CIRCUMSTANTIAL EVIDENCE OF NEGLIGENCE: THE NEED FOR CLARIFICATION IN MISSISSIPPI

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It is a longstanding rule of Mississippi jurisprudence that circumstantial evidence of negligence can create a question of fact for the jury.[1] "It is also well settled that negligence may be proven by circumstantial evidence and when the case turns on circumstantial evidence it should rarely be taken from the jury."[2] A case of circumstantial evidence as to the origin of a fire is generally for the jury; through a process of elimination, the plaintiff must show that his theory is the more probable of any possible causes.[3] However, as discussed below, the circumstantial

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[1] *See* Kurn v. Fondren, 198 So. 727, 730 (Miss. 1940) ("[W]hen the circumstantial evidence justified the jury in finding that the inference that the fire was set by a railroad locomotive is stronger and more probable than that it was set out from another cause, the question of the fire's origin was for the jury.").

[2] Davis v. Flippen, 260 So. 2d 847, 848 (Miss. 1972) (citing Cameron v. Hootsell, 90 So. 2d 195 (1956)).

[3] Miss. Power & Light Co. v. Goosby, 192 So. 453, 455 (Miss. 1939).

evidence rules are not always applied uniformly by the Mississippi courts and may need to be clarified.

I. EARLY CASES

Over 100 years ago, the Mississippi Supreme Court considered circumstantial evidence of negligence in the context of fires allegedly caused by sparks from passing locomotives.[4] In *Tribette v. Illinois Central Railroad Co.*,[5] a peremptory instruction in favor of the defendant railroad company should not have been given in a plaintiff's suit seeking damages for destruction of his buildings by a fire allegedly caused by the railroad's negligence. The Supreme Court held that the case should have been submitted to the jury because there were disputable facts (i.e., circumstantial evidence including at least one witness who saw sparks emitting from some train on the date of loss), and more than one inference could be drawn from all the evidence.[6]

Along the same lines, the Supreme Court stated that it would not disturb a jury verdict involving the issue of liability for a fire based upon circumstantial evidence and conflicting testimony whether a passing train had caused property damage by fire.[7]

II. CURRENT STANDARDS

> Of course negligence may be proved by circumstantial evidence. . . . The law does not require every fact and circumstance which make up a case of negligence to be proved by direct and positive evidence or by the testimony of eyewitnesses. Proof of the fact of negligence may rest entirely in circumstances; in other words, circumstantial evidence alone may authorize a finding of negligence. Hence, negligence may be inferred from all the facts and attendant circumstances in the case, and where the circumstances are such as to take the case out of the realm of conjecture and

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[4] *Id.*

[5] 13 So. 899 (Miss. 1893).

[6] *Id.*

[7] Mardis v. Yazoo & M. V. R. Co., 76 So. 640 (Miss. 1917).

> within the field of legitimate inference from established facts, a prima facie case is made.[8]

To survive summary judgment, "the proof of circumstances must be such that they will take the case out of the realm of conjecture and place it within the field of a legitimate inference of liability."[9] Mere allegations and speculation will not suffice.[10]

The case of *Weathersby Chevrolet Co. v. Redd Pest Control Co.*,[11] is a good example of how the circumstantial evidence rules are applied. An employee for plaintiff Redd Pest Control Company delivered his service truck to defendant Weathersby Chevrolet Company, complaining of a problem with the air conditioning unit. Defendant's mechanic replaced the air conditioner control panel for the unit. Five days later, and after the truck had been driven 310 miles, plaintiff's employee noticed smoke coming from the center area of the dashboard, which is where the air conditioner control panel was located. A fire burning under the dash destroyed the truck and all equipment installed on it. Plaintiff sued, alleging defendant was negligent in performing the truck repairs. The jury found in favor of the plaintiff, and the Mississippi Supreme Court affirmed.

> At trial, [plaintiff] necessarily relied primarily upon circumstantial evidence to establish [defendant's] allegedly negligent repair because those parts of the truck that might have offered some objective basis to determine the cause of the fire were substantially consumed in the fire. Although such a loss of probative evidence may make the matter of proof more difficult, negligence can be proved solely by circumstantial evidence. This Court has clearly held that negligence may be proved by circumstantial evidence where circumstances are such as to remove the case from the realm

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[8] Matthews v. Carpenter, 97 So. 2d 522, 524 (Miss. 1957) (citation omitted). In *Matthews*, the plaintiff's truck was damaged by fire in a mechanic's shop. The trial court erred by directing a verdict in favor of the defendant as the case should have been presented to the jury. *Id.*

[9] Patterson v. T. L. Wallace Constr., Inc., 133 So. 3d 325, 332 (Miss. 2013).

[10] *Id.*

[11] 778 So. 2d 130 (Miss. 2001).

> of conjecture and place it within the field of legitimate inference.[12]

Circumstantial evidence "must be sufficient to make the plaintiff's asserted theory reasonable probable, not merely possible, and more probable than any other theory based on such evidence."[13] The jury should weigh the conflicting circumstantial evidence of negligence.[14]

III. NOT EVERY CASE WILL REACH THE JURY

In *Huynh v. Phillips*,[15] plaintiff sued the owner of a nail salon, alleging negligence and gross negligence after "something" hit her in the eye while she was having acrylic nails applied. The Circuit Court of Simpson County denied the defendant's motion for summary judgment, and she was granted leave to file an interlocutory appeal.

On appeal, the Mississippi Supreme Court noted that "[i]n view of the fact that the burden of proof is upon the plaintiff, such circumstances must be ample and must appear from the evidence. Moreover, the evidence must not leave the causal connection a matter of conjecture; it must be something more than consistent with the plaintiff's theory as to how the accident occurred."[16] Since the plaintiff did not know what hit her eye or where it came from, there was simply "no circumstantial evidence from which a jury could infer causation."[17] As such, the Supreme Court reversed the judgment of the trial court and rendered judgment in favor of the defendant.

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[12] *Id.* at 133. The court cited *Hardy v. K Mart Corp.*, 669 So. 2d 34, 37-38 (Miss. 1996); *Kussman v. V&G Welding Supply, Inc.*, 585 So. 2d 700, 703 (Miss. 1991); *Cadillac Corp. v. Moore*, 320 So. 2d 361, 366 (Miss. 1975); *Brown Oil Tools, Inc. v. Schmidt*, 148 So. 2d 685, 688 (Miss. 1963); and *Palmer v. Clarksdale Hosp.*, 40 So. 2d 582, 586 (Miss. 1949).

[13] *Id.*

[14] *Id.*

[15] 95 So. 3d 1259 (Miss. 2012).

[16] *Id.* at 1264 (quoting Glover ex rel Glover v. Jackson State Univ., 968 So. 2d 1267, 1277 (Miss. 2007)).

[17] *Id.* The court also held that plaintiff offered no evidence of what "instrumentality" caused her injury or that the object ordinarily would not have hit her eye if defendant used proper care; thus, the evidence was insufficient to raise a presumption of negligence under a theory of *res ipsa loquitur*. *Id.* at 1262.

The same result was reached many moons ago in *Tombigbee Electric Power Association v. Gandy*.[18] After his store was destroyed by a fire, plaintiff sued defendant electric company for negligently continuing to pass currents through a wire that was in close and dangerous proximity to a gasoline storage tank on the property. The trial court entered judgment in favor of the plaintiff, but the Supreme Court reversed. Plaintiff presented "nothing but the wildest form of conjecture, and there is no legitimate inference under anything shown by the record" to implicate the defendant.[19] "There is no more reason to support a finding that this fire was caused by a spark of electricity than there is to say that it was caused from the act of some vandal or by the act of some thief stealing gasoline who carelessly permitted it to be ignited by a match or a lighted cigarette."[20] "The record here shows nothing more, at best, than a remote possibility as to the origin of the fire," and "verdicts must rest upon reasonable probabilities and not upon mere possibilities."[21]

These two examples illustrate that the plaintiff will not always reach the jury when presenting mere circumstantial evidence. The plaintiff should make every effort to eliminate the other possible causes of his injury.

IV. THE NEED FOR CLARIFICATION . . . OR A BETTER UNDERSTANDING BY THE COURT OF APPEALS

The case of *Patterson v. T. L. Wallace Construction, Inc.*,[22] highlights the need for clarification on this issue, or at least a better understanding of the circumstantial evidence rules by the Mississippi Court of Appeals. Plaintiff Carl Patterson, Jr., was driving his motorcycle on Cross Creek Parkway in Hattiesburg, Mississippi, when he struck debris in the road and suffered personal injury. Plaintiff sued (1) the owner of land located on each side of the highway, and (2) a construction company that performed work on a retention pond nearby. The Marion County circuit court granted the defendants' motions for summary

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[18] 62 So. 2d 567 (Miss. 1953).
[19] *Id.* at 570.
[20] *Id.*
[21] *Id.* at 570-71.
[22] 133 So. 3d 325 (Miss. 2013).

judgment. The Court of Appeals then reversed and remanded, determining that the case should have gone to a jury. The Supreme Court ultimately re-reversed, affirming the original judgment of the trial court.

After rejecting plaintiff's *res ispa loquitur* argument, the Court noted that the plaintiff could not identify who was responsible for the debris or how long the debris was in the highway.[23] Testimony that the construction company "had worked near the site of his accident several days prior to his accident and a few days after his accident" was "insufficient to show that it created the hazardous condition."[24] "In some cases, circumstantial evidence can be used to survive summary judgment."[25] However, quoting *Huynh*, the Court held that the circumstantial evidence presented must "take the case out of the realm of conjecture and place it within the field of a legitimate inference of liability."[26] Plaintiff Patterson only "relies on mere allegations and speculation to support his claims," so his case could not survive the summary judgment stage.[27]

When the Court of Appeals and Supreme Court are unable to agree on how to apply years of binding case law to the same set of undisputed facts in the record, it may be time for the Supreme Court to provide clarification. Unfortunately, the discussion of circumstantial evidence in *Patterson* was not overly informative, descriptive, or enlightening. It appears that the *Patterson* Court relied on option number two: hope the Court of Appeals can gain a better understanding of the circumstantial evidence rules and correctly apply those rules in future cases.

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[23] *Id.* at 331.
[24] *Id.*
[25] *Id.* at 332.
[26] *Id.* (quoting *Huynh*, 95 So. 3d at 1263).
[27] *Id.*