CASTEEL AND ITS IMPACT ON BROAD FORM SUBMISSION

RICHARD P. HOGAN, JR.
JENNIFER BRUCH HOGAN
Hogan & Hogan, L.L.P.
4200 Bank of America Center
700 Louisiana Street
Houston, Texas 77002-2793

State Bar of Texas
18th ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE
September 9-10, 2004
Austin

CHAPTER 15

Jennifer Bruch Hogan
HOGAN & HOGAN, L.L.P.
Bank of America Center
700 Louisiana, Suite 4200
Houston, Texas 77002

Phone: (713) 222-8800
jhogan@hoganfirm.com

BACKGROUND, EDUCATION AND PRACTICE

Jennifer Bruch Hogan is a partner in HOGAN & HOGAN, L.L.P., an appellate boutique in Houston, Texas. Jennifer handles a wide variety of civil cases for both plaintiffs and defendants, appellants and appellees, in both state and federal courts.

Jennifer obtained her undergraduate degree *cum laude* from Harvard University in 1982 and her law degree, with honors, from the University of Texas in 1985. Following her graduation, Jennifer served as a Briefing Attorney for Justice William W. Kilgarlin on the Texas Supreme Court. After her clerkship and before leaving to form her own firm, Jennifer was a partner in and co-leader of Fulbright and Jaworski's appellate group in Houston.

Jennifer is a frequent speaker at legal education seminars. Her recent topics have included "Charge Error on Appeal," South Texas College of Law, 2004; "Preserving Error in the Trial Court—Top Ten Things to Remember" and "Jury Charge Issues relating to *Crown Life v. Casteel*," Houston Bar Association, 2003; "Appealing Actual/Punitive Damages," State Bar of Texas, 2001; "Effective Motions for Rehearing," Houston Bar Association, 2001; "Doing the Right Thing: Ethics and Professionalism in Appellate Practice," University of Texas, 2001.

Jennifer has been recognized as a Texas Super Lawyer in both 2003 and 2004, and she was selected as a Top Lawyer in Houston 2004 by H Texas Magazine.

Jennifer and her husband, Richard, have three children: Colleen, who is 14; Phillips, who is 12; and Conor, who is 6. The family enjoys skiing, soccer, and traveling. In addition to her many law-related activities and family commitments, Jennifer serves as a trustee of the Awty International School in Houston and is president of the Board's executive committee.

Richard P. Hogan, Jr.
HOGAN & HOGAN, L.L.P.
Bank of America Center
700 Louisiana, Suite 4200
Houston, Texas 77002

Phone: (713) 222-8800
rhogan@hoganfirm.com

BACKGROUND, EDUCATION AND PRACTICE

Richard P. Hogan, Jr. is a partner at Hogan & Hogan, L.L.P., a civil appellate firm in Houston. Richard graduated *magna cum laude* from Duke University in 1981. He received his law degree, *cum laude*, from the South Texas College of Law, where he was twice the State Bar of Texas moot court champion, a national moot court champion, and an assistant editor of the SOUTH TEXAS LAW JOURNAL. Richard clerked for the Texas Supreme Court during 1985 and 1986, before handling both appeals and trials at two prominent Houston litigation firms.

Richard Hogan is triple board-certified in civil appellate law, civil trial law, and personal injury trial law by the Texas Board of Legal Specialization. As a result, aside from his appellate experience, Richard is frequently retained by trial lawyers to prepare the court's charge and post-verdict motions in complex cases. As a frequent CLE speaker, Richard has addressed lawyers on topics including the jury charge, preservation of error, challenges to expert witnesses under *Daubert* and *Robinson*, and oral argument. In November 1999, Richard argued a civil RICO case in the United States Supreme Court.

Richard is a member of the American Board of Trial Advocates. He has been recognized by *Texas Super Lawyers* and *Texas Monthly* magazines as a Texas Super Lawyer in 2003 and 2004. Richard is also a fellow of the Houston and Texas Bar Foundations. He is also admitted to practice in the United States Supreme Court and the Courts of Appeals for the Third, Fifth and Eleventh Circuits and the U.S. District Court for the Northern, Southern, Eastern, and Western Districts of Texas.

TABLE OF CONTENTS

I. THE DEVELOPMENT OF BROAD-FORM JURY SUBMISSION 1
A. The Transition from District and Separate Submissions 1
B. Broad-Form Questions Under Rule 277 1
1. Shall/Whenever Feasible 1
2. No Harmful Error for Failure to Use Broad-Form 2

II. THE SUPREME COURT CONCLUDES THAT BROAD-FORM IS NOT FEASIBLE FOR INVALID LIABILITY THEORIES: *CROWN LIFE V. CASTEEL* 2

III. THE SUPREME COURT CONCLUDES THAT BROAD-FORM IS NOT FEASIBLE FOR LUMP-SUM DAMAGES WHEN ANY ELEMENT OF DAMAGES HAS NO EVIDENTIARY SUPPORT: *HARRIS COUNTY V. SMITH* 4

IV. THE REMAINING QUESTIONS 4
A. Is Broad-Form Feasible for Multiple-Liability Apportionment Questions?: *KPH Consolidation, Inc. v. Romero* 4
B. Is Broad-Form Feasible for Inferential Rebuttal Submissions?: *Urista v. Bed, Bath & Beyond* 5
C. Is Broad-Form Feasible for Multiple Allegations of Negligence?: C*olumbia Medical Center of Las Colinas v. Bush* 6
D. Unanswered Issues on Preservation 6

TABLE OF AUTHORITIES

Cases

In re A.V., 113 S.W.3d 355 (Tex. 2003) 4, 6

Atrium Coso v. Bethke, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) 5

In re B.L.D., 113 S.W.3d 340 (Tex. 2003) 7

Balusik v. Kollatschny, 2002 WL 1822360 (Tex. App.—Houston [1st Dist.] 2002, no pet.) 3

Benjamin Franklin Sav. Ass'n v. Kotrla, 751 S.W.2d 218 (Tex. App.—Houston [14th Dist.] 1988, no writ) 2

Brookshire Bros., Inc. v. Lewis, 997 S.W.2d 908 (Tex. App—Beaumont 1999, pet. denied) 4

Brown v. American Transfer & Storage Co., 601 S.W.2d 931 (Tex. 1980) 1

Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981) 1

Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986) 1

City of Brownsville v. Alvarado, 897 S.W.2d 750 (Tex. 1995) 3

City of Fort Worth v. Zimlich, 29 S.W.3d 62 (Tex. 2000) 4

City of Garland v. Dallas Morning News, 2002 WL 31662724 (Tex. App.—Dallas 2002, no pet.) 4

Colonial County Mut. Ins. Co. v. Valdez, 30 S.W.3d 514 (Tex. App.—Corpus Christi 2000, no pet.) 3

Columbia Medical Center of Las Colinas v. Bush, 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. filed) 6

Crawford v. Deets, 828 S.W.2d 795 (Tex. App.—Fort Worth 1992, writ denied) 2

Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000) . . . . . *passim*

Custom Residential Paint Contracting, Inc. v. Klein, 2001 WL 1318420, *judgment voluntarily remitted*, 2002 WL 660200 (Tex. App.—Dallas 2002, pet. denied) 5

Davis v. Sheerin, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist .] 1988, writ denied) 7

Delaney v. Scheer, 2003 WL 247110 (Tex. App.—Austin 2003, no pet. h.) 3

Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001, no pet.) 3

Durban v. Guajardo, 79 S.W.3d 198, 207 (Tex. App.—Dallas 2002, no pet.) 5

Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517 (1922) 1, 3

Galveston County Fair & Rodeo v. Glover, 940 S.W.2d 585 (Tex. 1996) 3

Gilbreath v. Hathaway, 108 S.W.3d 365, 366 (Tex. App.—Beaumont 2003, pet. denied) 3

H. E. Butt Grocery Co. v. Warner, 845 S.W.2d 258 (Tex. 1992) 2

Harris County v. Smith, 96 S.W.3d 230 (Tex. 2002) 4, 6, 7

Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n., 710 S.W.2d 551 (Tex. 1986) 1

In re J.F.C., 96 S.W.3d 256 (Tex. 2002) 2

KPH Consolidation, Inc. v. Romero, 102 S.W.3d 135 (Tex. App.—Houston [14th Dist.] 2003, pet. granted) 4

Keetch v. The Kroger Co., 845 S.W.2d 262 (Tex. 1992) 2

Koehn v. CST Drilling Fluids, Inc., 2003 WL 21189459 (Tex. App.—Amarillo 2003, no pet. h.) 3

Lemos v. Montez, 680 S.W.2d 798 (Tex. 1984) 1

Lowe v. Garza, 2003 WL 1945379 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.) 3

Lozano v. Lozano, 2003 WL 22076661 (Tex. App.—Houston [14th Dist.] 2003, no pet.) 4

Merckling v. Curtis, 911 S.W.2d 759 (Tex. App.—Houston [1st Dist.] 1995, writ denied) 2

Mobil Chemical Co. v. Bell, 517 S.W.2d 245 (Tex. 1974) 1

Missouri Pac. R.R. Co. v. Lemon, 861 S.W.2d 501 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd) 2

Pack v. Crossroads, Inc., 53 S.W.3d 492 (Tex. App.—Fort Worth, 2001 pet. denied) 3

Samedan Oil Corp. v. Intrastate Gas Gathering, Inc., 78 S.W.3d 425 (Tex. App.—Tyler 2001,
pet. dism'd by agr.) 5

San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App.—San Antonio 2003, pet. denied) 5

Scott v. Atchison, Topeka, & Sante Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978) 2

Southwestern Bell Tel. Co. v. Garza, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted) 8

Tesfa v. Stewart, 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. filed) 7

Texas Department of Human Services v. E. B., 802 S.W.2d 647 (Tex. 1990) 1

Texas Dept. of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680 (Tex. 1992) 2

U.S. Tire-Tech, Inc. v. Boeran, 110 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) 3

Urista v. Bed, Bath & Beyond, Inc., 132 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2004, pet. filed) 5

Vasquez v. Hyundai Motor Co., WL 1905203 (Tex. App.—San Antonio 2002, no pet.)*opinion withdrawn on en banc reconsideration on other grounds*, 2003 WL 22023175 (Tex. App.—San Antonio 2003) 3

Westgate, Ltd. v. State of Texas, 843 S.W.2d 448 (Tex. 1992) 2

Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture, 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.) 5

Rules and Statutes

TEX. FAM. CODE § 161.001(1)(N) 6

TEX. FAM. CODE § 161.001(1)(Q) 6

TEX. R. APP. P. 33.1(a)(1)(A) 7

TEX. R. APP. P. 44.1(a)(2) 6

TEX. R. CIV. P. 277 1

CASTEEL AND ITS IMPACT ON BROAD FORM SUBMISSION

I. THE DEVELOPMENT OF BROAD-FORM JURY SUBMISSION

Effective January 1, 1988, the first paragraph of Rule 277 was amended to require broad-form submission: "In all jury cases, the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277 (emphasis added).

The move to broad-form submission occurred incrementally over several decades.

A. The Transition from District and Separate Submissions

In 1973, Rule 277 was amended to provide trial courts with discretion in submitting jury charges:

> It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit the issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

See TEX. R. CIV. P. 277 (superceded).

The 1973 amendment replaced previous language requiring that issues be submitted "distinctly and separately." The requirement that issues be submitted distinctly and separately is generally traced to the court's 1922 opinion in *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). In that case, the supreme court held that each of the defendant's contributory negligence allegations had to be separately submitted. *See id.* at 521-22. The court wrote that "the duty of the court in trials by jury" is three-fold: "First, to submit all the controverted fact issues made by the pleadings; second to submit each issue distinctly and separately, avoiding all intermingling; and third, to give such explanation and definition of legal terms as shall be necessary to enable the jury to answer each issue." *Id.* (emphasis added).

Following the 1973 amendment granting discretion to submit broad-form questions, the supreme court emphasized that the rule meant what it said. In *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974), the court held the new rule meant that the jury could simply be asked whether a party was negligent. The court went further in 1980 stating that the 1973 amendment to Rule 277 was designed to abolish the "distinctly and separately" requirement. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980). Any lingering questions concerning the propriety of broad-form submissions were answered in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), where the court stated that "a workable jury system demands strict adherence to simplicity in jury charges." *Id.* at 924. To that end, the supreme court overruled application of all cases construing Rule 277 prior to the 1973 revisions. *Id.* at 925. The following year, the supreme court reiterated its approval of "broad issues . . . as the correct method for jury submission." *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

In *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W.2d 551 (Tex. 1986), the single broad-form question authorized by the court inquired "Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question?" *Id.* at 554. In another case, the court also approved a broad-form question asking whether a corporation "was the alter ego of the defendant." *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986). These mid-80s decisions approved submission of complicated legal questions to the jury in broad form, with appropriate explanatory instructions.

The transition from distinct and separate issues to broad-form questions was complete with the 1988 amendment to Rule 277.

B. Broad-Form Questions Under Rule 277

Under the 1988 amendment, "broad-form questions" shall be submitted "whenever feasible." TEX. R. CIV. P. 277 (emphasis added). The potential friction between the rule's use of the mandatory term "shall" and the qualifying phrase "whenever feasible" was promptly considered by the supreme court.

1. Shall/Whenever Feasible

In *Texas Department of Human Services v. E. B.*, 802 S.W.2d 647 (Tex. 1990), the court stated "whenever feasible" means "[i]n any or every instance in which it is capable of being accomplished." *Id.* at 649. According to the court, the rule unequivocally requires the trial court to submit broad-form questions "unless extraordinary circumstances exist." *Id.* Nonetheless, the court provided no guidance for exactly what "extraordinary circumstances" would justify not using broad-form submissions in a jury charge.

E. B. also addressed concerns that broad-form questions might conflict with Rule 292, which requires the same ten jurors to vote and agree on the answer to each question submitted. The court rejected arguments that the jury was required to agree on the specific grounds for termination. Implicit in the jury's decision to terminate parental rights was the agreement of all ten jurors that the mother had endangered the child under one or more of the factors listed in the instruction. *Id.* at 649; cf. *In re J.F.C.*, 96 S.W.3d 256, 259, 260-61, 277-79 (Tex. 2002) (majority declined to decide whether the trial court erred in failing to instruct the jury that the same ten jurors must agree that at least one statutorily described course of parental conduct occurred and that termination was in the best interest of the children).

2. <u>No Harmful Error for Failure to Use Broad-Form</u>

The question remained whether the supreme court would reverse an otherwise error-free submission of separate and distinct special issues solely because of failure to comply with Rule 277's mandate to use broad-form questions. Early challenges failed to offer guidance because the question had not been preserved for appeal. *See*, *e.g.*, *Keetch v. The Kroger Co.*, 845 S.W.2d 262, 267 (Tex. 1992).

Late in 1992, the supreme court handed down two cases that clarified the question of whether use of "granulated" submissions is harmful error. In *H. E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258 (Tex. 1992), the court held that an otherwise correct separate and distinct submission would not be reversed for failure to submit broad-form questions. The court noted that the charge fairly submitted the disputed issues of fact containing the proper elements of the cause of action and incorporated the correct legal standard for the jury to apply. Thus, the court concluded that failure to submit requested broad-form questions and instructions was not "harmful error." *Id.* at 259.

The same day the supreme court decided *Warner*, it also handed down *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448 (Tex. 1992). There, the court confirmed that it is not always reversible error to use separate and distinct special issues rather than broad-form questions and accompanying instructions. *Id.* at 457. By footnote, the court observed that Rule 277 is not absolute in requiring broad-form submission. Presaging its decision in *Crown Life Insurance Co. v. Casteel*, the court noted that submission of alternative liability standards, particularly when the law is unsettled concerning one or more of the theories of recovery, would present an appropriate use of the old special issue practice. *Westgate*, 843 S.W.2d at 455 n.6.

II. THE SUPREME COURT CONCLUDES THAT BROAD-FORM IS NOT FEASIBLE FOR INVALID LIABILITY THEORIES: *CROWN LIFE V. CASTEEL*

In *Crown Life Insurance Co. v. Casteel*, the supreme court determined that "it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Thus, when "a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 388. Although Rule 277 says broad form is clearly the preferred method of submission, "when 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." *Id.*; *see also Westgate*, Ltd. v. State, 843 S.W.2d 448, 455 n. 6 (Tex.1992).

Prior to *Casteel*, courts rarely saw "extraordinary circumstances" that made broad-form infeasible. "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." *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd); *see Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 682 n.2 (Tex. 1992); *Scott v. Atchison, Topeka, & Sante Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978) (broad-form "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 allegations did not present extraordinary circumstance that made broad-form infeasible); *Crawford v. Deets*, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied) (distinct medical malpractice allegations 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 different theories of recovery is not error). In short, before *Casteel*, invalid theories in the mix rarely produced any error.

The harmfulness of any charge error lies at the heart of the *Casteel* holding. Before *Casteel*, and often since, a number of courts have ruled that other findings make a charge error immaterial; the other findings can cure any error. 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, 202-03 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (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 21189459 (Tex. App.—Amarillo 2003, no pet. h.) (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. h.) (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 [1st Dist.] 2003, no pet. h.) (memo opin.) (finding of excuse rendered any perceived error in negligence question immaterial); *Gilbreath v. Hathaway*, 108 S.W.3d 365, 366 (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.*, WL 1905203 (Tex. App.—San Antonio 2002, no pet.), *opinion withdrawn on en banc reconsideration on other grounds*, 2003 WL 22023175 (Tex. App.—San Antonio 2003) (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), (en banc); *Balusik v. Kollatschny*, 2002 WL 1822360 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (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 they jury's answers to other questions render the improper question immaterial."); *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App.—Fort Worth, 2001 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).

After *Casteel*, the commingling of valid and invalid theories of liability within a single broad-form question represents reversible error—although the trial court may not know of or agree with the invalidity at the time of submission. 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. Because the jury was not asked separately about each of the plaintiff's 13 theories of liability, the supreme court concluded that the jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. *Id.* at 387-88; *compare Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). 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. Likewise, "[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). Since the holding in *Casteel*, harmful error may exist when the appellate court cannot determine whether the same ten jurors followed the same path to a verdict, based upon a legally valid theory with support in the evidence.

III. THE SUPREME COURT CONCLUDES THAT BROAD-FORM IS NOT FEASIBLE FOR LUMP-SUM DAMAGES WHEN ANY ELEMENT OF DAMAGES HAS NO EVIDENTIARY SUPPORT: *HARRIS COUNTY V. SMITH*

The supreme court has not yet expressly considered whether the holding of *Casteel* applies to the failure of a single element of a broad-form liability question on sufficiency-of-the-evidence grounds. In *City of Fort Worth v. Zimlich*, 29 S.W.3d 62,69 n.1 (Tex. 2000), the supreme court noted that "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." *See also In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (refusing to review complaint on broad-form submission without objection to form or to evidentiary support of any theory submitted). Nonetheless, the court's decision in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), arguably presages the result the court will reach should the question be presented.

Before *Casteel*, courts routinely upheld damages awarded in a lump-sum as long as the evidence supported the total. *See*, *e.g.*, *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908,921-22 (Tex. App—Beaumont 1999, pet. denied) ("to successfully challenge a multi-element damage award on appeal, an appellant must address all of the elements and show the evidence is insufficient to support the entire damage award") But, following *Casteel*, the supreme court rejected the approach of these cases and clarified that a broad-form damage finding may be reversible if any single element of damages lacks evidentiary support. *See Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002).

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the trial court submitted two broad form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. Harris County objected to the questions and asked the trial court to submit each element separately. *Id.* at 231. After the court denied the request for separate submissions, Harris County objected on the ground that one listed element in each question was supported by no evidence. *Id.* at 231-32. The trial court overruled the objections. *Id.* On appeal, the court of appeals concluded there was no evidence of the challenged elements, but held the submission error was harmless "because there was ample evidence on properly submitted elements of damage to support the jury's awards to both plaintiffs." *Id.* at 232. The supreme court reversed, relying on *Casteel* and holding that "[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.) (not designated for publication).

The Fourteenth Court of Appeals recently applied the teaching of *Harris County v. Smith* in *Lozano v. Lozano*, 2003 WL 22076661 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (memorandum opinion). In *Lozano*, the defendants objected to a multi-element damages question with a single answer blank on "several grounds," including the ground that "there was no evidence from which the jury could assess an amount of money for medical care." *Lozano*, 2003 WL 22076661 at *4. According to the defendants, "[t]he only evidence with regard to future medical care or future health care services were [sic] by a psychologist who is not a medical doctor and cannot prescribe medicine." *Id.*

The court of appeals did not agree with the defendants that a psychologist's testimony cannot support an award for future medical care— the argument the defendants advanced in the trial court to support their no evidence objection. Nonetheless, the court concluded there was no evidence to support an award of future medical care because the psychologist's testimony about the need for psychological care in the future was "speculative." *Id.* at *5-6. Without mentioning whether the defendants ever objected to the form of the charge or asked for separate damages blanks, the court then concluded, "[b]ecause the trial court failed to segregate damages, the case must be remanded on all damages if we find reason to remand on one element of damages." *Id.* at *6. The court then remanded the entire case, including liability, because "[t]he court may not order a separate trial solely on unliquidated damages if liability is contested." *Id.*

IV. THE REMAINING QUESTIONS

A. Is Broad-Form Feasible for Multiple-Liability Apportionment Questions?: *KPH Consolidation, Inc. v. Romero*

As mentioned above, the supreme court has not yet determined whether the *Harris County v. Smith* analysis

applies in the liability context. While the supreme court has not yet determined the result when one liability theory included in a broad form submission fails on no-evidence grounds, however, the Fourteenth Court of Appeals has skipped ahead. In *KPH Consolidation v. Romero*, 102 S.W.3d 135 (Tex. App.—Houston [14th Dist.] 2003, pet. granted), the plaintiffs submitted two separate liability questions—one asking the jury to decide the Hospital's negligence and one asking the jury to decide the Hospital's malice in medical credentialing. The Hospital did not challenge the jury's negligence finding. The Hospital did challenge the malicious credentialing claim, and the court of appeals concluded that there was no evidence the Hospital acted with conscious indifference. *Id.* at 146-55.

After concluding that no evidence supported the credentialing claim, the court reversed the judgment and remanded the entire case, despite the jury's unchallenged negligence finding. *Id.* at 155-60. The court did so because the jury had answered a single apportionment question and single damages questions predicated on an affirmative answer to either liability theory. Id. The court found it "hard to believe that the 40% liability the jury attributed to the Hospital in question 3 was not based (1) partly on the liability it found for negligence (question 1), and (2) partly on the liability it found for malicious credentialing (question 2)." *Id.* at 159. The court likewise concluded that "the jury must have based part of the actual damages on negligence and part on malicious credentialing." *Id.* at 160. The court therefore, "reversed and remanded for a new trial on negligence and damages." *Id.*

Contrary to the court's holding in Romero, some courts hold *Casteel* does not apply and no error results from the failure of one of multiple liability theories tied to a single damages question. *See Durban v. Guajardo*, 79 S.W.3d 198, 207 (Tex. App.—Dallas 2002, no pet.) ("*Casteel* is not applicable when, as in this case, the damages from two causes of action, one valid, the other arguably invalid, are the same."); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531, 548-49 (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. lns. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.) (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*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. denied) (linking intentional infliction, malicious prosecution, and defamation to single damage question reversible error when intentional infliction claim failed as a matter of law); *Custom Residential Paint Contracting, Inc. v. Klein*, 2001 WL 1318420, *judgment voluntarily remitted*, 2002 WL 660200 (Tex. App.—Dallas 2002, pet. denied) (holding jury's DTPA finding defective and initially ordering remand for new trial even though contract question predicated on same damage finding left intact but later accepting remittitur rather than remand).

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*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. denied) (malice finding linked to reversed intentional infliction claim required reversal of punitive damages); *Atrium Coso v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (finding of waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings).

B. Is Broad-Form Feasible for Inferential Rebuttal Submissions?: *Urista v. Bed, Bath & Beyond*

In *Urista v. Bed, Bath & Beyond, Inc.*, 132 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2004, pet. filed), the court of appeals applied the "instruct[ion]" of *Casteel* in a case involving the erroneous inclusion of an unavoidable accident instruction. The court wrote:

> *Casteel* instructs us that, because our system of justice compels that parties be judged by a jury that has been properly instructed in the law, *Casteel*, 22 S.W.3d at 388, harmful error occurs when (1) a single, broad-form liability question erroneously commingles valid and invalid theories, (2) the appellant objects timely and specifically, and (3) it cannot be determined whether the erroneously submitted theory formed the sole basis of the jury's finding. *See id.* at 389. With regard to the third prong of this analysis, the supreme court stated as follows:

> [T]he best the [reviewing] court can do is to 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 fact finder actually found that the defendant should be held liable on proper, legal grounds.

Casteel, 22 S.W.3d at 388.

> Here, as in *Casteel*, the single, broad-form liability question erroneously commingled a valid negligence theory with an erroneous inferential rebuttal instruction that injected an invalid theory of “unavoidable accident.” Although *Urista* objected timely and specifically, the trial court overruled his objection. As in *Casteel*, although we have concluded it likely, on reviewing the record, that the erroneous instruction formed the sole basis for the jury's finding that BBB was not negligent, we cannot determine this conclusively. Therefore, the trial court's error in including the instruction probably was reversible error that prevented Urista from presenting his case to this Court, and remand for a new trial is proper. *See id.* at 390; TEX. R. APP. P. 44.1(a)(2).

Urista, 132 S.W.3d at 523.

C. Is Broad-Form Feasible for Multiple Allegations of Negligence?: *Columbia Medical Center of Las Colinas v. Bush*

In *Columbia Medical Center of Las Colinas v. Bush*, 122 S.W.3d 835, 857-59 (Tex. App.—Fort Worth 2003, pet. denied) (motion for reh’g filed), the defendant argued that the trial court improperly submitted a single broad-form negligence question that allowed the jury to consider multiple acts of alleged negligence, some of which were supported by no evidence. The court of appeals rejected the defendant’s argument, reasoning that “[t]he broad-form negligence special question submitted in this case simply does not present *Casteel/Harris County* error.” *Id.* at 858. The court distinguished *Casteel* on the ground that it involved multiple theories of liability, while the case before it involved only one theory of liability: negligence. *Id.* at 858-59. The court distinguished *Harris County* on the ground that the trial court in that case had “instructed the jury in making a lump-sum damage award to consider a specific element of damages on which no evidence was presented.” *Id.* at 859. In the case before it, “the trial court did not instruct the jury to consider or to not consider any specific act of negligence.” *Id.*

The court also recognized the full retreat from broad-form submissions the defendant proposed, requiring that each pleaded act of negligence must be separately submitted or separately excluded in the charge. *Id.* The court recognized the policy choice: do we continue with broad-form submissions or do we return to distinct and separate submissions, “avoiding all intermingling.” The court of appeals sided with broad-form submissions, but the supreme court has not yet addressed the issue.

D. Unanswered Issues on Preservation

In addition to many substantive questions that remain, there are several unanswered questions regarding preservation of charge error complaints following *Casteel* and *Harris County v. Smith*.

One question concerns the type of objection required to preserve and obtain a *Casteel/Harris County* type of review. In *In re A.V.*, 113 S.W.3d 355 (Tex. 2003), a parental rights termination case, the Department alleged that a father’s rights should be terminated under TEX. FAM. CODE §§ 161.001(1)(N) and (Q). The trial court submitted two broad-form questions to the jury asking whether the father’s rights to each of two children should be terminated based on either or both sections (N) and (Q). *In re A.V.*, 113 S.W.3d at 357. The father did not object to the form of the charge. *Id.* Apparently, the father also did not object to the charge on the ground that no evidence supported one or the other statutory basis included in the charge. *Id.* at 362-63.

On appeal, the father argued that both of the submitted theories were unconstitutional, and he argued that there was no evidence to support termination of his parental rights under section 161.001(1)(N). *Id.* at 357. Presumably, the father preserved his no evidence complaint in a post-judgment motion—because the court makes no suggestion that this complaint was waived.

Nonetheless, after the supreme court overruled the father’s constitutional challenge to subsection (Q), the court held that it could affirm without reaching any of the father’s other complaints. *Id.* at 362. The court explained:

> Puig 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. To preserve this complaint, a party must make "[a] timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is no evidence to support its submission . . . ." [FN40] The only specific objections Puig made to the charge were to request an instruction or definition on constructive abandonment and to argue the constitutionality of the statutes . . . .
>
> The [trial] court overruled the objections. The record is clear—and Puig does not dispute–that he never objected to the question being submitted to the jury in broad form. In *Harris County v. Smith* and *Crown Life v. Casteel*, we emphasized the importance of a specific objection to the charge to put a trial court on notice to submit a granulated question to the jury. Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.
>
> Thus, any complaint regarding harmful charge error on broad-form submission was not preserved for review by the court of appeals, or by us. And because any complaint about the trial court submitting a broad-form question to the jury was waived, we look only to see if one of the grounds submitted to the jury is a valid ground upon which termination of parental rights could be based.

113 S.W.3d at 362-63 (footnotes omitted).

What remains unclear after *A.V.* is whether the supreme court would have reached the same result if the father had lodged a no-evidence objection to submission of the subsection (N) ground before the charge was submitted. In other words, is it enough to object that a particular theory is supported by no evidence, or must a party also specifically complain that the charge should not be submitted in broad form?

As discussed above, it does not appear that the Houston Fourteenth Court of Appeals required such a form objection in *Lozano*. But the Fort Worth Court of Appeals reached a contrary result in *Tesfa v. Stewart*, 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. filed). The Fort Worth Court held that the analysis of *Harris County v. Smith* did not apply—on waiver grounds—when the defendant made no-evidence objections to each of the submitted damages elements, but did not object to the form of the charge. *See Tesfa v. Stewart*, 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. filed). The court explained:

> Appellants here objected to the submission of all four elements of damages submitted to the jury, including medical expenses, on no-evidence grounds, essentially asserting that no damage question should be submitted to the jury at all. Appellants did not object in any respect to the form of the damages question, did not contend that some proper element of damages was improperly commingled in a list with a damage element supported by no evidence, and did not plainly inform the trial court that any specific element of damages—as opposed to every element of damages—should not be included in the broad-form submission. *Cf. In re B.L.D.*, 113 S.W.3d 340, 349-50 (Tex. 2003) (requiring specific objection that particular damage element should not be included in broad-form list); *Harris County*, 96 S.W.3d at 236 (same); *see also A.V.*, 113 S.W.3d at 362 (recognizing alleged broad-form charge error not preserved when appellant did not argue that question should not be submitted in broad form). Appellants' objection was not specific and it did not call the trial court's attention to any problem with the broad-form damages submission. *Cf.* TEX. R. APP. P. 33.1(a)(1)(A). Additionally, Appellants' no-evidence objections to every element of damages obscured the complaint they now make: that special question number 3 improperly commingled some valid damage elements with an improperly submitted disfigurement element of damages. *See, e.g.*, *Davis v. Sheerin*, 754 S.W.2d 375, 385 (Tex. App.—Houston [1st Dist .] 1988, writ denied) (holding charge objection of "no evidence, insufficient evidence, no predicate, comment on the evidence" did not preserve appellant's comment-on- the-weight-of-the-evidence complaint because appellant failed to explain how question constituted comment on the evidence and only included this among other stock objections). In short, the record does not reflect that the trial court understood the complaint Appellants now raise but chose not

> to change the charge. Appellants simply made stock no-evidence objections to every element of damages included in the court's charge. Accordingly, we hold that Appellants did not preserve their broad-form submission charge error complaint.

Tesfa, 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. filed).

We may finally get an answer to this preservation question when the supreme court decides *S.W. Bell Telephone Co. v. Garza*, cause no. 01-1142 in the Supreme Court of Texas, a case argued in October 2003. In that case, the defendant, Southwestern Bell, challenges the trial court's submission of a single liability question that asked whether the defendant had disqualified or discharged the plaintiff in retaliation for filing a worker's comp claim. Southwestern Bell asserts that the disqualification theory is invalid, and that because this invalid theory was commingled with the (valid) discharge theory, the entire judgment should be reversed and the case should be remanded for a new trial on all issues. *See Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted).

The only preservation asserted by Southwestern Bell is that it tendered a question that included only the discharge theory and its tender was implicitly overruled by the trial court. Southwestern Bell did not make any objections to the charge, including no objection about the broad-form submission. Consequently, depending on the supreme court's ruling on the merits of the case, we may learn more about preservation requirements. In addition, the supreme court's decision in *Romero* may provide some guidance on preservation issues.

In the meantime, while the *Harris County* majority rejected the dissent's contention that the opinion means the end of broad form submission, trial counsel certainly will want to consider alternatives to broad form any time a no evidence objection is made to a charge question that includes multiple elements or theories. Concurring in *KPH Consolidation v. Romero*, Justice Seymore admonished both lawyers and trial courts to abandon their "penchant for broad-form submission," especially in cases involving multiple liability theories. *KPH Consolidation*, 102 S.W.3d at 162.