

**YET ANOTHER LOOK AT THE
“NO EVIDENCE” STANDARD OF REVIEW**

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YET ANOTHER LOOK AT THE “NO EVIDENCE” STANDARD OF REVIEW

I. INTRODUCTION

This is more a caveat than an introduction. I must confess that most of my appellate career I have skipped the standard of review discussions in opinions, feeling that I most certainly knew the appropriate standard of review for any given type of appellate error. In the last two years, I have handled several appeals that made me examine the legal sufficiency standard of review in more depth than the usual rote assertion; and I have come to realize that I didn't know everything there was to know about that particular standard of review. In so doing, I also found myself disagreeing in part with a recent seminar article that posited there were two divergent lines of Supreme Court of Texas cases on “no evidence” review, which the Court appeared to be moving between in the last few years.¹ While recognizing the foolhardiness of a novice in my position disagreeing with experts on standards of review, who also happen to be good friends, I nonetheless agreed to write this paper and thus offer the following hard-gained musings on the “no evidence” standard of review.

II. THE TRADITIONAL “NO EVIDENCE” STANDARD OF REVIEW

The following is the traditional statement of the “no evidence” standard of review. The reviewing court must “determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex.1994). In so doing, the court reviews the evidence in a light that tends to support the disputed finding and disregards evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex.2001). If more than a scintilla of evidence supports the challenged finding, the no-evidence challenge must fail. *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex.2003); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex.1993).

However, there is not a single “no evidence” standard of review; rather, there is the traditional rule with overlays necessitated by the type evidence being reviewed or by constitutional mandates, such as “clear and convincing.” It is those overlays that account for

what appear to be varying statements of the “no evidence” standard of review.

III. CIRCUMSTANTIAL EVIDENCE OVERLAY TO “NO EVIDENCE” REVIEW

The different statements of the “no evidence” standard of review identified in last year's seminar paper on sufficiency of the evidence can be traced to the differences in reviewing direct and circumstantial evidence.² The traditional standard of review works well when direct evidence is offered in support of a finding made by the trier of fact. It does not work as well when that evidence is circumstantial, requiring the jury to make inferences in order to arrive at a certain finding. Those inferences must necessarily be reviewed differently than direct evidence. Justice Baker's concurrence/dissent in *Lozano v. Lozano* with its separate paragraphs on “No Evidence Review” and “Circumstantial Evidence” highlights the notion that there are additional layers to a “no evidence” review when the evidence is circumstantial. 52 S.W.3d 141, 166 (Tex.2001)(per curiam)(Baker, J., concurring and dissenting).

A. Statement of “No Evidence” Review of Circumstantial Evidence -- *Lozano v. Lozano*

The years 2001 and 2002 were watershed years for Supreme Court opinions on circumstantial evidence review; but this variance on “no evidence” review is certainly not a new concept. In his revered 1960 law review article, Justice Calvert discussed what he labeled the “scintilla rule” for purposes of reviewing circumstantial evidence. Robert W. Calvert, “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*, 38 TEX. L. REV. 361, 364-65 (1960).

The best summary of circumstantial evidence review is Chief Justice Phillips's concurrence/dissent in *Lozano v. Lozano*, 52 S.W.3d 141, 145-49 (Tex.2001)(per curiam)(Phillips, C.J., concurring and dissenting).³ *Lozano* involved determining whether there was legally sufficient evidence to support the jury's finding that several paternal family members had aided in interfering with a mother's possessory rights

² For example, the article views *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002), as a return to the traditional “no evidence” rule without discussion of the two lines of cases; however, as demonstrated in section III, *Lenz* is merely a direct evidence case to which the circumstantial evidence/scintilla rule would not apply.

³ It should be noted that the opinion is “per curiam” stating a conclusion about the sufficiency of the evidence, but without discussing the application of the standard of review. Thus, the discussion of the standard of review in Chief Justice Phillips's concurrence/dissent, joined by four other justices, represents the plurality view on circumstantial evidence review.

¹ W. Wendell Hall and Charles R. “Skip” Watson, Jr., *When Is the Evidence Really Sufficient in the Supreme Court of Texas*, ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 14 at 1-4 (2003).

to her child. *Id.* at 143. Noting that there was no direct evidence, but rather only circumstantial evidence, Phillips began his review of the evidence with the recognition that a jury’s finding based on circumstantial evidence may be upheld so long as it may fairly and reasonably be inferred from the facts. *Id.* at 145, citing *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex.1995). After all, an inference is a deduction from the proven facts. *Id.* at 149, citing *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1064 (1898). Thus, in order to determine whether the jury’s inference is reasonable necessitates going beyond the traditional statement of “no evidence” review.

A basic principle of legal sufficiency review of circumstantial evidence is that in order 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). Put another way, circumstantial evidence can be used to establish any material fact, but it must transcend mere suspicion. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex.1993)(suspicion plus suspicion equals no evidence). As Justice Calvert noted, this scintilla rule only applies to circumstantial evidence that requires an inference from other relevant facts and circumstances which are proven because direct evidence is always more than a scintilla. 38 TEX. L. REV. at 363 & n. 13. In order to determine whether the evidence transcends suspicion and is more than a mere scintilla, a reviewing court must necessarily examine whether the jury’s finding may be reasonably inferred from the known circumstances. In conducting a circumstantial evidence review, the Waco Court of Appeals recognized “its duty not to indulge inferences contrary to the judgment”; however, it concluded that “the words ‘more than a scintilla’ are not without meaning.” *One 1995 Dodge Pickup v. State of Texas*, 119 S.W.3d 306, 309 (Tex.App.--Waco 2003, no pet.). Hence, it looked at the circumstantial evidence as a whole and found it to be meager and speculative, amounting to no more than suspicion of the fact necessary to support the judgment. Accordingly, the court reversed and rendered because the evidence was legally insufficient.

1. Equal Inference Rule Prior to *Lozano*

The equal inference rule arose in the context of circumstantial evidence review. Prior to *Lozano*, the equal inference rule had been stated 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.” *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex.1984). In line with *Litton*, the court of appeals in *Lozano* had concluded that because other reasonable inferences contrary to the jury’s verdict were equally plausible, the circumstantial evidence was in legal

effect no evidence. *Lozano v. Lozano*, 983 S.W.2d 787, 792 (Tex.App.--Houston [14th Dist.] 1998), *aff’d in part & rev’d in part*, 52 S.W.3d 141 (Tex. 2001).

2. Statement of Circumstantial Evidence Review in *Lozano*

In his *Lozano* concurrence/dissent, Phillips disagreed, reasoning that the *Litton* view of the equal inference rule led appellate courts to start weighing the evidence, which is not permissible in a “no evidence” review. *Lozano*, 52 S.W.3d at 148. Because the equal inference rule is a subspecies of the “no evidence” rule, it needed to be refined to bring it more in line with legal sufficiency review. Instead, the rule needed to emphasize that when circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. However, 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. The reviewing court determines only if the inference is reasonable. *Id.* at 148.

The question then becomes whether the jury’s finding can be reasonably inferred from the known circumstances. Therefore, in reviewing circumstantial evidence to determine reasonableness of the inference, each piece of circumstantial evidence must be viewed not in isolation, but rather in light of all the known circumstances or the totality of the known circumstances to determine its reasonableness. *Lozano*, 52 S.W.3d at 149. Applying that rule to the *Litton* case, Phillips’s concurrence/dissent stated:

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.

52 S.W.3d at 148 (emphasis added).

In his 1960 article, Justice Calvert had similarly questioned the equal inference rule, noting both its inconsistency with the “no evidence” review and the lack of necessity for such a rule. 38 TEX. L. REV. at 364-65. In his view, it does no harm to note the existence of an opposing inference; however, the “basic reason for sustaining the ‘no evidence’ point is that the inference supporting the finding of the vital fact is not reasonably to be drawn from the meager facts proved.” *Id.* at 365. To a point, this mirrors the *Lozano* modification of the equal inference rule.

However, it does not take into account *Lozano*'s statement that the totality of the circumstances must be considered to determine the reasonableness of the inference. That would seem to include looking at the reasonableness of opposing inferences, despite its inconsistency with the rule that all inferences to the contrary are disregarded.

While *Lozano* altered the equal inference rule, the central component of that rule remains, which simply reflects the long standing rule in Texas that a vital fact may only be established by a reasonable inference, without piling inference upon inference. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex.1968). As *Lozano* emphasized, an inference must be reasonable before a jury may consider the inference; and it is the role of the trial court and appellate court to determine if such an inference is reasonable. 52 S.W.3d at 148; *see also Wal-Mart Stores, Inc. v. Chavez*, 81 S.W.3d 862, 863 (Tex.App.--San Antonio 2002, no pet.). This requirement that the inference be reasonable in order to constitute evidence was not a concept that originated with Phillips's concurrence in *Lozano*; it had existed in Texas law for some time. *See Western Tel. Corp. v. McCann*, 128 Tex. 582, 99 S.W.2d 895 (1937); *Texas & N.O.R. Co. v. Warden*, 125 Tex. 193, 78 S.W.2d 164 (1935); 38 TEX. L. REV. at 363 (“It follows that ‘no evidence’ points based on the scintilla rule require a careful analysis of the facts proved for the purpose of determining whether the vital fact may be reasonably inferred.”). The rationale underlying the requirement is that if the inference is not reasonable based on the proven facts, then it is merely a guess; and it is, in legal effect, no evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex.2004); *Lozano*, 52 S.W.3d at 148. Moreover, where there is slight circumstantial evidence, something else must be found in the record to corroborate the probability of the fact's existence. *Lozano*, 52 S.W.3d at 147.

3. The Equal Inference Rule, As Modified by *Lozano*, Has Become a Question of Whether the Inference Is Reasonable, Not Whether There Are Equal Inferences

Justice Hecht in his concurrence/dissent felt that the *Lozano* plurality opinion had sounded the death knell for the equal inference rule. *Lozano*, 52 S.W.3d at 157 (Hecht, J., concurring and dissenting). While *Lozano* did not per se “abolish” the equal inference rule, it did reformulate the rule in an attempt to bring it in line with traditional “no evidence” review -- as much as it could given the traditional requirement of looking at only the evidence supporting the jury's verdict. While *Lozano* continued to speak in terms of “equal inference rule,” the “equal inference” part of the rule is essentially gone -- replaced by the overall legal sufficiency test for circumstantial evidence which

focuses on the question of whether the inference the trier of fact had to make to support its fact finding is reasonable. Some appellate courts have continued to refer to the “equal inference rule”; others speak solely in terms of *Lozano*'s legal sufficiency test for reviewing circumstantial evidence and the inferences upon which the trier of fact's findings must necessarily be based. Listed below is a sampling of post-*Lozano* cases reviewing circumstantial evidence:

- *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex.2004)(in reviewing a no-evidence summary judgment motion, court held that circumstantial evidence of manufacturing defect did not exceed a scintilla; therefore, plaintiffs did not meet their burden to show a genuine issue of material fact)
- *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740 (Tex.2003)(per curiam)(while evidence may well establish that the harassment investigation was poorly conducted, such evidence does not constitute evidence that Wal-Mart's decision to discharge plaintiff was motivated by his disability; therefore, evidence legally insufficient to support jury's finding of discrimination)
- *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727-29 (Tex.2003)(per curiam)(stacking of inference upon inference, none more probable than another, results in nothing more than surmise and speculation; because there was nothing else in the record to corroborate the multiple inferences needed to reach the jury's conclusions, court held there was no evidence of a premises defect which proximately caused plaintiff's injuries)
- *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 710 (Tex.2003)(per curiam)(court of appeals' inference regarding plaintiff's lack of knowledge was unreasonable in light of undisputed evidence that plaintiff noticed the boxes stacked along the sides of the stairway and observed that the stairs were slippery or slick)
- *Citizens Nat'l Bank v. Allen Rae Investments, Inc.*, ___ S.W.3d ___, 2004 WL 1595732, at *15 (Tex.App.--Fort Worth 2004, no pet. h.)(reversing damage award and holding that an inference based on another inference does not constitute evidence and that the jury could not have reasonably inferred the fact argued for)
- *Axelrad v. Jackson*, ___ S.W.3d ___, 2004 WL 1440605, at **7-9 (Tex.App.--Houston [14th Dist.] 2004, no pet. h.)(there is no equal inference when direct evidence rendered patently

unreasonable an inference that plaintiff negligently failed to reveal relevant medical history)

- *Johnson v. Felts*, ___ S.W.3d ___, 2004 WL 414379, at **3-5 (Tex.App.--Houston [14th Dist.] 2004, no pet. h.)(because circumstantial evidence of causation was so meager that any inference of causation would be “purely a guess,” granting of no-evidence summary judgment is affirmed)
- *Pilgrim’s Pride Corp. v. Smoak*, 134 S.W.3d 880, 895 (Tex.App.--Texarkana 2004, pet. filed)(equal inference rule applies only when circumstantial evidence so slight that any plausible inference is only a guess and thus amounts to no evidence at all; if circumstantial evidence will support more than one reasonable inference, it is for the trier of fact to decide which is more reasonable)
- *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 123-24, 131-32 (Tex.App.--Houston [14th Dist.] 2003, pet. denied)(evidence legally insufficient to support jury’s fraud finding because no “logical bridge” between proven facts and inference of intent to deceive)
- *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 647 (Tex.App.--Houston [14th Dist.] 2003, pet. denied)(evidence reviewed in its totality in the light most favorable to the proponent to determine if it met the legal requisites to establish intent to deceive -- which almost invariably must be proven by circumstantial evidence)
- *One 1995 Dodge Pickup v. State of Texas*, 119 S.W.3d 306, 308-09 (Tex.App.--Waco 2003, no pet.)(in reviewing circumstantial evidence, court holds that because record is silent as to how truck was used in manufacture of methamphetamine, the evidence is meager, speculative and legally insufficient; relying on *Wal-Mart Stores, Inc. v. Gonzalez*)
- *Ed Rachal Found. v. D’Unger*, 117 S.W.3d 348, 395-98 (Tex.App.--Corpus Christi 2003, pet. filed)(Castillo, J., concurring and dissenting)(applying *Marathon Corp. v. Pitzner*, would hold that evidence of wrongful termination requires too much stacking of inferences to constitute evidence; therefore, would reverse finding because there is no more than a scintilla of evidence)
- *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 144-45, 155 (Tex.App.--Houston [14th Dist.] 2003, pet. granted)(material fact must be reasonably inferred from the known circumstances, but may not be proved by unreasonable inferences or by piling inference upon inference; held evidence legally insufficient to support malicious credentialing claim because no evidence of conscious indifference)
- *Mills v. Mest*, 94 S.W.3d 72, 74-75 (Tex.App.--Houston [14th Dist.] 2002, pet. denied)(“equal inference rule prohibits a jury from inferring an ultimate fact from meager circumstantial evidence that could give rise to any number of inferences, none more probable than another,” citing *Lozano*; thus, evidence of common-law marriage was legally insufficient, citing *Wal-Mart Stores, Inc. v. Gonzalez*)
- *Kugle v. DaimlerChrysler Corp.*, 88 S.W.3d 355, 368 (Tex.App.--San Antonio 2002, pet. denied)(Stone, J., dissenting)(would not have applied “death penalty” sanctions to plaintiffs individually because trial court was not permitted to guess that plaintiffs had knowledge of their attorneys’ conduct; because such an inference is only a guess, it is in legal effect no evidence)
- *Wal-Mart Stores, Inc. v. Chavez*, 81 S.W.3d 862, 865 (Tex.App.--San Antonio 2002, no pet.)(while an inference of delay is possible, there is no evidence that Wal-Mart failed to exercise reasonable care to clean up the oil timely; thus, the evidence creates merely a surmise or suspicion, which is no more than a scintilla)
- *Wal-Mart Stores, Inc. v. Amos*, 79 S.W.3d 178, 185-87, 191 (Tex.App.--Texarkana 2002, no pet.)(circumstantial evidence must show more than the “possibility” of the fact, citing *Wal-Mart Stores, Inc. v. Gonzalez*; here, there was legally sufficient evidence to support the jury’s finding of a causal connection between the termination and the filing of a worker’s compensation claim)
- *Wright v. Wal-Mart Stores, Inc.*, 73 S.W.3d 552, 555, 556-57 (Tex.App.--Houston [1st Dist.] 2002, no pet.)(relying on *Wal-Mart Stores, Inc. v. Gonzalez*, held that in context of constructive notice in a premises liability case, the evidence must establish that it is more likely than not that the dangerous condition existed long enough to give the proprietor a reasonable opportunity to discover the condition; here circumstantial evidence is so slight that any inference is purely a guess and thus no evidence at all)
- *Eberle v. Adams*, 73 S.W.3d 322, 327-36 (Tex.App.--Houston [1st Dist.] 2001, pet.

denied)(utilizing *Lozano* standard, court finds evidence to support a reasonable inference of aiding an abductor as to some parties and, as to other parties, no more than a mere suspicion and thus no evidence to support a reasonable inference)

- *In re S.W.H.*, 72 S.W.3d 772, 778-79 (Tex.App.--Fort Worth 2002, no pet.) (“A fact finder may not infer an ultimate fact from the evidence that merely gives rise to any number of inferences,” citing *Lozano*; in that instance something else in the record must corroborate the probability of the fact’s existence)
- *Wal-Mart Stores, Inc. v. Rosa*, 52 S.W.3d 842, 844 (Tex.App.--San Antonio 2001, pet. denied)(en banc)(relying on *Wal-Mart Stores, Inc. v. Gonzalez*, held that circumstantial evidence that banana was brown supports only the possibility that the dangerous condition existed long enough to constitute notice; instead, it must establish that it was more likely than not that the banana had been there long enough to charge Wal-Mart with constructive notice)
- *\$165,524.78 v. State of Texas*, 47 S.W.3d 632, 636-37 (Tex.App.--Houston [14th Dist.] 2001, pet. denied), *cert. denied*, 537 U.S. 974 (2002)(even under the more restrictive equal inference rule, the evidence was adequate to support the inference as being more probable than any other inference that the confiscated money was used in the commission of a drug-related felony)

Prior to *Lozano*, the Supreme Court decided *Wal-Mart Stores, Inc. v. Gonzalez*, in which it held that the burden on the party seeking recovery based on circumstantial evidence is to demonstrate that it was more likely than not that such a vital fact existed. 968 S.W.2d 934, 938 (Tex.1998) (holding mere speculative, subjective opinion as to constructive notice in a premises liability case is of no evidentiary value). In other words, possibilities will not meet the scintilla rule. *Id.* at 938; *see also Wal-Mart Stores, Inc. v. Amos*, 79 S.W.3d at 185. Neither *Lozano* nor any subsequent case has overruled or modified this holding in *Gonzalez*. At least one appellate court has refused to accept the argument that *Lozano* substantially altered *Gonzalez*. *See Wal-Mart Stores, Inc. v. Rosa*, 52 S.W.3d at 844; *but see id.* at 846-47 (Hardberger, C.J., dissenting) (after *Lozano*, if inference is reasonable, it constitutes evidence -- regardless of the *Gonzalez* “more probable than not” language; would hold that inference is reasonable from evidence that Wal-Mart had notice and opportunity to discover the banana).

The Fourteenth Court of Appeals in a recent opinion applying *Lozano* pointed out that inferences must be deduced from the evidence. *Axelrad*, 2004 WL 1440605, at *8, citing *Lozano*, 52 S.W.3d at 149. Thus, the majority rejected as support for an inference inconsistencies in the medical records, deposition, and trial testimony because such discrepancy goes to the plaintiff’s credibility, which is solely within the assessment of the jury and not part of the circumstantial evidence review. *Id.* at *8.

B. Subject Matter of Case May Require Some Variation in the Traditional “No Evidence” Rule

In 2002, the Supreme Court added to the *Lozano* circumstantial evidence review the principle that a reviewing court need not disregard undisputed evidence that allows only one logical inference. *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 519-20 (Tex. 2002).

For that principle, the *Wolff* Court looked to the opinion in *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). However, *Giles* actually falls into a category of its own because the nature of the inquiry in a bad faith case makes application of the traditional “no evidence” standard of review almost impossible. The burden of proof in a bad faith case is stated in the negative -- whether the absence of a reasonable basis to deny has been established. As both the *Giles* majority and Justice Hecht’s concurrence noted, applying the traditional “no evidence” review in bad faith cases is difficult because that would mean a reviewing court could give no weight to the insurer’s evidence of reasonable basis to deny the claim; therefore, no judgment could ever be reversed because there would never be any evidence of a reasonable basis. *Id.* at 51, 58, 76. Rejecting the concurrence’s suggestion for solving this dilemma, the Court refused to transform the question of reasonable basis from a fact question into a question of law which the appellate court reviews *de novo*. *Id.* at 56. Instead, the majority opinion pointed to a long standing rule for performing a “no evidence” review, to wit: a court does not have to disregard undisputed evidence that allows of only one logical inference -- in this case, an inference of no reasonable basis to deny payment on the claim. *Id.* at 51 n.1, citing *Wininger v. Fort Worth & D.C. Ry. Co.*, 105 Tex. 56, 143 S.W. 1150, 1152 (1912). Thus, the *Giles* majority applied the traditional “no evidence” standard of review, presumably with the inference rule appended, and concluded that some evidence supported the jury’s bad faith finding.

Justice Hecht, concurring, would define the standard for bad faith as a legal issue rather than a factual one as it currently stands because of the “inescapable difficulties in applying traditional no-evidence review standards to bad-faith cases.” *Giles*,

950 S.W.2d at 73 (Hecht, J., concurring)(“The problem lies in applying a review standard that does not permit a weighing of the evidence to a liability standard that requires such weighing.”). Justice Enoch, also concurring, felt that the Court had already resolved that dilemma in *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597 (Tex.1993) and *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373 (Tex.1994) by focusing on the relationship the evidence arguably supporting the bad faith finding has to the elements of bad faith. To him *Lyons* and *Dominguez* meant that the reviewing court is to examine the evidence before the factfinder in the light most favorable to the verdict, not the information before the insured. Hecht disagreed. To date, there is no definitive resolution of this dilemma. Thus, if you have a bad faith case on appeal, you certainly need to read the *Giles* opinion in full and conform your legal sufficiency review argument to it as closely as possible.

Justice Hecht’s concurrence also pointed out that this same difficulty of applying “no evidence” review is present in cases involving alter ego. If the jury must consider the total dealings between a corporation and an individual before it can find alter ego, it is hardly appropriate to review the propriety of an affirmative finding by looking only to those dealings which might imply alter ego. *Giles*, 950 S.W.2d at 78 (Hecht, J., concurring). Gross negligence had also presented the same difficulty until the Legislature adopted the *Moriel* definition of gross negligence. *Id.* at 75.

C. “No Evidence” of an Element of Cause of Action Is Another Type of “No Evidence” Review

The *Wolff* case and Enoch’s concurrence in *Giles* point to yet another type of “no evidence” review -- reviewing the evidence in light of the essential elements of the cause of action. Examining the different types of “no evidence” standards of review, Justice Calvert concluded that “no evidence” points which must be sustained arise in four situations:

- (a) a complete absence of evidence of a vital fact;
- (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact;
- (c) the evidence offered to prove a vital fact is no more than a mere scintilla;
- (d) the evidence establishes conclusively the opposite of the vital fact.

38 TEX. L. REV. at 362-63; *see also* *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex.2003)(per curiam); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997).

Expanding upon the Calvert article, Professors Powers and Ratliff discussed the “b” type case where the court determines that the facts do not constitute a cause of action. William Powers, Jr. & Jack Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence,”* 69 TEX. L. REV. 515, 522 (1991). Such a case falls within their designated “zone 1” -- meaning there is no evidence (*i.e.*, no more than a scintilla) to support a fact issue, which results in reversal and rendition. As an example, the article noted that in *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), the court was not required to evaluate specific evidence to determine whether the record contained a quantum of evidence to support a jury finding. Rather, the court made a legal determination about the substantive elements of a particular cause of action. *Id.* at 522.

As another example, in *Beal Bank, S.S.B. v. Schleider*, the court of appeals reviewed the evidence in its totality in the light most favorable to the proponent to determine if it met the legal requisites to establish intent to deceive -- which almost invariably must be proven by circumstantial evidence. 124 S.W.3d 640, 647 (Tex.App.--Houston [14th Dist.] 2003, pet. denied). Relying on *Lozano*, the Houston Court of Appeals determined that the evidence of intent to deceive did not transcend mere suspicion. *Id.* at 647-50; *see also* *T.O. Stanley Boot v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex.1992) (evidence of intent not to perform “so weak that it creates only a mere surmise or suspicion of its existence”). Like the rest of these type cases determining whether the legal requirements of a cause of action have been met, *Beal Bank* neither examined each piece of evidence to determine reasonable inferences, nor did it need to do so. Instead, the court noted that reasoning from circumstantial evidence often involves linking apparently unrelated events to establish a pattern; therefore, a court should not view each piece in isolation, but rather should view them in light of all known circumstances. *Beal Bank*, 124 S.W.3d at 648; *see also* *IKON Office Solutions v. Eifert*, 125 S.W.3d at 124. Guided by *Lozano*’s admonition that “legally sufficient circumstantial evidence requires a logical bridge between the proffered evidence and the necessary fact,” the *Beal Bank* court found that logical bridge lacking in terms of the jury’s “intent” finding. 124 S.W.3d at 648 (quoting *Lozano*, 52 S.W.3d at 152).

IV. VARIANCES TO “NO EVIDENCE” REVIEW REQUIRED BY HEIGHTENED “CLEAR AND CONVINCING” STANDARD OF PROOF

Recognizing that its traditional “no evidence” standard of review needed modification when it was applied to the constitutionally heightened “clear and

convincing” standard of proof, in 2002 and 2003 the Supreme Court of Texas undertook that modification.

A. Origins of “Clear and Convincing” Standard of Proof in the Due Process Clause

The United States Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1979), discussed the rationale underlying the significance of a standard of proof in a due process analysis. The function of a standard of proof is to instruct the factfinder on the degree of subjective certainty and confidence in its factual conclusions society requires in a particular type adjudication. *Id.* at 423; *see also Santosky v. Kramer*, 455 U.S. 745, 756, 769 (1982)(the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with “a significant deprivation of liberty” or “stigma”). It also indicates the relative importance society attaches to the ultimate decision. The preponderance of the evidence standard is generally utilized in civil monetary disputes about which society has minimal concern. However, with criminal adjudications, the interests of the defendant are of such magnitude that they have historically been protected by a “beyond a reasonable doubt” standard. The principal rationale for that standard is to prevent the likelihood of an erroneous judgment. With the “beyond a reasonable doubt” standard, society imposes almost the entire risk of an erroneous judgment on itself; whereas, in a monetary suit, the risks of an erroneous judgment are borne equally by the opposing parties under a preponderance of the evidence standard. 441 U.S. at 423-24.

In between those two standards is the intermediate standard of proof, most often termed “clear and convincing,” which is utilized when the interest at stake is more substantial than mere loss of money. *Id.* at 424. The standard is also used to protect important individual interests, such as deportation, denaturalization, involuntary commitment, and termination of parental rights. This mid-level standard reduces the risk of erroneously tarnishing a person’s reputation by increasing the risk on the party seeking an adverse adjudication. *Id.*; *see also In Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (extended clear and convincing standard to parental termination proceedings).

In *Addington*, the U.S. Supreme Court reasoned that a function of the legal process is to minimize erroneous decisions. 441 U.S. at 425; *see also Santosky*, 455 U.S. at 757 n.9 (“the standard of proof is a crucial component of legal process, the primary function of which is to ‘minimize the risk of erroneous decisions’”). As the Court subsequently summarized its decision:

Addington teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Santosky, 455 U.S. at 755.

Thus, in *Addington*, where civil commitment represented a significant deprivation of liberty requiring due process protection, something beyond mere preponderance of the evidence was required. 441 U.S. at 426-27. Moreover, a standard of proof like “preponderance of the evidence” which “by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case.” *Santosky*, 455 U.S. at 764. While the State has a legitimate interest in protecting the community, the individual’s risk was significantly greater than any possible harm to the State; therefore, the weight and gravity of the ultimate decision was such that an intermediate standard of proof more substantial than preponderance of the evidence was required by due process -- one that would strike a balance between the rights of an individual and the legitimate concerns of the state. *Id.* at 426-27, 431; *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (balancing test of three factors: the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure).

B. “Clear and Convincing” Standard of Proof Requires a Standard of Review Different from the Traditional “No Evidence” Rule

Addington left to the Supreme Court of Texas the determination of the precise legal boundaries and description of that intermediate standard. *Id.* at 433. Texas defined “clear and convincing” as meaning the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *State v. Addington*, 588 S.W.2d 569 (1979)(per curiam)(involuntary commitment).

However, neither *Addington* opinion indicated how appellate courts were to review findings based on that burden of proof. In *In re C.H.*, Justice Jefferson, writing for the Court, detailed the history of the development of the “clear and convincing” burden of proof and Texas appellate courts’ differing formulations of review standards for it. 89 S.W.3d 17, 23-24 (Tex.2002). The Dallas Court of Appeals was the first to require an intermediate standard of appellate review for this intermediate standard of proof. *See*

Neiswander v. Bailey, 645 S.W.2d 835, 836 (Tex.App.--Dallas 1982, no writ)(standard of review required the appellate court to determine whether the trier of fact could reasonably conclude that the fact’s existence is highly probable). Other courts of appeal disagreed that other than legal and factual sufficiency review was necessary. *In re C.H.*, 89 S.W.3d at 24. Ultimately the Court in *In re C.H.* concluded that “the burden of proof at trial necessarily affects appellate review of the evidence.” *Id.* at 25.

As the Supreme Court explained in *In re C.H.*, the traditional “no evidence/legal sufficiency” standard of review that requires no more than a scintilla of evidence will not work when the law imposes a clear and convincing burden of proof. That is so because “[a]s a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance.” *Id.* at 25. And, a scintilla of evidence cannot equal clear and convincing evidence. *In re J.F.C.*, 96 S.W.3d 256, 265 (Tex.2002). Thus, the traditional “no evidence” standard of review will not afford the protections inherent in the clear and convincing standard of proof. *Id.* at 266.

Given the problems with applying the traditional legal sufficiency standard, the Court formulated a new standard of review required in such cases. In *In re C.H.* the question for appellate review of termination of parental rights was stated as whether the evidence is such that a factfinder could reasonably form a belief or conviction about the truth of the allegations. 89 S.W.3d at 25. Accordingly, the standard of review formulated for clear and convincing burden of proof cases was to look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *J.F.C.*, 96 S.W.3d at 266. Looking at the evidence in the light most favorable to the judgment necessarily means that the reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. Therefore, the court will also need to consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. Under this heightened standard of review, a court is not required to disregard all the evidence that does not support the finding. To the contrary, it must consider undisputed evidence even if it does not support the finding because to disregard undisputed facts “could skew the analysis of whether there is clear and convincing evidence.” *Id.* In the Court’s opinion, this newly articulated standard with its focus on whether a reasonable jury could form a firm conviction or belief sufficiently “retains the deference an appellate court must have for the factfinder’s role.” *In re C.H.*, 89 S.W.3d at 26. Having stated this new standard of

review, the Court in the interest of uniform decision-making rejected any statement of the standard that varied from the one just announced, including the Dallas Court of Appeals’ test that the jury’s determination of a fact must be “highly probable.” *Id.* at 26.

While the proof under the clear and convincing standard must be more than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed -- so long as it carries a clear conviction of its truth. *State v. Addington*, 588 S.W.2d at 570. However, evidence of ambiguous quality, both in its origin and its content, make it weak in its alleged corroboration of the finding. Possibilities will not meet even the scintilla rule, much less the clear and convincing burden of proof. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex.1998). That is especially true where “intent” or “willful misconduct” is the vital fact at issue. Allowing intent to be established by possibilities is flatly illogical. *See Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex.1993) (“some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence”).

C. Cases to Which This Heightened Standard of “No Evidence” Review Is Applicable

While the Court’s initial formulation of this heightened standard of “no evidence” review occurred in termination-of-parental-rights cases, it is equally applicable any time the Constitution requires (involuntary commitment, actual malice in public-official defamation) or a statute mandates⁴ (termination of parental rights, tracing of separate property,⁵ malice/exemplary damages) that the proof be by clear and convincing evidence.

1. Defamation of Public Official

In public-official defamation cases the First Amendment requires clear and convincing evidence of

⁴ See Bill Vance, *The Clear and Convincing Evidence Standard in Texas: A Critique*, BAYLOR L. REV. 391, 490 & nn. 93, 94 (1996)(partial listing of statutes which require clear and convincing proof); see also *Arkoma Basin Exploration Co, Inc. v. FMF Assocs. 1990-A, Ltd.*, 118 S.W.3d 445 (Tex. App.--Dallas 2003, pet. filed)(construing Virginia law which requires fraud be proved by clear and convincing evidence; therefore, applies *J.F.C.* legal sufficiency standard of review to fraud finding).

⁵ *Irvin v. Parker*, ___ S.W.3d ___, 2004 WL 1353135, at **4 , 8 (Tex. App.--Fort Worth 2004, no pet. h.)(Family Code section 3.003(b) requires that that the separate character of property be established by clear and convincing evidence through tracing); *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 607 (Tex. App.--Houston [14th Dist.] 2004, no pet. h.)(same).

actual malice⁶ and independent review on appeal of the factfinder’s determinations at trial.⁷ See *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex.2002). For the *Bentley* plurality, “[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact.” *Id.* at 597. Rather, as the Court stated:

Judges, as expositors of the constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”

Id. at 597. Thus, it is a very different review from that to which appellate courts are accustomed. With independent review, deference to factfinder’s determinations is limited but not totally forbidden because there are issues of credibility which the jury must resolve and which are impossible for an appellate court to do without the benefit of seeing the witnesses’ demeanor. *Id.* *Bentley* outlined the steps of this independent review as follows: (1) determine what evidence the jury must have found incredible; if that determination is reasonable, disregard that evidence; (2) identify undisputed facts; and (3) determine whether the undisputed evidence, along with other evidence the jury reasonably could have believed, provides clear and convincing proof of actual malice. *Id.* at 598-601. Applying this standard, the plurality opinion concluded that there was legally sufficient evidence of actual malice as to Bunton, but not as to his co-host Gates. *Id.* at 602, 604. Justice Baker finds clear and convincing evidence of actual malice as to Gates also. *Id.* at 617-19 (Baker, J., dissenting). Applying the same independent review, Chief Justice Phillips finds no clear and convincing evidence of actual malice as to either Bunton or Gates. *Id.* at 608-15 (Phillips, C.J., concurring and dissenting).

2. Malice/Gross Negligence in Exemplary Damages Context

The Supreme Court of Texas has not yet written on the “clear and convincing” standard of review in the context of exemplary damages; however, one petition

has been granted and two petitions are currently pending, with requests for briefing on the merits, in cases where the court of appeals applied the “clear and convincing” standard of review to the malice finding underlying an exemplary damages award. To date, the cases where Texas courts of appeals have applied the *J.F.C.* standard in this context are as follows:

- *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 680-83 (Tex.App.--Dallas 2004, pet. filed 7/26/04)(holding a fact finder could reasonably form a firm belief or conviction that the hospital was grossly negligent)
- *Cigna Healthcare of Tex., Inc. v. Pybas*, 127 S.W.3d 400, 417-20 (Tex.App.--Dallas 2004, judgt. withdrawn)(holding no reasonable factfinder could form a firm belief or conviction either that the corporation had ratified its employee’s conduct or that plaintiff’s injuries resulted from a willful act or omission or gross neglect by the corporation through its vice-principals; therefore, exemplary damage award reversed)
- *Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 842-43, 854-55 (Tex.App.--Fort Worth 2003, pet. denied)(holding that a reasonable trier of fact could form a firm belief or conviction that both prongs of malice were established; therefore, exemplary damages award affirmed)
- *Qwest Communications Int’l, Inc. v. AT & T Corp.*, 114 S.W.3d 15, 23-28 (Tex.App.--Austin 2003, pet. filed 9/11/03; briefing on merits requested 12/16/03)(legally sufficient evidence of both malice and vice principal)
- *Kroger Tex. Ltd. P’ship v. Suberu*, 113 S.W.3d 588, 601-02 (Tex.App.--Dallas 2003, pet. filed 10/17/03, briefing on merits requested 2/26/04)(holding trier of fact could have formed a firm conviction or belief that Kroger acted with malice in detaining and prosecuting Suberu who it knew did not have a grocery cart when she was leaving the store; in addition, evidence legally sufficient to support deemed finding that employees involved were vice principals of Kroger)
- *First Valley Bank of Los Fresnos v. Martin*, 55 S.W.3d 172, 193 (Tex.App.--Corpus Christi 2001, pet. granted)(decided prior to *J.F.C.*, court applied standard of “whether trier of fact could reasonably conclude that the existence of the fact is highly probable”; holding that jury could have

⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 119-20 (Tex.2000)(this federal constitutional standard takes precedence over the Texas Constitution’s limitations on factual review).

⁷ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-86 (1989).

reasonably found that the bank acted with malice by clear and convincing evidence)

Note, however, that the United States Supreme Court has held that the review of a constitutional excessiveness challenge to the amount of the exemplary damages award must be *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). The Court’s rationale is that there should not be a deferential standard because the jury’s assessment of exemplary damages is not a fact finding. *Id.* at 437. An additional benefit is that a *de novo* review of the *Gore* criteria for imposition of exemplary damages will tend to unify precedent and stabilize the law. *Id.* at 436. In his concurrence in *In re C.H.*, Justice Hecht noted this requirement of *de novo* review under the United States Constitution. 89 S.W.3d at 29 (Hecht, J., concurring).

V. CONCLUSION

*A man may well bring a horse to the water,
But he cannot make him drink without he
will.*

John Heywood, PROVERBS [1546]
pt. I, ch. 11

Having been forced to “drink” of the depths of the overlays to the traditional “no evidence” review, I’m now a convert. Knowing the way to marshal and examine the evidence you’re challenging or defending on appeal can make a significant difference in the effectiveness of your written and oral arguments to the reviewing court. Being able to examine the reasonableness of the jury’s inferences or taking advantage of the “clear and convincing” standard of review with regard to exemplary damages awards unquestionably strengthens your appellate attacks on those jury findings. In short, take it from the horse’s mouth: learn from my mistakes and take my advice to read those “Standard of Review” paragraphs in opinions relevant to the subject matter of your next appeal while you’re writing the brief.