DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

FETTERMAN and **ASSOCIATES, P.A.,**
Appellant,

v.

ROBERT FRIEDRICH and **HEATHER FRIEDRICH,** his wife,
Appellees.

No. 4D09-3661

[August 3, 2011]

DAMOORGIAN, J.

Fetterman & Associates, P.A. ("Fetterman") appeals the trial court's order denying its motions for directed verdict and new trial. Fetterman was the defendant in a negligence suit in which Robert Friedrich sued Fetterman for failing to warn him of a defective chair located in Fetterman's office. We reverse the trial court's order denying Fetterman's motion for directed verdict and remand for entry of judgment in favor of Fetterman.

At trial, the evidence established the following facts. While at Fetterman's law office, the chair in which Friedrich was sitting collapsed. Friedrich sustained injuries in the fall. Friedrich sued Fetterman for negligence, alleging that he was a business invitee when the chair collapsed and that Fetterman had negligently failed to warn Friedrich of the chair's dangerous condition. The chair was purchased new and was used without incident from its date of purchase in 1998 through 2003 when the accident occurred.

During the trial, both parties produced engineering experts who agreed that the collapse resulted from a defective joint on the right side of the chair. The defect occurred during the manufacturing process and the joint had been further weakened by a poorly performed repair. The repair could have occurred anytime between the date of manufacture to the day of the accident, although the exact date could not be determined. Friedrich's expert stated that he inspected his own chairs approximately every six months, and that a "hands-on inspection" of the chair before the accident should have revealed the weak joint. 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.

Fetterman moved for a directed verdict at the close of Friedrich's case, at the close of all evidence, and again at the close of the charge conference. All motions were denied. The jury found that Fetterman was partially liable for Friedrich's damages. Post-trial, Fetterman moved to set aside the verdict and enter judgment in accordance with the previous motions to direct verdict, or, in the alternative, to grant a new trial on the grounds that the verdict was against the manifest weight of the evidence. The court denied these motions as well.

On appeal, Fetterman argues, among other things, that assuming due care required inspection of the chairs at six-month intervals, Fetterman's failure to perform these inspections did not cause the accident since Friedrich's expert could not opine that conducting the flex-test at any point during the six months preceding the accident would have revealed that the chair was defective. Accordingly, there was a lack of proof establishing a causal connection between Fetterman's failure to periodically conduct flex-testing on its office chairs and the accident.

The standard for reviewing a trial court's ruling on a motion for directed verdict is de novo. *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009). "[A]n appellate court must affirm the denial of a motion for directed verdict if any reasonable view of the evidence could sustain a verdict in favor of the non-moving party." *Id.* (citing *Amerifirst Fed. Sav. & Loan Ass'n v. Dutch Realty, Inc.*, 475 So. 2d 970, 971 (Fla. 4th DCA 1985)).

A business owner has a duty to determine that its premises are reasonably safe for invitees, and is required to use reasonable care to learn of any dangerous conditions on its premises.[1] *Cain v. Brown*, 569 So. 2d 771, 772 (Fla. 4th DCA 1990). As we noted in *Cain*, the duty imposed upon a business to discover otherwise unknown dangers was

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[1] To recover for negligence under Florida law, the plaintiff must prove that (1) the defendant owed him a legal duty; (2) the defendant breached that duty; (3) the plaintiff suffered injury as a result of that breach; and (4) the injury caused damage. *Kayfetz v. A.M. Best Roofing, Inc.,* 832 So. 2d 784, 786 (Fla. 3d DCA 2002).

best articulated by Judge Cowart's scholarly analysis in *Winn-Dixie Stores, Inc. v. Marcotte*, 553 So. 2d 213 (Fla. 5th DCA 1989):

> [T]he legal liability of a premises possessor for injuries resulting from dangers not actually known by the possessor prior to the injury is based on a breach of the legal duty to use reasonable care to look for, and to discover, reasonably foreseeable but not actually known dangerous conditions. . . . This duty of a premises possessor to look for unknown dangerous conditions not created by the possessor or his agents is breached by the possessor not making a reasonably diligent search or inspection at reasonable intervals of time. . . . The trial of any such premises liability action involves . . . evidence as to the defendant's actual actions relating to the extent and frequency of inspections actually made. . . . [I]f the injured invitee fails to prove . . . that the dangerous condition existed a length of time prior to the injury in excess of a reasonable period between inspections, the possessor should not be held liable for injury caused by that dangerous condition. In such a case, the length of time the dangerous condition existed prior to the injury is an indispensable factor in determining liability.

Id. at 215.

The issue in this case is whether 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. In other words, did the evidence "prove that the dangerous condition existed a length of time prior to the injury in excess of a reasonable period between inspections." *Id.*

The evidence established that Fetterman had no prior knowledge that the chair was defective or that the chair had been repaired. Friedrich's engineering expert admitted that he did not know when the repair work had been performed, and that it could have occurred anytime between the date of manufacture to the day of the accident. Next, Friedrich's expert opined that he inspected his office chairs every six months and that periodic inspections of office chairs was reasonable. The expert offered no other time frame for inspections. Finally, this 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.

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. *See id.*[2]

Accordingly, Fetterman's motion for directed verdict should have been granted. We reverse and remand for entry of judgment in favor of Fetterman.

Reversed and Remanded.

MAY, C. J., concurs.
LEVINE, J., dissents with opinion.

LEVINE, J., dissenting.

I respectfully dissent from the majority opinion and would affirm the trial court's denial of the directed verdict for Fetterman. The "appellate court must affirm the denial of a motion for directed verdict if any reasonable view of the evidence could sustain a verdict in favor of the

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[2] "'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)).

non-moving party." *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009). Further, the trial court's denial of a motion for new trial is reviewed by the appellate court for abuse of discretion. *Parisi v. Miranda*, 15 So. 3d 816, 817 (Fla. 4th DCA 2009). I believe that viewing the evidence submitted by Friedrich, there is a reasonable "view of the evidence" that could sustain the trial court's denial of Fetterman's motion for directed verdict.

When reviewing negligence actions "courts follow the more likely than not standard of causation" which requires the plaintiff to "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." *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)).

Friedrich was a business invitee of Fetterman. As such, Fetterman owed to Friedrich a duty "(1) to use reasonable care to maintain [its] premises in a reasonably safe condition and (2) to warn the invitee of any concealed dangers that the owner knows or should know about, which are unknown to the invitee and cannot be discovered by the invitee through due care." *Morales v. Weil*, 44 So. 3d 173, 178 (Fla. 4th DCA 2010); *see also Yuniter v. A & A Edgewater of Fla., Inc.*, 707 So. 2d 763, 764 (Fla. 2d DCA 1998). In *Yuniter*, a hotel guest attempted to stand on a chair when the leg broke, causing injury to the guest. In reversing the order granting summary judgment in favor of the hotel, the appellate court found that "[g]enerally questions concerning whether a proper inspection, if made, would have revealed alleged defects are considered genuine triable issues." *Id.* at 764 (citation omitted). The court determined that "the first duty" of the hotel was to "maintain the premises in a reasonably safe condition" and to "conduct inspections appropriate for the premises involved." *Id.* The court concluded that summary judgment was "inappropriate because whether the motel's inspection of the chair was reasonable was for a jury to determine." *Id.*

In *Fontana v. Wilson World Maingate Condominium*, 717 So. 2d 199 (Fla. 5th DCA 1998), a guest in a hotel was injured while sitting in a chair that collapsed. The trial court directed a verdict for the hotel, finding that there was no evidence that the hotel had notice as to the condition of the chair that collapsed. The Fifth District reversed, determining that the "defect was hidden" and that the hotel "had no procedure in place for the inspection or maintenance of its furnishing." *Id.* at 200. The court concluded that the "jury could have found that the

owner's ostrich-like approach to the safety of its premises did not meet its obligations to its invitees." *Id.*

As the Florida Supreme Court recently articulated in *Cox v. St. Josephs Hospital*, 36 Fla. L. Weekly S357 (Fla. July 7, 2011):

> [W]hile 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.

It is well established that "[i]f there is any evidence to support a possible verdict for the non-moving party, a directed verdict is improper." *McNichol v. S. Fla. Trotting Ctr., Inc.*, 44 So. 3d 253, 255 (Fla. 4th DCA 2010); *Brown v. Kaufman*, 792 So. 2d 502, 503 (Fla. 4th DCA 2001).

In the present case, there was no evidence that Fetterman had inspected the chair in the years preceding its collapse. Friedrich presented an expert witness who testified that a "hands-on inspection of the chair before the accident should have found" the "weak joint" in the rear, right side of the chair. On cross-examination, that same expert stated that he inspects the chairs in his own office. When asked "how often" he does so, he stated that "[w]henever I—probably every six months or so. Actually me and [my] wife just bought a table and chairs and I did an inspection of those chairs." Whether the weak joint in the chair would have been discovered, if Fetterman had a procedure in place to inspect the chair, was an issue ultimately to be determined by the jury.

In this case, there is sufficient "proof that the negligence probably caused the plaintiff's injury," such that the trial court did not err in denying Fetterman's motion for directed verdict. *Gooding*, 445 So. 2d at 1018. In conclusion, I would affirm the judgment for Friedrich.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Timothy McCarthy, Judge; L.T. Case No. 502005CA006954XXXXMB AE.

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Not final until disposition of timely filed motion for rehearing.