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.
_____/

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

PETITIONERS' INITIAL BRIEF ON THE MERITS

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
(561) 659-5455
and
SCOTT B. SMITH and
MARGARET M. BICHLER of
LYTAL, REITER, SMITH, IVEY & FRONRATH
515 North Flagler Drive, 10th Floor
West Palm Beach, FL 33401
(561) 655-1990

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PRELIMINARY STATEMENT

Petitioners/plaintiffs, Robert and Heather Friedrich, seek review of the Fourth District's decision in Fetterman & Associates, P.A. v. Friedrich, 69 So. 3d 965 (Fla. 4th DCA 2011) (A:1-4).[1] Mr. Friedrich was visiting the office of a personal injury law firm, defendant/respondent, Fetterman & Associates, P.A., seeking representation when the conference room chair that he was sitting on collapsed. Mr. Friedrich sustained serious neck and back injuries that ultimately required surgical fusion of four levels of his spine. After six days of trial, the jury found the Fetterman firm negligent and awarded the Friedrichs $2,230,569. The Fetterman firm appealed and the Fourth District reversed for entry of a directed verdict, despite acknowledging that the Friedrichs had presented evidence that the Fetterman firm should have discovered the dangerous condition.

The Fourth District's decision expressly and directly conflicts with decisions from other district courts involving chair collapses. These decisions hold 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

[1] All emphasis is supplied unless stated otherwise. The parties are referred by proper name, as plaintiffs and defendants, or as the Fetterman firm. The following symbols are used: A - appendix to this brief; R - record on appeal; PX - plaintiffs' exhibit; SR - supplemental record; T - trial transcript (found at R16-R26).

in the chair. The Fourth District's decision also conflicts with decisions from this Court prohibiting district courts from reweighing the evidence or imposing a burden of proof higher than the "more likely than not" standard. This Court has jurisdiction to review these express and direct conflicts. See Art. V, § 3(b)(3), Fla. Const. This Court should quash the Fourth District's decision and reinstate the judgment for the Friedrichs.

STATEMENT OF THE CASE AND FACTS

A. Mr. Friedrich's chair at the Fetterman firm collapsed, causing serious injuries.

The Fetterman firm represents plaintiffs in personal injury actions (T9:1120-21). Mr. Friedrich visited the Fetterman firm, seeking representation for injuries he had sustained in a car accident that occurred nine days earlier (T6:707-09; T8:1000-01).

The Fetterman attorney and Mr. Friedrich met in the firm's conference room for approximately 15 minutes (T8:957-59). After agreeing that the Fetterman firm would represent Mr. Friedrich, the attorney left the room so an assistant could bring Mr. Friedrich engagement papers to review (T6:711-14; T8:958-60).

Mr. Friedrich was in the conference room reading the papers when his chair suddenly collapsed (T8:959-62, 1001-02). He heard a sound and tumbled backwards

(T8:960, 1001-02). The back of Mr. Friedrich's head jammed on a piece of furniture (T4:388; T8:960). He saw a flash of light and felt a big bang, like a shock through his body (T8:960-61). Mr. Friedrich had never experienced similar pain in his life (T8:961). He had a golf-ball sized lump on his head (T8:964).

Mr. Friedrich's headaches and neck pain skyrocketed in frequency and intensity after the chair collapse (T4:382-85, 390-94; T8:921-22, 969, 975-76). He experienced new tenderness in the cervical spine, disc herniations at C3-C4 and C6-C7, left arm pain with numbness in the left hand, low back pain with numbness in the left foot, memory problems and difficulty sleeping (T4:389-95, 401). He also had increased neck pain, muscle spasms and headaches (T4:384, 389-91, 393-94).

For two years, Mr. Friedrich saw numerous doctors and therapists in an attempt to conservatively treat his chronic severe neck and back pain (T3:203-05). The pain persisted (T3:204-05). In January 2006, a neurosurgeon performed an anterior surgical discectomy and 4-level spinal fusion on levels C3-4, C6-7, C7-T1, and T1-2 (T3:204-07; T5:542-50; T7:864-65). A four-level spinal fusion is a serious and rare surgery (T3:210-11; T5:552-53).

The surgery was successful, but did not completely eliminate Mr. Friedrich's

neck pain (T3:211, 213-14, 216; T5:550, 566). Fusion of his spinal bones caused Mr. Friedrich to permanently lose 10-15 degrees of motion in his neck (T3:210; T5:553-54; T7:865). He continues to have difficulty swallowing and hoarseness, a known complication of the surgery (T5:547, 555, 560-62, 565-66; T8:1005-06). Mr. Friedrich's injuries also caused him to lose two jobs selling rigging supplies for high-end sailboats (T6:641-42, 655-57, 671; T8:945-50).

B. The Friedrichs sue the Fetterman firm for negligence.

The Friedrichs filed suit against the Fetterman firm in the Fifteenth Judicial Circuit Court, seeking damages for injuries sustained when the chair collapsed (R1:1-6; R10:1850-61). Mrs. Friedrich sought damages for loss of consortium (R10:1860). The Friedrichs alleged that Mr. Friedrich was a business invitee of the Fetterman firm when the conference room chair that he was sitting on broke and collapsed (R10:1852-53). The Fetterman firm negligently failed to warn Mr. Friedrich of the chair's dangerous condition, to adequately inspect and maintain the chair, and to exercise reasonable care (R10:1853).

The Fetterman firm had purchased the set of eight chairs six years before the accident from Brandon's Furniture[2] (T9:1107, 1123-24, 1143; PX:53). The Fetterman firm used the chairs with a conference room table where potential clients and other members of the public sat (T9:1109-11, 1144-45).

The chair is similar to a dining room chair (T2:169; T7:790). It is not commercial grade and cost only $89 (T7:790; T9:1108, 1143-44; PX:53). The Fetterman firm bought other, more expensive, chairs from the Brandon defendants on the same day, including chairs for Mr. Fetterman's personal office that each cost $209 and $249 (T9:1118-19, 1144-48).

Mr. Fetterman never asked anyone at Brandon's where the chairs were manufactured or how long they would last (T9:1141-43). He was more concerned with how the chairs looked and would fit into the décor of the office (T9:1142-43, 1149-50). In the six years the Fetterman firm owned the chairs, no one ever inspected them other than to sit in them (T2:138-40; T6:723; T7:789-90; T9:1112-13, 1115-17, 1154-55, 1161).

[2] The Friedrichs also sued the sellers of the chair, Brandon Now & Then, Brandon Estate Liquidators and Nicole Brandon (collectively, "the Brandon defendants"). The trial court entered a default against two of the Brandon defendants and directed a verdict on liability against Nicole Brandon.

At trial, both parties presented engineering experts who agreed the chair was unsafe and dangerous due to a weak joint in the rear, right side of the chair (A:1; T2:94, 97-107, 109; T7:770-71, 788; T9:1158). Both engineering experts agreed that the male/female joint did not fit tightly (T2:101-03, 105, 122, 124-25; T7:770-71). Glue added to the joint had not bonded properly (T2:99-103, 109-10; T7:770-71).

The Friedrichs' engineering expert, Tony Sasso, testified on direct that the right, rear joint of the chair was "inherently weaker" than the left, rear joint (T2:109). The right side was weaker because this joint did not fit tightly, the glue in the joint had not bonded properly, and a nail had been removed during a botched repair (T2:94, 97-110, 123-25, 144). "[T]he right side was a slow fracture in the glue bonding" and because there was no nail in that joint, the top layer of glue slowly peeled away (T2:109; see T2:97-111, 144). After the right side of the chair came apart, the left side broke quickly (T2:97-111, 144). The joint on the left side of the chair fractured, causing 1/2 inch of wood to pull off the back rail of the left side (T2:97-99, 109-11). As the Friedrichs' expert explained:

> This is dry glue where **it over time peeled away** from-- **that's how I know that the right side fracture was a slow fracture over a period of time** where if you compare it to the left-hand side, which was a rupture.

(T2:100).

The Friedrichs' expert testified on direct that "a hands-on inspection of the chair before the accident should have found the weak joint that caused this chair to fail." (T2:101; see T2:111-13). A person could have discovered the weak right joint by pressing down on the legs and the front and back of the chair, revealing that the joint on the right was much more flexible than the left side (T2:101, 111-13).

On cross-examination, Mr. Friedrichs' expert testified that he regularly inspects the chairs in his home office, about every six months (T2:117-18, 133). He does not wait until he thinks there is a problem with his chairs to inspect them (T2:117-18, 132-33). In addition to periodic inspections, he also inspects his chairs if he feels instability or hears an unusual noise, like a crack (T2:118, 132). Sitting in a chair is not an inspection (T2:131-32, 136-37).

Regarding whether the Fetterman firm should have discovered the dangerous condition of the chair, the Friedrichs' expert testified on cross-examination as follows:

> Q. And you have no opinion in terms of how quickly it went on the right side, whether it was seconds, minutes, hours or days, isn't that correct?
>
> A. Just from the evidence of the back wood peeling away it took time over - - it could take just seconds to hours to days to weeks.
>
> Q. So that's a yes?

A. Yes.

Q. Thank you. With regard to whether my client would know that this right joint was loose, isn't that pure speculation on your part?

A. **Had he done a hands-on inspection he would have found that the right side was more flexible than the left side.**

. . . .

Q. . . . And because you don't know what it looked like after the manufacturer, after the repair process, there would be no way of you being able to testify whether my client knew or should have known or could have done an inspection that would reveal the right sided weakness, isn't that true?

A. **Just if he had done a right side - - an inspection of the chair he would have found it.**

(T2:127-28).

Q. On the right side of the chair, Mr. Sasso, the one that you say was a slow failure?

A. Yes.

Q. But you don't know how slow, minutes, seconds, hours, days, right?

A. Yes.

(T2:130).

Q. And that would be pure speculation on your part to believe that that type of a testing would reveal a problem?

> A. **That type of testing will test the flexibility of both joints and if one is significantly more flexible than the other that would show a weaker joint.**

(T2:135).

> Q. . . . Is it possible, Mr. Sasso, to inspect the chair today, a chair like this, find no problem and to have the chair fail tomorrow?
>
> A. It's possible, yes.

(T2:137).

On redirect, the Friedrichs' expert made clear that because the joint of the chair loosened slowly over time, the Fetterman firm should have discovered it:

> Q. Is it because of the gradual loosening of the right side over time that **you believe a simple inspection would have revealed that there's less of a bond on the right side versus the left?**
>
> A. **Yes.** There would have been more flexibility on the right side than the left, yes.

(T2:144).

The Fetterman firm's engineering expert testified that it is unreasonable to expect a business to conduct periodic inspections of its chairs (T7:781-82). He also did not think that an inspection would have revealed the danger in the chair (T7:779-

81, 785). Despite this, the defense engineering expert agreed that it is foreseeable that chairs can collapse (T7:817).

When the Friedrichs rested their case, the Fetterman firm moved for a directed verdict on the duty to maintain the premises and to warn of the dangerous condition of the chair (T9:1027-29). The Friedrichs relied upon numerous chair collapse cases holding that the reasonableness of the property owner's inspection of the chair is a question for the jury (T9:1027-28; R11:2093-94).[3] The court acknowledged this precedent: "[T]hey all say it's a jury issue" (T9:1027-28). The court denied the motion, finding the Friedrichs presented sufficient evidence of negligence (T9:1027-29). At the close of the evidence, the trial court denied the Fetterman firm's renewed motion for directed verdict on the same grounds (T9:1185-86).

C. The jury's verdict and posttrial motions

The jury found that the Fetterman firm's negligence caused the Friedrichs' damages (R12:2309-12). The jury apportioned responsibility between the Fetterman firm and the Brandon defendants, allocating 32.5% to the Fetterman firm and 67.5% to

[3] See 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).

the Brandon defendants (R12:2310). The jury also apportioned the damages the Friedrichs sustained from the chair collapse (75%) and the automobile accident (25%) (R12:2312).

The jury awarded Mr. Friedrich damages of $2,160,569 and Mrs. Friedrich $70,000 for past and future loss of consortium and services (R12:2311-12). The Fetterman firm filed a renewed motion for directed verdict and alternative motion for new trial (R12:2318-400; R13:2401-08). The Friedrichs opposed the motion (R13:2416-48; R14:2666-77). After a hearing, the trial court denied the motion and entered judgment against the Fetterman firm for $1,130,278.50 (R13:2456-57; R14:2605-06, 2648-78). The Fetterman firm appealed to the Fourth District (R14:2631-34, 2640-44A).

D. The Fourth District reverses for entry of directed verdict.

On appeal, the Fetterman firm argued that the judgment should be reversed for entry of a directed verdict because the Friedrichs failed to prove causation (A:2). The Fourth District recognized that, as a business owner, the Fetterman firm 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). The decision explained that the Friedrichs' expert testified that he regularly inspects his own chairs and a "'hands-on

inspection' of the chair before the accident should have revealed the weak joint." (A:1).

Nevertheless, the Fourth District reversed, holding that the Friedrichs failed to establish causation because "[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). The Fourth District stated that the Friedrichs' expert "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).

The actual testimony of the Friedrichs' expert during cross-examination, however, contained no such concession. He testified that "[h]ad [Fetterman] done a hands-on inspection he would have found that the right side was more flexible than the left side" and "if he had done a right side -- an inspection of the chair he would have found it." (T2:128). The Friedrichs' expert maintained "[t]hat type of testing will test the flexibility of both joints and if one is significantly more flexible than the other that would show a weaker joint." (T2:135). On redirect, he clarified that the Fetterman

firm should have discovered the dangerous condition because the chair joint loosened slowly over time (T2:144).

Judge Levine dissented, explaining that the majority had ignored well-settled law (A:4-6). The reasonableness of the defendant's inspection of a collapsing chair is generally one for the jury under Fontana v. Wilson World Maingate Condo., 717 So. 2d 199, 199-200 (Fla. 5th DCA 1998), and Yuniter v. A & A Edgewater of Fla., Inc., 707 So. 2d 763, 764 (Fla. 2d DCA 1998) (A:5). Under this Court's decision in Cox v. St. Josephs Hosp., 71 So. 3d 795, 799-800 (Fla. 2011), a directed verdict is improper "if there is any evidence to support a possible verdict for the non-moving party." (A:6) (Levine, J., dissenting). As Judge Levine explained, plaintiffs met this burden because the Fetterman firm never inspected the chairs and plaintiffs' expert "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." (A:6).

SUMMARY OF ARGUMENT

This Court should quash the Fourth District's decision and remand to reinstate the final judgment for plaintiffs. The Fourth District decision expressly and directly conflicts with numerous decisions from other district courts involving collapsing chairs. These collapsing chair cases hold that the defendant's motion for directed verdict must be denied

when, as here, the plaintiffs present evidence that the defendant would have discovered the dangerous condition of the chair with an inspection.

The Fourth District decision also conflicts with decisions of this Court applying the standard governing directed verdicts. The district court misapplied the directed verdict standard 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 misapplication of controlling precedent creates express and direct conflict in the law that this Court must resolve.

ARGUMENT

POINT ON REVIEW

THE JURY MUST DECIDE THE QUESTION OF NEGLIGENCE IN A COLLAPSING CHAIR CASE WHEN THE PLAINTIFF PRESENTS EVIDENCE THAT THE DEFENDANT WOULD HAVE DISCOVERED THE DANGEROUS CONDITION WITH AN INSPECTION AND THE DISTRICT COURT CANNOT REWEIGH THE EVIDENCE OR IMPOSE A CAUSATION STANDARD HIGHER THAN "MORE LIKELY THAN NOT."

The Fourth District's decision expressly and directly conflicts with decisions establishing that when, as here, a plaintiff presents evidence that a defendant should have discovered a dangerous condition with an inspection, the jury must decide the issue of negligence. See Art. V, § 3(b)(3), Fla. Const. The Fetterman decision reaches

the opposite result from other cases involving collapsing chairs despite very similar facts. It also misapplies the directed verdict standard, creating conflict with decisions from this Court.

As a business inviting members of the public onto its premises, the Fetterman firm owed two duties to invitees, like Mr. Friedrich: (1) to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) to warn of concealed perils which were known, or should have been known. See, e.g., Moultrie v. Consol. Stores Int'l Corp., 764 So. 2d 637, 639 (Fla. 1st DCA 2000); Yuniter v. A & A Edgewater of Fla., Inc., 707 So. 2d 763, 764 (Fla. 2d DCA 1998). Reasonable care requires that the business conduct inspections appropriate for the premises. See Yuniter, 707 So. 2d at 764.

A. The decision conflicts with chair collapse cases establishing that the reasonableness of an inspection is a question for the jury.

The Fourth District recognized that the Friedrichs' engineering expert testified that "a 'hands-on inspection' of the chair before the accident should have revealed the weak joint" and "periodic inspections of office chairs was reasonable" (A:1, 3). Despite this, the Fourth District reversed for entry of a directed verdict because the expert "provided no time frame concerning *how long* before the accident such testing

would have been effective" (A:3) (emphasis in original). This conflicts with decisions from other district courts addressing the burden of proof in chair collapse cases and fails to view the testimony of the Friedrichs' expert in the light most favorable to them, as required.

"'Generally questions concerning whether a proper inspection, if made, would have revealed alleged defects are considered genuine triable issues.'" Yuniter, 707 So. 2d at 764; see Taylor v. Piggly Wiggly Corp., 646 So. 2d 817, 818 (Fla. 1st DCA 1994) (reversing summary judgment for property owner that failed to inspect wall and awning that collapsed where expert testified that periodic inspections would have revealed problem); Belflower v. Risher, 206 So. 2d 256, 257-58 (Fla. 4th DCA 1968) (reversing summary judgment for owner of dock that collapsed due to rotten planks because the reasonableness of the inspection "can properly be answered only by a jury").

The Fourth District's decision conflicts with numerous cases from other districts involving collapsing chairs that hold the reasonableness of an inspection is a question for the jury. See, e.g., Fontana v. Wilson World Maingate Condo., 717 So. 2d 199, 199-200 (Fla. 5th DCA 1998); Yuniter, 707 So. 2d at 764; 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, the 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 (explaining that "whether a reasonable inspection would have revealed a defect" in the chair and "whether the inspection which was made was reasonable and sufficient under the circumstances" must be determined by the jury).

The decisions in Fontana and Fetterman cannot be reconciled. 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.

Like Fontana, this case involves a collapsing chair with a dangerous condition not visible to the naked eye, but discoverable with a simple inspection (A:1-4; T2:101, 111-13, 117-19, 123, 128, 130, 133, 135, 140, 144; T7:770-71, 788). See Fontana, 717 So. 2d at 199-200. Both parties' experts agreed the chair had a dangerous condition (A:1; T2:94, 97-107, 109; T7:770-71, 788; T9:1158). As Judge Levine recognized in his dissent, the Fetterman firm took the identical "ostrich-like approach" to safety condemned in Fontana and never inspected the chairs (A:5-6; see T2:138-40; T6:723; T7:789-90; T9:1112-13, 1115-17, 1154-55, 1161). The decision of the Fourth District allows a business to escape liability by taking no steps to ensure the safety of its invitees.

The Fetterman decision also conflicts with Fontana and Yuniter because it imposed an arbitrary requirement that the plaintiff prove the length of time the chair had been defective (A:3). The Fourth District reversed because the Friedrichs' 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 Fourth District, "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 direct conflict with this holding, 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.

Similarly, the Second District in Yuniter did not require the plaintiff to establish the length of time a defective condition existed. 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 question of fact existed on the reasonableness of the inspection. See id.

The decision in Fetterman involves facts very similar to the decisions in Fontana, Yuniter, and Schneider, but the decisions reach the opposite results. In all four cases, the plaintiffs presented evidence that a reasonable inspection would have revealed the dangerous condition in the chair (A:1-2). See Fontana, 717 So. 2d at 199-200; Yuniter, 707 So. 2d at 764; Schneider, 128 So. 2d at 399. The Fourth District decision recognized that the Friedrichs' 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). Yet, the Fetterman decision reversed the judgment for the Friedrichs and remanded to enter judgment for the defendant who had never inspected

the chair. This express and direct conflict among district court decisions creates uncertainty and confusion in the law, as Judge Levine aptly recognized in his dissenting opinion (A:4-5).

B. The Fetterman decision conflicts with this Court's decisions establishing the standard governing directed verdicts and prohibiting district courts from reweighing the evidence.

This Court should also quash the Fetterman decision because it misapplies the standard governing motions for directed verdict set forth in controlling decisions from this Court. See, e.g., Cox v. St. Josephs Hosp., 71 So. 3d 795, 799-801 (Fla. 2011); Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329-30 (Fla. 2001);[4] 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 not" caused the injuries. Cox, 71 So. 3d at 799-801; Gooding, 445 So. 2d at 1020.

In Cox, this Court quashed a Second District decision that misapplied the directed verdict standard the same way the Fetterman decision did here. The district court in Cox had

[4] The 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 involving transitory substances on the floor of a business. See § 768.0755, Fla. Stat. (2011); § 768.0710, Fla. Stat. (2002),

"impermissibly reweighed the testimony presented by the plaintiffs' expert witness" on whether the medical malpractice caused the injuries. 71 So. 3d at 796. This directly conflicted with Gooding, which holds that as long as the plaintiff's expert testifies that the defendant's conduct "more likely than not" caused the injury, the 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, 71 So. 3d at 801. This Court in Cox reiterated the operative test--a directed verdict "is not appropriate in cases where there is **conflicting evidence** as to the **causation** or the likelihood of causation." Id. "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.

Here, as the Fourth District acknowledged, plaintiffs' expert testified the Fetterman firm should have inspected the chairs periodically and, had it done so, the inspections "**would** have revealed the defect in the chair" (A:3). That testimony satisfies the "more likely than not" or "probably" standard set forth in Cox and Gooding. As discussed above in part A, the Friedrichs' expert testified that the Fetterman firm would have discovered the dangerous condition with a simple inspection. In accordance with cases addressing the sufficiency of the evidence in chair collapse cases, such as Fontana,

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repealed by Ch. 2010-8, Laws of Fla. § 2 (2010).

717 So. 2d at 199-200, and Yuniter, 707 So. 2d at 764, the Fourth District was required to affirm the jury's verdict.

The Fourth District also conflicts with Cox, Owens, and Gooding cases by incorrectly reweighing the testimony of the Friedrichs' expert and failing to view the evidence in the light most favorable to them. The Friedrichs' engineering expert opined that the Fetterman firm would have found the dangerous condition had someone had inspected the chair:

- "**[A] hands-on inspection of the chair before the accident should have found the weak joint that caused this chair to fail**." (T2:101).
- "Now, a hands-on inspection of the chair before the accident **should have found** this weak joint." (T2:111).
- "The hands-on inspection of the chair before the accident **should have found** this weak joint." (T2:112).
- "[A] hands-on inspection of the chair before the accident **should have found** this weak joint that caused the chair to fail." (T2:113).
- While the defect was not visible, "[y]ou can perform a flexibility inspection" and discover it (T2:123).
- "Had he done a hands-on inspection he **would have found** that the right side was more flexible than the left side." (T2:128).

The Fourth District concluded that plaintiffs failed to establish that the Fetterman firm could have discovered the dangerous condition because the Friedrichs' expert "acknowledged that flex-testing may not have revealed the defect until just before the collapse." (A:4). This ignores the actual testimony of the Friedrichs' expert

that with "a hands-on inspection," the Fetterman firm "would have found that the right side [of the chair] was more flexible than the left side" (T2:128; see T2:101, 111-13, 123, 130, 144). On redirect, the Friedrichs' expert clarified that because the joint of the chair loosened slowly over time, the Fetterman firm should have discovered it:

> Q. Is it because of the gradual loosening of the right side over time that **you believe a simple inspection would have revealed that there's less of a bond on the right side versus the left?**
>
> A. **Yes.** There would have been more flexibility on the right side than the left, yes.

(T2:144).

The failure to consider the testimony of the Friedrichs' expert witness as a whole 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, 71 So. 3d at 799-801; Owens, 802 So. 2d at 329-30; Gooding, 445 So. 2d at 1020. The Fourth District incorrectly stated that the Friedrichs' expert "conceded that it was possible that a flex-test may not have revealed the weak joint" (A:2). This is not supported by the record.

Actually, plaintiff's expert testified repeatedly that "a flex-test would have revealed the defect in the chair" (A:3; see T2:101, 111-13, 123, 130, 144). The Fetterman decision failed to view this testimony in the light most favorable to plaintiffs,

the prevailing parties. See Cox, 71 So. 3d at 799-801; Hughes v. Slomka, 807 So. 2d 98, 100 (Fla. 2d DCA 2002) (requiring denial of a directed verdict because, even though expert testimony is "somewhat internally inconsistent," it must be viewed in the light most favorable to the non-moving party); accord Bernhardt v. Halikoytakis, 32 Fla. L. Weekly D2049 (Fla. 2d DCA Aug. 24, 2012) (prohibiting judges ruling on a motion for summary judgment from "consider[ing] either the weight of the conflicting evidence or the credibility of witnesses").

The Fourth District's misapplication of the directed verdict and causation standards is an issue of exceptional importance that will affect negligence cases throughout Florida. If the Fourth District's decision is allowed to stand, it will create uncertainty regarding the standard governing motions for directed verdicts. The decision also imposes on plaintiffs an impossible burden of proving the exact length of time a dangerous condition existed. The Fourth District changed plaintiffs' burden of proof and the well-settled standard governing motions for directed verdict. This Court must quash the decision in Fetterman and remand with instructions to reinstate the final judgment for plaintiffs.

CONCLUSION

This Court should quash the decision of the Fourth District and reinstate the final judgment for plaintiffs.

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
(561) 659-5455
janewalsh@kwcvpa.com
rvargas@kwcvpa.com
eservice@kwcvpa.com
and
SCOTT B. SMITH and
MARGARET M. BICHLER of
LYTAL, REITER, SMITH, IVEY & FRONRATH
515 North Flagler Drive, 10th Floor
West Palm Beach, FL 33401
ssmith@foryourrights.com
mbichler@foryourrights.com
(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 e-mail this _____ day of September, 2012, to:

ELIZABETH K. RUSSO
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, FL 33143
e-service@russoappeals.com
ekr@russoappeals.com
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
dmethe@flacivillaw.com
kbrock@flacivillaw.com
Counsel for respondent, Fetterman & Associates

By:_____
REBECCA MERCIER VARGAS
Florida Bar No. 0150037

CERTIFICATE OF FONT

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

By:_____
REBECCA MERCIER VARGAS
Florida Bar No. 0150037

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