IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01801

BRIEAH S. PIGG, INDIVIDUALLY AND
ON BEHALF OF GARRETT KADE PIGG, A MINOR — APPELLANT

VS.

EXPRESS HOTEL PARTNERS, LLC
D/B/A HOLIDAY INN EXPRESS,
EXPRESS HOTEL PARTNERS, LLC,
BHARAT R. PATEL, ABC, DEF AND GHI — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE REPLY ARGUMENT

The underlying facts of this case have been clearly set forth in appellant's principal brief. The trial court incorrectly granted summary judgment to appellees. There is a genuine issue as to a material fact, requiring that the subject case be submitted to the jury for consideration. The minor child injured by the appellees' negligence did not contribute to his injuries and cannot be held legally responsible due to his age. Appellees' argument that *res ipsa loquitur* does not apply to premises liability actions fails as a matter of law. To the contrary, appellant cited a recent Mississippi federal court case in her principal brief which went ignored in appellees' brief that specifically analyzed the *res ipsa loquitur* doctrine in a premises liability claim.

Negligence may be proven by circumstantial evidence and appellant is not required to exclude all other possible causes for the injury to recover. In the subject case, it is more *probable* than *possible* that the mirror which fell and cut the minor child's cornea was not adequately secured to the door in the appellees' business. There is a genuine issue as to a material fact and a jury should be permitted to consider and infer appellees' negligence.

REPLY ARGUMENT

I. THE LOWER COURT ERRED IN GRANTING APPELLEES' SUMMARY JUDGMENT MOTION

As stated in appellant's principal brief, the facts established during discovery demonstrate that summary judgment should not have been granted for appellees. It is not disputed that appellant was an invitee on the appellees' premises. (Appellees' Brief at 8). As such, appellees owed a duty to appellant as an invitee to "keep the premises reasonably safe." *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004) (quoting, *Massey v. Tingle*, 867 So. 2d 235, 239 (Miss. 2004)). If an invitee is injured as a result of a breach of the duty owed, the invitee may seek recovery under a theory of negligence.

Appellant has the burden to prove appellees' negligence and may do so by circumstantial evidence. This Court has steadfastly held that negligence may be proved by circumstantial evidence where circumstances are such as to remove the case from the realm of conjecture and place it within the field of legitimate inference. *Weathersby Chevrolet Co. Inc. v. Redd Pest Control Co., Inc.*, 778 So. 2d 130, 133 (Miss. 2001)(citing, *Kussman v. V&G Welding Supply, Inc.*, 585 So. 2d 700, 703 (Miss. 1991), *Cadillac Corp. v. Moore*, 320 So. 2d 361, 366 (Miss. 1975)); see also *Leflore County v. Givens*, 754 So. 2d 1223, 1230 (Miss. 2000)(overruled on other

grounds)(citing, *K-Mart Corp. v. Hardy*, 735 So. 2d 975, 981 (Miss. 1999)); *Mississippi Valley Gas Co. v. Walker*, 725 So. 2d 139, 145 (Miss. 1998); *Downs v. Choo*, 656 So. 2d 84, 90 (Miss. 1995); *Dees v. Campbell*, 183 So. 2d 624, 626 (Miss. 1966); *Mississippi Winn-Dixie Supermarkets v. Hughes*, 247 Miss. 575, 585 So. 2d 734, 736 (1963); *Palmer v. Clarksdale Hosp.*, 206 Miss. 680, 698, 40 So. 2d 582, 586 (1949). As stated by the Mississippi Supreme Court in *Weathersby*, the rule regarding the proof of causation from circumstantial evidence is:

> Proof of the necessary factual causal connection may be by either direct or circumstantial evidence, but in the event the latter is used, it must be sufficient to make the plaintiff's asserted theory reasonably probable, not merely possible, and more probable than any other theory based on such evidence, and it is generally for the trier of fact to say whether circumstantial evidence meets this test.

Weathersby, 778 So. 2d at 133 (quoting, 57A Am. Jur. 2d Negligence § 461, at 441-42 (1989) (footnotes omitted))(emphasis added). In *Capital Transport Co., Inc. v. Segrest*, 181 So. 2d 111, 119 (Miss. 1965)(citing, *Matthews v. Carpenter*, 97 So. 2d 522 (Miss. 1957)), the Mississippi Supreme Court found that "[p]roof of the fact of negligence may rest entirely in circumstances; in other words, circumstantial evidence alone may authorize a finding of negligence." The *Segrest* court also stated, "where a case turns upon circumstantial evidence it should rarely be taken from the jury." *Id.*

Nonetheless, appellees would have this Court believe that in order for appellant to succeed on proving her negligence claim by circumstantial evidence, appellant must exclude every other reasonable hypotheses on how the accident could have happened. (Appellees' Brief at 12)(emphasis added). Appellees' argument is unfounded and presents an incorrect statement of law in the realm of civil litigation. Appellees' argument would only be correct if this litigation was a criminal matter. In 1906, the supreme court opined it was reversible error for the trial court in a civil matter to instruct the jury that circumstantial evidence was insufficient to support a verdict for plaintiff, unless it excluded every other hypothesis. *Brister et al. v. Illinois Central RR Co.*, 88 Miss. 431, 40 So. 325 (1906).

Burdens of proof differ in civil and criminal matters. In a civil case, the burden is upon the plaintiff to prove the material elements of negligence by a preponderance of the evidence. *S.C. Ins. Co. v. Keymon*, 2008 Miss. LEXIS 67 (Miss. 2008)(citing, *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007)). In a criminal matter, the burden is upon the State to prove the guilt of the accused beyond a reasonable doubt, which is a higher burden than the civil standard. *Hicks v. State*, 973 So. 2d 211 (Miss. 2007). The Mississippi Supreme Court stated in *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987), "[c]ircumstantial evidence is entitled to the same weight and effect as direct evidence and this Court has upheld convictions

based solely on circumstantial evidence." *Id.* (quoting, *Cardwell v. State*, 461 So.2d 754, 760 (Miss.1984)). The Court went on to state that "where the evidence of guilt is largely circumstantial, the State is required to prove the accused's guilt not only beyond a reasonable doubt, but to the exclusion of every other reasonable hypothesis consistent with innocence." *Guilbeau*, 502 So. 2d at 641 (citing, *Fisher v. State*, 481 So. 2d 203, 212 (Miss.1985); *Keys v. State*, 478 So.2d 266, 267 (Miss.1985)).

Appellees support their argument by citing a criminal case, not a civil matter, and fail to provide any other persuasive authority that the exclusion applies to civil litigation. Appellees' argument that appellant can not proceed under a theory of circumstantial evidence fails as a matter of law. Negligence may be proven by circumstantial evidence, that is "evidence of a fact, or a set of facts, from which the existence of another fact may reasonably be inferred." *Hughes*, 585 So. 2d at 736.

Appellant argues that appellees should have adequately inspected the mirrors attached to the doors in their business establishment frequented by the appellant and their failure to do so resulted in injury to appellant. The deposition testimony before this Court indicates that appellees did not inspect all of the mirrors on a regular basis (R. at 241-42) nor did the housekeeping staff check the mirror by asserting force. (R. at 229-31). It speaks volumes that Patal's testimony was that the hotel room should have been safe for a two year old child when left alone for a few minutes for the

child's parent to take a shower (R. at 233, 243-44) and that if the door to which the mirror was attached was bumped by a child's shoes or pushed into by a child, the mirror should not fall off. (R. at 234-42, 245). Further, Patel testified that it was foreseeable that if a mirror or glass fell, someone would get hurt. (R. at 246-47).

Undisputed testimony from Greg and Brieah Pigg (hereinafter "Greg" or "Brieah"), the minor's parents, also support the appellant's allegations of negligence. Greg and Brieah entered two of the rooms near the one they occupied to inspect the mirrors attached to those bathroom doors. (R. at 249-52, 203-04, 206, 207). One hundred percent of the rooms checked by Greg and Brieah were found to have loose mirrors attached to the bathroom doors. (R. at 249-52, 203-04, 206, 207). The fact that two of the hotel rooms near the appellant's room had loose mirrors certainly is circumstantial evidence in support of the negligence claims against the appellees and presented a question of fact for the jury to render a decision.

It is not disputed that there were no adult witnesses to the accident. However, the testimony concerning the location of the broken mirror post accident supports the appellant's theory that the mirror was not securely fastened to the door and does not support the appellees' speculation that the two year old child slammed the bathroom door into the wall, or rapidly maneuvered the door back and forth, or hit the door with his fists or head. Further, all testimony contained in the record indicates that the door

was not slammed shut or into the wall. The housekeeper testified that there is a stopper is in place to keep the door from slamming into the wall (R. at 225-26) and Brieh testified that the only sound she heard was the mirror crashing (R. at 198-200). Even if the child tried to push the door back, the stopper would have prevented him from doing so and it would have made a noise heard by his mother. Testimony by Brieah was that her son's hand was on the door knob, not the door itself. (R. at 194-95). There is no testimony indicating that there were injuries to the child's hands or fists which negates the appellees' speculation that the child broke the mirror with his fists. Likewise, there was no injury to the child's scalp or forehead indicative of the child butting head against the mirror. The testimony is that the child was bleeding from a cut near his right eye and on his arms. (R. at 167-70, 200).

Further, all testimony supports the fact that the door was never shut and certainly not slammed. Brieah testified she found her two year old son lying on his back on the bathroom floor with glass on his clothes, on the carpet outside of the bathroom and around the child on the tile floor of the bathroom itself. (R. at 198-200). She testified that her son did not get the door shut, which statement was agreed to by appellees' counsel. (R. at 198-99). The placement of the glass supports appellant's contention that the bathroom door was neither slammed open or shut. It must be sufficient to make the appellant's asserted theory reasonably probable, not merely

possible, and it is generally for the trier of fact to say whether circumstantial evidence meets this test. *Mississippi Valley Gas Co. v. Walker*, 725 So. 2d 139, 145 (Miss. 1998).

The facts support the appellant's position that it is probable that the mirror was not adequately and securely fastened to the bathroom door, thus rendering the premises unsafe. The mirror was maintained by the appellees and therefore, it is more probable than not, that the appellees' negligence in inspecting and maintaining the mirror (as evidenced by the two rooms inspected by Greg and Brieah) to the door caused the injury to the two year old child. As such, a question as to a material fact exist and as such, the award of summary judgment was in error. Pursuant to *Mississippi Valley Gas Co. v. Walker* and the other identified circumstantial evidence cases, the jury sitting as the trier of fact is to analyze the circumstantial evidence and determine what inference, if any, it will give it.

II. *RES IPSA LOQUITUR* IS APPLICABLE TO THE SUBJECT PREMISES LIABILITY CASE.

Appellees' continued argument that *res ipsa loquitur* is inapplicable in premises liability cases is simply incorrect. The doctrine is rooted in a premises liability case. In 1863, a barrel of flour rolled out of a warehouse window and fell upon a passing pedestrian. *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299

(1863). At its inception which evolved, it was a "reasonable conclusion, from the circumstances of [the] unusual accident, that it was probably the defendant's fault." W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 39 at 243 (5th ed. 1984)(citing, *Byrne*). Case law from Mississippi and other jurisdictions do not support appellees' position. Generally, *Byrd v. Sam's East, Inc.*, 2007 U.S. Dist. LEXIS 81298 (October 31, 2007); *J.C. Penney Co. v. Evans*, 172 Miss. 900,904-06, 160 So. 779, (1935); *Levit's Jewelers, Inc. v. Friedman*, 410 S.W. 2d 947 (Tex. Ct. Civ. App. 1967); *Lipsitz v. Schechter*, 142 N.W. 2d 1 (Mich. 1966); *Both v. Harband*, 331 P. 2d 140 (Cal. App. 1958); *Kelly v. Laclede Real Estate & Invest. Co.*, 155 S.W. 2d 90 (Mo. 1941); *McCloughry v. Finney*, 37 La. Ann. 27 (La. 1885). In appellant's principal brief, she relied upon a recent Mississippi federal court case that analyzed that applicability of *res ipsa loquitur* in a premises liability action. *See, Byrd v. Sam's East, Inc.*, 2007 U.S. Dist. LEXIS 81298 (October 31, 2007). The district court found the *res ipsa loquitur* doctrine was inapplicable under the facts of the case but did not determine that *res ipsa loquitur* was inapplicable in all premises liability cases. *Byrd*, at *6 (emphasis added). Because the plaintiff could not prove that it was *probable* instead of just *possible* that the store's employee placed the box in the location where it fell and hit her, the doctrine was inapplicable. *Id.* (emphasis in original). Interestingly, appellees failed to address this recent case in their brief.

In contrast to the *Byrd* case, the appellees, and/or its employees, were the only parties responsible for maintaining and inspecting the mirrors to make sure that the objects were adequately fastened to the doors. Further as shown by the testimony of the Piggs regarding their inspection of the adjacent rooms, it is *probable*, rather than *possible*, that the appellees' negligence caused the accident and thus, takes it out of the realm of conjecture and places it within the field of legitimate inference.

"It has been said that where *res ipsa* is applicable, a presumption of negligence arises requiring the defendant to come forward with an explanation." *Read v. Southern Pine Elec. Power Assoc.*, 515 So. 2d 916, 920 (Miss. 1987). In the case at bar, the appellees cannot and have not offered any other explanation for the mirror to fall other than to speculate and place blame on a mere two year old child.

The doctrine of *res ipsa loquitur* (literally, "the thing speaks for itself") permits the jury to infer that the appellees caused the appellant's harm if three elements are present: (1) the instrumentality causing the damage was under the exclusive control of the defendants, (2) the occurrence was such that in the ordinary course of things would not happen if those in control used proper care, and (3) the occurrence was not due to any voluntary act on the part of the plaintiffs. *Read*, 515 So. 2d at 919-20 (citing, *Clark v. Vardaman Mfg. Co.*, 162 So. 2d 857 (Miss. 1964), *Palmer v. Clarksdale Hospital*, 206 Miss. 680,694, 40 So. 2d 582, 584 (1949)). In the case at

bar, all three elements of *res ipsa loquitur* have been met. The mirror was attached to the bathroom door in the appellees' hotel room. It was in the appellees' exclusive control when it was attached to the door and certainly when it was allegedly inspected and maintained. The broken mirror caused harm to appellant and, in the ordinary course of things, should not have fallen. If the mirror was adequately and securely fastened to the door, it should not have fallen at all and certainly not if it was opened or closed by a two year old child. As indicated by Patel, an adequately secured mirror should not fall if it is pushed or bumped by the shoe of a small child. (R. at 245). Concerning the third element, appellant prays this Court reverses the lower court finding it erred in its ruling that the child may have made a voluntary act which caused the mirror to fall. The child, at the time of the accident, was only two years old and as a matter of law, incapable of voluntarily acting to his detriment.

Appellees make a slight argument in their brief that the mirror was not in their exclusive control at the time of the injury (Appellees' Brief at 17). As appellant discussed at length in her principal brief, "control" is a flexible term. It has been found by the Mississippi Supreme Court that the control of the instrumentality required is at the time of the negligent act, i.e. the failure to maintain and adequately secure and fasten the mirror to the door, not at the time of the injury itself. See, *Johnson v. Coca-Cola Bottling Co., Inc.*, 239 Miss. 759, 765-66, 125 So. 2d 537

(1960); W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 39 at 250 (5th ed. 1984). There is no question that the mirror was in the exclusive control of the appellees. Further, when a guest exits the room, the appellees' staff clean and allegedly inspect the room.

Although the Mississippi appellate courts have not considered the ramifications of the actions of a child of tender years in a *res ipsa loquitur* case, our sister state of California has. The Supreme Court of California provides persuasive case law to support appellant's position that a child of tender years cannot be held to contribute to the injury in a *res ipsa loquitur* scenario. The California court considered a similar situation as the case at bar in 1964 when it ruled on a personal injury case involving a child nearly four years old who was injured while attending a private nursery school. *Fowler v. Annabelle Seaton*, 61 Cal. 2d 681, 683, 687-88, 690, 394 P. 2d 697, 698, 700-01 (1964). The child was turned over to the private preschool nursery in a healthy condition and was returned to her parents later the same day in a seriously injured condition. *Id.* at 687-88. The California Supreme Court held that *res ipsa loquitur* should have been applied to the case and reversed the lower court which had previously refused to do so and dismissed the litigation. *Id.* at 686. The court stated that the test to connect the defendant with negligence without an eyewitness or direct evidence was "whether a reasonable man could reach the conclusion from the

evidence offered that it was more likely than not that the injury involved was the result of negligence on the part of defendant." *Id.* at 687. As with the case at bar, "*res ipsa loquitur* may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent and that such negligence caused the injury." *Id.* The *Fowler* court stated in *res ipsa* cases, that it was incumbent on the plaintiff that the plaintiff's actions did not contribute to the injuries. *Id.* at 690. The court determined that "it was shown that plaintiff is of an age that, as a matter of law, she could not be guilty of contributory negligence." *Id.* Thus, she did not contribute to her injuries. *Id.* The California Supreme Court reversed the lower court and determined that a jury could find that the doctrine of *res ipsa loquitur* was applicable and it was error to have granted the nonsuit. *Id.*

Likewise, the Supreme Court of Rhode Island determined that *res ipsa loquitur* was applicable in a premises liability action at a grocery store when a minor child was injured by a stack of falling butter. *Motte v. First Nat'l Stores, Inc.*, 70 A. 2d 822, 824-26 (R.I. 1950). A jury awarded a verdict in favor of plaintiff. *Id.* at 823. Although witnesses disputed how the accident occurred (whether the child was simply a bystander, was reaching for the butter or whether she climbed on the stacks of butter), the appellate court affirmed the award and the application of *res ipsa loquitur*. *Id.* at 823-24, 827.

In 1966, the Supreme Court of Missouri evaluated a *res ipsa loquitur* case involving an injury to a child. *Walsh v. Phillips*, 399 S.W. 2d 123, 125-26, 128-29 (Mo. 1966). The minor child and her parents rented an apartment in a building owned by defendant. *Id.* at 125. The building included an ordinary wood screened door hung by hinges which was used by all tenants. *Id.* On the day of the accident, the minor child ran at the screen door, turning her head and body to her left, striking the door with the right side of her body and pushing the door out to an approximate 100 degree angle. *Id.* at 126. The action was witnessed by the child's babysitter who indicated that a "child will do that sometimes" concerning the way the child opened the door. *Id.* The child was struck in the eye by an unknown sharp object when she opened the door, either the sharp end of the spring that held the door or the screw eye that held the spring to the door jamb. *Id.* The defendants contended that there could have been several hypotheses explaining how the spring broke from the door jamb, including the unusual manner in which the child opened the door on the day of the injury or her past abuse on the door, neither of which it would have been responsible for. *Id.* at 127. The court concluded that defendant's position was not persuasive and held that "a plaintiff in a *res ipsa loquitur* case [was] not required to exclude every other reasonable theory of nonliability on the part of defendant." *Id.* at 128 (citing, *Littlefield v. Laughlin*, 327 S.W. 2d 863, 866 (Mo. 1959), *Bone v. General*

Motors Corp., 322 S.W. 2d 916, 921 (Mo. 1959), *Adam Hat Stores, Inc. v. Kansas City, Missouri*, 316 S.W. 2d 594, 600 (Mo. 1958)).

Each of the above cases provide persuasive authority for the case at bar, specifically the *Fowler* case. Appellant is unaware of any factually similar cases to the one at bar that has been analyzed by the Mississippi appellate courts. In the case before this Court, the injured child was a mere two years of age. This Court stated previously stated that *prima facie,* a child of tender years is incapable of exercising judgment and discretion. *Westbrook v. Mobile & Ohio R.R. Co.*, 66 Miss. 560, 568 6 So. 321 (1889). The tender years doctrine was later expanded by the Mississippi Supreme Court when it stated:

> The [plaintiff], on account of his tender age, is *prima facie* presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence for his failure, if such there was, to exercise due care for his safety. This presumption may be overcome by proof, in which event it becomes a question of fact for the jury. Even when chargeable with contributory negligence, a child of the tender age of [plaintiff] is not held to the same degree of care as is required of adults under similar circumstances, but only such care as it is capable of exercising, taking into consideration its age, experience, knowledge, and intelligence.

Potera v. Brookhaven, 95 Miss. 774, 783 (1909). As appellant stated in her principal brief, the tender years doctrine has been upheld and followed by other cases, citing

Skelton v. Twin County Rural Elec. Assoc., 611 So. 2d 931 (Miss. 1992); *Murchison, a minor v. Sykes*, 223 Miss. 754, 78 So. 2d 888 (1955)(holding that a nine year old child was of tender years and incapable of contributory negligence), *Hinds, Director General of RR, et al. v. Moore, et. al.*, 124 Miss. 500; 87 So. 1 (1920); *Mayor of Vicksburg v. McLain*, 67 Miss. 4, 14 6 So. 774, 775-76 (1889). Following the California high court's ruling in *Fowler*, appellant's minor son could not have contributed to his injury. The doctrine of *res ipsa loquitur* is applicable and all elements have been met.

The appellees were negligent and did not keep their premises reasonably safe. As such, the duty owed to the invitee appellant was breached. The door housing the mirror was in the appellees' hotel and under their exclusive control. The mirror would not have fallen but for the appellees' negligence. The appellant did not contribute to or cause the mirror to fall. Furthermore, as a matter of law, the minor child was incapable of contributing to his injury. Clearly, the injury to the child's eye is related to the falling glass. The appellees' own witness testified that she saw damage to the child's right eye caused by the falling glass and that he was crying. (R. at 167-70). Appellees have not asserted any other theory to explain the causation of the injury to the minor's eye.

Res Ipsa Loquitur is applicable to infer negligence on the part of appellees in the case at bar. The lower court erred when it ruled that *res ipsa loquitur* did not apply in this case. Appellant prays that this Court will reverse the trial court and allow the case to proceed to trial.

CONCLUSION

For the reasons set forth in Appellant's principal and reply briefs, Brieah S. Pigg, Individually and on behalf of Garrett Kade Pigg, a minor, respectfully submits the lower court committed errors of law in its grant of summary judgment and its failure to be persuaded by the doctrine of *res ipsa loquitur.* Brieah S. Pigg respectfully requests that this Court reverse the judgment entered by the lower court, and allow the case to proceed to trial.

Respectfully submitted,

BRIEAH S. PIGG, INDIVIDUALLY AND ON BEHALF OF GARRETT KADE PIGG, A MINOR

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CERTIFICATE OF SERVICE

I, Victoria Hardy Rundlett, of counsel for Appellant Brieah S. Pigg, Individually and on Behalf of Garrett Kade Pigg, a Minor, do hereby certified that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant Brieah S. Pigg, Individually and on Behalf of Garrett Kade Pigg, a Minor to:

Honorable Lee J. Howard
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THIS, the 21st day of March, 2008.

Victoria Hardy Rundlett
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5239-113808/