

A REVIEW AND RECONSIDERATION OF
FLORIDA'S RULE AGAINST BASING AN
INFERENCE ON AN INFERENCE IN CIVIL
CASES

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I. INTRODUCTION: THE RULE AND ITS RATIONALE

Few rules of evidence cause greater confusion among trial lawyers and the courts than the rule that prohibits basing an inference on an inference in civil cases. This rule is used to determine the sufficiency of circumstantial evidence. The rule does not prevent every instance of building on inferences to prove a case. The persuasiveness of the initial inference determines whether that inference can become the basis for others. To be permissible, the first inference must outweigh all other reasonable contrary inferences so significantly that it is considered to have conclusively proven the point. In essence, it must become an established fact before a subsequent inference can be drawn from it. Appellate decisions on the rule refer to the first inference as having been elevated to the dignity of a fact, thus becoming a sound, non-speculative foundation for the second inference. Unfortunately, how this process works is not always clear.

Proponents of the rule argue that litigants should not be subjected to judgments based on speculation. They believe strict adherence to the rule protects against this danger. However, the rule is not without its critics, and one of the harshest among them was Professor Wigmore. He considered the rule meaningless sophistry and urged its abandonment.

Today most students of the problem of inference recognize that any single vision about the world or conclusion of fact rests on a multitude of inferences, premises, and beliefs, on a large complex of assumptions, and on a body of implicit or explicit principles by which the human organism perceives, organizes, structures, and understands experience; thus it is generally conceded that it is meaningless to denounce multistaged or cascaded inferences.¹

This Article will explore the origin and application of the rule limiting the use of an inference based on another inference in Florida. It will review civil cases where the rule has been applied, and

1. 1A JOHN H. WIGMORE, EVIDENCE § 41, at 1112 (Peter Tillers rev. 1983).

suggest an alternative means for evaluating the sufficiency of circumstantial evidence, specifically, one utilized by the federal courts and those in many of Florida's sister states. The method proposed would allow Florida courts to consider the totality of the evidence. The current rule requires courts to decide what inferences can be drawn from the circumstances, determine which inference is primary, and weigh it to see if it has been conclusively established. Only then are the factfinders permitted to consider other inferences. This Article will assert that the use of the totality of the evidence rule in civil cases would overcome the weaknesses that are inherent in the rule against basing an inference on an inference.

II. THE MEANING OF AN INFERENCE: HOW DOES AN INFERENCE BECOME A FACT?

To infer, according to the Random House Dictionary, is "to derive by reasoning; conclude or judge from premises or evidence."² Black's offers a more elegant and lawyerly definition: "A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted."³ The *Florida Evidence Code* defines an inference somewhat mechanistically as "a deduction of fact that the fact-finder, in his discretion, may logically draw from another fact or group of facts that are found to exist or are otherwise established in the action."⁴ In *Little v. Publix Supermarkets, Inc.*,⁵ the Fourth District Court of Appeal defined an inference as "a permissible deduction from the evidence which the jury may reject or accord such probative value as it desires, . . . and it is descriptive of the factual conclusion that a jury may draw from sufficient circumstantial evidence."⁶

2. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 978 (2d ed. 1987).

3. BLACK'S LAW DICTIONARY, 778 (6th ed. 1990).

4. FLA. STAT. ANN. § 90.301 (1979 & Supp. 1993); see Law Revision Council Note — 1976.

5. 234 So. 2d 132 (Fla. 4th DCA 1970).

6. *Id.* at 133–34 (citing 53 AM. JUR. TRIAL § 186 (1945); *Busbee v. Quarrier*, 172 So. 2d 17, 22 (Fla. 1st DCA 1965)). This definition of an inference is similar to an earlier one adopted by the Second District Court of Appeal in *Greyhound Corp. v. Ford*, 157 So. 2d 427 (Fla. 2d DCA 1963), which involved a rear-end collision between an automobile and a bus. The court distinguished between inferences and presumptions in the context of the *res ipsa loquitur* doctrine. The court stated that *res ipsa loquitur* results in an inference, not a presumption of negligence. *Id.* at 431. This inference "will support

The Florida Supreme Court stated in *Johnson v. Dicks*⁷ that “the law has always recognized the validity of inferences as evidence when such inferences are logically and naturally drawn from admitted or known facts. Inferences which naturally flow from admitted or known facts are just as valid as evidence as statements of eye-witnesses.”⁸ In *Johnson*, the decedent, a fruit picker, was found dead on wet ground near an aluminum ladder he had been carrying.⁹ He was immediately beneath electrical wires low enough to have been touched by the ladder.¹⁰ The court concluded that the decedent had died by electrocution in the course of his employment and reversed a workers' compensation order denying benefits to his widow.¹¹ Because the case involved a workers' compensation claim the standard of proof was lower, and the claimant was required to show only that the evidence demonstrated a reasonable basis for an inference that the death resulted from an accident arising out of, and in the course of, employment.¹² Whether this inference would have been considered a fact in a case where a higher standard of proof was required begs the question of how and when an inference becomes a fact.

III. THE BACKGROUND OF THE RULE: THE USE OF CIRCUMSTANTIAL EVIDENCE IN CIVIL CASES

The Florida Supreme Court first recognized the use of circumstantial evidence in civil cases in *King v. Weis-Patterson Lumber Co.*¹³ and *Fireman's Fund Indemnity Co. v. Perry*.¹⁴ In *King*, the plaintiff alleged that fire damage to his property was caused by an accumulation of flammable trash in the defendant's adjoining mill-

a jury verdict but not a directed verdict . . .” *Id.* In *Busbee*, the First District Court of Appeal stated that there are two usages of “inference”: The first, a conclusion of law drawn from “an admitted antecedent fact” and the second, a “factual conclusion that a jury may draw from sufficient circumstantial evidence.” *Busbee*, 172 So. 2d at 22.

7. 76 So. 2d 657 (Fla. 1954).

8. *Id.* at 661.

9. *Id.* at 658.

10. *Id.*

11. *Id.* at 661–62.

12. *Id.* at 661.

13. 168 So. 858 (Fla. 1936), *rev'd sub nom.* *Weis-Fricker Mahogany Co. v. King*, 190 So. 880 (Fla. 1939).

14. 5 So. 2d 862 (Fla. 1942).

yard.¹⁵ There was no direct evidence of the cause of the fire.¹⁶ The Florida Supreme Court reversed the trial court's directed verdict in favor of the defendant and held that when "circumstantial evidence is relied on in a civil case to prove an essential fact," the rule is less stringent than in a criminal case.¹⁷ The inference must outweigh contrary reasonable inferences "drawn from the same circumstances" only by a simple preponderance of the evidence.¹⁸ Because the trial court had directed a verdict for the defendant, every conclusion favorable to the non-moving party should have been admitted for purposes of the motion, including all reasonable inferences that could be drawn from the evidence.¹⁹

The supreme court did not change its previous rule of law on the third appeal of the *King* case.²⁰ Noting that the evidence was circumstantial, because there were no eyewitnesses to the fire, the court affirmed the verdict, stating:

The test of the sufficiency of the evidence in such cases seems to be that if the circumstances proven are inconsistent with any theory [other] than that defendant or its negligence was responsible for the fire and there is an absence of evidence tending to point to any other agency causing it, then the jury may be warranted in finding for the plaintiff.²¹

In *Fireman's Fund Indemnity Co. v. Perry*,²² the Florida Supreme Court reiterated its earlier statement of the burden of proof one must meet when relying on circumstantial evidence in a civil case.²³ The *Perry* court upheld the plaintiff's verdict against the insurance company for losses caused by the theft of jewelry.²⁴ The case had been proven by circumstantial evidence and the insurance

15. *King*, 168 So. at 859.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Weis-Fricker Mahogany Co. v. King*, 190 So. 880 (Fla. 1939). By the third appeal, *Weis-Fricker Mahogany Company, Inc.*, was the successor company to *Weis-Patterson Lumber Company*, a corporation. The case was also tried three times. *Id.* at 881. The last appeal of *King* was from a jury verdict in favor of the plaintiff.

21. *Id.*

22. 5 So. 2d 862 (Fla. 1942).

23. *Id.* at 863.

24. *Id.* at 866.

company argued that the proof of loss was not sufficient to comply with the policy standards, which were set out in daunting detail in the court's opinion.²⁵ The appellate court rejected the insurance company's assertion, finding that the proof substantially met the requirements of the policy, and held in favor of the plaintiff.²⁶ The court defined the burden of proof when circumstantial evidence is used in a civil case as a "preponderance of all reasonable inferences that might be drawn from the circumstances in evidence to prove the principal fact sought to be established sufficient to outweigh all other contrary inferences."²⁷

The Florida Supreme Court reaffirmed this view in *City of Jacksonville v. Waldrep*,²⁸ stating that "when circumstantial evidence . . . is relied upon" in a civil case to establish essential facts, the inferences to be drawn "from the proven circumstances must be sufficient to overcome all . . . contrary reasonable inferences" as a preponderance of all inferences deduced from the circumstances.²⁹ The court contrasted this rule to the one applicable to criminal cases, where the inference "must not only be consistent with the facts sought to be proved, but wholly inconsistent with any other reasonable inference to the contrary."³⁰

In *Waldrep*, the plaintiff tripped over a water meter, sustaining permanent injury.³¹ The trial court found in his favor, but the Florida Supreme Court reversed, holding that the judgment was based solely on circumstantial evidence, and that the plaintiff had failed to overcome by the necessary preponderance of the evidence all contrary reasonable inferences that were deducible from the proven circumstances.³² The court did not cite any facts from the record to support its ruling, nor did it discuss the "equally reasonable inferences" that the plaintiff, in its view, failed to overcome.³³

In *Byers v. Gunn*,³⁴ the Florida Supreme Court affirmed a jury verdict for the plaintiff even though it was based on circumstantial

25. *Id.* at 864-66.

26. *Id.* at 866.

27. *Id.* at 863.

28. 63 So. 2d 768 (Fla. 1953).

29. *Id.* at 769 (citing *Perry*, 5 So. 2d at 862).

30. *Id.* (quoting *King*, 168 So. at 858).

31. *Id.*

32. *Id.* at 768.

33. *Id.* (quoting *Stigletts v. McDonald*, 186 So. 233, 235 (1938)).

34. 81 So. 2d 723 (Fla. 1955).

evidence contradicted by direct evidence. In *Gunn*, the plaintiff had sat on the fender of a friend's car after the friend had refused to let her into the car.³⁵ The friend started to drive off, causing the plaintiff to fall and sustain injuries.³⁶ The supreme court held that the plaintiff was a trespasser, and that the defendant owed her a duty "to refrain from . . . [inflicting] willful or wanton injury."³⁷ The defendant challenged the sufficiency of the proof of willful and wanton conduct on the grounds that circumstantial evidence cannot overcome direct positive testimony.³⁸ The defendant denied knowing that the plaintiff was on the front of the automobile and argued that this knowledge "cannot be established by inferences to be drawn from circumstantial evidence in the face of positive testimony to the contrary."³⁹ The supreme court rejected that argument "because it precludes an appropriate evaluation of all of the testimony by the jury especially in view of the weakening effect of . . . [the defendant's] deposition as contrasted to her testimony from the witness stand."⁴⁰ Although based on circumstantial evidence, the court allowed the verdict to stand, finding that the inferences favoring recovery by the plaintiff outweighed by a preponderance all contrary reasonable inferences.⁴¹

In *Tucker Bros., Inc. v. Menard*,⁴² a child was burned in a smoldering, ash-covered fire on a lot near his home.⁴³ Judgment was rendered for the plaintiffs and the defendant appealed on the grounds that there was no direct proof that the child was injured on the land containing the bed of coals.⁴⁴ The supreme court affirmed,

35. *Id.* at 724.

36. *Id.* at 725. In a pretrial deposition, the defendant admitted knowing that two people were on her car. *Id.* However, at trial the defendant claimed she was unaware of the plaintiff's presence. *Id.*

37. *Id.*

38. *Id.* The defendant did not address the contradictions in the defendant's deposition and testimony at trial. *Id.*

39. *Gunn*, 81 So. at 726.

40. *Id.* See *supra* note 36.

41. *Gunn*, 81 So. at 726. The court quoted *Voelker v. Combined Ins. Co. of America*, 73 So. 2d 403 (Fla. 1954), extensively regarding the permissible uses of circumstantial evidence. Yet the part of *Voelker* which announced the inference on an inference rule was not cited and did not play a part in the Florida Supreme Court's ruling in *Gunn*.

42. 90 So. 2d 908 (Fla. 1956).

43. *Id.* at 910.

44. *Id.* at 909-10. The jury in the trial court found that the defendant maintained an attractive nuisance. *Id.* The Florida Supreme Court upheld the judgment for the mi-

finding that the “record abounds in circumstantial evidence that certainly weighs heavily in favor of the jury's conclusion.”⁴⁵ The court restated its view, expressed earlier in *Byers*, that circumstantial evidence can establish an ultimate fact in a civil case, and the quantum of proof is less than that required in a criminal case.⁴⁶ Further, the court stated that when circumstantial evidence is utilized in a civil action to prove an essential fact “the particular inference of the existence of such fact . . . must outweigh all contrary inferences to the extent that it amounts to a preponderance of all reasonable inferences that might be drawn from the same circumstances.”⁴⁷ Simply put, it must outweigh other reasonable inferences to the contrary, but only by a preponderance of the evidence.⁴⁸ This line of cases leaves little doubt that the Florida Supreme Court had given its blessing to the use of circumstantial evidence, considering it qualitatively as good as direct evidence, and requiring only that it meet the same standard of proof applicable to all evidence in civil cases, specifically, a preponderance of the evidence. These well-established principles were challenged later, if not cast aside altogether, in the court's subsequent formulation and use of the rule against basing an inference on an inference.

IV. THE EVOLUTION OF FLORIDA'S RULE AGAINST BASING AN INFERENCE ON AN INFERENCE IN CIVIL CASES: VOELKER AND ITS PROGENY

The Florida Supreme Court directly confronted the question of whether one inference can be the basis for a second inference in *Voelker v. Combined Insurance Co. of America*.⁴⁹ This case is cited in virtually every subsequent opinion on this subject, and is factually

nor child because it was known that the defendant's property had an area of hot coals covered by a bed of ashes and that children had previously been attracted to it. *Id.* at 910.

45. *Id.* at 911.

46. *Id.* “In a criminal case . . . the circumstantial evidence must point to guilt to the exclusion of any reasonable hypothesis of innocence.” *Id.* See also *Byers*, 81 So. 2d at 726.

47. *Tucker*, 90 So. 2d at 911.

48. *Id.* Although the court relied on *Voelker*, the issue of a second inference was never raised. Rather, the court restricted its discussion to the use of circumstantial evidence. *Id.*

49. 73 So. 2d 403, 407 (Fla. 1954).

interesting as well as legally ground-breaking. Voelker was found dead in a canal beside a roadway.⁵⁰ His body bore no external signs of injury; even his eyeglasses were in place.⁵¹ His car was found wrecked on the edge of the canal with damage indicating that it had been sideswiped.⁵² There were no witnesses to what had occurred.⁵³ Voelker's body was embalmed and buried without an autopsy, so the exact cause of death was not determined.⁵⁴ Suit was brought to recover under insurance policies covering death resulting solely from bodily injuries caused by an accident while driving or riding in an automobile.⁵⁵ The trial court granted the insurance companies' motions for directed verdicts and the Florida Supreme Court affirmed.⁵⁶

The *Voelker* court acknowledged that circumstantial evidence may be relied on in a civil case, and that doing so does not increase the plaintiff's burden of proof.⁵⁷ The jury must determine whether the case has been proven by a preponderance of the evidence, a standard "less stringent than the rule which governs in criminal cases."⁵⁸ The court held that a jury question is presented when the evidence is susceptible to inferences that would allow recovery even though there are equally reasonable contrary inferences.⁵⁹ The question becomes one for the court to decide as a matter of law only when none of the inferences that can be deduced to support the plaintiff's case "accords with logic and reason or human experience, while on the other hand an inference which does square with logic and reason or human experience" exists which supports the defendant's view of the facts.⁶⁰

The supreme court engaged in an extensive analysis of the fac-

50. *Id.* at 405.

51. *Id.*

52. *Id.*

53. *Id.* at 404.

54. *Voelker*, 73 So. 2d at 405.

55. *Id.*

56. *Id.* at 405, 408.

57. *Id.* at 406.

58. *Id.*

59. *Voelker*, 73 So. 2d at 406.

60. *Id.* *Voelker* is often cited for this premise alone, without reference to its rule regarding stacked inferences. *See, e.g.*, *Reed by and through Marrero v. Goldsmith*, 486 So. 2d 530 (Fla. 1986) (upholding the use of the *res ipsa loquitur* doctrine in a medical negligence case to create an inference of negligence during surgery); *Lawrence v. Bowen*, 503 So. 2d 1265 (Fla. 2d DCA 1986) (upholding the use of circumstantial evidence in a dog bite case to prove provocation for the bite).

tual permutations that it believed could be deduced from the presence of Voelker's body in the canal and the damage to his automobile.⁶¹ It decided that to infer that Voelker's death was directly attributable to the vehicular accident was too speculative.⁶² The lack of evidence regarding the nature of the injury proved fatal to the claim. The court stated that in order for one inference to be the basis for a second, the initial inference must be so compelling that it can be said that "no contrary reasonable inference may be indulged."⁶³ The initial inference is then considered to have been "elevated for the purpose of further inference to the dignity of an established fact."⁶⁴ The court further held the first inference must meet 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."⁶⁵

Thus, the *Voelker* court, while acknowledging the accepted burden of proof in civil cases based on circumstantial evidence, changed the rules if more than one inference was involved. The first inference must meet some higher proof standard, closer to what is required in a criminal case, before the second inference can be considered by the fact finder. After *Voelker*, the burden of proof one must meet when relying on circumstantial evidence in a civil case remained only a preponderance of the evidence, unless multiple inferences were involved, and then, a substantially greater burden was imposed.

This rule was refined in many later decisions by applying it to other, divergent fact patterns, giving it greater legitimacy as a means for analyzing cases based on circumstantial evidence. It became an established part of Florida jurisprudence, favored by the courts not just as an analytical tool, but as a hard and fast rule of law, signaling defeat for claims and defenses based on circumstantial evidence if the reviewing court decided that the initial inference

61. *Voelker*, 73 So. 2d at 406.

62. *Id.* at 407-08.

63. *Id.* at 407.

64. *Id.*

65. *Id.* The comparison of the burden of proof the first inference must meet to the criminal standard has been the source of much of the confusion and controversy that surrounds the rule. Not all states that follow the rule use the analogous criminal standard. See *infra* text accompanying notes 422-35.

did not measure up to the quasi-criminal standard of proof. Two subsequent decisions serve as examples of this aspect of the rule's evolution, one from the First District Court of Appeal and the other from the Florida Supreme Court.⁶⁶

The First District Court of Appeal relied on *Voelker* to reverse a trial court's verdict in *Commercial Credit Corp. v. Varn*.⁶⁷ In *Varn*, an elderly woman slipped and fell in the lobby of the defendant's office building.⁶⁸ She claimed to have skidded before falling, but did not know what caused her to fall.⁶⁹ Other witnesses saw nothing on the floor that would have caused the fall, and "[t]here were no skidmarks or tracings of wax . . . on the floor or on [her] shoes."⁷⁰ However, three "so-called" experts called by the plaintiff testified that if the floor had been maintained as the defendant's janitor had testified, there would have been a wax buildup over time causing a slippery condition.⁷¹ The defendant's expert testified that pedestrian traffic passing over the waxed area would reduce the wax buildup "to a less hazardous condition."⁷² The district court held that the plaintiff's case was based on an impermissible stacking of inferences.⁷³ It ruled that the initial inference — that the defendant had negligently maintained the floor in a slippery condition — did not sufficiently outweigh contrary reasonable inferences to the extent that it could be elevated to an established fact.⁷⁴ Consequently, the second inference — that a hazardous condition existed which caused the plaintiff to skid or slip — was unsupported and thus could not be permissibly drawn by the jury.

In *Nielsen v. City of Sarasota*,⁷⁵ the second of the decisions refining the rule, the Florida Supreme Court reaffirmed the view that circumstantial evidence is qualitatively no different from direct positive evidence, and can be relied upon to prove even such a critical

66. *Commercial Credit Corp. v. Varn*, 108 So. 2d 638 (Fla. 1st DCA 1959); *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960) (hereinafter *Nielsen II*).

67. 108 So. 2d 638, 640 (Fla. 1st DCA 1959).

68. *Id.* at 639.

69. *Id.* at 639–40.

70. *Id.* at 640.

71. *Id.*

72. *Varn*, 108 So. 2d at 640. Note that the appellate court did not refer to the defendant's experts as "so-called," as it did the plaintiff's.

73. *Id.* at 640–41.

74. *Id.*

75. 117 So. 2d 731 (Fla. 1960).

element as proximate cause.⁷⁶ However, it also reaffirmed the viability of the rule against basing an inference on an inference unless the initial inference meets the higher standard of proof established in *Voelker*.⁷⁷ In *Nielsen II*, a child was injured when he fell through an open space in stadium stands during a baseball game.⁷⁸ No one witnessed the fall.⁷⁹ Once again the supreme court stated that circumstantial evidence is as effective and conclusive as direct evidence in proving a civil case.⁸⁰ Because of the procedural posture of the case, the Florida Supreme Court limited its review to the question of whether there was proof of proximate cause.⁸¹ On certiorari to the supreme court, the plaintiffs argued that the district court of appeal had required "direct . . . evidence of proximate cause" rather than permitting the use of circumstantial evidence.⁸² The Florida Supreme Court disagreed, holding that the district court had not rejected circumstantial evidence as a means for proving proximate cause.⁸³ The supreme court concluded that the plaintiffs had presented no "evidence, either direct or circumstantial, to support a finding that the alleged negligence of the [defendants] was the proximate cause of the" minor plaintiff's injuries.⁸⁴ The court found that the district court's ruling did not conflict with the supreme court's earlier decisions on the use of circumstantial evidence to prove civil cases.⁸⁵ Therefore, the court upheld a summary judgment in favor of

76. *Id.* at 733-34. The court stated that to hold that circumstantial evidence cannot establish proximate cause would run contrary to *Tucker Bros. Id.* See *supra* note 42-48 and accompanying text for a discussion of the court's decision in *Tucker Bros.*

77. *Nielsen II*, 117 So. 2d at 733. See *supra* notes 67-74 and accompanying text for a discussion of the application of this more stringent standard by the First District Court of Appeal in *Varn*.

78. *Nielsen II*, 117 So. 2d at 731. The supreme court adopted the statement of facts set out in the district court opinion. See *Nielsen v. City of Sarasota*, 110 So. 2d 417, 418 (Fla. 2d DCA 1959) (hereinafter *Nielsen I*) for these facts.

79. *Nielsen I*, 110 So. 2d at 418.

80. *Nielsen II*, 117 So. 2d at 733.

81. *Id.* The district court had let stand the trial court's ruling that there was no evidence of negligence. Consequently, that issue was not before the court. The supreme court reviewed the case on certiorari to determine whether the district court's ruling conflicted with the rule of law established previously in *Tucker Bros. Id.* See *supra* notes 42-48 and accompanying text for a discussion of *Tucker Bros.*

82. *Nielsen II*, 117 So. 2d at 733.

83. *Id.* at 733-34.

84. *Id.* at 734.

85. *Id.* The court stated that it might have given greater import to the inferences if it had heard the case *de novo. Id.*

the defendant.⁸⁶ The court rejected the plaintiffs' attempt to stack one inference on another when the underlying inference had not been shown to exclude all other contrary reasonable inferences.⁸⁷ Consequently, the inference regarding the cause of the fall (i.e. negligence) had not become an established fact and could not support the second inference regarding proximate cause.⁸⁸

Varn and *Nielsen II* are illustrative of the analytical method applied by the courts in using the inference on an inference rule. Additionally, these cases shed light on how the courts examine the sufficiency of the evidence in order to determine whether the initial inference meets the higher burden of proof required before the fact finder can consider subsequent inferences.

V. USE OF THE RULE ON MOTIONS FOR SUMMARY JUDGMENT: IS ITS APPLICATION APPROPRIATE?

Summary judgments are appropriate in civil cases when there is no genuine issue of material fact and a court can decide a claim or defense as a matter of law.⁸⁹ However, in considering motions for summary judgment, courts are required to apply the highest evidentiary standard in order to determine if the moving party has met its burden.⁹⁰ Consequently, it would seem that in most instances the rule against stacking inferences would not figure prominently in the decision-making process in summary judgment cases. This is particularly true when the same evidentiary standard makes it the duty of the court to "draw every possible inference in favor of the party against whom the motion is made."⁹¹ Nevertheless, the rule has been the basis for many appellate decisions upholding summary judgments.

86. *Nielsen I*, 110 So. 2d at 418. The court's decision emphasized the absence of a witness to the child's fall. *Id.*

87. *Nielsen II*, 117 So. 2d at 734.

88. *Id.* The district court in *Nielsen II* also concluded that there was no evidence "to provide proximate cause even if it might be said that there was some evidence of negligence." *Id.* at 733.

89. FLA. R. CIV. P. 1.510(c).

90. *See, e.g.*, *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977) (citing *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966) (holding that conclusive proof of the lack of a genuine issue of material fact is required)).

91. *Id.* at 32 (citing *First Realty Corp. v. Standard Steel Treating Co.*, 268 So. 2d 410, 413 (Fla. 4th DCA 1972) (Mager, J., dissenting)).

For example, in *Moore v. General Casualty Co. of America*,⁹² the Florida Supreme Court upheld a summary judgment for the defendant insurance company.⁹³ The plaintiffs' locked safe had been stolen during a nighttime burglary in which his premises were forcibly entered; the safe was never recovered.⁹⁴ The defendant had issued an insurance policy providing for indemnification of the plaintiff for losses due to theft of property from the safe if entry into the safe had been "made by actual force and violence of which there shall be visible marks made by tools, explosives, electricity, gas or other chemicals, upon the exterior of . . . the safe."⁹⁵ Since the safe could not be produced, the appellant could not prove by the presence of visible marks that it had been forcibly entered, and the insurance company refused to pay the claim.⁹⁶ In its decision the supreme court noted the similarity between this case and *Voelker*, and held:

[W]e would enter the forbidden realm of speculation if we were to infer that the opening of the safe left marks upon it, which would bring the case within the terms of the policy. We would also be speculating if we were to say that the safe could not have been opened without leaving marks.⁹⁷

The Florida Supreme Court again avoided the "forbidden realm of speculation" in *Pritchard v. Peppercorn & Peppercorn, Inc.*⁹⁸ In *Pritchard*, the court relied on *Voelker* in affirming a summary judgment for the defendant in a wrongful death case arising from a vehicular accident.⁹⁹ The plaintiff argued that an affidavit from a witness stating that the defendant had consumed alcoholic beverages earlier in the evening of the accident was sufficiently persuasive on the issue of intoxication to permit the inference that the defendant was intoxicated upon leaving the bar and when the accident occurred, as well as the further inference that his intoxication caused

92. 91 So. 2d 341 (Fla. 1956).

93. *Id.* at 342.

94. *Id.* at 341.

95. *Id.*

96. *Id.* at 342.

97. *Moore*, 91 So. 2d at 342. In *Voelker*, the plaintiff "relied wholly upon circumstantial evidence in an attempt to recover under an insurance policy." *Id.*

98. 96 So. 2d 769 (Fla. 1957).

99. *Id.* at 771.

the accident.¹⁰⁰ The investigating officer testified that the plaintiff's car was three feet across the center line at the time of the collision, and, more importantly, that the defendant was not intoxicated.¹⁰¹ The court held that the plaintiff's argument required the stacking of other inferences onto the initial inference of the affidavit, which itself was not conclusive enough to allow consideration of the subsequent inferences.¹⁰²

Food Fair Stores, Inc. v. Trusell,¹⁰³ a slip and fall case, also involved the entry of a summary judgment for the defendant which the plaintiff appealed.¹⁰⁴ The plaintiff had filed an affidavit from an employee of the grocery store in opposition to the defendant's motion for summary judgment.¹⁰⁵ The affidavit stated that the store's employees took the grocery carts from the checkout counters to the area where they were stacked, and that the bag boys were responsible for removing debris from the carts, including particles of vegetables or other food stuffs.¹⁰⁶ Additionally, the affidavit stated that the bag boys would not always accomplish the task, and that sometimes "loose leaves would fall from the buggies to the floor, being shaken loose by the stacking process."¹⁰⁷ On the basis of the affidavit the district court of appeal ruled there was a genuine issue of material fact, reversed the summary judgment, and remanded the case for trial.¹⁰⁸ The defendant filed a petition for certiorari in the Florida Supreme Court, and the supreme court reversed the district court, reinstating the summary judgment.¹⁰⁹

The supreme court found that the statements of the store employee were not admissible at trial to prove an essential element of the plaintiff's case because the testimony was speculative, and the inference created by it was insufficient to outweigh "contrary or opposing inferences."¹¹⁰ The plaintiff argued that a jury would have

100. *Id.*

101. *Id.* at 770.

102. *Id.* at 771.

103. 131 So. 2d 730 (Fla. 1961).

104. *Id.* at 731-32.

105. *Id.*

106. *Id.* at 732.

107. *Id.*

108. *Trusell*, 131 So. 2d at 732.

109. *Id.* at 734.

110. *Id.* at 733 (citing *Voelker*, 73 So. 2d at 403; *Byers*, 81 So. 2d at 723; *Nielsen II*, 117 So. 2d at 731; *Varn*, 108 So. 2d at 638).

been justified in inferring that the lettuce leaf she slipped on had dropped from a grocery cart pushed to the stacking area by a store employee, that the leaf on the floor created a hazardous condition, and that the condition was the proximate cause of her fall.¹¹¹ The supreme court rejected this assertion, stating that: "It is apparent that a jury could not reach a conclusion imposing liability on the petitioner without indulging 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."¹¹²

The court struck down what it perceived to be an effort by the district court to adopt a higher standard of liability, one applicable to circumstances where the employer would be deemed to know of the dangerous condition created by the method of operation of the store, so that notice, whether actual or constructive, would not be required to establish liability.¹¹³ The supreme court found that the rule "would not apply when the dangerous condition was created by a third party."¹¹⁴ In such cases, the court stated that it would be necessary to show actual or constructive knowledge of the danger before the premises owner could be held liable.¹¹⁵

The First District Court of Appeal followed *Trusell* in *Schaap v. Publix Supermarkets, Inc.*,¹¹⁶ and affirmed a summary judgment in a

111. *Id.*

112. *Id.*

113. *Trusell*, 131 So. 2d at 733.

114. *Id.*

115. *Id.*

116. 579 So. 2d 831 (Fla. 1st DCA 1991). *See also* *Bates v. Winn-Dixie Supermarkets, Inc.*, 182 So. 2d 309 (Fla. 2d DCA 1966), *cert. denied*, 188 So. 2d 813 (Fla. 1966) (holding that the condition of a banana peel described as "overripe, black and old" was not sufficient to support an inference that it had been on the floor long enough for supermarket employees to have actual or constructive notice of its presence); *Lewis v. Rogers*, 164 So. 2d 864 (Fla. 1st DCA 1964), *cert. denied*, 170 So. 2d 590 (Fla. 1964) (finding the facts in *Trusell* to be "strikingly similar" to those it was considering, and setting aside the plaintiff's verdict on the grounds that the jury had violated the inference on an inference rule); *Winn-Dixie Stores, Inc. v. Manning*, 143 So. 2d 339 (Fla. 2d DCA 1962) (following the supreme court's holding in a case involving a slip and fall on a grape). *But see* *Ress v. X-tra Super Food Ctrs., Inc.*, 616 So. 2d 110 (Fla. 4th DCA 1993) (holding that whether sauerkraut remained on floor long enough to give constructive notice to store was a fact question); *Washington v. Pic-N-Pay Supermarket, Inc.*, 453 So. 2d 508 (Fla. 4th DCA 1984) (reversing a directed verdict for the store where the plaintiff slipped and fell on "[s]ome nasty old collard green leaves," finding that the condition of the leaves that caused her fall, and the fact that the collard greens were not displayed in closed packages, so that leaves could fall to the floor, sufficient to present a jury

case where the plaintiff slipped and fell on what appeared to be a cookie fragment.¹¹⁷ The store had a policy of providing free cookies to children under twelve years old who were accompanied by adults, and of permitting the cookies to be eaten anywhere in the store.¹¹⁸ The assistant manager acknowledged that he expected children would drop portions of cookies in the store while they were eating them, and that the store's terrazzo floor would be dangerous when food was on it.¹¹⁹ He testified that he had found what may have been a Publix cookie on the spot where the plaintiff fell.¹²⁰ However, the appellate court rejected the plaintiff's theory of liability on the grounds that it would require an impermissible pyramiding of inferences similar to that which had been rejected by the Florida Supreme Court in *Trusell*.¹²¹ The dissent argued that the facts were more closely aligned with those cases where the mode of operating the store eliminated the need for proof of actual or constructive notice.¹²² The dissent distinguished *Trusell* because in *Schaap*, the assistant manager's testimony was evidence of "an established course of conduct in the operation of Publix's cookie program, which included as well his knowledge that broken cookie pieces had been dropped in the store aisles and at the check-out counters."¹²³ Based on that evidence, the dissenting judge would have sustained an inference favoring the plaintiff's theory of liability, reversed the sum-

question); *Marlowe v. Food Fair Stores of Florida, Inc.*, 284 So. 2d 490 (Fla. 3d DCA 1973), cert. denied, 291 So. 2d 205 (Fla. 1974) (reversing a directed verdict for the store and finding that plaintiff's fall on "a piece of black looking rotten banana about the size of a fifty-cent piece" in an area of the store used exclusively by employees which had not been swept for an hour and a half before the incident was sufficient to infer constructive knowledge).

117. *Schaap*, 579 So. 2d at 834-35.

118. *Id.* at 833.

119. *Id.* The assistant manager also pointed out that, to his knowledge, this was the first incident where a customer had slipped on cookie fragments. *Id.*

120. *Id.*

121. *Id.* at 834. Because there was no evidence that the owner had actual or constructive notice of the spill or that these spills occurred frequently, the plaintiff sued under the methods of "operation theory." *Id.* To recover under this theory, the plaintiff had to prove that the method was inherently dangerous or conducted negligently, and that the cookie fragment was on the floor as a result of this negligence. *Id.*

122. *Schaap*, 579 So. 2d at 835-36. Typical of such cases is *Wells v. Palm Beach Kennel Club*, 35 So. 2d 720 (Fla. 1948), where a dog track operator had permitted patrons to take bottled beverages to the stands without providing proper means for disposing of the bottles.

123. *Schaap*, 579 So. 2d at 836.

mary judgment, and remanded the case for trial.¹²⁴

Automobile accidents have also provided fertile ground for the application of summary judgment principles in cases where the plaintiffs have based their claims on circumstantial evidence and the inferences to be drawn that evidence from it. In *Fideli v. Colson*,¹²⁵ the Third District Court of Appeal upheld a final summary judgment for the defendant.¹²⁶ The issue was whether the defendant, owner of the car involved in the accident, had given the driver permission to operate it.¹²⁷ The driver claimed to have received permission from her boyfriend, a companion of the owner of the car.¹²⁸ The plaintiff contended that an inference of permission arose when the owner failed to stop the driver from taking the car.¹²⁹ The court rejected the inference as too tenuous to form the basis for the ultimate inference — that the defendant had consented to the driver's operation of the automobile.¹³⁰

Florida courts have often appeared reluctant to adhere strictly to the appropriate limits of summary judgment review in cases involving circumstantial evidence, but that has not always been true.

124. *Id.* See also *Rothenberg v. Leevans Corp.*, 155 So. 2d 839 (Fla. 3d DCA 1963). In *Rothenberg*, the court reversed a defendant's summary judgment where the plaintiff testified she fell because something caused the heel of her shoe to grab, and afterwards noted the rug in the area of the fall was off the floor a few inches. *Id.* at 839–40. The plaintiff contended this condition caused her fall and the defendant argued that the conclusion was based on an impermissible pyramiding of inferences. *Id.* The appellate court held that the rule limiting the stacking of inferences did not apply to eliminate genuine issues of material fact in view of the standard of proof that must be used when considering a motion for summary judgment. *Id.* at 840–41.

125. 165 So. 2d 794 (Fla. 3d DCA 1964).

126. *Id.* at 795.

127. *Id.* The plaintiff was the driver of the other car involved in the accident. The plaintiff sued the owner of the car instead of the actual driver.

128. *Id.*

129. *Id.* In order to conclude that the owner gave permission, the plaintiff had to establish that the owner overheard the driver talking to her boyfriend.

130. *Id.* See also *Byrd v. Leach*, 226 So. 2d 866, 867 (Fla. 4th DCA 1969), affirming a summary judgment in favor of the defendant, where a child walked into the side of a truck while walking on the edge of a roadway in the same direction as traffic. *Id.* The truck did not swerve. *Id.* Nothing was protruding from it, and the child had not started into the truck's path of travel immediately before the accident. *Id.* The appellate court held that in order to reverse the summary judgment it would have to infer first, that the child was not aware of the truck as it approached, and second, that the driver sounding the horn or turning the truck away from the child would have prevented the accident. *Id.* at 868. The court found that the first inference was not sufficiently established to allow consideration of the second. *Id.* at 868–69.

For example, in *Tucker v. American Employers Insurance Co.*,¹³¹ a personal injury claimant sued the defendant's insurance company for violating her right of privacy and harassing her by aggressive surveillance techniques.¹³² She claimed that the insurance company's intimidation caused her to settle her case for less than she would otherwise have accepted.¹³³ The defendant's investigators admitted conducting surveillance of the plaintiff, but denied responsibility for the most egregious acts the plaintiff alleged, which included trespassing on her property and following her at night.¹³⁴

The appellate court reversed the summary judgment, finding that the evaluation of the defendant's motion required weighing of conflicting inferences and assessing credibility of witnesses.¹³⁵ Consequently, it found that the lower court erred in granting the motion and reversed it.¹³⁶ Chief Judge Walden dissented,¹³⁷ asserting that the inferences the majority found to have been in conflict with inferences supporting the summary judgment were weak and speculative, particularly the initial inference — that there was an illegal surveillance of the plaintiff.¹³⁸ In his dissenting opinion, the chief judge stated that he would have applied the rule of *Voelker* to affirm the summary judgment.¹³⁹

In *Goode v. Walt Disney World Co.*,¹⁴⁰ the Fifth District Court of Appeal reversed a defense summary judgment for the defendant on the grounds that reasonable inferences existed from which a jury could find for the plaintiffs.¹⁴¹ In *Goode*, a four-year-old child

131. 218 So. 2d 221 (Fla. 4th DCA 1969), *cert. dismissed*, 227 So. 2d 482 (Fla. 1969).

132. *Id.* at 221.

133. *Id.*

134. *Id.* at 221–22. One investigator had interviewed the plaintiff at her home by feigning interest in enrolling his child in the nursery school the plaintiff operated. *Id.*

135. *Id.* at 223.

136. *Tucker*, 218 So. 2d at 223. The court also found that the evidence raised a genuine issue of material fact concerning the defendant's responsibility for the late night surveillance. *Id.*

137. *Id.* at 223–30 (Walden, J., dissenting). In a laudable display of civility, Judge Walden prefaced his dissent by acknowledging “due and abiding respect for my colleagues and for the scholarship reflected in the majority opinion.” *Id.* at 224.

138. *Id.* at 226–28.

139. *Id.* at 226–27, 230.

140. 425 So. 2d 1151 (Fla. 5th DCA 1982).

141. *Id.* at 1156. The trial court granted summary judgment for the defendants because it found no evidence of a causal link between the defendant's negligence and the child's drowning. *Id.* at 1153.

drowned after becoming separated from his parents, climbing a low fence, and falling into a water-filled moat at Walt Disney World.¹⁴² The defendant relied on *Nielsen II* to assert that proximate cause could not be proven by an inference.¹⁴³ The appellate court rejected this argument, acknowledging that although the Florida Supreme Court had upheld the district court in *Nielsen II*, it did not say “proximate cause could not be established by circumstantial evidence.”¹⁴⁴ The plaintiff cited *Voelker* to urge that the circumstances of the case created an inference pointing unerringly to an essential fact, an inference that outweighed all other reasonable inferences to the contrary, thus amounting to proof of an ultimate fact.¹⁴⁵ The *Goode* court agreed and found:

[T]here is a reasonable inference available to the jury that a causal relationship exists between the negligence (admitted for summary judgment argument) of the defendant in having a fence too short to prevent physical access to the moat by small children and the drowning death of Joel Goode. Disney World has conceded that it is foreseeable that small children frequently become separated from their parents and that they have been known to climb its short fences and gain access to the grassy area bordering the moat.¹⁴⁶

VI. MOTIONS FOR DIRECTED VERDICT BASED ON THE RULE AGAINST STACKING AN INFERENCE ON AN INFERENCE

It is well-recognized in Florida that a party moving for a directed verdict admits, for purposes of the motion, every inference supporting the adverse party's case that a jury might reasonably draw from the evidence, viewed in a light most favorable to the non-mov-

142. *Id.*

143. *Id.* at 1154. See *supra* notes 75–88 and accompanying text for a discussion of the decision in *Nielsen II*.

144. *Goode*, 425 So. 2d at 1154. The Florida Supreme Court noted that proximate cause could be based on circumstantial evidence when appropriate. *Id.*

145. *Id.* at 1154–55.

146. *Id.* at 1156. *But see* *Streeter v. Bondurant*, 563 So. 2d 729 (Fla. 1st DCA 1990) (reversing a summary judgment in a medical malpractice case, questioning the wisdom of applying the rule against stacking inferences to summary judgment proceedings, and holding that in considering a summary judgment, reasonable inferences should be resolved against the movant).

ing party.¹⁴⁷ This rule for evaluating the evidence on a motion for directed verdict was followed in one of the leading cases allowing reliance upon circumstantial evidence in civil actions. In *King v. Weis-Patterson Lumber Co.*,¹⁴⁸ the trial court's directed verdict for the defendant was reversed on the grounds that the evidence was qualitatively the equal of direct positive proof.¹⁴⁹ Further, the court held that the circumstantial evidence would be sufficient if it met the burden of proof applicable to civil cases — a preponderance.¹⁵⁰ But in *Voelker*, the rule against stacking inferences was used to affirm the defendants' directed verdict on the grounds that none of the inferences that could be drawn from the evidence were found to support the plaintiff's case.¹⁵¹ With the court's announcement in *Voelker* of the rule that an inference could not be the basis for another inference unless the first inference met the higher, quasi-criminal standard, a more stringent rule became applicable if a court could be convinced that more than one inference must be drawn from the circumstantial evidence in order to sustain a claim.

However, not all courts were willing to accept the premise that the facts of every case based on circumstantial evidence could be dissected into multiple inferences. For example, in *Belden v. Lynch*,¹⁵² the Second District Court of Appeal rejected that analysis.¹⁵³ In *Belden*, the plaintiff had backed his car partially out of a diagonal parking space and then stopped in the defendant's lane of travel.¹⁵⁴ The defendant collided with the plaintiff, leaving 100 feet of skid marks from just before the point of impact to where his car came to rest.¹⁵⁵ The accident occurred during daylight hours.¹⁵⁶ Prior to the

147. See, e.g., *Cutchins v. Seaboard Airline R.R.*, 101 So. 2d 857 (Fla. 1958) (reversing a directed verdict on the issue of the negligence of a railroad and its engineer); *Williams v. Office of Sec. & Intelligence*, 509 So. 2d 1282 (Fla. 3d DCA 1987) (reversing defendant's directed verdict where an apartment complex tenant alleged that negligent security resulted in her rape by another tenant).

148. 168 So. 858 (Fla. 1936).

149. *Id.* at 859.

150. *Id.* Thus, if an inference outweighs all others by a preponderance, it is permissible. *Id.*

151. *Voelker*, 73 So. 2d at 406–08. See *supra* text accompanying notes 49–65 for a discussion of the facts of *Voelker* and a thorough analysis of the case.

152. 126 So. 2d 578 (Fla. 2d DCA 1961).

153. *Id.* at 580–81.

154. *Id.*

155. *Id.* at 581.

156. *Id.*

accident, the defendant was following a truck that had safely passed the plaintiff's vehicle without colliding with it.¹⁵⁷ The trial court directed a verdict for the defendant because it felt that inferences of "certain actions" by the defendant were not sufficiently established to support further inferences of negligence and proximate cause.¹⁵⁸ The appellate court reversed, finding that the rule against pyramiding inferences was not applicable since the inferences were not based upon one another, but were essentially parallel inferences arising from the established circumstances.¹⁵⁹ Further, the court cautioned against granting directed verdicts under these circumstances stating that "if any reasonable theory of the evidence, including inferences drawn therefrom, would justify a verdict for the plaintiff, then it is the duty of the court to submit the question to the jury."¹⁶⁰

Other courts have applied the dictates of the rule against basing an inference on an inference to reject attempts to convert remote inferences into equally reasonable conflicting inferences. The obvious purpose of asserting such inferences would be to attempt to show that the party with the burden of proof had failed to establish the initial inference sufficiently. In *Renninger v. Foremost Dairies, Inc.*,¹⁶¹ the plaintiff was injured when a milk container she had removed from a dairy case separated from its handle so that the bottom of the bottle fell on her foot, injuring her.¹⁶² She sued the dairy, alleging that the bottle was defective.¹⁶³ A jury found in her favor, but the trial court entered a directed verdict for the defense.¹⁶⁴ The defendant admitted that the bottle was defective when the plaintiff removed it from the case, and that the defect caused the accident.¹⁶⁵ However, the defendant asserted that its responsibility for the bottle ended with the bottle's safe arrival at the store, and that nothing in

157. *Belden*, 126 So. 2d at 581. The plaintiff stopped to allow a truck to pass. *Id.*

158. *Id.* at 579. For example, there was evidence which showed that the skid marks began before the point of impact. *Id.*

159. *Id.*

160. *Id.* at 581-82.

161. 171 So. 2d 602 (Fla. 3d DCA 1965).

162. *Id.* at 603.

163. *Id.*

164. *Id.*

165. *Id.* at 604. Interestingly, the plaintiff testified that she did not notice anything wrong with the bottle and that she did not cause it to break. *Id.*

the record demonstrated the bottle was defective when delivered.¹⁶⁶ The defendant contended that other reasonable inferences could be drawn from the circumstances, such as the bottle was damaged by a store employee or another customer.¹⁶⁷ The Third District Court of Appeal rejected this argument, reversed the ruling and reinstated the verdict.¹⁶⁸ It found that the first inference — that the bottle was defective when it separated from the handle — met the standard required of initial inferences that form the foundation for others.¹⁶⁹ The court held that the defendant could not rely on the inference that an employee or another customer caused the defect because “the possibility that the defect was caused by an unusual circumstance such as a third party striking the bottle with or upon a sharp or heavy object was so remote as to not constitute a reasonable explanation for the existence of the defect.” Thus, the inference was considered too remote to be an equally reasonable opposing inference.¹⁷⁰

A common sense approach to the use of inferences in directed verdicts was applied in *Tillery v. Standard Sand & Silica Co.*,¹⁷¹ a wrongful death case where the court permitted the stacking of inferences.¹⁷² The trial court in *Tillery* directed a verdict for the defendant, finding that the plaintiff had not established the cause of the decedent's death, and that even if the cause could be inferred, the evidence was not sufficient to establish negligence on the part of decedent's employer.¹⁷³ The plaintiff alleged that the decedent died due to an electric shock from a defective welding machine.¹⁷⁴ A wit-

166. *Renninger*, 171 So. 2d at 604.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* See also *Franklin v. Dade County*, 230 So. 2d 730, 734–36 (Fla. 3d DCA 1970), *cert. denied*, 237 So. 2d 761 (Fla. 1970) (reversing a directed verdict for the defense in the wrongful death claim of an innocent motorist killed in a high speed police chase, where the court held that the extent of the damage to the vehicles involved and the severity of the injuries to the occupants permitted the inference that the police officer had violated regulations requiring him to slow down for stop signs during a chase, regardless of what other, remote inferences might have been drawn from the circumstances).

171. 226 So. 2d 842 (Fla. 2d DCA 1969).

172. *Id.* at 847–48.

173. *Id.* at 847. The decedent was an independent contractor, so workers' compensation coverage was not an issue. *Id.*

174. *Id.* at 843. The suit was against the employer only, and not the manufacturer of the welding machine. *Id.*

ness testified that the machine was in need of general repair and could not deliver enough voltage to kill someone unless it was internally faulty.¹⁷⁵ Previously, employees had received shocks from the machine, and just before his death the decedent was heard to scream to others to turn off the machine.¹⁷⁶ The appellate court reversed the directed verdict and remanded the case for trial, finding that the first inference — that the electric shock came from a defective welding machine — was sufficiently established to support the second inference — that the decedent died either from an electric shock or the fall to the ground caused by the shock.¹⁷⁷

In *Teate v. Winn-Dixie Stores*,¹⁷⁸ the Third District Court of Appeal avoided the rule against pyramiding inferences altogether by finding that the jury needed to draw only one inference in order to reach its verdict.¹⁷⁹ The plaintiff in *Teate* had slipped and fallen on peas in a frozen food department, and to prevail had to prove that the peas were on the floor long enough for Winn-Dixie to have been charged with constructive knowledge of the dangerous condition.¹⁸⁰ A jury found Winn-Dixie eighty percent at fault, but the trial court entered a directed verdict, ruling that there was insufficient evidence to present a jury question on the issue of constructive notice.¹⁸¹ The plaintiff presented evidence that no employee had cleaned the area for fifteen to twenty minutes before the accident, and that there was water on the floor around the peas, which the plaintiff asserted was proof that the frozen peas had been on the floor long enough to thaw.¹⁸² Winn-Dixie claimed the water on the floor was the result of ice crystals on the bag that would have melted instantly when the bag hit the floor.¹⁸³ The court rejected the argument that the plaintiff's case was based on pyramided inferences,

175. *Id.* at 844. Expert testimony also showed that the welding machine needed general repair and that the electric cable on the machine's outside was worn. *Id.*

176. *Tillery*, 226 So. 2d at 844. The defendant's assistant superintendent closed down the main switch and gave Tillery mouth-to-mouth resuscitation, but was unsuccessful. *Id.*

177. *Id.* at 847-48.

178. 524 So. 2d 1060 (Fla. 3d DCA 1988).

179. *Id.* at 1061.

180. *Id.* Constructive knowledge can be proven by circumstantial evidence. *Id.*

181. *Id.* at 1060.

182. *Id.* at 1061.

183. *Teate*, 524 So. 2d at 1061. There was no question that water was actually on the floor. *Id.*

and held that the jury needed to draw only one inference about why the water was on the floor in order to reach its decision.¹⁸⁴ The jury “was entitled to believe . . . [the plaintiff] and to select the inference that it did [c]onsequently, it was error to set aside the verdict.”¹⁸⁵

Eyewitness testimony is direct positive evidence that can give rise to inferences, but when those inferences extend beyond the reach of reasonability, their origin in direct testimony is no help. *Reaves v. Armstrong World Industries, Inc.*,¹⁸⁶ is one such example. In *Reaves*, an asbestos exposure case, the Fourth District Court of Appeal affirmed the trial court's order setting aside the plaintiff's verdict and directing a verdict on behalf of the defendants, three asbestos manufacturers.¹⁸⁷ The plaintiff had performed janitorial work for many years at two factories where insulation containing asbestos was being torn out and replaced, and part of his job was to clean up debris from the insulation.¹⁸⁸ He originally filed suit against eighteen companies who manufactured, distributed, or sold asbestos during the years of his exposure, but only three remained as defendants at the time of the trial.¹⁸⁹ The trial court held that in order to recover, the plaintiff had to first show that the exposure came from products the three remaining defendants sold or manufactured.¹⁹⁰ He then had to establish by the greater weight of the evidence that his injuries were due to the negligence of those defendants.¹⁹¹

The plaintiff presented testimony from a co-worker who said that on occasion he had seen the plaintiff cleaning up the asbestos debris left by the maintenance crews.¹⁹² Asbestos products manufactured and sold by the three remaining defendants were used in the

184. *Id.*

185. *Id.* See also *Winn-Dixie Stores v. Benton*, 576 So. 2d 359 (Fla. 4th DCA 1991) (following *Teate* and refusing to analyze the case on the basis of the inference on an inference rule); *Little v. Publix Supermarkets*, 234 So. 2d 132 (Fla. 4th DCA 1970) (reversing a directed verdict for the supermarket and finding that an initial inference based on eyewitness testimony was sufficient to support a second inference).

186. 569 So. 2d 1307 (Fla. 4th DCA 1990).

187. *Id.* at 1308.

188. *Id.*

189. *Id.* The record is silent on the disposition of the cases against the 15 other companies.

190. *Id.*

191. *Reaves*, 569 So. 2d at 1308.

192. *Id.*

plant, but were not the only asbestos products used.¹⁹³ Although the appellate court found that the jury could infer that the plaintiff had been exposed to asbestos dust, it held that there was no proof of the specific manufacturer to whose asbestos he was exposed.¹⁹⁴ Relying on *Gooding v. University Hospital Building*,¹⁹⁵ the district court found that the plaintiff was unable to meet the burden of proof necessary to show that exposure to asbestos manufactured by the three remaining defendants was the cause of his condition.¹⁹⁶ The appellate court held that the verdict against the defendants was flawed by an impermissible stacking of inferences, and cited with approval the trial court's ruling:

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 [his co-workers] 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.¹⁹⁷

VII. BENCH AND JURY VERDICTS INVOLVING THE RULE AGAINST AN INFERENCE BASED ON AN INFERENCE

In reviewing bench and jury verdicts involving multiple inferences drawn from circumstantial evidence, appellate courts have applied the closest scrutiny to determine the sufficiency of the evidence. The courts' rationale has been the perceived need to prevent juries and trial judges from speculating on the basis of weak or unfounded inferences, or on inferences unsupported by others that

193. *Id.* at 1308-09.

194. *Id.* at 1309.

195. 445 So. 2d 1015, 1018 (Fla. 1984) (holding, in a medical negligence case alleging that the defendant deprived the decedent of a chance to survive, that "[i]n 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").

196. *Reaves*, 569 So. 2d at 1309.

197. *Id.* at 1309-10.

have been elevated to established fact.¹⁹⁸ Unfortunately, it has not always been clear whether this purpose has been served.

In the opinions discussed below, as in many of those reviewed earlier, it has often been difficult to understand how the courts determined that some inferences were established facts and others were not. The appellate courts have not hesitated to substitute their view of the facts for those of the jurors or of the judges sitting as triers of fact. The decisions of those persons who have made a first-hand evaluation of the testimony of the witnesses, and of the tangible and demonstrative evidence, are frequently given little consideration.

The deciding feature in the reversal of many plaintiffs' verdicts in slip and fall cases has been absence of proof of what caused the fall. Lack of eyewitnesses or direct evidence to prove what caused the fall was fatal to the plaintiff's case in *Green House, Inc. v. Thiermann*,¹⁹⁹ where the plaintiff fell either on loose rock or a concrete divider located in the defendant's parking lot.²⁰⁰ The appellate court reversed the jury verdict on the grounds that it was based on an impermissible stacking of inferences, and noted that there had been no expert testimony suggesting negligent location of the concrete divider, if indeed it had even caused the fall.²⁰¹ A similar result was reached in *Publix Super Markets v. Schmidt*,²⁰² where the plaintiff also did not know what caused her to fall, but thought it was grease because of the way she slipped.²⁰³ She argued that the store had constructive, if not actual, notice of the dangerous condition, and asserted that the grease she claimed to have slipped on was probably from a dinner tray that had been over-filled at the store's delicatessen.²⁰⁴ The appellate court found that the initial inference — actual or constructive notice — was completely unsupported, so the second inference — the source of the slippery substance that caused the fall — was not sustainable.²⁰⁵

198. See section IV of this Article for a discussion concerning the use of summary judgments.

199. 288 So. 2d 566 (Fla. 2d DCA 1974), *cert. denied*, 295 So. 2d 303 (Fla. 1974).

200. *Id.* at 567.

201. *Id.* at 568.

202. 509 So. 2d 977 (Fla. 4th DCA 1987).

203. *Id.* at 978. The plaintiff also noticed a greasy stain on her skirt. *Id.*

204. *Id.* There was also evidence that a Publix employee had cleaned the area after the plaintiff's fall. *Id.*

205. *Id.* See also, *Winn Dixie Stores v. Gaines*, 542 So. 2d 432 (Fla. 4th DCA 1989)

Lack of knowledge about what caused the plaintiff to fall was also the decisive element in *North American Co. v. Landahl*,²⁰⁶ where the plaintiff testified that she did not know what caused her to fall nor did she investigate the area afterwards.²⁰⁷ However, she produced photographs showing imperfections in the dimly lit flagstone walkway where she had fallen.²⁰⁸ The defendant, a hotel, had received no complaints of accidents in the area for at least eleven years.²⁰⁹ The district court reversed the plaintiff's verdict on the grounds that it was based on pyramided inferences where the initial inferences were not sufficiently proven.²¹⁰

Proving what caused one to fall generally takes slip and fall cases out of the ambit of the rule against basing an inference on an inference. For example, in *Fritts v. Collins*,²¹¹ the appellate court reversed the defendant's judgment notwithstanding a verdict for the plaintiffs, and reinstated the jury verdict.²¹² The plaintiff had fallen in a shower stall at the defendant's motel.²¹³ She testified she had not begun to use soap yet, but the floor of the shower became slick and greasy, "unlike any that [she] had ever encountered before," causing her to fall.²¹⁴ The evidence showed that a motel maid had used a commercial disinfectant on the shower stall floor the day before the accident.²¹⁵ An expert testified that the untreated shower stall surface was not slippery, but if the disinfectant was not completely removed its residue would become slippery when wet.²¹⁶ The

(reversing a jury verdict where *Schmidt* was cited as controlling on the issue of whether the evidence supported an inference of constructive notice of the dangerous condition created by loose beans and rice on the floor of defendant's store).

206. 113 So. 2d 588 (Fla. 2d DCA 1959), *cert. discharged*, 118 So. 2d 215 (Fla. 1960).

207. *Id.* at 588.

208. *Id.* at 589. The plaintiff's theory was based on the imperfections on the walkway, as well as the lack of light, claiming both were factors that led to her injuries. *Id.*

209. *Id.* at 588.

210. *Id.* at 590. *But see* *Roach v. Raubar*, 362 So. 2d 84 (Fla. 3d DCA 1978) (affirming the jury verdict because the plaintiff had photographs of the defective condition of the step where she fell, even though she did not specifically testify that the step had caused her to fall).

211. 144 So. 2d 850 (Fla. 2d DCA 1962).

212. *Id.* at 852.

213. *Id.* at 851.

214. *Id.*

215. *Id.*

216. *Fritts*, 144 So. 2d at 851. The expert testified that the disinfectant, when not properly removed, formed an invisible residue on the stall's surface, that became slippery when wet. *Id.*

trial court found that the jury would have had to engage in an impermissible pyramiding of inferences to find for the plaintiff.²¹⁷ The Second District Court of Appeal disagreed, finding that only a single inference needed to be drawn from the circumstantial evidence in order for the jury to find for the plaintiff — that disinfectant residue caused the fall.²¹⁸ Because the district court held that the rule against basing an inference on an inference would not play a part in the jury's determination, the case was returned to the lower court for reinstatement of the verdict.²¹⁹

Implicit in many of the cases, and indeed in all cases where there is a conflict between direct and circumstantial evidence, is the question of whether direct evidence must always be accorded greater weight than circumstantial evidence. In *LaBarbera v. Millan Builders*,²²⁰ this issue was addressed by the First District Court of Appeal when it reviewed a jury verdict in favor of the plaintiffs in an action for damages arising from a fire that started in the central heating system of a home.²²¹ The trial court had set aside the jury's verdict for the plaintiffs and dismissed the case on the grounds that direct evidence presented by the defendant outweighed the inference on an inference that supported the plaintiffs' verdict.²²² The plaintiffs con-

217. *Id.*

218. *Id.* at 852.

219. *Id.* See also *Cain v. Brown*, 569 So. 2d 771 (Fla. 4th DCA 1990) (rejecting the argument that the case was based on an improper stacking of inferences and finding that only one inference needed to be drawn from the evidence, "that the greasy substance on the ground, regardless of the exact nature and source of the substance, was there for a sufficient length of time so as to put the owner on constructive notice"); *Scott v. Midyette-Moor, Inc.*, 221 So. 2d 178 (Fla. 1st DCA 1969), *cert. denied*, 226 So. 2d 819 (Fla. 1969) (rejecting the application of the multiple inference rule because the plaintiff used photographs to prove that the ceiling clearance in the stairway where the decedent fell was so low that a person of the decedent's height could strike his head ascending the stairs). *But see Gaidymowicz v. Winn-Dixie Stores*, 371 So. 2d 212, 214 (Fla. 3d DCA 1979) (finding that where the plaintiff fell on liquid detergent that had spilled on the floor of the defendant's store, the presence of the substance on the floor in several aisles of the store was insufficient to create an inference that it had been there long enough to give the store constructive notice of the dangerous condition); *Marlo Invs., Inc. v. Verne*, 227 So. 2d 58, 60 (Fla. 4th DCA 1969) (concluding that direct evidence outweighed inferences drawn from circumstantial evidence and rejecting the applicability of cases involving circumstantial evidence because of the availability of the direct testimony).

220. 191 So. 2d 619 (Fla. 1st DCA 1966).

221. *Id.* at 620.

222. *Id.* at 621. The trial judge's order provided that if reversal was granted on appeal, the defendant would be given a new trial because a directed verdict should have been granted in its favor at the conclusion of the evidence. *Id.* at 620.

tended that in constructing their home the defendant contractor had obstructed a ceiling louver with insulation material.²²³ The contractor denied the allegation.²²⁴ An expert called by the plaintiffs testified that when he inspected the area after the fire he found insulation material obstructing a ceiling louver, and that this condition would cause the creation of a “puff-back” resulting in a surge of flame and smoke in the plaintiffs' furnace room.²²⁵ The trial court rejected the expert's testimony as an impermissible stacking of inferences from circumstantial evidence that was directly contradicted by the defendant's testimony.²²⁶ The appellate court found that the expert's testimony, although based on an examination of the fire damage afterwards and necessarily including assumptions about what occurred during the fire, was direct and positive evidence of the defendant's negligence.²²⁷ Nevertheless, the court affirmed the result, finding no proof that the defendant negligently caused the clogged louver.²²⁸ However, the appellate court also expressed concern over the trial court's basis for excluding the expert's opinion:

Although a conclusion expressed by an expert witness in response to a hypothetical question may, in one sense be characterized as an inference, we do not believe it to be the character of inference which falls within the prohibition against constructing an inference upon an inference to arrive at an ultimate conclusion. To hold otherwise would render incompetent every opinion of an expert witness given in response to a hypothetical question if it were found that one of the several facts forming the basis of the question consisted of an inference drawn from circumstantial evidence. Such a result would not comport with logic, reason, or the practicalities of the judicial process.²²⁹

223. *Id.*

224. *Id.*

225. *LaBarbera*, 191 So. 2d at 620. The expert also stated that this “puff-back” started the fire. *Id.*

226. *Id.* at 621.

227. *Id.* at 622.

228. *Id.*

229. *Id.* See also *Zack v. Centro Espanol Hosp.*, 319 So. 2d 34 (Fla. 2d DCA 1975). In *Zack*, medical experts testified that a bladder fistula was caused by removal of a Foley catheter with the cup inflated, even though the nurse who removed the catheter denied that the cup was inflated. *Id.* at 36. The trial court had set aside the plaintiff's verdict and granted judgment n.o.v., but the appellate court reversed, holding that under certain circumstances expert opinions on causation can be considered direct rather than circumstantial evidence. *Id.* But see *Sears, Roebuck & Co. v. Davis*, 234 So. 2d 695 (Fla.

The plaintiff's efforts to persuade the appellate court to use the rule against basing an inference on an inference to reverse the trial judge's charge to the jury on an assumption of risk defense failed in *Hogge v. United States Rubber Co.*²³⁰ In *Hogge*, the court held that the jury needed to draw only a single inference in order to find for the defendants on the assumption of risk defense.²³¹ The plaintiff sued the manufacturer and retailer of a tire for injuries he sustained when the tire exploded.²³² An employee of the retailer had begun inflating the tire but noticed that it was not seated properly on the rim.²³³ In the presence of the plaintiff, the employee told a co-worker not to inflate the tire any further because it might blow up, and that the tire's condition was dangerous.²³⁴ He instructed the co-worker to take the valve core out of the tire so it would deflate.²³⁵ Before attending to the tire, both employees left to help other customers.²³⁶ The plaintiff continued to inflate the tire before either employee could return and remove the valve core, and the tire exploded, injuring him.²³⁷ The defendants raised the affirmative defense of assumption of risk, and the jury found in their favor.²³⁸ The appellate court affirmed the verdict, finding that the jury needed to draw only one inference — that the plaintiff heard one employee tell the other not to put more air in the tire, that it was dangerous, and that it needed

3d DCA 1970). In *Davis*, the plaintiff contended that the defendant's rifle was defective because it had discharged with the safety engaged. *Id.* at 696. The defendant's expert testified that the gun could not have fired with the safety engaged, but the court held that the plaintiff's direct testimony precluded use of the rule against basing an inference on an inference, since the rule applies only to cases involving circumstantial evidence, not direct testimony. *Id. Accord*, *Paniello v. Smith*, 606 So. 2d 626, 628 (Fla. 3d DCA 1992) (holding that direct evidence outweighed contrary circumstantial evidence).

230. 192 So. 2d 501 (Fla. 4th DCA 1966).

231. *Id.* at 504.

232. *Id.* at 502.

233. *Id.*

234. *Id.* at 502–03. The single inference the jury needed to draw was that the plaintiff had heard the employee's statement that the tire was dangerous. *Id.* The employee testified that the plaintiff was close enough to have heard him tell his co-worker that the tire was dangerous. *Id.* at 503.

235. *Hogge*, 192 So. 2d at 503.

236. *Id.* at 502.

237. *Id.* The employee attempted to stop the plaintiff from inflating the tire, but was too late. *Id.* at 503.

238. *Id.* at 502.

to be deflated.²³⁹ This direct testimony eliminated the need to utilize a rule of law applicable only to circumstantial evidence.²⁴⁰

Direct evidence was also used to reject application of the inference rule in *C. R. Bard, Inc. v. Mason*.²⁴¹ In *Bard*, the Second District Court of Appeal affirmed a jury verdict for the plaintiff, finding direct evidence that the product in question was defective.²⁴² The plaintiff was injured when the tip of a venous catheter separated, and a segment of it travelled into his heart, necessitating surgery to remove it.²⁴³ The record showed that a small percentage of the manufacturer's catheters contained a defect which would cause this separation to happen.²⁴⁴ Since the catheter had been "routinely" discarded by the two hospitals involved," the jury's verdict was necessarily based upon an inference that the known defect had existed in this case.²⁴⁵ The manufacturer appealed on the grounds that the verdict was based on a stacking of inferences.²⁴⁶ Judge Mann rejected this assertion:

This is a beguiling argument, but it is not an "inference upon an inference" as that misunderstood phrase is used in the cases. Of course a finding that the catheter was severed as a consequence of faulty manufacture is based on an inference. There is no direct proof of this fact. But all the other possibilities are excluded by direct evidence which the jury could — and obviously did — believe. This leaves the inference of faulty manufacture sufficiently supported.²⁴⁷

239. *Id.* at 504.

240. *Id.* *But see* *Sirmons v. Pittman*, 138 So. 2d 765, 770–71, 774 (Fla. 1st DCA 1962) (reversing verdict for the defense where the trial court had instructed the jury on the doctrine of "unavoidable accident," finding that the inference that the defendant's car experienced an unknown brake malfunction over which he had no control was insufficiently proven to permit the second inference, that a skid caused by the brake malfunction forced the car across the center line, thus producing an "unavoidable accident").

241. 247 So. 2d 471 (Fla. 2d DCA 1971), *cert. denied*, 251 So. 2d 471 (Fla. 1971).

242. *Id.* at 472.

243. *Id.* at 471.

244. *Id.*

245. *Id.*

246. *Bard*, 247 So. 2d at 471.

247. *Id.* at 471–72. *Bard* predates *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976), *aff'd*, 547 F.2d 885 (5th Cir. 1977), which created strict liability in certain products cases, and *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981), adopting the so-called "Greco-Cassisi" inference that a product that fails in normal usage is presumed to be defective. *Bard* was cited as controlling in *Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730 (Fla. 2d DCA 1972), *cert. denied*, 284 So. 2d 691 (Fla. 1973), where

Fire damage cases, because they so often involve the use of circumstantial evidence, have been fertile ground for consideration of multiple inferences. In *Shepherd v. Finer Foods, Inc.*,²⁴⁸ the Florida Supreme Court held that the First District Court of Appeal misapplied the rule to reverse verdicts for the plaintiffs. In *Shepherd*, a fire started in a storage room where flammable sacks were stacked on the top and sides of an oil heater.²⁴⁹ The plaintiffs asserted that the fire originated when the heater ignited these flammable materials.²⁵⁰ The second inference argued was that the negligent placement of the flammable materials allowed the fire to start.²⁵¹ The supreme court reversed the district court's holding and reinstated the judgment entered by the trial court, finding that the jury had correctly analyzed the inferences to be drawn from the evidence, and that the first inference was sufficiently established to support the second one.²⁵²

Insufficient support for an inference was fatal to the appellants' efforts in *In Re Estate of Dalton*,²⁵³ where heirs of the decedent filed for revocation of probate, arguing that the testatrix lacked testamentary capacity and had been unduly influenced by the beneficiary of the will.²⁵⁴ However, there was direct evidence that the decedent possessed testamentary capacity, causing the court to reject the

the court reversed a summary judgment for the defense in a wrongful death case where a child died in a gas explosion in an underground bomb shelter. *See also* Parke v. Scotty's, Inc., 584 So. 2d 621 (Fla. 1st DCA 1991) (reversing summary judgment in a products liability case involving a stepladder where the trial court erroneously ruled that the Greco inference applied only to "magic box" type products, where there is only passive user involvement); McCarthy v. Florida Ladder Co., 295 So. 2d 707 (Fla. 2d DCA 1974) (citing *Bard*, 247 So. 2d 471) (reversing a summary judgment for the defendant, and holding that the absence of the ladder that was the subject of the product liability claim did not preclude the suit).

248. 165 So. 2d 750 (Fla. 1964).

249. *Id.* at 752.

250. *Id.* at 755.

251. *Id.*

252. *Id.* But see *Perma Spray Mfg. Co. v. La France Indus. of Miami*, 161 So. 2d 13 (Fla. 3d DCA) (finding sufficient direct evidence of the negligent use of an acetylene torch, that the jury did not use multiple inferences to reach its verdict, and that the circumstantial evidence was sufficient for the jury to draw the single inference needed to reach its verdict that the negligent use of the acetylene torch caused the fire), *cert. denied*, 161 So. 2d 147 (Fla. 1964).

253. 246 So. 2d 612 (Fla. 3d DCA), *cert. denied*, 252 So. 2d 800 (Fla. 1971).

254. *Id.* at 614.

heirs' claim on that ground.²⁵⁵ On the issue of undue influence, the heirs contended that the court below committed reversible error when it excluded expert testimony showing that the decedent's signature was forged on two powers of attorney.²⁵⁶ The powers of attorney were used by the beneficiary to borrow money to pay a gift tax owed by the testatrix.²⁵⁷ There was no evidence that the beneficiary procured or placed the signatures on the documents, nor was it shown that he was aware they were forgeries.²⁵⁸ The heirs claimed that evidence of the forgeries was relevant because one could infer undue influence from it.²⁵⁹ The court rejected this contention, finding the evidence too remote to draw the inferences urged by the heirs.²⁶⁰ In its holding, the court reasoned that to rule otherwise would have been "tantamount to piling an inference upon an inference which is not permissible."²⁶¹

Another example of the courts' refusal to permit reliance upon remote inferences is *Rodgers v. Auto-Owners Insurance Co.*²⁶² In *Rodgers*, the appellate court reversed a jury verdict in favor of the insurance company on the plaintiff's claim for recovery under a fire insurance policy.²⁶³ The evidence showed that the insured had obtained a one-day extension on her fire insurance coverage the day before her business was damaged by fire.²⁶⁴ She had recently rented a storage area in a nearby warehouse, and had moved many items

255. *Id.* at 614-15.

256. *Id.* at 615.

257. *Id.* The trial court found that the testatrix understood her will and codicil in that she read the codicil in its entirety, her attorney brought the major changes in the codicil to her attention, and she stated that she did not want her niece to receive the residuary estate. *Id.*

258. *Dalton*, 246 So. 2d at 615.

259. *Id.*

260. *Id.* at 615-16.

261. *Id.* at 616. See also *Greenfield Real Estate Inv. Corp. v. Merritt*, 348 So. 2d 1199 (Fla. 3d DCA 1977). In *Merritt*, the plaintiff, who was injured after falling over a concealed pipe on the defendant's parking lot, argued that the defendant had constructive knowledge of the dangerous condition because it owned the property when the underground sprinkler system was removed and the land was converted to a parking lot. *Id.* at 1200-01. The appellate court rejected the argument as an impermissible inference, because the primary inference — that the pipe was part of an old sprinkler system — was not sufficiently established to allow the second inference — that the owner had constructive knowledge of its presence. *Id.*

262. 379 So. 2d 700 (Fla. 2d DCA 1980), *cert. denied*, 388 So. 2d 1109 (Fla. 1980).

263. *Id.* at 703.

264. *Id.* at 701.

into it within a few weeks before the fire.²⁶⁵ The plaintiff had also taken some of her personal papers from the building before the fire, and a few days afterwards obtained a \$1,000 bank loan.²⁶⁶ In a letter written to a business partner six weeks after the fire she stated that she intended to rebuild and add onto the building.²⁶⁷ Additionally, the insurance company showed that the plaintiff had increased the value of the merchandise on hand at the store just before the fire.²⁶⁸ On the basis of these facts the insurance company contended that the jury was justified in finding the plaintiff had knowledge of the origin of the fire.²⁶⁹ While the appellate court conceded that the circumstances were suspicious, it held that the defendant had failed to meet its evidentiary burden under the insurance policy.²⁷⁰ "To establish its defense Auto Owners had to prove that after the fire, Rodgers knowingly and wilfully misrepresented facts material to the insurance company's risk."²⁷¹ The court found that the inference that the plaintiff had knowledge that the fire was to occur could not be drawn from her extending the fire insurance coverage and then borrowing money shortly after the fire took place.²⁷² It considered the circumstances to be equally susceptible to other interpretations.²⁷³

In workers' compensation cases a lesser burden of proof is placed upon initial inferences to be drawn from circumstantial evidence. In *Lee v. Florida Industrial Commission*,²⁷⁴ an employee was found dead in his home workshop with a bullet wound in his head, a discharged .22 caliber pistol on the floor, and an undischarged .38

265. *Id.*

266. *Id.*

267. *Rodgers*, 379 So. 2d at 701.

268. *Id.*

269. *Id.*

270. *Id.* at 707.

271. *Id.*

272. *Rodgers*, 379 So. 2d at 707.

273. *Id.* See also *Firemen's Fund Am. Life Ins. Co. v. Wohl*, 334 So. 2d 261 (Fla. 3d DCA 1976), *cert. denied*, 342 So. 2d 1101 (Fla. 1976). In *Wohl*, a widow claimed life insurance benefits after her husband disappeared at sea, and the defense sought to elevate a remote conflicting inference — that the couple's prior marital difficulties resulted in his disappearance — to an equally reasonable inference for the purpose of defeating her claim. *Id.* at 261. The appellate court found the widow's claim to have met the standard required for basing an inference on an inference, thus entitling her to the insurance benefits. *Id.*

274. 148 So. 2d 268 (Fla. 1962).

caliber pistol on his work bench.²⁷⁵ The death occurred on a work day.²⁷⁶ The employee had made telephone calls from his workshop in connection with his work assignment, a routine practice approved by his employer, and relating to his participation in pistol range competition that was paid for by his employer.²⁷⁷ The workers' compensation carrier claimed the death was a suicide and not work-related.²⁷⁸ Both the deputy commissioner of the Florida Industrial Commission (the workers' compensation judge) and the Florida Supreme Court concluded that the carrier had not overcome the statutory presumption against suicide and held that the death was accidental.²⁷⁹ However, the deputy commissioner rejected the survivor's claim on the grounds that the death did not occur in the course of employment, even though notes found on decedent's workbench showed that he had been making and receiving calls related to his employment.²⁸⁰ The deputy commissioner asserted that to find the death work-related he would have to base inferences on what he considered to be an initial insubstantial inference — that the decedent “met his death while he was in attendance upon his employer's business.”²⁸¹ However, the supreme court reversed the ruling and held that the known facts, and inferences to be drawn from them, met the lesser standard of proof required in a workers' compensation case — that competent, substantial evidence exists from which it can be reasonably inferred that the deceased was engaged in work-related activity when the accident took place.²⁸²

The First District Court of Appeal took a less charitable view of the facts in *Girdley Construction Co. v. Ohmstede*,²⁸³ another workers' compensation case, and reversed a deputy commissioner's finding that an employee's death occurred in the course and scope of

275. *Id.* at 269.

276. *Id.*

277. *Id.*

278. *Id.* at 270.

279. *Lee*, 148 So. 2d at 270. The court also found that since the decedent was experienced in firearms, he would have used the more lethal power of a .38 caliber pistol rather than a less predictable .22 calibre pistol had he been attempting suicide. *Id.*

280. *Id.* at 269–70.

281. *Id.* at 271.

282. *Id.* at 271–73. *See also* *Johnson v. Dicks*, 76 So. 2d 657 (Fla. 1954) (holding that inferences must meet a lesser standard in workers' compensation cases).

283. 465 So. 2d 594 (Fla. 1st DCA 1985).

employment.²⁸⁴ The deceased employee had been accidentally struck in the head by a board while at work, and that night his wife noticed that he was distraught and behaving unusually.²⁸⁵ He had no appetite, was listless, and had problems with his balance, memory, and coordination.²⁸⁶ A few days later he was seen stepping over a guard-rail onto a busy interstate highway, where he was killed when he walked without looking into the path of an oncoming truck.²⁸⁷

The medical examiner testified that several possibilities could have combined to cause the fatal accident.²⁸⁸ One was that a subdural hematoma from the original blow to the head could have resulted in confusion and neurological impairment, causing the decedent to walk in front of the truck in a mentally confused state.²⁸⁹ However, the medical examiner could not say with reasonable medical probability that the accident three days earlier caused the decedent to walk into the path of the truck.²⁹⁰ Another pathologist testified that the inference that the initial blow led to the death was medically supportable because there were findings that showed the trauma to the head caused the subdural hematoma and that the decedent's abnormal behavior was characteristic of one suffering from such an injury.²⁹¹ The court found the case to have been based on a impermissible stacking of inferences, namely, that the injury caused a subdural hematoma which led to mental impairment, and that the impairment caused the decedent to walk in front of a truck.²⁹² However, the dissenting judge found that the testimony of the second pathologist supported the deputy commissioner's order.²⁹³ Nevertheless, specifically citing *Voelker*, the majority rejected the deputy commissioner's findings.²⁹⁴ Thus the court left open to ques-

284. *Id.* at 596.

285. *Id.* at 595. The wife stated that he had an abrasion on his forehead which looked similar to a severe wood burn. *Id.*

286. *Id.*

287. *Id.*

288. *Ohmstede*, 465 So. 2d at 595.

289. *Id.*

290. *Id.* at 596. Additional evidence portrayed the decedent as acting unusual and peculiar before the accident. *Id.* Also, a doctor testified that the decedent had a history of bizarre behavior. *Id.*

291. *Id.*

292. *Id.*

293. *Ohmstede*, 465 So. 2d at 596.

294. *Id.* The *Ohmstede* court stated that "an inference upon an inference may not be relied on to establish an essential fact unless the original inference can be elevated to

tion whether workers' compensation proceedings are to be governed by the quasi-criminal standard applicable to the initial inference to be drawn from circumstantial evidence, or whether inferences must only meet the lesser standard of proof required in workers' compensation cases, as stated by the Florida Supreme Court in *Johnson v. Dicks*²⁹⁵ and *Lee v. Florida Industrial Commission*.²⁹⁶

The rule against basing an inference on an inference has also played a role in at least two appellate decisions involving uninsured motorist coverage cases and allegations of injury from phantom vehicles. In *Allstate Insurance Co. v. Bandiera*,²⁹⁷ the Fourth District Court of Appeal reversed a jury verdict for the plaintiff on a claim for uninsured motorist (UM) benefits for injuries suffered when the plaintiff was hit by a concrete block that came through the windshield of an automobile in which he was a passenger.²⁹⁸ Neither the driver nor the plaintiff had any idea where the block came from.²⁹⁹ The policy provided UM coverage if the accident involved a phantom hit-and-run vehicle.³⁰⁰ The district court held that the inference that the block originated from a phantom vehicle did not sufficiently outweigh contrary inferences that could be drawn from the circumstances.³⁰¹ Therefore, the second inference — that negligent conduct by an unidentified operator or occupant of another vehicle caused the injury — could not be considered by the jury.³⁰²

A contrary conclusion was reached in *Transamerica Insurance Co. v. United Services Automobile Ass'n*,³⁰³ where the First District Court of Appeal rejected the trial court's conclusion that the plaintiff's case was based on an impermissible stacking of inferences.³⁰⁴ The plaintiff testified that an object struck him in the eye as

the dignity of an established fact because of the absence of any reasonable inference to the contrary." *Id.* (citing *Voelker*, 73 So. 2d at 403).

295. 76 So. 2d 656 (Fla. 1954). See *supra* notes 7–12 for a discussion of this decision.

296. 148 So. 2d 268 (Fla. 1962). See *supra* notes 274–82 for a discussion of this case.

297. 512 So. 2d 1082 (Fla. 4th DCA 1987).

298. *Id.* at 1083.

299. *Id.* The plaintiff argued, however, that the cinder block came from a vehicle that was in front of him. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. 569 So. 2d 768 (Fla. 1st DCA 1990).

304. *Id.* at 770.

he was jogging, and that it came from the direction of a passing vehicle.³⁰⁵ The appellate court found that the inference that the object came from the vehicle was sufficiently established to permit the jury to draw a second inference — “that the object was propelled as a result of a negligent or intentional act of the owner or operator.”³⁰⁶ Consequently, the court remanded the case with instructions that the trial court accept as an established fact that the object came from an unidentified vehicle.³⁰⁷

Two cases, one applying the rule and one rejecting it, illustrate the way courts in Florida currently apply the rule prohibiting an inference on an inference. In *Slitor v. Elias*,³⁰⁸ the Second District Court of Appeal reversed a verdict for the plaintiffs and remanded the case for entry of a judgment for the defendant.³⁰⁹ The purchasers of a home brought suit against the sellers for failure to disclose defects in the swimming pool.³¹⁰ At trial, the plaintiffs produced evidence that a crack in the pool had been repaired by caulking it.³¹¹ However, the inference that would have to be drawn from that fact was “that the sellers knew at the time they made the repair that the crack constituted a major problem likely to reoccur or continue.”³¹² In order to sustain the verdict, that inference would have to be elevated to a fact so that the final inference could be drawn — “that the sellers knew at the time of the sale that a problem materially affecting the value of the pool existed.”³¹³ However, the plaintiffs presented no direct evidence that the sellers knew at the time of the sale that there was a defect in the pool that would have a material impact on the value of the property.³¹⁴ On the other hand, the buyers testified that the pool appeared to be in satisfactory condition, and that there was no evidence of further repairs necessary before

305. *Id.* at 769.

306. *Id.*

307. *Id.* at 770.

308. 544 So. 2d 255 (Fla. 2d DCA 1989).

309. *Id.* at 259.

310. *Id.* at 256.

311. *Id.* at 257. The plaintiffs also complained that the paint on the inside of the pool flaked off causing the filter to constantly clog thus preventing a proper chemical balance. *Id.*

312. *Slitor*, 544 So. 2d at 257–58.

313. *Id.* at 258.

314. *Id.*

sale.³¹⁵ The court found that an equally reasonable inference that could be drawn from the evidence was that the sellers had no reason to believe a problem existed with the pool when they sold the property.³¹⁶ Consequently, the inference that the sellers knew a problem existed could not be raised to the level of a fact, and the third inference — that the sellers knew of a problem materially affecting the value of the property — was considered impermissible speculation which violated the rule against basing an inference on an inference.³¹⁷

The Fourth District Court of Appeal reached the same result under different circumstances in *Barcello v. Rubin*.³¹⁸ In *Barcello*, the district court reversed a trial court's ruling submitting the seat belt defense to the jury.³¹⁹ The court held that testimony that the seat belt would "click" when fastened was not sufficient to prove it was fully operational, and therefore, the issue should not have been submitted to the jury.³²⁰ The plaintiff testified that she was wearing her seat belt when the accident occurred, and that she believed that she had heard it click when she put it on.³²¹ The defense expert testified that the use of a fully operational seat belt would have lessened the plaintiff's injuries.³²² Consequently, the defense expert said that her injuries were either the result of her not wearing the seat belt or it not having been operational.³²³ However, the plaintiff's expert testified that the clicking of the seat belt when it is engaged does not unequivocally prove that it is functional, and that even if the plaintiff was wearing an operational seat belt and shoulder harness her injuries would not necessarily have been prevented.³²⁴ Based on this evidence, the district court found that instructing the jury on the seat belt defense was error because it violated the rule against pyramiding inferences.³²⁵ B e

315. *Id.* at 257.

316. *Id.* at 258.

317. *Id.*

318. 578 So. 2d 58 (Fla. 4th DCA 1991), *rev. denied*, 589 So. 2d 292 (Fla. 1991).

319. *Id.* at 59.

320. *Id.*

321. *Id.* at 58.

322. *Id.*

323. *Barcello*, 578 So. 2d at 58.

324. *Id.* at 58–59.

325. *Id.* at 59. *But see* Bulldog Leasing Co., Inc. v. Curtis, 630 So. 2d 1060 (Fla. 1994) (creating a rebuttable presumption that seatbelts are operational once competent

cause the plaintiff's expert testified that a seat belt cannot be proven to be operational simply because it clicks, the first inference the jury would have had to draw to find that the belt was operational was not established to the exclusion of other reasonable opposing inferences that could be drawn from the circumstantial evidence.³²⁶ Thus the jury should not have been permitted to infer from the extent of her injuries that the plaintiff was not wearing her seat belt.³²⁷

**VIII. THE FUTURE OF THE INFERENCE ON AN INFERENCE
RULE: SHOULD IT BE ABANDONED IN FAVOR OF THE
TOTALITY OF THE EVIDENCE RULE?**

The problems with the rule against stacking inferences are many. How does one decide when an inference in a civil case outweighs all reasonable contrary inferences by sufficient probative magnitude that it can be treated as an established fact? Is it always clear which inference forms the basis for the others, or is the selection an exercise in judicial logic that is sometimes dubious, sometimes sound? Is the choice of the foundation inference based necessarily on the circumstances of the case, or is it simply because the court says it is so? If the inference fails to meet that greater burden, are all subsequent inferences actually so tainted and speculative that a jury should not be allowed to consider them? Conversely, if it does meet that standard, are subsequently drawn inferences so certifiably free from speculation that they must remain unchallenged?

In our legal system it is the role of the fact-finder to make factual determinations unless they are so baseless, so devoid of support in the record, that they cannot be allowed to stand.³²⁸ Granted, courts should not tolerate verdicts based on speculation and conjec-

evidence has been offered, that the vehicle contained seatbelts, and disapproving *Barcello* to the extent it conflicts with the Florida Supreme Court's ruling in *Bulldog Leasing*).

326. *Barcello*, 578 So. 2d at 59.

327. *Id.*

328. *See, e.g.*, *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (stating that "an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact . . . , [l]egal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal"), *aff'd*, 457 U.S. 31 (1982); *Hilkmeyer v. Latin Am. Air Cargo Expeditors*, 94 So. 2d 821, 824 (Fla. 1957) (holding that a trial judge is authorized to direct a verdict to prevent "mere speculation . . . to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked") (quoting *Galloway v. United States*, 319 U.S. 372, 395 (1943)).

ture, but the line between these two evils and an inference that is supported by the circumstantial evidence is often a fine one. Have we permitted what may be a useful analytical tool to be elevated to an often arbitrary rule? The rule suffers from the flaw of assuming that all inferences must be considered serially, ranked in order of primacy and importance, then weighed against an initial standard of proof not ordinarily applied to civil cases.

This last problem may have constitutional significance. The rule imposes on a civil trial involving circumstantial evidence with multiple inferences a standard of proof closely akin to that used in a criminal case. It does this based on the fiction that one inference cannot be considered with another unless the primary inference is transformed into a fact by having met the standard of proof needed to establish that a person is guilty of a crime. There are many instances where no direct evidence of events is available. If the factfinder in a civil case cannot consider all the inferences to be drawn from the known circumstances until the court has decided that one inference is primary, and that it meets the higher burden of proof, is the plaintiff being granted full access to the courts as required by the Florida Constitution?³²⁹

Two criminal cases illustrate not only the difficulty of uniformly applying the rule against an inference based on an inference, but also the reasons why it should be rejected in civil cases in favor of one that allows examination of the totality of the evidence.³³⁰ In one case, the court implied in dicta that a contrary result would violate the rule,³³¹ in the other it declined to be strictly bound by the rule, arguing that to follow it too literally would defy logic and common sense.³³²

Consider first *State v. Norris*.³³³ The defendant, Mrs. Norris experienced the tragic coincidence of losing her husband and two

329. FLA. CONST. art. I, § 21 (1968). This § guarantees that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” *Id.* Use of the rule against basing an inference on an inference may also be challenged on the grounds that it denies a civil litigant the right to have his or her case decided by a jury under FLA. CONST. art. I, § 22 (1968), which protects the right to trial by jury.

330. *State v. Norris*, 168 So. 2d 541 (Fla. 1964); *Benson v. State*, 526 So. 2d 948 (Fla. 2d DCA 1988), *cert. denied*, 489 U.S. 1069 (1989).

331. *Norris*, 168 So. 2d at 541.

332. *Benson*, 526 So. 2d at 948.

333. *Norris*, 168 So. 2d at 541.

acquaintances to what was alleged to be arsenic poisoning.³³⁴ In January of 1952, her husband died, in March of 1953, an associate, Mr. Pace, died, and in 1960, a second associate, Mr. Merrill, suffered the same fate.³³⁵ Mrs. Norris was charged with the murder of Mr. Merrill.³³⁶ The exhumed bodies of Mrs. Norris' husband and Mr. Pace contained arsenic.³³⁷ At her trial, the jury was permitted to hear testimony regarding the arsenic content in the exhumed bodies on the basis of the "similar fact evidence rule," then also called the *Williams* rule.³³⁸ However, the state lacked proof that Mrs. Norris had fed the arsenic to her husband, Mr. Pace, or to Mr. Merrill.³³⁹ The murder conviction was reversed, with the Florida Supreme Court finding that the admission of evidence of the two earlier deaths was in error.³⁴⁰ It found a lack of evidence to connect Mrs. Norris to the deaths, and bolstered its opinion by relying on what it referred to as *Voelker's* "criminal rule" against pyramiding inferences.³⁴¹ The court held that to uphold the convictions

would . . . lead to the improper construction of inferences upon inferences. The instant case is illustrative. In order for the questioned evidence to reach a degree of admissible relevancy, it would be necessary to infer that lethal potions of arsenic had been administered to Mr. Norris and to Mr. Pace. From that, we would have to infer that Mrs. Norris committed the acts. The evidence admitted here does not meet the test of the criminal rule announced by *Voelker* and *Tucker*.³⁴²

The failure of the state to directly connect the two earlier deaths to the defendant proved to be an unbridgeable gap, one that was

334. *Id.* at 542.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* See *Williams v. State*, 110 So. 2d 654 (Fla. 1959) (permitting use of evidence of similar facts pointing to the commission of a separate crime, wrong, or act, to establish motive, intent, or modus operandi, to negate a defense, identify a defendant, or to show a plan or pattern of conduct relating to the commission of a crime), *cert. denied*, 361 U.S. 847 (1959). This decision is now codified at FLA. STAT. § 90.404(2)(a) (1993).

339. *Norris*, 168 So. 2d at 542.

340. *Id.* at 544.

341. *Id.* at 543.

342. *Id.* See *supra* notes 49–65 and accompanying text for a discussion of *Voelker* and notes 131–39 and accompanying text for a discussion of *Tucker*.

fatal to the prosecution's efforts. On the one hand, the court reaffirmed the appropriate usage of the *Williams* rule.³⁴³ On the other, it rejected the use of it here on the basis of *Voelker*.³⁴⁴ But was it necessary to rely on *Voelker* to reach that result? Or was the problem simply that the available facts did not justify use of the *Williams* rule? While it must have been tempting for the prosecution to use the information about the two earlier deaths, there was no proof to connect Mrs. Norris to them in a way that would satisfy the standard governing the sufficiency of evidence in criminal cases.³⁴⁵ Thus, regardless of whether *Voelker* was used to analyze the evidence presented, the result would have been the same: Under the *Williams* rule without proof tending to show that Mrs. Norris had committed a collateral crime, admission of the similar fact evidence would not have been proper.

The second criminal case illustrating the difficulty in uniformly applying the rule is *Benson v. State*,³⁴⁶ where the defendant was convicted of murdering the competing heirs to his mother's \$10,000,000 estate by detonating a home-made bomb in a vehicle occupied by his mother and the heirs.³⁴⁷ His convictions on two counts of first-degree murder, attempted first-degree murder, and other crimes arising from the bombing were affirmed in an opinion by Judge Lehan,³⁴⁸ who also wrote the opinion of the court in *Slitor v. Elias*,³⁴⁹ a civil case, where the higher burden of proof was applied to an inference that formed the basis for a second inference.

Because *Benson* was a criminal case, use of the "criminal rule"

343. *Norris*, 168 So. 2d at 543.

344. *Id.*

345. This standard is: Beyond and to the exclusion of a reasonable doubt. *See, e.g.*, *Brown v. State*, 565 So. 2d 304 (Fla. 1990) (affirming a first-degree murder conviction and approving of the standard jury instruction on reasonable doubt, which requires proof "beyond every reasonable doubt"), *cert. denied*, 498 U.S. 992 (1990); *Spells v. State*, 283 So. 2d 54, 55 (Fla. 4th DCA 1973) (reversing a second-degree murder conviction because the trial court failed to instruct on the presumption of innocence and the requirement of "proof of guilt to the exclusion of and beyond every reasonable doubt").

346. 526 So. 2d 948 (Fla. 2d DCA 1988).

347. *Id.* at 949.

348. *Id.* at 960.

349. 544 So. 2d 255. *See supra* notes 308–17 and accompanying text for a discussion of this case where the rule prohibiting an inference on an inference was used to reverse a jury verdict for the plaintiff decided after *Benson*. Judge Lehan analyzed the facts and applied the rule without reference to *Benson* or to Professor Wigmore's criticisms of the rule that he had incorporated into the *Benson* opinion. *Slitor*, 544 So. 2d 255.

of *Voelker* was more appropriate. The higher burden of proof meant that inferences to be drawn from the circumstantial evidence were required to outweigh other contrary inferences beyond a reasonable doubt. The entire fabric of the prosecution's case consisted of a series of inferences drawn from disparate circumstances.³⁵⁰ The defendant raised many grounds on his appeal, but the one pertinent to consideration of *Voelker* was his claim that there had been an improper pyramiding of inferences, and that the evidence had failed to eliminate every reasonable hypothesis of innocence.³⁵¹ Relying upon *Buenoano v. State*,³⁵² Judge Lehan asserted that "permissible inferences do not require the exclusion of all other possible hypotheses."³⁵³

The court rejected the criticism that the state's case was built on circumstantial evidence, and noted, "[a]s the Florida Supreme Court recognized in *Voelker*, 'cases may and do exist wherein circumstantial evidence is as convincing of an asseverated fact as is testimonial evidence'."³⁵⁴ To the charge that the case was based on impermissibly stacked inferences, the court asserted that a strict *Voelker* analysis was not justified, and cited with approval Wigmore's view that the rule limiting inferences based on inferences should be repudiated.³⁵⁵ Judge Lehan found the following comment by *Wigmore* to be particularly applicable to the complex set of circumstances and inferences presented by *Benson*:

350. *Benson*, 526 So. 2d at 949–51. The case is a fascinating one to read for this reason alone.

351. *Id.* at 952.

352. 478 So. 2d 387 (Fla. 1st DCA 1985) (affirming a first-degree murder conviction based on circumstantial evidence, ruling that the issue of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to decide, and stating that if the verdict is supported by competent substantial evidence, an appellate court will not reverse it).

353. *Benson*, 526 So. 2d at 952.

354. *Id.* at 953 (quoting *Voelker*, 73 So. 2d at 407).

355. *Id.*

There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon The fallacy has been frequently repudiated in judicial opinions.

Id. at 954 (citing 1A JOHN H. WIGMORE, EVIDENCE § 41 at 1111, 1120 (Peter Tillers rev. 1983)).

[S]ingle inferences, though weak when taken individually, may be substantial and powerful when added together [T]he probative strength of an underlying inference is a factor that affects the strength of the final factum probandum, but . . . no mechanical rule can be laid down concerning how strong any underlying inference must be. The question is not whether any given inference in a chain is too weak but is always whether, in view of all patterns of corroborating and contradicting evidence at all levels of all inferential chains, the final factum probandum has been shown to the degree of likelihood required by the applicable standard of persuasion³⁵⁶

Benson cited with approval the holdings in criminal cases in Arizona and the Ninth Circuit, where the rule against basing an inference on an inference was rejected in favor of a rule that considers the totality of the evidence, including the inferences, to determine whether the proof presented met the appropriate standard.³⁵⁷ The court concluded that the result in *Benson* would be the same whether it applied the rule of *Voelker* or the rule that allowed consideration of the totality of the evidence: There was sufficient evidence to support the conviction.³⁵⁸

Judge Lehan summarized the reasons why a strict *Voelker* analysis must give way to a method of reviewing the facts that allows for consideration of all the evidence and inferences:

We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allega-

356. *Id.* (quoting 1A J. WIGMORE, EVIDENCE, § 41, at 1138) (Peters Tillers rev. 1983)).

357. *State v. Harvill*, 476 P.2d 841 (Ariz. 1970) (en banc) (affirming a criminal conviction, holding that the trial court's instruction to the jury that there is no distinction between direct and circumstantial evidence was not error, and finding that the inferences drawn from the circumstances were sufficient to support the conviction); *Toliver v. United States*, 224 F.2d 742, 745 (9th Cir. 1955) (affirming a criminal conviction, rejecting the contention that the charges were proven by inferences based upon inferences, finding that "[t]he old rule . . . that an inference predicated upon an inference is inadmissible has been repudiated").

358. *Benson*, 526 So. 2d at 954.

tions against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.³⁵⁹

IX. THE PRACTICAL BASIS FOR ADOPTING THE TOTALITY OF THE EVIDENCE APPROACH: FULL CONSIDERATION OF THE EVIDENCE, NO ARTIFICIAL CONSTRAINTS, A NET GAIN FOR JUDICIAL CREDIBILITY

The views expressed by Judge Lehan in *Benson* apply with even greater weight to civil cases. Ideally, lawyers for the parties have presented and argued to the fact-finder all of the inferences to be drawn from the circumstantial evidence that favor their client's position. Should a decision on the facts now be made by imposition of a rule of circumstantial evidence so arcane that few can apply it to the facts of a case in a way that avoids arbitrariness or that allows the ruling to be easily understood? If the facts support an outcome, or if they do not, the result will be as easily determined by use of a rule that allows the evidence to be considered in its totality.

The question which underlies *Voelker* remains unanswered: How does one decide when one inference outweighs all others by such a magnitude that it can be considered a fact, allowing subsequent, perhaps weaker inferences to be built upon it? In *Benson*, Judge Lehan found that the critical inference was established as a fact by the jury's verdict against the defendant — it “was the permissible effect of the jury verdict, the evidence in its totality supports no contrary reasonable inference.”³⁶⁰ So the danger *Voelker* is meant to guard against, judgments based on speculation, is not present under either analysis in his view. The analytical exercise that lies at the heart of *Voelker* can be as harmful to judicial review of some circumstances as it is helpful to others, but the “totality of the evidence” rule frees the court from unquestioning adherence to the prohibition against stacking inferences without increasing the risk of affirming speculative judgments.

The rule that prohibits basing an inference on an inference has

359. *Id.* at 956.

360. *Id.* at 953.

generated more confusion than clarity in the cases where it has been used. It exists as an anachronism, a judicial exercise that often defies understanding rather than serving as an aid to lucid analysis by courts at either the trial or appellate level. It is time for the views of Professor Wigmore on this confusing rule to prevail in the courts of Florida, as they have in the courts in the federal system and many of our sister states.³⁶¹

X. DIFFERING VIEWPOINTS: HOW OTHER COURTS HAVE VIEWED THE RULE

Federal courts view the state rule against pyramiding inferences as strictly evidentiary, not substantive, and do not apply it to trials in the federal system.³⁶² Some state courts apply it in much the same way Florida does, requiring the initial inference to meet a higher standard of evidence, raising it to the level of an established fact, before the second inference can be considered.³⁶³ Others soften the impact of the rule by lessening the burden of proof the first inference must satisfy.³⁶⁴ Some states reject the rule outright.³⁶⁵ The following discussion highlights some examples of how the rule has been treated in the federal courts and other states.

The Fifth Circuit Court of Appeals rejected the Florida rule against basing an inference on an inference in *Pogue v. Great Atlantic & Pacific Tea Co.*³⁶⁶ In *Pogue*, the court held that federal, rather than state, procedural and evidentiary rules controlled in order to guarantee “[t]he kind of jury trial to which the parties are

361. See, e.g., *Cora Pub v. Continental Cas. Co.*, 619 F. 2d 482 (5th Cir. 1980) (upholding pyramiding inferences that are supported by the evidence); *Orey v. Mutual Life Ins. Co.*, 19 N.E.2d 547 (Ind. 1939) (rejecting the rule prohibiting an inference up an inference). See *infra* text accompanying notes 380–86 for a discussion of *Cora Pub* and text accompanying notes 400–21 for a discussion of *Orey*.

362. See, e.g., *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957) (rejecting the Florida rule against basing an inference on an inference). See *infra* notes 366–79 and accompanying text for a discussion of *Pogue*.

363. See, e.g., *Benton v. Snyder*, 825 S.W.2d 409 (Tenn. 1992) (requiring evidence in support of an initial inference to be sufficiently strong). See *infra* notes 432–35 and accompanying text for a discussion of *Benton*.

364. See, e.g., *McConnell v. Oklahoma Gas & Elec. Co.*, 563 P.2d 632, 634 (Okla. 1977) (requiring initial inference to be “a justifiable conclusion from evidence”). See *infra* text accompanying notes 422–31 for a discussion of *McConnell*.

365. See, e.g., *Orey*, 19 N.E.2d at 547. See *infra* text accompanying notes 400–21 for a discussion of *Orey*.

366. 242 F.2d 575 (5th Cir. 1957).

entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure [and] preserved by the Seventh Amendment to the Constitution.³⁶⁷ The court in *Pogue* had under review a summary judgment in favor of the storekeeper in a slip and fall case.³⁶⁸ At issue was whether the legal principle to be applied was that which the Florida Supreme Court announced in 1948 in *Wells v. Palm Beach Kennel Club*,³⁶⁹ where the court held that if a premises owner, by his method of operation, created a dangerous condition by causing food, debris, or other foreign matter to be on the floor of the premises, then the plaintiff was not required to produce additional proof of negligence.³⁷⁰ The opposing theory, asserted by the store in *Pogue*, was initially advocated by Florida Supreme Court Justice William Glenn Terrell in a concurring opinion in *Carl's Markets v. De Feo*,³⁷¹ where Justice Terrell argued that modern, self-serve supermarkets required a new rule.³⁷² He favored the principle, now well-accepted in Florida law, that to show liability, a plaintiff must prove that the defendant either knew of the dangerous condition or that it had existed long enough that the defendant should have known of it.³⁷³ The first trial judge in *Pogue* denied the motion for summary judgment on the basis of *Wells*.³⁷⁴ More than two years later a new trial judge, relying on the newer principle stated in *Carl's Markets*, granted a summary judgment.³⁷⁵

The appellate court in *Pogue* weighed the two arguments and ultimately applied *Wells*, declining to adopt the appellee's novel suggestion that the rule first propounded in *Carl's Markets* was ultimately approved by the Florida Supreme Court to protect storekeepers against clumsy and opportunistic tourists.³⁷⁶ The appellee

367. *Id.* at 582. See FED. R. CIV. P. 38 (providing that “[t]he right of trial by jury . . . shall be preserved to the parties inviolate”); FED. R. CIV. P. 39 (providing for jury trial upon appropriate demand, unless the right does not exist under the United States Constitution or federal statutes); 28 U.S.C. § 1861 (1988) (stating the policy of the United States that “litigants in Federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community.”).

368. *Pogue*, 242 F.2d at 576.

369. 35 So. 2d 720 (Fla. 1948).

370. *Id.* See *Pogue*, 242 F.2d at 578, 582.

371. 55 So. 2d 182 (Fla. 1951).

372. *Pogue*, 242 F.2d at 579.

373. *Id.* at 580.

374. *Id.* at 576.

375. *Id.*

376. *Id.* at 582. The appellee supported its argument by stating:

also argued that Florida's rule for weighing inferences drawn from circumstantial evidence justified not submitting the case to the jury.³⁷⁷ The Fifth Circuit Court of Appeals declined to apply the state rule, referring to it as an "apparently unique doctrine of Florida law,"³⁷⁸ holding instead that on matters of procedure and evidence the federal law is controlling, not state law.³⁷⁹

The Fifth Circuit rejected the rule against pyramiding inferences again in *Cora Pub, Inc. v. Continental Casualty Co.*³⁸⁰ Because the lower court had granted the insured's motion for directed verdict, the applicable standard required the court to consider the evidence in the light most favorable to the insurance company, including all inferences that could be reasonably drawn from the record.³⁸¹ In *Cora Pub*, the court held that an insurance company's evidence in support of its affirmative defense — that its insured committed arson — was sufficient to create a jury question.³⁸² The court's criticism of the inference rule echoed Wigmore's:

The rule against inferences upon inferences is frequently overstated as absolutely prohibiting the drawing of one inference from another. Behind the rule is the thought that unless the first inference is certain, the improbability of the second inference is com-

Perhaps this is because the state of Florida has experienced such a rash of cases because of the transient and fun-seeking population so prevalent in this state. It is a well recognized fact that vacationers and other transients in this area are very prone to 'slip and fall' accidents, with the obvious intent of procuring for themselves some sort of settlement value in order to aid in meeting the expense of their vacation.

Id.

377. *Pogue*, 242 F.2d at 582. The appellee cited several cases in support of its position. See, e.g., *Voelker*, 73 So. 2d at 403; *Waldrep*, 63 So. 2d at 768; *King*, 168 So. 2d at 858. See *supra* text accompanying notes 49–65, 28–33, and 15–21 for a discussion of *Voelker*, *King*, and *Waldrep*, respectively.

378. *Pogue*, 242 F. 2d at 582.

379. *Id.* The view that the sufficiency of the evidence in diversity cases in federal court will be determined by federal procedural and evidentiary law rather than state law was reiterated by the Fifth Circuit in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), a case brought under the Federal Employers' Liability Act to recover damages for a work-related injury. See also *Lavender, Adm'r. v. Kurn*, 327 U.S. 645, (1946) (upholding a plaintiff's verdict in a wrongful death case under the F.E.L.A. that was based solely on multiple inferences, even though the evidence also supported a contrary inference).

380. 619 F.2d 482 (5th Cir. 1980).

381. *Id.* at 484.

382. *Id.*

pounded. Consistently enforced, however, the rule would make proof by circumstantial evidence virtually impossible, since most generally accepted inferences may be dissected into intermediate inferences.³⁸³

The court cited with approval criticism of the rule from Judge Wisdom in *NLRB v. Camco*: "The so-called rule against pyramiding inferences, if there really is such a 'rule' and if it is anything more than an empty pejorative, is simply legalese fustian to cover a clumsy exclusion of evidence having little or no probative value."³⁸⁴ The *Cora Pub* court found nothing inherently wrong with pyramiding inferences that are reasonably well-supported by the evidence.³⁸⁵ In essence, the probative value of each inference must be considered, rather than having one inference designated the primary one, applying a higher burden of proof to that one, and, if the higher burden is met, allowing the fact-finder to consider the others.³⁸⁶ Under the rule requiring the court to weigh the totality of the evidence to determine its sufficiency, all inferences may be evaluated regardless of how they are ordered.

The United States Eleventh Circuit Court of Appeals, like the Fifth Circuit, also allows consideration of all reasonable inferences. In *Daniels v. Twin Oaks Nursing Home*,³⁸⁷ the lower court applied the state's rule against drawing an inference from an inference and held that plaintiff's evidence was insufficient to submit to the jury.³⁸⁸ An elderly nursing home resident disappeared and was presumed dead.³⁸⁹ The patient was senile and had on previous occasions left the nursing home undetected and wandered into a swamp in nearby woods.³⁹⁰ The plaintiff asserted that the deceased had gone into the woods this time as well, and perhaps died in the swamp, although his body was never found.³⁹¹

The appellate court affirmed the result, but refused to apply

383. *Id.* at 485.

384. *Id.* at 486 (quoting *NLRB v. Camco*, 340 F.2d 803 (5th Cir. 1965)), *cert. denied*, 382 U.S. 926 (1965).

385. *Cora Pub*, 619 F.2d at 486.

386. *Id.*

387. 692 F.2d 1321 (11th Cir. 1982).

388. *Id.* at 1323.

389. *Id.* at 1322-23.

390. *Id.* at 1322.

391. *Id.* at 1323.

Alabama's rule against pyramiding inferences.³⁹² Instead, it used the federal standard, which allows the fact-finder to consider all inferences as long as they are reasonable.³⁹³ The court rejected the notion that an inference cannot be considered if circumstantial evidence supports other equally probable contrary inferences, stating that "[t]his rule of equally probable inferences is no longer sound."³⁹⁴

The *Daniels* court ruled that the jury could choose among allowable inferences, even if conflicting inferences were equally probable.³⁹⁵ The court viewed inferences drawn from circumstantial evidence as necessarily based partially on conjecture.³⁹⁶ But it held that juries will not be permitted to indulge in that degree of speculation and conjecture which would cause their findings to be guesswork or possibilities, rather than probabilities.³⁹⁷ The appellate court found that, while there was sufficient evidence for the jury to conclude the nursing home was negligent, the circumstances did not support inferences that the home's negligence had proximately caused the decedent's death.³⁹⁸

[T]here is no evidence beyond a mere scintilla that tells us what happened to Daniels; it is this lack of evidence that keeps the case from the jury and requires a directed verdict against the party with the burden of proof. We do not require that the cause of death be identified with scientific precision. However, the evidence must support an explanation of the cause of death that is sufficiently articulated that the jury is not permitted to engage in an unallowable degree of speculation.³⁹⁹

392. *Daniels*, 692 F.2d at 1323, 1328.

393. *Id.* at 1324.

394. *Id.* The court traced the history of the federal rule that allows juries to consider equally reasonable conflicting inferences. *Id.* at 1325 n.5.

395. *Id.* at 1325.

396. *Id.*

397. *Daniels*, 692 F.2d at 1328.

398. *Id.*

399. *Id.* (citation omitted). In his dissent Judge Anderson disagreed with the view that the jury could not reasonably have inferred the defendant's negligence caused the decedent's death. *Id.* (Anderson, J., dissenting). He quoted the trial court, which concluded there was no reasonable contrary inference to be drawn from the evidence on the issue of proximate cause than that the decedent's death was caused by his having wandered away. *Id.* at 1329 (Anderson, J., dissenting). The majority opinion never identified the initial inference that was too weak to support the second inference that wandering away caused the death. However, it must be assumed that this inference, which the lower court found not to have been established by sufficient probative weight, was that

Indiana courts have also rejected the rule against basing one inference upon another. In *Orey v. Mutual Life Insurance*,⁴⁰⁰ the Indiana Supreme Court was faced with a set of facts as puzzling as those considered by the Florida Supreme Court in *Voelker*. The plaintiff, a beneficiary on a life insurance policy containing a double indemnity provision, sued the insurance company for the full policy benefits.⁴⁰¹ The policy in question awarded double indemnity benefits only in the event bodily injury or death was caused by external, violent, and accidental means.⁴⁰² The decedent, a physically fit young man, was employed driving a lumber truck.⁴⁰³ On the date of the accident, he was seen driving his loaded truck up a hill.⁴⁰⁴ The truck was observed to stop for no apparent reason and to back up a short distance.⁴⁰⁵ The decedent was seen standing in the road around and beside the truck, and then walking toward a nearby village.⁴⁰⁶ He arrived in the village obviously ill and said he was dying.⁴⁰⁷ A doctor found he had a strangulated scrotal hernia that was described as being as large as two fists.⁴⁰⁸ The decedent was then transported to a hospital where he died from the hernia.⁴⁰⁹ The evidence showed that when he arrived at the village his overalls were torn and clay and dirt were on the knees.⁴¹⁰ There were also scratch-

the nursing home was negligent. There was evidence that the home's best efforts could not keep the senile, but apparently intrepid, resident from leaving.

The "totality of the evidence" rule cannot prevent jurists from having differing views of the facts in a given case, nor should it be expected to. The lack of a body proved to be fatal to the case in this instance. *Id.* at 1328-29. *But see Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692 (11th Cir. 1993) (finding *Daniels* factually distinguishable in a nursing home death case where an elderly resident had run away and had not been found).

400. 19 N.E.2d 547 (Ind. 1939).

401. *Id.* at 547. The trial court directed the jury to return a verdict for the defendant and the plaintiff appealed. *Id.*

402. *Id.*

403. *Id.* at 548.

404. *Id.*

405. *Orey*, 19 N.E.2d at 548.

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Orey*, 19 N.E.2d at 548. There were also scratches and small wounds on the decedent's legs. *Id.*

es and small wounds on the decedent's legs.⁴¹¹ A rock was found placed under one of the truck's rear wheels, footprints were found around the truck,⁴¹² and the hand crank was inserted "in the front of the truck in position for cranking."⁴¹³ The deceased had no hernia before the incident.⁴¹⁴ At trial, three doctors were called as experts.⁴¹⁵ One testified that the hernia had been caused by violent external means, not by a strain, and the two others testified that the hernia could have been caused by an unusual strain or an external blow.⁴¹⁶

The Indiana Supreme Court reversed the trial court, finding that whether the hernia was accidentally caused by external, violent means was for the jury to decide.⁴¹⁷ It rejected the contention that a jury would have to base an inference upon an inference in order to find for the plaintiff:

[T]here is no such general rule in the sense in which the language itself implies, and that if . . . such a rule may be said to exist, the phraseology used to express it is inaccurate and misleading . . . The language has become a sort of judicial slogan, used carelessly, inaccurately, and to the confusion of the profession . . . [W]hat is meant primarily is that an inference cannot be based upon evidence which is uncertain or speculative, or which raises merely a conjecture or possibility."⁴¹⁸

The court found that it was not necessary for a jury to base an inference upon an inference.⁴¹⁹ If the jury decided "that the injury was caused by violent external means," then it had to draw only one inference — that the injury was accidental.⁴²⁰ The court concluded that under the circumstances, this inference would not be unreasonable.⁴²¹

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Orey*, 19 N.E.2d at 548.

416. *Id.*

417. *Id.* at 549.

418. *Id.* (quoting R.E. Heinselman, Annotation, *Inference on Inference: Presumption on Presumption*, 95 A.L.R. 162, 182 (1935)).

419. *Id.*

420. *Orey*, 19 N.E.2d at 549.

421. *Id.*

The Oklahoma Supreme Court claims adherence to the rule prohibiting an inference on an inference but has expressed it in terms that alter its conventional meaning. In *McConnell v. Oklahoma Gas & Electric Co.*,⁴²² the plaintiffs sued the power company to recover damages for loss of their dog, which was struck and killed by an automobile.⁴²³ Plaintiffs claimed the dog escaped from their yard due to the negligence of a company meter reader, who had entered the yard to read the meter earlier on the day of the incident.⁴²⁴ No one saw the dog escape through an open gate.⁴²⁵ The plaintiffs' witness testified that the gate appeared to have been opened, but was shut when he observed it, and he was not sure whether the latch was fastened.⁴²⁶ The power company's demurrer was sustained, and the dog owners appealed.⁴²⁷ The Oklahoma Supreme Court affirmed the trial court's ruling that the plaintiff's case was based on an inference on an inference.⁴²⁸ "A judgment reached in this manner under a factual situation such as we have here is not permitted in the law."⁴²⁹ However, in explaining its interpretation of the rule, the court described one quite different from what is utilized in Florida: "An inference upon an inference is permitted if the first inference is a justifiable conclusion from evidence, testimonial or circumstantial, and if the second inference is a justifiable conclusion from the first inference by itself or in connection with other evidence."⁴³⁰ Thus, the rule announced by the Oklahoma Supreme Court does not establish a higher evidentiary burden for the initial inference. Both the initial inference and those subsequently drawn must meet the same standard,⁴³¹ and that standard does not differ from other evidence adduced in a civil trial. Rather than enshrining the rule in the manner the Florida courts have, the Oklahoma Supreme Court applies it as an analytical tool, but in the final analysis focuses more on the to-

422. 563 P.2d 632 (Okla. 1977).

423. *Id.* at 633.

424. *Id.* at 634.

425. *Id.*

426. *Id.*

427. *McConnell*, 563 P.2d at 633.

428. *Id.* at 634. The court stated that: "A judgment reached in this manner under a factual situation such as we have here is not permitted in the law." *Id.* at 633.

429. *Id.*

430. *Id.* at 634.

431. *Id.* The "evidence must establish essential facts as probably, not merely possibly being true." *Id.*

tality of the evidence.

The Tennessee Supreme Court applies the rule in a manner similar to the way it is used in Florida courts, although it does not appear to have established as high a standard of proof for the first inference. For example, in *Benton v. Snyder*,⁴³² a medical malpractice case in which it was alleged that a physician fraudulently concealed from his patient that he had sterilized her, the Tennessee Supreme Court held that "it is well settled in Tennessee that an inference cannot be properly drawn from another inference."⁴³³ However, while it may be well-settled that the rule is applied, it is interpreted to mean only that "the evidence supporting the first inference may be of such character and so strong that it justifies a conclusion or a finding of fact which becomes a proper basis for another inference."⁴³⁴ By implication this ambiguous standard falls somewhere between a preponderance of the evidence and proof beyond a reasonable doubt.⁴³⁵

Illinois also professes adherence to the rule against basing an inference on an inference. However, in *Gillespie v. R.D. Werner Co.*,⁴³⁶ the Illinois Fifth District Court of Appeal, while not refusing to follow the rule, did as the Tennessee Supreme Court would do later in *Benton v. Snyder*, and cited Wigmore's criticisms of the rule, and then went on to find the evidence insufficient regardless of the

432. 825 S.W.2d 409 (Tenn. 1992).

433. *Id.* at 414.

434. *Id.* at 415 (quoting R.E. Heinselman, Annotation, *Inference on Inference: Presumption on Presumption*, 95 A.L.R. 162, 184 (1935) (citing *Nashville Gas & Heating Co. v. Phillips*, 69 S.W.2d 914 (Tenn. 1934) and *Adamant Stone & Roofing Co. v. Vaughn*, 7 Tenn. App. 170 (Ct. App. 1928)).

435. *Id.* The Tennessee Supreme Court found that the majority of jurisdictions "follow the rule against basing an inference on an inference," and that a minority have abandoned it. *Id.* Inexplicably, Florida is listed in both categories. *Id.* The court cites no cases to support its compilation of the states adhering to the rule, or those rejecting it. Florida courts would be surprised to find themselves considered among those who have abandoned the doctrine. *See, e.g.*, *Keys v. State*, 606 So. 2d 669, 673 (Fla 1st DCA 1992) (reversing criminal convictions where the trial court's instruction on flight to avoid apprehension was found to be based on impermissibly stacked inferences, and noting that "Florida courts have long adhered to the rule proscribing the fact-finder from basing an inference upon an inference in order to arrive at a conclusion of fact"); *In re D.J.S.*, 563 So. 2d 655, 693 (Fla. 1st DCA 1990) (dissenting opinion in a case severing the biological father's parental rights argued that the majority's ruling was based on "piling an inference on an inference, an invalid practice long discredited under Florida law").

436. 357 N.E.2d 1203 (Ill. App. Ct. 1976), *rev'd*, 375 N.E.2d 1294 (Ill. 1978).

standard used.⁴³⁷ The three options the Illinois court considered available to it for weighing circumstantial evidence were to prohibit an inference on an inference, prohibit only remote inferences, or to require that all inferences be reasonable.⁴³⁸ The last two options more closely approximate the standard referred to as the totality of the evidence rule.

The Illinois case involved a products liability claim based on a fall from a stepladder.⁴³⁹ The plaintiff was near the top of the ladder when he fell.⁴⁴⁰ He did not know what caused his fall.⁴⁴¹ Afterwards a witness noticed that the bottom of the left front rail of the ladder was bent inward and twisted.⁴⁴² The issue was whether the condition was caused by a structural defect or by the plaintiff having struck that part of the ladder when he fell.⁴⁴³ The appellate court ruled for the defense, finding that the jury's conclusion that a defect in the ladder caused the plaintiff's injury was reached by basing an inference on an inference.⁴⁴⁴ The court held that to find for the plaintiff the jury had to infer that a defect which was known to occur in another part of the ladder, one that caused the ladder side rail to bend outward, had manifested itself where the ladder was damaged, resulting in this instance in the inward bending and twisting of the side rail that was found after the plaintiff's fall.⁴⁴⁵ The appellate court considered the evidence too speculative to support the inferences drawn from it.⁴⁴⁶

The Supreme Court of Wyoming allows what it refers to as "sequential inferences," a hybrid of the rule that incorporates a lesser standard of proof for the initial inference. In *Roosa*,⁴⁴⁷ a will contest, the issue was whether the testator lacked testamentary capacity.⁴⁴⁸ Affidavits by the testator's nieces and nephews raised inferences of

437. *Id.* at 1206–07. See *supra* notes 432–35 for a discussion of *Benton*.

438. *Gillespie*, 357 N.E.2d at 1207.

439. *Id.* at 1204.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Gillespie*, 357 N.E.2d at 1205.

444. *Id.* at 1206.

445. *Id.* at 1206–07.

446. *Id.* at 1207.

447. 753 P.2d 1028 (Wyo. 1988).

448. *Id.*

his incapacity and eccentricity.⁴⁴⁹ The court relied on direct evidence from witnesses rather than conclusory statements in the affidavits to find that the testator had testamentary capacity, but it rejected the notion that a properly drawn inference which is contrary to direct testimony is always outweighed by the direct testimony.⁴⁵⁰ The court held that an inference can serve to raise a genuine issue of material fact, but that in this instance the inferences asserted in the affidavits could not reasonably be drawn from them, or from the other evidence in the case.⁴⁵¹ Consequently, there was no genuine issue of material fact. The court did as other courts have done, acknowledged Wigmore's criticisms of the rule, and in the end embraced only a slight variant of it:

The result is that an inference may be drawn from an inferential fact, that is a fact that itself was inferred, when the prior inference excludes any other reasonable theory or alternative inference. A mere probability that the prior fact exists is not sufficient to sustain the next sequential inference.⁴⁵²

The cases cited in this section are representative of other courts' views on the rule. The reactions range from utter scorn, as expressed in several of the federal court opinions, to efforts to ameliorate the harsh effect of the rule by lessening the burden of proof the first inference must meet in order for a fact-finder to draw subsequent inferences. Whether the "strict" rule is followed, rejected, or modified in any given jurisdiction seems to depend on the facts presented in a given case. The one approach that does eliminate the tenuous inference-balancing act required by the rule is outright rejection of it.

449. *Id.*

450. *Id.* at 1034.

451. *Id.* at 1034–35.

452. *Id.* at 1036. Two justices concurred in the holding but criticized as unnecessary and confusing the discussion of sequential inferences. *Id.* at 1037 (Cardine, J., concurring) (Macy, J., concurring). Justice Cardine, writing for the concurring members of the court, asserted that "conclusions such as what is 'reasonable' and what is a 'mere probability' should be left to the trier of fact." *Id.* (Cardine, J., concurring).

XI. CONCLUSION

There are several guiding principles for evaluating the sufficiency of circumstantial evidence in civil cases. First, in spite of the courts' protestations to the contrary, if there is direct evidence that conflicts with the circumstantial evidence, in most instances the direct evidence is given the greatest weight.⁴⁵³ Second, a single inference drawn from circumstantial evidence must only be proven by a preponderance.⁴⁵⁴ Third, in Florida when more than one inference is drawn from the evidence, the inferences must be considered serially, and the first one must meet a higher standard of proof similar to the burden in a criminal case.⁴⁵⁵ Only then can the other inferences be considered by the trier of the facts. However, once the initial burden is met, the subsequent inferences need only be proven by a preponderance of the evidence.

The rule which prohibits basing an inference on an inference, unless the first inference has met the higher standard of proof, is one of the two cardinal principles for evaluating purely circumstantial evidence when there is no direct evidence to change the equation. Since the Florida Supreme Court announced the rule in *Voelker*, it has become so entrenched in the law of the state that almost no Florida appellate court determining the sufficiency of circumstantial evidence fails to consider whether the rule is applicable to the case under review.

The cases discussed in this Article represent a broad cross-section of fact patterns in which the rule has been used by the courts, for better or worse, but it is not definitive. The rule has been discussed, and in some cases has been determinative, in actions as diverse as review of administrative rulings,⁴⁵⁶ of petitions for bar

453. See *supra* notes 199–229 and accompanying text. This is true more often than not, even though the courts have said that qualitatively there is no difference between the two.

454. See *supra* notes 13–48 and accompanying text.

455. See *supra* notes 48–65 and accompanying text.

456. See *Tropical Park v. Ratliff*, 97 So. 2d 169 (Fla. 1957) (declining to suspend the license of a racetrack and holding that the conclusion of the administrative tribunal below that a bookie was using a telephone in the racetrack office to transmit racing information with the knowledge and permission of a track official was based on an impermissible stacking of inferences); *Townsend Fruit Co. v. Mayo*, 98 So. 2d 345, 362 (Fla. 2d DCA 1957) (upholding a ruling for an orange grower in a contract action between the grower and a citrus fruit dealer, where the dissent complains that the administrative findings below relied on “pyramiding an inference on an inference” to reach the result

admission,⁴⁵⁷ breach of contract actions,⁴⁵⁸ insurance coverage cases,⁴⁵⁹ will contests,⁴⁶⁰ and tort claims.⁴⁶¹

The problem with the rule against basing an inference on an inference is not that it lacks value as an analytical tool, but that it requires one inference to be deemed primary and to meet the greater standard of proof imposed on it, proof comparable to what must be produced in a criminal case. Consequently, the reviewing court forces the trier of fact to conform to a structure for analyzing events that is required by the rule, instead of permitting the fact-finder reasonable latitude. One piece of the factual puzzle must weigh

affirmed by the majority).

457. See Florida Bd. of Bar Examiners Re: L.K.D., 397 So. 2d 673 (Fla. 1981) (granting a petition for admission to the bar, finding that the evidence of two shoplifting incidents, one not resulting in the filing of criminal charges and the other ending in an acquittal of the charge, did not outweigh evidence of good character, with the dissent arguing that the evidence of good character did not preponderate over other conflicting inferences).

458. Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990), *rev. denied*, 581 So. 2d 1307 (Fla. 1991). Miller is a spoliation of evidence case against plaintiff's insurance company for having destroyed an automobile needed as evidence in a products liability case. *Id.* The court, although not directly discussing the rule against basing an inference on an inference, relied on principles analogous to it in refusing to allow the insurance company to use as a defense to the claim for damages the inference that the car was defective because it was destroyed in an accident caused by a malfunction. *Id.*

459. Insurance Co. of N. Am. v. Ready, 240 So. 2d 311 (Fla. 3d DCA 1970) (reversing a judgment on behalf of a judgment creditor who sued the insurance company to recover the amount of a judgment obtained in a negligence action, on the grounds that the finding of coverage was based on an impermissible stacking of inferences).

460. See *In re Estate of Yost*, 117 So. 2d 753 (Fla. 3d DCA 1960) (reversing a probate court's refusal to probate an executed copy of a codicil, and finding, on the basis of the rule against pyramiding inferences, that the presumption that the testatrix had obtained the original of the codicil and destroyed it could not be established).

461. See *Laborers' Int'l. v. Rayburn Crane Serv.*, 559 So. 2d 1219 (Fla. 2d DCA 1990) (arising out of a labor dispute, where the dissent asserts that an award of punitive damages against a union local would violate the rule of *Voelker* regarding permissible inferences to be drawn from circumstantial evidence); *Lynch v. Brown*, 489 So. 2d 65 (Fla. 1st DCA 1986) (reversing a summary judgment in a slip and fall case where the plaintiff fell on an outside stairway that was allegedly not in compliance with the applicable building code and poorly lit, and the dissent argued for affirmance on the grounds that the plaintiff's case was based on the impermissible stacking of inferences); *Counts v. McGillick*, 267 So. 2d 97 (Fla. 4th DCA 1972) (affirming a judgment for the plaintiff in a slip and fall case, where the plaintiff did not know what caused his fall or how he fell, with the dissent arguing that the verdict was based on impermissible pyramiding of inferences); *Fouk v. Perkins*, 181 So. 2d 704 (Fla. 2d DCA 1966) (affirming a plaintiff's verdict in a wrongful death case, finding that inferences of contributory negligence and assumption of risk were not sufficiently supported by the evidence to overcome the presumption that the decedent acted prudently to assure his own safety).

more heavily or all others, regardless of their viability, are discarded. The rule requires a structured and limited consideration of complex events, an approach that is unrealistic in most circumstances, where events unfold rapidly, not in the studied and orderly steps suggested by an analysis based on the rule.

Where the rule works to produce an outcome that is persuasive and credible, it is likely that other means for evaluating the sufficiency of the evidence, such as consideration of the totality of the evidence, would be as effective. Almost every permutation of the prohibition against pyramiding inferences is more defensible than the strict rule itself. For instance, the variation that permits consideration of all reasonable inferences and the one that prohibits only remote inferences, both tend to allow a more realistic consideration of the full range of inferences that can be reasonably drawn from circumstantial evidence. As the rule presently stands, with the first inference required to meet a higher burden of proof than is imposed on any other evidence in a civil trial, and the trier of fact free to accept almost any subsequent inference that is based on the one that meets the initial burden, the rule should be considered arbitrary, capricious, and violative of a litigant's constitutional rights to access to the courts and trial by jury.⁴⁶²

One way to overcome the problems posed by the rule would be to require the initial inference to meet a proof standard that is no higher than is required of other evidence in a civil case.⁴⁶³ The premise of *Voelker*, that one inference can be so overwhelmingly proven that it is elevated to the status of an established fact, has not

462. See, e.g., *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (invalidating a provision in tort reform legislation that capped noneconomic damages); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (invalidating a statute requiring a minimum amount of property damage from an automobile accident before suit can be brought). In both of these cases no overpowering public need was shown for the abolition of the right involved and no reasonable alternative to the right sought to be abolished was provided by the legislature.

463. In most instances the required standard is a preponderance of the evidence, described in the Florida Standard Jury Instructions, as "the greater weight of the evidence." FLA. STD. JURY INSTR. (Civ) 3.7. See, e.g., *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (reversing dismissal of a DES products liability case and finding that the plaintiff who cannot identify the manufacturer of the product that caused the injury can prove a market-share alternative theory of liability by a preponderance of the evidence, and a defendant "may exculpate itself from liability by proving by a preponderance of the evidence that it did not produce or market the type of DES taken").

withstood close scrutiny.⁴⁶⁴ Also flawed is the concept that the inferences in a given case can be considered serially, so that a court can make a determination of the weight to be given the first inference, thus either converting it to a fact or dooming the remainder of the case to fail because of the weakness of the first inference.

The adoption of a rule that would allow consideration of all inferences proven by a preponderance of the evidence is closer to what has been done by those state courts who no longer follow the strict rule. Most of those who have considered the rule have expressed concern about when to use it, or what burden of proof must be met. The most appealing aspect of the totality of the evidence rule is that it does not require either the ordering of inferences or the application of a higher standard of proof to any of them.

Elsewhere, courts address the problem that the Florida rule is intended to treat by banning remote inferences, those that are so unlikely in a given case that they are unworthy of consideration by a rational fact-finder.⁴⁶⁵ Stated differently, this approach does not allow consideration of those inferences that are not established by a preponderance of the evidence. But in the final analysis, all attempts to rewrite or reinterpret the rule, while still preserving it, would be unnecessary if the standard applied by the federal courts, the totality of the evidence rule, is adopted by Florida.

In Wigmore's view, we undermine the process used to search for truth when we attempt to force events to conform to this rule. He was offended by it because it requires reality to artificially conform to its restrictions, rather than considering the way in which events actually occur. Subjectivity cannot be disciplined out of the law entirely, but legal theories that comport with common sense, yet which do not abrogate the role of the judiciary, are to be viewed more favorably than those which encourage subjectivity and obfuscate the process of fact-finding.

A rule of evidence in civil cases that would allow Florida courts to consider all inferences drawn from circumstantial evidence on much the same basis that a trier of the facts considers direct evidence, would better serve the judicial system. For one thing, it would make appellate review of the sufficiency of evidence more un-

464. See, e.g., *Benson*, 526 So. 2d at 948. See *supra* notes 346–59 and accompanying text for a discussion of this case.

465. See *supra* text accompanying notes 437–52.

derstandable. It is time for Florida's courts to abandon this confusing rule, deserving as it is of the scorn Professor Wigmore heaped on it, and to adopt the totality of the evidence rule as it has been applied in the federal cases cited in this Article.