J., and OVERTON, J., concur.

EHRLICH, Justice, concurring.

I concur with the majority but wish to explain that the decision is limited to a narrow range of surgical injuries. The plaintiff submitted herself to surgery on various parts of her body, and to being rendered unconscious for purposes of the surgery, Upon regaining consciousness, she discovered an injury to a part of her body ***not involved in the surgical procedure.*** It is this unexplained injury to a part of the body not involved in the surgery from which the injury arises which justifies giving the res ipsa loquitur instruction of *Ybarra* v. *Spangard,* 25 Cal.2d 486, 154 P.2d 687 (1944). If forced to choose between who should bear the burden under such circumstances, it is easy for me to assign the burden to the medical staff rather than to the unconscious, faultless patient.

The *Ybarra* decision is alone sufficient support for the easing of the requirement of exclusive control, but I note that this Court has also eased the exclusive control requirement in the case of exploding bottles. In such cases, we do not require the plaintiff to show the bottle literally remained in the exclusive control of the bottler until the time of injury. The law has developed a legal fiction to circumvent the requirement of exclusive control. The plaintiff can establish grounds for relying on res ipsa loquitur by proving the bottle was not subjected to extraneous abuse between the time it left the exclusive control of the bottler and the time of injury. See, ***e.g., Groves v. Florida Coca Cola Bottling*** Co., 40 So.2d 128 (Fla.1949).

Marrero suffered an injury to a part of her body which normally should not have been at risk during the course of an anesthetized surgical procedure. An inference may justifiably arise that all of the parties to the procedure may be found liable, unless any single one can prove his own lack of negligence. It is they, rather than Marrero, who are in the best position to know what occurred while she was unconscious and in their care.

I do not conclude here, nor has the majority decided, whether injuries to parts of the body which are involved in a surgical procedure, unexplainable except for the fact that such injury normally does not occur in the absence of negligence, are also subject to the res ipsa loquitur doctrine of *Ybarra.* The implication that *Ybarra* might not be applicable is raised in ***Borghese v. Bartley, 402*** So.2d 475 (Fla. 1st DCA 1981). The court construed section 768.45(4), Florida Statutes (1981), to allow application of the res ipsa loquitur doctrine when injury is unrelated to and not a direct result of medical treatment or diagnosis. The negative of the holding is that res ipsa loquitur may not be applied when the injury *is* direct and related. The operation of section 768.45(4) under such a circumstance, and its added statutory presumption of negligence when a foreign body is left in a surgical wound, are matters which are not before us and on which I reserve judgment.

ADKINS and SHAW, JJ., concur.

McDONALD, Justice, dissenting.

The trial judge was correct in declining to give a res ipsa loquitur instruction in this case. His primary reason for doing so was that there was no showing that the three doctor defendants had exclusive control of the plaintiff. For the res ipsa loquitur doctrine to be applicable there must be a showing 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." Chenoweth v. Kemp, 396*** So.2d 1122, 1125 (Fla.1981), citing ***Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.,*** 358 So.2d 1339, 1342 (Fla.1978) (emphasis supplied). Res ipsa loquitur concerns a type of circumstantial evidence upon which a plaintiff may rely to discharge his burden of proving that his injury was more probably than not the result

of negligent conduct on the part of the defendant.

The chief deficiency in this case is that when this litigation was submitted to the jury not all of the actors, those having control or supervision, were still in the case. Having settled with the hospital, the trial proceeded against Goldsmith, Kitsos, and Brewster. Goldsmith had performed a twenty- to thirty-minute hemorrhoidectomy and then left the operating room. Kitsos had operated in the abdominal area and also removed a cyst from an eyelid. His procedures lasted two to two-and-one-half hours. Brewster was the anesthesiologist for both procedures. Also present with substantial responsibilities were the hospital's nurses.

Marrero suffered a brachial plexus injury. Her chief theory was that this was caused by a traction injury brought about by improper positioning of her right arm on the operating table. The directions for the position of the arm were the 'doctors' responsibility; the actual positioning was performed by the nurses. Kitsos, for the most part, stood on the left side of the patient during his procedure. Almost everyone agreed that if the injury was caused by faulty positioning it could not have occurred during the twenty to thirty minutes that Goldsmith was operating. Brewster spent his time at the head of the patient checking respiration and vital signs. The nurses moved Marrero onto the operating table for Goldsmith's operation. They moved her position somewhat for the Kitsos operation. They took her from the operating room to the recovery room where she remained until the anesthesia wore off. It was when Marrero, herself a nurse, awakened from the effects of the anesthesia, that she noticed something amiss with her arm. There was no indication whatsoever that either surgical procedure directly caused the condition.

Res ipsa loquitur is not a substantive rule of law, but is rather a rule of evidence. ***American District Electric Protective Co. v. Seaboard Air Line Railway,*** 129 Fla. 518, 177 So. 294 (1937). It is a form of circumstantial evidence. For circumstantial evidence to be adequate in a civil case the circumstances must be such that any reasonable inference deducible from the circumstances which would authorize recovery must outweigh each and every contrary reasonable inference. ***Voelker v. Combined Insurance Co., 73*** So.2d 403 (Fla.1954). In this case, not only was the cause of the condition unknown, the causing agent or party is unknown. It is at least as likely that it was caused by some of the acts of the nurses, acting independently from the orders and supervision of the doctors, as it was by the acts or directions of the doctors. The inferences of negligence by the doctors simply do not outweigh all other inferences.

This case was submitted to the jury on the standard instructions of negligence, as it should have been. It was a long and expensive trial. By its verdict the jury concluded that the doctors committed no acts of negligence. It should now end with that finding being upheld.

BOYD, C.J., and OVERTON, J., concur.

STATE of Florida, Petitioner, Cross-Respondent,

v.

Herman JOHNSON, Jr., Respondent, Cross-Petitioner.

No. 66551.

Supreme Court of Florida.

Feb. 6, 1986.

Rehearing Denied May 5, 1986.

Notice and Cross-Notice for Review of the Decision of the District Court of Appeal-Direct Conflict of Decision; First District-Case No. AW-171.

[5] The primary purpose of the pretermitted spouse rule is to assure that the decedent spouse considered the surviving spouse *as a spouse* when making his or her will. Eliminating the "in contemplation of marriage" requirement, as held by the district court, defeats the reason for the rule. For the reasons expressed, the decision of the district court below is quashed and this cause is remanded to reinstate the trial court's judgment.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

CITY OF NEW SMYRNA BEACH UTILITIES COMMISSION, Petitioner,

v.

Robert McWHORTER, Respondent.

No. 60961.

Supreme Court of Florida.

July 29, 1982.

Homeowners brought suit against city for damages following flooding of their home due to blockage in city's sewer system. The Circuit Court, Volusia County, James T. Nelson, J., entered judgment denying recovery for damages to homeowners, and homeowners appealed. The District Court of Appeal, 400 So.2d 23 reversed and remanded. Upon application for review, the Supreme Court, McDonald, J., held that: (1) homeowners were not entitled to instruction on doctrine of res ipsa loquitur; and (2) doctrine of res ipsa loquitur was inapplicable in that city did not have exclusive control over what entered sewer system.

Opinion of district court quashed with directions to reinstate trial court judgment.

Adkins and Boyd, JJ., dissent.

1. Negligence ⇐121.2(10)

Given restrictive nature of doctrine of res ipsa loquitur, court should never lightly provide this inference of negligence, but rather, it is incumbent upon plaintiff to present his or her case in manner which demonstrates and satisfies each of doctrine's requisite elements and only after plaintiff carries his burden of proof may court supply inference.

2. Municipal Corporations ⇐845(6)

Where property owners showed only occurrence and result of city sewer line stoppage, asserting that, since they in no way caused or were responsible for obstruction, damage-causing obstruction could only have been product of negligence and improper maintenance by city, but failed to allege or prove that direct evidence of city's negligence was unavailable, that line ordinarily would not have become obstructed and sewage would not have flooded their home absent negligence by city, and that main sewer line was under exclusive control of city, property owners were not entitled to instruction of res ipsa loquitur in their action against city damages which arose when sewer backed up.

3. Municipal Corporations ⇐845(6)

Where city demonstrated that externally introduced objects frequently cause sewer line blockages despite reasonable preventive safeguards, and produced detailed testimony relative to its own, as well as other cities' sewer line experiences and maintenance procedures and adduced evidence that city sewer lines were regularly inspected and adequately maintained, property owners were not entitled to instruction on doctrine of res ipsa loquitur in their action against city for damage which arose when sewer backed up.

4. Municipal Corporations ⇐845(4)

Even though city had exclusive control over construction and operation of sewer system, where city did not, and could not, have control over what entered system, and

it was object in system, and not defect in system itself, which caused reverse flow of sewage which flooded property owners' residence, doctrine of res ipsa loquitur was inapplicable in action brought by property owners against city.

Jacqueline R. Griffin of Dempsey & Slaughter, Orlando, for petitioner.

Judson I. Woods, Jr., of Woods & Watson, New Smyrna Beach, for respondent.

McDONALD, Justice.

We have for review *McWhorter v. City of New Smyrna Beach Utilities Commission,* 400 So.2d 23 (Fla. 5th DCA 1981), because of conflict with *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358* So.2d *1339* (Fla.1978). We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution, and quash the holding of the district court.

In April 1978 an accumulation of paper, of unknown origin, caused an obstruction in a New Smyrna Beach main *sewer* line at a point near the McWhorter residence. This blockage impeded the normal flow of sewage, and sewage and water backed up through the McWhorter's lateral line and flooded into their house, causing extensive damage. The McWhorters filed suit against the city for damages, pleading estoppel, negligence, nuisance, trespass, and contract in a single-count complaint. Refusing to give requested instructions on res ipsa loquitur, nuisance, trespass, or estoppel, the circuit court instructed the jury only on simple negligence. The jury returned a verdict for the city. On appeal, the Fifth District Court of Appeal reversed and remanded for a new trial, finding that the McWhorters had established the elements of res ipsa loquitur and should have benefitted from an instruction on that theory.

The issue before this Court is whether the district court correctly ruled that the circuit court's failure to give jury instructions on res ipsa loquitur constituted reversible error. We must answer in the negative, finding that the district court misapplied the doctrine of res ipsa loquitur as discussed in *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.,* 358 So.2d 1339 (Fla.1978).

In *Goodyear,* which involved the applicability of res ipsa loquitur to "exploding tire" cases, this Court set forth the essential elements of the doctrine, stating:

> The time seems propitious simply to address the dimensions of the doctrine head-*on,* and in so doing to restore the inference of negligence to its historically proper bounds-that is, when direct evidence of negligence is unavailable to the plaintiff due to the unusual circumstances of the injuring incident.
>
> Res ipsa loquitur-"the thing speaks for itself"-is a doctrine of extremely limited applicability. 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.

Id. at 1341-42 (footnotes omitted).

[1] Given the restrictive nature of the doctrine, a court should never lightly provide this inference of negligence. Rather, it is incumbent upon the plaintiff to present his or her case in a manner which demonstrates and satisfies each of the doctrine's requisite elements and only after the plaintiff carries this burden of proof may a court supply the inference. As we stated in *Goodyear* :

> Plainly, the threshold inquiry is whether that which occurred is a phenomenon which does not ordinarily happen except in the absence of due care. 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. An injury standing alone, of course, ordinari-

> ly does not indicate negligence. The doctrine of res ipsa loquitur simply recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause.

Id. at 1342 (footnote omitted).

[2] At the risk of redundancy, we would add that res ipsa loquitur is applicable only if all of its requisite elements are present in a *given case.* Consequently, the McWhorters could benefit from the doctrine only if they had shown that: 1) direct evidence of the city's negligence was unavailable; 2) the line ordinarily would not have become obstructed and that the sewage ordinarily would not have flooded their home absent negligence by the city; *and* 3) the main sewer line and all that entered it was under the exclusive control of the city. The McWhorters, however, failed to allege, much less prove, any of the above. Rather, the record reveals that at trial, the McWhorters showed only the occurrence and results of the city line stoppage, asserting that, since they in no way caused or were responsible for the obstruction, the damage-causing obstruction could only have been the product of negligent and improper maintenance by the city. By so limiting their presentation of evidence, the McWhorters failed to carry their initial burden of proof and neglected to demonstrate the necessary elements of the doctrine. This oversight alone precludes application of res ipsa loquitur and proves fatal to their cause.

[3] Moreover, in contrast to the McWhorters' virtual inaction at trial, the city actively presented evidence which emphasized the inapplicability of *res* ipsa loquitur to this case. In demonstrating that externally introduced objects frequently cause line blockages despite reasonable preventative safeguards, the city effectively undercut any argument that a sewage back-up such as that which injured the McWhorters was of such an extraordinary nature as to preclude any cause other than the city's negligence. Additionally, the city produced detailed testimony relative to its own, as well as other cities', sewer line experiences and maintenance procedures and adduced evidence that the New Smyrna Beach sewer lines were regularly inspected and adequately maintained-thereby illustrating that "the facts surrounding the incident were discoverable and provable, and not of a nature typically suggestive of negligence by the [city]." 358 So.2d at 1342. Furthermore, any inference of the city's negligence was inappropriate because the McWhorters "failed to allege and prove the essential element of defendant's exclusive control over the injury-causing instrumentality." *Id.*

To overcome these evidentiary deficiencies, the district court was forced to expand "the doctrine far beyond its intended perimeters, both by liberalizing the elements requisite to its application and by allowing the development of inferences not only as to the incident itself but also as to pre-incident acts." *Id.* Certainly, the district court's desire to provide relief to the McWhorters is understandable. The family's suffering, occasioned by such a disgusting invasion of their home, would incite the sympathy of any feeling person. But regardless of the magnitude of the McWhorters' misfortune, the facts of this case do not justify the court's efforts to provide that relief through the invocation of res ipsa loquitur. As we noted, the McWhorters' evidentiary omissions at trial foreclosed the use of the doctrine.

[4] However, even had the McWhorters been more thorough, and the city less vigorous, in the presentation of evidence at trial, res ipsa loquitur is inapplicable here simply because the control element of the doctrine is lacking. The district court, in determining that "the city had exclusive control over the design, maintenance, and operation of the system," *McWhorter v. City of New Smyrna Beach Utilities Commission,* 400 So.2d 23, 25 (Fla. 5th DCA 1981), stated:

> Here, appellants had no control or voice in the operation, design or installation of the sewer system. Appellee installed the system, performed the maintenance and established the conditions and methods for tying into the sewer lines. It deter-

mined the size, number and locations of the system's lines, manholes and clean-outs. It also determined the number of homes which the sewer would serve and when and where the lines were cleaned and inspected. It knew blockages occur.

With this we have no argument. However, it is one thing to say that the city had exclusive control over the construction and operation of the sewer system but quite another to say that the city did, or could, have control over what entered the system. It was, after all, the object in the system, and not any defect in the system itself, which caused the reverse flow of sewage which flooded the McWhorter residence.

Here, the city was clearly not responsible for the bundle of papers which caused the stoppage. Moreover, the city obviously could not control what users flushed down their toilets. Nor could the city realistically be expected to control or dictate what third parties might put into storm drains or manholes. The unknown origin of the obstruction in the sewer line bears dramatic testimony to this. Any number of inappropriate objects may be, and are, forced into a public sewer system at any given time with potentially catastrophic results. Accordingly, the efficient working of a city's sewer system is in large measure dependent upon the good sense and responsibility of the users it serves. The district court's conclusion that the city's "exclusive control is not defeated by the fact that other persons have access to the system because the very purpose of the system is to carry away the collective wastes of the community" (400 So.2d at 25) comports with neither logic nor experience, In fact, it is this very public access to the sewer line which defeats the requisite degree of control and renders the doctrine of res ipsa loquitur inapplicable to a case such as this where an obstruction, not caused by a defect in the design or construction of the system itself, produces an injury-causing sewer back-up.*

The circuit court correctly denied the McWhorters' requested instructions on res ipsa loquitur and correctly submitted the case to the jury as one of simple negligence dependent upon circumstantial evidence. Accordingly, we quash the opinion of the district court with directions to reinstate the trial court judgment.

It is so ordered.

ALDERMAN, C. J., and OVERTON, SUNDBERG and EHRLICH, JJ., concur.

ADKINS and BOYD, JJ., dissent.

ALACHUA COUNTY COURT EXECUTIVE, et al., Appellants,

v.

Kirk ANTHONY, Alachua County Juror No. 006, Appellee.

No. 61209.

Supreme Court of Florida.

July 29, 1982.

A widower, who was father of a three-year-old boy, filed motion to quash juror's

* For this, and other reasons, other jurisdictions have determined that res ipsa loquitur is inapplicable to obstruction-caused sewage back-up cases. *Jivelekas v. City of Worland*, 546 P.2d 419 (Wyo. 1976); *Freitag* v. City of *Montello*, 36 Wis.2d 409, 153 N.W.2d 505 (1967): Reich v. *Salt Lake City Suburban Sanitary Dist. No. I*, 29 Utah 2d *125. 506* P.2d *53* (1973); *Ward v. City of Charlotte*, 48 N.C.App. 463, 269 S.E.2d 663 (1980). The cases cited by the district court as supporting its holding are distinguishable on a factual basis. In those cases, damage resulted not from obstructions in the line. but, rather, from defects in the system itself. *Hull v. City of Griggsville*, 29 Ill.App.3d 253, 330 N.E.2d 293 (1975) (damage from sewage back-up caused by break in underground sewer line); *Royal Furniture Co. v. City of Morgantown*, 263 S.E.2d 878 (W.Va.1980) (damage caused by break in water main). In such cases a city could be charged with exclusive control over the injury-causing instrumentality, thus rendering the application of res ipsa loquitur more plausible. Although the court in *Cummins v. City of West Linn*, 21 Or.App. 643, 536 P.2d 455 (1975). found res ipsa loquitur applicable in a sewage back-up case, the Oregon court's decision conflicts with the principles of &he doctrine established by this Court, and hence has no persuasive value.

court for proceedings not inconsistent with this opinion.

It is so ordered.

ENGLAND, HATCHETT and KARL, JJ., concur.

ADKINS, Acting C. J., concurs in result only.

GOODYEAR TIRE & RUBBER CO. and Travelers Insurance Co., Petitioners,

v.

HUGHES SUPPLY, INC., Hartford Accident and Indemnity Co., the Hanover Insurance Co. and Joseph Hale, Respondents,

DAYTON TIRE & RUBBER CO. et al., Petitioners,

v.

Clyde E. DAVIS et al., Respondents.

Nos. 50411 and 52360.

Supreme Court of Florida.

March 2, 1978.

As Corrected On Denial of Rehearings June 13, 1978.

In tire blowout cases against tire manufacturers, both the District Court of Appeal, Fourth District, 336 So.2d 1221, and the District Court of Appeal, First District, 348 So.2d 575, held that jury instruction on doctrine of res ipsa loquitur was properly given, despite fact that both parties introduced substantial evidence tending to prove or disprove negligence associated with injured plaintiff's use of tire and in tire manufacturing process. Tire manufacturers filed petitions for writs of certiorari. After consolidating cases, the Supreme Court, England, J., held that in these tire blowout cases, doctrine of res ipsa loquitur was not applicable, inasmuch as facts surrounding incident were discoverable and provable and were not of a nature typically suggestive of negligence by manufacturers and plaintiffs failed to allege and prove essential element of manufacturers' exclusive control over the particular tires.

Decisions of Fourth and First District Courts of Appeal quashed and cases remanded.

Adkins, J., dissented.

1. Negligence ⇐121.2(3, 8)

Doctrine of res ipsa loquitur provides an injured plaintiff with a commonsense inference of negligence where direct proof of negligence is wanting and injured plaintiff has established that instrumentality causing his or her injury was under exclusive control of defendants, and that accident is one that would not, in ordinary course of events, have occurred without negligence on part of one in control.

2. Negligence ⇐121.2(3)

In determining whether doctrine of res ipsa loquitur is applicable, the threshold inquiry is whether that which occurred is a phenomenon which does not ordinarily happen except in absence of due care and initial burden is on plaintiff to establish that circumstances attendant to injury are such that, in light of past experience, negligence is the probable cause and the defendant is the probable actor.

3. Negligence ⇐121.2(12)

Doctrine of res ipsa loquitur recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing by injured plaintiff of injury's immediate, precipitating cause; such requirement is not satisfied, however, by plaintiff's allegations and proof of specific acts of negligence.

4. Automobiles ⇐16

Res ipsa loquitur supplies no inference of manufacturer's negligence in tire blowout cases, at least where blowout has oc-

curred after possession and some significant use by another; disapproving contrary decisions.

5. Automobiles ⇐16

It is conceivable that res ipsa loquitur would be appropriate in some situations involving tire malfunctions, as where one is injured by a new tire which explodes while being mounted for first time.

6. Automobiles ⇐16

In tire blowout cases against tire manufacturers, doctrine of res ipsa loquitur was not applicable, inasmuch as facts surrounding incidents were discoverable and provable and were not of a nature typically suggestive of negligence by manufacturers and injured plaintiffs failed to allege and prove essential element of manufacturers' exclusive control over these tires given time of plaintiffs' control over tires and extent of their usage; disapproving contrary decisions.

7. Products Liability ⇐78

In "exploding bottle" cases, applicability of res ipsa loquitur against bottler requires that plaintiff make an affirmative showing that the bottle after it had left possession of bottler was not subjected to any unusual atmospheric changes, or changes in temperature, or that it was not handled improperly up to time of explosion.

8. Automobiles ⇐16

There is nothing inherent in automobile or truck tires which warrants creating an exception to exclusive control requirement of res ipsa loquitur for such products once they have left manufacturer's possession and have been put to their intended use; disapproving contrary decisions.

Janis M. Halker of Gurney, Gurney & Handley, Orlando, for Goodyear Tire & Rubber Co.

L. William Graham and Joe C. Willcox of Dell, Graham, Willcox, Barber, Ryals & Henderson, Gainesville, and W. C. O'Neal of Chandler, O'Neal, Gray, Lang & Haswell, Gainesville, for Dayton Tire & Rubber Co., petitioner.

Elmo R. Hoffman of Hoffman, Hendry, Smith, Stoner & Schoder,' Orlando, for Hughes Supply, Inc.

Dan H. Honeywell of Billings, Frederick, Wooten & Honeywell, Orlando, for Clyde E. Davis, respondent.

ENGLAND, Justice.

Both the Goodyear and Dayton tire companies have asked us to review district court of appeal decisions involving essentially the same set of facts and the identical point of law.' The availability of the reasoning of both district courts on the single legal issue suggested that we consolidate the cases for both analytical and opinion purposes.

These are personal injury cases initiated when an individual was injured while driving a motor vehicle on which a tire blew out. The tire in each case had been manufactured by the respective defendant tire company. In Goodyear's case the incident occurred after the allegedly defective tire had been in the possession and control of the plaintiff for one month, and had been driven 9,500 miles. In Dayton's case the plaintiff had been in possession and control of the tire for six months, and the tire had been driven 4,000 miles. A more complete recitation of the facts of the two occurrences, available in each of the district courts' opinions, is not essential to our review of the legal question presented.

In each case, a divided panel of the district court held that a jury instruction on the doctrine of res ipsa Ioquitur was properly given, in addition to other standard jury instructions, despite the fact that both parties introduced substantial expert and other evidence tending to prove or disprove negligence associated with the plaintiff's use of the tire and in the tire manufacturing process. The basis for our review is the determination by each court that the plaintiff in

1. *Goodyear Tire & Rubber Co. v. Hughes Supply*, Inc., 336 So.2d 1221 (Fla. 4th DCA 1976); *Dayton Tire & Rubber Co. v. Davis*, 348 So.2d 575 (Fla. 1st DCA 1977).

a controverted negligence case is entitled to the benefit of the inference which the doctrine of res ipsa loquitur provides, a proposition in direct conflict with our decision in *Frash* v. *Sarres*, 60 So.2d 924 (Fla.1952).[2]

In *Frash* the plaintiff was struck by the revolving blades of an overhead fan in defendant's restaurant while attempting to open a window shutter. The facts surrounding the injuring occurrence-whirling fan blades coming in contact with the plaintiff-were not in dispute, and liability hinged on whether the fan had been turned on before or after plaintiff's attempt to open the shutter. This was a factual matter on which "there were direct conflicts in the evidence." [3] Our Court there upheld the trial court's ruling that plaintiff was not entitled to the benefit of the inference which the doctrine of res ipsa loquitur would supply. In *South Florida Hospital Corp. v. McCrea*, 118 So.2d 25 (Fla.1960), we construed the *Frash* decision to mean that there is no room for an inference of negligence where direct evidence is adduced to reveal the circumstances surrounding the occurrence and to establish the precise cause of the plaintiff's injury.

The *Frash* and *McCrea* decisions are viewed by Goodyear and Dayton as our announcement that res ipsa loquitur is unavailable whenever a defendant introduces specific evidence tending to disprove its asserted negligence. Judges Walden and Smith, dissenting in the two cases now before us, have focused the problem in somewhat different terms. Judge Walden has isolated the factors which take this type of "exploding tire" case out of the mainstream of res ipsa loquitur cases, in particular rejecting his colleagues' acceptance of an attenuated "exclusive control" requirement for tire manufacturers. Judge Smith views the majority position' in his court's case more broadly, and in developing his point he traces what he perceives to be an evolutionary departure from the basis on which the doctrine of res ipsa loquitur was first introduced into the fault system of tort liability. Both judges agree, however, that the use of a res ipsa inference in the situations presented here would essentially make it available for plaintiffs in every products liability lawsuit.

We are persuaded, after studying the able arguments of counsel and the thoughtful analyses of the law developed by all of the district court judges who considered these cases, that Judges Walden and Smith are correct in their penultimate conclusion, and that the doctrine of res ipsa loquitur has developed a judicial gloss which was never intended. Having the historical development so well presented in the opinions below, our reiteration of that history is unnecessary. The time seems propitious simply to address the dimensions of the doctrine head-on, and in so doing to restore the inference of negligence to its historically proper bounds-that is, when direct evidence of negligence is unavailable to the plaintiff due to the unusual circumstances of the injuring incident.

[I] Res ipsa loquitur-"the thing speaks for itself" [4]-is a doctrine of extremely limited applicability. 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

2. Art. V, § 3(b)(3), Fla.Const.

3. 60 So.2d at 926.

4. Dean Prosser has suggested that the Latin label has created confusion in the cases to which the doctrine is applied. "Along with res gestae and other unhappy catchwords, the Latin tag should be consigned to the legal dustbin." Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn.L.Rev. 241, 271 (1936). Lord Shaw, in *Ballard v. North British R.R.*, [1923] Sess.Cas., H.L., 43, opined that "[i]f that phrase had not been in Latin, nobody would have called it a principle."

on the part of the one in control.[5] The district courts of Florida have expanded the doctrine far beyond its intended perimeters, both by liberalizing the elements requisite to its application and by allowing the development of inferences not only as to the incident itself but also as to pre-incident acts, such as manufacture or production.

[2, 3] Plainly, the threshold inquiry is whether that which occurred is a phenomenon which does not ordinarily happen except in the absence of due care. 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. An injury standing alone, of course, ordinarily does not indicate negligence. The doctrine of res ipsa loquitur simply recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause.[6]

[4, 5] In the cases now before us, persons were injured as a result of tire blowouts. Can it realistically be concluded, on the basis of previous human experience, that this "happening" does not ordinarily occur in the absence of negligence by the manufacturer? American courts have consistently, and thoughtfully, rejected that notion.' We, too, hold that res ipsa loquitur supplies no inference of the manufacturer's negligence in tire blowout cases, at least where the blowout has occurred after possession and some significant use by another.[8]

[6] Not only was the use of the negligence inference inappropriate in these cases because the facts surrounding the incident were discoverable and provable, and because they were not of a nature typically suggestive of negligence by the defendants, but the inference was inappropriate because the plaintiffs in these cases failed to allege and prove the essential element of defendant's exclusive control over the injury-causing instrumentality. In *Schott v. Pancoast Properties*, 57 So.2d 431, 432 (Fla. 1952), we held:

> "The doctrine may not be invoked unless it appear [sic] that the thing causing the injury was so completely in the control of the defendant that, in the ordinary course of events, the mishap could not have occurred had there been proper care on the defendant's part."

In the two cases before us, the evidence presented to establish the tire companies' sole control was wholly insufficient. Given the time of plaintiffs' control over the tires and the extent of their usage, it is impossible to assert that the tire companies had "exclusive control" at the time of the injuries.

[7, 8] We recognize that there are exceptions to the exclusive control requirement in Florida. Each is supported, how-

5. *DeMoss v. Darwin T. Lynner Constr. Co.*, 159 N.W.2d 463 (Iowa 1968). See *Frash v. Sarres*, 60 So.2d 924 (Fla.1952); *American Dist. Elec. Protective Co. v. Seaboard Air Line Ry.*, 129 Fla. 518, 177 So. 294 (1937): *W. Prosser, Law of Torts* § 39, at 214 (4th ed. 1971).

6. This requirement is not satisfied, however, by the plaintiff's allegations and proof of specific acts of negligence. As one court explained:

> "When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of res ipsa loquitur; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence."

Sand Springs Park v. Schrader, 82 Okl. 244, 248, 198 P. 983, 987 (I 92 1), quoting from *Griffen v. Manice*, 166 N.Y. 188, 196, 59 N.E. 925. 927 (1901).

7. *See, e. g., Shramek v. General Motors Corp.*, 69 Ill.App.2d 72, 216 N.E.2d 244 (App.Ct.1966); *Wojciuk v. United States Rubber Co.*, 19 Wis.2d 224, 120 N.W.2d 47, modified, 122 N.W.2d 737 (1963). See also *Restatement (Second) of Torts* § 328d, at 158 (I 965).

8. It is conceivable that res ipsa loquitur would be appropriate in some situations involving tire malfunctions, as where one is injured by a new tire which explodes while being mounted for the first time. See the cases cited in Judge Smith's dissent below in *Dayton*, 348 So.2d at 587.

ever, by a justifiable basis for inferring that the cause of injury was probably the defendant's negligence.[9] It is untenable to suggest that anything inherent in the product warrants creating an exception for automobile or truck tires once they have left the manufacturer's possession and have been put to their intended use.

We agree with Judge Smith that to allow the use of res ipsa loquitur in the present cases, where the plaintiffs neither satisfied the essential elements of the doctrine nor demonstrated an inaccessibility to evidence of the occurrence, is to recognize res ipsa loquitur as but

> "a finishing stroke, administered by the charging judge, in a plaintiff's case which is built step by step until the last on ordinary circumstantial evidence that defendant was negligent and [plaintiff] was not." [10]

The decisions of the Fourth and First District Courts of Appeal are quashed, and these cases are remanded for further proceedings consistent with this opinion."' To the extent that other Florida decisions are in conflict with these views,[12] they are disapproved.

It is so ordered.

OVERTON, C. J., and BOYD, SUNDBERG and HATCHETT, JJ., concur.

ADKINS, J., dissents.

DEPARTMENT OF REVENUE, consisting of Ruebin O'D. Askew, as Governor of Florida, Bruce A. Smathers, as Secretary of State, Robert L. Shevin, as Attorney General, Gerald A. Lewis, as Comptroller, Philip F. Ashler, as Treasurer, Doyle Conner, as Commissioner of Agriculture, and Ralph Turlington, as Commissioner of Education; and J. Ed Straughn, as Executive Director of the Florida Department of Revenue, Appellants,

v.

AMREP CORPORATION, an Oklahoma Corporation, Silver Springs Shores, Inc., a Florida Corporation, Silver Springs Golf and Country Club, Inc., a Florida Corporation, Marion Realty, Inc., a Florida Corporation, Holiday Shores Tours, inc., a Florida Corporation, Mid-Florida Lakes, Inc., a Florida Corporation, Florida Ridge Utilities Corp., a Florida Cor-

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9. In the line of "exploding bottle" cases, such as *Starke Coca-Cola Bottling Co. v. Carrington*, 159 Fla. 718, 32 So.2d 583 (1947), plaintiffs were injured by an exploding bottle which had left the control of the bottler. The applicability of res ipsa loquitur in suits against the bottler requires that the plaintiff make an affirmative showing "that the bottle after it left possession of the bottler was not subjected to any unusual atmospheric changes, or changes in temperature, or that it was not handled improperly up to the time of the explosion." *Starke Coca-Cola Bottling Co. v. Carrington*, 159 Fla. at 721, 32 So.2d at 585. In *Yarbrough v. Ball U-Drive Sys., Inc.*, 48 So.2d 82 (Fla.1950), the Court analogized to the "exploding bottle" cases where severe injuries were incurred by reason of a mechanical failure of a truck recently rented from the defendant as part of his rental business. The Court concluded that the element of control was satisfied under these particular circumstances. The same situation could occur in an "exploding tire" case, of course. See note 8 above.

10. *Dayton Tire & Rubber Co. v. Davis*, 348 So.2d 575, 587 (Fla. 1st DCA 1977) (Smith, J., concurring and dissenting).

11. Obviously. our decision on *res* ipsa loquitur with respect to the *Dayton* case does not bear in any way on the other issues passed upon by the district court.

12. Among these are *Auto Specialties Mfg. Co. v. Boutwell*, 335 So.2d 291 (Fla. 1st DCA), cert. dismissed, 341 So.2d 1080 (Fla.1976); *Cortez Roofing Inc. v. Barolo*, 323 So.2d 45 (Fla. 2d DCA 1975); *Kulczynski v. Harrington*, 207 So.2d 505 (Fla. 3d DCA 1968); *National Airlines, Inc. v. Fleming*, 141 So.2d 343 (fla. 1st DCA 1962).

Fishback, Williams & Smith, Orlando, for appellant.

Dorothea Watson, Orlando, for appellee.

TERRELL, Justice.

Appellant brought this suit to invalidate certain conveyances executed in favor of appellee. Louise Sippel was permitted to intervene and file a counterclaim attacking the validity of an assignment of mortgage. An answer was filed, testimony was taken, and at final hearing the amended bill of complaint and the counterclaim of the intervenor were dismissed. This appeal was prosecuted from the final decree.

The sole point presented is whether or not the conveyances brought in question were the product of incompetency and undue influence.

After taking a large volume of oral and documentary testimony, the chancellor wrote a very helpful opinion in which he set out in extenso his findings of fact, including the governing rule of law on which he based his final decree. Under such circumstances the question reduces itself to that of whether or not the record contains substantial and pertinent testimony to support the decree appealed from. We have examined the evidence, and find ample support for the chancellor's finding as to competency of Julius and Louise Sippel, that the instruments assaulted were freely and voluntarily made and were not the product of undue influence on the part of Mrs. Buser, the appellee.

The fact that husband and wife and two sisters were the principals in this litigation creates no presumption of fraud or undue influence, All presumptions support the findings of the chancellor, and a diligent search reveals nothing that would warrant us in overthrowing the final decree. The chancellor thought the case was ruled by Rappaport v. Kalstein, 156 Fla. 722, 24 So. 2d 301, and we think his finding was correct,

The judgment appealed from is therefore affirmed.

Affirmed.

SEBRING, C. J., and THOMAS and HOBSON, J J., concur.

LITHGOW FUNERAL CENTERS et al. v. LOFTIN et al.

(Supreme Court of Florida, Special Division B. Oct. 17, 1952.

Personal injury action against railroad arising out of crossing collision between ambulance and train. The Circuit Court, Dade County, J. N. Morris, J., entered judgment on verdict for defendant, and plaintiff appealed, The Supreme Court, Futch, A. J., held that the instructions were prejudicially erroneous to plaintiff.

Reversed with instructions.

1. Appeal and Error ⇐596

A duty evolves upon attorneys for both appellant and appellee to see that a record is sent to supreme court which can be used with a minimum of time loss,

2. Trial ⇐139(1), 186

The evidence is for the jury to evaluate and apply, unless it is so one-sided as to call for an instructed verdict, and trial courts are not permitted to comment upon the evidence when instructing a jury. F.S.A. § 54.17.

3 Appeal and Error ⇐1064(2)
Trial ⇐194(17)

Instruction in personal injury action arising out of collision between ambulance and train that plaintiff had offered no evidence that contradicted positive testimony that train blew its whistle as it approached the crossing where the accident occurred was prejudicially erroneous to plaintiff as an improper comment on the evidence. F.S.A. § 54.17.

4. Trial ⇐229

Court erred in personal injury action arising out of crossing collision between ambulance and train in placing undue emphasis upon ambulance driver's duty by frequent repetition of such duty in instructions to jury.

5. Trial ⇐260(8)

Refusal of trial judge to give further instructions on specific question in personal injury accident arising out of crossing collision between ambulance and train was not an abuse of discretion.

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6. Railroads ⇨351(2, 13)

Instruction in personal injury action arising out of crossing collision between ambulance and train to effect that if ambulance driver knew of approach of train but failed to have his ambulance under control so as to enable him to stop it and avoid injury, driver was guilty of negligence, and that if such negligence was the sole cause of the accident, the verdict should be for the railroad, was not justified by the evidence, was erroneous and was so worded as to mislead and confuse the jury.

Dixon, DeJarnette & Bradford, Miami, for appellant.

Robert H. Anderson, William S. Frates, Miami, and Russell L. Frink, Jacksonville, for appellee.

FUTCH, Associate Justice.

This is an appeal in a personal injury suit wherein the jury rendered a verdict for the defendant below. The appeal is from the judgment entered on the verdict.

[1] Appellant lays stress on a charge given by the Court below (he says it was given at the request of appellee, but the record fails to show any request for any charge or charges, either by appellant or appellee, and the index does not at any place reveal where any charge or charges may be found. A duty evolves upon the attorneys for both appellant and appellee to see to it that a record is sent here which can be used with a minimum of time loss. This record is not so compiled or indexed). The charge complained of is as follows: "I instruct you further, Gentlemen, that the plaintiff has offered no evidence that contradicts the positive testimony that the train blew its whistle as it approached the crossing." (R. 285).

Mrs. Morrison, a witness for plaintiff (Tr. 68-86) lived in fear of this particular crossing and had good reason to listen and observe at the time of this. accident, Her daughter had just left with a friend on a trip which took her over this particular crossing, To discount Mrs. Morrison's testimony counsel for appellee offer gratuitous information in the form of a rectangular drawing purporting to show measured distances and a statement that Mrs. Morrison is also suing the railroad. (Appcllee's brief p. 10).

No testimony could be more positive that no whistle was sounded than was the testimony of Mrs. Morrison and her daughter, Mrs. Sanders.

[2] Trial courts in Florida are not permitted to comment upon the evidence when instructing a jury. The evidence is for the jury to evaluate and apply, unless the evidence is so one-sided as to call for an instructed verdict by the Court.

F.S.1952, Section 54.17, F.S.A., is as follows :

Court's charge to jury; direction of verdict

"(I) Upon the trial of all cases at law in the several courts of this state, the judge presiding at such trials shall charge the jury only upon the law of the case; that is, upon some point or points of law arising in the trial of said cause. If, however, after all the evidence shall have been submitted on behalf of the plaintiff in any civil case, it be apparent to the judge that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff in such civil case, the judge shall, upon motion of the defendant, direct the jury to find a verdict for the defendant; and if, after all the evidence of the parties shall have been submitted, it be apparent to the judge that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party.

"(2) At the trial of any civil action or proceeding at law in the courts of this state, the judge presiding shall charge the jury on the law of the case in the trial at the conclusion of the argument of counsel."

Decisions supporting the foregiong conclusions are too numerous to repeat here. See Vol. 7, Enc. Digest of Florida Reports, p. 527, Sec. 32.

[3] The charge complained of was clearly erroneous and harmful to appellant's cause.

[4] Appellant further complains of undue stress on one important phase of the case by frequent repetition thereof by the Court in its instructions to the jury. There is no reason for saying the same thing more than once except for the purpose of adding emphasis to the statement. This Court has criticised such undue emphasis in a number of cases. See Biscayne Beach Theatre v. Hill, 151 Fla. 1, 9 So.2d 109; Farnsworth v. Tampa Electric Co., 62 Fla. 166, 57 So. 233; Jacksonville Electric Co. v. Adams, 50 Fla. 429, 39 So. 183. There was undue repetition of and hence too much emphasis placed on the duty of the ambulance driver.

[5] Appellant's third question challenges the action of the Court below in refusing to give further instructions on a specific question in the case. The action of the trial Judge was within his discretion and we can not say that he abused his discretion when he declined to re-instruct on one particular phase of the case.

[6] The instruction complained of by appellant in its fourth question is as follows: "If you find from the evidence that the driver knew of the approach of the train, but that, notwithstanding, he failed to have his ambulance under control so as to enable him to stop it and avoid injury, then such conduct on his part constituted negligence, and, under the circumstances and if it was the sole cause of the accident, then your verdict should find the railroad not guilty."

This instruction, we think, was erroneous and was so worded as to mislead and confuse the jury and there is no evidence in the record to which the charge could apply.

For the reasons given, the judgment of the lower Court is reversed with instructions to grant a new trial.

SEBRING, C. J., and ROBERTS and MATHEWS, JJ., concur.

STATE v. FLORIDA STATE IMPROVEMENT COMMISSION.

Supreme Court of Florida, en Banc.
Oct. 17, 1952.

Action was brought for decree validating bonds proposed to be issued for financing construction of county hospital. The Circuit Court for Leon County, W. May Walker, J., entered decree validating bonds, and appeal was taken. The Supreme Court, Mathews, J., held that insofar as a special act creating hospital board authorized levy of ad valorem tax on all taxable property of county, proceeds of which should be used to pay whole or part of principal and interest of certificates of indebtedness for construction of county hospital, without an approving vote of freeholders of county, violates constitutional provision requiring such validation.

Affirmed in part and reversed in part for further proceeding in accordance with opinion.

Terrell, J., dissented, and Taylor, A. J., dissented in part.

1. Courts ⇐92

Where language in opinion of Supreme Court was not essential to decision in case and was obiter dicta, it was not controlling in subsequent case before Supreme Court.

2. Constitutional Law ⇐16

If any interpretation or construction of constitutional provision is necessary to determine purpose of legislature in proposing constitutional provision and of people in adopting provision, Supreme Court may resort to history of the times to determine evil sought to be remedied and purpose to be accomplished.

3. Constitutional Law ⇐5

A constitutional provision cannot be modified, amended or repealed in any particular by legislative fiat, executive usurpation, or judicial interpretation or construction, and if there is to be a modification, amendment, or repeal, it must be in manner and method provided for in constitution itself.

4. Counties ⇐178

In so far as special act creating Madison County Health and Hospital Board authorizes a levy of ad valorem tax of all

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This rule imposes no hardship on the parties-it does not hamper the court in the administration of justice and it is in accord with all of our concepts of fair play and due process. Anything less is insufficient and contrary to American traditions.

[4] In the instant case the record is completely silent as to the existence of any authority of the attorney of record for defendants in the original action to bind the defendants in these proceedings, The determination of the sufficiency of the notice is confined to the revelations of the record itself and when the record does not satisfy the requirements of law any relief based thereon cannot stand. Feuer v. Feuer, 156 Fla. 117, 22 So.2d 641.

[S] For the reasons herein expressed this appeal is dismissed. Nothing herein shall prejudice the rights of the natural parents to institute and prosecute appropriate proceedings for the purpose of obtaining a judicial determination of their rights to have the custody of said child because of changed circumstances or conditions subsequent to November 21, 1951. The decree of that date is rcs adjudicata of all matters litigated therein and of the facts relating to the question of custody prior to that time.

Appeal dismissed.

ROBERTS, C. J., and TERRELL and SEBRING, JJ., concur.

PER CURIAM.

A rehearing having been granted in this cause and the case having been further considered upon the record and briefs for the respective parties; it is thereupon ordered and adjudged by the Court that the opinion and judgment of this Court filed in this cause on February 19, 1954, be and it is hereby reaffirmed and adhered to.

ROBERTS, C. J., TERRELL, THOMAS, SEBRING and DREW, JJ., and PATTERSON, Associate Justice, concur,

DOWLING v. LOFTIN et al. (three cases).

YELVINGTON v. LOFTIN et al.

CLARK v. LOFTIN et al. (three cases).

Supreme Court of Florida.
Special Division A.
April 20, 1954.
Rehearing Denied May 18, 1954.

Death actions arising from railroad crossing accident. The Circuit Court for Duval County, A. D. McNeill, J., following verdict of not guilty, denied plaintiffs' motion for new trial, and plaintiffs appeal& The Supreme *Court,* Mathews, J., held that evidence was sufficient to sustained verdict.

Affirmed.

1. Railroads ⇐348(1)

In death actions arising from railroad crossing accident, evidence was sufficient to sustain verdict of not guilty.

2. Appeal and Error ⇐1005(2)

Jury findings which have been reviewed by trial judge, will not be disturbed on appeal if there is any suhstantial evidence to support verdict unless assignments of error pinpoint error in instructions to jury or in admitting or rejecting testimony with resulting miscarriage of justice.

3. Appeal and Error ⇐1064(1)

Where record, and particularly charges requested by one party, discloses an overtrial of case with resulting miscarriage of justice, judgment should be reversed and set aside

4. Trial ⇐295(1)

Upon review of assignments of error concerning instructions to jury, the supreme court has duty to examine not one but all of such instructions. F.S.A. § 54.23; 30 F.S.A. Rules of Common Law, rule 39 (b).

5. Appeal and Error ⇐1064(4)

In death actions arising from railroad crossing accident, record, which revealed that instruction to jury could have been simplified, was not sufficient to establish that trial resulted in miscarriage of justice.

6. Appeal and Error ⇐1032(1)

Appellants have burden of showing reversible error.

Harry B. Fozzard and Tom B. Stewart, Jr., Jacksonville, for appellants.

Russell L. Frink and Samuel Kassewitz, Jacksonville, for appellees.

MATHEWS, Justice.

This is an appeal growing out of a horriblc railroad crossing accident which resulted in the death of a man, his wife, and their four infant children.

[1] Voluminous testimony was taken with reference to the scene of the accident and pertinent facts in connection therewith, No good purpose can be served by a recital of these details and facts testified to. It is sufficient to say that all questions were submitted to the jury and the jury found a verdict of not guilty. There was abundant substantial evidence supporting the verdict.

[2] Motion for new trial was denied by the trial judge The findings of the jury, reviewed by the trial judge, will not be disturbed on appeal when there is any substantial evidence to support the verdict unless the assignments of error pinpoint some error of the trial judge in the instructions to the jury or in admitting, or rejecting, testimony which resulted in a miscarriage of justice.

The record in this case contains fifteen assignments of error, most of which are concerning the giving, or failure to give, instructions or charges to the jury.

The record discloses that an entire afternoon was devoted, by the trial judge and the attorneys for the respective parties, in going over and discussing requested charges. The next day, after the Court had charged the jury, the Court addressed the attorneys for the parties and asked the question, "Is there anything else you can suggest?" The only suggestion from anyone was from one of the attorneys for the appellants when he said, "I don't recall you giving the charge on the burden of proof or contributory negligence". The Court then further instructed the jury. No further request, or objection, of any kind appears in the record until long after the motion for new trial had been denied when attorneys for the appellants then contended that objections had been made to various charges and their objections were not in the record and -that they had made a general objection to all of the charges, that they were repetitious and such repetition unduly stressed certain matters prejudicial to the appellants. 30 F.S.A. Rules of Common Law, Rule 39(b) on thc subject of charges to the jury is full and complctc.

A hearing was held on motion to supplement the record. This motion was granted and the record was filed in this Court on March 29, 1954, one day before the argument in this Court, but even if regular and permissible, same is of little benefit to the appellants. About the only thing which this supplemental record shows is that there was a general objection tbat some of the charges were repetitious and that appellants claimed that such repetitious charges unduly emphasized certain principles of law advantageous to the appellees and prejudicial to the appellants.

We have heretofore discussed and considered the force and effect of Rule 39(b) in the cases of Eli Witt Cigar & Tobacco Co. v. Matatics, Fla., 55 So.2d 549, and Guarino v. State, Fla., 67 So.2d 650.

[3] It is quite true that in many cases charges contain repetitions 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 result in a miscarriage of justice, the judgment should be reversed and set aside.

[4] It is our duty to examine not one but all of the charges. F.S. § 54.23 F.S.A.; Martin v. Stone, Fla., 51 So.2d 33; Staff v. Soreno Hotel Co., Fla., 60 So.2d 28; General Ready-Mix Concrete v. Wheeler, Fla., 55 So.2d 331.

[5, 6] In the case at Bar it may be that the charges requested by the appellants could have been simplified but an examination of the entire record, including all of the charges given, does not show that the trial resulted in a miscarriage of justice. The appellants have failed to carry the burden of showing any reversible error.

Affirmed,

ROBERTS, C. J., and TERRELL, J., and MILLEDGE, Associate Justice, concur,

JONES

v.

FLORIDA POWER CORP. et al.

Supreme Court of Florida,
Special Division B.

April 6, 1954.

Rehearing Denied May 19, 1954.

Common-law action for damages for injuries caused by negligence allegedly attributable to the defendants. The Circuit Court for Highlands County, Don Register, J., rendered summary judgment for defendants, and plaintiff appealed. The Supreme Court, Roberts, C. J., held that defendant corporation which contracted with plaintiff's employer for plumbing on construction of extension to corporation's plant, and with third company for general construction work, was not a "common employer" of all employees on the project, including plaintiff, nor a "contractor" in that there was no subletting of primary obligation of defendant under contract and thus defendant had no liability to procure workmen's compensation on the workers, and could be sued by plaintiff in action at common law for injuries attributable to negligence of employee of third company using crane of defendant.

Reversed and remanded.

I. Workmen's Compensation ⇐2165

Under provisions of Workmen's Compensation Act declaring in effect that an employer, within meaning of act, must secure payment of compensation to its employees, and that a contractor who sublets work shall be deemed the employer of the subcontractor for purpose of securing payment of compensation, it is not the providing of the compensation that gives immunity from suit by employee of a subcontractor on theory that contractor is a third-party tort-fcasor, but it is the existence of the liability, vel non, to secure compensation which gives the employer immunity. F.S.A. §§ 440.02, 440.10.

2. Workmen's Compensation ⇐2165

Defendant corporation which contracted with plaintiffs employer for plumbing on construction of extension to corporation's plant, and with third company for general construction work, was not a "common employer" of all employees on the project, including plaintiff, nor a "contractor", in that there was no subletting of primary obligation of defendant under contract, and thus defendant had no liability to procure workmen's compensation on the workers, and could be sued by plaintiff in action at common law for injuries attributable to negligence of employee of third company using crane of defendant. F.S.A. §§ 440.02, 440.10.

See publication Words and Phrases, for other judicial constructions and definitions of "Common Employer" and "Contractor".

TGI FRIDAY'S, INC., etc., Petitioner/Cross-Respondent,

v.

Marie DVORAK, Respondent/Cross-Petitioner.

No. 83811.

Supreme Court of Florida.

Aug. 24, 1995.

Rehearing Denied Nov. 27, 1996.

Customer who was injured in slip-and-fall accident brought personal injury action against restaurant owner. After jury returned verdict for customer in amount substantially greater than all customer's offers of judgment, the Circuit Court, Broward County, Jack Musselman, J., refused to award customer attorney fees under offer of judgment statutes and rule, and customer appealed. The District Court of Appeal affumed in part and reversed in part and certified conflict, 639 So.2d 58. On review, the Supreme Court, Overton, J., held that: (1) offer of judgment statute expressly provides for award of attorney fees regardless of reasonableness of offeree's rejection of offer of judgment, and (2) to extent offer of judgment statute creates substantive rights, statute does not violate constitutional provision giving Supreme Court exclusive authority to adopt rules of practice and procedure in state courts.

Decision approved.

Wells, J., filed opinion concurring in part and dissenting in part.

Shaw, J., concurred in result only.

1. costs ⇐194.50

Offer of judgment statute expressly provides for award of attorney fees regardless of reasonableness of offeree's rejection of offer of judgment. F.S.1987, § *768.79.*

2. Constitutional Law ⇐50, 67

Constitutional provision governing adoption of rules of practice and procedure provides Supreme Court with exclusive authority to adopt rules for practice and procedure in state courts; Legislature, on the other hand, is entrusted with task of enacting substantive law. West's F.S.A. Const. Art. 6, § 2(a).

3. Constitutional Law ⇐55
Judgment ⇐74.1

To extent offer of judgment statute creates substantive rights, statute does not violate constitutional provision giving Supreme Court exclusive authority to adopt rules for practice and procedure in state courts; procedural portions of statute were superseded by rule governing offer of judgment procedure. West's F.S.A. Const. Art. 5, § 2(a); F.S.1987, § 768.79; West's F.S.A. RCP Rule 1,442 (1991).

4. **costs ⇐194.50**

Factors in offer of judgment statute bearing on question of whether offer ox demand for judgment was unreasonably rejected are intended to be considered in determination of amount of attorney fee to be awarded. F.S.1987, § 768.79.

John B. Marion, IV of Sellars, Supran, Cole & Marion, PA., West Palm Beach; and Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., West Palm Beach, for petitioner/cross-respondent.

Dan Cytryn of the Law Offices of. Dan Cytryn, P.A., Tamarac, for respondent/cross-petitioner.

Jack W. Shaw, Jr, of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Jacksonville, amicus curiae for Florida Defense Lawyers Association.

OVERTON, Justice.

[1] We have for review *Dvorak v. TGI Friday's,* Inc., 639 So.2d 58 (Fla. 4th DCA 1994), in which the district court approved the constitutionality of the offer of judgment statute, section 768.79, Florida Statutes (1987), and held that the statute expressly provides for the award of attorney's fees regardless of the reasonableness of an offeree's rejection of an offer of judgment. The

district court also certified conflict with *Bridges v.* Newton, 556 So.2d 1170 (Fla. 3d DCA 1990). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed in this opinion, we approve the decision of the district court.

At the outset, it is important to understand that this case concerns two statutes and one rule of civil procedure, all of which employ different language governing offers of judgment: sections 45.061 and 768.79, Florida Statutes (1987), and Florida Rule of Civil Procedure 1.442 (1990). Section 46.061 reads as follows:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not, accepted does not preclude the making of a subsequent. offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) *If, upon a motion by the offeror within* SO ***days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in*** the cost of litigation, *it may* ***impose an appropriate sanction*** *upon the offeree. In* making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against, the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in

other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 763.23.

(Emphasis added.)

Section 763.79 reads as follows:

(l)(a) In any action to which this part applies, *if* a ***defendant files an offer*** of judgment which is not accepted by the plaintiff within 30 days, ***the defendant shall be entitled to recover reasonable costs and attorney's fees*** incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where ***such costs*** *and attorney's* ***fees*** *total more than the judgment,* ***the court shall enter*** *judgment* ***for the*** *defendant* ***against the*** *plaintiff* ***for the amount of the costs and*** *fees,* less the amount. of the plaintiffs award. ***Zf a*** *plaintiff files a demand* for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, ***he shall*** be entitled to recover ***reasonable*** costs ***and attorney's*** fees *incurred from the date of the filing of the demand.* If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of trial.

(2)(a) ***Zf a party is entitled to*** costs *and* fees ***pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer*** of ***judgment was not made in good faith. In such case, the court may disallow*** an *award* of costs ***and attorney's*** fees.

(b) When determining the reasonable***ness*** of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim that was subject to the offer.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

(Emphasis added.)

Florida Rule of Civil Procedure 1.442 reads as follows:

Offer of Judgment

(a) Applicability. This rule applies only to actions for money damages,

(b) Time Requirements, To be effective, an offer of judgment must be served no sooner than 60 days after the offeree has filed its first paper in the action and no later than 60 days prior to trial, except that the offeree may serve a counteroffer within 16 days after service of an offer notwithstanding the time limits of this rule.

(c) Form of Offer.

(1) An offer of judgment may be made by any party or parties.

(2) The offer shall be in writing; shall settle all pending claims; shall state that it is made pursuant to this rule; shall name the party or parties making the offer and the party or parties to whom the offer is made; shall briefly summarize any relevant conditions; shall state the total amount of the offer; and shall include a certificate of service in the form required by Rule 1.08009.

(d) Counteroffers.

(1) A counteroffer is an offer made by a party with respect to a prior unexpired offer or counteroffer made to that party.

(2) Counteroffers shall conform to all the requirements of offers, except as otherwise specified in this rule.

(e) Service and Filing. The offer of judgment shall be served upon the party or parties to whom it is made but shall not be fled unless accepted or unless necessary to enforce the provisions of this rule.

(f) Acceptance, Failure to Accept and Rejection.

(1) Offers of judgment shall be deemed rejected for purposes of this rule unless accepted by filing both a written acceptance and the written offer with the court within 30 days after service of the offer. Upon proper filing of both the offer and acceptance, the court shall enter judgment thereon.

(2) A counteroffer operates as a rejection of an unexpired offer or unexpired counteroffer.

(3) A rejection of an offer terminates the offer.

(g) Withdrawal. An offeror may withdraw the offer in a writing served on the offeree before a written acceptance is served on the offeror. Once withdrawn in this manner, the offer is void.

(h) Sanctions.

(1) Upon motion made within 30 days after the return of the verdict in a jury action or the date of tiling of the judgment in a non-jury action, the court may impose sanctions equal to reasonable attorneys fees and all reasonable costs of the litigation accruing from the date the relevant offer of judgment was made whenever the court finds both of the following:

(A) *that* ***the party against whom sanctions are sought has unreasonably rejected or refused the offer, resulting in*** unreasonable ***delay and needless increase in the cost of litigation;*** and

(B) that either

(i) an offer to pay was refused and the damages awarded in favor of the offeree and against the offeror are less than 75 percent of the offer; or

(ii) an offer to accept payment was refused and the damages awarded in favor of the offeror and against the offeree are more than 126 percent of the ***offer.***

(2) In determining entitlement to and the amount of a sanction, the court may consider any relevant factor, including:

(A) the merit of the claim that was the subject of the offer;

(B) the number, nature and quality of offers and counteroffers made by the parties;

(Cl the closeness of questions of fact and law at issue;

(D) whether a party unreasonably refused to furnish information necessary to evaluate the reasonableness of an offer;

(E) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties;

(F) the fact that, at the time the offer was made and rejected, it was unlikely that the rejection would result in unreasonable cost or delay;

(G) the fact that a party seeking sanctions has himself unreasonably rejected an offer or counteroffer ***on*** the same issues or engaged in other unreasonable conduct;

(H) the fact that the proceeding in question essentially was equitable in nature;

(I) the lack of good faith underlying the offer; or

(J) the fact that the judgment was grossly disproportionate to the offer.

(3) No sanction under this rule shall be unposed in any class action or shareholder derivative suit, nor in any proceeding involving dissolution of marriage, alimony, nonsupport, child custody or eminent domain.

(i) Evidence of Offer. Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this rule, and not otherwise.

Fla.R.Civ.P. 1.442 (1990) (emphasis added).

The record in this case reflects that Marie Dvorak brought a lawsuit against TGI Friday's, Inc. for injuries she suffered in a slip and fall incident at a TGI Friday's restaurant in 1987. Prior to trial, Dvorak made three different offers of judgment. The first offer of judgment was based on the authority of section 46.061, the second was based on section 768.79, and the third was based on rule

1.442. TGI Friday's rejected all three offers, the case proceeded to trial, and the jury returned a verdict for Dvorak in an amount substantially greater than all of Dvorak's offers of judgment.

After the district court affirmed the judgment, Dvorak filed a motion in the trial court requesting an award of attorney's fees and costs based on TGI Friday's rejection of her offers of judgment, TGI Friday's filed a motion to strike the offers of judgment and a motion to determine Dvorak's entitlement to attorney's fees. The trial judge granted TGI Friday's motion to strike the fist two offers on the grounds that sections 46.061 and 768.79 were unconstitutional. The judge explained that this Court had determined that each statute unconstitutionally infringed "upon the Court's exclusive authority to adopt rules for practice and procedure in Courts pursuant to Article V, Section 2(a) of the Florida Constitution," and cited *Florida Bar re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550* So.2d 442, 443 (Fla.1989). The judge also ruled that rule 1.442 provided no authority for the award of attorney's fees to Dvorak because the rule, which was enacted after Dvorak's cause of action accrued, was substantive *in* nature and could not be applied retroactively. As an alternative basis for the denial *of* attorney's fees, the trial judge held that Dvorak had failed to demonstrate that TGI Friday's had unreasonably rejected the three offers of judgment.

Dvorak appealed to the Fourth District Court of Appeal. The district court affirmed the trial court's denial of attorney's fees under section 45.061 and Rule of Civil Procedure 1.442, but reversed the trial court on its denial of fees under section 768.79. The district court's opinion sets forth four distinct holdings. First, the district court determined that the trial judge erred in finding that sections 45.061 and 768.79 were unconstitutional. The district court noted that the trial court was without the benefit of this Court's decision in *Leapai* v. *Milton, 595* So.2d 12 (Fla.1992), when it made its ruling. In *Leapai,* this Court upheld the constitutionality of section 45.061 and found that the statute did not infringe on the rule-making authority of the Court. Finding no relevant distinction between section 45.061 and section 768.79, the district court ruled that section 768.79 was likewise constitutional.

Second, the district court held that rule 1.442 could be applied to this case despite the fact that Dvorak's cause of action preceded the effective date of the rule. The district court once again relied on this Court's decision *in Leapai* and our holding that section 45.061 could be retroactively applied to a cause of action so long as the statute was enacted before the offeree's rejection of the offer of judgment. The district court held that the same reasoning should apply to rule 1.442, and found that the rule would apply in this instance because TGI Friday's rejected Dvorak's offer after rule 1.442 became effective.

Third, the district court held that the issue of whether TGI Friday's had unreasonably rejected Dvorak's offer of judgment had no bearing on whether Dvorak was entitled to an award of attorney's fees under section 768.79. The district court held that, unlike section 45.061 and rule 1.442, section 768.79 does not require that an offeree's rejection be unreasonable as a prerequisite *to an* award of fees, The court stated: "[S]ection 768.79 does not give the trial court discretion to deny attorney's fees, once the prerequisites of the statute have been fulfilled, except if the court determines under section 768.79([2])(a) that 'an offer was not made in good faith." *Dvorak, 639* So.2d at 69.

Finally, the district court addressed the issue of attorney's fees under section 45.061 and role 1.442 and stated: "The trial court's finding that there was not an unreasonable rejection of the offer by the defendant . . . provide[s] a proper basis for his conclusion that attorney's fees would not be awarded as a result of the offers of judgment under rule 1.442 and section 45.061." *Id.* at 60. The district court noted that the rule and statute provide a presumption that an offer has been unreasonably rejected when the judgment is twenty-five percent greater than the offer, but rejected Dvorak's assertion that TGI Friday's had failed to present sufficient evidence to overcome the presumption and held that TGI Friday's could rely entirely on the trial

judge's familiarity with the case to rebut the presumption. *Id.*

[2, 3] Both parties have petitioned this Court for review of the district court's decision. We approve each of the four distinct holdings of the district court and adopt its reasoning as our own. Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting *substantive* law. In *Leapai v. Milton, 595* So.2d 12, 14 (Fla.1992), we noted that the judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other's constitutional powers. The Legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions, To the extent section 766.79 creates substantive rights, we find the statute constitutional. The procedural portions of the statute were superseded by Rule of Civil Procedure 1.442.[1] See *Florida Bar re Amend. to* R.Civ. *P., Rule 1.442.*

[4] We also find that the district court correctly held that section 766.79 provides for the award of attorney's fees regardless of the reasonableness of an offeree's rejection of an offer of judgment. In making this determination, the district court referred to its earlier decision in *Schmidt v. Fortner, 629* So.2d 1036 (Fla. 4th DCA 1993). In *Schmidt,* the district court explained the application of section 768.79 as follows:

> Turning to the substance of section 768.79 itself, we conclude that the legislature has created a mandatory right to attorney's fees, if the statutory prerequisites have been met. The statute begins by creating an "entitlement" to fees. That entitlement may then lead to an "award" of fees. That award may then be lost by a finding that the entitlement was created "not in good faith," or the amount of the award may be adjusted upward or downward by a consideration of statutory factors. That, in outline form, is how we read this statute. We explain in more detail in the following paragraphs.
>
> To begin, the words "*shall* be entitled" [e.s.] in subsection (1) quoted above cannot possibly have any meaning other than to create a right to attorney's fees when the two preceding prerequisites have been fulTilled: i.e., (1) when a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement. The court is faced with a simple, arithmetic, calculation. How that entitlement gets translated into tangible attorney's fees is covered by the process of an "award,"
>
> Subsection (6)(b) of section 768.79 (in pertinent part) provides as follows:
>
> "(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:
>
> (a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.
>
> (b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be

1. It is the 1990 version of rule 1.442 that is at issue here. In 1992, this Court changed rule 1.442 to simply reference the procedure set forth in section 768.79, Florida Statutes (1991).

awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served."

Under this provision, the right to an award turns only on the difference between the amount of a rejected offer and the amount of a later judgment. It does not depend on whether the offer or the rejection was reasonable. If the offer is 25 percent more or less than the judgment, then the party has qualified for an *award*. To repeat, these two provisions together create an *entitlement* which qualifies a party to an *award* of attorney's fees where the party has served an offer that is more or less than the ultimate judgment, if the motion therefor has been timely made.

It is under subsection (7) of section 768.79 that Fortner says he finds his support for the trial judge's denial of fees in this case. He argues that under subsection (7) the court is given discretion to decline an award of fees. In this he is certainly *partially* correct. Subsection (7)*(a)* provides that:

"(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees."

This provision does indeed allow the court in its discretion to disallow an award of attorney's fees, *but only if it determines that a qualifying offer "was not made in good* faith. " That is the sole basis on which the court can disallow an entitlement to an award of fees. In that circumstance, however, a "not in good faith" offeror—though prima *facie* entitled to fees under section 768.79(7)—has lost that entitlement because the offeree has succeeded in persuading the trial judge that the offeror acted without good faith. His *entitlement* to fees has thus been disallowed because his intentions have been shown to be "not in good faith." Here, however, that provision is inapplicable because there was no evidence that the demand was "not made in good faith," and no finding to that effect by the trial judge.

Hence, Fortner turns to subsection (7)(b) and the following text to attempt to justify a discretionary denial of all fees:

"(b) When *determining the reasonableness* of *an award of attorney's fees pursuant to this section,* the court shall consider the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay the offer reasonably would be expected to incur if the litigation should be prolonged." [e.s.]

He argues that award and entitlement amount to the same thing, and thus the judge could properly use the enumerated factors of subsection (7)(b) as the basis for denying all fees to an otherwise qualifying offeror. We disagree.

In the first place, the term "award" of fees in subsection (7)(b) obviously relates back to subsection (6)(b) where-as we have just seen-that term first appears. There the legislature established the mechanism by which an *entitlement* is converted to an award of attorney's fees. Subsection (7)(b) proceeds on the notion that a party has successfully perfected a right or entitlement to fees and has properly qualified for an award under subsection (6). Moreover, in order to reach subsection (7)(b), the court must have already ruled out a disallowance of an award because of a finding of "not made in good faith" under subsection (7)(a). The noun "award" in (7)(b) therefore refers to the process of fixing the amount of the fee to which the qualifying plaintiff is already

WELLS, J., *concurs in* part and dissents in part with an opinion.

ANSTEAD, J., recused.

WELLS, Justice, concurring in part and dissenting in part.

I concur with the majority's approval of the district court's decision upholding the constitutionality of sections 45.061 and 768.79, Florida Statutes (1987),[3] holding that Florida Rule of Civil Procedure I.442 may be applied retroactively and finding that defendant did not unreasonably reject the plaintiffs demands for judgment under rule 1.442 and section 45.061. I dissent from the majority's approval of the district court's holding that section 768.79 provides for an award of attorney fees regardless of the reasonableness of an offeree's rejection of an offer of judgment.

I disagree for several reasons with the majority's approval of the construction of section 768.79, Florida Statutes (1991), provided in *Schmidt v. Fortner*, 629 So.2d 1036 (Fla. 4th DCA 1993). First, I find that as a result of the 1990 amendments to the statute, there is a significant difference between section 768.79, Florida Statutes (1987), the provision applicable in this case, and section 768.79, Florida Statutes (1991), which was interpreted in *Schmidt*.[4] In approving *Schmidt* with regard to the 1987 version of the statute, the majority fails to recognize the material distinctions between the two versions of the statute. Furthermore, I find that *Schmidt* and, consequently, the majority erroneously interpreted section 768.79, Florida Statutes (1991), so as to eliminate any discretion of the trial court in awarding attorney fees.

An initial analysis of section 768.79 reveals that the statute should be strictly construed. There is a long-standing adherence in Florida law to the "American Rule" that attorney fees may be awarded by a court only when authorized by statute or agreement of the parties.[5] See *P.A.G. v. RF.*, 602 So.2d 1259,

3. Subsequent references to section 768.79 are to the 1987 version unless otherwise indicated.

4. In 1987, paragraph (I)(a) of the statute read as follows:

> (I)(a) In any action to which this part applies, if a defendant filed an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment far the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiffs award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

§ 768.79, Fla.Stat. (1987). In 1990, the statute was substantially amended, and subsection (6) was added stating in part:

> (6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:
>
> (a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.
>
> (b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

§ 768.79, Fla.Stat. (1991).

5. We have recognized a limited exception to the American Rule, *see Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1148 (Fla. 1985), *modified an other grounds by Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla.1990), but that exception is not applicable here.

1260 (Fla.1992); *Rowe, 472* So.2d at 1147–48; *Main* v. Benjamin *Foster* Co., 141 Fla. 91, 192 So. *602, 604 (1939); Brite v. Orange Belt Securities* Co., 133 Fla. 266, 182 So. 892 (1938). Accordingly, statutes such as section 768.79, which authorize an award of attorney fees, must be strictly construed, *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n,* 539 So.2d 1131 (Fla. 1989); *DeRosa v. Shands* Teaching *Hospital & Clinics, Inc.,* 549 So.2d 1039 (Fla. 1st DCA 1989). Moreover, this attorney-fee provision is a sanction for failing to settle for the amount of a demand *or offering. See Leapai v. Milton,* 596 So.2d 12, 15 (Fla.1992); *Florida* Bar *re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment),* 550 So.2d 442 (Fla.1989). Statutes awarding attorney fees in the nature of a penalty must also be strictly construed. Sea Wilmington *Trust Co. v. Manufacturers Life Ins. Co., 749* F.2d 694, 700 (11th Cir.1985).

The rules of statutory construction require all parts of a statute to be read together in order to achieve a consistent whole. *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla.1992). In reading section 768.79 as a whole, I conclude that it first creates statutory authority for awarding attorney fees if the twenty-five percent condition in paragraph (I)(a) is fulfilled.[6] The statute then provides the trial court criteria in subsection (2) with which to decide if the statutorily authorized attorney fees should be awarded.' In sum, the trial court maintains the discretion to deny an award of fees, and paragraphs (Z)(a) and (2)(b) provide criteria for the trial court to use in exercising that discretion.

In *Schmidt,* the district court likewise recognized that paragraph (l)(a) of the statute [8] only creates statutory authority which may lead to an award of attorney fees. 629 So.2d at 1040. The district court then concluded, however, that an award of fees is mandated if a party meets the twenty-five percent condition. The court found that a trial court has discretion to decide whether to award fees only when paragraph (7)(a) of the statute is implicated.[9] To reach this conclusion the district court relied upon subsection (6) of the 1991 version of the statute. The court concluded that it was through subsection (6) that the entitlement to attorney fees translated into a tangible award. ***Id.*** at 1040-41. However, subsection (6) was not included in the 1987 version of the statute and therefore is not applicable to this case.

Because subsection (6) was not a part of the 1987 version of the statute, under the majority's decision in this case, it must be subsection (2) of section 769.79, Florida Statutes (1987), that mandates an award of attorney fees. However, the criteria listed in subsection (2) are clearly criteria intended for the court to consider in determining whether the demand or offer of judgment was reasonably rejected. The criteria simply do not fit logically into the assessment of the reasonableness of the amount of an award of

6. The statute specifically provides that the defendant or plaintiff "shall be *entitled* to recover . . attorney's fees" if the twenty-five percent condition is met. § 748.79, Fla.Stat. (1987).

7. Subsection (2) provides:

(2)(a) If a party is entitled to costs and fees Pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim that was subject to the offer.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

§ 768.79, Fla.Stat. (1987).

8. Paragraph (l)(a) of the *1987* and *1991* versions of the statute are the same.

9. Paragraph (7)(a) is the same as paragraph (2)(a) in the 1987 version of the statute.

attorney fees, nor does the plain language of subsection (2) mandate an award of fees.

If section 768.79 is to be read as a consistent whole in compliance with our *Forsythe* decision, paragraphs (2)(a) and (2)(b) must be read collectively. When read collectively, paragraph (2)(a) sets forth one basis upon which the court may disallow an award of fees, i.e., that the offer was not made in good faith, and paragraph (2)(b) provides criteria for determining the reasonableness of awarding attorney fees when an offer is made in good faith. For example, it is possible that a court, in applying the criteria in subparagraph (2)(b)3., might find that it was reasonable for the opposing party to reject a demand or offer for settlement that was made in good faith because of the closeness of the questions of law or fact in the case. That is apparently what occurred in this case wherein the demand for settlement was in good faith but was turned down because of the closeness of the question of liability on the part of the defendant. By reading the statute in this way, all subsections of the statute are made compatible. I would therefore quash the district court's decision reversing the trial court's denial of attorney fees based upon section 768.79, Florida Statutes (1987).

I do agree with the Schmidt court's conclusion that subsection (6) of the 1991 version of section 768.79 concerns how the "entitlement" to an award of attorney fees is to be translated into a tangible award. Paragraphs (6)(a) and (6)(b) state that if the twenty-five percent condition is fulfilled, the party entitled to an award of fees pursuant to subsection (1) of the statute "shall be awarded . . . attorney's fees calculated in accordance with the guidelines promulgated by the Supreme Court." § 768.79, Fla.Stat. (1991). I conclude that the guidelines to which the statute refers are those set forth in rule 4-1.5 of the Rules Regulating The Florida Bar. It follows then that subsection (6) was added to the statute to expressly provide a trial court with criteria for determining the amount of attorney fees to be awarded if it is determined that the award itself is reasonable.

The inclusion of this statement in subsection (6) thus provides further support for the conclusion that the criteria set forth in paragraph (2)(b) of the 1987 version of the statute are criteria which the trial court is to use to decide whether an award of attorney fees can be reasonably made in a particular case. If paragraph (Z)(b) contained criteria for the court to use in determining the reasonableness of an amount of attorney fees rather than the reasonableness of awarding attorney fees, then the inclusion of that paragraph in the 1991 version of the statute as paragraph (7)(b) would have been redundant because subsection (6) already provides criteria for determining the reasonableness of the fee amount.

I do not agree, however, with the *Schmidt* court's conclusion that paragraph (7)(b) obviously relates back to subsection (6) of section 768.79, Florida Statutes (1991), and thereby makes an award of fees mandatory. It obviously does not. As noted, paragraph (7)(b) in the 1991 version of the statute existed as paragraph (2)(b) in the 1987 version before *subsection* (6) existed. What is obvious and logical, therefore, is that paragraph (7)(b) relates to paragraph (7)(a) just as paragraph (2)(b) in the 1987 version of the statute related to paragraph (2)(a).

In conclusion, I do not believe that the addition of subsection (6) makes the 1991 version a mandatory attorney-fee provision. Regardless, that version of the statute is not applicable to this case. I would therefore disapprove Schmidt and approve the decision in *Bridges* v. N&on, 556 So.2d 1170 (Fla. 3d DCA 1990), to the extent that it conforms with this opinion.

INQUIRY CONCERNING a Judge, No. 94-222, re Raphael STEINHARDT.

No. 85711.

Supreme Court of Florida.

Nov. *22, 1996.*

Judicial disciplinary proceeding was brought. The Supreme Court held that

2. Damages ⇐188(3)

Evidence did not support award of $3,600 compensatory damages for automobile dealer customer's loss of use of vehicle, in action in which the dealer was found liable for civil theft and fraud; only that portion of compensatory damages which constituted award for parts charged and not replaced would be affirmed.

Marshall G. Curran, Jr., Fort Lauderdale, for appellant.

Patrice A. Talisman of Daniels & Hicks, P.A., and Henry T. Courtney, Miami, for appellee.

PER CURIAM.

[1, 2] The defendant automobile dealer was found by the jury to be liable for civil theft [1] and fraud, having charged its customer for (a) replacement of two parts when it had only repaired the vehicle and not replaced the parts and (b) replacement of a third part which it neither replaced nor repaired. It assessed punitive damages of $25,000.00, which we affirm.[2] It also awarded compensatory damages of $3,847.75, of which $247.75 is explained by the charges for replacement of the same parts, and the balance ostensibly being for loss of use of the vehicle. We affirm only that portion of the compensatory damages which constituted an award of $247.75 for the parts charged and not replaced, there being no basis on the record for the additional $3,600.00. We remand with direction to correct the final judgment by reduction of the total thereof to $25,247.75.

HERSEY, C.J., and DOWNEY and GLICKSTEIN, JJ., concur.

On Motion for Rehearing

ORDERED that Appellee's October 22, 1985 Motion for Rehearing is granted. The opinion of this Court of October 16, 1985 is amended to reflect that the final judgment is reduced to $25,743.25.

Morty MARKS, as Personal Representative of the Estate of Michael Marks, deceased, and on Behalf of Morty Marks, individually, Appellant,

v.

Richard MANDEL, M.D., Paul Baum, Ira Bloomfield, M.D., P.A., Palmetto General Hospital, Florida Patients' Compensation Fund and Allstate Insurance Company, Appellees.

Nos. 83-2803, 83-2906.

District Court of Appeal of Florida, Third District.

Oct. 22, 1985.

Rehearing Denied Nov. 20, 1985.

Father of deceased accidental shooting victim brought wrongful death action against hospital, physicians and owner of gun. The Circuit Court for Dade County, James C. Henderson, J., entered judgment in favor of defendants, and father appealed. The District Court of Appeal held that: (1) trial court erred in excluding from evidence hospital's emergency room policy and procedure manual; (2) evidence was sufficient to go to jury on issue of liability of hospital and emergency room supervisor for failure of on-call system to produce specialist in a timely fashion; and (3) physician who professed great familiarity with

1. See *Roush v. State*, 413 So.2d 15 (Fla.1982) for a discussion of the relevant statute and its application to consumer fraud. The standard of proof in such cases is a preponderance of the evidence. See *Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So.2d 1157, 1163 (Fla. 3d DCA 1984).

2. *See Hutchens v. Weinberger*, 452 So.2d 1024 (Fla. 4th DCA 1984), *rev. denied*, 459 So.2d 1040 (Fla.1984) for nondisturbance of an evidentiary conclusion on this question.

standard of care for emergency rooms and on-call systems was fully competent to testify as an expert.

Reversed and remanded with instructions.

1. **Hospitals** ⇐8

Trial court erred in excluding from evidence hospital's emergency room policy and procedure manual, in wrongful death action against hospital alleging negligence and failure of on-call system to produce thoracic surgeon and failure of hospital staff to send patient to a different hospital with a trauma center, where manual set out in detail how on-call system should operate and detailed procedure for responding to calls from ambulance.

2. Hospitals ⇐8
Physicians and Surgeons -18.90

Evidence was sufficient to go to jury in wrongful death action on issue of liability of hospital and emergency room supervisor for failure of on-call system to produce thoracic surgeon in a timely fashion, where on-call system failed to have specialist attending to emergency room patient within 30 minutes of call, which was national standard adopted by hospital in its published policy. West's F.S.A. § 768.45.

3. Evidence ⇐538

Physician who professed great familiarity with standard of care in the United States for emergency room treatment and securing on-call specialists was fully competent to testify as expert in wrongful death action against hospital and physicians. West's F.S.A. § 768.45(2)(c).

4. Trial ⇐256(9)

Trial court erred in giving additional instructions on ordinary care which were confusing and misleading, after having already instructed jury according to standard jury instructions.

Cohen & Cohen, Miami Beach, Greene & Cooper and Joan M. Bolotin, Miami, for appellant.

Blackwell, Walker, Gray, Powers, Flick & Hoehl and James C. Blecke, Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern and John W. Wylie, Adams, Hunter, Angones & Adams and Christopher Lynch, Daniels & Hicks and Elizabeth K. Clarke, George, Hartz, Burt & Lundeen, Miami, for appellees.

Before HENDRY, NESBITT and BASKIN, JJ.

PER CURIAM.

This is an appeal by Morty Marks, as personal representative of the estate of his son, Michael Marks, from a final judgment entered upon an adverse jury verdict. We affirm the directed verdict in favor of appellees Baum and Allstate Insurance Company and reverse and remand for a new trial on all issues pertinent to the remaining appellees.

This cause arose out of a tragic accident in which the deceased was shot in the chest when the World War II vintage handgun his friend was using misfired. The accident occurred at 1:20 p.m. and the rescue unit was at the scene by 1:50 p.m. The paramedics contacted Palmetto General Hospital (the closest hospital to the accident site) at 2:00 p.m. Dr. Richard Mandel, a third year orthopedic resident who was working as the on duty emergency room doctor that day, instructed the rescue unit to bring Marks to Palmetto General. Dr. Mandel did not attempt to contact the on call thoracic surgeon at that time because he believed that Marks had an injury to the right lung with the bleeding coming from either the lung itself or a blood vessel beneath the rib and that treating the wound would require only minor surgical procedures.

Marks arrived at Palmetto General at 2:20 p.m. and at that point Dr. Mandel realized that a thoracic surgeon was needed. The first call was made to a thoracic surgeon at 2:20 p.m. For a variety of reasons an available thoracic surgeon was

not located until 3:25 p.m.[1] He arrived at 3:45 p.m. and surgery began immediately. Michael Marks died at 4:45 p.m.

The personal representative filed a wrongful death action against Baum, alleging that he negligently entrusted the handgun, which he knew to be dangerous, to Marks' friend.[2] The personal representative also filed suit against Palmetto General Hospital and Dr. Ira Bloomfield who had contracted with Palmetto General to run the emergency room, alleging 1) that they were responsible for the failure of the on call system to produce a thoracic surgeon in a timely fashion and 2) that they were vicariously liable for Dr. Mandel's failure to diagnose the injury as serious when he was first contacted by the paramedics. The complaint alleged that as a result of Dr. Mandel's failure to diagnose the seriousness of the injury, the search for an available thoracic surgeon was delayed for at least twenty minutes. Finally, the personal representative filed suit against Dr. Mandel personally, alleging that he should have tried to contact a thoracic surgeon immediately upon receipt of the paramedics' report at 2:00 p.m., or that he should have sent Marks directly to Jackson Memorial Hospital, which, at the time this accident occurred, was the only hospital in Dade County with a fully staffed trauma center.[3]

The cause waa tried before a jury. At the close of Marks' case the trial court granted a partial directed verdict in favor of Palmetto General and Dr. Bloomfield on the agency issue, ruling as a matter of law that neither defendant was responsible for the failure of the on call system to produce a thoracic surgeon in a timely manner. Because the jury found no negligence on the part of Dr. Mandel, the issue of the vicarious liability of Palmetto General and Dr. Bloomfield was obviated. This appeal ensued.

[1] Appellant raises several issues on appeal. As his first point, appellant argues that it was error for the trial court to exclude as evidence Palmetto General's emergency room policy and procedure manual. We agree. The manual sets out in detail how the on call system should operate. In a section entitled "Emergency Room Coverage" the manual states:

> Emergency medical care is provided by but not limited to the following:
>
> 1). An Emergency Room contract physician with specialty consultation within thirty (30) minutes.

Further sections, entitled "Response to Calls," detail when and how often the emergency room personnel will attempt to contact a physician, either by telephone or by page and, significantly, what future action will be taken against a doctor who fails to respond. Additionally, the manual contains a section on patient transfers to Jackson Memorial Hospital. Since appellant's complaint alleged negligence in both the failure of the on call system to produce a thoracic surgeon within thirty minutes and the failure of the hospital staff to send

1. The first on call thoracic surgeon was in emergency surgery at another hospital. After determining that no other thoracic surgeon was in the hospital, calls were placed to Dr. Zequeria, the second on call thoracic surgeon, at 2:40, 2:45, 3:00, 3:05 and 3:15 p.m. He telephoned at 3:25 p.m.-but not because he received the messages from the emergency room. He just happened to call in regarding a patient of his own who was scheduled for surgery the next day. In the meantime, the emergency room contacted several general surgeons, two of whom responded and performed surgery with Dr. Zequeria.

2. Because we are affirming the trial court's directed verdict in favor of Baum, we will not address this issue.

3. At the time of this accident, the policy of Dade County's medical rescue service was to contact the nearest "qualified emergency medical hospital" when it had a seriously injured person. The on duty emergency room doctor would then decide, based either on his own determination or on hospital policy, whether to have the patient brought into that emergency room or to have the patient taken to another hospital better equipped to handle the injuries. With the advent of Dade County's new regional trauma center network, however, this procedure has been modified. Patients with certain types of trauma, such as gunshot wounds, will be taken automatically to the nearest trauma center, not to the nearest hospital.

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Marks on to Jackson Memorial Hospital, the manual contained relevant information which should have been given to the jury. Courts have held repeatedly that these internal manuals should be admitted when they contain either 1) evidence of a general industry custom or standard, or 2) evidence that the defendant violated its own policy or an industry standard. *Nesbitt v. Community Health of South Dade, Inc.*, 467 So.2d 711 (Fla. 3d DCA 1985); *Stambor v. 172nd Collins Corp.*, 466 So.2d 1296 (Fla. 3d DCA 1985); *Clements v. Boca Aviation*, Inc., 444 So.2d 597 (Fla. 4th DCA 1984); *Nance v. Winn Dixie Stores, Inc.*, 436 So.2d 1075 (Fla. 3d DCA 1983), *rev.* denied, 447 So.2d 889 (Fla.1984). Thus, on retrial, the emergency room policy and procedure manual should be admitted and the trial court should give the relevant jury instructions pertaining to evidence of general standards or of specific policies. See *Nesbitt v. Community Health, 467* So.2d at 715.

[2] Appellant's second issue concerns the partial directed verdict entered in favor of Palmetto General and Dr. Bloomfield on the issue of the failure of the on call system to produce a thoracic surgeon in a timely fashion. Again, we agree that this was error. Appellees Palmetto General and Bloomfield assert that there can be no vicarious liability imposed on them because appellant did not allege that any of the surgeons who finally responded committed any negligent acts. We do not believe that the issue. Rather, the issue concerns who is going to assume ultimate responsibility for the entire on call system, a system which was designed and operated by the hospital and the doctor who contracted to run the emergency room, when that system fails. Extensive trial testimony proved that the local and national standard for on call systems is to have a specialist actually attending to the patient within thirty minutes of the call to the physician. Palmetto General had a published policy which adopted this standard. In the case at bar, however, the fact that a thoracic surgeon eventually attended to Marks was a matter of coincidence and not a result of the on call system. The system failed. A jury should decide whether the failure was a breach of the standard of care owed to Michael Marks, see § 768.45, Fla.Stat. (1979), and whether Palmetto General and/or Dr. Bloomfield should bear ultimate responsibility for the failure of the on call system to work in this case. See generally *Jaar* v. *University of Miami, 474* So.2d *239* (Fla. 3d DCA 1985) (en banc).

[3, 4] The other points raised on appeal merit only brief attention. First, Dr. West was fully competent to testify as an expert under section 768.45(2)(c) and it was error to exclude his testimony. Dr. West professed great familiarity with the standard of care in the United States for these types of cases; there is no difference in that standard in Dade County. *Schwab v. Tolzey*, 345 So.2d 747, 753 (Fla. 4th DCA 1977). Second, having instructed the jury on the standard of reasonable or ordinary care, as explained in Florida Standard Jury Instruction (Civil) 4.2, the trial court erred in then giving additional instructions on ordinary care which were confusing and misleading. *Webb* v. *Priest*, 413 So.2d 43 (Fla. 3d DCA 1982).

Finally, we hold that the court erred, under the circumstances of this particular case, in limiting the number of expert witnesses that plaintiff could call.

Reversed and remanded with instructions.

Ben COHN, Appellant,

v.

DEPARTMENT OF PROFESSIONAL REGULATION, Appellee.

No. 84-1217.

District Court of Appeal of Florida, Third District.

Oct. *22,* 1985.

Board of Pharmacy ordered revocation of pharmacist's license, and pharmacist ap-

1

Timothy Leroy COOPER, Appellant,

v.

The STATE of Florida, Appellee.

No. 97-2000.

District Court of Appeal of Florida, Third District.

San, 28, 1998.

An Appeal from the Circuit Court for Dade County, Jeffrey Rosinek, Judge,

Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, for appellant.

Robert A. Butter-worth, Attorney General, and Christine E. Zahralban, Assistant Attorney General, for appellee.

Before NESBITT and GODERICH, JJ., and BARKDULL, Senior Judge.

CONFESSION OF ERROR

PER CURIAM.

As the State properly concedes, the trial court erred by adjudicating the defendant, Timothy Leroy Cooper, guilty of both robbery with a firearm, section 812.13(2)(b), Florida Statutes (1995), and unlawful possession of a firearm while engaged in a criminal offense, section 790.07(2), Florida Statutes (1995). *Cleveland v.* State, 587 So.2d 1145 (Fla.1991) ("[W]hen a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony under section 790.07(2)."). Accordingly, the defendant's conviction and sentence for unlawful possession of a firearm while engaged in a criminal offense is vacated and this cause is remanded for resentencing.

2

Gusmane GLIEYE, Appellant,

v.

The STATE of Florida, Appellee.

No. 97-3078.

District Court of Appeal of Florida, Third District.

May 28, 1998.

An appeal from the Circuit Court of Dade County, Richard V. Margolius, Judge.

Bennett H. Brummer, Public Defender, and Susanne M. Froix, Assistant Public Defender, for appellant.

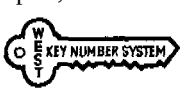
Robert A Butterworth, Attorney General, and Christine E. Zahralban, Assistant Attorney General, for appellee.

Before GREEN, FLETCHER, and SHEVIN, JJ.

PER CURIAM.

We affirm appellant's conviction. However, we accept the State's confession of error regarding sentencing and reverse and remand for prompt resentencing within the guidelines range. See *State* v. *Varner*, 616 So.2d 988 (Fla. 1993); State v. *Tyner*, 506 So.2d 405 (Fla. 1987). The resentencing aspect of this opinion shall be acted upon by the trial court forthwith.

Affirmed in part; reversed in part.



3

McFARLAND & SON, INC., etc., et **al., Appellant/Cross-Appellees,**

v.

Royal Mende BASEL and Steven Kane, etc., Appellees/Cross-Appellants.

Nos. 98-614, 98-969.

District Court of Appeal of Florida, Fifth District.

Jan. 15, 1999.

Rehearing Denied March 18, 1999.

Co-guardians of car passenger, who was injured when car was struck by truck,

brought negligence action against car driver's estate, truck driver, and truck driver's employer. The Circuit Court, Brevard County, Frank R. Pound, Jr., J., entered final judgment against truck driver and employer in amount of $5,124,080 in economic damages and $200,000 in noneconomic damages, and in amount of $250,000 in noneconomic damages solely against employer. Driver and employer appealed. The District Court of Appeal, Goshorn, J., held that: (1) employer was not liable for negligent hiring, training, or supervision of truck driver; (2) guardians' experts could testify as to results of their accident simulations, which were conducted with exemplar car's headlights on; and (3) guardians failed to comply with offer-of-judgment rule.

Reversed and remanded.

1. Automobiles ⇐201(1.1)

Failure of truck driver's employer to farce him to completely fill out his employment application did not constitute negligent hiring, even though Interstate Commerce Commission (ICC) regulations provided that a person could not drive commercial vehicle until application for employment was completed; failure to fill out application did not cause accident, and none of the matters that driver failed to report would have disqualified him from driving. 49 C.F.R. § 391.21.

2. Negligence ⇐6

Simple violation of a licensing statute, unless the violation can be shown to be directly related to the incident, is not proof of negligence.

3. Negligence ⇐56(3)

Without proof of a causal connection between the regulatory restriction and the incident, the finding of liability based on a regulatory deficit is unsustainable.

4. Automobiles ⇐197(1), 201(1.1)

Employer was not liable for negligently training track driver who struck car parked across driving lane of interstate highway; there was no evidence that driver's action in attempting to avoid striking car was that of an untrained driver, or even that training would have prevented driver from responding as he did in the situation.

5. Automobiles ⇐201(1.1)

Failure of truck driver's employer to teach driver how to properly fill out his driving logs did not constitute negligent supervision; accident still would have occurred even if driver had not violated reporting regulations and even if employer had required driver to properly maintain his logbook.

6. Evidence ⇐557

In negligence action arising from collision between truck and car, car passenger's experts could testify to results of their accident simulations, which were conducted with exemplar car's headlights on, despite arguments of truck driver and his employer that there was no basis to conclude that headlights were on before accident; evidence was consistent with finding that lights were on at time of accident, and arguments of truck driver and employer went to weight of evidence, not its admissibility.

7. Evidence ⇐150

Trial court's conclusion as to the similarity of the experiment to the event is a matter within the court's discretion.

8. Costs ⇐42(2), 194.50

In action brought by guardians of car passenger injured in accident against car driver's estate, truck driver, and truck driver's employer, guardians' offer of judgment did not comply with rule requiring a joint proposal to state the amount and terms attributable to each party, and thus guardians were not entitled to attorney fees and costs; offer was directed to employer, truck driver, and personal representative of car driver's estate, yet no separate amount attributable to car driver or any other defendant was made. West's F.S.A. RCP Rule 1.442(c)(3).

Michael V. Elsberry and Harry W. Lawrence of Lowndes, Drosdick, Doster, Kantor & Reed, PA., Orlando, for Appellants/Cross-Appellees.

Edna L. Caruso and Russell S. Bohn of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, and 0. John Alpizar of

Alpizar, Ville, Torres & Camfield, Palm Bay, for Appellees/Cross-Appellants.

GOSHORN, J.

McFarland & Son, Inc. and Jonathan Queen (Defendant& appeal the final judgment rendered on the jury verdict issued in the negligence suit fled by Royal Easel and Steven Kane (Plaintiffs) as co-guardians of Mark Basel, a passenger in the car hit by a truck driven by Queen. Defendants assert numerous errors occurred in the course of the trial, one of which we find dispositive. Plaintiffs cross-appeal the denial of their motion for costs and fees under their offer of judgment.[1]

Jonathan Queen was driving an eighteen-wheel car carrier for his employer, McFarland & Son, -Inc., at 2:00 a.m. on August 6, 1994. He was headed north on I-95 and had just crossed over the Garden Street overpass in Titusville when he saw a 1984 Grand Prix parked across the right-hand lane and extending perhaps seven inches into the left lane. Later measurements showed the car was between 800 and 924 feet from the top of the overpass. According to Queen, the car's lights were off. He swerved to the left and braked, jack-knifed, and hit the car. The car driver, Jean Ann Basel, was killed instantly; her husband, Mark, was ejected from the car and suffered extreme permanent brain injury.

Mark's injuries left him without memory of the accident. Friends of the two testified Mark was living apart from Jean.[2] The night of the accident, the two coincidentally wound up at the same bar and left together in Jean's car. Blood tests showed both were legally drunk at the time of the accident. There is no explanation for how or why the two ended up parking at a 70-degree angle across I-95.

Plaintiffs filed a negligence suit against Jean's estate, Queen, and McFarland & Son, Inc. and later successfully moved to amend their complaint to add a count against McFarland & Son, Inc. for the negligent hiring, training, and supervlsion of Queen. We reverse because of the error in denying McFarland & Son, Inc.'s motion for directed verdict on this count.[3]

111 The evidence was simply insufficient to have gone to the jury on the issue of McFarland & Son, Inc.'s negligent hiring, training, and supervision of Queen. At trial, it was established that Queen had been driving for McFarland & Son, Inc. for two years prior to the accident without incident and that Queen had a valid commercial driver's license. Plaintiffs' expert discovered, however, that Queen had not completely filled out his application for employment with McFarland & Son, Inc. The Interstate Commerce Commission (ICC) regulations provide that a person "shall not drive" a commercial vehicle until the application for employment is completed. 49 C.F.R. § 391.21. McFarland & Son, Inc. allowed Queen to drive without forcing Queen to comply with this regulation. According to the expert, Queen should not have been driving the night of the accident, although the expert admitted the failure to fill out the application did not cause the accident. In fact, none of the matters which Queen failed to report would have disqualified him from driving for McFarland & Son, Inc.

[2, 3] The simple violation of a licensing statute, unless the violation can be shown to be directly related to the incident, is not proof of negligence. *Brackin v. Boles,* 452

1. By separate appeal (case # 98-969), Defendants challenge the propriety of the post-judgment order awarding Plaintiffs their costs pursuant to section 57.041, Florida Statutes. The two cases, # 98-614 and # 98-969, were consolidated for appellate purposes. Our reversal of case # 98-614 necessitates the reversal of the order appealed in case # 98-696.

2. In fact, the accident occurred on a Saturday and the couple's final divorce hearing was scheduled for that Monday.

3. Following a lengthy trial, the jury found Queen 20% liable, McFarland & Son, Inc. 25% liable, Jean 45% liable, and Mark 10% liable. Total damages for Mark were assessed at $6,693,422. Final judgment was entered against Queen and McFarland & Son, Inc. jointly and severally for $5,124,079.80 in economic damages and $200,000 in noneconomic damages, An additional $250,000 was charged solely to McFarland & Son, Inc. for noneconomic damages.

So.2d 540 (Fla.1984). Without proof of a causal connection between the regulatory restriction and the incident, the finding of liability based on a regulatory deficit is unsustainable. See *Dorsett* v. *Dion*, 347 So.2d 826 (Fla. 3d DCA 1977).

[4] Plaintiffs assert there was evidence of negligent training, too, which would support the denial of the directed verdict on this count. They contend that McFarland & Son, Inc. knew Queen had never driven an eighteen-wheel rig before, yet only gave him a 50–mile road test and had him ride with another driver for three weeks before putting him on the road in his own rig. McFarland & Son, Inc. gave Queen no formal training on braking. The evidence showed that Queen locked his brakes one half second prior to impact, causing him to lose his ability to steer around the car.

Queen had *only* a few seconds to figure out how to avoid the emergency situation presented: a car parked at a 70–degree angle across the driving lane of an interstate highway at 2:00 a.m. at most 924 feet from the crest of an overpass. He chose to steer and brake to avoid the car, unfortunately locking the brakes in the process. There was no evidence that his action was that of an untrained driver, or even that training would have prevented Queen from responding as he did in this situation.

151 As to the supervision aspect, Plaintiffs assert McFarland & Son, Inc.'s failure to teach Queen how to properly fill out his driving logs led to the accident because Queen was falsifying his driving records. They state McFarland & Son, Inc. was aware Queen was not filling in his mileage and if McFarland & Son, Inc. had checked, it would have determined the mileage showed Queen was driving more hours than allowed. However, there is no nexus between improper bookkeeping and the accident. Even if Queen had not violated the ICC Reporting Regulations and even if McFarland & Son, Inc. had required Queen to properly maintain his logbook, the accident would have still occurred. The portion of the final judgment finding that McFarland & Son, Inc. was negligent in hiring, training, and supervising Queen is reversed.

[6, 7] Because our reversal necessitates a new trial, we comment on an additional argument made by Defendants. Defendants argued strenuously both here and below that it was error to allow Plaintiffs' experts to testify to the results of their accident simulations, which simulations were conducted with the exemplar car's headlights on. Defendants contend that just because the light switch was in the "on" position at the end of the crash and the bulb filaments may be consistent with the headlights having been on at the moment of impact, there is no basis to conclude the headlights were on the entire 8.4 seconds before the accident. We disagree. Defendants' argument goes to the weight of the evidence, not its admissibility. The fact that the headlights were on at the moment of impact raises the permissible inference they were on the 8.4 seconds it took Queen to reach the car after cresting the hill. *See Detroit Marine Eng'g, Inc. v. Maloy*, 419 So.2d 687 (Fla. 1st DCA 1982) (evidence that boat steering wheel was found underwater near the body leads to logical and permissible inference that decedent was holding the wheel when it broke and that the breaking of the wheel was the cause of death). Further, the court's conclusion as to the similarity of the experiment to the event is a matter within the court's discretion. *Vitt v. Ryder Truck Rentals, Inc.*, 340 So.2d 962 (Fla. 3d DCA 1976). No abuse of discretion has been demonstrated.

Turning now to the cross-appeal of the denial of Plaintiffs' motion for fees and costs under their offer of judgment, Plaintiffs proposed settlement as follows:

> COME NOW the Plaintiffs, ROYAL MENDE BASEL and STEVEN KANE as Co-Plenary Guardians of the person and property of MARK VICTOR BASEL, by and through their undersigned counsel, and pursuant to § 768.79, Florida Statutes, hereby serves this Offer of Judgment on Defendants, MCFARLAND & SONS, INC., a foreign corporation, JONATHAN QUEEN, and BETTY ANN SWIFT, as Personal Representative of the Estate of JEAN ANN HARTY BASEL, deceased, in the amount of Two Million Dollars

($2,000,000.00) as to the claims pending against Defendants. This Offer of Judgment is being served on Defendants jointly*

[8] Post-trial, Plaintiffs moved for attorneys' fees and costs pursuant to section 763.79. Defendants moved to strike the motion and argued at the hearing thereon that the offer did not comply with the provision in Florida Rule of Civil Procedure 1.442(c)(3) that "[al proposal may be made by or to any party or parties and by or two any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party." The court found that the offer was void for failure to comply with the particularity requirement of rule 1.442(c)(3). We agree.

The instant offer obviously did not comply with the express requirements of rule 1.442(c)(3). It was directed not only to McFarland & Son, Inc. and Queen, but also to Betty Swift, the personal representative of Jean Easel's estate, yet no separate amount attributable to Jean, or any other Defendant, was made. Because an offer of judgment is made before anyone knows the result of the case, the efficacy of the offer must be analyzed as it would be at the time it was made. Pre-trial there was no way for the Defendants to know that the bulk of the damages would be economic and the percentage of fault of Plaintiff would be less than the percentage of fault applicable to any particular Defendant. See section 768.81(3), Fla. Stat. (1997).[4]

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, Inc.*, 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 Plaintiffs' motion for fees and costs under their offer of judgment.

REVERSED and REMANDED for further proceedings.

THOMPSON, J., and BLACKWELL-WHITE, A., Associate Judge, concur.

Martin **CARABELLA**, Appellant,

v.

STATE of Florida, Appellee.

No. **98-0427**

District Court of Appeal of Florida, Fourth District.

Feb. 3, 1999.

Testimony was excluded, upon state's hearsay objection, by the Circuit Court, Broward County, Fred J. Berman, J. Appeal was taken. The District Court of Appeal held that appellant's failure to raise arguments for admissibility in trial court failed to preserve for appeal contention that statements were not

4. This section provides:

In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.