IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

ROBERT FRIEDRICH and
HEATHER FRIEDRICH, his wife,

MB

Petitioners,

v.

FETTERMAN AND ASSOCIATES,
P.A.,

Respondent.
_____/

L.T. CASE NOS:
4DCA CASE NO. 4D09-3661
15th CASE NO. 50 2005 CA 006954

PETITIONERS' BRIEF ON JURISDICTION

REBECCA MERCIER VARGAS and
JANE KREUSLER-WALSH of
KREUSLER-WALSH, COMPIANI & VARGAS, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, FL 33401-5913
rvargas@kwcvpa.com
(561) 659-5455
and
SCOTT B. SMITH of
LYTAL, REITER, SMITH, IVEY & FRONRATH
515 North Flagler Drive, 10th Floor
West Palm Beach, FL 33401
(561) 655-1990

TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

Petitioners/plaintiffs, Robert and Heather Friedrich, seek review of the decision of the Fourth District in Fetterman and Associates, P.A. v. Friedrich, 69 So. 3d 965 (Fla. 4th DCA 2011) (A:1-7). The Fourth District's decision expressly and directly conflicts with decisions from other districts involving collapsing chairs. The cases from other districts hold that the jury must decide the question of negligence when the plaintiff presents evidence that a business should have conducted an inspection that would have discovered a dangerous condition. In conflict with these cases, the Fourth District reversed for entry of a directed verdict for the defendant despite evidence that Fetterman should have discovered the dangerous condition. The decision also conflicts with decisions from this Court prohibiting district courts from reweighing the evidence or imposing a burden of proof higher than "more likely than not." Respondent/defendant is a law firm, Fetterman and Associates, P.A. ("Fetterman"). All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Plaintiffs strongly disagree with the Fourth District's mischaracterization of the facts in several respects, but limit this statement to the facts found within the "four corners" of the decision. While at the Fetterman law firm as a business invitee, Mr. Friedrich suffered serious injuries when a chair collapsed out from under him (A:1). Plaintiffs sued Fetterman for negligently maintaining its business premises and failing

to warn of the dangerous condition of the chair (A:1).

At trial, both parties' engineering experts agreed that the chair was dangerous due to a defective joint on the right side of the chair (A:1). The defect occurred during manufacturing (A:1). A botched repair further weakened the defective joint (A:1).

Fetterman never inspected the chairs (A:1-4). Plaintiffs' engineering expert testified that Fetterman would have found the dangerous defect if it had inspected the chair (A:1, 3). Fetterman should have performed a hands-on inspection of the chair by flexing the joint and pulling on the chair leg (A:1-2). Thus, even though the problem was not visible to the naked eye, a simple physical inspection "**should have revealed the weak joint**" (A:1-2).

The jury returned a substantial verdict for plaintiffs and Fetterman appealed the final judgment. The Fourth District recognized that, as a business owner, Fetterman had a duty to make its premises reasonably safe for business invitees and to use reasonable care to learn of dangerous conditions on its premises (A:2). However, the majority reweighed the testimony of plaintiffs' expert and stated that he "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" (A:2).[1] According to the majority, plaintiffs failed to establish causation because their expert "provided no time frame concerning *how long*

[1]The record contradicts this characterization of plaintiffs' expert testimony, who did not concede this.

before the accident such [flex] testing would have been effective" (A:3) (italics in original). The majority decision reversed for entry of a directed verdict, reasoning that "[e]ven 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" (A:4). This conclusion ignored the repeated testimony of plaintiffs' expert that a simple physical inspection "**would have** revealed the defect in the chair" (A:3). Judge Levine dissented and explained that the majority had ignored well-settled law (A:4-6).

SUMMARY OF ARGUMENT

As the Fourth District recognized, plaintiffs presented expert testimony from an engineer that Fetterman should have conducted periodic physical inspections of the chair. These simple inspections would have revealed the dangerous condition of the chair. The Fourth District remanded for judgment for Fetterman because plaintiffs failed to present expert testimony regarding the exact length of time the dangerous condition in the chair existed.

The majority decision expressly and directly conflicts with numerous decisions from other district courts involving collapsing chairs. These collapsing chair cases require denial of the defendant's motion for directed verdict when, as here, the plaintiff presents evidence that the defendant would have discovered the dangerous condition of the chair with an inspection. The majority decision also conflicts with decisions of this

Court by: (1) failing to view the evidence in the light most favorable to plaintiffs; (2) reweighing the testimony of plaintiffs' experts; and (3) imposing a higher burden on plaintiffs than the "more likely than not" standard. This Court should accept jurisdiction to resolve these conflicts.

ARGUMENT

THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS HOLDING THE JURY MUST DECIDE THE QUESTION OF NEGLIGENCE WHEN THE PLAINTIFF PRESENTS EVIDENCE THAT THE DEFENDANT WOULD HAVE DISCOVERED THE DANGEROUS CONDITION AND PROHIBITING THE DISTRICT COURT FROM REWEIGHING THE EVIDENCE OR IMPOSING A CAUSATION STANDARD HIGHER THAN "MORE LIKELY THAN NOT."

This Court has the power to review decisions that expressly and directly conflict with the decisions of this Court or another district court of appeal. See Art. V, § 3(b)(3), Fla. Const. Decisions are in express and direct conflict when they reach a different result despite similar facts. See, e.g., Aravena v. Miami-Dade County, 928 So. 2d 1163, 1166-67 (Fla. 2006) (explaining conflict jurisdiction exists when the holdings of two decisions "are irreconcilable" because they "reached the opposite result" despite similar facts).

The Fourth District's majority decision conflicts with numerous cases from other districts involving collapsing chairs. See, e.g., Fontana v. Wilson World Maingate Condo., 717 So. 2d 199, 199-200 (Fla. 5th DCA 1998); Yuniter v. A & A Edgewater of Fla., Inc., 707 So. 2d 763, 764 (Fla. 2d DCA 1998); Schneider v. K.S.B. Realty &

Investing Corp., 128 So. 2d 398, 399 (Fla. 3d DCA 1961). These collapsing chair cases establish that a business has a duty to conduct inspections appropriate for the premises. See Yuniter, 707 So. 2d at 764. Where, as here, the plaintiff presents evidence that a reasonable business would have discovered the dangerous condition in the chair by conducting a periodic inspection, a jury must decide the issue of negligence. See Fontana, 717 So. 2d at 199-200; Yuniter, 707 So. 2d at 764; Schneider, 128 So. 2d at 399. As these cases demonstrate, plaintiffs do not have to prove exactly how long the dangerous condition existed in the chair.

In Fontana, the defendant hotel agreed that the chair was defective, but claimed it had no notice of its dangerous condition. 717 So. 2d at 199-200. The Fifth District decision recognized that the defect in the chair "was hidden" and that the defendant's employees "merely looking at the chair would not have observed danger." Id. at 200. "Admittedly, there was **no evidence offered as to how long the chair had been defective**." Id. at 199. The defendant "had no procedure in place for the inspection or maintenance of its furnishings" and "did not check the condition of its furniture to see that it was in a safe condition." Id. at 200. The court in Fontana **reversed** a **directed verdict** for the defendant because "[t]he jury could have found that the owner's **ostrich-like approach to the safety** of its premises did not meet its obligations to invitees." Id.

The decisions in Fontana and Fetterman cannot be reconciled. Both involve collapsing chairs with dangerous conditions not visible to the naked eye, but

discoverable with a simple inspection (A:1-4). See Fontana, 717 So. 2d at 199-200. As Judge Levine recognized in his dissent, Fetterman took the identical "ostrich-like approach" to safety condemned in Fontana and never inspected the chairs (A:5-6). Yet the Fourth District majority in this case allows a business to escape liability by taking no steps to ensure the safety of its invitees.

In addition, the Fourth District majority reversed because plaintiffs' expert "provided no time frame concerning *how long* before the accident such testing would have been effective." (A:3) (italics in original). According to the majority, "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." (A:4). In contrast, the Fifth District found a jury question existed even though "there was **no evidence offered as to how long the chair had been defective**." Fontana, 717 So. 2d at 199. The two decisions reach opposite results despite similar facts, creating express and direct conflict.

The Fourth District's decision also conflicts with the decision of the Second District in Yuniter, 707 So. 2d at 764. In Yuniter, a chair in a hotel room collapsed when the plaintiff, a hotel guest, stood on it. The trial court granted summary judgment for the defendant because it had not discovered the defect in the chair during an inspection six weeks earlier or when the housekeeping staff turned the chair upside down to dust it. See id. The Second District reversed because a conflicting question of

fact existed on the reasonableness of the inspection. See id.

The decisions in Yuniter and Fetterman reach opposite results despite very similar facts. The plaintiffs in both cases presented evidence that a reasonable inspection would have revealed the dangerous condition in the chair (A:1-2). See Yuniter, 717 So. 2d at 764. The Fourth District decision recognized plaintiffs' expert testified that testing the chair "**would have revealed the defect** in the chair" and that "periodic inspections of office chairs was reasonable." (A:3). While Yuniter held that the jury should determine the question of the reasonableness of the chair inspection six weeks earlier, the Fetterman majority reversed the verdict and remanded to enter judgment for the defendant who never inspected the chair. This creates uncertainty and confusion in the law, as Judge Levine recognized in his dissenting opinion (A:4-5).

This Court also has jurisdiction to resolve the conflict created by the Fourth District's misapplication of controlling decisions from this Court governing motions for directed verdict. See, e.g., Cox v. St. Josephs Hosp., 36 Fla. L. Weekly S357, S358-59 (Fla. July 7, 2011); Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329-30 (Fla. 2001);[2] Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1020 (Fla. 1984). These decisions hold that a plaintiff establishes causation by presenting **any** evidence, viewed in the light most favorable to plaintiff, that the defendant's negligence "more likely than

[2] This discussion in Owens regarding traditional directed verdict principles was not affected by statutes overruling the part of the decision creating a rebuttable presumption of negligence in slip-and-fall cases. See § 768.0755, Fla. Stat. (2011); § 768.0710, Fla. Stat. (2002), repealed by Ch. 2010-8, Laws of Fla. § 2 (2010).

not" caused the injuries. See, e.g., Cox, 36 Fla. L. Weekly at S358-59; Gooding, 445 So. 2d at 1020.

In Cox, this Court recently quashed a Second District decision that misapplied the directed verdict standard the same way the majority did here. The district court had "impermissibly reweighed the testimony presented by the plaintiffs' expert witness" on whether the medical malpractice caused the injuries. 36 Fla. L. Weekly at S357. This directly conflicted with Gooding, which holds that as long as the plaintiff's expert testifies that the defendant's conduct "probably" or "more likely than not" caused the injury, resolution of conflicting expert testimony "is a matter for the jury, not a matter for the appellate court to resolve as a matter of law." Cox, 36 Fla. L. Weekly at S358-59. This Court in Cox reiterated the operative test--that a directed verdict "is **not appropriate in cases where there is conflicting evidence as to the causation** or the likelihood of causation." Id. at S359. "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." Id.

The Fourth District's misapplication of the directed verdict standard is demonstrated by the fact it relied upon Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213 (Fla. 5th DCA 1989) (A:3). Winn-Dixie is one of a "myriad number of cases dealing with transitory foreign substances" on the floor of a business that caused slip-and-fall accidents. Owens, 802 So. 2d at 330. The Fifth District in Winn-

Dixie reversed for entry of a directed verdict for the supermarket because the plaintiff failed to produce evidence "as to how or when the substance got on the floor **or the length of time it was there** before the accident." 553 So. 2d at 214. In Owens, this Court called into question the line of cases, including Winn-Dixie, suggesting that plaintiffs must present evidence of the exact amount of time a transitory foreign substance has been on the ground. See Owens, 802 So. 2d at 322 & 329-30. This Court applied traditional directed verdict principles and held that "evidence of the deteriorated condition of the foreign substance **provided a sufficient basis** for the plaintiffs in these cases to survive a directed verdict." Id. at 329-30.

In conflict with Cox, Owens and Gooding, the Fourth District majority misapplied the directed verdict standard used in a transitory foreign substance case. The cited transitory foreign substance case, Winn-Dixie, is no longer good law in light of Owens. The majority acknowledged that plaintiffs' expert testified Fetterman should have inspected the chairs periodically and, had it done so, the inspections "**would** have revealed the defect in the chair" (A:1-4). That testimony satisfies the "more likely than not" or "probably" standard set forth in Cox and Gooding. Notably, the Fourth District did not cite any cases involving the sufficiency of the evidence in a chair collapse case, such as Fontana, Yuniter, or Schneider. These chair collapse cases all required affirmance of the final judgment because plaintiffs' expert testified that Fetterman would have discovered the dangerous condition with a simple inspection.

Instead of applying this well-settled directed verdict standard, the majority imposed a near-impossible causation burden on plaintiffs and required proof of exactly how long a dangerous condition existed. Neither side's experts will be able to pinpoint with reasonable certainty the exact length of time that a dangerous condition existed. This is especially true in cases like this, where the chair had broken and collapsed long before both parties' experts examined it.

The Fourth District majority also conflicts with these cases because it incorrectly reweighed the testimony of plaintiffs' expert and failed to view the evidence in the light most favorable to plaintiffs. This conflicts with the well-settled principle that if **any** evidence supports a verdict for plaintiffs, a directed verdict cannot be granted. See, e.g., Cox, 36 Fla. L. Weekly at S358-59. 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). The Fourth District's misapplication of the directed verdict and causation standards is an issue of exceptional importance that will affect negligence cases throughout the state.

CONCLUSION

This Court should exercise its discretionary jurisdiction to resolve this express and direct conflict and quash the decision of the Fourth District.

Respectfully submitted,

REBECCA MERCIER VARGAS and
JANE KREUSLER-WALSH of
KREUSLER-WALSH, COMPIANI & VARGAS, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, FL 33401-5913
rvargas@kwcvpa.com
(561) 659-5455
and
SCOTT B. SMITH of
LYTAL, REITER, SMITH, IVEY & FRONRATH
515 North Flagler Drive, 10th Floor
West Palm Beach, FL 33401
(561) 655-1990
Counsel for petitioners, Robert and Heather Friedrich

By:_____
REBECCA MERCIER VARGAS
Florida Bar No. 0150037

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by mail this _____ day of November, 2011, to:

ELIZABETH K. RUSSO
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, FL 33143
Appellate Counsel for respondent, Fetterman & Associates

DANIEL C. METHE
KARA BERARD ROCKENBACH
METHE & ROCKENBACH, P.A.
1555 Palm Beach Lakes Boulevard
Suite 400
West Palm Beach, FL 33401-2327
Counsel for respondent, Fetterman & Associates

By:_____
REBECCA MERCIER VARGAS
Florida Bar No. 0150037

CERTIFICATE OF FONT

Petitioners' Brief on Jurisdiction has been typed using the 14-point Times New Roman font.

By:_____
REBECCA MERCIER VARGAS
Florida Bar No. 0150037