IN THE SUPREME COURT OF FLORIDA

ROBERT FRIEDRICH and
HEATHER FRIEDRICH, his Wife,

Petitioners/Plaintiffs,

vs.

FETTERMAN AND ASSOCIATES,
P.A.,

Respondent/Defendant.
_____/

CASE NO: SC11-2188

L.T. CASE NOS.:
4TH DCA CASE NO. 4D09-3661
15TH JUDICIAL CIR. CASE NO.
502005CA006954XXXXMB

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF THE PETITIONERS/PLAINTIFFS

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MOVANT'S INTEREST

The Florida Justice Association ("FJA") is a voluntary, state-wide association of approximately 3,000 members, pledged to the preservation of the legal system, the protection of individual rights, liberties, access to courts, and the right to jury trial. The FJA worries that the District Court's opinion below, will result in upending our State's well-established rules prohibiting the entry of directed verdicts, when evidence exists that could support a verdict. It fears a resulting erosion of the constitutional right to a jury trial currently held by Florida's citizens, and a misuse against persons with meritorious claims.

Many FJA members are trial lawyers with vast experience both in defending and prosecuting motions for directed verdict. They repeatedly encounter attempts by defendants who seek to usurp consideration of claims by juries. As practitioners who will confront the long-term effects of this decision on a daily basis, the FJA has a legitimate interest in this case, and is a proper *amicus*. The FJA has a direct interest in ensuring that all citizens appearing in Florida's courts are entitled to the predictability mandated by *stare decisis*, as well as the ability to trust in the sanctity of the common law.

Finally, although the FJA supports the petitioners'/plaintiffs' arguments, the FJA does not repeat those arguments. Rather, the FJA builds on them, addressing the issue from a more generalized, detached legal perspective.

I. SEEMINGLY GUIDED BY A STANDARD OF PROOF WHICH THIS HONORABLE COURT HAS ALREADY OVERRULED, THE FOURTH DISTRICT MISTAKENLY NAVIGATED ITS WAY TO A LEGALLY FLAWED CONCLUSION.

For lack of a better characterization, there are essentially two "strains" of actionable claims, arising out of premises liability, *i.e.*, (a) those resulting from falls on transitory foreign substances, and (b) those resulting from "hidden defects" on the property. The distinction between these two basic premises liability scenarios was perhaps best described by *Fontana v. Wilson World Main Gate Condo*, 717 So. 2d 199 (Fla. 5th DCA 1998), which--coincidentally--also arose out of injuries sustained by the victim of a collapsing chair. In illustrating this important distinction, the *Fontana* court explained:

> The situation involved in this case is **not like a normal slip and fall case** in which the danger is a pool of liquid or a banana peel on the floor which would be readily apparent from a visual inspection at reasonable intervals; **here, the defect was hidden**. *Id.* at 199-200.

In garden variety "hidden danger" injury cases, property owners owe two duties to their business invitees, *i.e.*: (1) to warn of concealed dangers which are or

should be known to the owner, and which are unknown to the invitee and cannot be discovered through the exercise of due care; and (2) to use ordinary care to maintain their premises in a reasonably safe condition. *See, e.g., Rocamonde v. Marshalls of Ma, Inc.*, 56 So. 3d 863, 865 (Fla. 3rd DCA 2011)(citation omitted).

Notwithstanding that Mr. Friedrich's grave injuries were **not** caused by a "pool of liquid or a banana peel on the floor," the Fourth District still viewed the case facts through "transitory-foreign-substance"-law-glasses. *See, Fetterman & Associates, P.A. v. Friedrich*, 69 So. 3d 965, 967 (Fla. 4th DCA 2011)(which cited to conventional slip and fall cases as guidance). Relying on two traditional "slip and fall" cases, *Cain v. Brown*, 569 So. 2d 771, 772 (Fla. 4th DCA 1990) and *Winn-Dixie Stores, Inc. v. Marcotte*, 553 So. 2d 213 (Fla. 5th DCA 1989), the lower court majority mistakenly framed the issue on appeal as:

> [W]hether Friedrich presented competent evidence establishing that Fetterman had a duty to periodically inspect its office furniture for hidden defects **and that such periodic inspections would have placed Fetterman on *notice* of the defect**. *Id.* at 968.

The court then clarified its inquiry, stating:

> In other words, did the evidence '***prove*** that the dangerous condition **existed a length a time prior to the injury** in excess of a reasonable period between inspections'. *Id.* at 968 (citation omitted).

The lower court majority's two-fold analytical misstep--*i.e.*, the inadvertent misapplication of the notice requirements of "banana peel law" coupled with its implication that plaintiffs must "**prove**" their cases to survive a directed verdict--led it to erroneously strip the Friedrichs of their jury verdict and the subsequently entered judgment.

The majority below relied on the overruled precedent articulated in *Winn-Dixie Stores, Inc. v. Marcotte, supra.* Yet, at no point did the Fourth District ever mention this Honorable Court's opinion in *Owens v. Publix Supermarkets*, 802 So. 2d 315 (Fla. 2001).

Following numerous other jurisdictions, *Owens* pioneered a "burden-shifting," modernization of our State's premises liability law.[1] *See*, *Id*. at 331. This Court felt the time had come to free injured victims from having to prove the "artificial requirement" (as it characterized it) of how long an offending substance was on the floor. *See, Id*. at 331.

Apropos of a premises liability case like this one, involving a business invitee victim **outside** of the "grocery store" context, this Honorable Court also acknowledged that in certain circumstances the law may obviate the need to prove

[1] In 2011, the Florida legislature rejected this Honorable Court's finding with respect to the rebuttable presumption. However, that statute applies solely to "transitory foreign substances" cases, which this is not. *See,* §768.0755, Fla. Stat.

notice altogether. *See*, *Owens*, 802 So. 2d at 323 ("We have on a limited basis recognized that, by virtue of the nature of the business or its mode of operation, the requirement of establishing constructive knowledge is altered or eliminated."). The Fourth District itself applied the *Owens* court's reaffirmed "mode of operation" theory, even extending it to cases like this one involving a "hidden" danger. *See*, *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257-58 (Fla. 4th DCA 2003)(recognizing that while the *Owens* holding was limited to foreign substance cases, "mode of operation," as a theory of negligence, could also apply to more "traditional places of business"). Extrapolating from the principles driving transitory foreign substance cases, the Fourth District in *Martino*--as opposed to what it did in this case--**refused to see the alleged lack of notice as fatal to the plaintiff's claim**. *Id.* at 1257.

Martino arose when a Wal-Mart cashier asked Mrs. Martino to lift up the bag of water softener salt she was purchasing, so the cashier could scan the price code. *Id.* at 1252. To accomplish this, Mrs. Martino placed the bag of salt on top of the shopping cart, at which point the cart collapsed, injuring her hand. *Id.* at 1253. The Martinos asserted that the failure to properly train store employees regarding appropriate procedures for scanning, and its enlistment of customers to assist in the

handling of heavy items for price scanning, constituted a "negligent mode of operation," allowing for a finding of liability. *Id.*

In *Martino*, ironically, the Fourth District **reversed the directed verdict** the trial judge granted for Wal-Mart, writing:

> Well before the *Owens* decision, **outside of the context of foreign substance, supermarket slip and fall cases**, Florida's courts have applied a 'mode of operation' theory of liability to premises liability cases. *See, e.g., Brisson v. W. T. Grant Co.*, 79 So. 2d 771 (Fla. 1955); ***Fontana v. Wilson World Main Gate Condo***, 717 So. 2d 199 (Fla. 5th DCA 1998). *Id.* at 1258.

Fontana, which the Fourth District cited in support of its reversal of the directed verdict in *Martino* as noted earlier, also arose from a case involving a collapsing chair.

There, Paula Fontana innocently sat in a chair at the defendant's hotel, which too collapsed while she was sitting in it. *Id.* at 199. Finding that plaintiff presented no evidence of "actual or constructive notice" as to the condition of the chair, the trial judge in *Fontana* directed a verdict for the hotel. *Id*.

The only record evidence presented by the plaintiff in *Fontana*, was that the hotel **had no procedure in place for inspecting or maintaining its furnishings,** and the hotel **had not checked the condition of its furniture, to see that it was in a safe condition**. *Id.* The *Fontana* court found **that fact alone**, was enough

evidence to get the case to a jury under the circumstances presented, suggesting that the failure to inspect was the "mode of operation."

Contrary to its sister court in *Fontana*, the lower court majority here was unmoved by the evidence that the defendant never performed any inspections on the subject chair. *Fetterman & Associates, P.A.*, 69 So. 3d at 967. Instead, the lower court majority granted judgment notwithstanding the verdict, based in part on its finding that the Friedrichs failed to "**prove** that the dangerous condition existed a length of time prior to the injury in excess of a reasonable period between inspections." *Id.* at 968.

Yet, the majority below seemed to overlook that appellate courts are only supposed to affirm directed verdicts or actually "direct" them, "where **no proper view of the evidence could sustain a verdict** in favor of the nonmoving party." *Owens*, 802 So. 2d at 329. Nothing in the law requires a plaintiff to **prove** his/her case, as a prerequisite to surviving a directed verdict. Plaintiffs must simply **provide evidence** that a **negligent act more likely than not caused the injury**. *See, Cox v. St. Joseph's Hospital*, 71 So. 3d 795, 801 (Fla. 2011).

The majority below then took an **additional** step, and opined that even if there **were** evidence that the defendant should have inspected the chair, the lack of evidence about the length of time between an inspection and the accident, also

compelled the court to snatch the case from the hands of the jury. As the district court explained:

> **Even if the jury concluded that due care required Fetterman to inspect** its chairs at regular six-month intervals, the jury had no basis from which to conclude that Fetterman would have discovered the defect in the chair without receiving evidence **as to how long before the accident flex-testing would have revealed the defect**. In this case, the lack of evidence establishing when the flex-test would have revealed the defect in the chair prior to the injury was an indispensable factor in determining liability. *Id.* at 968.

Contrary to the lower court majority's finding, Florida law simply **does not require** an introduction of "evidence as to how long before the accident," testing would have revealed the defect. In fact, "[g]enerally questions concerning whether a proper inspection, if made, would have revealed alleged defects **are considered genuine triable issues**." *Black v. Heininger*, 163 So. 2d 3 (Fla. 2d DCA 1964). *See also, Yuniter v. A & A Edgewater of Florida, Inc.*, 707 So. 2d 763 (Fla. 2d DCA 1998)(quoting *Black, supra*.).

The inadvertent misapplication of overruled and inapposite precedent, coupled with an impermissible judicial demand for an evidentiary showing not required by the law, led the majority below down an analytical path that it punctuated with an erroneous conclusion. Notwithstanding the vociferousness of the dissent, the majority, respectfully, clung to its flawed reasoning. The FJA

respectfully submits that the application of this court's current precedent dictates reversal and reinstatement of the well-considered verdict reached by the jury.

II. IN VIOLATION OF DIRECTED VERDICT LAW, THE FOURTH DISTRICT MAJORITY UNWITTINGLY ANALYZED THE QUALITY OF THE PLAINTIFF'S EVIDENCE, RATHER THAN ASSESSING WHETHER THE INFERENCES DRAWN FROM IT COULD SUPPORT A VERDICT FOR THEM.

Inherent in every decision rendered by an appellate court, is a multilayered combination of concerns. Most opinions involve facts, juxtaposed against constitutional, statutory and/or some kind of procedural considerations. However, when the court's focus inadvertently dwells too strongly on any one of these considerations, its overemphasis may upset the proper analytical balance, ultimately leading to an erroneous decision.

The FJA respectfully submits that the Fourth District majority below unwittingly fell into this trap. The majority found itself so mired in the specific factual setting, that it mistakenly subverted constitutional guaranties and contravened important precedent, as powerfully articulated by the Third District:

> [T]he **direction of a verdict** can **constitute** an **encroachment on the right of a litigant to a jury trial** and an invasion by the court of the province of a jury which is **contrary to constitutional guaranties**.

Hernandez v. Motrico, Inc., 370 So. 2d 836, 837 (Fla. 3rd DCA 1979). Because "trial by jury is a constitutionally protected right," courts accord the full measure of that right when "there is any substantial, competent evidence, coupled with all reasonable inferences to be drawn therefrom, tending to sustain the issue sought to be advanced." *Hill v. American Home Assur. Co.*, 193 So. 2d 638, 646 (Fla. 2nd DCA 1966).

In *Cox v. St. Joseph's Hospital*, 71 So. 3d 795 (Fla. 2011), this Honorable Court reversed the Second District's decision to grant a directed verdict for the defendant, because the appellate court impermissibly "reweighed" the testimony presented by the plaintiff's expert. *Id.* at 796. While the plaintiff's expert testified that the negligence at issue "probably" caused the injury, the expert never testified that the plaintiff's chances of benefitting from the therapy he did not receive, exceeded those of other patients. *Id.* at 799-800. That perceived shortcoming led the Second District to conclude that the testimony was speculative. *Id*.

In rejecting the Second District's "reweighing" of the evidence, this Court wrote:

> As our review of the case law illuminates, while a directed verdict is appropriate in cases where the plaintiff has *failed* to provide evidence that the negligent act more likely than not caused the injury, it is not appropriate in cases **where there is conflicting evidence as to the causation or the likelihood of causation**. If the plaintiff

> has presented evidence that could support a finding that the defendant more likely than not caused the injury, a directed verdict is improper. Here the **jury was presented with conflicting testimony** as to the significance of statistics from the NINDS study--which is a matter for the jury, not a matter for the appellate court to resolve as a matter of law. *Id.* at 801. (Emphasis in original).

Unfortunately, the Fourth District seemed to get caught in the same vortex of reviewing and weighing the facts that plagued the Second District in *Cox*, unwittingly overlooking the **existence** of evidence, instead of assessing its quality and believability. As Judge Levine observed in his dissent, a key piece of evidence in this case was that **defendant had never engaged in any inspections**--let alone routine bi-annual inspections as the expert testified should have been done--of the chairs in his office. *Fetterman*, 69 So. 2d at 969-70 (Levine, J. dissenting). The expert further opined that such inspections "should have found" the defect in the chair, notwithstanding the court's finding that he conceded it was possible that such testing may not have revealed the weak joint. *Id*. at 970.

This evidence--and the inferences drawn from it--**was far from incontrovertible**. The jury easily could have found that routine inspections **more likely than not** would have prevented Mr. Friedrich's serious injuries.

While this Honorable Court's *Cox* opinion provides this Court's most recent pronouncement regarding the evils of inappropriately directed verdicts, we cannot

forget the many other aspects where Florida law admonishes against directed verdicts. For example, it goes without saying that courts must treat motions for directed verdict with special caution, especially in negligence cases, where the jury must weigh and evaluate the evidence from which reasonable people can draw various differing conclusions. *See, Collins v. School Board of Broward County*, 471 So. 2d 560, 563 (Fla. 4th DCA 1985).

That principle applies equally to motions for judgment notwithstanding the verdict. *See, Melgen v. Suarez*, 951 So. 2d 916, 917 (Fla. 3rd DCA 2007). As *Melgen* noted:

> Motions for JNOV should be resolved with extreme caution since the granting thereof holds that one side of the case **is essentially devoid of probable evidence**. [T]his is especially true in negligence cases where the function of a jury to weigh and evaluate evidence is particularly important since reasonable people can draw various conclusions from the same evidence." (Citations omitted)). *Id.*

Trial courts "should not infer certain facts as a matter of law, **unless they are <u>certain</u> and <u>incontrovertible</u>**." *Hernandez, supra.*, 370 So. 2d at 837. Trial courts also "cannot judge the credibility of witnesses or weigh evidence when ruling on such a motion." *Hughes v. Slomka*, 807 So. 2d 98, 100 (Fla. 2nd DCA 2002).

Any time "there is conflicting evidence or if **different reasonable inferences may be drawn from the evidence**," the case presents a factual question needing

resolution by a jury. *See*, *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 925 (Fla. 5th DCA 2009). Courts should direct verdicts only where **no view of the evidence**, and **no view of the *inferences* drawn from the evidence,** could support a verdict for the non-moving party. *Id.* As part of that analysis, the court must also "evaluate the testimony in the light most favorable to the non-moving party, and **every reasonable evidentiary inference**," in favor of the non-moving party. *Id.*

Ironically, an *en banc* panel of the Fourth District itself recently admonished that directed verdicts are improper if **any** evidence will support a verdict for the non-moving party. *Claire's Boutiques v. Locastro (en banc)*, 85 So. 3d 1192, 1195 (Fla. 4th DCA 2012). Trial courts, the Fourth District advised, "should direct a verdict in favor of the defendant only 'where the facts are unequivocal, such as where **the evidence supports no more than a single reasonable inference**.'" *Id.*

Notwithstanding the majority's own take on the evidence, or its view of plaintiffs' position, under the well-established tenets of "directed verdict" law, the court simply erred in reversing the final judgment. No view of this record could support a finding that plaintiffs' case was "**devoid** of probative evidence," or that the evidence supported only one single reasonable inference. No view could leave reasonable people believing there was not **any** evidence in the record to support the jury's verdict. The lower court majority's finding to the contrary, contravened

established precedent and encroached on plaintiffs' constitutional right to a jury trial.

CONCLUSION

The FJA respectfully submits that established law compels this Honorable Court to reverse the Fourth District Court of Appeal's 2-1 decision below, with directions to reinstate the original final judgment entered by the trial court.

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