In the Supreme Court of Florida

CASE NO.: SC11-2188

ROBERT FRIEDRICH and
HEATHER FRIEDRICH, his wife,

Petitioners,

v.

FETTERMAN AND ASSOCIATES, P.A.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Petitioners/Plaintiffs seek review based on asserted express and direct conflict with other Florida appellate decisions, but do so based on an improper statement of the case and facts. As detailed below, Plaintiffs' statement alters the facts recited in the actual Opinion of the Fourth District by reciting portions out of context, and then ***disagrees with*** facts recited in the Opinion, saying that they are contradicted by the record. The law is clear, however, that Plaintiffs are bound by the decision as written, and may not rewrite it or refer to claimed deviations from the record:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). *See also Paddock v. Chacko*, 553 So. 2d 168, 168-69 (Fla. 1989) (McDonald, J., concurring) ("[I]t is neither appropriate nor proper for us to review a record to find conflict ... ; the opinion itself must directly and expressly, on its face, conflict with another opinion.")

The Plaintiffs' departures from this rule are set out below, but Respondent initially sets out the facts pertinent to the jurisdictional inquiry. They show that this was a decision based on very specific facts; that the standard, long-established Florida law on causation in negligence cases was properly applied to the facts; and that no conflict has been created by this run of the mill disposition of a tort case on

its facts.

The critical facts that led the Fourth District to reach its decision were those on causation. Specifically, the Fourth District's Opinion[1] recites that the Plaintiffs put on an expert who said that chairs should be inspected every six months, and "that a 'hands-on inspection' of the chair before the accident should have revealed the weak joint." (Opinion, p 1). The Opinion went on to say: "The expert explained that a hands-on inspection entailed flexing the joint by pulling on the chair leg. ***He then conceded that it was possible that a flex-test may not have revealed the weak joint since it was not possible to determine when the joint began to weaken to the point that the legs would have begun to flex under the test.*** Finally, a visual inspection would not have revealed the defect." (Opinion, p 2).

The bolded text was the pivotal point for the Court's disposition of the case, because it showed why the Plaintiffs' case failed on the issue of causation. As the Court explained:

> [Plaintiffs'] expert testified that a flex-test would have revealed the defect in the chair, ***but provided no time frame concerning how long before the accident such testing would have been effective. On cross-examination, Friedrich's expert acknowledged that flex-testing may not have revealed the defect until just before the collapse.***

[1] The Fourth District's decision is attached as an Appendix to the Petitioners' jurisdictional brief, and is referred to herein by page number, as follows (Opinion, p __). Unless otherwise indicated, all emphasis in this Brief has been supplied by undersigned counsel.

> 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.

(Opinion, pp 3-4). The Opinion then provided a footnote setting out the standard Florida law to the proof required to establish causation in a negligence case:

> " 'In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury.' " *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 328–29 (Fla. 4th DCA 1998) (quoting *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984)). Further, the *Gooding* court noted:
>
> > On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.
>
> *Gooding*, 445 So. 2d at 1018 (quoting Prosser, Law of Torts § 41 (4th ed. 1971)).

(Opinion, p 4, n 2).

Plaintiffs' Brief on Jurisdiction tries to obscure the Opinion's clear pin-pointing of where the failure in the Plaintiffs' causation evidence failed by

repeatedly quoting out of context the Opinion's reference to "[Plaintiffs'] expert testified that a flex-test would have revealed the defect in the chair ..." (Plaintiffs' Brief, pp 2, 3, 7, 9, 10). Plaintiffs simply eliminate the rest of the Opinion's sentence and the following sentence, which show that the complete version is: "[Plaintiffs'] expert testified that a flex-test would have revealed the defect in the chair, but provided no time frame concerning how long before the accident such testing would have been effective. On cross-examination, Friedrich's expert acknowledged that flex-testing may not have revealed the defect until just before the collapse." (Opinion, pp 3-4).

Plaintiffs' entire argument is based on repetition of the out-of-context excerpting of the "would have revealed" reference from the Opinion, which is just wrong. The facts are as recited in the Opinion, not as revised by Plaintiffs.

Plaintiffs' recital of the facts also engages impermissibly in a ***contradiction*** of what the Opinion says. As indicated above, the Opinion recites that Plaintiffs' expert "then conceded that it was possible that a flex-test may not have revealed the weak joint since it was not possible to determine when the joint began to weaken to the point that the legs would have begun to flex under the test." (Opinion , p 2). Plaintiffs' statement of the facts states: "The record contradicts this characterization of plaintiffs' expert testimony, who did not concede this." (Petitioners' Brief, p 2, n 1). Respondent does not agree at all with Plaintiffs

comment about the record contradicting the Opinion's recital, but the parties' disagreement over what the record is wholly immaterial to the facts pertinent to this Court's potential basis for conflict review.

Finally, in the Argument section of Plaintiffs' Brief, Plaintiffs combine their out-of-context phrase with their contradiction of the Opinion to state, as ***fact***: "Plaintiffs' expert did not concede[] that it was possible that a flex-test may not have revealed the weak joint (A:2). Instead, he testified repeatedly that a flex-test would have revealed the defect in the chair (A:3)." (Petitioner's Brief, p 10).

Plaintiffs' statement of the case and facts should be disregarded as misleading and improper. The Opinion speaks for itself as to the actual facts before the Court.

SUMMARY OF ARGUMENT

Petitioners/Plaintiffs' brief is impermissibly based on re-worked facts that are not contained in the Fourth District Opinion as to which review is sought. The argument is then made that the re-worked facts show conflict with other Florida appellate decisions. No express and direct conflict has been shown because only the facts recited in the Opinion have any significance for purposes of conflict review.

Further, the Fourth District's Opinion as written clearly does not conflict with any of the cited decisions. The Opinion is a perfectly routine and straightforward application of Florida's *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018

(Fla. 1984) more likely-than-not standard for causation evidence in negligence cases to the unique facts of this case.

Discretionary conflict review is not warranted.

ARGUMENT

Plaintiffs' claim conflicts with two sets of cases: chair collapse cases and directed verdict cases. Plaintiffs are wrong as to both.

Plaintiffs first assert conflict with "numerous cases from other districts involving collapsing chairs" (Plaintiffs' Brief, p 4), citing three and discussing two. Plaintiff says that the Opinion here conflicts with *Fontana v. Wilson World Maingate Condo.*, 717 So. 2d 199 (Fla. 5th DCA 1998). Specifically, Plaintiffs note the comments in that decision that "Admittedly, there was no evidence offered as to how long the chair had been defective," and that the defendant hotel "had no procedure in place for the inspection or maintenance of its furnishings." 717 So. 2d 199, 200. Plaintiffs contend that these facts are identical to the facts addressed by the Fourth District, such that the "decisions cannot be reconciled." (Plaintiffs' Brief, p 5).

In fact, the cases are not comparable. The facts recited in the Opinion here show that there was not a simple dearth of evidence on the subject of how long the chair had been defective, but affirmative testimony from the Plaintiffs' expert that the nature of the defect was such that it may not have weakened the chair

sufficiently to have been able to be detected by the expert's proposed flex test until just before the collapse. That combined with the expert's standard of care testimony that the inspections and flex-tests should be performed every six months affirmatively showed that Plaintiffs could not meet the requisite standard of showing that more likely than not the Respondent's failure to flex-test the chair was the cause of Plaintiff's injury in the collapse. On the contrary, that testimony established that the Respondent could have met the standard of care by flex-testing the chair three months, or three weeks, or three days before the accident with the collapse still occurring. Plaintiffs' expert's affirmative testimony here eliminated their ability to meet their burden on causation, which is entirely different than what was presented in *Fontana*.

The other chair collapse case discussed by Plaintiffs is *Yuniter v. A & A Edgewater of Florida, Inc.*, 707 So. 2d 763 (Fla. 2d DCA 1998). No conflict exists here either. Plaintiffs claim as to the conflict is that the Second District reversed a summary judgment for the defendant "because a conflicting issue of fact existed on the reasonableness of the inspection." (Plaintiffs' Brief, pp 6-7). That was not the issue presented in this case, and neither did the Fourth District decision here turn on the question of reasonableness of inspections. The result here was based on the Plaintiffs' expert's testimony at trial eliminating any evidence from which a jury could determine that more likely than not the accident would not have occurred

absent negligence on the part of the Respondent.

Plaintiffs then argue that the Opinion misapplied this Court's decisions "governing motions for directed verdict." (Plaintiffs' Brief, p 7). This argument is based entirely on Plaintiff's revised version of the actual Opinion in which Plaintiffs lift the phrase "would have revealed" out of its actual context. Plaintiffs say, inaccurately, that the majority "acknowledged" that Plaintiffs' expert testified that inspections "**would** have revealed the defect." (Plaintiffs' Brief, p 9)(Plaintiffs' emphasis). That testimony, says the Plaintiff, "satisfies the more likely than not" standard[.] (Plaintiffs' Brief, p 9). Since the Opinion is completely misquoted by the Plaintiffs in this argument, it presents no basis for exercise of conflict jurisdiction. This Court has neither obligation nor right to consider Plaintiffs' revisionist version of the facts in determining whether conflict exists. And neither would the bench or bar perceive any conflict since the members thereof will only be reading the Opinion as written.

Respondent respectfully submits that Petitioners/Plaintiffs have presented no basis for the exercise of this Court's discretionary conflict jurisdiction, and that review should accordingly be denied.

CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that discretionary review should be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction was sent by U.S. mail this 5th day of December, 2011 to: Scott B. Smith, Esquire, Lytal, Reiter, Smith, Ivey & Fronrath, 515 North Flagler Drive, 10th Floor, West Palm Beach, Florida 33401; and Rebecca Mercier Vargas, Esquire, Kreusler-Walsh, Compiani & Vargas, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, Florida 33401-5913.

_____

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on Jurisdiction complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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