The Outer Limits

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One of the most potentially powerful weapons in a plaintiff's attorney's arsenal is the inference. Inferences allow plaintiffs to bridge the sometimes gaping holes in their case, whether those holes are temporal, causal, relational, or simply evidentiary.

This paper collects representative state and federal cases from around the country. It reveals that although the general rule against stacking inferences is well established, states address the issue differently in connection with permitting an underlying inference to be considered sufficiently established to permit a further inference to be built atop it.

INTRODUCTION

"The origin of the so-called rules against basing an inference upon an inference or a presumption upon a presumption is obscure," and "many judicial opinions may be found stating the rule against the basing of an inference upon an inference and at least purporting to apply it to hold proof of a contested issue insufficient." *Modern Status Of the Rules Against Basing An Inference Upon An Inference Or A Presumption Upon A Presumption*, 5 A.L.R.3d 100 § 2. "The statement of the rules has frequently been explained as merely a shorthand expression for the judicial distrust of tenuous reasoning or of reliance upon remote or unfounded inferences or conclusions." *Id.*

"Criticisms of the rules against basing an inference upon an inference … have usually taken the form of statements that chains of inference are a necessity of any logical process and that this form of reasoning is constantly relied upon in all other areas of human endeavor." *Id.* Thus, "[a]lthough it is comparatively easy to expose the fallacy of these rules, or to explain them

away as merely the result of loose judicial language, they have displayed substantial survival value and, of course, must be taken into account by any party or attorney advancing or attacking a line of legal reasoning based partially on inference." *Id.*

I. REPRESENTATIVE STATE LAW DECISIONS ON INFERENCE STACKING

Cases standing for the proposition that a party is not entitled to prove his or her case by stacking or pyramiding one inference atop another are legion. Nonetheless, a plaintiff is entitled to rely upon an inference when that inference is premised on a fact. And there may well be instances in which an underlying inference is sufficiently established that it can actually support a further inference without violating the above-stated rule. Case law on this point varies throughout the country.

A useful representative case is the Florida Supreme Court's decision in *Voelker v. Combined Insurance Company of America*, 73 So.2d 403 (Fla. 1954). There, the court affirmed the trial court's directed verdict in favor of the defendant, which turned on the determination, arrived at by way of certain inferences, as to whether the plaintiff's decedent's death resulted from injuries sustained in an automobile accident or from drowning.

The court began its analysis by noting that, under certain circumstances, a party can prove its case with circumstantial evidence, so long as that evidence outweighed all contrary evidence by a preponderance of all the reasonable inferences:

> Where circumstantial evidence is relied on in a civil case to prove an essential fact or circumstance essential to recovery, the rule is that the particular inference of the existence of the fact relied on so arising from the circumstances established by the evidence adduced, should outweigh all contrary inferences to such extent as to amount to a preponderance of all of the reasonable inferences that might be drawn from the same circumstances.

Id. at 405 (citing *King v. Weis-Patterson Lumber Co.*, 124 Fla. 272, 168 So. 858, 859 (1936)). Before a jury could be permitted to weigh these inferences, however, an initial determination had to be made regarding the very first inference in the case:

> It is our considered judgment that when an inference . . . is inescapable, that is to say when no contrary *reasonable* inference may be indulged, such inference is elevated for the purpose of further inference to the dignity of an established fact. . . . We think, however, that such method of establishing an ultimate fact should not ordinarily be indulged unless the first inference meets a test which may be analogized to the criminal rule concerning circumstantial evidence, i.e., in the ordinary case, only if the prior or basic inference is established to the exclusion of any other reasonable theory should another be drawn from it.

Id. at 407 (italics in original). *Id.* at 408. *Accord Food Fair Stores, Inc. v. Trusell*, 131 So. 2d 730, 733 (Fla. 1961) ("It is apparent that a jury could not reach a conclusion imposing liability on the petition without engaging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences").

Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307 (Fla. 4th DCA 1990), is also instructive, particularly as to toxic tort cases. There, the plaintiff sued several asbestos manufacturers claiming he was exposed to asbestos and that such exposure was the proximate cause of his injuries. The trial court permitted the exposure issue to go to the jury. However after the jury found for the plaintiff, the court directed a verdict for the defendants. The appellate court, in affirming, adopted the findings of the trial court verbatim:

> The Court finds here, as a matter of law, that the inference of exposure to asbestos; as the basis for the inference of plaintiff's being in close proximity to [persons who used asbestos products] at the time they were using defendants' specific products; as the basis for the further inference that the negligence of these defendants in failing to place warning labels on packaging caused said exposure; as the basis for the ultimate proximate causation inference that Reaves would not have contracted asbestosis absent the negligence of these defendants, constitutes the type of compounding inference on inference prohibited under the case law of the State of Florida.

Id. at 1309-1310

In *Le Sage v. Pitts,* 223 S.W.2d 347 (Ky. 1949), the plaintiff fell 25 feet to the ground while working on the top of a wall of a warehouse during its construction. He alleged that the defendant negligently placed a concrete block in the wall in a dangerous and unsafe condition, despite the knowledge that workers would be exposed to the block. The trial court granted a directed verdict to the defendant on the basis that the plaintiff failed to establish a claim by competent proof. The appellate court affirmed.

The court explained that Kentucky law "requires a clear connection to be shown between evidentiary facts and conclusions and does not permit conclusions to be drawn from remote inferences." *Id.* at 352. Further, although "[a]n inference may be drawn from a clearly established fact … if the conclusion is drawn upon a fact dependent for proof of its existence upon a prior inference, the evidentiary fact is too remote to support the conclusion." *Id.* As such, where "the ultimate inference is based upon an inference which in turn is based upon a prior inference, depending upon an even more remote inference, the conclusion does not rise above the dignity of mere speculation, because a pyramiding of inferences never has been regarded as sound reasoning and al-ways has been held not to be a permissible predicate for a conclusion." *Id.* Accordingly, the court held:

> As a matter of fact, this is the first inference appellant invokes in support of his theory of the case. His theory is that it was the duty of appellee under the direction of the general contractor to leave openings in the walls for the placement of the steel structure. We think the evidence to be conclusive on this point. Appellant, from the fact that mortar was attached to the block which rolled with him, infers that the block was anchored safely in its place in the original erection of the wall. He then theorizes, without even a scintilla of evidence to support the theory, that, in constructing the wall, appellee forgot, or at least failed, to leave openings in which to place the steel structure. This theory calls for an inference to be drawn upon the first inference. He further theorizes that, having forgotten to leave the openings in the first instance, appellee cut the openings after having erected the wall in solid formation. This is an inference drawn upon the second

> inference. Finally, he theorizes that, in cutting the openings in the solid wall, the block causing the injury was loosened and left in an unsafe condition in its original position. This is an inference based upon the third inference.

Id.

Another representative case is *Lovato v. Plateau, Inc.*, 444 P.2d 613 (N.M. App. 1968), in which the plaintiff sought damages as a result of a fire in his vehicle. The trial court entered a directed verdict for the defendant, and the plaintiff appealed. The Court of Appeals began its analysis by noting that although all reasonable inferences from the evidence "must be indulged in support of plaintiffs' case," nonetheless "an inference is more than a supposition or a conjecture. It is a logical deduction from facts which are proven, and guess work is not a substitute therefore." *Id.* at 615.

The court further explained that a "reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence, when such facts are viewed in the light of common knowledge or common experience." *Id.* On the other hand, "[i]f the facts admitted or established by the evidence are equally consistent with two hypotheses, then these facts tend to prove neither." *Id.* Accordingly, the court held:

> Since there is no evidence as to how or when the gasoline got on the apron or driveway, the presence of gasoline thereon is just as consistent with an inference that it leaked from a vehicle, or was otherwise present by reason of the acts of someone unknown, as it is to infer that defendants were responsible for its presence. As above stated, two hypotheses equally consistent under the evidence tend to establish neither. Here we just have an absence of proof as to how the gasoline, assuming it was gasoline, happened to be present upon the station apron or driveway.

Id. at 616. *Accord Hansler v. Bass*, 743 P.2d 1031, 1035 (N.M. App. 1987) ("While a party opposing summary judgment is entitled to have reasonable inferences drawn from the facts . . .

to reach plaintiffs' conclusions the trial court would have had to stack one inference upon another inference. This is not permitted.").

In *State v. Theroux*, 306 A.2d 44, 47 (R.I. 1973), the court explained that "[c]onceding that a reasonable inference drawn from an established fact is itself an inferential fact which may be of probative force, it does not follow that such an inferential fact may then serve as the basis for a further inference that would likewise possess some probative force." *Id.* (citing *Industrial National Bank v. Dyer*, 188 A.2d 909, 913 (R.I. 1963)), As such, "[a] conclusion reached by drawing inferences from inferences is never considered as being probative of an ultimate fact under any proper concept of judicial proof." *Id.*

The court further stated that "[o]bviously a court should never draw an inference from an inference that is itself speculative or of remote possibility." *Id.* (citing *Waldman v. Shipyard Marina, Inc.*, 230 A.2d 841, 845 (R.I. 1967). Nevertheless, "in cases that do not reach this extreme, justice may be promoted by the acceptance of an inference as having probative force which rests on another inference *where that inference clearly excludes the drawing from the same fact of another reasonable inference*. *Id.* at 48. By the same token, "an inference resting on an inference drawn from established facts must be rejected as being without probative force where the facts from which it is drawn are susceptible of another reasonable inference." *Id.*

Finally, in *Southwest Olshan Foundation Repair Co., LLC v. Gonzales*, --- S.W.3d ---, 2010 WL 1608888, *7 (Tex. App. – San Antonio 2010), a fraud case, the court explained that "[f]raud usually is not susceptible to direct proof; it invariably must be proven by circumstantial evidence." However, "although circumstantial evidence may be used to establish any material fact, it must transcend mere suspicion.... Moreover, a vital fact may not be established by piling inference upon inference." *Id.* (internal citation omitted).

Additional cases addressing these principles include *Estate of Vredenburg v. National Catastrophe Restoration*, 2005 WL 1561032, *3 (Kan. Ct. App. July 1, 2005) ("Where reliance is placed on circumstantial evidence, the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.") (citing *State v. Rice*, 261 Kan. 567, 587, 932 P.2d 981 (1997) (inference stacking)); *Miller v. Gerber Products Co.*, 62 S.E.2d 174, 176 (Ga. 1950) ("Ordinarily it is a rule of circumstantial proof that the facts from which the main fact is to be inferred must be proved by direct evidence. An inference resting only upon an inference is not permissible."); *Aldridge v. Tillman*, 516 S.E.2d 303, 308 (Ga. Ct. App. 1999) ("The act of Mr. Tillman discharging a gun 16 years earlier was not a substantially similar criminal act to make Mr. Tillman's present assault on Aldridge with a knife reasonably foreseeable to Mrs. Tillman. There was no evidence that Mr. Tillman discharged the gun at either Aldridge or Mrs. Tillman; to infer such facts would be mere speculation and conjecture based upon the pyramiding of inferences."); *Malone Freight Lines, Inc. v. McCardle*, 167 So.2d 274, 280 (Ala. 1964) ("One fact cannot be inferred from another act which is itself an inference, since an inference cannot be grounded on an inference"); *see also Gaines v. K-Mart Corp.*, 860 So.2d 1214 (Miss. 2003).

Other state cases adopt a more flexible approach to the issue. For example, in *Eitel v. Times, Inc.*, 352 P.2d 485 (Or. 1960), the Oregon Supreme Court stated that "[w]e cannot support our belief by mathematical proof that the probabilities favor the plaintiff's contention. We have only our own experiences, observations and understanding of what commonly happens from which to judge whether the inferences drawn from the circumstances connect up defendant's conduct to the injury more strongly than the conduct of some other person." *Id.* at

490 (citations omitted). This suggests something akin to a mere preponderance of evidence test for measuring the merits of inferences The court went on to explain:

> The statement appearing in some cases that an inference cannot be based upon an inference, usually without citation and certainly without adequate discussion, does not and cannot mean that an inference cannot be based upon a fact which is itself based upon circumstantial evidence. . . . Nearly all departments of reasoning are based upon deducing one fact from another fact that has itself been deduced from a prior fact. The only fallacy that may occur in such reasoning is where a deduced fact is based upon circumstantial evidence that is unreliable, is too remote or is too conjectural. The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural. In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference. This is the only conceivable basis upon which the otherwise apparently conflicting cases can be reconciled.

Id. at 492.

A number of other courts have taken a similar approach. *See Bettencourt v. Pride Well Service, Inc.*, 735 P.2d 722, 729 (Wyo. 1987) ("We hold that in this instance the circumstantial evidence presents a question for the jury and extends beyond conjecture, speculation or surmise. The circumstantial evidence here present and common knowledge provide a basis from which the causal sequence may be inferred. Reasonable minds could differ on the question, but they also could find that the design of the oil tank and the attached ladder; the absence of artificial lighting; the oil on top of the tanks; and the continued use of the tank with the ladder in the condition described by McGowen or any or all of these did constitute a substantial factor in bringing about the injuries to Bettencourt."); *Cf. Yelk v. Seefeldt*, 151 N.W.2d 4, 9 (Wis. 1967) ("While, as we have noted elsewhere, a fact proved by inference can in turn be the foundation of another inference, … and the jury can, therefore, draw an inference from an inference, there is a difference between a permissible inference and mere speculation.").

The Tennessee Supreme Court approached the issue from a somewhat different perspective, explaining that although some jurisdictions appear to reject the rule against stacking

inferences, the rejection is merely a matter of labeling. That is, "the jurisdictions that have abandoned the rule have rejected its form, rather than its application. Accordingly, those jurisdictions continue to apply the rule; they have just changed the 'label on the can' to a rule against drawing remote inferences." *Benton v. Snyder*, 825 S.W.2d 409, 415 (Tenn. 1992). The court then noted that it has "qualified the general rule by adopting a rule that a fact may be inferred from circumstantial evidence, and from the fact thus inferred, another fact may be inferred without contravening the rule that an inference cannot be based upon an inference. . . . What is meant by this rule is that a 'fact,' although arrived at by indirect or circumstantial evidence, may serve as a basis for an inference; that is the evidence supporting the first inference may be of such a character and so strong that it justifies a conclusion or a finding of fact which becomes a proper basis for another inference." *Id.* (citations omitted).

II. REPRESENTATIVE FEDERAL DECISIONS ON INFERENCE STACKING

There are decisions by federal courts both supporting and rejecting the principle that an inference cannot be stacked upon another inference. For example, in *Faddish v. Buffalo Pumps* (*In re Asbestos Products Liability Litigation),* 2010 WL 3245764 (E.D. Pa. Apr. 26 2010), the federal asbestos Multi-District Litigation court applied Florida's rule against stacking one inference atop another in concluding that summary judgment in favor of the defendant was warranted. In *National Labor Relations Board v. Stewart & Stevenson Servs. Inc.*, 414 F.2d 232, 233 (5th Cir. 1969), the court stated that "[t]he Board's conclusion that Morrissey's discharge was discriminatory is based upon an assumed trumped-up transfer for the purpose of finding his work unsatisfactory in order to justify his discharge. We cannot accept these pyramidal inferences and assumptions as substantial evidence of unlawful motive."

See also Gray v. Dollar General Corp., 2009 WL 4348336, *3 (N.D. Miss. Nov. 24, 2009) ("Plaintiff has essentially stacked one inference upon another without offering any proper

summary judgment evidence. Even if Plaintiff had proper evidence to support his inferences and speculation, suspicious timing must be combined with other significant evidence of pretext for a Title VII claim to survive summary judgment…. Plaintiff has offered no such evidence, and 'speculative and unsubstantiated assertions ... are not sufficient to create an inference of discrimination.'") (citations omitted); *Abuobeid v. Hargus*, 2010 WL 1849281, *9 (S.D. Ohio May 3, 2010) ("Plaintiff's account of the July 2007 incident presents nothing more than the impermissible stacking of inference upon inference.").

Other federal courts have rejected, or at least qualified, the notion that inferences cannot be stacked atop other inferences. For example, in *Daniels vs. Twin Oaks Nursing Home*, 692 F.2d 1321 (11th Cir. 1982), the court held that a magistrate's ruling that Alabama's rule against pyramiding inferences applied was erroneous since the rule "is no more than a rule concerning the sufficiency of the evidence and therefore is a matter of federal law." *Id.* at 1323. The court then stated that under federal law, "there is no prohibition against pyramiding inferences; instead all inferences are permissible so long as they are reasonable." *Id.* at 1324. "Under the modern case law applying a federal standard, *a verdict based on circumstantial evidence is not infirm simply because the evidence supports an equally probable inference to the contrary. It is the jury that chooses among allowable inferences*." *Id.* at 1326 (emphasis added). "The standard for determining whether an inference is allowable is generally whether it is a reasonable one, that is, whether it is one that 'reasonable and fair-minded men in the exercise of impartial judgment' might draw from the evidence. . . . [An inference] is not unreasonable simply because it is based in part on conjecture, for an inference by definition is at least partially conjectural. . . . Unavoidably, in deciding how much the jury can speculate ... the line of demarcation which we are required to walk is ephemeral.'" *Id.* (citations omitted)

See also Hall v. General Motors Corp., 8 F.3d 27 (Table Op.), 1993 WL 410692, *5 (9th Cir. 1993) (recognizing that "'stacking of inferences' is commonplace in products liability cases.…. [T]here was nothing improper in letting the jury in this case first conclude that the fire began in the Halls' Buick, and then that a defect in the product caused the fire.")

III. INFERENCES AND PROXIMATE CAUSATION

In the tort context, issues of permissible inference and of proximate (or legal) causation often march in lockstep. Plaintiff's counsel, facing the burden of proving that his or her client's injury was caused by the defendant's conduct, may seek to establish causation through a chain of inferences, the links of which are often progressively more speculative and conjectural. This is especially so in connection with claims such as fraud and civil conspiracy, where tangible and direct evidence of a defendant's tortious conduct vis-à-vis the plaintiff may be minimal or nonexistent. For example, in *Zervas v. Faulkner*, 861 F.2d 823, 836 (5th Cir. 1988), the Fifth Circuit rejected a civil conspiracy claim whose element of subjective intent was grounded in speculation and conjecture, writing,

> For a defendant to be liable for civil conspiracy to defraud, it must be shown not only that there was such a conspiracy but that the particular defendant charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy. . . . Proof that a defendant had some collateral involvement in a transaction, and had good reason to believe that there existed a conspiracy among other parties to it, is insufficient of itself to establish that the defendant was a conspirator. **Although a conspiracy is usually proved by circumstantial evidence, nevertheless vital facts may not be proved by unreasonable inferences from other facts and circumstances or by piling inference upon inference**.

Id. at 836 (emphasis added)

Many of the considerations – and the underlying policy questions – that courts look to in determining whether proximate causation exists are precisely the same as those to which courts

look in determining the permissibility of evidentiary inferences. As Professors Prosser and Keeton have noted, proximate or legal causation

> is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.
>
> As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 269 (5th ed. 1984)

Thus, seemingly innumerable degrees of separation between the plaintiff's injury and the activities of an insurance company defendant led the California Superior Court to reject, as a matter of law, civil conspiracy, fraud, and negligence claims against the insurance company, because causation was "too speculative and conjectural." *Todak v. Asbestos Defendants*, No. 320621 (Cal. Super. Ct., Transcript of Hearing on Motion for Summary Judgment, March 14, 2002) . In this asbestos case, the plaintiff had sought to link his injuries to certain industrial hygiene services the insurance company had performed on behalf of a manufacturer of asbestos products decades prior to the plaintiff's alleged asbestos exposure. The court stated that, to find causation, a "jury would need to stack impermissible inference on top of impermissible inference." *Id.*

> [T]here was substantial, indeed voluminous published information in the medical and scientific literature during the relevant time period concerning the health hazards of asbestos. [T]o suggest that the world of asbestos usage would have somehow changed to the benefit of [plaintiffs'] health if [the insurer] had said or agreed with others to say something less, something different or something more is entirely speculative and conjectural.

Id.. The court concluded that "the connection between [the insurer] and the Plaintiffs is **too tenuous or attenuated** to support a finding of reliance or causation on any theory of fraud, misrepresentation, concealment or failure to warn." *Id.* (emphasis added).

CONCLUSION

The varied degrees of rigidity in applying the rule against stacking inferences, as suggested by the cases surveyed above, present a cautionary tale for defense counsel, which turns largely on the case law of the jurisdiction in which the case is pending. In some states – those more tolerant of inference stacking – defense counsel may face the specter of being denied an otherwise meritorious motion for summary judgment, or of having a case that is built upon inferential stilts go to the jury when it seemingly should not. In other states, a defense challenge to plaintiff's evidentiary inferences may strike a fatal blow to the plaintiff's case.