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## INTRODUCTION

Properly preserving error in the jury charge is likely the most difficult and complicated preservation task a trial lawyer faces. As the supreme court has acknowledged: “The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer.” *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). The supreme court promised, eleven years ago, to simplify charge practice: “We can, however, begin to reduce the complexity that case law has contributed to charge procedures.” *Id.* at 241.

Despite the supreme court’s promise, in the eleven years since *Payne* was decided, it seems fair to say that the situation has not improved. “[T]he process of telling the jury the applicable law and inquiring of them their verdict [remains] a risky gambit in which counsel has less reason to know that he or she has protected a client’s rights than at any other time in the trial.” *Id.* at 240. In *Payne*, the court said that with broad-form practice, “the process is becoming worse, not better.” *Id.* at 241. The question we take on is, how much better and simpler have things gotten as we have moved away from broad submissions?

### I. CHARGE SUBMISSION—HOW WE GOT HERE; THE DEVELOPMENT OF BROAD FORM

#### A. The Charge Submits Controlling Fact Questions to the Jury.

The jury is charged with deciding the factual disputes necessary to form the basis of a judgment. *Tarter v. Metropolitan Sav. & Loan Ass’n.*, 744 S.W.2d 926, 928 (Tex. 1988). Under Rules 277 and 278 only “questions, instructions and definitions” are to be submitted to the jury. Rule 278 restricts submission to questions raised by written pleadings and the evidence. However, all controlling fact issues must be submitted to the jury by way of questions or instructions in the charge. A litigant is entitled to have controlling questions submitted to the jury. *See Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex.1995). A controlling question is one that determines the outcome of the case. *See* 4 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 22:14 (1992).

#### B. Form of 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).

##### 1. Development of Broad-Form Charges

The move to broad-form submission occurred incrementally over several decades. In 1973, Rule 277 was amended to provide:

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 farther 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.

## **2. 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.

**a. Shall/Whenever Feasible**

In *Texas Department of Human Resources 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.

**b. No Harmful Error for Failure to Use Broad-Form**

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.

**C. Special-Issue Practice and the Problem of Error-Preservation**

Before the use of broad-form was in vogue, error-preservation rules had grown up during the days of the old special-issue practice. Although jury charge practice evolved, the hesitancy to abandon old ways remained, and error-preservation rules stuck from the old days. Rules for error-preservation were—and they still are—technical and difficult.

## 1. Traditional preservation requirements—object or request?

There has been general uniformity concerning the proper method for preserving complaints of error in the charge:

- Proper **objections** are required to preserve complaints about questions, instructions or definitions actually submitted in the charge. TEX. R. CIV. P. 274, *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923, 924 (Tex. 1983).
- Proper **objections** can preserve error for failure to submit a question relied upon by an opposing party. TEX. R. CIV. P. 278; *See Lyles v. T.E.I.A.*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.).
- A substantially correct **written request** is required to preserve error for failure to submit a question relied upon by the complaining party. TEX. R. CIV. P. 278. *Univ. of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.—Austin 1996, no writ).
- A substantially correct **written request** is required to preserve failure to submit any instruction or definition, regardless of which party relied upon it. TEX. R. CIV. P. 278. *Dept. of Human Services v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995).

These four simple rules have spawned a huge amount of confusion and case law. Some courts have held that a substantially correct written request for an omitted question, instruction, or definition is not enough to preserve error unless accompanied by an objection. *See, e.g., Johnson v. State Farm Mut. Auto. Ins.*, 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied). The courts' basis for requiring an objection in addition to a requested submission was apparently rule 274's statement that “[a]ny complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections.” This reasoning appears to be contrary to the supreme court's holdings in *Morris v. Holt*, 714 S.W.2d at 312-13, and *American Teachers Life v. Bruggette*, 728 S.W.2d at 763.

Other courts have held that the party who would benefit from instructions must request them in addition to objecting to the question's submission without a limiting instruction. *E.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 878 (Tex. App.—Corpus Christi 1988, writ denied); *Texas Power & Lights Co. v. Barnhill*, 639 S.W.2d 331, 335 (Tex. App.—Texarkana 1992, writ ref'd n.r.e.).

## 2. Requests

Each party must request the questions, instructions and definitions necessary for the party to prevail. TEX. R. CIV. P. 278.

**a. Questions**

Rule 278 states:

Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.

Thus, unless the omitted question is relied upon by the opposing party, it must be requested or error is waived.

It now appears that error in omitting a question relied upon by a party can be preserved if the *other* party requests the question. In *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986), the defendant's request preserved error on an omitted question upon which the plaintiff bore the burden of proof. Subsequently, the court held that a defendant's request preserved error on an omitted question forming a necessary element of the plaintiff's case. *American Teachers Life Ins. Co. v. Brugette*, 728 S.W.2d 763 (Tex. 1987). The cases should be compared to the slightly earlier holding in *Island Rec. Dev. Corp. v. Republic of Texas Sav.*, 710 S.W.2d 551 (Tex. 1986), which appeared to reach a contrary result.

**b. Instructions and definitions**

The rule applying to instructions and definitions is quite clear. Rule 278 continues:

Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Failure to request an instruction or definition should not be taken lightly. Under broad-form submission, constituent elements of an opponent's claim or defense will likely be relegated to instructions or definitions. If Rule 278 means what it says, a substantially correct definition or instruction must be tendered by the party complaining of the judgment or the error is waived. This is true even if the instruction is part of your opponent's case!

**c. When**

Requests must be made before the case is submitted to the jury. They must also be made separate and apart from objections to the charge. TEX. R. CIV. P. 273; *Templeton v. Unigard Security Ins. Co.*, 550 S.W.2d 267, 269 (Tex. 1976). If you mix together objections and requests, you run the risk of waiving both. *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985).

**d. How**

**(i). In writing**

Requests must be in writing. TEX. R. CIV. P. 278. The rules make no provisions for oral requests, or even requests dictated on the record to the court reporter. *But see Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) and *compare Hartnett v. Hampton Inns, Inc.*, 870 S.W.2d 162, 165 (Tex. App.—San Antonio 1993, writ denied).

**(ii). Tendered to court**

Requests must be tendered to the trial court under Rule 278. In *Peterson v. Dean Witter Reynolds*, 805 S.W.2d 541, 552 (Tex. App.—Dallas 1991, no writ), an instruction was waived because the proposed charge was filed with the district clerk and never “tendered” to the trial court. *General Res. Org. Inc. v. Deadman*, 907 S.W.2d 22, 33 (Tex. App.—San Antonio 1995, writ denied).

**(iii). Separate from objections**

Requests must be made separate and apart from objections to the court’s charge. TEX. R. CIV. P. 273; *Woods v. Crane Carrier Co., Inc.*, 693 S.W.2d 377, 279 (Tex. 1985). Requests are waived even when tendered with written objections which are refused by the court. *T.E.I.A. v. Eskeu*, 574 S.W.2d 814 (Tex. Civ. App.—El Paso 1978, no writ).

**(iv). Substantially correct**

Requests must be in substantially correct wording. TEX. R. CIV. P. 278. “Substantially correct” means that the request is in a form that would allow its submission as worded. *Yellow Cab Co. v. Smith*, 381 S.W.2d 197, 198 (Tex. App.—Waco 1964, writ ref’d n.r.e.). An often quoted explanation states:

Substantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct. *And that is not affirmatively incorrect.*

*Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20 (Tex. 1987) (emphasis added). Simply put, a request is not substantially correct if its insertion in the charge would, upon proper objection, constitute error upon appeal. *Adams v. Rhodes*, 543 S.W.2d 18 (Tex. Civ. App.—Ft. Worth 1976, writ ref’d n.r.e.). Likewise, requests that are improperly conditioned are not substantially correct. *U.S. Fidelity & Guaranty Co. v. Hernandez*, 410 S.W.2d 224 (Tex. Civ. App.—Eastland 1966, writ ref’d n.r.e.).

The court may refuse requests lacking necessary definitions and instructions. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 479-80 (Tex. 1978). Likewise, requests can be refused when they accompany a defective definition. *Sherwin-Williams Paint Co. v. Card*, 449 S.W.2d 317 (Tex. Civ.

App.—San Antonio 1970, no writ). In *Edinburg Hosp. Auth. v. Trevino*, 904 S.W.2d 831, 838 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 941 S.W.2d 76 (Tex. 1997), the court rejected the wording of an instruction in a fetal death case because part of the instruction was erroneous, even though the rest was correct.

**(v). But not “en masse”**

The practice of tendering a complete charge, ready for submission, also carries risk. The courts frown upon “en masse” requests. The trial court is justified in refusing to give any question tendered en masse if any one of the questions is improper. *Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.). The appellate court's reason that the trial judge should not be required to sift through voluminous requests in order to submit those that are proper. *Tempo Tanner, Inc. v. Crowe-Houston Four Ltd.*, 715 S.W.2d 658, 666-67 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Hoover v. Barker*, 507 S.W.2d 299, 305 (Tex. App.—Austin 1974, writ ref'd n.r.e.).

**e. Court's action**

Rule 276 provides that refused or modified questions, instructions or definitions must be endorsed, signed by the court, and filed with the clerk to preserve error. The endorsement should state “refused” or “modified as follows: (stating how the request was modified) and given, and exception allowed.” TEX. R. CIV. P. 276. See, *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ). Without such a written ruling, the request does not preserve error. *Anderson v. Vinson Explor. Inc.*, 832 S.W.2d 657, 667 (Tex. App.—El Paso 1992, writ denied). *But see* TEX. R. APP. P. 33.1 (a)(2)(A) (generally recognizing implied rulings for error preservation purposes).

**f. Invited error**

Parties may not request a submission and then object to it. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993), *cert. dismiss'd*, 114 S. Ct. 490 (1994). *Daily v. Wheat*, 681 S.W.2d 747 (Tex. Civ. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Nor may a party agree to the jury charge as submitted and later attack it on appeal. *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 304 (Tex. App.—Houston [14th Dist.] 1995, no writ). Note, however, that Rule 279 permits objection to the factual or legal sufficiency of the evidence after the verdict, regardless of which party requested the submission.

**3. Objections**

The Rules contemplate that errors contained in the charge will be preserved by objections. Failure to object waives affirmative error in that charge. Rule 274 states in part:

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

The point of the objection, therefore, is to advise the trial court of the error in a manner that permits its correction. TEX. R. APP. P. 52. This has later been stated as a question, rather than as a rule: “whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” *State Dept. of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

**a. When**

“In every instance,” objections must be made before the charge is read to the jury. TEX. R. CIV. P. 272; *Missouri Pac. Ry. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). Agreements to make objections after the charge has gone to the jury will not be enforced. *Sudderth v. Howard*, 560 S.W.2d 511, 516 (Tex. App.—Amarillo, 1978, writ ref’d n.r.e.). Failure to make objections prior to submission to the jury results in waiver. *T.E.I.A. v. Neuman*, 379 S.W.2d 295 (Tex. 1964). Even if you have informally acquiesced in a question placing the burden of proof, an objection before the charge is read to the jury will nonetheless preserve the complaint. *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ). However, unless otherwise noted in the record, it is presumed that objections were made at the proper time. TEX. R. CIV. P. 272.

Objections may not be required until the charge has been submitted to the parties or their attorneys for inspection. A reasonable time must be given both to examine the charge and to present the objections. *See Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App.—Austin 1960, writ ref’d n.r.e.) (15 minutes too short, but harmless).

**b. How**

Objections may be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel. TEX. R. CIV. P. 272; *see Alaniz v. Jones & Neuse, Inc.*, 970 S.W.2d 450, 451 (Tex. 1995) (“Alaniz objected on the record to the omission, and this was the only objection he made to the charge.”). Objections dictated outside the court’s presence are not preserved. *Brantley v. Spargue*, 636 S.W.2d 224 (Tex. App.—Texarkana 1982, writ ref’d n.r.e.).

Most objections do not meet the dual requirements of Rule 274. A party objecting to a charge must: (1) point out distinctly the objectionable matter; and (2) the grounds of the objection.

The point of the objection is to permit the court to recognize and correct errors in the charge before it is submitted. Therefore, in order to preserve error, a litigant is required to distinctly point out the matter to which he is objecting. He is then required to explain the ground or reason why the matter is erroneous. “An objection that does not meet both requirements is properly overruled and does not preserve error on appeal.” *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986); *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978).

In 1992, the supreme court ruled that a complaint should be preserved if “the party made the trial court aware, of the complaint, timely and plainly, and obtained a ruling.” *State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992). The court also recognized, however, that its rules are not changed by opinion, but by formal adoption of new rules.

**(i). Not voluminous or unfounded**

Objections obscured by voluminous unfounded objections do not preserve error. Rule 274 states in part:

When the complaining party's objection, or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable.

The rule can be violated in at least two ways. First, objections can simply be too profuse. *Monsanto Co. v. Milam*, 494 S.W.2d 534, 536 (Tex. 1973); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 330-31 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). Note however, *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145-46 (Tex. App.—Dallas 1985, writ dism'd by agr.), holding that the mere number of objections alone does not violate Rule 274. The test for voluminous objections is whether the trial court was deprived of a real opportunity to correct errors in the charge. *Northcutt v. Jarrett*, 585 S.W.2d 874 (Tex. Civ. App.—Amarillo 1979), *writ ref'd n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979).

Second, the rule can be violated by filling the record with spurious objections that cannot be sustained. *See Tesfa v. Stewart*, 2004 WL 814287, \*2 (Tex. App.—Fort Worth 2004, pet. filed) (“appellants’ no-evidence objections to every element of damages obscured the complaint they now make”). In *Smith v. Christley*, 755 S.W.2d 525, 528-29 (Tex. Civ. App.—Houston [14th Dist.] 1988, writ denied), the court concluded that objections to the factual sufficiency of the evidence to support submission could not have justified refusal to submit the issue. Questions must be submitted to the jury if there is some evidence to support them even if it is factually insufficient. *See Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963). A request on one piece of paper including five other requests—a question, two instructions and two definitions—was not improper. *Lester v. Logan*, 907 S.W.2d 452, 453 (Tex. 1995).

#### **(ii). No adoption by reference**

Rule 274 expressly prohibits adoption of objections made to prior issues or instructions. The trial judge should not be required to recall arguments made earlier in the charge conference in determining whether a party has met the burden of clearly and distinctly setting forth objections and grounds. The goal of Rule 274 is to give all participants, including the trial judge and the appellate courts, an opportunity to know with certainty that all objections have been made at the designated point in the proceedings. *See Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 728 (Tex. Civ. App.—Eastland 1964, no writ).

#### **c. No objection needed**

Some errors need not be pointed out by objections to the charge. Ironically, these include most “stock objections,” such as no evidence, sufficiency of the evidence, and great weight and preponderance points. These points may or must be preserved elsewhere. Nonetheless, with *Casteel* and *Harris County v. Smith* on the books, proper no evidence objections should be considered in every case. *See Section II, below.*

**(i). Sufficiency of the evidence**

Under the last sentence of Rule 279, it is not necessary to object to the lack of sufficient evidence to warrant submission of charge questions. It states:

A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

It is clear from the supreme court's opinions in *Aero Energy, Inc. v. Circle C. Drilling Co.*, 699 S.W.2d 821 (Tex. 1985) and *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473 (Tex. 1988) that complaints of legal insufficiency can be made by motion for new trial in addition to the various motions for judgment and objections to the charge.

**(ii). Immateriality**

The immateriality of a jury finding has also been recognized as a complaint that may be raised for the first time after verdict. As early as 1966 the supreme court held in *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966) that “a jury’s answer to a special issue may be disregarded only when it has no support in the evidence *or when it is immaterial.*” Thus, a motion to disregard a jury finding may be used to bring an immaterial issue to the attention of the trial court. *Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).

A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). A jury question is immaterial when it should not have been submitted, or, though properly submitted, answers to other questions make it void of legal significance. *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.). When a response is clearly immaterial, the court can disregard the immaterial finding on its own motion. *Clearlake City Water Authority v. Winograd*, 695 S.W.2d 632, 639 (Tex. Civ. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).

The difference between an immaterial finding and an erroneously submitted material question was again at the heart of the supreme court’s decision in *Spencer v. Eagle Star Ins. Co. of America*, 860 S.W.2d at 870. A question asking whether the defendant insurance company had committed an “unfair practice in the business of insurance” followed by an overly-broad and ill-defined instruction was an erroneous attempt to submit the material question of whether Article 21.21 of the Insurance Code had been violated.

The court noted that immaterial findings include those that are beyond the province of the jury, such as questions of law. *Id.* Curiously, the court also held that the error of the overly broad definition had been preserved by an objection that it asked the jury to determine a question of law—what duty, if any, the company owed to its insureds. The court apparently reasoned that this submission of an otherwise immaterial question of law was “merely defective” because it attempted to submit a core fact issue. *Id.* at 868, 870.

#### **d. Court's action**

Rule 272 requires the court to announce its ruling on objections “before reading the charge to the jury.” The court is also required to “endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel.”

In *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984) the supreme court held that when a question or instruction is submitted as proposed, in spite of objections, the overruling of the objection would be implied. *See also*, TEX. R. APP. P. 33.1 (a)(2)(A) (recognizing implied rulings). It is, nonetheless, helpful to the appellate practitioner to have clear rulings to objections that form the basis of appellate complaint.

#### **4. Object and request**

Some courts have held that a substantially correct written request for an omitted question, instruction or definition is not enough to preserve error unless accompanied by an objection. *See, e.g., Johnson v. State Farm Mutl. Auto Ins.*, 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied); *Wright Way Constr. Co. V. Harlingen Mall Co.*, 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied). The courts’ basis for requiring an objection in addition to a requested submission was apparently Rule 274's statement that “[a]ny complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections.” This reasoning appears to be contrary to the supreme court’s holdings in *Morris v. Holt*, 714 S.W.2d at 312-13 and *American Teachers Life v. Bruggette*, 728 S.W.2d 763. *See also Clarostate Mfg., Inc. v. Alcor Aviation, Inc.*, 544 S.W.2d at 794.

Other courts have held that the party who would benefit from instructions must request them in addition to objecting to the question’s submission without a limiting instruction. *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 878 (Tex. App.—Corpus Christi 1988, writ denied); *Texas Power & Lights Co. v. Barnhill*, 639 S.W.2d 331, 335 (Tex. App.—Texarkana 1992, writ ref’d n.r.e.).

## **II. WHERE WE ARE WITH BROAD-FORM TODAY—NOTHING IS AS FEASIBLE AS IT SEEMS.**

Recall that in 1990 the supreme court stated that the rule requiring broad-form questions “whenever feasible” requires broad-form questions “[i]n any or every instance in which [they are] capable of being accomplished.” *Texas Dep’t of Human Resources v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). According to the court only “extraordinary circumstances” would justify a departure from broad form submission. *Id.* A decade after deciding *E.B.*, the supreme court first identified a set of “extraordinary circumstances” in which broad-form submission was “not feasible.”

### **A. 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 dismissed); *see Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 682 n.2 (Tex. 1992); *Scott v. Atchison, Topeka, & Santa 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, 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 2471110 (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*, 2003 WL 1937168 (Tex. App.—Beaumont 2003, pet. denied) (refusal to include unavoidable accident instruction harmless when jury heard evidence of theory and was not required to pick one party or the other); *Vasquez v. Hyundai Motor Co.*, WL 1905203 (Tex. App.—San Antonio 2002, no pet.) (any error in asking jury to assign percentage of responsibility to driver of car as responsible third party not properly joined immaterial when jury found no design defect and did not apportion any responsibility to defendant), *opinion withdrawn on en banc reconsideration on other grounds*, 2003 WL 22023175 (Tex. App.—San Antonio 2003) (en banc); *Balusik v. Kollatschny*, 2002 WL 1822360 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (n.d.p.) (to extent fiduciary duty instruction erroneous, finding immaterial because no damages awarded

based on breach of fiduciary duty); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (holding that trial court erred in omitting negligent standard of liability for defamation or libel but finding no harm when jury answered predicate question in the negative).

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

After *Casteel*, the commingling 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.

**B. 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 evidentiary 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 if liability is contested.” *Id.*

**C. 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, Inc. 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 entire case, including 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. Ins. 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. dismissed 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 in tact 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.) (n.d.p.) (finding of waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings).

**D. Is Broad form Feasible for Inferential Rebuttal Submissions?: *Urista v. Bed, Bath & Beyond*.**

In *Urista v. Bed, Bath & Beyond, Inc.*, 2004 WL 306009 (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*, 2004 WL 306009 at \*5.

### III. WHERE ARE WE GOING—THE RULE OF UNINTENDED CONSEQUENCES

#### A. Unanswered Issues on Preservation

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.

*Id.* 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*, 2004 WL 814287 (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*, 2004 WL 814287 (Tex. App.—Fort Worth 2004, pet. filed). The court explained:

[3] 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. B.L.D.*, 113 S.W.3d at 349-50 (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*, 2004 WL 814287 at \*2.

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 case should be reversed. *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 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.

#### **B. Lawyers And Trial Judges Do Factorials—The Charge Matrix**

The court of appeals' opinion in *KPH Consolidation v. Romero* instructs trial courts and practitioners that the only way to prevent reversal of unchallenged liability findings is to submit separate apportionment questions and separate damages questions—on every theory. It is no Chicken Little prediction to say this is the end of broad form submissions in Texas.

From now on, the only safe way for trial courts and opposing lawyers to respond to no evidence objections will be to submit multiple liability, apportionment, and damages questions. Every theory of liability, every combination of theories, and every combination of defendants will have to be separately submitted with its own apportionment and damages questions. This means lengthy jury charges in even "routine" cases. In *Romero*, for example—involving five plaintiffs, two non-settling defendants, two settling defendants, negligence theories against each defendant, and a malice theory against one defendant—the jury charge would have needed to include more than 175 questions.

#### **C. Review of Granulated Damages**

There is an apparent contradiction in the Supreme Court's ruling in *Harris County* with the new review standard announced in *Golden Eagle Archery v. Jackson*, 116 S.W.3d 757 (Tex. 2003). The former case suggests that damages should be granulated to make appellate review more easy, while the latter case suggests that granulating damages makes no difference in an appellate court's ability to look at the evidence on each single element of damages.

In *Golden Eagle*, the court considered a great weight attack on a single element of damages, physical impairment. Rather than looking at the evidence that could be mustered in support of that single element, the court said that the evidence of physical impairment was overlapping. Partly, this was due to a problem of defining the damages: "some of the categories of damages submitted to the

jury in this case were not defined and therefore were not cleanly and clearly segregated from one another . . . .” *Id.* at 770. But in reviewing the evidence of the granulated elements of damages, the supreme court ruled that “the court of appeals should consider whether the jury could reasonably have compensated . . . for a particular loss that might be ‘physical impairment other than loss of vision’ under another category of damages. If the jury could have done so, then the failure to award damages for that particular loss would not be against the great weight and preponderance of the evidence.” *Id.* at 771. Thus, in reviewing evidence cited to challenge an award as insufficient, the court of appeals should consider overlapping evidence on multiple damages elements. If the total amount awarded in the overlapping categories is enough, the lack of money in any single damages blank is not error, and the jury verdict can be affirmed. *Id.* at 773.

Apart from announcing a new standard of review, the supreme court appears to have resurrected a harm analysis, applicable to granulated submissions of damages, that it had rejected for broad form in *Casteel*. The trial court in *Golden Eagle* split physical impairment into two separate elements (“physical impairment of loss of vision”), which the court said violated the broad-form mandate of Rule 277. The court stated that “[a]lthough the trial court granulated physical impairment into two separate categories, Golden Eagle did not explain how it was harmed by the submission, particularly in light of the jury’s award of ‘\$0’ for physical impairment other than loss of vision.” *Id.* at 776. Thus, if a party insists on granulated damages, with each element submitted to the jury, the supreme court uses a harm analysis to evaluate error, but in a broad-form case, if the elements are subsumed in single issue, an appellate “challenge must address all the elements that could have been considered by the jury in making its total, single-amount award. ‘If there is just one element that is supported by the evidence, the damages award will be affirmed if it is supported by the evidence.’” *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003) (internal citations omitted).

#### **D. Factual-Sufficiency Review**

In *Harris County v. Smith*, the majority indicated that its segregation holding did not encompass “potential errors, such as factual insufficiency.” 96 S.W.3d at 235. But, the dissent suggests otherwise. Of course, it was a dissent, but the question remains whether an objection to a broad-form submission combined with a later factual sufficiency issue presented on appeal might preserve error as the dissent suggests. *See id.* at 239. The same logic would seem to apply. If a legal sufficiency complaint is rendered meaningless on appeal by a broad-form submission when some element of liability or damages lacks legally-sufficient evidence, why not factual-sufficiency complaints as well? At some point, the reversal rates in such cases could overwhelm the system.