[Cite as *Haughey v. Twins Group, Inc.*, 2005-Ohio-1371.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

CHRIS HAUGHEY, ET AL. :

Plaintiff-Appellant : C.A. CASE NO. 2004-CA-7

vs. : T.C. CASE NO. 2001-CV-25

TWINS GROUP, INC. : (Civil Appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 25th day of March 2005.

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GRADY, J.

{¶ 1} This is an appeal from a summary judgment for the defendants granted by the court of common pleas on plaintiffs' claim for relief for personal injuries.

{¶ 2} Plaintiffs, Chris and John Haughey, who are husband and wife, went to the Taco Bell restaurant in Urbana on February 15, 1999, to eat lunch. Both ordered food at the counter and took it to a table. Chris Haughey had a Mexican Pizza, a dish she had eaten at other Taco Bells.

{¶ 3} After Chris Haughey had taken several bites of her

pizza, she felt a hard object in her mouth. Searching around inside with her tongue, she located a piece of tooth that had broken off. After removing the piece of tooth from her mouth, and unable to locate any foreign object inside, she swallowed the food remaining in her mouth.

{¶ 4} Chris Haughey's broken tooth required extensive dental repairs, including a cap and two root canals. On February 15, 2001, she and her husband commenced an action on her claim for personal injuries against Taco Bell of America, Inc. Subsequently, Taco Bell of America, Inc., was dismissed and Nicholas Kallengis and John or Jane Doe were substituted as defendants. Later, on November 21, 2003, those defendants were dismissed and Twin's Group, Inc. ("Twins Group"), was substituted.

{¶ 5} Twins Group filed responsive pleadings and later moved for summary judgment on the Haughey's claims for relief. The motion asserted two grounds. First, that the claim for relief was barred by R.C. 2305.10, the two-year statute of limitations governing personal injury claims. Second, that Plaintiffs lacked evidence necessary to find that Twins Group is liable for Chris Haughey's broken tooth. The latter was supported by Chris Haughey's deposition statements.

{¶ 6} The trial court denied the motion for summary judgment on the statute of limitations contention, finding that the claims against Twins Group related back to the

original complaint that was filed, per App.R. 15(C). The court granted summary judgment in favor of Twins Group on the issue of liability, however. The Haugheys filed a timely notice of appeal. Twins Group filed a notice of cross-appeal.

{¶ 7} APPELLANT'S ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT-APPELLEE ON THE BASIS THAT PLAINTIFF-APPELLANTS FAILED TO STATE A CLAIM."

{¶ 9} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶ 10} Haughey's negligence claim is posited on a theory

that Twins Group served her a pizza containing a foreign object that caused her tooth to break when she bit down on it, not knowing it was there. Therefore, her burden at trial would require her to offer evidence demonstrating (1) the injury she suffered and the resulting loss, and (2) the agency that proximately caused the injury to occur, one for which Twins Group was responsible.

{¶ 11} Twins Group supported its motion for summary judgment with Haughey's deposition in which she described her injury and how it occurred. However, she was unable to describe or identify the object that she allegedly bit down on that caused her tooth to break.

{¶ 12} In *Drescher v. Burt* (1996), 75 Ohio St.3d 280, the Supreme Court held that a defendant who moves for summary judgement and contends that the plaintiff lacks evidence to prove a claim for relief "cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has the reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts

showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*, at 293.

{¶ 13} Here, relying on Haughey's admission in her deposition, Twins Group pointed to evidence which affirmatively demonstrates that the Plaintiffs lack evidence to support their claim that the pizza Chris Haughey was served contained a foreign object that caused her tooth to break and for which Twins Group was responsible. It then became Haughey's burden to offer evidence showing that such an object was in the food she was served. *Dresher*. She offered none. Instead, Haughey necessarily relied on inferences to support her claim, and in deciding a motion for summary judgment any evidence from which an inference may be drawn must be construed most strongly in her favor. Civ.R. 56(C).

{¶ 14} In *Detrick v. Columbia Sussex, Inc.* (1993), 90 Ohio App.3d 475, we reversed summary judgment for a defendant on the plaintiff's slip and fall claim. Plaintiff alleged that she slipped on a soapy substance left on a restroom floor. She offered evidence showing that her clothes bore a residue of a similar kind. She also offered evidence that the defendant's employee had cleaned the restroom that day using a similar substance. We found that the evidence would permit a jury to infer that the employee was negligent in allowing the substance to remain on the

floor, which was the theory of the plaintiff's claim. The inference was sufficient for summary judgment purposes to overcome the employee's denials and other evidence offered by the defendant to show that a different substance for which the defendant was not responsible was on the floor and may have caused the plaintiff's fall.

{¶ 15} Here, as in *Detrick*, Haughey testified concerning her injury and its occurrence. In *Detrick*, the defendant attempted to evade responsibility. Twins Group makes a similar argument, citing cases in which defendants have been absolved of responsibility for objects that occur naturally in the food they served; for example, a chicken bone in a chicken sandwich or a piece of clam shell in a fried clam strip. However, the analogy would seem to have little application to a pizza, and Taco Twins does not explain how it does.

{¶ 16} Twins Group also argues that the injury may have occurred spontaneously; that Chris Haughey's tooth broke from an inherent weakness. That is possible, but on this record it is no more than mere speculation. The question remains whether the pizza contained a foreign object that broke Chris Haughey's tooth.

{¶ 17} In order to find that there was an object in the pizza that Taco Twins served which was hard enough to break Chris Haughey's tooth, a trier of fact must necessarily infer that (1) it was foreign to the food she was served and

(2) that Twins Group's negligent act or omission had allowed or caused the object to be there. However, the second inference is necessarily drawn from the first. In that case, the finding of fact required to hold Taco Twins liable on Haughey's theory of negligence violates the rule against the stacking of inferences. *State v. Grant* (1993), 67 Ohio St.3d 465. Enforcement of the rule is consistent with a claimant's burden at trial, which requires proof and not merely the speculative proposition that stacked inferences might support.

{¶ 18} Plaintiffs cannot rely on stacked inferences to satisfy the requirement to show that there is a genuine issue of material fact for trial. *Drescher*, *supra*. Without other evidence, which does not exist in this record, the trial court's summary judgment was proper for Twins Group on the issue of liability.

{¶ 19} Appellant's assignment of error is overruled.

{¶ 20} APPELLEE'S CROSS ASSIGNMENT OF ERROR

{¶ 21} "THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT, THE TWINS GROUP, INC.'S, MOTION FOR SUMMARY JUDGMENT ON THE BAR OF THE TWO YEAR STATUTE OF LIMITATION PROVIDED BY R.C. 2305.10."

{¶ 22} Affirming the grant of summary judgment in its favor renders Twins Group's cross assignment of error moot. Per App.R. 12(A)(1)(c), we decline to address it.

{¶ 23} The judgment from which the appeal was taken will

be affirmed.

FAIN, J, concurring in the judgment:

{¶ 24} I write separately to set forth my views regarding the inference-upon-an-inference conundrum. In *Hurt v. Charles J. Rogers Transportation Co.* (1955), 164 Ohio St. 329, upon which the Supreme Court relied in *State v. Grant* (1993), 67 Ohio St.3d 465, 478, the court cited, at 164 Ohio St. 332, as "[o]ne of the clearest statements of the rule pertaining to inferences upon inferences," the following passage from *Indian Creek Coal & Mining Co. v. Calvert*, 68 Ind. App. 474, 120 N.E. 709:

{¶ 25} "There is a rule to that effect. It, however, is frequently misinterpreted and misapplied. For the purpose of supporting a proposition, it is not permissible to draw an inference from a deduction which is itself purely speculative and unsupported by an established fact. Where an inference not supported by or drawn from a proven or known fact is indulged, and is then used as a basis for another inference, neither inference has probative value. Such a process may be described as drawing an inference from an inference, and is not allowable. At the beginning of every line of legitimate inferences there must be a fact, known or proved. * Where there is such a fact, the proper tribunal is not only permitted, but also it is its duty, to draw therefrom those legitimate inferences that seem to be most reasonable. An inference so drawn becomes a fact in so**

far as concerns its relation to the proposition to be proved. It merges itself into the proved fact from which it was deduced, and the resulting augmented fact becomes a basis for other proper inferences. To assign to an inference properly drawn a position inferior to an established fact would in effect nullify its probative force."

{¶ 26} **This is consistent with the principle more recently set forth in *State v. Jenks* (1991), 61 Ohio St.3d 259, first paragraph of syllabus, 574 N.E.2d 492, that: "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof."**

{¶ 27} **In *Hurt, supra,* at 164 Ohio St. 331-332, the Ohio Supreme Court cited approvingly the following passage from 1 Wigmore on Evidence (3 Ed.) 434, Section 1, which I find illuminating:**

{¶ 28} **"It was once suggested that an 'inference upon an inference' will not be permitted, *i. e.,* that a fact desired to be used circumstantially must itself be established by testimonial evidence; that this suggestion has been repeated by several courts, and sometimes actually enforced.**

{¶ 29} **"There is no such orthodox rule, nor can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that**

he discharged it, and from this we infer that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that the fatal stab was a result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no court (until in very modern times) ever thought of forbidding it. 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." (**Emphasis in quotation in *Hurt, supra*.**)

{¶ 30} **Perhaps most tellingly, and certainly the most succinctly, the following principle is cited approvingly in *Hurt, supra,* at 332-333: "In 20 American Jurisprudence, 169, Section 165, it is stated that, where a court seeks to apply the rule forbidding the basing of one inference upon another, the principle involved is that an inference can not be based upon evidence that is too uncertain or speculative or which raises merely a conjecture or possibility."**

{¶ 31} **I take from all this the proposition that whether a factfinder may take an ultimate fact as proven, by the**

requisite burden of proof, based upon the conjunction[1] of two or more inferences, depends upon whether that conclusion is reasonable. In this situation, even if it would be reasonable to take an intermediate fact as proven from each inference, considered individually, it might not be reasonable to take an ultimate fact as proven, by the requisite burden of proof, from the two inferences considered conjointly. This follows from the fact that it is necessary, when two inferences are being used conjointly, to accept both inferences as true.

{¶ 32} For example, in an invasion of privacy case, P must prove, by a preponderance of the evidence, that D was the person who made a harassing telephone call to her some time between 3:00 and 4:00 one afternoon. P can pin down the time to between 3 and 4 o'clock, because the phone call was received after her favorite soap opera had ended, but before she left for her work, at about 4 o'clock in the

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[1] **I distinguish a conjunction of two inferences – where the proof of the ultimate fact requires that both inferences be drawn – from a disjunction of two inferences – where the ultimate fact could be proven by either one of two inferences being drawn, independently of the other inference. Where two inferences are used disjunctively as circumstantial proof, even if each inference, standing alone, were too weak to permit a reasonable factfinder to find the ultimate fact, both inferences, together, might suffice. For example, A sells B some powder, representing it to be cocaine. The powder is not recovered. One possible inference is that the powder was, in fact, cocaine. Another possible inference that it was not cocaine. If there is some evidence tending to support the inference that it was not cocaine – evidence of a pattern of past dealings whereby A sells counterfeit cocaine to unsuspecting buyers, perhaps – the inference that the powder was cocaine might be too weak to permit a reasonable jury to find, beyond reasonable doubt, that A sold B a controlled substance. If that was the wording of the indictment, the evidence might be insufficient to support a conviction. However, if the indictment charged merely that A offered to sell cocaine to B, clearly there would be sufficient proof, since either inference would suffice, and, on these facts, one of the two inferences must be the case.**

afternoon. The telephone used to make the call was in a locked room to which only two men, D and X, had access. Both D and X had virtually identical motives for harassing P. There is independent proof that D was in the room where the telephone was located from 3:00 to 3:45. At 3:45, D left the room and X entered it. On these facts, it is arguably reasonable to infer that D made the harassing phone call, since he had access to the telephone for three-quarters of the time within which the call was made, and P is only required to prove that D made the call by a preponderance of the evidence; that is, that it is more likely than not that D made the call.

{¶ 33} **Suppose, however, that there was a second telephone in the house that D and X occupied, in a different room, not the locked room, and that four men, including D and X, had access to the second telephone. Suppose, further, that all of the men had virtually identical motives for harassing P. The records of the telephone company establish only that the call was made from one of the two telephones at the house occupied by the four men. Now the proof that D made the harassing phone call requires the conjunction of two inferences: that the call was made from the locked room, and that it was D, not X, who made the call. Perhaps it would be reasonable, viewed separately, to infer that the phone call was made from the telephone in the locked room, because one could reasonably suppose that the harassing caller would not want to risk being overheard by**

someone else in the room. Assuming, however, that that would be a weak, if nevertheless reasonable, inference when viewed separately, it is easy to see that the conjunction of the two inferences would be too weak to permit a reasonable jury to conclude, by a preponderance of the evidence, that D was the harassing caller.

{¶ 34} On the other hand, if there was proof that only D had the key to the locked room, and if there were evidence from which it would be reasonable to infer that whoever made the harassing phone call would not have wanted to make the call from a phone where there was a risk of being overheard, then the conjunction of the two inferences would arguably be reasonable. What has changed? The inference that D made the call if the call was from the locked room is now very strong, since there is proof that D was the only person who had a key to the locked room. It is still inferential proof. There is no direct proof that D made the call. But it is sufficiently strong, when considered independently, that it can arguably suffice, when considered conjointly with the inference that the call was made from the locked room, to support proof, by a preponderance of the evidence, that D made the call.

{¶ 35} What must Haughey prove in the case before us? First, she must prove that there was an object foreign to the food she was served; second, she must prove that the foreign object was the agency that caused her tooth to break, i.e., that it was a hard object and that her tooth

contacting this hard object, other than the tooth being in a condition where even chewing soft food might result in its breaking, was the cause of the breakage; and third, that the foreign object causing her broken tooth was in the food as a result of Twin Group's negligent act or omission. There is some evidence tending to disprove the first element in this chain of proof. By her own admission, Haughey probed the food in her mouth with her tongue, but the only hard, non-food object she encountered was a piece of her tooth.

{¶ 36} The only fact that Haughey can prove directly, other than by inference, is that her tooth broke. Even though the breaking of a tooth is not a common occurrence when eating food, I agree that upon this record the chain of inferences upon which Haughey relies to prove her case is not sufficient to permit a reasonable factfinder to conclude, by a preponderance of the evidence, that Twin Group's negligence resulted in a foreign object's being present in the food it served to Haughey, and that the foreign object caused the breaking of Haughey's tooth.

{¶ 37} Accordingly, I concur in the judgment of this court.

WOLFF, J., concurs in concurring opinion.

Copies mailed to:

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