

# 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

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**Argued on April 5, 2000**

CHIEF JUSTICE PHILLIPS filed a concurring and dissenting opinion in which JUSTICE ENOCH and JUSTICE HANKINSON joined except as to Part IV(D), Monica Lozano, and Part IV(E), Alex Lozano, and in which JUSTICE BAKER and JUSTICE ABBOTT joined except as to Part IV(A), Sandra Lozano Warner, Part IV(D), Monica Lozano, and Part IV(E), Alex Lozano.

I agree that there is some evidence that Junior's mother assisted him in taking, retaining or concealing Bianca. I further agree that there is no evidence that Juan or Sandra aided or assisted Junior. I cannot agree, however, that there is any evidence that Junior's younger sister and brother, Monica and Alex, assisted Junior in taking or concealing the child. Accordingly, I join in part of the Court's decision and dissent in part.

## I. Standard of Review

Section 42.003 provides for civil liability against one who aids or assists in the interference with another person's possessory interest in a child. TEX. FAM. CODE § 42.003. Under that section, a person who aids or assists the taking, retaining, or concealing of a child in violation of another's possessory rights may be liable if (1) the person 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 an order and that the person's actions were likely to violate the order. *Id.*; *see also Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992).

Here, the liability issue was submitted to the jury with the instruction that "a defendant is liable for aiding or assisting Juan Antonio Lozano, Jr., in taking or retaining or concealing the whereabouts of Bianca Lozano only when ... [s]uch Defendant *knew that the Defendant's action would aid or assist* Juan Antonio Lozano, Jr. in violating the Court's order." (Emphasis added). Because the parties included this knowing requirement in the instruction without objection, we need not decide whether this instruction was proper and may review the sufficiency of the evidence in light of the questions and instructions as submitted. *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985). Because the Lozanos admit that they had actual knowledge of the court order awarding Deana possession, the only issue is whether there is some evidence that the Lozanos knew their actions would aid or assist Junior in taking, retaining, or concealing Bianca in violation of the order.

In reviewing a no evidence point, we consider the evidence in a light most favorable to the verdict. *Weirich*, 833 S.W.2d at 945. 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). To rise above a scintilla, the evidence offered to prove a vital fact must do more than create a mere surmise or suspicion of its existence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). In determining legal sufficiency, we consider whether the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994); *see also Kindred*, 650 S.W.2d at 63.

Deana offered no direct evidence that any of the Lozanos knowingly aided or assisted Junior in taking, retaining, or concealing Bianca. But the jury’s finding may be upheld on circumstantial evidence as long as it may fairly and reasonably be inferred from the facts. *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995).

## II. The Evidence

In 1994, Junior and Deana separated, going to live with their respective parents. Divorce proceedings were subsequently commenced, with the issues surrounding custody of Bianca being especially contentious.

Under temporary custody orders, Junior picked up Bianca at Deana’s parents’ home on Friday evening, April 7, 1995, for weekend visitation. He took the child, then twenty months old, to his own parents’ home, where Juan and Blanca testified that they visited with Junior and their granddaughter Friday evening before they went to bed.

Junior’s brother, Alex, also lived in the family home, but he testified that he never saw Junior after he picked up Bianca that weekend. Junior’s younger sister, Monica, who also lived at home but worked nights, testified that she only saw Junior and Bianca on Friday evening before she left

for work. Finally, Juan and Blanca testified that they did not see either Junior or their granddaughter after they went to bed on Friday night.

The elder Lozanos left the house together on Saturday morning to run errands. Before they left, Juan tried to open the door to Junior's bedroom, but it was locked. Junior and the child were not at home when the Lozanos returned early that evening, nor had they come home by the time the Lozanos retired. On Sunday morning, the elder Lozanos went to church. They testified that they assumed that Junior and Bianca were asleep in Junior's bedroom, but they did not check to see. When they returned from church, Junior and the child were definitely gone.

Their only contact with Junior after Friday occurred late Sunday afternoon, when Junior spoke briefly to Blanca by telephone. She recalled Junior saying, "Mom, we're okay and I'm not coming home," but she offered no other details. Although she had not seen him since Friday, Blanca did not ask where he and Bianca had gone, when they had left, or where they would be going.

A little after 6 p.m. Sunday evening, Deana called the Lozanos' house when Junior was late returning Bianca. Blanca, who answered the phone, told Deana that Junior was on his way to her house. When Junior had not arrived after another twenty minutes, Deana called again. This time she asked Blanca which car Junior had taken. Junior did not own a car, but his parents let him use a family vehicle when he needed transportation. Deana also asked if Junior had taken any baby clothes when he left. Blanca said that she would check and that Deana should call back.

Meanwhile, Deana called the police. Under their internal policy, it was too soon for them to be involved so they told her to contact her attorney. In checking Junior's room, Blanca discovered that some items of clothing were indeed missing. She also discovered that there were

no soiled baby clothes in the room, as would be expected after a weekend visit from such a young child.

Before 7 p.m., Deana made her third call to the Lozanos. Blanca told her that none of the family's cars were missing. According to Deana, she asked again about missing clothes, but Blanca avoided giving an answer. Blanca also did not volunteer that she had not seen Junior since Friday night or that the house showed no signs of the baby's visit. Deana testified that she called two or three more times that evening before Blanca asked her not to call anymore.

After abducting Bianca, Junior apparently went to Houston, where on Monday, April 10, he cashed a \$1000 check at a Houston credit union. This check had been given to him three weeks earlier by his sister Sandra, who lived with her husband near Houston.

Following Bianca's disappearance, Deana filed a missing persons report with the Baytown police and met with the district attorney's office. On April 24, the district attorney prepared an indictment against Junior for interference with child custody. Deana also continued to seek information from the Lozanos, but after a few days they quit taking her calls, and eventually they changed to an unlisted telephone number.

Frustrated by the Lozanos' lack of cooperation, Deana filed suit against them in May, alleging that they had aided or assisted Junior in abducting or concealing Bianca. With her original petition, Deana served interrogatories and requests for admissions. Acting pro se, the Lozanos answered the suit and responded to Deana's discovery. Each of their answers and responses was nearly identical.

Because Junior and his parents were Mexican citizens and had a large extended family in

Monterrey, Deana feared that Junior had fled to Mexico. In particular, Blanca's mother lived in Monterrey in a house owned by the Lozanos. Junior had also registered Bianca at birth for Mexican citizenship. Because of this connection to Mexico, Deana asked in one interrogatory for the names and addresses of all the Lozanos' relatives and friends in that country. Instead of answering, each defendant asserted his or her Fifth Amendment privilege. Juan also asserted his Fifth Amendment privilege during his deposition, although he withdrew the assertion before the deposition ended. Juan and the other Lozanos also subsequently withdrew their assertions of privilege and provided answers to all Deana's interrogatories. Deana maintains, however, that the Lozanos purposefully delayed responding to her discovery to aid Junior in concealing Bianca.

Deana also sought information from the public to aid in locating Bianca. Thousands of posters with pictures of Junior and Bianca were posted around town. Deana testified that a lot of the posters were taken down and had to be replaced. Blanca, Monica and Alex each admitted to removing or destroying one or more of these posters.

Blanca, accompanied by Alex, took down one poster from a state automobile inspection station. Blanca allegedly stated to the station owner that she did not want her son's picture up in a public place. When the station owner objected to her removal of the poster, Blanca replied that he would not be helping Deana if he knew the truth about the "child abuse". Blanca also removed a poster from a Conoco station. Blanca and Sandra went into a doctor's office where a poster was displayed, and one or both of them asked that it be taken down. When the office manager refused, either Blanca or Sandra asked if it would change her opinion if she knew that Deana had abused the baby. Finally, Alex admitted that he removed one poster, and Monica admitted taking down one

poster. In August 1995, Deana got a temporary restraining order and in September a temporary injunction, enjoining the Lozanos from removing any more posters or from harassing anyone displaying a poster on their property.

Deana also suspected that the Lozanos were providing Junior with money even after he disappeared, as Junior had always been somewhat dependent on his family for financial support. In this regard, Deana found a number of cash transactions involving Alex, Junior's younger brother, suspicious. Within five months after Junior's disappearance, Alex borrowed about \$3000 in three separate transactions using his credit card. Deana also found it suspicious that Blanca cashed a check for \$800 just five weeks after Junior disappeared. And finally Deana pointed to the \$1000 check that Sandra had given Junior just weeks before the abduction.

On this evidence, the jury found that Juan, Blanca, Sandra, Monica and Alex Lozano had each aided or assisted Junior in taking or retaining possession of Bianca or concealing her whereabouts.

### III. The Equal Inference Rule

The court of appeals held that the circumstantial evidence was not legally sufficient to support the jury's finding that any of the Lozanos aided or assisted Junior. 938 S.W.2d 787. Relying on the equal inference rule, the court of appeals discounted the evidence supporting the jury's verdict, concluding that the circumstantial evidence gave rise to equally plausible but contrary inferences – either that the Lozanos were in some way involved in Junior's abduction of Bianca or that they had no knowledge of Junior's plans and did nothing to assist him. 983 S.W.2d at 792.

Deana argues that the court of appeals evaluated the legal sufficiency of the evidence under

an erroneous standard, causing it to substitute its view of the evidence for the jury's. As to each piece of circumstantial evidence, the court of appeals concluded that because other reasonable inferences contrary to the jury's verdict were equally plausible, the circumstantial evidence was in legal effect no evidence. 983 S.W.2d at 790-91. I agree with Deana that this approach was erroneous.

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." *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997). Thus, in cases with only slight circumstantial evidence, something else must be found in the record to corroborate the probability of the fact's existence or non-existence.

In purporting to apply the rule, the court of appeals cited *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996), which in turn cited *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319 (Tex. 1984). 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." *Id.* at 324.

*Litton* exemplifies the type of case in which the rule may apply. There, the Deceptive Trade Practices Act applied if, but only if, a ratchet adapter was sold after the Act's effective date. Similar adaptors had been sold both before and after this date, and nothing in the record provided a clue about the particular adaptor's date of manufacture or sale. Thus, the meager circumstantial evidence gave rise to equal inferences, not because two or more reasonable inferences could be drawn, but because there was no reasonable basis in the record for inferring either that the ratchet adaptor was

or was not sold after the effective date of the DTPA.

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. *See, e.g., Farley v. M M Cattle Co.*, 529 S.W.2d 751, 757 (Tex. 1975). 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. *Benoit v. Wilson*, 239 S.W.2d 792, 797 (Tex. 1951). If it may reasonably be inferred from the circumstantial evidence in this record that one or more of the Lozanos knowingly aided or assisted Junior in taking, retaining or concealing Bianca in violation of Deana's right of possession, then there is some evidence to support the jury's verdict against such defendant or defendants.

#### IV. Reasonable Inferences

Deana argues that all the Lozanos were involved in Junior's abduction scheme and that their involvement may reasonably be inferred from their respective conduct, such as refusing to share information with Deana, providing financial assistance to Junior, delaying discovery, asserting their

Fifth Amendment privileges to resist her requests for discovery, and undermining her efforts to locate Bianca by removing posters and slandering her. She urges that we consider the totality of the known circumstances in determining the legal sufficiency of the circumstantial evidence and the reasonable inferences to be drawn therefrom. *See Felker v. Petrolon, Inc.*, 929 S.W.2d 460, 464 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1996, writ denied) (“In reviewing circumstantial evidence, we must look at the *totality* of the known circumstances rather than reviewing each piece of evidence in isolation.”).

Circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion. *Browning-Ferris*, 865 S.W.2d at 928. The material fact must be reasonably inferred from the known circumstances. *Joske v. Irvine*, 44 S.W. 1059, 1064 (Tex. 1898)(inference is merely a deduction from proven facts). “By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern.” *Browning-Ferris*, 865 S.W.2d at 927. Thus, each piece of circumstantial evidence must be viewed not in isolation, but in light of all the known circumstances. *Brinegar v. Porterfield*, 705 S.W.2d 236, 238-39 (Tex. App.--Texarkana 1986), *aff'd*, 719 S.W.2d 558 (Tex. 1986); *State Farm Fire & Cas. Ins. Co. v. Vandiver*, 970 S.W.2d 731, 736 (Tex. App.--Waco 1998, no writ). With these principles in mind, I next examine whether the evidence provides legal support for the jury’s verdict against each defendant.

#### A. Sandra Lozano Warner

Sandra gave Junior a \$1000 check three weeks before the abduction. Deana asserts that Sandra’s check was intended to help fund Junior’s abduction plans, and Junior no doubt used the

money for this purpose. At the time of the abduction, 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 some assistance from his parents, and thus Deana suspected that Junior could not have successfully abducted Bianca without some financial assistance from his family.

In light of the charge submitted to the jury, I must look for some evidence that Sandra “knew” that her check “would aid or assist” Junior’s abduction plans. Even in the absence of direct evidence, we could affirm the judgment if there were any circumstantial evidence of such knowledge. For example, evidence that Sandra had never before given a relative such a large gift might be some evidence that would support the verdict. But the only evidence in this record is that the check was given and that Junior needed money to accomplish his plan. Without more, this is no probative evidence of Sandra’s intent to aid or assist Junior.

Deana also urges that Sandra’s conduct during discovery is some evidence that she knowingly aided Junior in abducting or concealing Bianca. Sandra, like the other members of her family, asserted the Fifth Amendment privilege rather than answer certain questions posed by Deana during discovery. Acting pro se, Sandra initially declined to give the names and addresses of relatives and friends in Mexico,<sup>1</sup> refused to identify any person assisting her in answering the

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<sup>1</sup> “ANSWER: Objection as to being overly broad and burdensome to Defendant. I exercise my right under the 5<sup>th</sup> Amendment of the Constitution of the United States of America to not answer this question in that my answer might tend to incriminate me.”

questions,<sup>2</sup> and also invoked the Fifth Amendment to protect the identity of her employer.<sup>3</sup> Some months later, after retaining an attorney, she amended her answers to the interrogatories, withdrawing her assertions of privilege and answering Deana's questions. Deana nevertheless argues that because Sandra initially invoked the privilege, the jury could infer that she either knew where Junior and Bianca were hiding or had conspired with others to conceal their whereabouts so that to provide certain information would be incriminating.

In a civil case, a fact finder may draw reasonable inferences from a party's assertion of the privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Texas Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995); TEX. R. EVID. 513(c). But the negative inferences that Deana suggests are not reasonable under the circumstances disclosed in this record. While Sandra's earlier assertion of the privilege may have influenced the jury's view of her credibility, that assertion is not enough to prove the opposite of what Sandra testified the facts to be. *United States v. Rylander*, 460 U.S. 752, 761 (1983) ("claim of privilege is not a substitute for relevant evidence"); *Baxter*, 425 U.S. at 318 (judgment based only on invocation of privilege and "without regard to the other evidence" exceeds constitutional bounds); *see also Tweeddale v. Commissioner of Internal Revenue*, 841 F.2d 643, 645 (5th Cir. 1988) (taxpayer cannot use privilege to meet his burden of proof in proceeding he instituted); *Custody of*

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<sup>2</sup> "ANSWER: I refuse to answer this question in that who does, or who does not, assist me in answering these questions is totally irrelevant to the issue of the lawsuit. I exercise my right under the 5<sup>th</sup> Amendment of the Constitution of the United States of America to not answer this question in that my answer might tend to incriminate me."

<sup>3</sup> "ANSWER: I am greatly concerned that Plaintiff will harass me at my work place; therefore, I exercise my right under the 5<sup>th</sup> Amendment of the Constitution of the United States of America to not answer this question in that my answer might tend to incriminate me."

*Two Minors*, 487 N.E.2d 1358, 1363 (Mass. 1986) (adverse inference “is not sufficient, by itself, to meet an opponent’s burden of proof”). Sandra’s assertion of the Fifth Amendment does not show her culpability either by itself or in conjunction with her giving Junior the \$1000 check.

Deana also complains, however, that Sandra’s assertion of the Fifth Amendment privilege and other objections to discovery aided Junior in delaying Deana’s search for Bianca. Deana further submits that even after Sandra waived the Fifth Amendment and supplemented her answers to interrogatories, much of the information she provided was incomplete or wrong. But our record does not disclose that Deana complained about incomplete discovery before trial. Had she presented this complaint to the trial court, she might have obtained the information more quickly with the court’s help. Instead, Deana proceeded to trial on the proof she had. Because she failed to present any specific discovery complaint to the trial court, I would not now permit Deana to transmogrify these assertions into some evidence of a statutory violation.

Nor is there any evidence that Sandra’s delay in responding fully to Deana’s interrogatories in any way aided or assisted Junior in concealing Bianca. Deana shared her suspicions with the investigating authorities. The police questioned family members, kept the Lozanos’ house under surveillance, subpoenaed the Lozanos’ phone records, and followed up on leads in Mexico. Deana offered no evidence that the police or any other government body found anything to confirm that Junior and Bianca were living in Mexico or that Junior was in contact with relatives or friends there.

Finally, Deana argues that Sandra’s intent to aid Junior may be inferred from Sandra’s remarks following the abduction. Deana asserts that Sandra accused her of abusing Bianca while trying to convince two employees in a doctor’s office to remove one of the posters identifying Junior

and Bianca. The two employees testified that after they refused, either Sandra or Bianca asked them to reconsider because Deana had abused the child.

Although Sandra is never identified as the party making the accusation, the court of appeals deduced that Sandra, rather than Bianca, must have uttered the slanderous remark because one witness only remembered Bianca specifically mentioning her attempt to file child abuse charges with the District Attorney. Contrary to the court of appeals, I do not believe that this is enough to affirm the jury's award of damages for slander against Sandra while reversing a similar award against Bianca. 983 S.W.2d at 792-94.

Deana concedes that neither witness specified who made the remark, but she urges us to attribute the remark to both defendants. I would not do so. This is not a case in which both parties clearly committed a wrong contributing to plaintiff's injury. *Cf. Landers v. East Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) (when individual liability cannot be apportioned with reasonable certainty between two wrongdoers each contributing to the injury, plaintiff may hold wrongdoers jointly and severally liable). Nor is it a case in which one defendant was authorized to speak on behalf of the other. *See, e.g.*, 4 J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS AND REMEDIES § 52.06[3] (2000) (agency law binds principal for agent's slanderous communications if made in course and scope). Nor is there a finding that Bianca and Sandra conspired to defame Deana. *See, e.g., Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (quoting *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995) ("civil conspiracy requires specific intent' to agree 'to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.'")). Although Deana pled civil conspiracy as a part of her claim against the

Lozanos, she did not submit the elements of a conspiracy to the jury, but instead asked the jury to consider each defendant individually. In light of this submission, we may only consider the evidence which pertains to Sandra specifically.

Justice Baker assumes in his dissent, however, that Sandra was part of a Lozano family conspiracy to abduct Bianca. He speculates that Sandra herself removed posters because other family members did. He surmises that Sandra asked the doctor's employees to remove a poster and accused Deana of child abuse when they refused because she accompanied her mother to the doctor's office, and at least one of the two made such statements. Justice Baker also infers that Sandra intended to assist Junior financially in his crime because she gave him a check that he did not cash until after the abduction. Finally, he suggests that Sandra used her Fifth Amendment privilege to aid or assist Junior in some manner.

To support his conclusion, Justice Baker seems to rely on suspicion and conjecture rather than on known facts. But suspicion and conjecture are not evidence. *Browning-Ferris*, 865 S.W.2d at 928; *Kindred*, 650 S.W.2d at 63. Legally sufficient circumstantial evidence requires a logical bridge between the proffered evidence and the necessary fact. *See Joske*, 44 S.W. at 1064 (inference is merely a deduction from proven facts). Although Justice Baker argues that there is sufficient circumstantial evidence to make this bridge, he never pieces these circumstances together to make the requisite connection, and in lieu of such analysis, he substitutes only his own suspicion. Our law, however, "does not permit the citizen to be deprived of his property, his liberty, or his life upon mere surmise or suspicion, and places upon a trained judiciary the grave responsibility of determining as a question of law whether the testimony establishes more." *Id.* at 1062. Because

there is no evidence that Sandra knowingly aided or assisted Junior in the abduction or concealment of Bianca, I concur in the Court's decision to affirm the judgment of the court of appeals that plaintiff take nothing from Sandra Lozano Warner.

#### B. Blanca Lozano

Deana argues that Blanca aided and assisted Junior in concealing Bianca by asserting her Fifth Amendment privilege, delaying discovery, taking down posters, and accusing Deana of child abuse. Deana further contends that Blanca aided Junior in the abduction by misrepresenting Junior's intentions and concealing other significant information from her.

Blanca and Juan were the last family members to see Junior and Bianca before they disappeared. Although they both maintained that Junior and Bianca slept in Junior's room Friday and Saturday night, they never actually saw either father or child after Friday evening. When Junior finally called Sunday afternoon, Blanca apparently was neither curious about where he had gone nor what he had been doing. Further, when Deana called, concerned as to why Junior was late returning Bianca, Blanca misrepresented that Junior and the child were on their way to Deana's. Although she had not seen Junior in two days and knew there were no visible signs that the child had spent any appreciable time in their home that weekend, Blanca did not provide this information to Deana in any of their several conversations Sunday evening. Far from sharing Deana's concern, Blanca soon simply quit taking her calls.

Blanca testified that she did not see Bianca after Friday and conceded that there were no signs that Junior "had fed [Bianca] or [done] anything in [the Lozanos'] house" that weekend. Blanca exhibited no apparent misgivings at not having shared more time with Bianca during

visitation that weekend, testifying that it was not uncommon for Junior to take the baby away from home to the park, to the mall, and even to Galveston during visitation. In contrast to Blanca's attitude that weekend, Deana testified that Blanca was ordinarily so intent on spending time with her granddaughter that her visits to Bianca's daycare became disruptive and had to be curtailed.

The record further reveals that Blanca attempted to remove some of the posters seeking information about the abduction, and succeeded in doing so on at least two occasions. An employee at a Conoco station testified that Blanca removed one poster and later returned to ask that others be taken down. The owner of an automobile inspection station testified that Blanca removed a poster on his property, justifying her actions when challenged by vaguely alluding to problems of child abuse. Blanca also tried unsuccessfully to remove posters displayed at the doctor's office she visited with Sandra. As I have already discussed, the doctor's employees rebuffed this attempt.

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. Blanca explained, however, that she removed these posters because they were embarrassing and harassing to her family. The court of appeals found her explanation to be equally as plausible as Deana's theory that Blanca removed the posters to inhibit the search for Bianca. 983 S.W.2d at 792. The court further concluded that Blanca's reluctance to share information with Deana was just as likely a product of animosity over Deana's divorce and custody dispute with Junior as it was her desire to aid Junior in concealing Bianca. *Id.* at 791-92. This may all be true. But as I have discussed, the mere fact that more than one reasonable inference may be drawn from this evidence does not mean that no evidence supports the

jury's verdict. If more than one reasonable inference may be drawn, a question of fact is ordinarily presented for the jury to decide. *Benoit*, 239 S.W.2d at 796-97.

Considering all the circumstantial evidence, the jury could have reasonably inferred that Blanca's conduct violated the statute. They could have believed that Blanca intended to delay Deana's search and thereby aid Junior, first by misrepresenting that Junior was on his way to her house and later by refusing to provide information to Deana when she called. Blanca's apparent disinterest in her granddaughter's unexplained disappearance also supports the inference that she knew that Bianca, although not in her mother's care, was nevertheless safe with Junior. Further, the jury might have reasonably believed that Blanca's vague allusions to child abuse aided or assisted Junior by discouraging others from helping Deana find her child. These conclusions are reasonable and fair inferences drawn from the evidence and are legally sufficient to support the jury's finding that Blanca Lozano knowingly aided or assisted Junior. Because there is some evidence that Blanca aided or assisted Junior, I concur in the Court's decision to reverse the court of appeals' judgment as to her and remand to that court for a factual sufficiency review of the evidence.

### C. Juan Lozano

Juan was privy to much of the same information as Blanca during the weekend which ended in Bianca's abduction. While he claimed that he was somewhat concerned about not seeing his son or granddaughter after Friday evening, he apparently was not sufficiently concerned to take any action. Nevertheless, Juan was not involved in conversations with Deana or her requests for additional information on April 9. Nor did he remove any posters or participate in spreading rumors of Deana's child abuse after the abduction. And while it may seem peculiar that Juan was not more

active in the search for his missing son and granddaughter, he did cooperate with the authorities. Without more, no reasonable inference may be drawn from his apparent inactivity.

Deana maintains, however, that there is more. She argues that Juan's assertion of the Fifth Amendment privilege and other delay in responding to discovery is some evidence that he knowingly aided or assisted Junior. Like Sandra and the other family members, Juan initially declined to give the names and addresses of relatives and friends in Mexico. He also asserted the privilege on advice of counsel during his deposition, but months later he answered Deana's deposition questions and written interrogatories. Deana again argues that because Juan initially invoked the privilege, the jury could reasonably infer that he either knew where Junior and Bianca were hiding or had conspired with others to conceal their whereabouts so that to provide certain information would be incriminating.

I have already rejected a similar argument against Sandra. As with her, I note as to Juan that any adverse inference from using the privilege "is not sufficient, by itself, to meet an opponent's burden of proof." *Custody of Two Minors*, 487 N.E.2d at 1363.

Finally, Deana submits that Juan's lack of candor during discovery is probative of his intent to aid Junior in concealing Bianca. For example, rather than disclose his plans to visit Mexico, Juan objected that an interrogatory inquiring about plans to travel outside the country was too speculative because it did not include any time frame. Two days after filing his objection, Juan and the family left for their time-share condominium in Cancun, Mexico.<sup>4</sup> In July and November, Juan also traveled to Monterrey with Blanca and Alex. Although the stated purpose of the trips to Monterrey

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<sup>4</sup> Sandra Warner did not accompany the family on any trip to Mexico in 1995.

was to visit Blanca's ailing mother, Deana suspects that all these trips were really to see Junior and Bianca.

When Deana shared her discovery and suspicions with the authorities, as previously discussed, the police found nothing to confirm that Junior and Bianca were living in Mexico or that Junior was in contact with relatives or friends there. While lack of candor during discovery may reasonably affect a jury's view of credibility, it is not a substitute for evidence. Deana's unconfirmed suspicion is not evidence that Juan aided or assisted Junior. *Browning-Ferris*, 865 S.W.2d at 927 ("some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence"). Because there is no evidence that Juan knowingly aided or assisted Junior in abducting or concealing Bianca, I believe the court of appeals correctly rendered judgment that plaintiff take nothing from Juan Lozano.

#### D. Monica Lozano

Deana asserts that Monica, like the other Lozanos, aided or assisted Junior by asserting her Fifth Amendment privilege and delaying discovery. Additionally, Deana maintains that Monica aided Junior's concealment of the child by tearing down posters she had placed around town. The police detective investigating the abduction testified that these posters were an important investigative tool and that their removal would interfere with his efforts to locate the child. Monica admitted that she removed one poster at a sports bar.

Monica explained that she removed this poster because it disclosed her home street address and was embarrassing to her. The court of appeals considered Monica's explanation, concluding that it was equally as plausible as the inference that she removed the poster to help Junior by limiting

public information about his crime. But the known fact – Monica’s removal of a poster – does not in my view implicate the equal inference rule. Given the purpose of these posters, it may reasonably be inferred that by removing one Monica intended to aid or assist Junior in concealing the child. An equal but opposite inference is not suggested by the bare fact of its removal. Monica’s testimony may have put her intent in issue, but it did not negate the reasonable inference that she intended something else when she removed the poster.

Intent alone, however, is not enough under the statute. The Family Code premises liability on aiding or assisting the perpetrator, providing a cause of action against “(a) person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person” and against “(a) person who aids or assists in (such) conduct.” TEX. FAM. CODE §§ 42.002(a), 42.003(a). Thus, I must examine the record for any evidence that Monica’s removal of the poster aided or assisted Junior in concealing the child from the authorities.

These posters were put up to collect information on Junior’s whereabouts, and the police detective in charge of the investigation testified generally to their effectiveness in other cases. He further testified that thousands of posters were put up around town – that posters were literally “everywhere you looked ....” Deana agreed with this assessment, testifying that she put up “around a thousand or more” posters herself. The detective also testified about the efforts of others to publicize the disappearance, including Crime Stoppers, Advo, Inc., the National Center for Missing and Exploited Children, as well as the local newspapers. Unfortunately, none of these efforts succeeded in locating Junior or the child.

The inquiry, however, is not about what was done to locate Junior and the child, but rather

about what Monica did to hinder those efforts. The issue is whether the removal of one poster is some evidence, more than a scintilla, of aid and assistance to Junior.<sup>5</sup> As we have said, more than a scintilla of evidence exists when the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Burroughs Wellcome Co., v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). On the other hand, less than a scintilla of evidence exists when the evidence is “so weak as to do no more than create a mere surmise or suspicion” of a fact. *Kindred*, 650 S.W.2d at 63. The detective testified generally to the importance of publicizing the abduction, but he did not testify that the removal of a particular poster had any effect on his efforts to locate Junior. I have not found any additional evidence or circumstances in this record to indicate that Monica’s removal of a poster aided or assisted Junior’s concealment of the child. Without some logical connection between the removal of the poster from the sports bar and the authorities inability to find Junior, I believe it unreasonable to infer that Junior could have been aided or assisted by Monica’s actions. Because there is no evidence that Monica knowingly aided or assisted Junior in abducting or concealing Bianca, I would affirm the court of appeals’ judgment that plaintiff take nothing from Monica Lozano.

#### E. Alex Lozano

Deana asserts that Alex aided or assisted Junior in concealing Bianca by asserting the Fifth

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<sup>5</sup> Contrary to the assertion in Justice Baker’s concurring opinion, I apply only the burden imposed by the Family Code, which provides that “[a] person who aids or assists in conduct for which a cause of action is authorized by this chapter is jointly and severally liable for damages.” TEX. FAM. CODE § 42.003. This is not equivalent to “successfully” aid or assist which to me would imply at least cause in fact. Under this record, I believe that it is unreasonable to infer that the removal of one poster could have aided or assisted Junior in concealing the child. Justice Baker, on the other hand, suggests that because it is impossible to know under this record whether the removal of a single poster aided or assisted, we must leave it to the jury to guess whether or not it did. It is still erroneous to authorize a jury verdict on “mere surmise or suspicion” that a fact may exist. *Kindred*, 650 S.W.2d at 63.

Amendment, delaying discovery, removing posters and providing financial assistance. Alex admitted that he removed one poster from a Conoco station. Alex also testified that he borrowed about \$3000 on his credit card within five months after Junior disappeared, a sum which totaled more than half of his earned income for that year. As with Sandra, however, Deana offers nothing beyond suspicion that this money was funneled to Junior. And as with Monica, Alex's removal of a single poster is no evidence of aid or assistance to Junior in concealing the child. Because there is no evidence that Alex knowingly aided or assisted Junior in abducting or concealing Bianca, I would affirm the court of appeals' judgment that plaintiff take nothing from Alex Lozano.

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Thomas R. Phillips  
Chief Justice

OPINION DELIVERED: March 8, 2001