IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1155

Florida Bar No. 184170

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

Petitioners,

vs.

DEWEY L. GAULDIN,

Respondent.

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

AMENDED
REPLY BRIEF OF PETITIONERS ON THE MERITS
ARTHUR P. STRAHAN, Indiv., and d/b/a STRAHAN MANAGEMENT, PATRICIA STRAHAN, Indiv., d/b/a STRAHAN MANAGEMENT, ARTHUR P. STRAHAN, JR., Indiv., and STRAHAN MUSIC, INC.

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(954) 525-5885 - Dade

and

Joseph G. Murasko, Esquire
DICKSTEIN, REYNOLDS & WOODS
West Palm Beach, FL

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REPLY ARGUMENT

A. *Res Ipsa Loquitur* Instruction in Direct Conflict

The "flying jukebox" in this case, slipped out of the Defendant's grip, landed on the sidewalk and hit the Plaintiff. The use of *res ip loquitur* was in direct and express conflict with decisions of this Cou and must be reversed. Whether the Defendant losing hold of the jukebo was a sudden accident, or negligence, was an ordinary, routine type ju question in this personal injury suit. The judge thought there had to negligence involved, so he gave a *res ipsa loquitur* instruction and a negligence instruction, virtually guaranteeing a verdict for the Plaintiff. However, the jukebox was not flying around unattended; lik the famous barrel, or the tires in more recent lawsuits. There were t eyewitnesses; the Defendant and the Plaintiff's co-worker, Bailey, who saw the jukebox sliding out of the truck and tried to push the Plainti out of the way (T 29). The Plaintiff testified at trial:

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

Gauldin's lawyer successfully argued to avoid a defense directed verdict:

> MR. MCGREAL: Your Honor, I believe there's been sufficient enough evidence on the issue of liability in this case. Whether it comes from Mr. Gauldin's recollection that he saw grease on the floor, the gentlemen (Strahan) falling and the jukebox going out, or if you go simply on Mr. Strahan's testimony that it was under his possession and control while he was moving it and lost control of it....

(T 578).

The Plaintiff's appellate explanation of his trial testimony does not change the fact that this was an ordinary negligence case and should have gone to the jury with only the standard negligence instruction. The Fifth District repeatedly rejected the Plaintiff's argument that the Defendant waived his challenge to the trial judge giving both negligence instructions. Strahan v. Gauldin, 756 So. 2d 158 (Fla. 5th DCA 2000). There was no legal basis to object to the standard negligence instruction being given. The Defendant repeatedly asserted that the *res ipsa loquitur* instruction was unnecessary and improper as it allowed the jury to infer negligence, which was not necessary in this ordinary negligence case (R 579-589; 601-602; 632-635).

The cases relied on by the Plaintiff involved situations where an unattended flying object suddenly appears somewhere, causing injury. They are not situations like the present case, where the Defendant had his arm wrapped around the jukebox, it slipped and fell out. While the Defendant properly asserted this was not negligence, or direct evidence of negligence, or any evidence of negligence, the Defendant was not given a directed verdict and the ordinary issue of negligence should have gone to the jury, like in any other personal injury accident case. If the Fifth District is correct, that a *res ipsa loquitur* instruction is proper anytime the instrumentality is in control of the defendant and but for the lack of care on the part of the defendant the accident would not have occurred, we must give the *res ipsa loquitur* instructions in virtually every personal injury

accident case. A car suddenly appearing in front of another car in an intersection, would require a *res ipsa loquitur* instruction. The fact that the driver could not explain exactly why he was in an intersection at a particular moment in time would be sufficient to allow this inference of negligence.

Eye witnesses saw what happened and that the Defendant lost his grip on the jukebox and it fell. A barrel rolling out of a second story window, with no witnesses and no idea of why the barrel would do that is the classic example calling for a *res ipsa loquitur* instruction. Even the Plaintiff has to admit that; whether it is after the fact or not; he had a reasonable explanation and theory of how the accident occurred, which in and of itself was sufficient to avoid a *res ipsa loquitur* instruction. . . .

The cases cited on pages 27 and 28 of the Plaintiff's Brief support the Defendant's position that a *res ipsa* instruction was not warranted; Kulczynski v. Harrington, 207 So. 2d 505 (Fla. 3d DCA 1968)(unattended ladder flew off of a truck and hit the plaintiff in the head, as he was walking down the street). McDougald v. Perry, 716 So. 2d 783 (Fla. 1998)(unattended tire escaped from a cradle underneath a truck, flew out and crashed into the plaintiff's windshield); Stanek v. Houston, 165 So. 2d 825 (Fla. 2d DCA 1964)(all parties agreed that *res ipsa loquitur* instruction was required in a case where the defendant lost control of his truck and crashed in the plaintiff's house); Cortez Roofing, Inc. v. Barolo, 323 So. 2d 45 (Fla. 2d DCA 1975)(unattended carpet roll containing a steel pipe, which fell off a rack in a warehouse and hit the plaintiff, was

untouched by anyone, and served as a basis for a *res ipsa loquitur* instruction); Deveaux v. McCrory Corporation, 535 So. 2d 349 (Fla. 3d DCA 1988)(an unattended sweeper, which fell of a shelve, which it was too wide to be stored, formed the basis of an instruction on *res ipsa loquitur*); Cheung v. Ryder Truck Rental, Inc., 595 So. 2d 82 (Fla. 5th DCA 1992)(doctrine of *res ipsa loquitur* applied to an unattended wheel, which fell off an automobile being towed by the driver of a rental truck); Cardina v. Kash N' Karry Food Stores, Inc., 663 So. 2d 642 (Fla. 2d DCA 1995)(an unattended 25 pound case of tomatoes falling from a pallet and striking and knocking over the plaintiff was a factual basis for a *res ipsa loquitur* jury instruction).

The Plaintiff's new argument in this Court, that a *res ipsa* instruction is required if evidence is discarded has been waived, as it is being raised now for the first time; but is also without merit. The Plaintiff waited for four and seven years before filing suit and seeking discovery about the truck and jukebox, and this untimely behavior is probably why he did not ask for *a res ipsa* instruction on this basis below. The Plaintiff took a photo of his bruise within four weeks of the accident, so he was clearly contemplating litigation very early on. Causeway Marinara, Inc. v. Mandel, 276 So. 2d 71 (Fla. 3d DCA 1973) has no application to this case and provides no support for the *res ipsa* instruction.

The Plaintiff continues to ignore the fact that the *res ipsa* rule of evidence must be used only in "rare" cases. In City of New Smyrna Beach Utilities Commission v. McWhorter, 418 So. 2d 261 (Fla. 1982), this Court found that the failure to give a *res ipsa loquitur*

instruction was not error, noting the restrictive nature of the doctrine and that the trial judge should never lightly provide this inference of negligence. While McWhorter does stand for the proposition that a *res ipsa loquitur* instruction can be given, even when there is some direct evidence of negligence, the Plaintiff still has not addressed the very restrictive nature of this jury instruction. He just keeps repeating over and over that if the Plaintiff can not show exactly why an accident happened *res ipsa* must be given. Of course, this means that any case where there is only circumstantial evidence of negligence, a *res ipsa* instruction must be given. It is respectfully submitted that the open ended use of *res ipsa* the Plaintiff advocated and the Fifth District allowed, is in direct conflict with the law of this Court. McWhorter, supra; McDougald v. Perry, supra; Marrero v. Goldsmith, 486 So. 2d 530 (Fla. 1986); Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978).

The fact that the instruction should be very rarely used was again established in the Supreme Court's decision in McDougald, supra. The Court again explained that in rare instances, an injury my permit an inference of negligence, coupled with the sufficient showing of the immediate and participating cause. The Court very strongly stated that the application of the *res ipsa loquitur* instruction, under the facts of McDougald, was not to be seen as an expansion of the doctrine's applicability and the Court, reminded us that the *res ipsa loquitur* instruction applies only "in rare instances." McDougald, 785.

This case clearly is not the flying tire, flying barrel, falling shelf, or a patient waking up with a sponge in their abdomen type case, that required a *res ipsa loquitur* instruction. Because this instruction was erroneously given and at best was repetitive of the standard negligence instruction given, it gave undo emphasis to the issue of negligence and therefore contrary to what the Plaintiff argues, this was not harmless error, but rather prejudicial reversible error. Florida Power & Light Co. v. Robinson, 68 So. 2d 406 (Fla. 1953); Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. 1952); Shaw v. Congress Building, Inc., 113 So. 2d 245 (Fla. 3d DCA 1959); Dowling v. Loftin, 72 So. 2d 283 (Fla. 1954).

The Plaintiff really wants his cake and eat it too. He justifies the *res ipsa* instruction by arguing there was no direct evidence of negligence; and turns right around and argues he was entitled to a directed verdict on liability, based on the evidence of negligence at trail. Then he goes a step further and reasons that since there was sufficient evidence of negligence for his directed verdict on liability, any erroneous jury instruction can only be harmless! If the Plaintiff had enough evidence of negligence to even argue for a directed verdict on liability, then he was not entitled to a *res ipsa* instruction and a new trial must be granted. If there was an "obvious failure to exercise due care in controlling and managing the jukebox while moving it," then this was a standard negligence question for the jury and not one requiring a *res ipsa loquitur* instruction.

Giving the *res ipsa* instruction was harmful, prejudicial error;

giving two negligence instructions, after directing a verdict for the Plaintiff on comparative negligence ensured a finding against the Defendant and was reversible error. The Defendant repeatedly objected to the giving of anything but one standard instruction on negligence and only agreed that if *res ipsa* was going to be given over his objection, it should be given at the same time as the negligence instruction (T 602-603). More importantly, the Fifth District twice rejected this waiver argument by the Plaintiff and this Court must reject it as well.

Whether this Court looks to the cases cited by the Defendant or the Plaintiff, what is clear is this Court's adherence to the rule that the *res ipsa loquitur* instruction is used only in extremely, rare circumstances. It was clear, reversible, legal error for the judge to allow the second jury instruction on negligence and the undo influence and emphasis on this question requires the excessive Verdict to be reversed and a new trial granted.

B. Joint Proposal for Settlement Void

The Second District Court of Appeal in Allstate Insurance Company v. Materiale, 26 Fla. L. Weekly D1204 (Fla. 2d DCA May 11, 2001) has held that a proposal for settlement to two offerees, which is undifferentiated, to settle a case for a single amount, is invalid and in violation of Fla. R. Civ. P. 1.442(c)(3). The Second District has certified conflict between its holding in Materiale and the Fifth District's decision in Spruce Creek Development Co. of Ocala, Inc. v. Drew, 746 So. 2d 1109 (Fla. 5th DCA 1999) where the court held that a single offer by two plaintiffs to one defendant was not void for failing to separate the offer as to each plaintiff; and in conflict

with Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999), where the Third District held that a single offer by two defendants to one plaintiff was not void for failing to separate the offer as to each defendant. In the present case, Gauldin made a single offer to settle the case to multiple Defendants, but did not state the amounts or terms attributable to each party/offeree in violation of Fla. R. C. P. 1.442(c)(3). The Fifth District, in affirming the validity of the Plaintiff's Offer of Judgment, cited to the Third District's opinion in Flight Express, which held that a lack of apportionment of the defendants' offer to a single plaintiff, did not affect the plaintiff's ability to consider it. Strahan, 161. Throughout, the Defendants have argued that where there are multiple offerees, the offerees must be given the ability to evaluate the plaintiff's settlement as to each offeree, in order to be in compliance with Rule 1.442. If the offeror makes a joint proposal to multiple offerees without stating the amount in terms attributable to each offeree, the offer is void. Materiale, supra.

In Materiale, the injured plaintiff and her husband served a proposal for settlement in the amount of $105,000 on the single defendant, Allstate; but did not allocate the $105,000 between the claims of the plaintiffs. The jury returned a verdict for $180,000; Mr. and Mrs. Materiale moved for fees and costs based on their proposal for settlement. Allstate challenged the proposal claiming it was invalid and in violation of the express terms of Rule 1.442(c)(3) and the Second District agreed. It relied on its previous decision in United Services Automobile Association v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000), where the insurance company had

made a single proposal for settlement to a husband and wife, but did not state the amount attributable to each of the offerees individually. The Second District held the offer of judgment to be defective stating:

> To further the statute's goal, each party who receives an offer of settlement is entitled, under the rule, to evaluate the offer as it pertains to him or her.
>
> To accept USAA's position, that its unspecified joint proposal satisfies the requirements of the rule, would mean that Mrs. Behar would not have an independent right to evaluate and decide the conduct of her own claim merely because her count for consortium damages was joined in the same lawsuit with her husband's claim. We reject this notion....

752 So. 2d at 664-665.

> Therefore, when one offeror makes a proposal for settlement to more than one offeree, each offeree is entitled to know the amount and terms of such offer that is attributable to that party in order to evaluate the offer as it pertains to him or her. *See Goldstein v. Harris*, 768 So. 2d 1146 (Fla. 4th DCA 2000).
>
> Materiale, D1204.

In distinguishing Spruce Creek, the Second District noted that regardless of whether acceptance of an offer would entitle a defendant to be released by both offerors, the offeree should still be allowed to evaluate each of the plaintiff's claims separately. It also did not agree with Flight Express that the failure to apportion an offer to defendant offerees was a harmless, technical violation. Materiale, D1204. The Second District also pointed out that the conclusion in Danner Construction Company, Inc. v. Reynolds Metal Company, 760 So. 2d 199, 202 (Fla. 2d DCA 2000), where the Second

District had agreed with Spruce Creek and Flight Express was modified by the fact that when the joint offers were made by defendants in a case, the failure to specify the amount contributed by each defendant is harmless, if the theory for the defendants' joint liability does not allow for proportionment under § 768.81, Fla. Stat. (1997), the comparative fault statute. Materiale, D1204. In Judge Casanueva's concurring opinion, he notes that the requirement of apportionment as to multiple offerees, as in Behar, and multiple offerors, serves to further the important public policy of the statute, for the defendants to make a reasonable assessment of the value of the primary claim in the case and to allow the defendants to not be exposed to attorney's fees liability and the imposition of multiple multipliers. Materiale, D1205. The judge continued to adhere to his belief that the application of a multiplier, under § 768.79, violates the equal protection clause in both the state and federal constitutions; as the court had ruled in Pirelli Armstrong Tire Corporation v. Jensen, 752 So. 2d 1275 (Fla. 2d DCA 2000), which this Court did not review, because the certified question had not been expressly answered by the Second District. Pirelli Armstrong Tire Corporation v. Jensen, 777 So. 2d 973 (Fla. 2001); Materiale, D1205.

The Petitioners submit that there is no exception in Rule 1.442 for vicariously liable offerees which somehow exonerates the offeror from compliance with this sanction rule. The rule requires strict compliance and without question, this Court was well aware of vicarious liability and § 768.81, at the time that the rule was enacted and then subsequently amended. The Second District has adhered to a strict construction of Rule 1.442 and it is submitted

that this Court should also require strict adherence to the clear language of this Rule of Civil Procedure. See also, Allstate Indemnity Company v. Hingson, 25 Fla. L. Weekly D2431 (Fla. 2d DCA October 11, 2000)(voiding a single offer of judgment to joint plaintiffs/ offerees and certifying conflict with Herzog v. K-Mart Corporation, 760 So. 2d 1006 (Fla. 4th DCA 2000); Stern v. Zamudio, 2001 WL 27786 (Fla. 2d DCA January 12, 2001)(voiding an offer of judgment by a single defendant to multiple plaintiffs/offerees).

It is submitted that whether the offerees are plaintiffs or defendants, or vicariously liable or actively negligent defendants, the rule must be applied equally to all offerees because each one is entitled to know the amount and terms of the offer that is attributable to that party, in order to evaluate the offer as it pertains to them. Materiale, D1204. Strahan is the first opportunity for this Court to resolve a conflict existing throughout the State of Florida regarding which offerors and which offerees are subject to Fla. R. Civ. P. 1.442 and to resolve the conflict and rule that everyone must abide by the clear and unambiguous terms of the rule and hold that failure to do so voids an undifferentiated proposal for settlement. Strahan must be quashed, the proposal voided and the Final Judgment for fees reversed.

C. Multiplier Ruling Must be Affirmed

The Plaintiff's Cross-Petition to this Court, to review the multiplier in this case, was denied and it is submitted if the Strahan decision is affirmed, it must be affirmed in all respects, including the striking of the multiplier, which was not based on any

competent evidence. Strahan, supra. On appeal the Plaintiff argued that there was a waiver to any challenge to the multiplier, because the parties' experts agreed a multiplier was appropriate. The court in Strahan rejected that argument, after the Appellant presented the Record facts substantiating the Defendants' objections to the fee award and the multiplier. In his three post-trail Motions, Gauldin then changed his story and claimed he was "misled" into believing the Defendants had waived any objection to the multiplier and this argument was three times rejected by the appellate court. Now the Plaintiff has gone back to his first argument that there was a waiver of the use of the multiplier. Suffice it to say, where the Plaintiff's argument has been rejected four times by the appellate court, there is no reason for this Court to readdress it and reject it again. The Fifth District also rejected the Plaintiff's argument that the challenge to the multiplier was being raised for the first time on appeal; and therefore, all the cases that the Plaintiff cites for that argument, on that same position, which was also rejected by the appellate court, are not on point. More importantly, the Fifth District ruled based on this Court's decision in Bell v. U.S.B. Acquisition Company, Inc., 734 So. 2d 403 (Fla. 1999) and found that where no evidence was presented that Gauldin's counsel could not have been retained, but for the multiplier, it was proper to strike the application of the multiplier. Strahan, 161-162. The Fifth District pointed out that the idea of a multiplier was not even born in the case, until after Strahan had rejected the settlement offer; this was not the type of case under Supreme Court law that required the use of a multiplier; and in fact the use of such a multiplier could have a

negative effect. Strahan, 162; citing City of Burlington v. Dague, 505 U.S. 557 (1999). This conclusion in Strahan has now be reached by other appellate courts as well. Materiale, supra, (the trial court erred in applying a contingency risk multiplier, where no evidence was presented that the relevant market required a contingency fee multiplier to obtain competent counsel; in a case where the defendant admitted negligence and the only issues at trial were causation and damages); Internal Medicine Specialists, P.A. v. Figueroa, 26 Fla. L. Weekly D310 (Fla. 5th DCA January 26, 2001)(striking a 2.0 multiplier as illegal under the decision in Pirelli, supra, because there was no evidence to support it under Strahan); Seminole Casualty Insurance Company v. Mann, 26 Fla. L. Weekly _____ (Fla. 5th DCA March 9, 2001)(contingency risk multiplier reversed where the record was void of any evidence that the plaintiff was unable to hire competent counsel without the multiplier). The Plaintiff's attack on the contingency risk multiplier in this case is based on a false factual predicate, the Plaintiff's claim of waiver; and without question there was no evidence presented below that the Plaintiff was unable to hire competent counsel, in the absence of a multiplier. It was properly struck by the Fifth District. Strahan, supra.

D. Excessive Verdict Must be Reversed

The excessive Verdict in this case was also contrary to the manifest weight of the evidence where the Plaintiff never reported this jukebox accident to anybody, not to his employer, not to the Defendant's employer, not to the police, not to the building owner

and never once told his treating physician he was ever injured by a flying jukebox. The Plaintiff treated for eight months for a neck injury, where the records showed extensive degenerative disc disease preexisting the accident and certainly the Plaintiff's job as a roofer was more than an ample basis for the treatment to be unrelated to the unreported jukebox incident. The Plaintiff stopped treating altogether for several years and then began treating for a low back injury when he kicked in a door, which admittedly had nothing to do with the jukebox incident. The Plaintiff's low back injuries and carpal tunnel syndrome were admitted by his own physicians to be unrelated to the jukebox incident. Therefore, the award of almost $200,000 for a preexisting neck condition was contrary to the manifest weight of the evidence. The Plaintiff only missed one week of work in seven years and that one week was allegedly due to the unreported jukebox incident. Doctors discussed the possibility of surgery some 20 years away, but only if the Plaintiff had continuing problems and again the Plaintiff went completely untreated for many years. The failure of the Plaintiff's business was completely unrelated to the jukebox incident, which the Plaintiff admitted. There is no law that holds the Plaintiff has to be able to make more money at the same exact job, than he made previously, in order to be entitled to an excessive award of lost earning capacity. Therefore, it was a clear abuse of judicial discretion for the court to fail to grant a new trial, where the Verdict was clearly contrary to the manifest weight of the evidence and at the very least excessive requiring the granting of a new trial.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of June, 2001 to:

Joseph G. Murasko, Esquire
DICKSTEIN, REYNOLDS & WOODS
Northbridge Center
Suite 700
515 North Flagler Drive
West Palm Beach, FL 33401

Jerry D. McGreal, Esquire
KNUDSON & McGREAL, P.A.
1824 S. Fiske Boulevard, Suite 2
Rockledge, FL 32955

Edna L. Caruso, Esquire
CARUSO, BURLINGTON, BOHN & COMPIANI, P.A.
Suite 3A/Barristers Building
1615 Forum Place
West Palm Beach, FL 33401

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(954) 525-5885 - Dade

and

Joseph G. Murasko, Esquire
DICKSTEIN, REYNOLDS & WOODS
West Palm Beach, FL

By: _____
Richard A. Sherman

/dlo

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.