IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,811

TGI FRIDAY'S, INC., a New York corporation, d/b/a TGI FRIDAY'S,

Petitioner,

vs.

MARIE D. DVORAK,

Respondent.
_____/

RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF ON CROSS-PETITION

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RESPONSE TO "POINT I"

As was stated in *Times Publishing Company v. Russell*, 615 So.2d 158 (Fla.1993):

> Pursuant to article V, section 3(b)(3) of the Florida Constitution, this Court has subject-matter jurisdiction over any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The word "express" simply requires a "discussion of the legal principles which the court applies . . ." *Ford Motor Company v. Kikis*, 401 So.2d 1341, 1342 (Fla.1981). Each of the cases cited to support the conflict jurisdiction of this Court contains a "discussion of the legal principles which the court applied . . ." id, at 1342. Further, as can be seen in the chart below, which allows ease of comparison, the conflict is "direct". "It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal." *Nielsen v. City of Sarasota*, 117 So.2d 731, 734 (Fla.1960). All of the decisions cited as conflicting "collide so as to create an inconsistency or conflict . . ." (TGI Friday's/Petitioner's answer brief, page 4). Further:

> [I]t is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under section 3(b)(3).

Ford Motor Company v. Kikis, at 1342.

The following chart demonstrates the express conflict between the Fourth District Court of Appeals' decision in *Dvorak* and the decisions of the other district courts of appeal:

CHART DEMONSTRATING CONFLICT

District Court of Appeal case which conflicts with 4th DCA in *Dvorak v. TGI Fridays*	**Other Court's holding:**	**Fourth District Court of Appeals holding:**
Lennar v. Muskat, 595 So.2d 968 (Fla. 3rd DCA 1992)	A party must make "*evidentiary* showing to rebut the presumption of unreasonable rejection . . ." (emphasis added), at 968.	No evidentiary showing to rebut presumption of unreasonable rejection, trial court can rely on its own "familiarity with case" . . . at 60.
O'Neil v. Wal-Mart Stores, Inc., 602 So.2d 1342 (Fla. 5th DCA 1992)	When determining fees, court shall 'consider all of the relevant circumstances *at the time of the rejection*,' at 1343 (emphasis added).	When determining fees, court can: rely on trial court's "observation of the evidence *at trial*", at 60 (emphasis added).
Carlough v. Nationwide Mutual Fire Insurance Company, 609 So.2d 770 (Fla. 2nd DCA 1992)	Party seeking to avoid imposition of attorneys fees must provide "evidence in support of his position . . ." at 771.	Party does not have to present evidence to avoid imposition of attorneys fees, trial court can rely upon "[f]amiliarity with the case . . ", at 60.
A.G. Edwards & Sons v. Davis, 559 So.2d 235 (Fla. 2nd DCA 1990)	If judgment is 25% greater than offer, "plaintiff *is* entitled to fees" . . . (emphasis added), at 236.	If judgment is 25% greater than offer, plaintiff "may" be entitled to fees, at 60.
Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3rd DCA 1991)	Because judgment was off by more than 25%, defendants are "*entitled*" to recover fees (emphasis added), at 780.	If judgment is 25% greater than offer, plaintiff "may" be entitled to fees, at 60.

RESPONSE TO TGI FRIDAY'S "POINT V"

TGI Friday's Answer Brief On Cross-Petition fails to address each of the five points raised by Plaintiff in its brief, and instead responds in one shotgun-like approach. The obvious reason for failing to respond to each point individually is that TGI Friday's does not have an adequate response. This tactic makes the brief difficult to read for this Court, and

difficult for counsel to respond to. TGI Friday's fails to even tangentially discuss the issues raised in Points II A and C of Plaintiff's cross-petition.

TGI Friday's attempts to support the trial judge's conclusory ruling that the rejection was reasonable by referring this Court to irrelevant and incomplete hypothetical questions that were posed to Plaintiff's expert at trial that were not based on any facts in evidence[1]. TGI Friday's states that Plaintiff's expert admitted in cross-examination in response to TGI Friday's "hypothetical questions that the rejection would not be unreasonable" (TGI Friday's brief, page 6). The problem was that the hypothetical questions that were being presented to this expert dealt with a case fantasized by counsel for TGI Friday's, but which were not the facts of the case. Counsel for TGI Friday's was asking the expert to "assume that there was no evidence that there was any hazardous condition..." (T. 41):

> A. If I have to accept that hypothetical that you're telling me, assuming that there is absolutely no evidence that the floor is slippery beyond the standards in the community, that there is nothing on the floor, and that it's a perfect floor and there isn't anything wrong with it, obviously the answer is, yeah, I feel it's defendable.
>
> Q. Even to the extent of directed verdict?
>
> A. Sure. If that's the evidence. But that's your hypothetical. That isn't exactly the same as what I'm getting from Mr. Cytryn.
>
> Q. You have to accept what I ask you, sir. And I understand that.

(H. 28)

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[1] The trial judge *never* made any findings with regard to whether the offer was unreasonably rejected. The trial judge simply had both parties submit written orders, and he signed the order prepared by TGI Friday's (H. 80)

TGI Friday's argument that Plaintiff's expert's testimony supported TGI Friday's position at the hearing on entitlement to attorney's fees is frivolous. The hypotheticals posed to Plaintiff's expert, Jack Donoho, had absolutely nothing to do with the facts in this case. Obviously, when the facts are turned around completely and do not represent the situation that actually occurred, an expert can give an opinion that is completely irrelevant to the facts of the case at bar.

As set forth in Plaintiff's Statement of Facts, four ex-employees of TGI Friday's and three customers testified at trial that they slipped on the same exact floor as the Plaintiff, and the Plaintiff introduced one employee who testified that she herself had seen fifteen to twenty people slip on the same floor. This does not include the thirty-one incident reports of other people slipping on TGI Friday's floors that were also admitted to evidence. The entire nine days of trial was replete with evidence showing the treacherous condition of the greasy polyurethane coated wood floor at TGI Fridays.

Counsel for TGI Friday's asked Plaintiff's expert questions that were irrelevant to the facts of our case. It's kind of like asking somebody to assume in a rear-end accident case where the front vehicle was driving in darkness at night without any lights on to assume that the rear-end accident had happened during the day.

On page 9 of its brief, TGI Friday's states: "even the Plaintiff's 'expert' admitted on cross-examination that there is a much higher percentage of defense verdicts in slip and fall accidents." That's not what Plaintiff's expert stated. Plaintiff's expert stated:

> A. Let's put it this way, you get a much higher percentage of defense verdicts of slip and fall cases than you do in, say, automobile accident rear-end, stop sign, yield sign.

(H. 24).

Nothing like taking a statement out of context.

Mr. Donoho testified in forty-eight pages of transcript that the failure of TGI Friday's to accept the offer was an unreasonable rejection, resulting in unnecessary delay and needless increase in the cost of litigation:

> [T]he offer of judgments were extremely reasonable . . . [and] it wasn't reasonable [for TGI Friday's] to reject it.

(H. 52).

TGI Friday's further states that it was "he [the trial judge] who almost directed a verdict for the defendants, who came very close to granting a mistrial, and who initially ruled that the incident reports on which plaintiff premised her case were inadmissible" (TGI Friday's brief, page 6). To show how misleading that statement is, the portion where the judge spoke about possibly directing a verdict in the case was before the first witness testified. That occurred in 185 pages of trial transcript before any testimony began where the trial judge was listening to TGI Friday's Motions In Limine (T. 1-185). The trial judge was stating that if the plaintiff did not present sufficient evidence, he would grant a directed verdict.

At the charge conference, TGI Friday's trial counsel and present appellate counsel for TGI Friday's, over vehement objection by Plaintiff, wanted the following special interrogatory questions on the verdict form:

> We, the jury, return the following verdict:
>
> 1. Was there negligence on the part of Defendant, TGI FRIDAY'S, INC., which was a legal cause of damage to Plaintiff, MARIE D. DVORAK?
>
> YES ---------- NO ----------

(If your answer to Question 1 above is NO, your verdict on the claim of MARIE D. DVORAK is for TGI FRIDAY'S, INC., and you should not proceed further except to date and sign this

verdict form and return it to the courtroom. If your answer to Question 1 is YES, Please Answer Questions 1 (a) and 1 (b).)

1 (A) Was there grease or some other foreign substance on the floor where MARIE D. DVORAK fell, which was a legal cause of her fall?

YES ---------- NO ----------

1 (B) Was the floor surface in and of itself a dangerous condition which was a legal cause of MARIE D. DVORAK'S fall?

YES ---------- NO ----------

Please answer Question 2.

The jury answered "YES" to all three questions. Not only did they find that there was a foreign substance on the floor, they also found that the floor was inherently dangerous in and of itself. The trial court denied TGI Friday's Motion for Directed Verdict, and the case was per curiam affirmed by the Fourth District Court Of Appeal (Case No. 91-01820). The appellate court didn't even think enough of the issues raised by TGI Friday's to write an opinion on it.

There was testimony that the substance on the floor in the area where the Plaintiff fell was "greasy" (T. 1296), and further, Plaintiff did not have to identify the nature of the substance that made her slip and fall. See *Fletcher v. Petman Enterprises, Inc.*, 324 So.2d 135 (Fla.1976). In *Fritts v. Collins*, 144 So.2d 850, 851 (Fla. 2d DCA 1962), the plaintiff described the floor upon which she had slipped as "slick, [and] felt greasy," reminding the witness of a "greasy biscuit pan." The court held that "a jury question is present when there was [an] (sic) invisible substance on the floor which caused the party to fall." *Fritts*, at 851.

TGI Friday's does not even tangentially address issues A and C. It reminds this writer of the tactic that an attorney is supposed to do in the closing argument at trial if either the law or the facts are on one side: 'If the facts are not on your side, argue the law. If the law is not

on your side, argue the facts. And if the law and the facts are against you, bang on the table.' TGI Friday's does a lot of banging, because neither the law nor the facts are on its side.

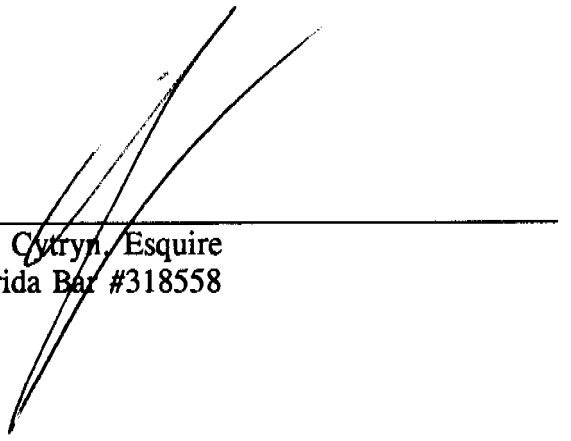
With regard to point A, TGI Friday's does not overcome the presumption of unreasonable rejection. With regard to point B, the time for determining whether the offer was unreasonably rejected was erroneously applied by the Fourth District Court of Appeal. With regard to point C, the trial court failed to make express findings of fact to facilitate meaningful appellate review. See *Henson v. Haslam*, 19 Fla. Law Weekly D 2439 (Fla. 2d DCA November 16, 1994):

> Any determination that the presumption has been rebutted and that the rejection was "reasonable," should be supported by express findings and not a mere conclusion as to reasonableness.

Finally in point D, there was no expert sworn testimony to rebut the presumption of unreasonable rejection.

TGI Friday's arguments fail on all points.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to: John Marion, Esquire, P.O. Box 3767 West Palm Beach, Florida 33402, Jack Shaw, Esquire, 225 Water Street, Suite 1400, Jacksonville, Florida 32202, and Marjorie Gadarian Graham, Esquire, Marjorie Gadarian Graham, P.A., 11380 Prosperity Farms Road, Suite 204, Palm Beach Gardens, Florida 33410 this 16th day of March, 1995.

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