THE CHARGE CONFERENCE FROM THE DEFENDANT'S PERSPECTIVE

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THE CHARGE CONFERENCE IS DEFENSE COUNSEL'S opportunity to prevent or blunt a finding of liability by excluding improper theories of liability and damages from the jury's consideration.

Defense counsel can maximize that opportunity by: (1) heeding the Texas Supreme Court's lessons for the pre-trial proposed charge; (2) invoking the established limits on broad form submission; and (3) taking advantage of the open question on the new frontier of *Casteel/Harris County* error.

I. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012): Lessons for the Pre-trial Proposed Charge.

Texas trial courts can require the parties to submit proposed jury charges before the pre-trial conference.[1] The Texas Supreme Court's opinion in *Cruz v. Andrews Restoration, Inc.*[2] is a cautionary tale in how defense counsel should approach the pre-trial proposed charge.

A proposed charge that is comprehensive enough to be an effective checklist has the added benefit of becoming a possible template for the court's actual charge.

In *Cruz*, a party (Protech) filed a pre-trial proposed charge that included questions about its reasonable and necessary attorney's fees, and each question included three subparts and answer blanks: one for trial, one for an appeal to the court of appeals, and one for an appeal to the Texas Supreme Court. The court's final charge omitted the subpart questions on trial fees.[3] Protech failed to request trial-fee subpart questions or object to their omission at the formal charge conference, and was awarded no trial fees.[4]

The Texas Supreme Court held that Protech's pre-trial proposed charge did not preserve error as to its trial fees.[5] Although the Supreme Court recognized that the earlier charge gave some notice to the trial court, it bemoaned the fact that the matter was not brought to the court's attention during the charge conference, holding that:

> Trial courts lack the time and means to scour every word, phrase, and omission in a charge that is created in the heat of trial in a compressed period of time . . . . Our procedural rules require the lawyers to tell the court about such errors before the charge is formally submitted to a jury. Tex. R. Civ. P. 272.[6]

The Court emphasized that the key question for error preservation is whether the party made the court aware of the error at the appropriate time and obtained a ruling. Because "[a] charge filed before trial rarely accounts fully for the inevitable developments during trial," a mere departure from the pre-trial proposed charge did not alert the court to error.[7]

Cruz teaches two lessons about the proposed charge. First, defense counsel should view the proposed charge as a checklist for the charge conference, not as a stand-alone error-preservation mechanism. To maximize its usefulness, file a comprehensive proposed charge that closely approximates the desired final charge, allowing changes only for evidentiary vagaries that arise during trial. Be particularly vigilant to include all questions and instructions on affirmative defenses to damages.

Once you receive the court's proposed charge, do a line-by-line comparison against your proposed charge, marking any discrepancies. Then, call these discrepancies to the court's attention at the charge conference by making requests and/or objections as necessary.

A proposed charge that is comprehensive enough to be an effective checklist has the added benefit of becoming a possible template for the court's actual charge, if it looks like something the court could actually hand to the jury. Robert B. Gilbreath has provided many helpful tips for achieving this goal, such as:

- including the boilerplate instructions concerning the deliberations from the Pattern Jury Charge (PJC);

- omitting the "Given, Refused, Modified" blanks that typically accompany a written request tendered in the final charge conference; and
- giving the court a modifiable working file of your proposed charge.[8]

Cruz's second lesson is that the court expects the parties to depart from their pre-trial proposed charges based on evidentiary developments at trial. Strive to make the pre-trial proposed charge comprehensive, but monitor the evidence closely so that you can adjust the charge to reflect what evidence is actually admitted.

That said, while the court expects evidence-related modifications to the proposed charge, simply flip-flopping on an instruction or request will be greeted with skepticism. Do not hesitate to hold the plaintiff to a request or instruction in its proposed charge that is supported by the evidence.

II. The Limits of Broad Form Submission After Crown Life Insurance Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).

The best insurance policy against an emotional verdict is a specific jury charge. This poses a challenge for defense counsel, given that broad form submission has been the general rule in Texas for thirty years.[9]

Fortunately, more recent Texas Supreme Court decisions confirm that broad form submission is not without limits. Commit these holdings to memory and be prepared to invoke them at the charge conference.

A. *Casteel* Error: Question Submits a Valid Legal Theory and an Invalid Legal Theory.

Since 1988, Texas Rule of Civil Procedure 277 has required the use of broad form submission whenever "feasible." Broad form submission reached its high-water mark in 1990, when the Texas Supreme Court warned that it was serious about mandating broad form, even when it was unclear that the same ten jurors agreed on the same liability theories.[10]

Nearly a decade later, the Texas Supreme Court announced a dramatic shift away from mandatory broad form submission in its famous *Casteel* decision. There, the Court carved out an entire category of cases in which broad form was not feasible, holding "it may not be feasible to submit a single broad form liability question that incorporates wholly separate theories of liability" when one of the theories is invalid.[11]

When one of the legal theories is invalid, the Court held that a new trial is required. Harm is presumed because the appellate court cannot determine whether the jury relied up the valid or invalid theory. Therefore, to avoid the remand, the only option is to split the multiple legal theories into individual special issues.[12]

B. *Harris County* Error: Question Mixes Valid and Invalid Elements of Damages in a Single Broad Form Submission.

The Texas Supreme Court quickly followed up two years later by extending *Casteel*'s presumed harm analysis to damage questions that comingled damage theories for which there was evidence with theories for which there was not legally sufficient evidence.[13]

In *Harris County v. Smith*, the plaintiff submitted a broad form damages question that included an element for "loss of earning capacity" over the defendant's objection that there was no evidence to support that damage element. The question was whether to extend *Casteel*'s presumed harm analysis to an evidentiary matter. Proponents argued that the same presumed harm analysis would logically follow, while opponents suggested the jury should be trusted to disregard a complete lack of evidence.

The proponents won out. The Court held that the mixing of "valid and invalid elements of damages in a single broad form submission" was harmful error because it prevented the appellate court from determining whether the jury based its verdict on an improperly submitted invalid element of damage.[14]

C. *Romero* Error: Invalid Liability Theory Included as a Predicate to a Comparative Responsibility Finding.

In *Romero v. KPH Consolidation, Inc.*,[15] the court extended *Casteel* to the inclusion of an invalid liability theory as a predicate to a comparative responsibility finding. In *Romero*, two separate liability questions were submitted as predicates to a single proportionate responsibility question. The Texas Supreme Court held that the invalid liability question poisoned the comparative responsibility question and did not permit the court to determine whether the jury based its answer on the valid or invalid theory.

D. *Hawley* Error: Failure to Give Instruction Necessary to Prevent the Jury from Finding Liability on an Improper Basis.

Columbia Rio Grande Healthcare, L.P. v. Hawley[16] established that broad form questions sometimes must be accompanied by limiting instructions to avoid a verdict that imposes liability on an improper basis.

In that med-mal case, the trial court had submitted a broad form negligence question against the hospital. The jury was instructed that the hospital "acts or fails to act only through its employees, agents, nurses and servants."[17] The court denied the hospital's request to instruct that it was not liable for the acts of the defendant doctor because he was an independent contractor.

The Texas Supreme Court held that the court should have granted the hospital's independent contractor limiting instruction. In so holding, the Court acknowledged that neither *Casteel* nor *Harris County* strictly applied. Nonetheless, the Court presumed harm because the Court could not determine whether the jury found the hospital liable due to the independent contractor's acts.[18]

III. The Next Frontier: Does the Court Err by Submitting Multiple Factual Theories, One of Which Is Not Supported by the Evidence, in a Single Broad Form Question?

Trial courts are often faced with the situation in which one theory of liability is based on multiple factual theories. Often some of the factual theories are supported by the evidence, but others are not.

In *Scott v. Atchison, Topeka & Santa Fe Railway Co.*, the Texas Supreme Court held that the trial court should not submit legal theories which are not supported by the evidence.[19] *Scott* suggested that the court's charge should list "the relevant acts or omissions" raised by the evidence and warns to do otherwise would allow the jury to return a verdict supported by no evidence.[20] The question is whether the failure to take this step or the failure to eliminate theories not supported by the evidence creates a *Casteel/Harris County* problem.

The Fort Worth Court of Appeals rejected such a *Casteel/Harris County* complaint in *Columbia Medical Center of Las Colinas v. Bush*.[21] There, a defendant hospital requested limiting instructions that the jury could not consider specific acts in its evaluation of negligence. The trial court refused, and the hospital appealed.

On appeal, the Fort Worth Court held that *Casteel/Harris County* did not apply because the case involved alternative factual allegations in support of a single legally grounded theory, not multiple liability theories, one of which was defective. The court further held that there was nothing misleading in the charge, which "did not instruct the jury to consider or not to consider any specific act or negligence."[22] The Texas Supreme Court denied review.

Since *Bush*, Texas intermediate courts of appeals have split on the issue. The year after *Bush* was decided, the San Antonio Court of Appeals declined to follow it in *Laredo Medical Group Corp. v. Mireles*.[23]

In *Mireles*, the court confronted a broad form question that submitted—in support of the same cause of action—"multiple liability theories, several of which are not supported by legally sufficient evidence." The court reasoned that although the Texas Supreme Court had not "yet decided whether *Casteel* should apply in this scenario, we believe that the same policy concerns underlying *Casteel* and *Harris* apply here." The court found harmful error because it was impossible to conclude that the jury's answer was not based on one of the improperly submitted factual theories.[24]

By contrast, several other intermediate courts have followed *Bush*.[25] For example, in *Memon v. Shaikh*, the Houston Fourteenth Court followed *Bush* in considering whether the trial court committed *Casteel/Harris County* error by submitting a single damage question predicated on the jury's answers to multiple questions testing defamation as to nine different statements allegedly made by the defendant. On appeal, the defendant argued that the evidence did not support a finding of defamation as to one of those statements. [26]

Citing *Bush*, the court reasoned that *Casteel/Harris County* did not apply:

> When a plaintiff alleges that multiple instances of the same kinds of acts committed by the same defendant result in liability for the same cause of action, it is an open question as to whether the acts constitute multiple theories of liability or simply multiple factual allegations supporting a single theory of liability. We conclude that on the facts of this case, in which each factual allegation required proof of the same elements and resulted in the same injuries, only one theory of liability was presented.[27]

In the alternative, the court held that error was not preserved because the defendant failed to object to the charge.[28]

In a concurring opinion, Justice Frost disagreed with the majority's *Casteel/Harris County* analysis, reasoning that:

> The *Casteel* harm analysis is available based upon a valid and an invalid theory of liability, even if both theories are based upon different actionable conduct under the same tort. In addition, Texas law treats

each of the nine statements alleged to be defamatory as a separate and independent tort.[29]

Justice Frost nevertheless concurred in the judgment because the defendant "failed to lay the requisite predicate by objecting to the jury charge."[30]

Defense counsel should monitor this open question and object to any question that submits multiple factual theories in a single broad form question when one of those theories is not supported by the evidence. However, if appellate courts required trial courts to load the charge with granulated factual allegations in limiting instructions, broad form might never be "feasible."

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1 Tex. R. Civ. P. 166(k).
2 364 S.W.3d 817 (Tex. 2012).
3 *Id*. at 830.
4 *Id*. at 831.
5 *Id*. at 829-31.
6 *Id*. at 829-30.
7 *Id*. at 831.
8 Robert B. Gilbreath, *Crafting a Court's Charge from the Defendant's Perspective*, THE ADVOCATE, at 35 (Winter 2004).
9 *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 554-55 (Tex. 1986); Tex. R. Civ. P. 277.
10 *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).
11 *Casteel*, 22 S.W.3d at 390.
12 *Id*. at 389-90.
13 *Harris Cnty. v. Smith*, 96 S.W.3d 230 (Tex. 2002).
14 *Id*. at 234.
15 166 S.W.3d 212, 226 (Tex. 2005).
16 284 S.W.3d 851, 864-65 (Tex. 2009).
17 *Id*. at 863.
18 *Id*. at 863-65.
19 572 S.W.2d 273, 277-78 (Tex. 1978).
20 *Id*.
21 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. denied).
22 *Id*. at 858-59.
23 155 S.W.3d 417, 427 (Tex. App.—San Antonio 2004, pet. denied).
24 *Id*.
25 *Memon v. Shaikh*, 401 S.W.3d 407, 417 (Tex. App.—Houston [14th Dist.] 2013), *judgm't withdrawn*, No. 14-12-00015-CV, 2014 WL 6679562 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.); *see also Shelby Distributions, Inc. v. Reta*, 441 S.W.3d 715, 720 (Tex. App.—El Paso 2014, no pet.); *Powell Elec. Sys., Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 124-25 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Christus Spohn Health Sys. Corp. v. De La Fuente*, No. 13-04-00485-CV, 2007 WL 2323989, at *13-14 (Tex. App.—Corpus Christi Aug. 16, 2007, pet. granted, judgm't vacated w.r.m.) (mem. op.); *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 254 (Tex. App.—Texarkana 2005, no pet.).
26 401 S.W.3d at 416–17.
27 *Id*. (citations omitted).
28 *Id*. at 417.
29 *Id*. at 424 (Frost, J. concurring) (citations omitted).
30 *Id*. at 425.