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IN THE FLORIDA SUPREME COURT

Case No. 96-595
L.T. Case No.: 96-02758

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On Discretionary Review Of The Decision
Of The Second District Court Of Appeal

LAWRENCE D. McDOUGALD,
Petitioner,

v

HENRY D. PERRY and C & S CHEMICALS,
INC., a foreign corporation,
Respondents.

INITIAL BRIEF OF PETITIONER

Hank B. Campbell, Esq. (FBN 0434515)
Christine C. Daly, Esq. (FBN 0998362)
Lane, Trohn, Bertrand & Vreelmd, P.A.
Post Office Box 3
Lakeland, Florida 33802-0003
(941) 284-2200
(941) 688-0310 (fax)

Raymond Ehrlich, Esq. (FBN 022247)
Scott D. Makar, Esq. (FBN 0709697)
Holland & Knight LLP
50 N. Laura Street, Suite 3900
Jacksonville, Florida 32202
(904) 353-2000
(904) 358-1872 (fax)

Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

This “wayward wheel” case arises from a 130 pound spare tire that dislodged from a tractor-trailer while passing over railroad tracks. The spare tire, which was catapulted into the air, struck a vehicle that was being operated by Petitioner, Lawrence D. McDougald (“Mr. McDougald”), who was injured in his futile attempt to avoid the airborne tire’s return to earth.

The Flying Spare Tire

The incident occurred on July 26, 1990. [T 170] On that date, Mr. McDougald injured his knee when the spare tire from a tractor-trailer, leased by Respondent C & S Chemicals, Inc. (“C & S”) and operated by Respondent Henry D. Perry (“Mr. Perry”), struck Mr. McDougald’s vehicle while travelling on Highway 60 West, in Bartow, Polk County, Florida. [T 170] The spare tire dislodged from the tractor-trailer as Mr. Perry drove over railroad tracks that crossed the highway. After dislodging, the spare tire passed underneath the wheels of the tractor-trailer, which hurled it into the air towards Mr. McDougald’s windshield. [T 170-172]

In an effort to avoid the airborne tire, Mr. McDougald -- whose vehicle was behind and in the same lane as the tractor-trailer -- struggled to shield himself under his vehicle’s dashboard. [T 171-172] The tire struck the front of Mr. McDougald’s vehicle, causing him to lose control and spin into the median. [T 172-173]

An eye-witness stated that the “semi come over the railroad tracks and a spare tire bounced out from underneath it, and [Mr. McDougald’s vehicle] swerved to miss it, but he couldn’t miss it. He caught it anyhow, and it liked to have flipped him.” [T 62] When Mr. McDougald’s vehicle “hit the tire he almost flipped” and he “just started fishtailing and swerving and he was out of control then.” [T 63] The eye-witness stated McDougald did nothing wrong:

“He was just trying to keep from hitting the tire. He swerved to miss it, but it bounced right in front of him.” [T 62]

In attempting to avoid the tire, Mr. McDougald caught his foot somewhere on the vehicle’s floorboard, injuring his right knee as a result. [T 171-172] He stated he “ducked” and “tried to get below” the dashboard, but that he felt the “collision” and a “snap” in his knee. [T 171-72] He stated that: “The snap twisted me, my right foot caught something, have no idea what. It happened so quick and such shock going through my mind, I thought I was dead.” [T 172]

At the scene, the driver of the tractor-trailer -- who had the “chain in his hand” that was supposed to have restrained the spare tire -- spoke to Mr. McDougald, [T 174] According to Mr. McDougald, the driver said “when he hit -- hit the track and felt the tires -- felt the trailer come up, he thought that the tire had come out. He assumed what had happened. And he looked in his rearview mirror, seeing if it missed anybody, when he saw cars going in all directions he figured at that point that the tire had struck somebody.” [T 174]

*The Pre-Trip Inspection, The Twenty-Year Old ‘Dog’-
Type Chain, The Nut/Bolt And “Stretched” Link, And The Accident*

Prior to leaving Waycross, Georgia, at 3:30 a.m. or 4:00 a.m. on the day of the incident, Mr. Perry performed a pre-trip inspection of the tractor-trailer. [T 253-254] With regard to the scope of his pre-trip inspection, Mr. Perry stated:

Q. What do you do in a pre-trip inspection?

A. I check my truck and make sure it’s safe.

Q. And how do you do that?

A. Well, first thing you do is a walk around, you look at everything, check all your tires, make sure all the lights work, check your oils, waters, make sure there is nothing dragging, make sure everything is secure.

Q. And did you do that on that day?
A. I certainly did.

[T 254] Mr. Perry stated that this included a cursory inspection of the spare tire [T 258-259]

The spare tire, which was on a metal rim, weighed approximately 130 pounds. It was carried in a 45-degree angled cradle located in a rack underneath the truck, and was held in place by its own weight. [T 369] A four to six foot link chain, which was wrapped around the tire once, purportedly served to secure the tire. [T 255, 257). Mr. Perry described the chain as “[an] inch, like a circle inch chain, like a dog chain you would tie your dog up with or kind of small, but they are made, you know, real, real sturdy.” [T 257] He recalled looking at the spare tire and the chain on the day of the incident. [T 257-258] Mr. Perry did not physically inspect each link. [T 258-259] He stated:

Q. Okay. And as to the spare tire, you look at that?
A. Yes, I did.

...

Q. Okay. So when you checked the chain back at the yard, did you check it, I mean, and look at every link and everything?

A. No, sir, I did not.

Q. You just go walk through and look at it?

A. I did not check every link.

...

Q. That day when you walked around, you don't check every link on the chain?

A. No, sir.

Q. You look and see if the chain is secured?

A. Right.

[T 254-255, 258-259]

Mr. Perry described how the chain was supposed to be secured in place. A latch and bolt system was originally used to secure the chain to the spare tire and rack with a lock. [T 255-57]

The original latch, however, had apparently broken off at some point and was replaced with just a nut and bolt. [T 256-57] As a result, no lock was used to secure the chain. [T 257] Instead, on the day of the accident, the chain itself only had a half-inch bolt with a nut and washer through the end of it, [T 256-257] Mr. Perry admitted that a lock -- which was originally used -- “would help hold the chain, yes, but you don’t have to do that, it’s not a requirement.” [T 257]

A post-accident examination of the chain revealed that the nut and bolt, which were still fastened together, had entirely slipped through a link in one end of the chain. [T 258, 272-273] According to Mr. Perry, one of the links had apparently “stretched out” and permitted the nut and bolt to slip through. Mr. Perry stated that the “link was stretched out, so evidently it stretched out enough that the bolt would go through there.” [T 258] The other end of the chain, however, was still connected to the tractor-trailer and was dragging on the ground,’ [T 261, 273] He stated that he told people at the scene of the accident that the “chain had come loose.” [T 271]

Mr. Perry described the railroad tracks that he crossed as “real rough.” [T 275-276] The speed limit was 55 miles per hour, but he had to reduce the speed of the tractor-trailer to about 35-40 miles per hour when crossing or else he would “hit the ceiling,” [T 275-276] He was aware of the rough crossing because it was on his usual route and he had crossed it about five times a week for the last year. [T 275] The spare tire was located in the undercarriage of the

¹ Mr. McDougald did not have the benefit of repair and/or maintenance records with respect to the tractor-trailer or the chain and was unable to perform any testing on the chain following the incident. The corporate representative of C & S surmised at trial that the chain was still located on the tractor-trailer at issue. Mr. Perry and C & S, however, denied the existence or availability of the chain, as well as the maintenance records, during pre-trial discovery. [T 364-365; 369-373]

trailer, which Mr. Perry stated would move around a lot when driving over bumps. [T 274-275] Although Mr. Perry could not recall exactly when the link in the chain became “stretched,” he recognized that the jostling of the trailer could cause stress on the chain. [T 259-260; 274-275] The chain itself appeared to be the original chain that came with the tractor-trailer in 1969. [T 258]

Roy Beverly, the Operations Manager for C & S, described the incident as “unbelievable,” and further stated that -- prior to the incident in question -- he had never even heard of a spare tire coming out of its rack. [T 368-369] Mr. Beverly explained that “it’s very difficult to pull the tire in and out of the rack” manually, presumably because of the tire’s weight, [T 369]

Mr. McDougald’s Injuries and Damages

Mr. McDougald experienced a burning sensation in his knee moments after the incident and later that night. [T 175-176] As a result, he sought medical treatment immediately the next morning. [T 176] The physician who examined Mr. McDougald surmised that he sustained some type of sprain as a result of the incident. [T 176]

When the burning pain continued, Mr. McDougald sought treatment from an orthopedic surgeon, who prescribed physical therapy for Mr. McDougald’s knee and later performed arthroscopic surgery. [T 300] The medical testimony indicated that the “tear in the posterial cruciate is probably due to that accident. The plica is probably more due to that accident than anything because of the timing.” [T 310, 320] In addition, the testimony was that Mr. McDougald was “predisposed” to his ACL injury because of the accident. [T 31 1] In other words, although the ACL was not torn in the accident, the “accident was a part of the reason” that it ultimately became torn. [T 322] Further, the “posterior cruciate ligament” and the “tear

in the posterial horn of the lateral meniscus are definitely -- are most probably due to the automobile accident.” [T 3 19]

As a result of continued pain, Mr. McDougald had two additional **arthroscopies** performed by a second orthopedic surgeon, who concluded that Mr. McDougald suffered from a tear of the anterior cruciate ligament in his knee. [T 180] The second orthopedic surgeon additionally concluded that Mr. McDougald could expect to undergo multiple knee replacements in the future, and further surmised that Mr. McDougald sustained a permanent injury as a direct and proximate result of the incident in question. [T 79-80, 96-98, 326]

Prior to the incident, Mr. McDougald was very active physically and engaged in snow-skiing, water-skiing, and triathalons (i.e., run three miles, bike four miles, and swim one-quarter mile). [T 181-82, 21]] Following the accident, his knee continued to deteriorate, was unstable, and had frequent pain (which ultimately became constant). [T 182] His physical activities had become “very limited” because he lacked the “maneuverability” he formerly had. [T 188]

Prior to the incident he was also actively involved in big game hunting, an activity that he considered to be more than a mere hobby. [T 189-190] In the years before the accident, Mr. McDougald arranged hunting trips to Montana, Colorado, and Wyoming for various clients and friends. [T 194] Mr. McDougald chose the locale, scheduled the flights, arranged all accommodations, and also provided guide and consulting services while on the trips. [T 194-198] He considered his activities as a quasi-business. [T 195-196] He was described as the “Michael Jordan” of hunting -- a “hunter’s hunter” whose knowledge and skills were a “cut above.” [T 343-344, 355]

At first, these outings consisted of a way of paying for his own hunts, [T 195-196] Mr. McDougald, however, eventually planned to semi-retire from his employment in order to perform these services on a professional basis. [T 198] The incident curtailed his plans by limiting his ability to walk and hunt on rough terrain, and also by restricting his ability to conduct these hunting trips on as large a scale as he intended. [T 198] He testified that he “can’t walk like” he used to and that its “not safe” for him to try to traverse games trails that can be “extremely tough” terrain. [T 199] Although described as still having “enthusiasm” for hunting, Mr. McDougald had physical limitations that, for example, required him to “stay close to the pickup truck” rather than to “be right there with you” during the hunt itself. [T 356] Due to these limitations, he ultimately closed down his guide business. [T 199]

Mr. McDougald testified as to his estimate of revenues he would have earned from his business once he had semi-retired. He considered his expenses, the expected number of hunters he would take out, and what the hunters would pay based upon prior agreements he had with outfitters. [T 203] Based upon these factors, Mr. McDougald estimated that he could earn approximately \$20,000.00 to \$25,000.00 per year. [T 213] This estimate did not include non-pecuniary benefits such as complimentary hunts he might receive. [T 213] He estimated that these free hunts had previously cost him between “five and six thousand dollars a year.” [T 25 1]

The Trial Court Proceedings

On July 21, 1994, Mr. McDougald commenced the instant action seeking damages against C & S and Mr. Perry for their negligence in causing Mr. McDougald’s injuries.* [R1 1-3] Mr.

² Mr. McDougald’s former wife, Kay Mr. McDougald, previously had a claim for loss of consortium, which she voluntarily dismissed on April 22, 1996. [R2 219]

McDougald sought damages against C & S and Mr. Perry for past and future loss of earning capacity, for medical expenses, and for past and future pain and suffering.

The case proceeded to a jury trial, which took place on April 15-22, 1996. [T 1-680]

At trial, the presiding judge gave the following negligence instructions to the jury:

The first issues for your determination on the claim of the plaintiff against the defendants are whether the defendant Henry D. Perry was negligent in the operation or maintenance of the vehicle, and whether C & S Chemicals, Inc. was negligent in its maintenance of the vehicle. And if so, whether such negligence was the legal cause of loss, injury, or damage sustained by the plaintiff.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances.

Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

...

Negligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that but for the negligence the loss, injury or damage would not have occurred.

If you find that the circumstances of the accident were such that in the ordinary course of events the accident would not have happened in the absence of negligence and that the instrumentality causing an injury was in the exclusive control of a defendant at the time it caused the injury, you may infer that defendants were negligent, unless taking into consideration all of the evidence in the case you conclude that the occurrence was not due to any negligence on the part of defendants.

[T 661-663]

Following their deliberations, the jury found in favor of Mr. McDougald, finding C & S 90% at fault and Mr. Perry 10% at fault for Mr. McDougald's injuries. [R2 3 19-321; T 677]

The jury awarded Mr. McDougald \$5,000.00 for past loss of earning capacity, \$50,000.00 for

future medical expenses, \$45,000.00 for future loss of earning capacity, and \$150,000.00 for pain and suffering (\$25,000 for past, \$125,000 for future), for a total of \$250,000.00. [R2 319-321; T 678] The trial court entered a Final Judgment on June 12, 1996,

Mr. Perry and C & S subsequently appealed, [R2 331-332; R4 334-335, 336-338] Among other grounds, Mr. Perry and C & S alleged that the trial court erred by giving a *res ipsa loquitur* instruction to the jury. They also claimed error in the trial court's denial of their motion for directed verdicts on the issue of their negligence, as well as the lack of evidence to support the jury's award for Mr. McDougald's past and future loss of earning capacity.

The Second District's Opinion

On July 30, 1997, the Second District Court of Appeal reversed the Final Judgment and remanded the case to the trial court with directions to direct a verdict in favor of Mr. Perry and C & S on the issue of their negligence. Perry v. McDougald, 698 So. 2d 1256, 1260 (Fla. 2d DCA 1997). The Second District concluded that the trial court erred in giving the *res ipsa loquitur* instruction because "the facts in this case fail to support the inference that absent Perry's or C & S's negligence the chain would not have otherwise come loose." Id. The Second District also concluded that Mr. McDougald presented no evidence of negligence by Mr. Perry or C & S, stating that "[i]f the chain broke or stretched from too much stress, and this condition had not yet occurred during the daily inspections by C & S drivers, this would not be negligence on the part of Perry or C & S because there was no showing of a breach of due care in the inspection and maintenance of this chain and tire." Id. at 1259. In addition, the Second District -- in dicta -- reversed the award of Mr. McDougald's past and future losses of earning capacity from his

hunting and guide referral business “because there is no expert or other competent evidence” to support such damages. Id. at 1260.

Pursuant to Rule 9.120, Florida Rules of Appellate Procedure, Mr. McDougald sought discretionary review of the Second District’s decision. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, and Article V, Section 3(b)(3), Constitution of the State of Florida.

SUMMARY OF THE ARGUMENT

The Second District erred in reversing the Final Judgment entered after the jury's verdict in favor of Mr. McDougald. Contrary to Second District's opinion, the doctrine of *res ipsa loquitur* is applicable in this case. Further, ample evidence existed, by inference or otherwise, of negligence on the part of Mr. Perry and C & S, and ample evidence existed as to the jury's award for past and future loss of earning capacity. For these reasons, this Court should reverse the Second District's decision and reinstate the Final Judgment.

In this "wayward wheel" case, the presiding judge was correct to instruct the jury as to the doctrine of *res ipsa loquitur*. Cases in Florida, as well as other jurisdictions, hold that this doctrine is particularly applicable in "wayward wheel" cases where the defendant has exclusive control over the instrumentality (i.e., car, truck, etc.) that caused the injury, and the incident would not have occurred in the ordinary course of events without negligence on the defendant's part. As one court stated: "Thousands of automobiles are using our streets, but no one expects the air to be filled with flying hubcaps," Likewise, the roadways of Florida are populated by hundreds of trucks and cars, but no one expects the air to be filled with flying spare tires. Under these circumstances, the doctrine of *res ipsa loquitur* provides the fact finder with a common sense inference of negligence where, as here, direct proof of evidence may not be readily available. In light of the evidence presented at trial, the lower court properly instructed the jury as to the doctrine and properly denied a directed verdict for C & S and Mr. Perry,

Further, the un rebutted evidence regarding the dislodging of the 130 pound spare tire directly inferred negligence on the part of Mr. Perry and C & S, specifically as to the maintenance and operation of the tractor-trailer's spare tire holder and chain. Mr. Perry and C

& S, as the driver and lessor of the tractor-trailer respectively, had exclusive control over the tractor-trailer and its spare tire that dislodged and struck Mr. McDougald's vehicle. Mr. Perry had just crossed over "real rough" railroad tracks, which -- Mr. Perry knew from experience -- required that he drastically reduce his speed or else he would "hit the ceiling." The 130 pound spare tire was carried in an angled cradle, held there only by gravity and a twenty year-old dog-type chain wrapped once around the tire, clasped only with a nut and bolt. The original chain had a latch mechanism and lock that had broken off at some point and was replaced with the nut and bolt. An examination of the chain after the accident indicated that the nut and bolt had slipped through the link in the chain, raising an inference that the nut and bolt were too small for their intended use or that the chain was negligently maintained.

In addition, Mr. McDougald sustained a permanent injury as a direct and proximate result of the accident. Due to this permanent injury, the trial court correctly instructed the jury on the issue of Mr. McDougald's past and future loss of earning capacity. The testimony as to Mr. McDougald's hunting and guide business provided the jury with an adequate basis upon which to measure Mr. McDougald's prospective diminished earning capacity. As such, the jury's verdict as to Mr. McDougald's loss of future earning capacity should be affirmed.

ARGUMENT

- I. **THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE DOCTRINE OF *RES IPSA LOQUITUR* BECAUSE THE UNREBUTTED EVIDENCE AT TRIAL SHOWED THAT (1) C & S AND MR PERRY HAD EXCLUSIVE CONTROL OF THE INSTRUMENTALITY CAUSING THE ACCIDENT; AND (2) THE ACCIDENT WOULD NOT HAVE OCCURRED IN THE ORDINARY COURSE OF EVENTS WITHOUT NEGLIGENCE ON C & S'S OR MR. PERRY'S PART.**

This “wayward wheel” case is a classic example of the type of circumstances warranting the application of the doctrine of *res ipsa loquitur*. As this Court recognized in Goodvear Tire & Rubber Co. v. Hughes Supply, Inc., the doctrine of *res ipsa loquitur*:

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.

358 So. 2d 1339, 1341-42 (Fla. 1978) (emphasis added); see also Marrero v. Goldsmith, 486 So. 2d 530, 531 (Fla. 1986). Because Mr. McDougald met each of the two requirements for application of the doctrine to the tractor-trailer and its “wayward” spare tire, the trial court properly instructed the jury on this issue.³

In fact, the Fifth District Court of Appeal, in Cheung v. Ryder Truck Rental, Inc., 595 So. 2d 82 (Fla. 5th DCA 1992) specifically acknowledged the applicability of *res ipsa loquitur* to circumstances similar to the case at bar. In Cheung, the plaintiff sustained injuries when a “rapidly moving wheel” suddenly crashed through her windshield while driving down a four lane,

³ Prior to trial, C & S and Mr. Perry conceded responsibility for maintenance of the tractor-trailer, including the spare tire and chain. [R2 220-226]

divided highway. Id. at 83. The wheel had apparently detached from the left rear axle of a Toyota Corolla towed by a Ryder Truck travelling in the opposite direction. Id.

In Cheung, the plaintiff brought suit against John and James Slein, the driver of the Ryder Truck and the owner of the Toyota Corolla, respectively. He alleged, *inter alia*, a claim for damages based upon “unspecified negligence under the theory of *res ipsa loquitur*.” Id. The trial court entered summary judgment in favor of these defendants, and the plaintiff subsequently appealed. The Fifth District affirmed the summary judgment entered in favor of James Slein, but reversed the summary judgment entered in favor of John Slein (the driver of the truck). Id. at 83. Of importance, the Fifth District expressly stated that “*res ipsa loquitur* is particularly applicable in wayward wheel cases.” Id.

In reversing the summary judgment entered in favor of the truck driver, the Fifth District relied upon and cited with approval three cases from other jurisdictions which, like the instant case, also involved “wayward wheels.” Cheung, 595 So. 2d at 84 (citing Guerra v. W.J. Young Constr. Co., 165 So. 2d 882 (La. Ct. App. 1964); Ross v. Tynes, 14 So. 2d 80 (La. Ct. App. 1943); and, Dearth v. Self, 220 N.E.2d 728 (Ohio Ct. App. 1966)). Each of these cases provides additional support to the application of the *res ipsa loquitur* doctrine under the facts in the instant case.

In Dearth, the court applied the doctrine of *res ipsa loquitur* when “the circumstances were such as to justify a finding that the casting of a wheel from the tractor-trailer into the opposite lane of traffic was the result of defendants’ negligence in the maintenance and care of the tractor-trailer equipment.” 220 N.E.2d at 730. Similarly, in Guerra, the court applied the doctrine of *res ipsa loquitur* to an accident involving a truck-trailer whose detached left rear wheel crashed

into the plaintiffs vehicle, which had been travelling in the opposite direction. The court in Guerra specifically stated that "[e]ven if defendant's negligence in that case were so clear that plaintiff there could have won without pleading and urging *res ipsa loquitur*, we are satisfied that the *res ipsa* doctrine is applicable in detached wheel cases against the party who had the vehicle within his entire and exclusive control." Guerra, 165 So. 2d at 885.

Moreover, in Ross -- which the Fifth District in Guerra also cited with approval -- the court applied the doctrine of *res ipsa loquitur* to an accident involving a pedestrian struck and killed by a double wheel that detached from a passing truck. The court in Ross stated:

In our opinion the facts of this case, which are not in dispute, present a classic example of the proper application of the doctrine of *res ipsa loquitur*. Plaintiff was killed while walking on the sidewalk by a double wheel which became detached from a passing truck. It follows that there is an inference, or presumption of negligence on the part of defendants. In other words, when an injury is caused by an instrumentality under the exclusive control of the defendant, as in this case, and it is such as would not ordinarily happen if the party having control of the instrumentality had used proper care, there arises an inference or presumption of negligence.

14 So. 2d at 81.⁴ No meaningful difference exists between Ross and the instant case in which C & S and Perry concede responsibility for the maintenance and care of the chain and spare tire.

⁴ See *also* McLaughlin v. Lasater, 277 P.2d 41, 42 (Cal. Ct. App. 1954) ("A wheel does not ordinarily become detached from an automobile in the absence of negligence in either its operation or maintenance"); Spica v. Connor, 288 N.Y.S.2d 719, 723 (N.Y. App. Div. 1968) ("It is common knowledge that a wheel will not ordinarily leave a car unless there has been a lack of reasonable care in its installation or maintenance"); Harless v. Ewing, 469 P.2d 520, 524 (N.M. Ct. App. 1970) ("When plaintiff introduced evidence that defendant had exclusive control of the truck's maintenance and evidence that the wheel had in fact come off, he had introduced evidence of an accident which ordinarily doesn't occur in the absence of negligence by the person having control"); Lambert v. Marklev, 503 S.W.2d 162 (Ark. 1973) (finding *res ipsa loquitur* instruction proper where a truck's detached wheel axle injured railroad employee working on side of railroad).

Like the situations in the Cheung, Dearth, Guerra, and Ross decisions, Mr. McDougald was injured as a result of a tire that dislodged from and flew off of the tractor-trailer. C & S and Mr. Perry had exclusive control over the tractor-trailer, including its spare tire and chain, and both conceded responsibility for their maintenance prior to trial. Roy Beverly, the C & S representative who testified at trial, stated that the event “was pretty unbelievable at the time,” as “gravity” alone supposedly held the 130 pound tire in the cradle underneath the trailer. Although Mr. Beverly stated that his drivers inspected the trailer “a minimum of twice a day,” the inspection of the spare tire area typically did not include a direct physical inspection of the dog-type chain, which was to assist in securing spare tire. Mr. Beverly characterized the chain as merely a “backup, security” device (despite the fact that only gravity held the 130 pound spare tire in place and that the driver of the tractor-trailer would “hit the ceiling” when driving over rough terrain). In light of this evidence, the lower court justifiably concluded that an issue existed as to whether the accident constituted “one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control.” Goodyear Tire, 358 So. 2d at 1341-42. The trial court properly instructed the jury as to this issue.

As this Court has previously recognized, the “doctrine of *res ipsa loquitur* permits, but does not compel, an inference of negligence under certain circumstances.” Marrero, 486 So. 2d at 53 1. The doctrine “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).

As an example, in Wilson v. Spencer, 127 A.2d 840 (D.C. 1956), a case involving similar issues, the appellate court stated:

Application of [*res ipsa loquitur*], of course, does not compel a finding for plaintiff or even shift the burden of proof. . . . The jury ‘are at liberty to decide

for themselves whether the preponderance is with the plaintiff even where there is no evidence to counter-vail the inference.' . . . 'The inference, even standing alone, may be rejected by the trier of fact.'

Id. at 841 (citations omitted). The court in Wilson further concluded:

The cause of the accident was known and it was under defendant's control. And it was unlikely to do harm unless defendant was in some **manner** negligent. *Thousands of automobiles are using our streets, but no one expects the air to be filled with flying hubcaps.* We have found no case exactly on point on the facts, but closely analogous are those cases where wheels have become detached from motor vehicles.

Id. (citations omitted) (emphasis added). Likewise, motorists in Florida have a well-founded expectation that highways will be filled with airborne spare tires, such that *the res ipsa loquitur* doctrine is applicable.

In the instant case, the jury weighed all of the evidence presented in assessing the parties' respective liabilities. As in Wilson, the jury could choose to reject the inference of negligence that *res ipsa loquitur* supplies in determining whether or not the accident would have happened in the absence of negligence on the part of C & S and Mr. Perry. The fact that the evidence also established specific acts or omissions by C & S and Mr. Perry that could be considered negligent does not alter this result. As this Court previously stated, the "presence of some direct evidence of negligence should not deprive the plaintiff of the *res ipsa loquitur* inference." Marrero, 486 So. 2d at 532. Clearly, an appropriate application of the *res ipsa loquitur* doctrine "does not require that there be a complete absence of direct proof," nor does it require that a plaintiff negative all other inferences, Id.

For instance, in Hanson v. Dalton Coal & Materials Co., a case which also involved a "wayward wheel," the appellate court stated:

‘The attendant facts must be such as to raise a reasonable inference of defendant’s negligence but not necessarily such as to exclude every other inference. The jury must draw the inference of negligence from the facts proven, and it must be a reasonable one.’

264 S.W.2d 897, 903 (Mo, Ct, App. 1954) (citations omitted). Likewise, the Supreme Court of Washington addressed this issue in Coverly v. Western Tank Lines, Inc., 218 P.2d 322 (Wash. 1950), a case involving similar facts to the case at bar. In Coverly, the plaintiff sued the defendant after a wheel became detached from the defendant’s trailer and struck one of the plaintiff’s mink sheds and killed five minks. Id. at 323. The un rebutted evidence showed that the wheels came off of the truck because the studs or bolts holding the wheel sheared off at the location where the studs enter the wheel drum. Id. The evidence, however, did not indisputedly show the exact cause of the shearing. Id. at 328. Although the driver of the truck had performed an inspection of the tires and lugs prior to driving the truck, the driver did not actually remove the tire at the time of his inspection Id. at 324. Rather, the driver merely shined his flashlight on the tires and lugs, and subsequently tightened one or two loose lugs. Id.

The trial court instructed the *jury* as to *res ipsa loquitur*. Id. at 327. The jury found in favor of the plaintiff, and the defendant appealed, specifically alleging that “no instruction on *res ipsa loquitur* should have been given, for the reason that the cause of the accident was known and the fault, if any, was negligence in inspection and replacement.” Id. at 327. The court in Coverly, however, rejected this argument and held that the lower court properly instructed the jury as to this issue. Id. at 328. The court stated:

[Defendant’s] explanation of the accident was that the ten studs or bolts holding the wheel had sheared off due to crystallization which could not have been discovered although adequate inspection was made. It is not disputed that the studs or bolts sheared off. But the evidence was in conflict, and left a distinct uncertainty, as to why this happened, and [defendant’s] responsibility therefor.

The testimony left a doubt as to whether the shearing off of these studs was due to loose lugs, wear on the studs, crystallization of the studs, or a combination of all three. There was also uncertainty in the testimony as to what causes lugs to loosen, and what causes studs to crystallize, In view of this, it could not be said that the evidence is so completely explanatory of how the accident occurred that an instruction invoking the doctrine of *res ipsa loquitur* was out of place in this case.

Id. at 328; see also Peerless Supply Co. v. Jeter, 65 So. 2d 240 (Miss. 1953) (*res ipsa loquitur* proper where evidence did not uncover precise reason lug nuts became loose on tire that detached from tractor-trailer and struck plaintiffs travelling in opposite direction),

In the instant case, as in Coverly, the evidence presented at trial did not show precisely the manner in which Mr. Perry and C & S were negligent. Rather, evidence inferring negligence existed such as to the age of the chain, the “dog”-type of link used, the nut and bolt system that replaced the latch/lock system that had apparently broken off, and the “stretched” link through which the nut and bolt passed. Evidence also existed as to the manner and scope of Mr. Perry’s and C & S’ inspection and maintenance of the spare tire and chain in general, as well as on the day of the incident in question. While no direct proof of the bolt’s inadequacies or the chain’s integrity may have existed (nor direct proof that a more careful inspection would have exposed these facts), sufficient evidence did exist in support of the conclusion that the accident would not have occurred in the ordinary course of events in the absence of negligence on the part of those in control, Certainly, no suggestion existed that an act of God, or some other extraneous force, caused the 130 pound spare tire to spontaneously jump out from underneath the trailer, catapult and fly through the air, and strike a completely blameless motorist.

The case of Lewis v. Carpenter Co., 477 S.E.2d 492 (Va. 1996), which the Second District cited in a footnote in support of its decision, simply does not apply. See Perry, 698 So.

2d at 1260 n.2. In the instant case, Mr. McDougald -- unlike the plaintiff in Lewis -- presented testimony as to the sufficiency of Mr. Perry's pre-trip inspection. Moreover, unlike the plaintiff in Lewis, and as discussed above, Mr. McDougald presented sufficient evidence that the accident at issue would not have occurred in the ordinary course of events in the absence of negligence on the part of Mr. Perry and C & S. Although the evidence at trial may not have furnished a definitive picture of how the accident at issue actually occurred, the evidence presented was enough for the jury to infer that Mr. Perry and C & S acted negligently. In Marrero, this Court stated:

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*.

Marrero, 486 So. 2d at 532 (citing **PROSSER & KEATON, LAW OF TORTS**, § 40 (5th Ed. 1984)).

To this end, this Court has recognized the appropriateness of a *res ipsa loquitur* instruction in cases similar in nature to the case at bar. In Yarbrough, this Court found the instruction proper in a case involving a drive shaft that detached from a rented truck, causing the truck to turn over and pin one of the occupants underneath. 48 So. 2d at 83. Certainly, as this Court

recognized, the plaintiff in that case had a “right to believe that the vehicle [would] not fall apart in the middle of the road.” Id. Likewise, Mr. McDougald had a right to believe that he would not be subject to airborne 130 pound spare tires on the public roadways.

Similarly, in Tamiami Trail Tours, Inc. v. Locke, 75 So. 2d 586 (Fla. 1954), this Court applied the doctrine of *res ipsa loquitur* to a property damage situation caused by a failed coupling mechanism in a tractor-trailer truck. In discussing the history underlying the doctrine’s development, one concurring justice stated:

It is the plaintiffs task to make out a case from which, on the basis of experience, the jury may draw the conclusion that negligence is the most likely explanation of the accident. That conclusion is not for the court to draw, or to refuse to draw so long as there is enough to permit the jury to draw it; and even though the court would not itself infer negligence, it must still leave the question to the jury where reasonable men may differ as to the balance of probabilities,

Id. at 590 (Holt, J., concurring). Based upon these principles and in light of the facts presented at trial, the trial court justifiably instructed *the* jury on the *res ipsa loquitur* doctrine. For these reasons, the Second District erred in reversing the Final Judgment entered by the trial court in this case.

II. THE TRIAL COURT WAS CORRECT IN DENYING DIRECT VERDICTS IN FAVOR OF C & S AND MR. PERRY BECAUSE AMPLE EVIDENCE EXISTED, BY INFERENCE OR OTHERWISE, OF NEGLIGENCE.

As the Second District recognized, directed verdicts in negligence cases should be granted with great caution. In determining whether to grant the motion, a trial court must view all evidence in the light most favorable to the non-moving party, and furthermore, must resolve all conflicts in favor of the non-moving party. Perry, 698 So. 2d at 1259 (citing Azar v. Richardson Greenshields Sec., Inc., 528 So. 2d 1266, 1269 (Fla. 2d DCA 1988)).

In Cadore v. Karp, 91 So. 2d 806 (Fla. 1957), this Court stated that in granting a motion for directed verdict, the court must determine that “no evidence” exists to support a jury finding for the party against whom the verdict has been sought. If the evidence presented at trial conflicts, or constitutes evidence susceptible to different inferences, and if the evidence at trial tends to prove the disputed issue, the court should submit the evidence to the jury as a question of fact, rather than decide the issue as a matter of law. Id. at 807. Even where the evidence is not conflicting, however, a directed verdict would be improper if the jury can draw a reasonable inference from the evidence presented. Bruce Constr. Corn. v. State Exchange Bank, 102 So. 2d 288, 291 (Fla. 1958) (“[It] is true that the testimony and evidence in this cause is not conflicting but this fact does not mean that it does not permit different reasonable inferences which would justify a judgment for either party to be drawn therefrom”). In Reed v. Bowen, 503 So. 2d 1265 (Fla. 2d DCA 1986), *approved*, 512 So. 2d 198 (Fla. 1987), the Second District Court of Appeal stated:

[A] motion for directed verdict should not be granted *unless the court concludes that the evidence and all inferences of fact, construed most strictly in favor of the non-moving party, cannot support in the minds of the jurors any reasonable difference as to any material fact or inference.* The fact that circumstantial evidence is relied upon does not alter the rule that it is solely within the province of the jury to evaluate or weigh the evidence.

(emphasis added) (citations omitted).

In this case, the evidence at trial clearly supported an inference of negligence on the part of C & S and Mr. Perry in their maintenance and/or operation of the tractor-trailer and its spare tire and chain. Viewed in the light most favorable to Mr. McDougald, as the non-moving party, the evidence at trial showed that although the tractor-trailer had undergone a “pre-trip inspection” on the day of the accident, the “pre-trip inspection” did not include an actual physical inspection

of the aged spare tire chain. The testimony revealed that the “dog-type” chain at issue was the original chain that came with the trailer over twenty years ago. Moreover, the testimony showed that a nut and bolt, which purportedly held the chain in place, had slipped through a “stretched” link in the chain, inferring that the nut and bolt were too small for their intended use or the chain was improperly maintained. Mr. Perry, who supposedly checked the spare tire that day, did not know when the chain became “stretched.” He stated, however, that a latch and lock had originally held the chain in place, but that they had broken some time before the accident in question and were replaced with only the nut and bolt. The representative from C & S described the accident as “unbelievable,” despite the fact that gravity alone supposedly held the 130 pound tire in the undercarriage of the trailer and despite the fact that the trailer would jostle about considerably when driving over bumps. Mr. Perry described the railroad tracks that he crossed on the day of the accident as “real rough,” so much so that Mr. Perry had to reduce the speed of his truck and trailer when crossing or else “hit the ceiling.”

These facts clearly support an inference that C & S and Mr. Perry acted negligently in their maintenance, inspection, and operation of the tractor-trailer and its spare tire and chain, and certainly supported an inference that the accident would not have occurred in the absence of negligence on their part. Contrary to the Second District’s conclusions, sufficient evidence existed, by inference or otherwise, of C&S’s and Mr. Perry’s negligence in this case. The absence of expert testimony on any of these issues does not alter this result because the facts constituting negligence on the part of C & S and Mr. Perry constituted matters within the ordinary experience of the jury. In this regard, the Fourth District stated:

Expert opinions are admissible only when the facts to be determined are obscure and can be made clear only by the opinions of persons skilled in relation to the

subject matter of the inquiry; and when facts are within the ordinary experience of the jury, conclusions therefrom will be left to them, and even experts are not permitted to give conclusions in such cases.

Smaglick v. Jersey Ins. Co. of New York, 209 So. 2d 475 (Fla. 4th DCA 1968) (citations omitted). As discussed previously, the evidence at trial showed more than just merely that an accident had occurred. As such, the Second District erred in reversing the Final Judgment entered by the trial court following the jury's verdict in favor of Mr. McDougald.

III, **THE TRIAL COURT CORRECTLY SUBMITTED THE ISSUE OF MR MCDUGALD'S PAST AND FUTURE LOSS OF EARNING CAPACITY TO THE JURY BECAUSE SUFFICIENT EVIDENCE EXISTED TO CREATE A JURY QUESTION.**

The Second District -- in dicta -- erred in reversing that portion of the Final Judgment representing Mr. McDougald's past and future loss of earning capacity in this case, Contrary to the Second District's opinion, sufficient competent evidence existed in support of Mr. McDougald's damages' claim for the trial court to submit this issue to the jury. As discussed below, this evidence enabled the jury to make a determination and calculation of Mr. McDougald's loss.

As this Court recognized, an award for loss of the ability to earn, unlike an award for lost business profits, does not depend upon actual earnings. Mullis v. City of Miami, 60 So. 2d 174, 177 (Fla. 1952); *see also* W. R. Grace & Co. v. Pyke, 661 So. 2d 1301, 1304 (Fla. 3d DCA 1995). As the First District has noted, "[a]ll that is required to justify the instruction is that there be reasonably certain evidence that the capacity to labor has been diminished and that there is a monetary standard against which the jury can measure any future loss." Long v. Publix Super. Markets, Inc., 458 So. 2d 393, 394 (Fla. 1st DCA 1984); *see also* W. R. Grace & Co., 661 So.

2d 1301, 1303 (Fla. 3d DCA 1995); Long, 458 So. 2d at 394; Allstate Ins. Co. v. Shilling, 374 So. 2d 611 (Fla. 4th DCA 1979).

In this case, the Second District's focus was not on Mr. McDougald's diminished capacity to earn, but rather, on the "monetary standard" against which the jury purportedly measured Mr. McDougald's loss, Pert-v., 698 So. 2d at 1260. The evidence presented at trial showed that Mr. McDougald, based upon his own past experiences, could have earned between approximately \$20,000.00 to \$25,000.00 per year by arranging big game hunting trips for various clients. At trial, Mr. McDougald presented sufficiently detailed evidence as to the scope and nature of past trips, the number of clients who had attended, and the amount of money that he had charged. As Mr. McDougald testified, his permanent injuries greatly affected his physical capabilities and thereby substantially reduced his ability to generate earnings from his these activities.

While the jury may have had to glean from Mr. McDougald's testimony the approximate amount of Mr. McDougald's future prospective losses, the jury's verdict is supportable, especially in light of the fact that Mr. McDougald sustained a permanent injury as a direct and proximate result of the accident at issue. In this regard, the Second District has noted that "when, as here, there is evidence of a permanent injury, it is error for the court to refuse to instruct on loss of future earning capacity." Hatfield v. Wells Bros., Inc., 378 So. 2d 33, 34 (Fla. 2d DCA 1979).

The figures that Mr. McDougald presented at trial provided the jury with sufficient evidence upon which to determine Mr. McDougald's future losses. The amount decided upon by the jury, however, was within its sole discretion. In W. R. Grace, the Third District Court of Appeal stated:

The purpose of a jury's award of damages for loss of any future earning capacity is to compensate a plaintiff for loss of capacity to earn income as opposed to

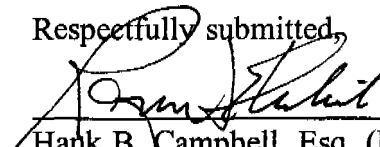
actual loss of future earnings, . . . A plaintiff must demonstrate not only reasonable certainty of injury, but must present evidence which allows a jury to reasonably calculate lost earning capacity. . . . Once sufficient evidence is presented, the measure of damages is the loss of capacity to earn by virtue of any impairment found by the jury and the jury must base its decision on all relevant factors including the plaintiffs age, health, habits, occupation, surroundings, and earnings before and after the injury.

661 So. 2d at 1302 (citations omitted). The jury obviously weighed the testimony, as the jury came up with its own amount, rather than wholly embracing the figures that Mr. McDougald supplied, The Second District simply erred in holding that the trial court should not have submitted this issue to the jury in this case. Therefore, the Final Judgment entered by the trial court should be affirmed.

CONCLUSION

For these reasons, this Court should quash the decision of the Second District and remand this case to the trial court with directions to enter judgment in favor of Petitioner, Mr. McDougald, in accordance with the jury's verdict.

Respectfully submitted,



Hank B. Campbell, Esq. (FBN 0434515)
Christine C. Daly, Esq. (FEN 0998362)
Lane, Trohn, Bertrand & Vreeland, P.A.
Post Office Box 3
Lakeland, Florida 33802-0003
(941) 284-2200
(941) 688-0310 (fax)

Raymond Ehrlich, Esq. (FBN 022247)
Scott D. Makar, Esq. (FBN 0709697)
Holland & Knight LLP
50 N. Laura Street, Suite 3900
Jacksonville, Florida 32202
(904) 353-2000
(904) 358-1872 (fax)

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been served by U.S. Mail this 30~~th~~ day of March, 1998 to: Douglas M. Fraley, Esq., 501 East Kennedy Boulevard, Suite 1225, Tampa, Florida 33602,



Attorney

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