

IN THE SUPREME COURT OF TEXAS

No. 99-0121

DEANA ANN LOZANO, PETITIONER

v.

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

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

JUSTICE HECHT, joined by JUSTICE OWEN, concurring in part and dissenting in part.

In my view, a majority of the Court in Part III of CHIEF JUSTICE PHILLIPS' OPINION misstates and misapplies settled law concerning the legal effect of circumstantial evidence. I also think that a majority of the Court in JUSTICE BAKER's opinion misconstrues section 42.003 of the Family Code to impose an unreasonable risk of liability for parental kidnapping on innocent family members. The record contains no evidence that Junior's younger sister and brother, Monica and Alex, *actually* aided him in abducting his daughter, Bianca, and therefore no basis exists for a judgment against them. I agree that there is some evidence, albeit slight, that Junior's mother assisted him, although not entirely for the reasons CHIEF JUSTICE PHILLIPS gives, and I agree with him that there is no

evidence that Junior was assisted by his father or older sister. Accordingly, I concur in the Court's decision in part and dissent in part.

Under section 42.003 of the Family Code, a person who aids or assists in the taking, retention, or concealment of a child in violation of another's possessory right may be liable for any damages caused in certain circumstances.¹ By the express language of the statute, *intent* to aid or assist is not enough; a person must *actually* aid or assist. For example, a person who provides a vehicle for use in abducting a child is not liable under the statute if the vehicle is not actually used. Proof of intent to assist is necessary, at least in this case, because the trial court instructed the jury that a defendant must act knowingly, and since there was no objection to this instruction, the evidence must be measured against it as well as the statute.² But proof of intent is not sufficient for liability; proof of actual assistance is also necessary. Thus, for a defendant here to be liable there must be evidence that he or she knew particular conduct would aid or assist Junior and that it actually did so.

A majority of the Court, joining in JUSTICE BAKER's opinion, holds that evidence that a person has *actually* aided or assisted in violating another's possessory right to a child is unnecessary. Evidence that the defendant's actions might conceivably have aided or assisted the violation is enough to establish liability, the majority says. Their view rewrites section 42.003 to impose liability on any person whose actions might have aided or assisted in the violation of another's

¹ *Ante* at ___ n.1.

² *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000); *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985).

possessory right to a child. Thus, in the view of a majority of the Court, a person who removes one poster seeking information about a kidnapping, out of thousands of posters placed throughout the community, is some evidence for holding that person liable for aiding or assisting in the kidnapping without any evidence that the person's actions could actually have aided or assisted the kidnapper. The jury is free to find liability or not, depending largely on what they think of the defendant. As this case illustrates, the majority's view threatens to impose enormous liability on persons who were never involved in a family member's wrongful conduct.

The issue is not whether proof of aiding and assisting can be made by circumstantial evidence. As in any case, it can be. Aiding or assisting may be inferred from other facts proved. It is a rule of logic, as well as law, that when the existence of a fact does not make one possible inference more probable than another, no inference can be drawn at all. For example, one cannot infer from a photograph showing the sun on the horizon that it is either sunrise or sunset; each is a possibility — indeed, they are the only possibilities — but if nothing else is known, neither possibility is any more likely than the other. Nor can the truth be ascertained by assessing the credibility of someone looking at the photograph. The fact that he thinks the sun is setting and is a congenital liar does not make it less likely that the photograph actually shows a setting sun. The issue is not credibility but logic.

A majority of the Court in CHIEF JUSTICE PHILLIPS' opinion acknowledges this "equal inference" rule, but then in a remarkable semantical sleight, abolishes it. Quoting from the Court's

opinion three years ago in *Hammerly Oaks, Inc. v. Edwards*,³ CHIEF JUSTICE PHILLIPS' opinion states:

The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence "which could give rise to any number of inferences, none more probable than another."⁴

His opinion then cites its 1984 opinion in *Litton Industrial Products, Inc. v. Gammage*⁵ and adds:

The applicable rule was succinctly stated in *Litton* as follows: "When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred."⁶

These two statements, each clear as a bell, are then turned to mush in six short sentences:

Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.

Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.⁷

³ 958 S.W.2d 387, 392 (Tex. 1997).

⁴ *Ante* at ____.

⁵ 668 S.W.2d 319, 324 (Tex. 1984).

⁶ *Ante* at ____.

⁷ *Ante* at ____ (citations omitted).

Most of what this passage says is true, but it is not a restatement of the “equal inference” rule. It is true: that circumstantial evidence so slight that any plausible inference is purely a guess is no evidence; that circumstantial evidence is not legally insufficient merely because it supports more than one reasonable inference; that a fact finder may be required, and is entitled, to choose between competing reasonable inferences; and that this choice may require assessments of credibility. But these propositions do not resolve the issue here, which is: if circumstantial evidence supports two reasonable inferences, neither of which is any more likely than the other, can a jury pick one? The “equal inference” rule says no. It is not enough that one inference is as reasonable as another; to be given weight, an inference must be more probable than others. “Reasonable” is not the same as “probable”. The “equal inference” rule stated in *Hammerly Oaks* and *Litton* (as well as other cases, noted below), expressly requires that an accepted inference not only be reasonable but that it be probable.

The passage quoted above from CHIEF JUSTICE PHILLIPS’ opinion, distilled to its essence, says: “Properly applied,” — which is code for “applied differently than the words appear to require” — “the equal inference rule does not really mean what it says. If more than one reasonable inference can be drawn from a fact or circumstance, and neither is more probable than the other, then a jury can pick whichever one it wants, and it may choose the inference urged by a party who is otherwise more credible.” A majority of the Court cannot take its readers very seriously if it expects them to believe that a proper application of the “equal inference” rule permits the very thing the rule expressly prohibits.

Of course, as CHIEF JUSTICE PHILLIPS’ opinion says, circumstantial evidence so slight that any plausible inference is purely a guess is no evidence at all. Although one cannot know from the fact that the sun is on the horizon that it is sunrise or sunset, at least those are the only two possibilities. If all one knows is that the sun is visible, or that someone *thinks* the sun is visible, even less can be inferred about the time of day. But the strength or weakness of the circumstantial evidence — the fact actually proved from which an inference, not proved, is to be drawn — is not the burden of the “equal inference” rule. Rather, the concern of that rule is with the logic of drawing inferences from evidence, however strong that evidence is. The illustration I have used, according to a majority of the Court, should be analyzed as follows:

If circumstantial evidence — that is, the sun is on the horizon — will support more than one reasonable inference — that is, the sun is either setting or rising — it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.

Evidence of the sun on the horizon may be indisputable. And it is certainly reasonable to infer from that fact that it is either rising or setting. Each possibility is equally reasonable, and equally likely, and for that reason it is impossible to tell which is true. It is silly to think that the observer’s credibility will help decide. Nor do jurors have any divine powers here. Jurors are certainly entitled to consider evidence, weigh credibility, and draw inferences, but they cannot do the impossible — draw inferences when logic simply does not allow it.

There may, of course, be other evidence to indicate whether the sun is rising or setting, and the weight of that evidence may turn on its credibility. A witness may come forward to testify that the photograph was taken toward the east, or a feature of the landscape may be such that it was

probably taken toward the west. A jury may disbelieve the witness and credit the other evidence, or vice versa, and find that the credible evidence makes one reasonable inference more probable than the other. But it is precisely such evidence that is missing in this case with respect to Monica and Alex. The jury could disbelieve their explanations for taking down a total of two posters and infer that they intended to aid Junior, but there is no evidence whatever in this record that they actually *did* aid Junior. Neither the evidence that posters were taken down nor the inference that they were taken down to aid Junior makes it more likely or less likely that Junior was or was not aided.

This Court has stated and applied the “equal inference” rule correctly in at least nine cases in the past twenty-five years. CHIEF JUSTICE PHILLIPS’ opinion briefly examines one of them and ignores the rest. Even a cursory review of these cases demonstrates the flaws in the majority’s treatment of the present case.

In *Hammerly Oaks, Inc. v. Edwards*, one issue was whether a leasing agent was sufficiently in charge of an apartment complex to be a vice principal of the owner.⁸ The circumstantial evidence offered to prove the agent’s standing was that she was alone in her office when the events in question occurred. That fact, we concluded, could not support an inference that she was a vice principal because it was just as likely that she was only a secretary or receptionist.⁹ We added: “A jury may not infer an ultimate fact from such evidence.”¹⁰

⁸ 958 S.W.2d at 392.

⁹ *Id.*

¹⁰ *Id.*

In *Continental Coffee Products Co. v. Cazarez*, we held that a jury could infer retaliatory discharge from evidence that the employer's stated reason for terminating the employee was false.¹¹ But we also observed that the same inference of retaliatory motive could not be drawn from evidence that the employer had asked job applicants whether they had ever received compensation, or evidence that the employer doubted that the employee's injury at issue was job-related, since the employer was legally entitled to do both.¹²

In *Blount v. Bordens, Inc.*, the issue was whether two men killed in a motor vehicle accident had a community of pecuniary interest sufficient for a joint enterprise.¹³ The men were hauling two racehorses to Texas when their pickup collided with a milk truck. The father of one testified that his son had said before he left to pick up the horses that when he returned he would be able to "take care of" an insurance payment due on his car. We concluded that the father's testimony would not support an inference that his son was to be compensated, along with the other man on the trip, for hauling the horses to Texas. Rather, we said, the testimony "could give rise to any number of inferences, none more probable than another." That is, the son may well have meant nothing more by his statement to his father than that he would pay his bills when he returned. We added: "A jury may not infer an ultimate fact from such evidence."¹⁴

¹¹ 937 S.W.2d 444, 452 (Tex. 1996).

¹² *Id.*

¹³ 910 S.W.2d 931, 932-933 (Tex. 1995) (per curiam).

¹⁴ *Id.* at 933.

In *Transport Insurance Co. v. Faircloth*, a minor's parents were killed in a traffic accident.¹⁵ Later the same day an adjuster met with the minor and a friend of hers to discuss settling her wrongful death claim. The adjuster also recommended attorneys that could represent the minor.¹⁶ The minor actually retained a different attorney, one who was not experienced in wrongful death claims, and the minor's friend was appointed her guardian. The attorney was experiencing financial problems, and the guardian may have sought to profit by his appointment, but the insurer was not aware of either of these circumstances. The claim was settled. Later, when the minor achieved the age of majority, she sued the insurer alleging that it had conspired with her guardian and her attorney to persuade her to settle her claim for less than it was worth. We concluded that the existence of a conspiracy could not be inferred from this evidence because there was no indication that the insurer knew of the attorney's and guardian's circumstances or that it was in any way connected with their actions.¹⁷ "In short," we said, "no evidence or any inference from it makes a conspiracy conclusion more probable than not."¹⁸

In *Browning-Ferris, Inc. v. Reyna*, the plaintiff sued a competitor for tortiously interfering with his street-sweeping contract with the State.¹⁹ The plaintiff offered evidence of mistreatment by the State and a comment by a State employee that the State was working with the defendant "to

¹⁵ 898 S.W.2d 269, 272 (Tex. 1995).

¹⁶ *Id.* at 278-279.

¹⁷ *Id.* at 279.

¹⁸ *Id.*

¹⁹ 865 S.W.2d 925, 926 (Tex. 1993).

get [the plaintiff] out of the contract.”²⁰ We held that the only inference that could be drawn from this evidence was that the defendant was cooperating with the State; it could not be inferred that the defendant was inducing the State to breach its contract with the plaintiff. In answer to the plaintiff’s argument that the defendant’s inducement could be inferred from the circumstantial evidence taken as a whole, we observed: “To the contrary, we believe that some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.”²¹

Two forfeiture cases illustrate the necessity that one inference be more probable than others before it can follow from other facts. In *\$56,700 v. State*, the State sought forfeiture of currency it claimed was derived from the sale of cocaine.²² The money was found in a residence by undercover officers who gained entrance under a search warrant. Officers had had the residence under surveillance for over a month, but there was no indication that anything suspicious had happened. The money was found in a bank bag in a safe located in a bathroom that was in a loft area of the residence.²³ There was cocaine in the safe, although not in the bank bag, and a large amount of cocaine, some of which was pure, in the bathroom. There was cocaine, marijuana, and other drug paraphernalia in the adjacent bedroom and closet. The drug paraphernalia included a funnel, a grinder, scales, vials, and a substance commonly used to cut pure cocaine to “street quality”. There was also a magazine article on laundering drug money. The homeowner, an architect, testified that

²⁰ *Id.*

²¹ *Id.* at 927.

²² 730 S.W.2d 659, 660 (Tex. 1987).

²³ *Id.* at 661.

he had obtained the money in his work.²⁴ We held that the evidence would not support an inference that the money was derived from the sale of cocaine because the inference that the homeowner was merely a purchaser and user of drugs was equally consistent. We stated, as we often have: “When circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred.”²⁵ We reached the opposite conclusion in *State v. \$11,014*.²⁶ There, a narcotics officer in an airport was watching flights known to be frequented by persons transporting drugs when he noticed a person who had deplaned and was acting suspiciously.²⁷ The man volunteered to the officer that he did not have a plane ticket, that he was traveling under an assumed name, and that he was a Jamaican citizen without proper immigration papers. He was then arrested by immigration authorities and searched. He had a single bag in which there were three or four items of clothing and two large bundles of cash wrapped in bedsheets.²⁸ He also had a bundle of cash in one of his pockets. A police dog alerted to the suitcase and separately, to the money, indicating that both smelled of marijuana. In this case, unlike *\$56,700*, the inference that money was derived from the sale of drugs was more likely than an inference that only purchase and use were involved.

²⁴ *Id.* at 662.

²⁵ *Id.*

²⁶ 820 S.W.2d 783, 783-784 (Tex. 1991) (per curiam).

²⁷ *Id.* at 784.

²⁸ *Id.* at 784-785.

Litton Industrial Products, Inc v. Gammage,²⁹ the only case CHIEF JUSTICE PHILLIPS' opinion discusses,³⁰ is somewhat more involved than his brief summary indicates. There, the plaintiff was injured when a ratchet adapter he was using broke, and he sued the manufacturer of the device for damages, including damages under the newly enacted Deceptive Trade Practices Act.³¹ One issue was whether the defendant had manufactured or sold the ratchet adapter after the effective date of the Act.³² The evidence was that the adapter could have been manufactured and sold to a warehouse distributor either before or after the effective date of the Act, that the adapter would then have been sold to a jobber for resale to end users like the plaintiff, that the plaintiff's employer received the adapter and charged the plaintiff for it about six months after the Act's effective date, and that the plaintiff himself was given the adapter later that year or early in 1974. From this evidence we concluded that it was no more likely that the defendant manufactured and sold the adapter after the Act's effective date than before. Contrary to what CHIEF JUSTICE PHILLIPS' opinion now says, there was a reasonable basis for concluding that the defendant sold the adapter after the Act became effective — that is, that the adapter did not end up in the plaintiff's employer's hands until six months later. But without evidence of the usual time taken for sale to an actual user, there was no way to assess whether sale after a certain date was probable or not.

²⁹ 668 S.W.2d 319 (Tex. 1984).

³⁰ *Ante* at ____.

³¹ 668 S.W.2d at 321.

³² *Id.* at 324.

Finally, in *Farley v. M M Cattle Co.*³³ we held that circumstantial evidence supported an inference that the defendant's negligence caused an accident. There, two cowboys, Farley and Beebe, were riding their horses on either side of a calf that had broken away, attempting to "lane" him back to the herd.³⁴ During this rapidly moving process, it happened that the two horses were suddenly headed toward each other. Beebe reined his horse sharply to the left to avoid an accident, but the two horses nevertheless collided. Beebe's horse stumbled, and Farley's horse fell, throwing Farley to the ground. Farley was so severely injured in the incident that he was never able to give an account of what had happened. Beebe testified that if Farley had reined his horse, Crowbar, to the right, the accident would have been averted. But the evidence was that Crowbar was nervous and hardheaded, did not rein well, and often stumbled. Farley sued the ranch, alleging that its negligence in providing him with an unsuitable horse and failing to supervise the operations caused the accident. The trial court directed a verdict for the ranch, and the court of civil appeals affirmed. We reversed, holding that there was sufficient circumstantial evidence that the ranch's negligence caused the accident that the case should have gone to the jury.³⁵ Specifically, we explained that evidence that Farley was a good rider who knew how to get himself out of a tight situation supported an inference that he had tried to avoid the accident by reining Crowbar to the right, and evidence of

³³ 529 S.W.2d 751 (Tex. 1975).

³⁴ *Id.* at 753, 756.

³⁵ *Id.* at 757.

Crowbar's past behavior supported an inference that he failed to respond in time to avoid the collision and fell.³⁶ The circumstantial evidence made the inferences probable.

Each of these cases consistently applies the "equal inference" rule. In each we insisted not only that the circumstantial evidence itself be more than slight, but that any inference to be drawn be more probable than other reasonable inferences. In this case alone a majority of the Court refuses to follow the rule.

A majority of the Court in JUSTICE BAKER's opinion concludes that Junior's younger sister, Monica, and his younger brother, Alex, may be liable because she took down a poster at a sports bar and he took down another at a gasoline station months after Junior had disappeared. The poster Alex removed was with the permission of the station attendant. While Monica's and Alex's actions may have shown an intent to help Junior, their intent alone proves nothing. Monica and Alex may have prayed that Junior would succeed in taking Bianca from Deana, intending, hoping with all their hearts that their prayers would be answered, but that does not mean that they aided or assisted Junior without proof that God granted their prayers when He would not have helped Junior otherwise. The question is whether the evidence that Monica and Alex took down two posters supports an inference that they aided or assisted Junior. The answer is that such inference is not only improbable but virtually impossible.

The evidence is that Junior went to Houston after he abducted Bianca. Deana's theory is that he then went to Mexico, where he has family. No one suggests that he stayed in Baytown, or Harris County, or even Texas. The FBI investigated the incident and put Junior on its list of most wanted

³⁶ *Id.*

fugitives. The federal Immigration and Naturalization Service, multiple state agencies, the Harris County District Attorney's Office, and the Baytown police department all joined the search. Crime Stoppers offered a \$1,000 reward for any information that might assist in locating Junior or Bianca. ADVO, Inc. and the National Center for Missing and Exploited Children, two groups who often become involved in such incidents, mailed photographs of Junior and Bianca not only into the Baytown area but throughout the nation. Local, national, and foreign media publicized the pair's disappearance. Thousands of posters soliciting information about Junior and Bianca were put up in Baytown in virtually every public place. As the officer in charge of the investigation testified, "Everywhere you looked there were posters." In view of all this, it is simply preposterous to say, as a majority of the Court does, that taking down one poster in a gasoline station and one poster in a sports bar may have aided or assisted Junior and that Monica and Alex knew it would.

CHIEF JUSTICE PHILLIPS' opinion states: "The police detective investigating Bianca's abduction testified to the importance of informing the public about the abduction, agreeing with Deana's attorney that destroying posters would interfere with his efforts to apprehend Junior."³⁷ But the officer was not asked and did not testify that the removal of as few as two posters would hinder efforts to find Bianca. The issue for the Court is whether removal of two posters under the circumstances was evidence of assistance to Junior; nothing indicates that it was, including the officer's testimony. There is evidence that removing all the posters would have hindered the investigation, but there is no evidence that removing *two* posters would have had the same effect.

³⁷ *Ante* at ____.

One cannot infer from the fact that Alex would have helped Junior if he removed every poster in Baytown that he also helped him by removing just one.

JUSTICE BAKER's opinion asserts that the judgment against Monica and Alex cannot be reversed without reading into section 42.003 an additional requirement that a defendant be successful in aiding and assisting another's violation of a possessory right to a child. This simply misreads my argument. I do not say that a defendant's aid or assistance must be successful. The kidnapper may be apprehended despite the defendant's best efforts and the defendant could still be liable for aiding and assisting. It is one thing to help another to no avail, and it is another not to help. It is one thing for a kidnapper to accept the offer of a getaway car only to be apprehended a mile down the road, and quite another thing for a kidnapper to decline the offer of the car. The person whose offer was accepted aided and assisted unsuccessfully; the person whose offer was not accepted did not aid or assist. To impose liability on Monica and Alex, section 42.003 requires that there be proof that their actions aided and assisted Junior — that is the express language of the statute — not merely that they might have. No such proof exists.

For the same reasons, the fact that Junior's mother, Blanca, took down one poster at an automobile inspection station and another at a gasoline station does not show that she aided or assisted Junior. The inspection station owner testified that the poster was down less than an hour, that he put up another in its place, and that he could not remember anyone coming by while the poster was down. The gasoline station manager stated that she told Blanca she could take down the poster if she wanted to. Nor can one infer that she assisted Junior by her occasional, general statements, made long after Junior had completely disappeared, that Deana had abused Bianca. No

one so much as hints that the score of participants in the national manhunt for Junior ever heard Blanca's statements, much less that they were in the least deterred by them.

But Blanca's actions at the time of the abduction are more problematic. Blanca testified that she did not see Junior or Bianca after she went to bed Friday evening, even though there was evidence, which the jury was entitled to credit, that Blanca was ordinarily intent on spending time with her granddaughter on the weekends. Blanca testified that Junior called late Sunday afternoon to say that he and Bianca were okay and were not coming home, and that she did not inquire further. A little later, Blanca told Deana that Junior was on his way to her house when she did not know that to be true. Blanca testified that she assumed Junior and Bianca were in the home during the weekend, but after Deana called she found no dirty clothes or plates to indicate that they had been there. When Deana called Blanca back, Blanca did not disclose the lack of evidence that Junior had been in her house all weekend. There is no direct evidence that Blanca learned of Junior's departure before anyone else did, or that she knew that her actions on Saturday and Sunday would aid or assist him in leaving. However, the evidence viewed in the light most favorable to Deana does support an inference — a very, very weak inference — that Blanca assisted Junior and knew she was doing so.

I agree with CHIEF JUSTICE PHILLIPS that liability cannot be inferred from any of the other circumstantial evidence, including the defendants' interrogatory answers and objections and their assertions of privilege under the Fifth Amendment. Therefore, I would remand the case only as to Blanca to the court of appeals and would render judgment for the other four family members.

To sum up, four things besides the result are troubling about this case:

First: The construction of section 42.003 by a majority of the Court creates a grave danger for families in which the abduction of a child occurs. Alex's situation here is very disturbing. Months after his older brother had disappeared, and with every indication that Junior was gone for good, he took down one poster in a local gasoline station, of the thousands of posters throughout the community, and now may be liable for \$1.2 million, not because he aided or assisted Junior — no one knows whether he even could have helped at that point, regardless of how many posters he took down — but because it may be inferred that he *intended* to help Junior. As determined as the Legislature may have been to stop parental kidnapping, I cannot conceive that it intended its statute to be construed and applied as a majority of the Court has here.

Second: Today's decision is precedent for disregarding the "equal inference" rule. It is no more likely that Alex's removal of one poster helped Junior than that it did not. The rule has been that in such a situation no inference can be drawn from the circumstantial evidence. The Court's holding is that if it is possible that Alex's action helped Junior, and if the jury believed Deana and not Alex, then the jury could conclude that Alex's action did in fact help Junior. If we are to follow today's reasoning, the law has become that to infer a fact from circumstantial evidence, the fact need only be possible, not probable. It is therefore possible for jurors in Texas courts to do what no one else can: to infer from evidence that the sun is on the horizon that it must be sunrise.

Third: CHIEF JUSTICE PHILLIPS' disregard of the "equal inference" rule is particularly disturbing in light of his endorsement of the rule. The same words cannot be used to say opposite things. The rule stated by the Court in *Hammerly Oaks* and *Litton* cannot mean anything significant

if it is explained and applied the way CHIEF JUSTICE PHILLIPS does here. The court of appeals had no difficulty applying the rule in this case. This Court's difficulties are inexplicable.

Fourth: The Court's careless nod to precedent suggests that the result in this case is more important than the process that must be employed. In case after case this Court has insisted that inferences drawn from circumstantial evidence be sturdy enough to transcend surmise and suspicion. I do not see how the Court could explain the analyses and results in those cases consistent with its view in this one. Significantly, it does not choose to try. The only plausible explanation for today's decision, given the plain language of the statute, the clarity and logic of the "equal inference" rule, and the overwhelming precedent applying the rule in a way distinctly different from this case, is that the decision is dictated by the desired outcome. It is perhaps too strong to say that this case is result-oriented, but it is certainly ad hoc, fact-driven, and one-way. Parental kidnapping is tragic, but so is allowing a million-dollar judgment to be rendered against the culprit's family on surmise. Logic is a neutral force; it cuts both for and against. To disregard logic, as the Court has done here, is to signal that other forces have been paramount in reaching this decision. Whatever they are, they should be foreign to this realm more than they are.

* * * * *

Law enforcement authorities suspected the Lozano family of assisting in Junior's disappearance, but in the end they found no evidence to charge, let alone convict, any of them. There is still much suspicion in this case. But as we observed in *Browning-Ferris*, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."³⁸

³⁸ *Browning-Ferris*, 865 S.W.2d at 927.

Nathan L. Hecht
Justice

Opinion delivered: March 8, 2001