

**The Court's Charge:  
The State of *Payne* and  
the Progeny of *Casteel***

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## The Court's Charge: The State of *Payne* and the Progeny of *Casteel*

As the law continues to develop under *Payne* and *Casteel*, preservation of charge error may grow easier in certain circumstances but strategy calls may grow more difficult as theories and form options increase. This paper outlines the basic principles and most recent cases in preserving charge error, identifying charge error, and applying the harmless error rule. An additional section is included that lists recent charge error holdings on specific claims and issues. The principles outlined in the paper are designed to aid in making the difficult strategy calls necessary in deciding if and when to preserve charge error in the unique circumstances of your case.

### I. Preservation of Charge Error

The general rules on preserving charge error have not changed. Practitioners and courts, however, continue to struggle with how to apply those rules in practice. This section discusses the basic requirements of preservation and recent decisions construing those provisions.

#### A. Fundamental error does not eliminate the burden to preserve error

In a series of termination of parental rights cases, parties argued that broad-form issues did not require ten-juror agreement on the same grounds of termination and thus denied constitutional due process guarantees. In that set of cases the parties argued that such error was so fundamental as to not require preservation. The supreme court rejected that fundamental error argument and held unpreserved charge error (including alleged error as to broad-form issues) will not be reviewed on appeal. *In re B.L.D.*, 46 Tex. Sup. Ct. J. 978 (July 3, 2003). Instead, traditional rules of preservation apply even in the constitutional context. *Id.*

#### B. Preserving complaints about the content of the charge

##### 1. The Rules of Procedure

The Texas Rules of Civil Procedure set forth the following seemingly simple rules of preservation:

- |  |         |
|--|---------|
| a. <i>Defective</i> Question, Definition,<br>or Instruction: | Object  |
| b. <i>Omitted</i> Definition or<br>Instruction:              | Request |

##### c. *Omitted* Question—

Party's Burden:	Request
Opponent's Burden:	Object

TEX. R. CIV. P. 274, 278, 279; *see Lyles v. TEIA*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (explaining requirements of rules); *see also Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (written request serves same purpose as objection and thus in case of omitted question on which party does not hold the burden, request suffices).

Prior to *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992), some courts held that the Rules require that a party request *and* object, at least in certain situations. *See, e.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (party who would benefit from addition of limiting instruction to damage question must object to deficiency as submitted and request limiting instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, writ denied) (party who requests question, definition or instruction on which that party relies must also object).

Those courts generally relied on two rules to require an objection and a request: (1) Rule 274 provides that “[a]ny complaint . . . on account of an omission . . . is waived unless specifically included in the objections,” and (2) Rule 278 requires a party relying on a question to submit a request. *See, e.g., Wright Way*, 799 S.W.2d at 418. Moreover, when a party will benefit from a question, instruction or definition, courts have generally required the relying or benefiting party to make the trial court aware of the complaint by an articulated objection to avoid building error in the record with unexplained requests. *See id.*

As a result, knowing when to object and/or request (particularly in a broad-form context) was historically a difficult task. Some practitioners chose to always do both—object and request. Although *Payne* sought to eliminate some of the procedural difficulty associated with preservation, even under *Payne*, parties may want to continue to object and request, at least in some circumstances.

## 2. Preservation by request

### a. Separate from objections

“A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge.” TEX. R. CIV. P. 273; *see Woods v. Crane Carrier Co.*, 693 S.W.2d 379-80 (Tex. 1985) (request dictated into record during objections did not preserve complaint).

### b. Tendered to the court in writing

All requests must be tendered to the court in writing. TEX. R. CIV. P. 278; *see Woods*, 693 S.W.2d at 379-80 (request dictated into record did not preserve complaint).

### c. In substantially correct wording

All written requests must be tendered to the trial court in substantially correct wording. Tex. R. Civ. P. 278; *Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (“[Substantially correct] means one that in substance and in the main is correct, *and that is not affirmatively incorrect*”); *see also Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002) (8<sup>th</sup> Circuit pattern on foreseeability in substantially correct form); *Town of Flower Mound v. Teague*, 2003 WL 21475644 (Tex. App.—Fort Worth 2003, pet. filed) (requested instructions that misstated causation standard for whistleblower claim and failed to track statute not in substantially correct form); *Saenz v. David & David Constr. Co.*, 52 S.W.3d 807 (Tex. App.—San Antonio 2001, pet. denied) (holding premises defect request not in substantially correct wording without instruction or question on control of independent contractor); *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 493 (Tex. App.—San Antonio 1994, writ denied) (instruction too vague renders it affirmatively incorrect); *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 180 (Tex. App.—Waco 1987, writ denied) (failure to fix burden of proof affirmatively incorrect).<sup>1</sup> Relying

<sup>1</sup> Relying on a PJC (at least when it has not been approved by the supreme court) is not a guarantee that the request is substantially correct. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (tortious interference submission modeled after pattern “not entirely correct” statement of the law); *State v. Williams*, 940 S.W.2d 583, 584-85 (Tex. 1996) (finding PJC premises defect pattern erroneous). Courts of appeal, however, frequently affirm submissions based upon the patterns. *See Borden, Inc. v. Price*, 939 S.W.2d 247, 253-

on *Payne*, some courts (particularly if other parts of the record demonstrate the trial court understood the issue) may now give a slightly broader latitude as to how correct a request must be.

### d. Not obscured or concealed with minute variations and numerous unnecessary requests

“When the complaining party’s . . . requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by . . . minute differentiations or numerous unnecessary requests, such . . . request shall be untenable.” TEX. R. CIV. P. 274.

Relying upon *Payne*’s preservation test, the supreme court held that a pre-trial submission of a complete charge did not necessarily “obscure” a request but could instead suffice to preserve error. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995). The trial court, however, had submitted part of the proposed charge, which the supreme court found made it clear that the trial court was aware of the plaintiff’s request for a finding on future lost profits. The plaintiff also objected to the omission. *Id.*

Without the separate oral reference, some courts continue to reject “en masse” filings to preserve error—reasoning that such filings do not make the trial court aware of the complaint. *Luensmann v. Zimmer-Zampese & Assocs., Inc.*, 103 S.W.3d 594, 599 (Tex. App.—San Antonio 2003, no pet.) (written objections with check marks and oral statement that no objections other than written insufficient to preserve error); *Hoffmann-La Roche, Inc. v. Zeltwanger*, 69 S.W.3d 634, 652 (Tex. App.—Corpus Christi 2002, pet. granted) (limitations defense filed with numerous other instructions and questions without bringing to trial court’s attention insufficient to preserve error); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (submitting entire charge not sufficient to preserve error under *Alaniz* or *Liedeker* when record did not show court ruled, in writing or

54 (Tex. App.—Amarillo 1997, writ requested) (approving use of conditional instruction to comparative responsibility question although informed jury of the effect of their answers). *Cf. Ishin Speed Sport, Inc. v. Rutherford*, 933 S.W.2d 343, 350 (Tex. App.—Fort Worth 1996, no writ) (mere fact that requested instructions appear in patterns does not automatically demonstrate error in refusal to submit such instructions).

orally, or was otherwise aware of the proposed requests).

In other words, an appellate court might find preservation if the record is clear as to party's complaint but no modification to eliminate the complaint was made to the charge (which is another reason a party may choose to both object and request).

**e. Signed as refused**

To preserve error, a judge should endorse requests as "Refused" or "Modified as follows:" and sign the same officially. TEX. R. CIV. P. 276. Endorsement is the preferred, but perhaps not the only, means of preserving error for refusing a request. *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386-87 (Tex. 1997) (finding that trial court's statement on the record that the court would note its refusal on the requests preserved error despite the fact that the court never endorsed and signed the requests). This potential fall-back explains why a party may still choose to object with a request—even if the requests somehow end up unsigned, the party may still have the error preserved by also objecting on the record.

**3. Preservation by objection**

**a. Separate from requests**

"A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge." TEX. R. CIV. P. 273.

**b. In writing or on the record**

"[O]bjections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury." TEX. R. CIV. P. 272.

**c. Pointing out the objectionable matter**

An objection "must point out distinctly the objectionable matter." TEX. R. CIV. P. 274. That is, the objection must identify *what* part of the question, instruction, or definition is objectionable. See *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986); *Carlton v. Cobank, Inc.*, 2003 WL 1728493 (Tex. App.—Amarillo 2003, pet. denied) (failing to explain how question was erroneous waived error).

**d. Stating the ground(s)**

An objection must point out "the grounds of the objection." TEX. R. CIV. P. 274. That is, a party must give the reasons *why* the part of the a matter is objectionable.

General objections do not suffice. See, e.g., *City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.—Austin 1997, writ denied) (objection that definition "not the law in Texas" insufficient); *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (objection that "no pleadings to support the submission" so broad as to be meaningless).

The objection at trial must also match the complaint on appeal. See, e.g., *Delaney v. Scheer*, 2003 WL 247110 (Tex. App.—Austin 2003, no pet.) (memo opin.) (objection that does not match complaint on appeal waives any error); *Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied) (objection that the measure of damage is improper does not match complaint that some elements of damage are omitted and thus does not preserve complaint on omission); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 383 (Tex. App.—El Paso 2002, pet. denied) ("party confined to jury instruction objection made at trial; any variant complaint on appeal is waived"); *Lyondell Petrochemical Co. v. Kirkland*, 1999 WL 1208506 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (n.d.p.) (objection at trial that instruction improperly commented on weight of evidence does not preserve error on whether instruction informed jury of the legal effect of its answer).

**e. Not incorporated from one part of charge to apply to another part of charge**

"No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only." TEX. R. CIV. P. 274. A party should specifically identify by objection for each question, instruction, or definition what is objectionable and why.

**f. Not obscured or concealed with voluminous or unfounded objections**

"When the complaining party's objection . . . is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, . . . such objection . . . shall be untenable." TEX. R. CIV. P. 274.

**g. Ruled upon by the court**

The court should “endorse the rulings on the objections if written or dictate the same to the court reporter in the presence of counsel.” TEX. R. CIV. P. 272. Rule 272, though, presumes that “the party making the objections presented the same at the proper time and excepted to the ruling thereon.” TEX. R. CIV. P. 272. As a result, the supreme court held that “if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled.” *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984).

#### 4. Making the court aware of the complaint—object and request?

The Texas Supreme Court adopted the following litmus test (drawn from the above rules read together) for charge error preservation: Did the trial court know of and overrule the substance of the complaint at a time when the court could have (but did not) correct the problem in the charge? *See Payne*, 838 S.W.2d at 235;<sup>2</sup> *see also Liedeker*, 958 S.W.2d at 387 (holding that to make endorsement sole means of preserving complaint on request would elevate form over substance and would “be ill advised”). Thus, under *Payne*, preservation requires that the record clearly reflect that the trial court understood the complaint but chose not to change the charge. According to some courts, that test still means a party must tender requests in some circumstances.

##### a. Repetition at each opportunity

When a pre-charge complaint is necessary, a party may decide to state its complaint whenever it gets the chance—early, often, orally and in writing—all designed to “make the court aware” of the nature of the party’s complaint. For example, in *S.E. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172-73 (Tex. 1999), the supreme court held that a trial court’s failure to include a “pre-pooling” limiting instruction rendered the question defective in an oil and gas drainage case. The lessors argued that error was waived by a failure to object to the drainage issue. In deciding whether the error was preserved, the court looked to the entire record, not just the charge conference and requests.

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<sup>2</sup> Specifically, the court in *Payne* held: “There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” 838 S.W.2d at 241.

Relying on *Payne*, the court noted that counsel had first raised the issue when asking to bifurcate the drainage issue from a bad-faith pooling claim. *Id.* Counsel further explained in detail the need to segregate the pooling and drainage issues in the charge when the court asked for a proposed charge. *Id.* While noting that those complaints at that early stage alone would not suffice, the court found that a re-urged objection at the charge conference to first submit the pooling issues before determining if any need existed to submit the drainage issue properly preserved the error. *Id.*

In other words, after counsel explained the issue three times to the court, those explanations satisfied *Payne* by making the trial court plainly aware of the impact of the pooling issues on the drainage issue—even though counsel did not object at the charge conference to the form of the drainage question or make a written request to add a limiting instruction to the question.

##### b. Objection only

Objections continue to suffice for defective submissions. *See, e.g., Holubec v. Brandenberger*, 46 Tex. Sup. Ct. J. 702 (May 22, 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve complaint about defect in nuisance question); *Miga v. Jensen*, 96 S.W.3d 207, 212-13 (Tex. 2002) (“Twice during the charge conference [the defendant] asserted that [the plaintiff’s] damages were limited to the value of the stock at the time of breach; the trial court interrupted [the defendant] the second time, saying, ‘you’ve got your objection on the record.’”); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (objection to entire question that plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficiently specific to preserve error and objection to each sub-part of same question on identical grounds not necessary to preserve error).

##### c. Request with objection

Many courts using the less harsh preservation test of *Payne* now look to both the objections and requests (usually in combination) to decide if a party preserved error, particularly when a request clarifies an objection or an objection clarifies a request. In other words, if a party tendered a request, *Payne* is more likely to help preserve error. *See, e.g., Primrose Op. Co. v. Jones*, 102 S.W.3d 188, 198 (Tex. App.—Amarillo 2003, pet. filed) (filed list of

questions, instructions and definitions discussed at charge conference sufficient to preserve error); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (written objection to proposed charge, oral reference of court to same written objections with final charge, and written request on same all combined to preserve error); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Payne* [and pre-*Payne* cases] and finding error preserved by objection, argument to court, and request); *Park Funeral Chapel, Inc. v. Gallegos*, 2001 WL 488007 (Tex. App.—San Antonio 2001, no pet.) (n.d.p.) (objection to omission of word “reasonable” from fees question and referring court to applicable PJC made court aware of complaint); *M.D. Mark, Inc. v. PIHI P’ship*, 2001 WL 619604 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (n.d.p.) (tendered instruction that included essential fiduciary concepts in form that did not assume a duty or controverted facts preserved error even though ultimately found harmless); *Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Am.*, 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dismissed by agr.) (objection that did not clearly state the grounds sufficient to preserve error when request clarified grounds for complaint); *Smith-Hamm, Inc. v. Equipment Connection*, 946 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1997, no writ) (objections and simple request “made the trial judge aware of its complaint, timely and plainly” when neither the case nor the complaint was difficult).

Discussions at the informal charge conference referenced during the formal charge conference have also assisted with establishing preservation under *Payne*. See *In re Stevenson*, 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied) (despite court responding to objection with “all right” rather than ruling, record indicated requested instruction discussed with trial court during informal charge conference and read into record during formal charge conference sufficed to preserve error under *Payne*); *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (refusing to rely on distinction between informal and formal charge conferences and holding that objection, reference to PJC, and court’s assurance that he had the requisite PJC together established that trial court was clearly aware of the defendant’s complaint). On the other hand, failure to bring forward a full record can result in a waiver

or presumptions that preclude reversal on the basis of charge error. See, e.g., *Munden v. Reed*, 2003 WL 57751 (Tex. App.—Dallas 2003, no pet.) (memo opin.) (partial record precluded review of alleged charge error).

#### d. Request only

Some courts construe *Payne* as consistent with Rule 278 only by allowing a written request to replace a written or oral objection, but not by allowing an objection alone to preserve error when an obligation to request existed. *Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied); see also *Gragson v. ME&E Welding & Fabrication, Inc.*, 2001 WL 1190087 (Tex. App.—Texarkana 2001, pet. denied) (n.d.p.) (“If a party does not submit that written request, he waives any error by the trial court in not submitting it. Dictating a requested instruction to the court reporter is not sufficient to support an appeal based on the trial court’s refusal to submit requested material.”); *Shamrock Communications, Inc. v. Wilie*, 2000 WL 1825501 (Tex. App.—Austin 2000, pet. denied) (n.d.p.) (citing *Payne* but requiring tender for omitted instruction and finding tendered instruction too narrow to constitute substantially correct wording); *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (finding complaint one of an omitted issue, relying on *Mason* but not *Payne*, and holding waiver occurred when no tender made); *Lewis v. Lewis*, 1999 WL 442176 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (n.d.p.) (finding any error on omitted question waived by failure to tender written request); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 24 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (finding complaint one of omitted instruction, relying on *Mason*, and holding waiver occurred in absence of tendered instruction).

*Tichacek*, decided after *Mason*, might alter the analysis used by these courts. Indeed, other cases also indicate the type of error and the record on preservation control the supreme court’s analysis of preservation. *Moritz v. Preiss*, 46 Tex. Sup. Ct. J. 784 (June 12, 2003) (failure to request submission of claims against a party or to object to the charge as submitted supported application of presumed finality rule after trial on the merits); *Holubec v. Brandenberger*, 46 Tex. Sup. Ct. J. 702 (May 22, 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve

complaint about defect in nuisance question); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2000) (defendant has burden to request instructions on affirmative defense); *see also Fraser v. Baybrook Bldg. Co.*, 2003 WL 21357316 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. filed) (memo opin.) (citing *Mason* to require request but holding waiver when no objection *or* request). Again, however, this line of cases may provide further reason for a cautious practitioner to both request and object.

#### e. Waiver

Significantly, even under the less harsh test of *Payne*, courts still routinely find waiver of charge error. *See, e.g., City of Weatherford*, 83 S.W.3d 261, 271-72 (Tex. App.—Fort Worth 2002, no pet.) (objection did not clearly direct the court's attention to the problems with the definitions and the request was not in substantially correct form when it failed to track statute); *Schlaflly v. Schlaflly*, 33 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (finding no objection or other appropriate motion to make trial court aware of complaint that charge failed to resolve correct fact issue); *Riddick v. Quail Harbor Condominium Ass'n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (complaint on refused definition waived when party never objected to omission of instruction, never asked judge to rule, and failed to show anywhere in record that judge did rule); *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 750 (Tex. App.—Corpus Christi 1999, pet. denied) (failure to object to purportedly defective definition of malice waived error); *Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 816 n.12 (Tex. App.—Tyler 1999, no pet.) (lack of objection to broad-form submission, request in series of requests and instructions, and failure to draw court's attention to request verbally resulted in waiver of any error, even under *Payne*).

#### f. Summary

What is clear from the majority of the post-*Payne* cases is the more often a party has raised an issue in the trial court, the more likely an appellate court will find preservation. So, if a party needs to complain before submission, the party may choose to complain early and at each opportunity to make the record clear that the trial court had an opportunity to deal with the issue about which the party is complaining. But, if the error involves an omission, a party *may* still need to make a request,

even with the most eloquent of objections. Like it or not, the “object *and* request” route still probably provides the clearest route to preservation under *Payne* and the Rules.

### C. Preserving complaints about the form of the charge (broad, granulated, and alternate theories)

#### 1. Predication

One error in form can arise from the predication or conditioning of questions in the charge. Failure to complain about the conditioning can waive error and result in losing the claim or defense. For example, in *Floating Bulk Terminal, LLC v. Coal Logistics Corp.*, 2002 WL 1733670 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2002, pet. denied) (n.d.p.), the jury answered that the defendant had not complied with its fiduciary duty (i.e., “No”) but did not answer the damage issue because it was conditioned on an affirmative finding in the breach question (i.e., “Yes”). The plaintiff moved for a mistrial but did not object to an incomplete verdict. As a result, when the court of appeals reversed the breach of contract recovery, the court held that rendition or remand on the alternate theory of recovery was not possible and instead rendered a take-nothing judgment. *Id.* (citing *Osterberg v. Peca*, 12 S.W.3d 31, 56 (Tex. 2000)).

#### 2. Broad or granulated

The general rule, from which the supreme court states it has not retreated, is to use broad-form submission whenever feasible. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000); *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995); *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Burk Royalty v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981); *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245 (Tex. 1974). That is, “in any or every instance in which it is capable of being accomplished.” *E.B.*, 802 S.W.2d at 649; *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 616-17 (Tex. App.—Corpus Christi 1994, writ denied); *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 508 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd by agr.). Unfortunately, that definition provides no real guidance as to what is feasible.

#### a. Granulation

Courts of appeal have always given great

deference to a trial court's decision to submit even a granulated charge. Thus, even with adequate preservation as to error in the failure to submit a broad-form charge, courts frequently find no error or harmless error. See *H.E. Butt Gro. Co. v. Warner*, 845 S.W.2d 258, 259-60 (Tex. 1992) (granulated submission not harmful); *Rosell v. Central West Motor States, Inc.*, 89 S.W.3d 643, 653-54 (Tex. App.—Dallas 2002, pet. denied) (granulated submission of negligent hiring, negligent training and negligent entrustment within court's discretion to ensure needed answers without confusing jury); *Isern v. Watson*, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, no writ) (citing *Warner* and holding that trial court had discretion to submit granulated factual bases in negligence theory); *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658, 663-64 (Tex. App.—Amarillo 1996, writ denied) (trial court had discretion to submit separate question to resolve predicate factual dispute and condition liability question on affirmative finding to predicate issue); *Sanchez v. Excelo Bldg. Maintenance*, 780 S.W.2d 851, 853-54 (Tex. App.—San Antonio 1989, no writ) (court had discretion to submit four elements in two questions when charge was not overly complex or granulated); see also *Diamond Offshore Mgmt. Co. v. Guidry*, 84 S.W.3d 256, 263-64 (Tex. App.—Beaumont 2002, pet. filed) (refusal to use granulated submission of "course and scope" and "in the service of the vessel" not improper particularly when issues represent inferential rebuttal issues). After *Casteel* and *Harris County*, courts of appeal may be more inclined to approve granulated submissions.

## **b. Broad-form**

### **i. No fundamental broad-form error**

Unpreserved complaints about the broad form of a charge will not be heard, even as fundamental error. *In re B.L.D.*, 46 Tex. Sup. Ct. J. 978 (July 3, 2003).

### **ii. Casteel and Harris County**

The method of preserving error as to a charge submitted in form too broad in some respect is not yet clear but may depend upon the basis of the error.

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), when five of the thirteen independent grounds failed based on consumer status, the supreme court held that an objection to each sub-part of same question on identical grounds was not necessary to preserve the error. Instead, the defendant's objection to the entire question that the

plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficed to preserve the error. 22 S.W.3d at 389. The objection thus was not specifically to the form but to the substance of the question.

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the supreme court may have relied on a no evidence objection to an element of damage to find error preserved error as to the broad-form submission of valid and invalid elements of damage. *Id.* The court of appeals noted that the objection to form was not complained of on appeal.<sup>3</sup> The supreme court noted an objection to form and a no evidence objection were made. Then stated, "Harris County pointed out to the trial court that particular elements of damage had no support in the evidence and should not be included in the broad-form"—a no evidence objection? *Id.* at 231-32. Ultimately, the court held "[a] timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, therefore preserves error for appellate review." *Id.* at 236; see also *Cathey v. Meyer*, 2003 WL 21877786 (Tex. App.—Waco 2003, no pet. h.) (majority and dissent disagreeing on whether party adequately objected to broad-form damage finding to allow review of evidence in support of individual elements).

Finally, in *In re A.V.*, 46 Tex. Sup. Ct. J. 938, 943 (May 15, 2003), the supreme court held that error was not preserved when the complaining party "did not object in the trial court to the form of the charge" and "did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form." That wording suggests the court may require a more specific "form" objection than was relied upon in *Harris County*.

Thus, depending upon the complaint, the supreme court may find preservation based on a

<sup>3</sup> The court of appeals had noted the following: "In addition to objecting to including the challenged elements of damages in the charge, Harris County objected to submitting the elements of damages globally, and asked the trial court to segregate each element of damages by listing each separately, with a blank beside each for any amount the jury might award. The trial court overruled this objection and submitted the elements globally, but Harris County has not challenged this ruling on appeal." 66 S.W.3d 326, 330 n.2 (Tex. App.—Houston [1 Dist.] 2001).

complaint regarding the substance, the evidence, or the form. Most courts of appeal, however, even after *Casteel* and *Harris County* require a specific objection as to form to preserve a complaint about broad-form submission. See *Law Eng'g & Env. Servs. v. Slosburg Co.*, 2003 WL 21513039 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no pet. h.) (party did not object to broad form damage question and evidence existed to support each damage element submitted); *Baribeau v. Gustafson*, 2003 WL 1090587 (Tex. App.—San Antonio 2003, pet. filed) (failure to object to any improper commingling of fraud theories waived in the absence of a *Casteel* objection); *Haggar Apparel Co. v. Leal Atrium Cos. v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (finding waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings); *Columbia HCA Healthcare Corp. v. Cotter*, 72 S.W.3d 735 (Tex. App.—Waco 2002, no pet.) (failure to object to segregation of damages between past and future waived any issue on point); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 386-87 (Tex. App.—El Paso 2002, pet. filed) (finding *Casteel* inapplicable without objection to inclusion of invalid theory in charge); *S.W. Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted) (any error as to commingling valid and invalid theories waived when not brought to trial court's attention); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories); *Molina v. Moore*, 33 S.W.3d 323, 328 (Tex. App.—Amarillo 2000, no pet.) (even if *Casteel* extended to require separate answers to elements of damage, party waived error by failing to object to the form). But cf. *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (despite lack of objection on broad-form format, court found objection as to lack of evidentiary support sufficient to preserve *Casteel* error).<sup>4</sup>

<sup>4</sup> Even if a court holds the failure to submit elements of a cause of action in broad-form erroneous, though, that error only requires reversal upon a showing of harm. See, e.g., *Warner*, 845 S.W.2d at 259-60. For example, if the pleadings, some evidence, and the law support each subpart of a question, *Casteel* and *Harris County* would not seem to apply. Or, as discussed in the final section below, if other findings can support the jury's verdict or the

#### **D. Preserving complaints about sufficiency of the evidence under law that differs from the law as submitted in the charge**

The supreme court has repeatedly stated that the sufficiency of the evidence will be measured against a defective jury charge—if it is not objected to. See *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (charge objected to and thus review against proper legal standard); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (review against charge in absence of objection); *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000) (review against charge in absence of objection); *MCN Energy Enters., Inc. v. Omagro De Colombia, LDC*, 98 S.W.3d 766, 771 (Tex. App.—Fort Worth 2003, pet. filed) (unobjected to instruction that defined misrepresentation as by words or conduct did not limit evidence review to affirmative misrepresentations).

Courts of appeals seem to differ on how to apply that rule to a charge with omitted (rather than defective) elements—deemed findings or review without the elements. Compare *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied) (omission of writing requirement in promissory estoppel question did not waive need for evidence to support deemed element of claim), with *Perry & Perry Bldrs., Inc. v. Galvan*, 2003 WL 21705248 (Tex. App.—Austin 2003, no pet. h.) (memo opin.) (omission of element not an issue and evidence measured against charge as submitted).

Thus, to preserve review of the evidence under a legal standard that differs from that submitted in the charge, a complaint regarding the law submitted in the charge must be preserved.

#### **E. Preserving complaints about incomplete or inconsistent verdicts**

Because Rule 295 contemplates further deliberation to resolve any error arising from incomplete or inconsistent verdicts, a party must raise any such error to the jury's release. Rule 295 provides the following in regard to conflicting or missing answers:

If [the verdict] is incomplete, or not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the court shall in

court's judgment, the error may be harmless.

writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations.

TEX. R. CIV. P. 295.

A party cannot allow a court to accept a partial or incomplete verdict and then complain later of error from the partial verdict. In *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000), the jury deadlocked on the reasonable amount of attorney's fees incurred in the case. The plaintiff failed to object or request an answer to the question. Instead, the plaintiff "asked the trial court to accept the verdict, and then asked the court to enter judgment as a matter of law for his attorney's fees. The trial court refused . . ." *Id.* Relying upon *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986), and *Continental Casualty Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964), the court held that "by failing to object when the jury did not return an answer, [the plaintiff] waived any right to have the trial judge supply his own factfinding or grant a new trial on the issue, and waived his right to appeal a judgment on the issue of attorney's fees." *Id.*<sup>5</sup> The court did so without discussion of whether the issue involved a controverted fact issue.

With conflicts, a party must likewise complain before the jury is discharged to preserve error.<sup>6</sup>

<sup>5</sup> See *Fleet*, 711 S.W.2d at 3 ("[A] trial court will not be reversed for rendering judgment . . . unless the party who would benefit from the answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury re-deliberate on the issues or that the trial court grant a mistrial."); *Street*, 379 S.W.2d at 651 (finding that when plaintiff did not object to jury's failure to answer question on amount of policy benefits due, "[t]he trial court had no alternative under the jury verdict but to render judgment for [the defendant], and [the plaintiff] waived any benefit he might have claimed under the unanswered issues, and any right to have them answered").

<sup>6</sup> A true irreconcilable conflict only arises if one finding would result in judgment for one of the parties, and the other finding would result in a judgment for the other party. See, e.g., *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 689-90 (Tex. App.—Dallas 2000, no pet.); *Checker Bag Co. v. Washington*, 27 S.W.3d 625, 642 (Tex. App.—Waco 2000, pet. denied) (no fatal conflict when either damage findings supported judgment in favor of same party). Moreover, only material issues can create a conflict. See, e.g., *Chappell Hill Bank v.*

Courts routinely hold that "[i]n order to preserve error, the appellant must object to the conflict or inconsistency before the jury is discharged." *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied); see also *Griffin v. Watley*, 2001 WL 257801 (Tex. App.—Amarillo 2001, no pet.) (n.d.p.); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23 (Tex. App.—Corpus Christi 1993, writ denied); *Roling v. Alamo Group, Inc.*, 840 S.W.2d 107, 109-110 (Tex. App.—Eastland 1992, writ denied).

If the court decides to order the jury to further deliberate over the objection of one party, that party should ensure that the record clearly reflects the jury's answers from its first *and* its second deliberations. Otherwise, the party might have difficulty showing on appeal the lack of conflict in the original verdict. See *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 876 (Tex. App.—Beaumont 2001, pet. denied) (requiring abatement of appeal to determine whether verdict form missing from record and how jury originally answered questions). Or why further deliberation was otherwise inappropriate. *Archer Daniels Midland Co. v. Bohall*, 2003 WL 21361772 (Tex. App.—Eastland 2003, no pet.) (based on error in predication, jury erroneously ordered to redeliberate).

Re-deliberation may not apply to "errors" in the charge. *Id.* In *Bohall*, the jury found that the decedent was neither a borrowed employee nor otherwise in the control of the control of the defendant. Yet, because the negligence and following questions were predicated on a "No" (rather than "Yes") finding to those questions, the jury proceeded to apportion responsibility for negligence and find damages. The defendant moved to accept the verdict, and the court released the jury from its duties. The plaintiff pointed out the erroneous predication (with the jury in the courtroom). The trial court explained to the jury that the court had made an error, prepared a new charge, and asked the jury to deliberate on the second charge. The jury changed its answer to the "control" issue in the second charge, and the trial court

*Lane Bank Equip. Co.*, 38 S.W.3d 237, 246 (Tex. App.—Texarkana 2001, pet. denied) (when jury answered in the negative on liability questions, answers as to amounts of damage immaterial and trial court did not err in disregarding damage answers). A properly preserved complaints regarding fatal conflicts require a new trial. See *Blakely*, 30 S.W.3d at 690.

ultimately entered judgment for the plaintiff. *Id.*<sup>7</sup>

The court of appeals held that Rule 295 does not apply to “erroneous” charges and that a jury, once released, cannot be ordered to “further” deliberate. The court held that because the “control” issue was decided against the plaintiff the subsequent answers were immaterial (and thus no incomplete or materially conflicting answers existed). *Id.* Nevertheless, citing to *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), and the principles of justice embodied in the idea of ensuring a jury trial on proper instruction, the court of appeals remanded the case for a new trial in the interests of justice—despite a lack of objection prior to the release of the jury.

Similarly, in a bifurcated setting, a party seeking punitive damages may not agree to the release of the jury and then seek punitive damages from a different jury in the same proceeding. *In re Bradle*, 83 S.W.2d 923, 927 (Tex. App.—Austin 2003, orig. proceeding). That is, failure to object before the jury is discharged waives any complaint as to the untried exemplary damage issue. *Id.* (further holding that trial of exemplary damages by separate jury would violate constitutional rights).

Thus, if the verdict includes incomplete, inconsistent, or conflicting answers that can be cured by further deliberation, to preserve any error, a party must object on the record and include any necessary paper trail to reflect the jury’s deliberations.

#### **F. Preserving complaints about immaterial findings**

As is clear from earlier cases interpreting the Rules (i.e., object and request) and from the *Payne* line of cases (i.e., “make the court aware”), the more often a party states its complaint to the court the more likely the party is to preserve the error. But a party may sometimes raise a complaint about immaterial findings after the verdict.

The traditional standard provides that a jury finding may be disregarded as immaterial if the answer would not alter the effect of the verdict, could be found elsewhere in the charge, or would be void of legal significance based on other questions. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995); *C. & R. Transport, Inc. v.*

*Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).

The supreme court recently refined the standard and discussed when a post-verdict/pre-judgment motion preserved error regarding immaterial findings even in the absence of a pre-submission complaint. In *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999), the plaintiff sought attorney’s fees, and the trial court submitted an issue as to the amount of reasonable fees. The defendant argued in its motion for judgment notwithstanding the verdict (“JNOV”) that the statute in question did not support a recovery of fees. The court of appeals held that the defendant waived the error by failing to object to submission of the fees issue to the jury. *Id.*

The supreme court gave the following test for when a complaint prior to submission is necessary: “A party must lodge an objection in time for the trial court to make an appropriate ruling *without having to order a new trial.*” *Id.* (emphasis added). The court held that the question on the amount of fees was immaterial to the ultimate question of whether fees were recoverable as a matter of law. Thus, the court held that a post-verdict motion asserting non-recoverability “gave the trial court ample opportunity to rule on the availability of attorney’s fees *before an erroneous judgment was entered.*” *Id.* (emphasis added).

The court re-affirmed that test a few months later. In *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 279-80 (Tex. 1999), the plaintiff sought a recovery of compensatory and punitive damages based upon a statutory wrongful discharge claim. The jury found damages for mental anguish, lost credit reputation, and exemplary damages. In response to the motion for judgment, the defendant urged for the first time that the statute allowed only equitable relief, not compensatory or punitive damages. The trial court nevertheless entered a judgment awarding the damages. The defendant again complained by JNOV that the statute did not support the damage awards. *Id.* The court of appeals found that the defendant had waived error by failing to object to the submission of the damage issues.

The supreme court again held that post-verdict preservation suffices when the trial court submitted an immaterial question. *Id.* That is, the jury’s findings of the amount of damages was immaterial to the legal issue of whether such damages were available. *Id.* Thus, citing *Holland*, the court held

<sup>7</sup> *Cf. Ray v. Robb*, 2002 WL 31835725 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (incidentally informing jury of effect of its answers through conditioning or predication not improper).

that the post-verdict complaints gave the trial court the opportunity to resolve the legal issues *prior to rendering judgment*.<sup>8</sup> *Id.*

In short, if the complaint goes to something that could be added to or corrected in the charge, *Holland* and *MacKenzie* suggest a party should make the trial court aware of the complaint prior to submission. Only if the charge makes no difference to the complaint is post-submission preservation a potential option. *See also Coronado Paint Co. v. Global Drywall Sys., Inc.*, 47 S.W.3d 28, 33 n.8 (Tex. App.—Corpus Christi 2001, pet. denied) (n.d.p.) (citing *Osterberg* and *Holland*, holding JNOV appropriate method by which to preserve error when “the court can determine as a matter of law that a claim or defense included in the jury charge is or is not viable”).

Because a court might find a defect (rather than immateriality) or may simply not follow the *Holland* rule, a party may choose to raise even immaterial finding complaints prior to submission. *See Geodyne Energy Income Prod. P’ship I-E v. Newton Corp.*, 97 S.W.3d 779, 785 (Tex. App.—Dallas 2003, pet. filed) (jury finding on rescission—a question of law—immaterial); *Great Am. Prods. v. Permabond Int’l*, 94 S.W.3d 675, 683 (Tex. App.—Austin 2003, pet. denied) (holding that JNOV proper means of raising warranty disclaimer impliedly found by finding parties bound by terms in invoices rendered immaterial breach of warranty finding). *But cf. Frost v. Crushed Stone Co. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 47 (Tex. App.—Waco 2002, no pet.) (failure to object to charging jury on attorneys’ fees in promissory estoppel case waived any error). *DeLeon v. Furr’s Supermarkets, Inc.*, 31 S.W.3d 297, 299 (Tex. App.—El Paso 2000, no pet.) (ultimately deciding comparative responsibility

submissions to be improper in nonsubscriber case and modifying judgment to award unreduced recovery but not before analyzing [without citation to *Holland*] whether objections to charge properly preserved complaint); *Enax v. Noack*, 12 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding in unpublished portion of opinion) (citing *Payne* and holding that complaint that “no cause of action exists in Texas for failure to discharge one’s guardian duties” waived by failure to object to inclusion of question in charge).

So, rather than relying on a post-verdict complaint, a party most likely wants to complain pre-submission and only rely on *Holland* when the argument first arises after verdict.

## II. General categories of charge error

A trial court has broad discretion to formulate questions, instructions and definitions that will enable the jury to render a verdict and resolve the controlling disputed fact issues. *See, e.g., Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998) (instruction is proper if it will aid the jury in answering the issues presented to the jury); *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (refusal to submit instruction erroneous only if it was “reasonably necessary to enable the jury to render a proper verdict”); *Jobe v. Penske Truck Leasing Corp.*, 882 S.W.2d 447, 451 (Tex. App.—Dallas 1994, no writ) (trial court has broad discretion in formulating charge); *Varme v. Gordon*, 881 S.W.2d 877, 881 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (same); *Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 364 (Tex. App.—Dallas 1993, writ denied) (same); *Bernal v. Garrison*, 818 S.W.2d 79, 83 (Tex. App.—Corpus Christi 1991, writ denied) (same). That discretion, however, is not without limitation. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995). This section lists the most common categories that constitute an abuse of discretion in formulating and submitting the court’s charge.

**A. Omits a controlling issue raised by the pleadings and the evidence, or submits an issue not raised by the pleadings and evidence.** Rule 278 “provides a substantive, non-discretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them.” *Elbaor v. Smith*, 845

<sup>8</sup> Interestingly, in both *Holland* and *McKenzie*, the court stressed that the complaints were made prior to the court entering judgment. And, in discussing why invited error did not occur by requesting an instruction to the immaterial question, the court in *Holland* stated that error did not occur until the court rendered judgment; the court noted the legal challenge by pre-judgment JNOV occurred before the error occurred with entry of judgment. *Holland*, 1 S.W.3d at 95. Thus, even though immateriality involves only a question of law, the Rules do not require a pre-judgment JNOV and a modification of the other judgment does not require a new trial, these cases suggest that a post-verdict, but not post-judgment, motion suffices to raise a complaint on an immaterial question.

S.W.2d 240, 243 (Tex. 1992); *see Interstate Northborough P'ship v. State*, 66 S.W.3d 213 (Tex. 2001) (trial court did not err in refusing instruction when no evidence supported request); *Mandlbauer*, 34 S.W.3d at 911 (proper instruction must find support in evidence and pleadings); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663 (Tex. 1999) (court must submit questions, instructions and definitions raised by the pleadings and evidence); *Knighen*, 976 S.W.2d at 676 (sudden emergency instruction proper when found support in evidence); *Aquila Southwest Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225 (Tex. App.—San Antonio 2001, pet. denied) (trial court did not err in including “best efforts” question when pleadings supported submission); *Guerra v. Wal-Mart Stores, Inc.*, 943 S.W.2d 56, 61-62 (Tex. App.—San Antonio 1997, writ denied); *Varme*, 881 S.W.2d at 881 (error to deny fraud submission by improper conditioning when theory found support in pleadings and evidence); *Texas Dept. of Transp. v. Ramming*, 861 S.W.2d 460, 463 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (a court’s “discretion is subject to the requirement that the questions submitted must control the disposition of the case, be raised by the pleadings and evidence, and properly submit the disputed issues for the jury’s deliberation”); *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.—Corpus Christi 1989, no writ) (all controlling issues supported by pleadings and some evidence must be submitted to jury).<sup>9</sup>

**B. Uses inaccurate statement of the law.** *See Timberwalk Apts., Partners, Inc. v. Cain*, 972 S.W.2d 749, 755 (Tex. 1998) (inapplicable statutory

<sup>9</sup> A trial court may refuse to submit a controlling issue only if the evidence is legally (rather than factually) insufficient to warrant its submission. *See, e.g., Elbaor*, 845 S.W.2d at 243; *Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996); *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992); *Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986); *Southwestern Bell Tel. Co. v. Thomas*, 554 S.W.2d 672, 673 (Tex. 1977); *Garza v. Alviar*, 395 S.W.2d 821, 824 (Tex. 1965); *Thedford v. Missouri Pac. RR. Co.*, 929 S.W.2d 39, 52 (Tex. App.—Corpus Christ 1996, writ denied); *Gilgon, Inc. v. Hart*, 893 S.W.2d 562, 566-67 (Tex. App.—Corpus Christi 1994, writ denied); *Walker v. Federal Kemper Life Assur. Co.*, 828 S.W.2d 442, 454 (Tex. App.—San Antonio 1992, writ denied); *Soto*, 776 S.W.2d at 754; *Deviney v. McLendon*, 496 S.W.2d 161, 166-67 (Tex. Civ. App.—Beaumont 1983, writ ref d n.r.e.)

provision erroneously included in charge);<sup>10</sup> *State v. Williams*, 940 S.W.2d 583, 584-85 (Tex. 1996) (trial court erred in submitting issue that misstated premises defect law); *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996) (same). But not every accurate statement of the law belongs in the charge. *See, e.g., Kansas City S. Ry. v. Stokes*, 20 S.W.3d 45, 48 (Tex. App.—Texarkana 2000) (“Mere fact that an instruction is a correct statement of law does not mean that a trial court should include it in the charge”).<sup>11</sup>

**C. Fails to submit all elements of a claim or defense.** *See Torrington v. Stutzman*, 46 S.W.3d 829, 838-39 (Tex. 2000) (charge error occurred when broad-form negligence question omitted elements necessary to establish undertaking claim); *Keetch v. Kroger*, 845 S.W.2d 262, 265 (Tex. 1992) (broad-form question proper if accompanied by instructions on all elements of claim).

**D. Improperly conditions one question on another (and denies claim or defense).** *See Varme v. Gordon*, 881 S.W.2d 877, 881 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (improper predication that precludes the jury from answering a question on a ground of recovery or defense constitutes reversible error); *see also Byrne v. Harris Adacom Network Servs., Inc.*, 11 S.W.3d 244, 247-48 (Tex. App.—Texarkana 1999, pet. denied) (refusing to find conditional submission harmful when error not preserved and evidence did not support claim purportedly eliminated by conditioning).

**E. Fails to track applicable statutory language.** *See Borneman v. Steak & Ale of Texas, Inc.*, 22 S.W.3d 411, 413 (Tex. 2000) (“when a statutory cause of action is submitted, the charge should ‘track the language of the provision as closely as possible’”); *Spencer v. Eagle Star Ins. Co. of Am.*,

<sup>10</sup> In *Timberwalk*, the court noted that “[e]rror in instructions to the jury is more likely to be harmful in a closely contested case.” 972 S.W.2d at 755; *see also Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723-24 (Tex. 2003); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2000).

<sup>11</sup> In *Stokes*, over objection, the trial court instructed the jury in a FELA case that the plaintiff was not entitled to workers’ compensation under Texas law. Although a correct statement of law, the court found the instruction improper and harmful. 20 S.W.3d at 48.

876 S.W.2d 154, 157 (Tex. 1994) (same); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980) (same).

**F. Fails to properly place the burden of proof.** See *Wiggins v. Cameron*, 763 S.W.2d 434, 436 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 182 (Tex. App.—Waco 1987, writ denied).

**G. Fails to submit a proper measure of damage.** See *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987) (failure to relate damage measure to theories of recovery represents error, if preserved); *Fraser v. Baybrook Bldg. Co.*, 2003 WL 21357316 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. filed) (memo opin.) (party must object and request if proper measure of damage not included in charge); *Morales v. Morales*, 98 S.W.3d 343, 346 (Tex. App.—Corpus Christi 2003, pet. denied) (failure to object or request damage submission waived any error on legal theory of recovery); *Housing Auth. of City of El Paso v. Guerra*, 936 S.W.2d 946, 952 (Tex. App.—El Paso 1998, pet. denied) (any error on improper measure of damage waived by failure to object); *St. Gelais v. Jackson*, 769 S.W.2d 249, 259 (Tex. App.—Houston [14th Dist.] 1988, no writ) (improper refusal to instruct on proper measure of damage waived by failure to object); see also *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 440 (Tex. 1995) (Gammage, J., concurring).

**H Inquires into questions of law or undisputed issues of fact.** See *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992) (court should submit only disputed fact issues); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (court must submit controlling issues of fact); *Park v. Larison*, 28 S.W.3d 106, 112-113 (Tex. App.—Texarkana 2000, no pet.) (duty is a question of law for the court and instruction on duty unnecessary for jury to render a verdict); *C&C Partners v. Sun Expl. & Prod.*, 783 S.W.2d 707, 715 (Tex. App.—Dallas 1987, writ denied) (court should not submit questions of law). But cf. *Union Pacific R.R. Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002) (8<sup>th</sup> Circuit patterns on foreseeability aspect of FELA duty requirement correct form); *Stokes*, 20 S.W.3d at 50 (instructions of duty under FELA cases improper only because of failure to relate to reasonable care

standard).

**I. Assumes the truth of a controverted fact.** See *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (assuming controverted fact constitutes comment on weight of the evidence).

**J. Submits inferential rebuttal issues.** A trial court has no discretion to submit inferential rebuttal issues as questions; those issues can go to the jury only by instruction. TEX. R. CIV. P. 277; see *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984); *Scott v. Atchison, Topeka, & Sante Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978); *Yarborough v. Berner*, 467 S.W.2d 188, 192-93 (Tex. 1971); *Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 365 (Tex. App.—Dallas 1993, writ denied); *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.—Corpus Christi 1989, no writ). Specifically, “[a]n inferential rebuttal issue is one that seeks to disprove the existence of an essential element submitted in another issue.” *Weitzul*, 849 S.W.2d at 365 (material breach is inferential rebuttal issue).

**K. Comments on the weight of the evidence.** TEX. R. CIV. P. 277; *In re VLK*, 24 S.W.3d 338, 343 (Tex. 2000) (a trial court’s instruction that no parental custody presumption applied could be error, even though a correct statement of the law, if it commented on the weight of the evidence); *Maddox v. Denka Chem. Corp.*, 930 S.W.2d 668, 670-72 (Tex. App.—Houston [1st Dist.] 1996, no writ) (statement regarding general rule of duty was correct statement of law but constituted harmful comment on the weight of the evidence). “To be a direct comment on the weight of the evidence, the issue submitted must suggest to the jury the trial court’s opinion on the matter.” *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998).

**L. Informs the jury of the legal effect of their answers.** TEX. R. CIV. P. 277. “[T]o directly advise the jury of the legal effect of its answers, the issue submitted must instruct the jury how to answer each question in order for the plaintiff or defendant to prevail.” *Bilotto*, 985 S.W.2d at 24.

**M. Unfairly submits the case or otherwise confuses or misleads the jury.** While a somewhat elusive concept, courts of appeals do assess the “fair submission” of a case. See *Clayton Williams, Jr.*,

*Inc. v. Olivo*, 912 S.W.2d 319, 325-27 (Tex. App.—San Antonio 1995), *rev'd in part*, 952 S.W.2d 523 (Tex. 1997); *Varme v. Gordon*, 881 S.W.2d 877, 881 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Likewise, courts look to whether the charge confused or mislead the jury. *See, e.g., Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995).

### III. Errors in Multi-Theory Submissions

Errors in multi-theory submissions can range from those arising from mistakes in the form of the charge to errors in law to failure in the proof. Courts of appeals have consistently reversed over time some types of broad-form errors, particularly those errors that deny a party a claim for relief or defense.

In the last several years based on *Casteel* and *Harris County*, however, several additional types of broad-form errors have emerged—some of which are difficult for a party or the trial court to predict in advance. Finally, there are several types of error that are still “percolating” through the system to the supreme court. This section describes those categories of error.

#### A. Acceptable combinations

The supreme court in the past has suggested that a single question suffices for multiple legal or factual theories. *See Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999) (such a submission might even be “necessary to avoid the risk the jury will become confused and answer questions inconsistently”); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988) (“Under the current practice of issue submission, defensive issues may be submitted by instruction or be otherwise combined with non-defensive issues, provided that the burden of proof is properly placed.”); *see also Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.—Houston [14th Dist.] 1993, writ *dism'd by agr.*). (“The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective.”).

Several recent decisions from the supreme court suggest that those propositions may no longer hold true in all circumstances, particularly when a legal or evidentiary complaint about a sub-part has been properly preserved. *See Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (“[I]t may

not be feasible to submit a single broad-form question that incorporates wholly separate theories of liability.”).

#### B. Clearly erroneous combinations

##### 1. Failure to limit jury's consideration to the conduct and theories at issue

Particularly in broad-form submissions, instructions must properly limit the jury's consideration to the theories at issue and secure the proper findings for each theory of recovery or defense. As the supreme court noted in *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994), “[I]liability cannot be imposed on any of the claims asserted . . . on so broad and ill-defined a finding.” Thus, what instructions the trial court includes with an issue will often determine the viability of the broad-form submission. *See Adams v. Valley Federal Credit Union*, 848 S.W.2d 182, 185 (Tex. App.—Corpus Christi 1992, writ denied) (“With the use of broad form submission, instructions become even more important than under the old rules.”); *Rampel v. Wascher*, 845 S.W.2d 918, 924 (Tex. App.—San Antonio 1992, writ denied) (“A proper broad form jury question asks an ultimate issue and instructs the jury about the elements of the ground of recovery or defense that the jury must find before giving a ‘yes’ answer to the issue.”).

The omission of instructions can render an issue too broad to stand. Indeed, the supreme court has recognized on several occasions that the failure to confine the jury's consideration to the conduct at issue represents error. *See Galveston County Fair & Rodeo v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996) (“While the trial court had the discretion to submit questions separately . . . or to submit an instruction . . . limiting the jury's consideration of that single broad issue, it did not have discretion to refuse to make any correction.”); *Spencer*, 876 S.W.2d at 157 (Insurance Code “by its express terms does not refer to every such practice imaginable but only to those specified by certain other statutes and regulations. Without an instruction specifying the actions for which [the insurer] could be liable, [the question] was improper.”); *see also Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (failure to properly instruct on *Hammerly Oaks* bases allowed jury to award punitive damages against corporation based on a broad range of conduct including acts that could not satisfy *Hammerly Oaks* as a matter of law). *But cf.*

*Texas A&M Univ. v. Bishop*, 105 S.W.3d 646 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. filed) (holding no abuse in refusing instruction excluding certain allegations when other allegations supported negligence claim excepted from sovereign immunity defense).

## 2. Question eliminates theories of recovery or defense

The opposite—but equally problematic—of the “too inclusive” instructions is a question so broad with such inadequate instruction that it eliminates a theory of recovery or defense. See *Clayton Williams, Jr., Inc. v. Olivo*, 912 S.W.2d 319, 325-27 (Tex. App.—San Antonio 1995), *rev'd in part*, 952 S.W.2d 523 (Tex. 1997); *Matthiessen v. Schaefer*, 27 S.W.3d 25, 32 (Tex. App.—San Antonio 2000, pet. denied) (wording of statute of limitations discovery question rendered it impossible to determine whether jury's answer represented date of discovery or date the plaintiff should have discovered a defect and left court unable to determine whether statute of limitations had run); *Kajima Int'l, Inc. v. Formosa Plastics Corp., USA*, 15 S.W.3d 289, 291-94 (Tex. App.—Corpus Christi 2000, pet. denied) (trial court erred in refusing requested instruction when court's limitation of fraud question to fraudulent inducement denied plaintiff a fraud theory supported by pleadings and evidence). Cf. *Wells v. Lewis*, 2002 WL 1933228 (Tex. App.—Dallas 2002, pet. denied) (n.d.p.) (no error in instruction that did not preclude jury from finding that owner held legal title but allowed jury to find another could hold title for owner).

An example of the elimination of a theory can be found in *Olivo*. In that premises defect case, the trial court submitted a single broad negligence question without an instruction on the premises defect elements. 952 S.W.2d at 529. The plaintiffs had requested an issue that included the premises defect elements but failed to complain of the refusal of that issue on appeal. The supreme court held that the omitted premises defect elements were not necessarily referable to the negligence issue and entered a take-nothing judgment against the plaintiffs. *Id.* In short, the broad question without adequate instruction eliminated an entire theory from the case.

## 3. Instructions eliminate a theory of recovery or defense

Like questions, instructions can also improperly

remove a theory from the jury's consideration.<sup>12</sup> For example, in *Harry v. University of Texas Sys.*, 878 S.W.2d 342, 345 (Tex. App.—Austin 1994, no writ), the court of appeals found that it was not feasible, under the facts of that case, to submit multiple theories of recovery in a single question. In that worker's compensation case, the plaintiff sought both lifetime medical benefits and compensation benefits. The trial court submitted an issue that combined an inquiry on course and scope with the incapacity issue. The plaintiff complained of the trial court's refusal of a separate issue on course and scope. The court of appeals agreed that the plaintiff could recover medical benefits based upon an affirmative course and scope finding—even without findings to support a recovery of compensation benefits.

The jury in *Harry* could have answered “no” to the broad-form question based on the incapacity inquiry alone. Without a separate finding on course and scope, the court could not determine whether the plaintiff was entitled to the future medical benefits (but not the compensation benefits). *Id.* The court found the broad-form submission erroneous because it denied the plaintiff a submission on one of her grounds for relief. *Id.* Because the court found res judicata principles would bar the plaintiff from later seeking the medical benefits, the court found the erroneous submission harmful. *Id.*

In making its holdings despite recognizing the broad-form mandate, the court noted that whether the broad-form submission “was ‘feasible’ under the pleadings and the evidence of this case depends in part on whether the issue of injury could be raised” in a subsequent lawsuit. *Id.* In other words, the court recognized that the pleadings and evidence in any given case would determine whether a broad-form submission was feasible—even if the broad-form issue submitted conformed to a pattern jury

<sup>12</sup> “So long as matters are timely raised and properly requested as part of a trial court's charge, a judgment cannot be permitted to stand when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence.” *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992) (citing Rules 277 and 278 for concept of “proper submission”); see *Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996). Indeed, refusal to submit a controlling defensive theory may deny a constitutional right to trial by jury. *Texas & Pac. Ry. Co. v. Van Zandt*, 317 S.W.2d 528, 530-31 (Tex. 1958) (citing Section 15 of Article I of Texas Constitution).

charge.

#### 4. Predication eliminates theory of recovery or defense

Predication can eliminate a theory of recovery (but even if preserved can result in harmless error when other theories establish a claim or defense). *Floating Bulk Terminal, LLC v. Coal Logistics Corp.*, 2002 WL 1733670 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2002, pet. denied) (n.d.p.) (predication error not preserved and thus resulted in loss of right to recover under alternate theory).

#### 5. Single damage question tied to liability theories having different measures of damage

Instructions should tie the theory of recovery to proper measure of damage; if not, a properly preserved complaint will result in reversal. *See Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987).

#### 6. Secures improper predicate for punitive damages

If the charge does not clearly establish liability based on conduct that could support punitive damages against the party from whom they are sought, error can result. *See, e.g., Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (failure to properly instruct on *Hammerly Oaks* factors allowed jury to award punitive damages against corporation based on a broad range of conduct including acts that could not satisfy *Hammerly Oaks* as a matter of law).

#### 7. Question cannot support different types of relief sought

To adequately form a judgment based on the relief sought, a party may need to secure separate findings on the various factual bases at issue. *See, e.g., Chromalloy Gas Turbine Corp. v. United Tech. Corp.*, 9 S.W.3d 324, 329 (Tex. App.—San Antonio 1999, pet. denied) (finding that jury finding established conduct occurring at some indeterminate time in the past [which might have supported actual damages] did not establish continuing illegal activity [as necessary to require injunctive relief]). In *Pine v. State*, 921 S.W.2d 866, 875 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, writ dismissed w.o.j.), the state instituted forfeiture proceedings against an individual. The state sought divestment of ownership of 14 animals based upon a conviction for cruelty to the animals. The individual claimed on appeal that the trial court erred in inquiring

collectively whether the animals had been cruelly treated, rather than resolving whether each animal had been cruelly treated. The court of appeals rejected the complaint because the evidence failed to show that any of the animals were treated any differently than any of the others. *Id.* Implicitly, however, the court's analysis suggests that if the animals had been treated differently, separate factfindings as to each animal would have been required to resolve the forfeiture issue on each animal.

### C. Potentially erroneous combinations

#### 1. Commingled valid and invalid legal theories of liability

Commingling valid and invalid theories of liability represents reversible error—although the trial court may not know of or agree with the invalidity at the time of submission. For example, in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), the charge included a single question with a single answer that could have been based on any one of thirteen independent grounds. Of the five DTPA laundry list grounds included, the plaintiff did not satisfy the required consumer status on four of those grounds. The jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. *Id.* at 387-88. As a result, the court held that “when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.” *Id.* at 388.

Most courts of appeals apply *Casteel* only when the error leaves the court unsure whether the jury based its finding on a valid legal theory of liability. *See North Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 122-24 (Tex. App.—Beaumont 2001, pet. denied) (no error in combining multiple grounds when each theory valid); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (no error when issue submitted valid theories and were supported by evidence); *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.—Amarillo 2001) (holding *Casteel* inapplicable when (1) no alternative theories of liability were involved, (2) no unsettled law was involved, and (3) no theories of which the trial court was unsure whether to submit), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002); *Ramex Constr.*

*Co. v. Tamcon Servs., Inc.*, 29 S.W.3d 135, 140 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.) (concurring opinion on rehearing) (when one party failed to plead waiver and other party pleaded waiver but charge failed to limit waiver instruction to proper party, concurring judge reasoned that court could not be satisfied that “properly submitted theories constituted the basis of the jury’s verdict”); *In re Stevenson*, 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied) (although not citing *Casteel*, holding that instructing jury that it could terminate parental rights under either of two grounds, one of which was improperly submitted, caused harmful error when court could not determine whether jury relied on proper theory); *Kansas City S. Ry. v. Stokes*, 20 S.W.3d 45, 51 (Tex. App.—Texarkana 2000) (when trial court submitted various duty instructions throughout charge, some of which were improper, court held reversal required under *Casteel* when court unable to determine whether jury relied on proper or improper instructions).

One court held that *Casteel* should apply to affirmative defenses as well. *Pantaze v. Welton*, 1999 WL 673448 (Tex. App.—Dallas 1999, no pet.) (n.d.p.). As a result, when one broad-form excuse question with a single answer allowed the jury improperly to base its answer on waiver or properly to base its answer on equitable estoppel, the court held reversible charge error occurred. *Id. But cf. El Paso Refining, Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 386-87 (Tex. App.—El Paso 2002, pet. filed) (noting applying *Casteel* to affirmative defenses troublesome when many defenses must be submitted as inferential rebuttal instructions).

Thus, as noted in the next two subsections, the combining of legal theories—whether claims or defense—when a question as the validity of a theory exists opens the door to potential reversible error.

## 2. Unsettled law on an alternative theory of liability

“[S]ubmitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible.” *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992).

## 3. Uncertainty as to applicability of a particular theory of liability

“[W]hen the trial court is unsure whether it should submit a particular theory of liability,

separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000).

## 4. Commingled valid and invalid elements of damages

Prior to *Casteel*, courts regularly upheld damage questions with a lump-sum answer, if the evidence supported that amount for any sub-part (or element) of the damages.<sup>13</sup> Citing to its rationale in *Casteel*, however, the supreme court recently clarified that a broad-form (or lump-sum or unsegregated) damage finding may cause reversible error. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Specifically, the court held: “[T]he trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damage in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.” *Id.* at 234; see also *City of Garland v. Dallas Morning News*, 2002 WL 31662724 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (although prior to *Harris County*, reversing when trial court submitted unsegregated fee finding over objection when a portion of fees were not recoverable and could be segregated).

In addition to the failure of evidence, refusal to

<sup>13</sup> See, e.g., *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.—Beaumont 1999, pet. denied); *Wal-Mart Stores, Inc. v. Garcia*, 974 S.W.2d 83, 87-88 (Tex. App.—San Antonio 1998, no pet.); *Provident Am. Ins. Co. v. Castaneda*, 914 S.W.2d 273, 276-77 (Tex. App.—El Paso 1996), *rev’d on other grounds*, 988 S.W.2d 189 (Tex. 1998); *Dodge v. Watts*, 876 S.W.2d 542, 545 (Tex. App.—Amarillo 1994, no writ); *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 593-94 (Tex. App.—Corpus Christi 1993, writ denied); *Baylor Med. Plaza Servs. Corp. v. Kidd*, 834 S.W.2d 69, 79 (Tex. App.—Texarkana 1992, writ denied); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 85 n. 1 (Tex. App.—El Paso 1992, no writ); *Curry v. Girard*, 502 S.W.2d 933, 934 (Tex. Civ. App.—Fort Worth 1973, no writ). *But cf. Jackson-Strickland Transp. Co. v. Seyler*, 123 S.W.2d 928, 935 (Tex. Civ. App.—Fort Worth 1938, writ dism’d by agr.). A few cases also fell in the time period between *Casteel* and *Harris County*. See *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.2d 577, 583 (Tex. App.—Austin 2003, no pet.); *Barrios v. Orsak*, 2002 WL 31429784 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002, no pet.).

segregate damages over objection could cause error in the context of legal theories as well. *See* TEX. CIV. PRAC. & REM. CODE § 41.008 (calculating cap with economic and noneconomic damages); TEX. FIN. CODE § 304.1045 (applies to final judgments signed or subject to appeal on or after Sept. 1, 2003, and precludes prejudgment interest on future damages); *Roberts v. Williamson*, 46 Tex. Sup. Ct. J. 944 (July 3, 2003) (holding Texas does not recognize action for parent's loss of consortium for non-fatal injury to child).

#### D. Unanswered issues on combinations

Several issues remain for resolution after *Casteel* and *Harris County*. Those issues center primarily upon (1) evidentiary failures in multi-theory questions and (2) failure of theories tried together in the charge by conditioning.

##### 1. Evidentiary grounds of broad-form liability question

The supreme court has yet to agree if the holding of *Casteel* applies to the failure of part of a broad-form question on evidentiary grounds. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (“The City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether our decision in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question before us.”). *But see In re A.V.*, 46 Tex. Sup. Ct. J. 938, 943 (May 15, 2003) (refusing to review complaint on broad-form submission without objection to form or to evidentiary support of any theory submitted); *Rocor Int'l, Inc. v. National Union Fire Ins. Co.*, 77 S.W.3d 253, 273 (Tex. 2002) (Baker, J., dissenting) (using traditional harmless error analysis to assess objection to charge that one of several theories submitted did not have support in the evidence).<sup>14</sup> But, because *Harris*

<sup>14</sup> Prior to *Casteel*, courts consistently found little problem with multiple factual bases for a single theory in one question. Specifically, courts noted that “[t]he fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective.” *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.—Houston [14th Dist.] 1993, writ dismissed by agr.) (quoting MCDONALD);

*County* involved failure of sub-parts of a damage question on legal sufficiency of the evidence grounds, that case may foretell the result when the supreme court reaches the issue, which it may have the opportunity to do with several pending cases.

##### a. Employment law: discrimination or discharge

The PJC recommends submitting discharge and discrimination on the basis of disability in a single question. The Corpus Christi court agreed that both theories are valid and can be submitted in a single question. *See Haggard Apparel Co. v. Leal*, 100 S.W.3d 303, 312 (Tex. App.—Corpus Christi 2002, pet. filed) (also holding a lack of preservation by failing to object to the broad-form submission precluded reversal in any event).<sup>15</sup> The court held legally sufficient evidence supported the jury's finding that “disability discrimination was a motivating factor in [the] decision to terminate” and that “disability was a motivating factor in [the] decision to discharge” the plaintiff.” If both are legally valid theories and both are supported by pleadings and evidence, then a *Casteel* issue would not come into play as currently formulated.

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*see Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 682 n.2 (Tex. 1992) (complaint that question failed to delineate particular employee or particular conduct found negligent contradicts broad-form submission mandate); *Scott v. Atchison, Topeka, & Santa Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978) (broad-form submission under “Rule 277 can be accomplished very simply by listing the relevant acts or omissions [those raised by both pleadings and evidence] in a broad ultimate fact issue . . . [or] by a complementary instruction”); *Merckling v. Curtis*, 911 S.W.2d 759, 770 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (different factual bases for medical malpractice case did not present extraordinary circumstance that made broad-form infeasible); *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 616-17 (Tex. App.—Corpus Christi 1994, writ denied) (charge not required to establish which design defect caused injury); *Crawford v. Deets*, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied) (different factual bases for medical malpractice case did not present extraordinary circumstance that made broad-form infeasible); *Benjamin Franklin Sav. Ass'n v. Kotrla*, 751 S.W.2d 218, 222 (Tex. App.—Houston [14th Dist.] 1988, no writ) (single causation question for two theories of recovery based on same conduct did not constitute error under broad-form principles).

<sup>15</sup> Two other questions were submitted on retaliatory discharge and age discrimination. *Id.*

The Corpus Christi court had previously upheld a question that submitted disqualification and discrimination in a single question. *S.W. Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted) (any error as to commingling discrimination and discharge theories waived when not brought to trial court's attention). The supreme court recently granted the petition in *Garza* (and is holding the petition in *Leal*) in which the defendants argue that “disqualification” is not a statutory ground for recovery, not pleaded as a ground for recovery, and not causally related to the damages recovered. (See Briefing on the Merits.) As a result, if the defendant prevails on any one of those grounds, the disjunctive submission could fall under the *Casteel* rationale.

**b. Family law: grounds for termination of parental rights**

Numerous cases assert a *Casteel* argument arising from an “*E.B.*” submission of two or more statutory grounds in the disjunctive in termination of parental rights cases. Although holding such an error was not preserved in *B.L.D.*, the supreme court noted: “While the court of appeals in this case states that *E.B.* does not control the resolution of this case, see 56 S.W.3d at 216 n. 15 (referring to the relevant discussion in *E.B.* as “dictum”), we observe that our courts of appeals are now divided on this issue.” *In re B.L.D.*, 46 Tex. Sup. Ct. J. 978, n.8.<sup>16</sup> The

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<sup>16</sup> The supreme court cited the following to show the split: “See *In re J.M.M.*, 80 S.W.3d 232, 249 (Tex. App.—Fort Worth 2002, pet. denied), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d 256, 267 n. 39 (Tex. 2002) (“[W]e cannot agree with the *B.L.D.* [court of appeals] majority opinion that broad-form jury charge submissions are *per se* violative of due process in termination cases.”); *In re K.S.*, 76 S.W.3d 36, 49 (Tex. App.—Amarillo 2002, no pet.) (“We are bound to follow *E.B.* unless the Texas Supreme Court overrules or vitiates it.”); *In re M.C.M.*, 57 S.W.3d 27, 31 n. 2 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (acknowledging the holding in [the court of appeals in] *B.L.D.* but concluding that “*E.B.* has not been overruled, and this Court must follow it[.]”).” Other cases have also addressed the issue. See *Sawyer v. Texas Dept. of Protective & Regulatory Servs.*, 2003 WL 549216 (Tex. App.—Austin 2003, no pet.) (memo opin.) (holding error not preserved but noting *E.B.*’s broad-form mandate does not violate parent’s due process); *Cox v. Texas Dept. of Protective & Regulatory Servs.*, 2002 WL 1025066 (Tex. App.—Austin 2002, pet. denied) (noting that disjunctive broad-form submission authorized by *E.B.* still applies to

supreme court also reviewed several other cases on the same or similar issue but found the error unpreserved in those cases as well. See *In re A.V.*, 46 Tex. Sup. Ct. J. 938, 943 (May 15, 2003); *In re K.N.R.*, 46 Tex. Sup. Ct. J. 998 (July 3, 2003); *In re A.F.*, 46 Tex. Sup. Ct. J. 1015 (July 3, 2003). As a result, that issue remains open for resolution.

**c. Fraud theories: misrepresentations, nondisclosure, constructive**

Mixing fraud theories, such as fraud by nondisclosure with affirmative fraud when a duty to disclose is unclear, may be another circumstance in which problems arise after the verdict comes in. See *Baribeau v. Gustafson*, 2003 WL 1090587 (Tex. App.—San Antonio 2003, pet. filed) (finding error not preserved on improper mixing of actual and constructive fraud in a single question).

**d. Other theories: negligence, DTPA, defamation**

Other theories of liability can likewise raise broad-form issues. See, e.g., *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (negligence); *Mars, Inc. v. Gonzalez*, 71 S.W.3d 434, 442 (Tex. App.—Waco 2002, pet. denied) (no evidence of publication but dissent arguing that failure to remove exhibited materials should support publication element of defamation claim under broad-form submission). *Harris County* used *Casteel*’s logic to reach its conclusion of commingling an element or theory without evidentiary resulted in harmful error. But, notably, in *Casteel* and *Harris County* (as do *Garza* and the parental rights termination cases), the questions listed the theories of DTPA practices and the elements of damage, respectively.

Thus, those cases leave unclear how the review would apply in cases in which the broad-form submission does not list such elements (such as negligence)—by looking to all pleaded practices? Would a broad “no evidence of any theory” suffice to preserve the complaint? Would a party meet such an objection with a granulated checklist of practices? Where would that result leave broad-form

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submission of statutory allegations); *Thornton v. Texas Dept. of Protective & Regulatory Servs.*, 2002 WL 246408 (Tex. App.—Austin 2002, pet. denied) (n.d.p.) (locating no invalid theories submitted to put case within scope of *Casteel* and holding that *E.B.* survives *Casteel* such that jury’s finding supported termination).

submissions?

**e. Factual sufficiency: multiple theories**

In *Harris County*, the majority indicated that its segregation holding did not encompass “potential errors, such as factual insufficiency.” 96 S.W.3d at 235. But, could an objection to a broad-form submission combined with a later factual sufficiency complaint preserve error as the dissent suggests. *Id.* at 239. That is, would review of the factual sufficiency error be denied under the reasoning of *Casteel* and *Harris County*? For now, the scope in question appears limited to legal sufficiency, and several pending cases may give the supreme court an opportunity to clarify the application of *Casteel* and *Harris County* to evidentiary failures in multi-theory liability questions.

**2. Multiple liability questions tied to single damage question**

Prior to *Casteel*, courts also upheld a single damage finding even if one or more of the multiple liability findings on which it was predicated failed.<sup>17</sup> But, since *Casteel*, courts have disagreed on whether such tying can result in error.

Some courts hold *Casteel* does not apply and no error results from the failure of one of the tied theories of liability. See *Durban v. Guajardo*, 2002 WL 1042161 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (judgment can rest on damage finding if either of underlying liability findings find support in law and evidence); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.) (even though several of questions on different theories of liability failed, remaining question also tied to same damage question did not leave the court wondering whether jury based its award on valid theory); *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.)

<sup>17</sup> See *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993) (actual damages based on contract and statutory claim would stand upon reversal of contract recovery and affirmation of statutory claim); *Automobile Ins. Co. v. Davila*, 805 S.W.2d 897, 903 (Tex. App.—Corpus Christi 1991, writ denied) (single damage question stands if any one liability question can support it). But cf *Putter v. Anderson*, 601 S.W.2d 73, 78 (Tex. Civ. App.—Dallas 1980, writ ref d n.r.e.) (pre-broad-form mandate case holding that failure of two of three libel counts resulted in remand when plaintiff secured only one unapportioned damage question).

(*Casteel* error in one question to which single damage question tied rendered harmless in light of survival of other liability question tied to same damage question); see also *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dism'd by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories).

Other courts find harm arises from the tying damages to multiple theories, one of which fails. See *San Antonio Credit Union v. O'Connor*, 2003 WL 21502765 (Tex. App.—San Antonio 2003, no pet. h.) (linking intentional infliction, malicious prosecution, and defamation to single damage question reversible error when intentional infliction claim failed as a matter of law); *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 159-60 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. filed) (not relying on *Casteel* but holding that linking of erroneously submitted malicious credentialing question along with negligence question to single actual damage question left court unable to tell which damages caused by what conduct); *Custom Residential Paint Contracting, Inc. v. Klein*, 2001 WL 1318420/2002 WL 660200 (Tex. App.—Dallas 2002, pet. denied) (n.d.p.) (holding jury's DTPA finding defective and initially ordering remand for new trial even though contract question predicated on same damage finding left in tact but later accepting remittitur rather than remand).

**3. Multiple liability questions tied to single apportionment question**

Similar to the actual damage context, at least one court has determined that linking a flawed theory of liability to an apportionment question results in error. See *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 159-60 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. filed) (not relying on *Casteel* but holding that linking of erroneously submitted malicious credentialing question along with negligence question to single apportionment question left court unable to tell how jury apportioned responsibility on what conduct).

**4. Multiple liability theories tied to a single penalty damage question**

Similar to the actual damage context, linking multiple theories of liability (and thus conduct) to a single penalty question may also cause a potential

error if one theory fails on appeal. *San Antonio Credit Union v. O'Connor*, 2003 WL 21502765 (Tex. App.—San Antonio 2003, no pet. h.) (malice finding linked to reversed intentional infliction claim required reversal of punitive damages); *Atrium Cos. v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (finding of waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings).

### 5. A “general” charge

Rule 290 defines a jury verdict as “general or special.” Tex. R. Civ. P. 290. At least one court, however, has held that a jury charge that asks a jury whether it finds in favor of the plaintiff or the defendant cannot meet the requirements of *Casteel*. *Commercial Bank of Texas v. Luce*, 92 S.W.3d 636, 639-40 (Tex. App.—Beaumont 2002, no pet.) (breach of employment contract action). Noting that both parties objected to the form of the charge, the court of appeals held that the jury question did not instruct the jury on the law or submit the controlling fact issues for the jury’s determination. *Id.*

### D. Strategy decisions

Whether the form of the broad-form question or conditioning of questions creates a risk of reversal depends upon how many theories of liability and defense a single question combines, how the jury answered the question(s), how the questions are tied together, and what fails on what grounds on appeal. Thus, strategic options will play an important role in deciding how to proceed.

If faced with an objection that falls in the “clear error” category above, modifications to the charge may represent the best strategic choice. But, if faced with objections on potential or unknown errors, the choices become more difficult. An accurate assessment of the record, the law, and the jury’s possible answers becomes critical to making the strategic choices raised in that context.

For example, ignoring a pure omission of a theory of liability or defense, the risk of reversal (or harmful error) most often arises with a question that submits multiple liability and defensive theories in a single question. With an *affirmative* finding in that context, when one of the multiple theories of liability in a single question fails, a reviewing court cannot determine on what part of the question the jury relied to allow recovery. With a *negative* finding, when one of the multiple theories in a single question fails, the reviewing court cannot determine

whether the jury answered “no” on liability or “yes” on a proper or improper defensive theory. Without knowing on what basis the jury answered in the negative, it may be difficult to hold that the question can stand after the failure of a defensive issue. On the other hand, a “no” to a pure liability question (with no defensive theories included) does not carry the same risk—the jury relied upon none of the theories and no risk exists of an improper recovery based on an invalid liability theory or a denial of recovery based on an invalid defensive theory.

Assuming the combination presents potential error, how serious the risk of reversal is should be assessed. Is there some evidence of every theory subsumed in the questions and instructions? How clear and strong is the law for or against the submission you seek? As the volume of evidence and strength of the law increases, the risk of reversal may decrease.

As a further example, in the context of segregated damages, submission of multiple damage blanks may make a defendant queasy—are separate blanks the best choice? Instead, as a defendant, do you want to allow an unsegregated damage finding without objection: What challenge do you face to gain review and reversal on the sufficiency of the evidence of any one or more damage element? Is that one of the main issues in the case or a lesser issue? The answers to those questions will help balance the need to win at trial with the risks of reversal on appeal.

Thus, practical considerations or matters of strategy may dictate the requested form of submission. The variations for a multi-theory case are too numerous to outline. Indeed, the combinations will vary depending upon, among other things, (1) how many plaintiffs and defendants the charge will submit,<sup>18</sup> (2) how many theories of liability and/or defense the charge will submit,<sup>19</sup>

<sup>18</sup> Joint and several liability (or several liability only) for actual or punitive damages also presents an array of issues in submission of a multi-party charge. Those issues are beyond the scope of this paper.

<sup>19</sup> For example, a plaintiff might prefer that the trial court not submit multiple defenses in separate questions because (1) the jury receives more than one opportunity to thwart the plaintiff’s recovery, (2) the opportunity for multiple defensive answers might create an overall perception against liability, (3) the possibility of conflicts increases with the number of questions submitted, and (4) a defendant can more easily challenge the evidentiary support of the jury’s findings. On the other hand, if the

(3) the strengths and weaknesses of a case—on evidentiary, legal and jury appeal grounds, (4) what relief or combinations of relief a party will seek in formation of the judgment,<sup>20</sup> and (5) the risk of reversal that a party can tolerate to achieve a “winning” verdict. These various influences will affect the ultimate submission choices.

#### IV. Recent opinions on specific claims or issues

The following subsections summarize recent opinions from courts on charge issues in various types of cases over the past year.

##### A. Spoliation

Submission of a spoliation instruction when it should not be given (such as in the absence of a duty to preserve the evidence destroyed) is harmful error. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723-24 (Tex. 2003) (the “very purpose” of a spoliation instruction is to “nudge” or “tilt” the jury and “the likelihood of harm from the erroneous instruction is substantial, particularly in a closely contested case”). But the supreme court has yet to determine what standard would control in determining whether a trial court should submit a spoliation instruction and what such instruction should say. *Cf. Cresthaven Nursing Residence v. Freeman*, 2003 WL 253283 (Tex. App.—Amarillo 2003, no pet. h.) (involving instruction similar to *Wal-Mart* instruction but holding no abuse of discretion when a scintilla of evidence supported theory of spoliation).

##### B. Facts taken as true

Discovery sanctions in the form of instructing the jury to take witness's statements as true on dispositive issues (when sanction was excessive under *TransAmerican* and inaccurate according to the statements) causes harmful error that denies defendant presentation of its case. *Spohn Hosp. v.*

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jury answers a multi-theory question adverse to the plaintiff, the plaintiff will face a difficult task in attacking the jury's finding.

<sup>20</sup> Some damage-related issues to consider in how broadly a court can combine theories include (1) whether claims have different measures of damages, (2) whether a party seeks tort based damages for recovery of punitive damages, (3) whether a party can seek both punitive and trebled damages, (4) whether attorneys' fees are at issue on a particular claim, and (5) the type of relief sought for various claims or conduct (e.g., forfeiture of different property, injunctive relief, etc.).

*Mayer*, 104 S.W.3d 878 (Tex. 2003).

##### C. Joint enterprise liability

Joint enterprise instruction's third element should require a “‘common business or pecuniary interest,’ not a ‘community of pecuniary interest in [the] common purpose, among the members [of the group].’” *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (holding PJC 7.11 [2000] erroneously stated third element).

##### D. Higher standard of care

Failure to instruct on the proper standard of care results in reversible error. *Elmer v. Speed Boat Leasing, Inc.*, 89 S.W.3d 633, 639 (Tex. App.—Corpus Christi 2002, pet. filed) (carriers and amusement operators held to higher standard of care and failure to instruct on elevated standard represents reversible error).

##### E. Mutually dependent leasehold duties

The mutually dependent nature of lessee's duty to pay and lessor's warranty of suitability for commercial purpose means that refusal of an instruction on “correlative” duties of parties is not error. *Parts Indus. Corp. v. AVA Servs., Inc.*, 104 S.W.3d 671, 682 (Tex. App.—Corpus Christi 2003, no pet.).

##### F. Sole proximate cause

The omission of a defense that finds support in the evidence generally results in reversible error. For example, denial of an instruction on a sole proximate cause defense is reversible error when some evidence supports its submission. *Texas Elec. Coop. v. Dillard*, 2003 WL 1884296 (Tex. App.—Tyler 2003, pet. filed) (jury not allowed to consider potential ramifications of unidentified rancher's conduct in allowing cows to wander on highway when sole proximate cause instruction omitted). *Cf. Luck v. Baylor Med. Ctr.*, 2002 WL 31750168 (Tex. App.—Dallas 2002, pet. denied) (n.d.p.) (testimony of treatment rendered by nonparty physician sufficient to support sole proximate cause instruction).

##### G. Unavoidable accident

Just as with exclusion, the inclusion of a defense such as unavoidable accident can result in reversible error when no evidence supports the submission. *Urista v. Bed, Bath, & Beyond, Inc.*, 2003 WL 21357307 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no

pet.) (unavoidable accident instruction reversible error when no evidence supported theory that nonhuman event caused trash cans to fall and jury returned negative finding to negligence issue in closely contested case). *Cf. Evans v. Allwhite*, 2003 WL 21659344 (Tex. App.—Texarkana 2003, no pet. h.) (evidence of loss of consciousness immediately before auto accident supported unavoidable accident and sudden emergency instructions); *Luck v. Baylor Med. Ctr.*, 2002 WL 31750168 (Tex. App.—Dallas 2002, pet. denied) (n.d.p.) (testimony regarding poor physical condition sufficient to support unavoidable accident instruction).

#### **H. DTPA statute of limitations**

PJC 102.23 suggests submission of DTPA statute of limitations to determine date “all” false, misleading, or deceptive acts should have been discovered. *Atrium Cos. v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (agreeing with comment to PJC that plaintiff need only prove that one act not time-barred).

#### **I. Agricultural operator's repose defense**

Agriculture Code's one-year bar of nuisance claims against agricultural operators did not require plaintiff's discovery, only existence of conditions or circumstances for more than a year. *Holubec v. Brandenberger*, 46 Tex. Sup. Ct. J. 702 (May 22, 2003) (construing Tex. Agric. Code § 25.004(a), and reversing based on erroneous submission repose defense).

#### **J. Worker's compensation issue of “no ability to work”**

Issue under Labor Code § 408.143 is not whether employee can engage in substantial or gainful employment but whether employee can not engage in any work at all. *Humphrey v. American Motorists Ins. Co.*, 102 S.W.3d 811, 815-16 (Tex. App.—Eastland 2003, pet. filed) (instructing on Labor Code § 408.143).

#### **K. Condemnation “unable to agree” requirement**

Phrase “if it is a bona fide offer” rather than “it must be a bona fide offer” sufficiently submitted the “unable to agree” element of a condemnor's claim. *Pitts v. Sabine River Auth. of Texas*, 2003 WL 21229541 (Tex. App.—Texarkana 2003, pet. filed) (instructing on Property Code § 21.012).

#### **L. Insurance Code's action for unfair claim settlement practices**

The supreme court reconciled the statutory cause of action for unfair claim settlement practices with a common law *Stowers* claim and listed the elements of such a claim. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002).

#### **M. Texas Securities Act aider and abetter action**

“The language of the [Texas Securities Act] does not require proof that an aider is generally aware of its role in the securities violation to be liable as an aider. . . . [T]he trial court [thus] did not abuse its discretion by failing to give [the defendant's] requested jury instruction on general awareness.” *See Sterling Trust Co. v. Adderley*, 2003 WL 21770799 (Tex. App.—Fort Worth 2003, no pet. h.).

#### **N. Common law indemnity from agent**

Jury finding of “duty to defend” for undefined “misconduct” of insurance agent improperly submitted common law indemnity claim of insurer against its agent for damages previously paid to insured. *Vellio Ins. Agency v. Vanguard Underwriters Ins. Co.*, 2003 WL 21197188 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no pet.). Instead, indemnity claim requires findings that establish (1) agent committed actionable tort and (2) insurer vicariously liable for the tort under doctrine of respondeat superior. *Id.*

#### **O. Chance of survival/proximate cause**

Even if “chance of survival” finds support in the evidence and disregarding the finding is improper, remand may still result when chance of survival was improperly treated as an affirmative defense rather than as part of proximate cause. *See Vigil v. Montero*, 2002 WL 1988173 (Tex. App.—El Paso 2002, pet. filed) (n.d.p.).

#### **P. Age discrimination**

The use of phrase “age was one of the reasons,” rather than “motivating factor” as suggested by PJC 107.6, is not error in federal age discrimination case. *Dallas County Sheriff's Dept. v. Gilley*, 2003 WL 21949700 (Tex. App.—Dallas 2003, no pet. h.).

#### **IV. Complaint not error or not reversible**

A trial court's broad discretion generally protects from review its decisions in areas outside of the general and broad-form categories of error listed

above. But, even if error occurs, no reversal on appeal occurs in the absence of harm. This section lists the general categories of decisions either considered not erroneous or not harmful.

#### A. No error

**1. Refusal to define terms not used in the charge.** See *Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 911 (Tex. 2000) (trial court did not err in refusing to define "producing cause" when charge submitted "resulting from" causation language); *Lakey v. Cauley*, 2000 WL 33354703 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (n.d.p.) (trial court did not err in refusing instruction that did not refer to a particular term or issue in the charge).

**2. Refusal to submit defenses abandoned during trial.** See *Gallagher v. Fire Ins. Exch.*, 980 S.W.2d 833, 838 (Tex. App.—San Antonio 1998, pet. denied) (plaintiff could not complain that court refused instruction defensive in nature, particularly when defendant abandoned defense prior to trial).

**3. Refusal to submit issues not controlling to outcome.** See, e.g., *Smith v. Outdoor Sys., Inc.*, 2002 WL 370200 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2002, pet. denied) (n.d.p.) (even if preserved, question on lease default irrelevant when lease terminated during point at issue).

**4. Refusal to submit instructions merely because it aids requesting party.** See *Akin v. Santa Clara Land Co.*, 34 S.W.3d 334, 346 (Tex. App.—San Antonio 2001, pet. denied) (additional requested instructions, while correct statements of law and beneficial to requesting party, not necessary to enable jury to render verdict).

**5. Refusal to submit instructions, definitions, or questions not supported by the evidence (or pleadings).** See *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.—Amarillo 2001) (trial court did not err in refusing "sole proximate cause" and "new and independent cause" instructions when record contained no evidence to support submission), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002); *Turnbull v. McIntosh*, 2001 WL 493169 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (n.d.p.) (trial court did not err in refusing "unavoidable accident" and "sudden emergency" instructions when no evidence supported either

theory).

**6. Refusal to submit surplus instructions.** Surplus instructions increase the risk of improper comments on the evidence and confusing or misleading the jury. See *Accord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984) (disapproving of appendage of surplus instruction to PJC); *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487 (Tex. App.—Texarkana 2001, pet. granted) (disapproving of surplus instructions but petition for review complains of omitted instruction as denial of defense); *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.—Beaumont 1999, pet. denied) (same).

**7. Refusal to submit shades and phases of questions, instructions, and definitions.** See *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.—Amarillo 2001) (court not required to submit mere shades or variations of the questions submitted), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002); *Krishnan v. Ramirez*, 42 S.W.3d 205, 220 (Tex. App.—Corpus Christi 2001, pet. denied) (same); *Riddick v. Quail Harbor Condominium Ass'n*, 7 S.W.3d 663, 674 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (same); *Bayliner Marine Corp. v. Elder*, 994 S.W.2d 439, 447 (Tex. App.—Beaumont 1999, pet. denied) (same).

**8. Refusal to de-personalize instructions and definitions.** See *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 750 (Tex. App.—Corpus Christi 1999, pet. denied) (personalized definition of malice proper).

#### B. Invited error

"Parties may not invite error by requesting an issue and then objecting to its submission." *General Chem. Corp. v. De la Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party waived any error when it requested the very issues sought to be avoided on appeal); *Dico Tire, Inc. v. Cisneros*, 953 S.W.2d 776, 795 (Tex. App.—Corpus Christi 1997, pet. denied) (although party objected to omission of third party in comparative responsibility question, party invited error by requesting comparative responsibility question without including third party); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 304 (Tex. App.—Houston [14th Dist.] 1995, no writ); (party may not agree to charge and then attack it on appeal). *But cf. Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999) (requesting

instruction to issue did not invite error when post-verdict complaint was that recovery was not available under legal theory of plaintiff's claim, not that recovery would not have been available under a different legal theory that would have applied if timely raised).

### C. Other findings render error immaterial

If other findings render the finding in which a charge error appears immaterial, then the charge error is deemed harmless. *See, e.g., U.S. Tire-Tech, Inc. v. Boeran*, 110 S.W.3d 194, 202 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. filed) (omission of issue on breach of implied warranty of fitness for particular purpose harmless when jury found no timely notice of breach); *Koehn v. CST Drilling Fluids, Inc.*, 2003 WL 21189759 (Tex. App.—Amarillo 2003, no pet.) (memo opin.) (any error in submitting sole proximate cause instruction rendered harmless when no percentage assigned to defendant); *Delaney v. Scheer*, 2003 WL 247110 (Tex. App.—Austin 2003, no pet.) (memo opin.) (any error in submitting issue on naming sole managing conservator rendered moot when jury found continued joint managing conservatorship proper); *Lowe v. Garza*, 2003 WL 1945379 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no pet.) (memo opin.) (finding of excuse rendered any perceived error in negligence question immaterial); *Gilbreath v. Hathaway*, 2003 WL 1937168 (Tex. App.—Beaumont 2003, pet. denied) (refusal to include unavoidable accident instruction harmless when jury heard evidence of theory and was not required to pick one party or the other); *Vasquez v. Hyundai Motor Co.*, 2002 WL 1905203 (Tex. App.—San Antonio 2002, no pet.) (any error in asking jury to assign percentage of responsibility to driver of car as responsible third party not properly joined immaterial when jury found no design defect and did not apportion any responsibility to defendant); *Balusik v. Kollatschny*, 2002 WL 1822360 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002, no pet.) (n.d.p.) (to extent fiduciary duty instruction erroneous, finding immaterial because no damages awarded based on breach of fiduciary duty); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (holding that trial court erred in omitting negligent standard of liability for defamation or libel but finding no harm when jury answered predicate question in the negative).

Similarly, even if broad-form or granulation is improper for some theories or issues, reversal will

result only if error is preserved and harm is shown. *See Galveston County Fair & Rodeo v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996) (holding trial court had discretion to submit one question with an instruction or separate questions but finding no harm from error in not doing either when different question supported judgment); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995) (“Submission of an improper jury question can be harmless if the jury’s answers to other questions render the improper question immaterial.”); *H.E. Butt Gro. Co. v. Warner*, 845 S.W.2d 258, 259-60 (Tex. 1992) (granulated submission not harmful); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749-50 (Tex. 1980) (holding error in defensive issues harmless when other jury findings supported trial court’s judgment); *Pack v. Crossroads, Inc.*, 53 S.W.2d 492 (Tex. App.—Fort Worth, pet. denied) (although error claimed in failing to charge on survivor claim, any error harmless when court found no evidence to support causation element of wrongful death action); *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.) (although DTPA question defectively included improper theories and created harm under *Casteel*, Insurance Code question tied to same damage question supported judgment and rendered DTPA error harmless).

### D. Other issues or instruction resolve factual dispute

If other findings have the “same effect” or otherwise resolve the disputed fact issues, courts of appeal are reluctant to reverse. *See, e.g., Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663 (Tex. 1999) (separate questions on defect for strict-liability and breach of implied warranty claims unnecessary when the controlling issues for both claims were “functionally identical”); *Lee v. Huntsville Livestock Servs., Inc.*, 2003 WL 1738418 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.) (memo opin.) (circumstantial evidence instruction sufficed to submit *res ipsa loquitur* theory); *Superior Laminate & Supply, Inc. v. Formica Corp.*, 93 S.W.3d 445, 448-49 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2002, pet. denied) (novation defense supported by pleading of doctrine of merger when doctrines had “same effect” and parties knew defendant intended to argue one contract supplanted another); *Star Enter. v. Marze*, 61 S.W.3d 449 (Tex. App.—San Antonio 2001, pet. denied) (“proximately cause the occurrence” and

“proximately caused the death” were functional equivalents under the facts and separate submissions were unnecessary); *M.D. Mark, Inc. v. PIHI P’ship*, 2001 WL 619604 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (n.d.p.) (fraud and breach of fiduciary duty claims encompassed same controlling issue and court did not err in refusing to submit fiduciary claim separately); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (single question submitted controlling fact issue determinative of contract and breach of fiduciary theories of liability and court did not err in refusing to submit each theory separately).

#### **E. Deemed findings or “as a matter of law” evidence fills in omission**

A charge that erroneously omits an element of a claim (without objection) is harmless if an express or deemed finding supplies the missing element. *See, e.g., In re J.F.C.*, 96 S.W.3d 256 (Tex. 2003) (omission of best interests element in parental termination proceeding harmless when trial court made express finding in judgment and parent failed to object to omission).

If the issue of liability is established as a matter of law, such “conclusion of law” may support a jury’s finding of damage. *See Picard v. Zarzoza*, 2003 WL 283826 (Tex. App.—Texarkana 2003, no pet.) (memo opin.) (sales agreement established vehicle ownership as a matter of law and thus judgment properly awarded recovery for property damage to vehicle); *Balusik*, 2002 WL 1822360 (n.d.p.) (instructing jury that defendant breached her fiduciary duty supported by evidence and law and rendered refusal to instruct on commercial reasonableness proper).

If not established as a matter of law but no liability finding is obtained despite an objection, the theory of recovery is waived. *See, e.g., Nat’l Dev. & Research Corp. v. Panda Global Energy Co.*, 2002 WL 1060483 (n.d.p.) (Tex. App.—Dallas 2002, pet. denied) (failure to request issue on breach of contract despite objection pointing out omission of issue resulted in waiver of right to recover despite jury finding on damage); *Rosell v. Central West Motor States, Inc.*, 89 S.W.3d 643, 653-54 (Tex. App.—Dallas 2002, pet. denied) (stipulation that employee acting in course and scope negated need to submit employer in negligence question).

#### **F. Slight wording errors insufficient to show harm**

Although “duty” and “breach” are not generally facts issues for the jury, mere inclusion of those words does not always render the charge defective to submit adequately and fairly the disputed fact issues. *See Green v. Gemini Expl. Co.*, 2003 WL 1986859 (Tex. App.—Austin 2003, pet. denied) (memo opin.) (question on oil and gas drainage claim that included the phrase “breach its duty” not harmful error when instructions required jury to find proper elements to support such claim). *But cf. see Maddox v. Denka Chem. Corp.*, 930 S.W.2d 668, 670-72 (Tex. App.—Houston [1st Dist.] 1996, no writ) (statement regarding general rule of duty was correct statement of law but constituted harmful comment on the weight of the evidence).

Moreover, a mismatch between the issue and the instruction may also be deemed insufficient error to cause reversal. *See, e.g., Pitts v. Sabine River Auth. of Texas*, 2003 WL 21229541 (Tex. App.—Texarkana 2003, pet. filed) (condemnation issue referred to “easement sought” and instruction referred to “taking” but variation insufficient to show jury confusion or other error).

#### **G. No challenge to a \$0 damage finding**

In the absence of a challenge to a \$0 damage finding, a court of appeals will not hear any complaints regarding other purported errors in the trial of the case. Courts consider such failure to render other complaints harmless. *See, e.g., Tristan v. Walker*, 2003 WL 21212342 (Tex. App.—Corpus Christi 2003, pet. filed) (memo opin.) (no complaint on negative defamation finding would be heard when no challenge to \$0 damage findings); *Hernandez v. Garcia*, 2003 WL 724182 (Tex. App.—San Antonio 2003, no pet.) (memo opin.) (no complaint of negative finding on negligence would be heard when no challenge made to \$0 damage finding); *Allchin v. Chemic, Inc.*, 2002 WL 1608616 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2002, no pet.) (n.d.p.) (jury’s malicious breach of fiduciary duty findings immaterial and not reviewable on appeal when no challenge to \$0 damage finding).