UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

33rd Annual Conference on State and Federal Appeals

June 8-9, 2023
Austin, Texas

KNIVES OUT: A CALL FOR THE SUPREME COURT OF TEXAS TO ABOLISH THE SO-CALLED "RULE" AGAINST INFERENCE STACKING

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I. INTRODUCTION

1. "Inference: A conclusion reached by considering other facts and deducing a logical consequence from them."[1]

> The origin of the so-called rules against basing an inference upon an inference or a presumption upon a presumption is obscure, but . . . despite the almost unanimous criticisms of legal scholars and of those courts which have gone into the matter at any length, the "rules" have shown amazing vitality . . . .[2]

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1. *Inference*, BLACK'S LAW DICTIONARY (9th ed. 2009).

2. W.E. Shipley, Annotation, *Modern Status of the Rule Against Basing an Inference upon an Inference or a Presumption upon a Presumption*, 5 A.L.R. 3d 100, 105 (1966).

In its 1969 decision in *Briones v. Levine's Department Store, Inc.*, the Texas Supreme Court noted "the general rule in [is] this state that an inference may not be based upon another inference."[3] But commentators have condemned this rule for a century.[4] The Fifth Circuit,[5] the Texas Court of Criminal Appeals,[6] and courts across the country have repudiated the rule.[7] The time has come for the Texas Supreme Court to join them and plunge a much-needed stake through the heart of the so-called rule against inference stacking.

Texas law governing the proper role of inferences in civil cases is hopelessly confused. Some of the Texas Supreme Court's decisions over the past three decades appear to reject the rule.[8] But more recently, the Court has cited the rule.[9] Reflecting this inconsistency, some lower courts reject the rule while others apply it.[10] And when courts do apply the rule, they usually do so improperly—treating it as a two-inferences-and-you're-out bar.[11] This approach exemplifies the "familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem."[12] Methodology aside, even references to "inference stacking" confuse Texas sufficiency review.[13]

The Texas Supreme Court should do what the Texas Court of Criminal Appeals did in 2007:[14] bring Texas into the national mainstream by repudiating the rule against inference stacking, instructing lower courts to avoid inference-stacking language, and clarifying that the proper review of inferences asks simply whether they are reasonable in light of the evidence.

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3. Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969) (citing Rounsaville v. Bullard, 276 S.W.2d 791, 793–94 (Tex. 1955)).

4. *See infra* notes 123–131 and accompanying text (providing a number of cases in which the rule is discussed).

5. *See infra* notes 106–116 and accompanying text (discussing a Fifth Circuit opinion in which the rule was repudiated).

6. *See infra* notes 118–121 and accompanying text (providing the context of the Texas Court of Criminal Appeals opinion condemning the rule in 2007).

7. *See infra* Part I.C.3 (providing a survey of United States courts' decisions on the rule).

8. *See infra* Part I.B.2 (discussing several Texas Supreme Court cases that seemingly reject the rule).

9. *See* Ford Motor Co. v. Castillo, 444 S.W.3d 616, 620–23 (Tex. 2014).

10. *See infra* notes 98–104 and accompanying text (discussing intermediate court opinions providing differing opinions on the validity of the rule).

11. *See, e.g.*, Miller v. Superior Forestry Serv., Inc., No. 03-17-00043-CV, 2018 WL 4039562, at *7 (Tex. App.—Austin Aug. 24, 2018, pet. denied) (holding evidence insufficient due to the need to "stack" multiple inferences).

12. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 591 (Tex. 2016) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 87, at 592 (3d ed. 1964)).

13. *See id.*

14. *See* Hooper v. State, 214 S.W.3d 9, 15–17 (Tex. Crim. App. 2007).

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First appeared as part of the conference materials for the
33rd Annual Conference on State and Federal Appeals session
"Inference Stacking"