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Giving It a Shot: Reviewing the PJC's New Proposed Felonious Conduct Questions for Exemplary Damages Cap-Busting

Kelley Clark Morris

Texas trial courts (and appellate specialists) "routinely rely on the Pattern Jury Charges in submitting cases to juries."[1] And, while the State Bar Pattern Jury Charge Committee endeavors to correctly state the law, and almost always does so successfully, the PJC Committee is not perfect, and its word is not law.[2] As readers likely know, there are some questions or instructions "missing" from the PJC. This article discusses one category of jury questions that, until a few months ago, was not addressed by the PJC,[3] whether the exemplary damages cap under Texas Civil Practice and Remedies Code section 41.008(c) applies—the so-called "cap busting" provision.[4]

When there is no applicable PJC question, instruction, or definition, the parties and trial court must write one. Usually, a litigant (or, more specifically, appellate counsel) requests inclusion of a question, instruction, or definition based on controlling case law or statutory language at the charge conference. That language either gets included in the trial court's charge or the tender is rejected, error is preserved, and the disputed language eventually makes its way to the Texas Supreme Court. At that time, the Court either blesses the language as a correct statement of the law, or the Court rejects the language as an improper statement of the law. Hopefully the Court's opinion addresses the disputed charge language head-on such that the PJC can draft a new charge question, instruction, or definition or revise existing language accordingly. Litigants and trial courts then adopt the new PJC language—unless and until the Texas Supreme Court or the Legislature changes the applicable legal standard. Such is the circle of life, or rather, the circle of the jury charge.

The PJC's new questions and instructions on section 41.008 cap busting, however, do not follow this pattern. The Texas Supreme Court has not spoken on the issue, and the statute leaves important questions unaddressed. Rather than waiting for these questions to percolate up to the Court, the PJC Committee opted to draft these

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[1] *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007).

[2] *See, e.g.*, *id.*

[3] Special thanks to Hon. Dan Hinde, Chair of the PJC Oversight Committee, for his presentation of changes reflected in the Summer 2023 editions of the PJC civil volumes at the June 2023 monthly meeting of the HBA Appellate Section.

[4] *See* PJC General Negligence, "Changes in the 2022 Edition" & Ch. 31 (2022).

questions without the guidance of controlling case law. Only time will tell if the Court blesses the PJC's formulations, and litigants and trial courts should consider some important questions before adopting these new PJC questions with open arms.

Under Texas law, exemplary damages may be recoverable on a claim of gross negligence, malice, or fraud, where that claim is proved by clear and convincing evidence and where both the jury's liability finding and exemplary damage award are unanimous.[5] The Legislature has mandated that the jury charge include this instruction:

> You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.[6]

If the jury unanimously finds liability for gross negligence, malice, or fraud **and** unanimously determines the amount of exemplary damages against a specific defendant, the Legislature has capped the amount of exemplary damages that can be awarded in the judgment, although the existence or application of the damage cap "may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction."[7]

Texas Civil Practice and Remedies Code section 41.008(b) provides that an exemplary damages award against each defendant is capped at the greater of:

[2 x economic damages] **+** [economic damages up to $750,000]

OR

$200,000

Under the cap, the maximum amount of economic damages that can be awarded against each defendant is $750,000 plus twice the amount of economic damages.[8] If the jury's determination of exemplary damages is less than $200,000, there is no cap. If the jury's determination of exemplary damages is greater than $200,000, the minimum amount of exemplary damages awarded is $200,000 under the cap.

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[5] Tex. Civ. Prac. & Rem. Code § 41.003(a)–(d).

[6] *Id.* § 41.003(e).

[7] *Id.* § 41.008(e).

[8] This formula leaves some questions unanswered, beyond the scope of this article, concerning the application of proportionate responsibility liability percentages.

Importantly, section 41.008(c) lists categories of felonious criminal conduct to which the cap **does not apply**,[9] provided that the conduct was committed intentionally or knowingly,[10] as defined by the Penal Code.[11] This is known as "cap busting" conduct. Despite becoming law in 1987, there is very little case law interpreting section 41.008. Reading the plain language of the statute generates many questions that have gone unanswered by the courts of appeals:

- Should the jury be separately asked whether the exemplary damage causing conduct is one of the listed felonies and, if so, where in the charge should that question go?
- Must the jury's felonious conduct finding be unanimous?
- Should the jury be instructed that a felonious conduct finding must be based on clear and convincing evidence, preponderance of the evidence, or beyond a reasonable doubt?
- If the defendant has been charged with or convicted of one of the listed felonies, is the plaintiff entitled to directed verdict on cap busting?
- If the underlying tort liability question is based on alleged criminal conduct (like theft or negligence per se), can the liability question itself be drafted to satisfy section 41.008(c)?
- Should there be a separate question as to whether the conduct in question was committed intentionally or knowingly, including instruction on the Penal Code definitions, or can intent or knowledge be addressed by an instruction on the felonious conduct question?

In the absence of guiding precedent, the PJC endeavored to draft proposed questions on each of the felonies list in section 41.008(c) in the new Chapter 31 of the General Negligence PJC volume. Each of the twelve new questions is followed by more than three pages of comments.[12] The first comment for each new question is:

> **When to use.** PJC 31.__ should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in [*qualifying*

[9] *Id.* § 41.008(c)

[10] The intentional or knowing requirement does not apply when the alleged conduct is intoxication assault or intoxication manslaughter, which do not, themselves, require this *mens rea*. *See id.* § 41.008(c) (excepting Texas Penal Code sections 49.07 (intoxication assault) and 49.08 (intoxication manslaughter) from requirement). For simplicity's sake, that caveat is omitted from discussion in this article.

[11] *Id.* § 41.008(d).

[12] PJC 31.1–31.12, General Negligence (2022).

> *statute*], and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(1). If the jury finds conduct that violates [*qualifying statute*], and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(1).

The PJC predicates each question on a positive, unanimous answer to the predicate liability question for exemplary damages, and each question includes the definition of "knowingly" and "intentionally" from the Penal Code. The PJC Chapter 31 questions include a preponderance of the evidence standard, rather than a heightened standard, and include the following comment:

> **Caveat—burden of proof.** Because Tex. Civ. Prac. & Rem. Code § 41.008 identifies no burden of proof and Tex. R. Civ. P. 226a instructs the jury that a "yes" answer must be based on a preponderance of the evidence, this question uses a preponderance of the evidence burden of proof. Tex. R. Civ. P. 226a. For a claimant to recover exemplary damages, the jury charge must require a finding of fraud, malice, or gross negligence by clear and convincing evidence. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a). See PJC 4.2 and 10.15 for these findings. The Penal Code provisions listed in section 41.008 do not establish a cause of action or otherwise authorize exemplary damages. *See* Tex. Civ. Prac. & Rem. Code § 41.003(c). Rather, if the jury finds any of the conduct listed in section 41.008(c), the limitation in section 41.008(b) does not apply. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c). As of the publication date of this edition, no Texas appellate court has definitively addressed the burden of proof for the conduct listed in section 41.008(c).

On the question of unanimity, the PJC Chapter 31 questions do not require a unanimous jury finding themselves, adding this comment:

> **Unanimity.** PJC 31.__ does not require a unanimous jury finding of the conduct listed in Tex. Civ. Prac. & Rem. Code § 41.008(c). Under chapter 41 of the Texas Civil Practice and Remedies Code, "exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). This is consistent with Tex. R. Civ. P. 292(b), which requires jury unanimity for awards of exemplary damages—an exception to the general rule (stated in rule 292(a)) that the agreement of ten of twelve jurors is required to render a verdict. Section 41.003 specifically provides an instruction on unanimity that

> addresses the amount of damages. Tex. Civ. Prac. & Rem. Code § 41.003(e) ("You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous."). However, nothing in chapter 41 purports to address the number of jurors who must agree on the findings required by section 41.008(c) for exceeding the usual limit on exemplary damages set by section 41.008(b). Texas Rule of Civil Procedure 226a provides that, unless otherwise instructed, "the answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority." Tex. R. Civ. P. 226a. As of the publication date of this edition, no Texas appellate court has definitively addressed the question of how many members of a jury must agree to a finding of the conduct listed in section 41.008(c).

Ultimately, the PJC did the best with what they have been given—the plain language of the statute. Not all questions raised by the statute are addressed in the pattern questions, though the PJC attempted to answer most. Some practitioners will disagree with the burden of proof selected by the PJC (preponderance). Some practitioners will disagree with the lack of unanimity requirement selected by the PJC. And some practitioners may disagree with the culpable mental state selected by the PJC (the complete statutory definition from the Penal Code). But until a case is tried to jury verdict and these questions are preserved for appeal, the new PJC Chapter 31 questions are our best guidance.

The *Casteel* Doctrine, Evidence, and Argument: *Horton v. Kansas City Southern Railway Co.*

Ryan Philip Pitts

In a decision near the end of the 2023 term, the Texas Supreme Court confirmed, once again, that the *Casteel*[13] doctrine of harmful charge error may trigger where a party has presented evidence of or argued a legally invalid theory of liability or damages, and the trial court then submits a broad-form question in the jury charge—even if the charge made no mention whatsoever of the invalid theory. *See Horton v. Kan. City S. Ry. Co.*, 668 S.W.3d —, 2023 WL 4278230 (Tex. June 30, 2023).

This decision marks the latest example of the Texas Supreme Court's willingness to apply Casteel's presumption of harmful error based on the interaction between evidence, arguments, and a broad-form liability question. This article tells you what you should know about that interaction. It also provides a hopefully helpful appendix with a copy of each charge question held by the Texas Supreme Court to give rise to a presumption of harmful error, as of early September 2023.

* * *

The *Casteel* doctrine presumes harmful error where, based on the form of a jury charge, the jury could have found liability or damages on legally unsupported grounds. It sits at the fault lines of two unyielding principles: the right "to be judged by a jury properly instructed in the law" and the inviolability of jury deliberations. *Casteel*, 22 S.W.3d at 389.

The *Casteel* doctrine reflects something of a compromise between these principles. Because Texas courts will generally not consider evidence of what the jury reasoned and concluded during its deliberations[14]—except as answered in the charge—a reviewing court cannot ascertain the actual basis of a jury's decision when a single "Yes" answer encompasses multiple legal theories, some valid and other invalid.

As a result, Texas law presumes that the jury relied on an invalid ground, requiring a new trial to protect judicial review and the right to a legally correct jury charge. As *Casteel* aptly explained:

> [W]hen a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is

[13] *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 387–90 (Tex. 2000).

[14] *See* Tex. R. Civ. P. 327(b); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 367 (Tex. 2000) ("[J]ury deliberations must be kept private to encourage jurors to candidly discuss the case.").

> determine that some evidence could have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds.

Casteel, 22 S.W.3d at 388.[15] The charge in *Casteel* set forth thirteen theories of liability—four of which were invalid—followed by a broad-form "Yes" or "No" liability question. *Id.* at 386–89. A new trial was ordered.

At bottom, *Casteel* addresses the consequences of doubt.[16] It teaches that because of the competing principles at stake, Texas courts must presume harmful error whenever doubt exists about whether the jury answered a question on legally supported (valid) or legally unsupported (invalid) grounds.[17] And because doubt in the charge may arise in different ways, *Casteel*'s presumption of harm has expanded over time: into damage questions,[18] proportionate-liability findings,[19] and more recently to broad-form liability questions preceded at trial by evidence or argument of an invalid theory.[20]

A broad-form jury question provides no indication of which of multiple theories the jury might have credited. Accordingly, Casteel-triggering doubt can arise where a party has offered evidence of or argued alternative legal theories for liability or damages, even where the jury charge makes no mention of the alternative theories. A simple hypothetical helps illustrate.

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[15] *See also* Tex. R. App. P. 61.1(b); *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006) ("[H]arm can be presumed when meaningful appellate review is precluded because valid and invalid liability theories or damage elements are commingled."); *Cortez ex rel. Est. of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005) ("[T]he most that a reviewing court can say is that the verdict might have been reached on a valid theory."); *Lancaster v. Fitch*, 246 S.W. 1015, 1016 (Tex. 1923).

[16] *See, e.g.*, *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 865 (Tex. 2009) ("[T]he jury could have found Columbia liable based on Dr. Valencia's acts or omissions under the charge as given, and there is no way for Columbia or an appellate court to tell if it did so.").

[17] *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 537 (Tex. 2012) (per curiam) ("[W]hen a broad-form question allows a finding of liability based on an invalid theory, an appealing party does not have to prove that the jury actually relied on the invalid theory. . . . The very characteristic of broad-form submission prevents parties or the Court from knowing for certain what theory the jurors relied upon.").

[18] *Harris Cnty. v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002); *cf. E. Tex. Elec. Co. v. Baker*, 254 S.W. 933, 934–35 (Tex. 1923).

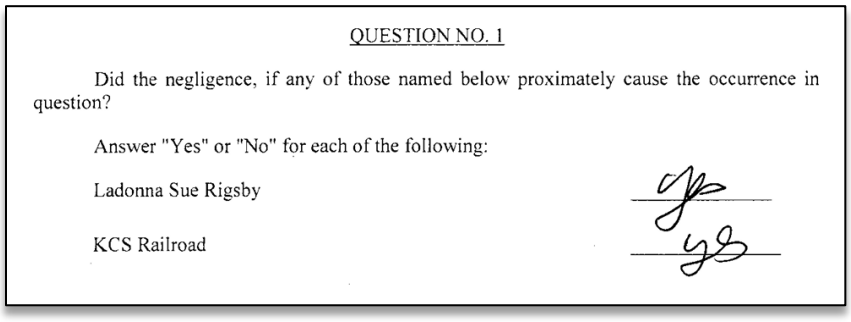
[19] *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 226–30 (Tex. 2005).

[20] *Benge v. Williams*, 548 S.W.3d 466, 474–75 (Tex. 2018).

Assume a jurisdiction's law holds that a bus driver has no legal duty to honk the horn before making a turn, no matter the circumstances. An accident happens after the bus turns in an intersection—injuring one of its passengers. At trial, the injured passenger offers expert testimony and other evidence that the bus driver should have honked the horn before making the turn. In closing argument, plaintiff's counsel mentions the driver could have avoided the accident by either honking the horn or looking before the turn. The case goes to the jury on a broad-form negligence question with no instruction on the no-honk rule: "Did the negligence, if any, of the bus driver proximately cause the accident in question?" The jury answers: "Yes." Not knowing the law prohibited the honk theory, the jury could have reasonably found negligence based on a failure to honk. The broad-form question makes it impossible to know if the jury did.

Thus, the Texas Supreme Court holds that harmful error must be presumed in this circumstance, where the jury could have answered "Yes" to a broad-form question under an invalid theory (because of insufficient evidence or legal unviability) presented in evidence or argument.[21] Its decisions help elucidate.

In *Horton*, a person died in auto-train accident.[22] The plaintiffs argued and introduced evidence of two theories at trial: a failure to replace a missing yield sign and the existence of a "hump" on the crossing.[23] After determining that no legally sufficient evidence supported that the missing yield sign proximately caused the accident, the Texas Supreme Court ordered a new trial based on presumed harm.[24] The broad-form negligence question obscured which theory the jury credited to find liability.[25]



QUESTION NO. 1

Did the negligence, if any of those named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following:

Ladonna Sue Rigsby Yes

KCS Railroad Yes

[21] This line of caselaw does seem to directly contradict prior statements of the Texas Supreme Court's that *Casteel*'s presumed error does not extend to "broad-form questions submitted a single liability theory (negligence) to the jury" *Urista*, 211 S.W.3d at 757; *accord Thota v. Young*, 366 S.W.3d 678, 685 (Tex. 2012) ("[T]his case involves a single liability theory—negligence—so *Casteel*'s multiple-liability-theory analysis does not apply.").

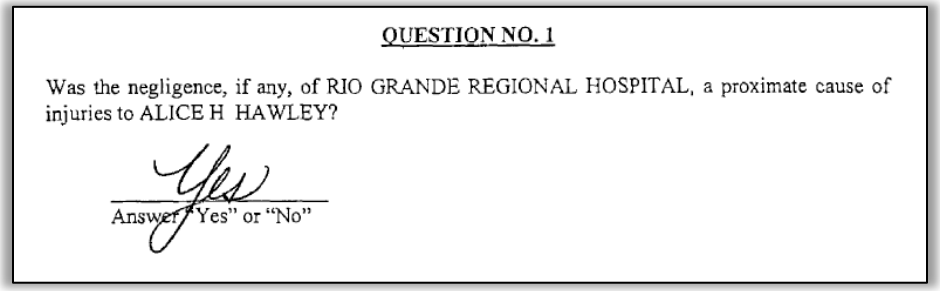
[22] 2023 WL 4278230, at *1.

[23] *Id.* at *16.

[24] *Id.* at *16–19.

[25] *Id.*

In *Columbia Rio Grande Healthcare, L.P. v. Hawley*, the plaintiff presented evidence of negligence by a doctor that could not be legally attributable to the defendant, a hospital.[26] The trial court declined to instruct the jury to disregard evidence of the doctor's negligence.[27] The Texas Supreme Court ordered a new trial because of a possibility that the jury could have found liability based on the evidence of the doctor's negligence.[28]



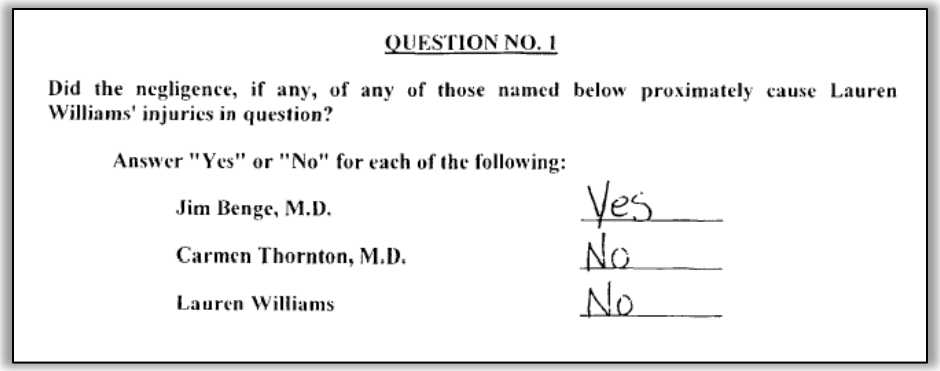
QUESTION NO. 1

Was the negligence, if any, of RIO GRANDE REGIONAL HOSPITAL, a proximate cause of injuries to ALICE H HAWLEY?

Yes

Answer "Yes" or "No"

Similarly, in *Benge v. Williams* and *Texas Commission on Human Rights v. Morrison*, the Texas Supreme Court applied *Casteel*'s presumption of harm where plaintiffs had presented evidence and argument of theories that they had either failed to plead or disclaimed.[29] Again, the broad-form questions did not allow the Court to discern whether the jury found liability based on the unpleaded and disclaimed theories.[30] New trials were ordered.



QUESTION NO. 1

Did the negligence, if any, of any of those named below proximately cause Lauren Williams' injuries in question?

Answer "Yes" or "No" for each of the following:

Jim Benge, M.D.	Yes
Carmen Thornton, M.D.	No
Lauren Williams	No

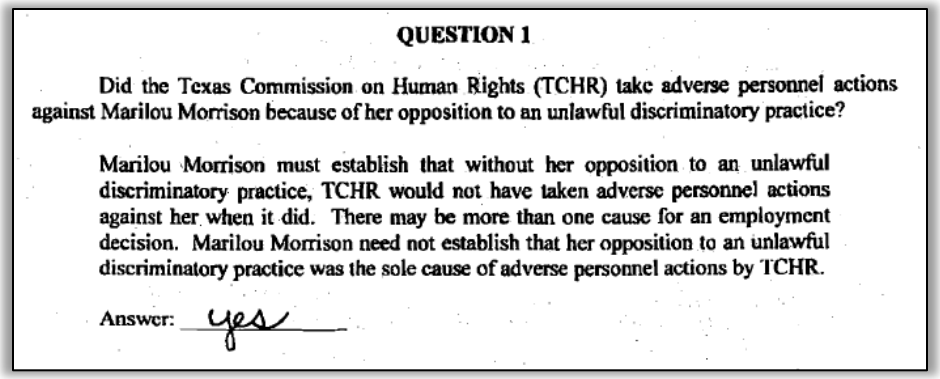
[26] 284 S.W.3d 851, 864–65 (Tex. 2009).

[27] *Id.*

[28] *Id.*

[29] *Benge*, 548 S.W.3d at 474–76; *Morrison*, 381 S.W.3d at 536–37.

[30] *Id.*



QUESTION 1

Did the Texas Commission on Human Rights (TCHR) take adverse personnel actions against Marilou Morrison because of her opposition to an unlawful discriminatory practice?

Marilou Morrison must establish that without her opposition to an unlawful discriminatory practice, TCHR would not have taken adverse personnel actions against her when it did. There may be more than one cause for an employment decision. Marilou Morrison need not establish that her opposition to an unlawful discriminatory practice was the sole cause of adverse personnel actions by TCHR.

Answer: yes

What these decisions teach is that litigants must craft their cases with care for the legal sufficiency of the theories and their evidentiary support. Otherwise, submitting a broad-form liability question presents a risk of presumed harm and a new trial. *Horton* indeed cautioned:

> Where, as here, true doubt exists as to the validity of one underlying theory and the trial court must resolve a close call as to whether sufficient evidence supports a separate act of negligence, submitting either separate questions or separate blanks within the same question may be helpful. . . . In some cases, rephrasing the question or giving an instruction not to consider theories that are unpled, invalid, or lacking in evidentiary support will be sufficient. And that alternative is preferable to separate questions when it is feasible.

2023 WL 4278230, at *18.[31]

For the appellate practitioner, the extension of *Casteel*'s presumption of harm to matters outside the four-corners of the charge means that counsel arguing the charge conference should understand the evidence presented beforehand as well as the arguments that will be made afterward in closing. If doubt exists about one of the theories in evidence or argument for a claim, consider (1) requesting to separate each distinct theory with a blank for the jury to answer yes or no (*if advancing the claim*), or (2) specifically objecting to the submission by a broad-form question (*if defending*

[31] *See also Romero*, 166 S.W.3d at 230 (the *Casteel* doctrine "encourage[s] and require[s] parties not to submit issues that have no basis in law and fact in such a way that the error cannot be corrected without retrial. If at the close of evidence a party continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether"); *Urista*, 211 S.W.3d at 756 (while the "broad-form submission should be used when feasible," a "granulated submission should be used when a liability theory is uncertain").

the claim). Any *Casteel* error must be preserved by "specific objection" that places the "trial court on notice to submit a granulated question to the jury."[32]

And hopefully to assist you in ascertaining when it may be necessary to granulate the legal theories or object to a broad-form question, an appendix follows that contains copies of jury questions determined by the Texas Supreme Court—to date—to require a new trial based on a presumption of harmful charge error.

[32] *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003). "Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful error." *Id.*; *see also In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) ("[C]omplaints of error in broad-form submission must be preserved by objection at trial."); *cf. Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) ("Chad did not make a Casteel-type objection to form; thus, to preserve error, Chad must have raised some specific objection to the submission of Questions 5 through 10."). *But see Thota*, 366 S.W.3d at 691 ("By making timely and specific objections that there was no evidence to support the disputed items submitted in the broad-form charge and raising these issues for the court of appeals to consider, Young properly preserved these issues for appellate review; Young did not have to cite or reference *Casteel* specifically to preserve the right for the appellate court to apply the presumed harm analysis, if applicable, to the disputed charge issues.").

Did You Know?

JoAnn Storey

"The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary." *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex.1993) (per curiam); *see also Rainier Income Fund I, Ltd. v. Gans*, 501 S.W.3d 617, 621–22 (Tex. App.—Dallas 2016, pet. denied).

Case Updates from the First Court of Appeals

Parth S. Gejji

***Tite Water Energy, LLC v. Wild Willy's Welding LLC*, No. 01-22-00158-CV, 2023 WL 5615816 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, no pet. h.)**

Panel consisted of Justices Hightower, Rivas-Molloy, and Farris. Opinion by Justice Rivas-Molloy.

This appeal contains an interesting harm analysis regarding allegedly superfluous jury instructions.

Colby Bigbey was injured in an explosion while working at a saltwater reclamation plant owned by Devon Energy Corporation ("Devon"). At the time of his injury, Tite Water Energy, LLC ("Tite Water") and Wild Willy's Welding, LLC ("Willy's") were conducting operations to pull oil from the bottom of a storage tanker. Bigbey sued Devon, Tite Water, and Willy's.

Devon and Tite Water had entered into a Master Service and Supply Agreement ("MSSA"), governed by Oklahoma law, which contained a defense and indemnification clause. As Devon's contractor, Tite Water had an obligation to defend and indemnify members of the "Company Group" against all claims for injuries to a member of the "Contractor Group." There was no question that Bigbey was a member of the Contractor Group. So the relevant question was whether Willy's was a member of the Company Group. The MSSA defined Company Group as, among other things, Devon's "agents," "contractors," and "consultants."

Initially, Willy's argued that it was Devon's agent, contractor, or consultant and thus was a member of the Company Group entitled to defense and indemnification. When Tite Water refused to defend and indemnify, Willy's brought crossclaims against Tite Water.

The trial court bifurcated the crossclaims from Bigbey's personal-injury claims. Ultimately, the trial court granted summary judgment on Bigbey's claims against Willy's and Bigbey settled his claims with the remaining defendants during trial.

Willy's then pursued its crossclaims against Tite Water. Willy's sought reimbursement for the costs it incurred in defending against Bigbey's claims and pursuing the crossclaims. Those crossclaims were eventually tried to a jury and Willy's prevailed.

On appeal, among other things, Tite Water argued that the trial court abused its discretion by submitting definitions for the commonly understood words "agent" and

"consultant." (By the time of appeal, Willy's had conceded that it was not Devon's contractor because it was actually a subcontractor.)

The jury charge defined an "agent" as "one who is authorized to act for or in place of another, a representative." It defined a "consultant" as "someone who advises people on a particular subject." The jury found that Willy's was Devon's agent and consultant.

The First Court began with the principle that a trial court's decision to include or refuse instructions and definitions in the jury charge is reviewed for an abuse of discretion. Even if a trial court abuses its discretion, the appellate court must review the entire record to determine if the error was harmful.

The First Court held that, even assuming that the trial court abused its discretion by defining "agent" and "consultant" in the jury charge, it could not reverse because Tite Water failed to show harm.

Under Oklahoma law, courts typically look first to dictionary definitions and then consider a term's usage in other statutes, court decisions, and similar authorities. The definitions of "agent" and "consultant" provided in the jury charge were consistent both with dictionary definitions and Oklahoma law. Indeed, Tite Water did not object to the substance of the definitions or offer alternative definitions.

Instead, Tite Water simply argued that it was improper to define these terms *at all* because the charge instructed the jury to interpret words in the MSSA in their ordinary and popular sense. According to Tite Water, the definitions prevented the jury from applying the ordinary and popular meaning of the words. But Tite Water was unable to show how the definitions prevented the jury from doing so. Thus, Tite Water did not demonstrate harm.

***Peters v. Volkswagen Group of America, Inc.*, No. 01-21-00634-CV, 2023 WL 5436383 (Tex. App.—Houston [1st Dist.] Aug. 24, 2023, no pet. h.)**

Panel consisted of Justices Kelly, Goodman, and Guerra. Opinion by Justice Guerra.

This appeal is a useful reminder to obtain a ruling from the trial court or, at the very least, object to the trial court's refusal to rule.

Folusho K. Peters sued Volkswagen Group of America, Inc. d/b/a Audi of America, Inc. ("Volkswagen") and Sewell Corporation d/b/a Sewell Audi North Houston ("Sewell") for personal injuries suffered when a rearview mirror detached from the windshield of her Audi vehicle and struck her in the face.

During the course of the trial court proceedings, Peters sought from Volkswagen documents related to the design, manufacture, and marketing of the Audi. Volkswagen resisted discovery on the basis that it did not have control of these documents. According to Volkswagen, it was simply an importer of Audi vehicles and other foreign corporations had control of the responsive documents.

Peters filed a motion to compel, but failed to get a ruling at the hearing. Instead, the trial court asked Peters to supplement the motion and explain the relationship between Volkswagen and its foreign counterparts. At a subsequent summary judgement hearing, the trial court confirmed that it had not ruled on the motion to compel.

Eventually, the trial court granted summary judgment against Peters. On appeal, Peters complained that the trial court erroneously granted summary judgment. Among other things, Peters argued that had she received the requested documents, she would have been able to file an adequate summary judgment response.

The First Court began with the principle that to preserve error on a discovery dispute, an appellant must obtain a ruling from the trial court on the discovery matter. This principle is consistent with Texas Rule of Appellate Procedure 33.1(a). The First Court held that Peters never secured a ruling on her motion to compel, and thus, had waived error.

The First Court also recited the principle that a failure to obtain a ruling on a motion to compel discovery prior to a ruling on a summary judgment motion waives any error pertaining to the discovery issue. Under this principle as well, Peters had failed to preserve her complaint regarding the discovery dispute for review.

Case Updates from the Fourteenth Court of Appeals

Eleanor Mason

***Bill Wyly Dev., Inc. v. Smith*, No. 14-22-00433-CV, 2023 WL 4357448 (Tex. App.—Houston [14th Dist.] July 6, 2023, no pet. h.) (Jewell, J., majority; Spain, J., concurring and dissenting).**

Eron and Hanna Smith sued Bill Wyly for intentional infliction of emotional distress ("IIED"), asserting Wyly threatened to ruin their lives and damage their property after the Smiths declined to hire Wyly to build their home. On appeal, the court concluded that Wyly's actions did not constitute "extreme and outrageous conduct" as necessary to establish an IIED claim.

To constitute extreme and outrageous conduct, a defendant's actions "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at *3 (internal quotation omitted). The court held that Wyly's "verbal confrontation" with the Smiths — which included insults, indignities, and threats — did not meet that standard. To support this conclusion, the court emphasized several facets of the parties' confrontation: (1) "the single encounter lasted at most five minutes"; (2) Eron, sitting in his car's driver's seat, "could have ended the encounter by driving away at any time"; and (3) "the absence of any relevant relationship between Wyly and the Smiths" that would have made it easier for Wyly to engage in "ongoing harassment." *Id.* at *6. Although Wyly's actions were "callous, meddlesome, mean-spirited, officious, overbearing, and vindictive," his conduct could not be characterized as "utterly intolerable in a civilized community." *Id.*

The Smiths asserted their IIED claim also found support in (1) Wyly's initial filing of the lawsuit against them, and (2) the "trashing" of the lot on which their home was to be built. Concluding that these actions also failed to establish "extreme and outrageous conduct," the court reasoned that IIED is a "gap-filler" tort. Because these complaints could have been addressed by other causes of action (malicious prosecution and trespass, respectively), the underlying conduct could not support recovery under an IIED theory.

The court concluded the trial court erred in denying Wyly's motion for directed verdict on the Smiths' IIED claim.

***Gilchrist Cmty. Ass'n v. Hill*, No. 14-21-00630-CV, 2023 WL 3513200 (Tex. App.—Houston [14th Dist.] May 18, 2023, no pet. h.) (Spain, J.).**

Asserting that the court erred by dismissing its appeal on jurisdictional grounds, Gilchrist Community Association argued that it complied with the requirements for extending post-judgment deadlines by timely filing a sworn motion in the trial court — even though the trial court did not hold a hearing and refused to rule on the motion. Resolving a split in appellate courts, the Fourteenth Court of Appeals agreed with Gilchrist.

With respect to deadline extensions, Texas Rule of Appellate Procedure 4.2 states as follows:

> [i]f a party affected by a judgment or other appealable order has not — within 20 days after the judgment or order was signed — either received the notice required by Texas Rule of Civil Procedure 306a.3 or acquired actual knowledge of the signing, then a period that, under these rules, runs from the signing will begin for that party on the earlier of the date when the party receives notice or acquires actual knowledge of the signing. But in no event may the period begin more than 90 days after the judgment or order was signed.

The rule also states that "[t]he procedure to gain additional time is governed by Texas Rule of Civil Procedure 306a.5." The court reasoned that Rule 306a did "not condition the receipt of additional time on a signed order containing a date-of-notice finding" — rather, the receipt of additional time was dependent only on the filing of a sworn motion in the trial court. *Id.* at *2. Although the next sub-part of Rule 4.2 required the trial court to sign an order finding when the party seeking an extension received notice or acquired actual knowledge of the signed judgment, "the language of the rule d[id] not make the written order a jurisdictional prerequisite for an appellate court." *Id.*

Given the wording of Rule 4.2, the court "concluded that a sworn motion in compliance with Rule 306a also invokes the otherwise-expired jurisdiction of an appellate court for the limited purpose of addressing the trial court's ruling on the motion to extend post-judgment deadlines, as well as any failure to rule on a sworn motion compliant with Rule 306a." *Id.* The court abated the appeal and remanded the case to the trial court for "the purpose of conducting a hearing and signing an order finding the date when Gilchrist first either received notice or acquired actual knowledge that the judgment was signed." *Id.* at *3.

***Zachry Eng'g Corp. v. Encina Dev. Grp., LLC*, 672 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2023, pet. filed) (Poissant, J.).**

In *Zachry*, the court held that, as a matter of first impression, the counter-claimant was not required to file a certificate of merit to support its counterclaim against Zachry Engineering for damages arising from the provision of professional engineering services.

After the parties executed a contract, Zachry sued Encina for suit on a sworn account and breach of contract, asserting Encina failed to pay Zachry money owed under the contract's terms. Encina asserted a counterclaim, contending that Zachry failed to complete all obligations in the parties' contract. Zachry filed a motion to dismiss the counterclaim on the grounds that Encina failed to attach a certificate of merit.

Texas Civil Practice and Remedies Code section 150.002 requires a party to file a certificate of merit "[i]n any action . . . for damages arising out of the provision of professional services." Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a). But section 150.002 also includes an exception to this requirement stating that the statute "does not apply to any suit or action for the payment of fees arising out of the provision of professional services." *Id.* § 150.002(h).

The court held that the exception applied here. Specifically, the court noted that the exception encompassed "any suit or action" — terms that "refer to a judicial proceeding in which parties assert claims for relief," including counterclaims. Therefore, under "the plaint text of the statute," the court concluded that "a certificate of merit is not required to be filed by a counter-claimant in any 'suit or action' for payment of fees arising out of the provision of professional services." *Id.* at 541.

Fifth Circuit Update

Kelsi Stayart White (AZA)

***Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc)**

In this significant *en banc* decision authored by Judge Willet, the Fifth Circuit reversed 30 years of its prior precedent and held that a Title VII claim does not need to be based on a narrow universe of "so-called 'ultimate employment decisions'" and may instead be based upon any discrimination in hiring, firing, compensation or the "terms, conditions, or privileges" of employment.

Female detention officers employed by Dallas County sued under Title VII because Dallas County had a scheduling policy that was explicitly sex-based. Female officers could not take full weekends off, but male officers could. The County asserted that the policy was based on safety concern. The district court granted the County's motion to dismiss, holding that the female officers had not alleged an adverse "ultimate employment decision" under Fifth Circuit precedent. This precedent limited the type of actionable employment decisions to "ultimate" ones: hiring, granting leave, discharging, promoting, or compensating. The panel urged *en banc* review.

The *en banc* Court reversed and remanded the dismissal of the female officers' Title VII claims. The Court focused on Title VII's text, which neither "explicitly [n]or implicitly" makes employment discrimination lawful if it does not involve an "ultimate employment decision." Rather, Title VII gives examples of types of adverse employment action and then prohibits employers from "otherwise" discriminating against employees regarding the "terms, conditions, or privileges of employment." Unlike some other circuits have done, the Fifth Circuit declined to impose a specific test for the minimum level of workplace harm necessary to plead a Title VII claim, but explained that *de minimis* harm would not suffice. The outer boundaries of *de minimis* harm will have to be explored in future opinions.

Judge Jones's concurrence in the judgment, joined by Judges Smith and Oldham, is of particular note. She reasoned that existing precedent would have required remand and further development without jettisoning the "ultimate employment decision" requirement. She also viewed the majority's opinion as "incomplete" for failing to explain what level of "harm" in a term or condition of employment is sufficient for bringing a Title VII claim.

***Allstate Fire & Casualty Ins. Co. v. Love*, 71 F.4th 348(5th Cir. 2023) (Higginbotham, Graves, and Douglas)**

This decision resolved how to determine the amount in controversy for diversity jurisdiction over a dispute involving an insurance claim arising from a policy with a $50,000 policy limit.

The plaintiffs were hit in a car accident by a driver insured by Allstate. Allstate paid for the vehicle damage, but the plaintiffs and Allstate could not resolve the physical injury claims, for which the plaintiffs wanted the $50,000 policy limit.

The at-fault driver did not cooperate in the underlying lawsuit and ended up liable under a default judgment for more than $150,000. Allstate then sued for declaratory relief in federal court, arguing it owed no duty to indemnify the plaintiffs for the damages arising from the default judgment.

The subject matter jurisdiction question was whether the amount in controversy should be determined by looking to the amount of the applicable policy limit ($50,000) or the value of the underlying claim (greater than $75,000). The district court determined there was subject matter jurisdiction and went on to enter summary judgment in Allstate's favor. The plaintiffs appealed on the jurisdictional issue.

The panel noted that a prior decision, *Hartford Insurance Group v. Lou-Con, Inc.*, 293 F.3d 908 (5th Cir. 2002), had already determined that the amount in controversy in an insurance dispute is measured by the policy limits or the value of the underlying claim, but at some point, district court cases had begun citing *Hartford* as holding that whichever value was *less* from those two choices—policy limits or value of underlying claim—determined the amount in controversy. The panel rejected this reading of *Hartford*.

Instead, a federal court determines the amount in controversy when policy limits are below the $75,000 threshold by assessing whether it is a "legal impossibility" that the plaintiff could recover beyond the policy limits. This inquiry involves looking at other available claims the plaintiff may have, such as a *Stowers* claim under Texas law. The party seeking to establish diversity jurisdiction must demonstrate that it is a "legal possibility" that the insurer could be subject to liability in excess of policy limits, based on a preponderance of the evidence.

***Hernandez v. West Texas Treasures Estate Sales, L.L.C.,* 79 F.4th 464 (5th Cir. 2023) (Wiener, Graves, and Douglas).**

The Fifth Circuit reversed a district court's dismissal of ADA claims in this case brought by *pro se* plaintiffs and handled on appeal *pro se*. The plaintiffs had sued an

estate sale company that had requested they wear face masks due to COVID-19 concerns at an estate sale they attended in April 2021. They explained they had disabilities exempting them from face masks, including asthma, PTSD, endocrine disorders, and spinal muscular atrophy. In response, they were told to make an appointment, and when they asked for a time, the representative for the estate sale company yelled at them. Things escalated from there, leading to pushing and more yelling, with the representative yelling that she could discriminate against anyone for any reason.

After the plaintiffs sued, the estate sale company moved to dismiss. Plaintiffs responded and asked for a chance to amend their claims as well. The district court denied the leave to amend, dismissed the case in part, and dismissed the state-law claims without prejudice. The district court reasoned that plaintiffs did not sufficiently plead they were disabled under the ADA and discriminated against based on those disabilities.

The panel reversed. The panel reasoned it was an abuse of discretion for the district court to fail to allow leave to amend, without explanation, particularly where the district court "essentially concedes it could have benefited from more detailed pleadings." While the plaintiffs had not put forth sufficient allegations to defeat the motion to dismiss based on their live complaint, they had offered enough that they should have the opportunity to amend to supply additional allegations to support a plausible claim.