ORIGINAL

IN THE SUPREME COURT

TALLAHASSEE, FLORIDA

CASE NO. 00-1155

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

Petitioners,

vs.

DEWEY L. GAULDIN,

Respondent
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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CERTIFICATE OF FONT SIZE

The undersigned certifies that the type size and style of the Brief of Respondent on Jurisdiction is Courier, 12 point, a font that is not proportionately spaced.

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PREFACE

This brief responds to Petitioners' Petition to Invoke the Court's discretionary jurisdiction. The parties will be referred to by their proper names or as they appeared below. The following designations will be used:

(A) - Respondent's Appendix

STATEMENT OF THE CASE AND FACTS

Plaintiff, Dewey Gauldin, a pedestrian on a sidewalk in front of a business, was injured when a 300 lb. jukebox came flying out of the back of a pickup truck, which had backed into a 45 degree parking space with its rear-end facing the sidewalk (A1-3). Defendant, Arthur P. Strahan, Jr., was loading the jukebox onto the bed of the pickup truck, He pulled the jukebox onto a power liftgate attached to the rear of his truck, pressed a lever and raised the lift to the level of the truck's bed (A1-2). Defendant pulled the jukebox onto the bed of the truck, and was attempting to rotate it, when for some unknown reason he lost control of the jukebox, It went flying out of the pickup truck and hit Plaintiff in the back (Al-2).

Strahan admitted that he was the only person in control of the jukebox "just prior to its conversion into the missile that struck Gauldin" (A2). He could not explain and had no idea what caused him to lose control of the jukebox. He speculated ("assumed") that the wheels may have caught on something, but he could not say what (A2).

It was undisputed that Plaintiff had his back to the pickup truck and never saw the jukebox falling (A2). On deposition, he speculated as to what caused the jukebox to fall. He testified that after the jukebox hit him, he saw Defendant sitting in the bed of the truck in some grease, so he concluded Defendant had slipped on the grease (A2-3).

At trial, the court gave a *res ipsa* loquitur jury instruction. The jury returned a verdict in favor of Plaintiff and against Defendants. Defendants appealed claiming the *res ipsa loquitur* jury instruction should not have been given, The Fifth District affirmed stating (A3):

> 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.

The Fifth District also held that Plaintiff's Offer of Judgment was valid, even though it did not apportion the amount between the Defendant directly liable, Strahan, and the other vicariously liable Defendants, stating:

> We do not agree with the Strahans that McFarland controls the result in this case. An important

difference between *McFarland* and the instant case is that in *McFarland,* liability, pursuant to the allegations of the complaint, could be allocated on the basis of fault among each of the defendants. In *McFarland,* there were separate issues relating to the negligence of each 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.

SUMMARY OF ARGUMENT

The Fifth District's opinion does not directly and expressly conflict with any other Florida appellate decisions. The *res ipsa loquitur* jury instruction was correctly given under the facts of this case. In fact, this "flying jukebox case" is not unlike the cases Defendant cites for conflict.

There is no direct and express conflict regarding the giving of two negligence instructions, because that did not occur here and the Fifth District's opinion does not even address the matter.

PRELIMINARY STATEMENT

Defendant incorrectly states that both sides are seeking review of the Fifth District's opinion. Plaintiff filed a Cross-Notice to Invoke because, if, and only if, this Court accepts

jurisdiction, Plaintiff wishes to raise additional issues. However, Plaintiff's position is that there is no jurisdictional conflict.

ARGTJMENT

Res Ipsa Loquitur

This case has always been referred to by both sides as the "flying jukebox case." The Fifth District's opinion describes the jukebox as becoming a 'missile" (A2) "flying out of" a stationary pickup truck (A3). Defendant did not know what he did wrong that caused him to lose control of the jukebox. Plaintiff had his back to the jukebox, and therefore he did not know what Defendant did wrong. Contrary to Defendant's statement in his brief, Defendants' actions prevented Plaintiff from examining either the truck or the jukebox in order to hire an expert to attempt to reconstruct the accident. Plaintiff requested production of the jukebox and truck. The truck had been disposed of and Defendant did not even know the make of the jukebox.

The Fifth District's opinion does not conflict with any of the cases cited by Defendant. In GOODYEAR TIRE & RUBBER v. HUGHES SUPPLY INC., 358 So.2d 1339 (Fla. 1978), this Court set forth the ***res ipsa loquitur*** doctrine as follows:

> ...It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control.

* * *

> The initial burden is on the plaintiff to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor. (Emphasis added).

Subsequent District Court cases interpreted GOODYEAR as holding that res *ipsa* loquitur did not apply unless direct proof of the probable cause and the probable actor was wanting. Eight years after GOODYEAR was decided, this Court explained in MARRERO v. GOLDSMITH, 486 So.2d 530 (Fla. 1986), that it never intended its GOODYEAR decision or its decision in CITY OF NEW SMYRNA BEACH UTILITIES COMMONS v. McWHORTER, 418 So.2d 261 (Fla. 1982) to be interpreted as holding that res *ipsa loquitur* only applied where there was no direct evidence of negligence available. The Court stated (486 So.2d at 532):

> If a case is a proper res *ipsa* case in other respects, the presence of some direct evidence of negligence should not deprive the plaintiff of the res *ipsa* inference. There comes a point, however, when a plaintiff can introduce enough direct evidence of negligence to dispel the need for inference. According to Prosser:
>
> * * *
>
> 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.*
>
> * * *
>
> . . .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.

This Court addressed the applicability of the doctrine of res ***ipsa loquitur*** in McDOUGALD v. PERRY, 716 So.2d 783 (Fla. 1998), which involved a spare tire flying out from its cradle underneath a truck, becoming airborne and crashing into a following vehicle's windshield. The Court stated that District Court cases had misread and interpreted too narrowly the Court's GOODYEAR opinion. The Court reiterated the fact that an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause. Id. at 785. The Court stated that GOODYEAR and the Court's other cases permit latitude in the application of "res ipsa" when the facts of an accident in and of themselves establish that, but for the failure of reasonable care by the person or entity in control of the injury producing object or instrumentality, the accident would not have occurred. Id. at 785. The Court referred to comments in section 328D of the Restatement (Second) of Torts (1965) that ***res ipsa loquitur*** applies to falling objects. The Court concluded that "res ipsa" applied to the flying spare tire involved in that case since common sense dictated an inference that a spare tire will stay with the truck unless there is a failure of reasonable care by the person or entity in control of the truck. Id. at 786. "Thus an inference of negligence comes from proof of the circumstances of the accident." (emphasis added)

Accordingly, in McDOUGALD this Court rejected the defendant's contention that ***res ipsa loquitur*** was inapplicable because the plaintiff failed to prove that direct evidence of negligence was unavailable. Judge Anstead concurred, citing an 1863 falling

barrel case which held that where a person is injured by something falling upon him from the defendant's premises, the circumstances of the accident give rise to an inference of negligence. This Court also rejected the defendant's contention that the plaintiff failed to establish an inference of negligence because other possible explanations existed to explain the failure of the chain holding the spare tire. The Court concluded that such speculation would not defeat the application of res *ipsa loquitur, so* long as the evidence allowed reasonable people to infer that negligence, "more likely than not" was the cause of the accident, stating:

> The plaintiff is not required to eliminate with certainty all other possible causes or inferences.... All that is required is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event ~~than~~ that there was not. (Emphasis added)

The Fifth District's opinion does not directly and expressly conflict with the above-cited cases. Rather, it correctly applies those cases to these facts. This Court has held that the presence of some direct evidence of negligence does not deprive a plaintiff of a res *ipsa* inference. Accordingly, the fact that Plaintiff could prove that the jukebox fell while Defendant was moving it did not prove why it fell. As this Court held in McDOUGALD, mere proof of the circumstances of the accident, as here, does not defeat application of res *ipsa loquitur.* None of the witnesses could testify exactly why Defendant lost control of the jukebox. Plaintiff had his back to the truck and did not see the jukebox fall. After the jukebox hit him, he saw Defendant sitting in the bed of the truck. From that fact, Plaintiff concluded in his

deposition, that Defendant slipped on grease in the bed of the truck and fell, which shoved the jukebox out of the truck. Obviously, this was supposition on Plaintiff's part since he based it on what he saw after the jukebox hit him.

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

The issue is not whether there was some direct evidence of Defendant's negligence. The issue is whether the two-pronged test espoused by this Court was met, and it clearly was here. First, the jukebox was in Defendant's exclusive control or management. The second prong of the test is also met, i.e., this accident would not, in the ordinary course of events, have occurred without the negligence of Defendant. A jukebox does not ordinarily fly out of a pick-up truck and strike a pedestrian on the sidewalk unless someone has been negligent. This jukebox would not have fallen from the pick-up unless Defendant failed to exercise the proper care in controlling the jukebox while moving it. The circumstances of this accident gave rise to an inference that 'more likely than not" Defendant's negligence in moving the jukebox was the cause of the accident, since the accident is not one that would ordinarily

occur unless there was negligence on the part of the one in control. The burden of going forward with the evidence shifted to Defendant to show that he was not responsible for the accident. That was something he could not do. Accordingly, the Fifth District correctly held that *res ipsa loquitur* applied. The Fifth District correctly applied the above cases, and its opinion does not directly and expressly conflict with those decisions.

OFFER OF JUDGMENT

There is also no direct and express conflict between the Fifth District's opinion and McFARLAND & SON, INC. v. BASIL, 727 So.2d 266 (Fla. 5th DCA 1999). That case involved a joint offer by a plaintiff to three defendants, who were individually liable, and therefore the offer was invalid. This case involves a joint offer to one defendant who was individually liable and other defendants who were vicariously liable only. That distinction accounts for the difference in the results of the cases. See also, DANNER CONSTR. CO., INC, v. REYNOLDS, 25 Fla.L.Weekly D946 (Fla. 2d DCA 2000). There is no conflict.

CONCLUSION

The Court should deny Defendants' petition because there is no jurisdictional conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 17th day of JULY, 2000, to: SCOTT TURNER, ESQ., Jack, Wyatt, Tolbert & Thompson, P.A., 1499 S. Harbor City Blvd., Suite 201, Melbourne, FL 32901; and RICHARD A. SHERMAN, ESQ., Richard A. Sherman, P.A., Suite 302, 1777 South Andrews Avenue, Ft. Lauderdale, FL 33316.

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C:\WPFILES\STRAHAN\SCT.BRF

Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2000

ARTHUR P. STRAHAN, etc., et al.,

Appellants,

v.

DEWEY L. GAULDIN,

Appellee.

/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 5D99-230 & 5D99-874

Opinion Filed March 17, 2000

Appeal from the Circuit Court
for Brevard County,
Jere E. Lober, Judge.

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.

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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.
>
> Q: What causes the bottom to kick out?
>
> 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,

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

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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).[1] 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.

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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.

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. Base/, 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.

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

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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 plaintiffs 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

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> 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'sfees. 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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