

# IN THE SUPREME COURT OF TEXAS

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No. 99-0121  
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DEANA ANN LOZANO, PETITIONER

v.

JUAN ANTONIO LOZANO, SR., BLANCA SUAREZ LOZANO, MONICA I. LOZANO,  
SANDRA WARNER, EDUARDO A. LOZANO, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS  
=====

**Argued on April 5, 2000**

JUSTICE BAKER, joined by JUSTICE ABBOTT, concurring in part and dissenting in part.  
JUSTICE ENOCH, JUSTICE HANKINSON, and JUSTICE GONZALES join in JUSTICE BAKER's opinion  
except as to Sandra Lozano Warner.

I agree with the Court's decision today except for its conclusion that there is not legally  
sufficient evidence to support the verdict against Sandra Lozano Warner. Therefore, I concur with  
the Court's judgment except for Sandra's culpability. I also agree with Chief Justice Phillips'  
discussion about the equal inference rule.

## I. APPLICABLE LAW

## **A. THE FAMILY CODE**

Chapter 42 of the Texas Family Code allows damages for interference with a possessory interest in a child. TEX. FAM. CODE § 42.002. The Family Code also provides that a person who aids or assists in interfering with another person's possessory right is jointly and severally liable for damages. TEX. FAM. CODE § 42.003. Liability may attach if the person: (1) had actual notice of the existence and contents of the order providing for a possessory right; or (2) had reasonable cause to believe that the child was the subject of such an order and that the person's actions were likely to violate that order. TEX. FAM. CODE § 42.003(b)(1)(2); *see also Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992).

## **B. STANDARDS OF REVIEW**

### **1. No Evidence Review**

In reviewing a no evidence claim, we must view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Weirich*, 833 S.W.2d at 945; *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). If more than a scintilla of evidence exists, it is legally sufficient. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

### **2. Circumstantial Evidence**

In situations where no direct evidence exists to prove a vital fact, we may uphold a jury's finding on circumstantial evidence as long as the jury could fairly and reasonably infer that finding

from the facts. *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995). A jury may consider circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe. *Benoit v. Wilson*, 239 S.W.2d 792, 797 (Tex. 1951). A party may use circumstantial evidence to establish any material fact, but that evidence must transcend mere suspicion. *Browning-Ferris, Inc.*, 865 S.W.2d at 928. The material fact must be a reasonable inference from the known circumstances. *Joske v. Irvine*, 44 S.W. 1059, 1063-64 (Tex. 1898). Rather than view each piece of circumstantial evidence in isolation, the reviewing court must look at the totality of the known circumstances. *Barksdale v. Dobbins*, 141 S.W.2d 1035, 1038 (Tex. Civ. App.--Texarkana 1940, writ ref'd); *Felker v. Petrolon, Inc.*, 929 S.W.2d 460, 464 (Tex. App.--Houston [1st Dist.] 1996, writ denied); *Brinegar v. Porterfield*, 705 S.W.2d 236, 238-39 (Tex. App.--Texarkana), *aff'd*, 719 S.W.2d 558 (Tex. 1986); *see also Long v. Long*, 125 S.W.2d 1034, 1036 (Tex. 1939).

## II. ANALYSIS

### A. THE EVIDENCE

I agree with Chief Justice Phillips' assessment of the evidence against Blanca and Juan, and therefore do not repeat it here. But because I disagree with his assessment of the evidence against Sandra, Monica, and Alex, I summarize below the totality of the known circumstances pertaining to these defendants.

- When the abduction occurred, Junior did not own a car, did not have a steady job, and was behind in his temporary child support payments.
- Junior had never been able to support himself without assistance from his parents.

- Sandra gave Junior a \$1,000 check.
- Approximately three weeks later, on April 9, 1995, Junior abducted Bianca.
- Junior cashed Sandra's check at a Houston credit union the next day, April 10.
- Within five months after Junior's disappearance, Alex borrowed about \$3,000 on his credit card, a sum totaling more than half of his earned income for that year.
- In response to Deana's discovery, Sandra, Monica, and Alex, like the other family members, asserted a Fifth Amendment privilege.
- Sandra, Monica, and Alex, like the other family members, refused to give the names and addresses of relatives and friends in Mexico on Fifth Amendment grounds.
- Sandra refused to identify any person assisting her in answering the interrogatories and refused to reveal her employer's identity on Fifth Amendment grounds.
- Thousands of posters with pictures of Junior and Bianca were posted around Baytown.
- Many posters were taken down and had to be replaced.
- Monica admitted to removing two posters.
- Alex admitted to removing one poster.
- Sandra went with Blanca to a doctor's office where a poster was displayed and asked that it be taken down.
- When the two employees in the doctor's office refused, Blanca or Sandra asked if their decision would change if they knew Deana had abused the baby.
- Sandra, Monica, and Alex, along with the other Lozanos, admitted they had actual knowledge of the court order awarding Deana possession.

## B. SANDRA’S, MONICA’S, AND ALEX’S LIABILITY

Deana argues that the Lozanos, including Sandra, Monica, and Alex, were involved in Junior’s abduction scheme and that their involvement may reasonably be inferred from their conduct. She points to their refusing to share information with her, providing financial assistance to Junior, delaying discovery, asserting Fifth Amendment privileges to resist her requests for discovery,<sup>1</sup> undermining her efforts to locate Bianca by removing posters, and slandering her.

We must view the evidence in a light that tends to support the jury’s finding of the disputed facts and disregard all evidence and inferences to the contrary. *See Weirich*, 833 S.W.2d at 945. We must also view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances. *Barksdale*, 141 S.W.2d at 1038; *Felker*, 929 S.W.2d at 464; *Brinegar*, 705 S.W.2d at 238-39; *see also Long*, 125 S.W.2d at 1036. Following these standards, the totality of the circumstances viewed in the light most favorable to the jury’s verdict supports the jury’s verdict against Sandra, Monica, and Alex.

Chief Justice Phillips concludes that the jury was unreasonable in inferring from these facts that Sandra aided or assisted Junior in abducting Bianca and that there is no “logical bridge” between these facts and the jury’s finding. Despite Chief Justice Phillip’s inability to see it, common sense provides the “logical bridge” between these circumstances and the jury’s finding that Sandra aided or assisted Junior in abducting Bianca. Chief Justice Phillips misses the bridge because, although he states the correct standard of review, he examines each piece of evidence in isolation. *Taken*

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<sup>1</sup> In a civil case, the jury may draw reasonable inferences from a party’s assertion of the Fifth Amendment privilege. TEX. R. EVID. 513(c); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Texas Dep’t Pub. Safety Officers Ass’n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

together, these facts support the jury’s finding against Sandra. *See Brinegar*, 705 S.W.2d at 239 (“A single factor standing alone may be insufficient, but when joined by other factors constituting a significant whole, the combination can justify a conclusion.”); *Barksdale*, 141 S.W.2d at 1038 (“All of the circumstances shown by the evidence should be considered, and even though none of the circumstances standing alone would be sufficient to show undue influence, if when considered together they produce in the ordinary mind a reasonable belief that undue influence was exerted in the procurement of a will, they are sufficient to sustain such conclusion.”)(citations omitted).

Chief Justice Phillips dissents to the Court’s conclusions about Monica and Alex on the ground that there is no evidence that Alex and Monica’s actions *successfully* aided or assisted Junior. In doing so, he creates an additional and higher burden of proof that the statute does not contemplate.

In construing a statute, we ascertain legislative intent in the plain and common meaning of the words used. TEX. GOV’T CODE § 311.011; *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000). Thus, we cannot enlarge the unambiguous language of a statute beyond its ordinary meaning. *See Montgomery I.S.D. v. Davis*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000); *Soroklit v. Rhodes*, 889 S.W.2d 239, 241 (“In applying the plain and common meaning of the language in a statute, courts may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning.”). But Chief Justice Phillips does just that when he interprets “aid or assist” to mean *successfully* aid or assist. The plain language of the statute does not include a requirement that the aid or assistance be successful.

Further, Chief Justice Phillip’s interpretation of aid or assist frustrates legislative intent. The Legislature enacted chapter 42 as part of a comprehensive attack on parental kidnapping. *See Sampson, Texas Family Code Symposium Supplement—Title 2. Parent and Child*, 17 TEX. TECH L.

REV. 1065, 1268 (1986). Chief Justice Phillip's construction of aid and assist would weaken this attack by rendering section 42.003 useless. It would be virtually impossible for custodial parents to prove that a defendant's actions were successful in helping to take, retain, or conceal a child in violation of the parent's right to possession. For example, Chief Justice Phillips states that there is no evidence that Monica's taking down two posters had any effect on the efforts to locate Junior and Bianca. But how could anyone know whether the two posters could or would have alerted someone who had seen Junior and Bianca and prompted them to call the authorities? The burden of proof the Chief Justice creates would be difficult enough in cases in which the child has been found but is impossible to meet in cases, like this, where the child remains missing.

### III. CONCLUSION

Viewing the evidence in the light most favorable to the jury's inferences and in the light of all known circumstances, there is some evidence to support the jury's verdict against Sandra, Alex, Monica, and Blanca. *See Weirich*, 833 S.W.2d at 945. Therefore, I dissent to the Court's decision that there is no evidence to support the jury's fact finding about Sandra's culpability. I concur with the remainder of the Court's opinion.

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James A. Baker, Justice

Opinion Delivered: December 14, 2000