

I

Our appellate rules contemplate that judgments will only be reversed when it is shown that the alleged error

- (a) probably caused the rendition of an improper judgment; or
- (b) probably prevented the petitioner from properly presenting the case to the appellate courts.

TEX. R. APP. P. 61.1; *cf.* TEX. R. APP. P. 44.1. Harris County does not complain that the submission of an unsupported damage element in each plaintiff's broad-form charge probably caused the rendition of an improper judgment in this case. That is because there was ample evidence to support the jury's damage award under the other elements submitted. Rather, Harris County and the Court seize upon subsection (b), which requires reversal if the broad-form damage submission probably prevented Harris County from properly presenting its case on appeal.

The Court determines that Harris County's appeal is not properly presentable because the jury might have based a portion of its award on a damage element that lacked evidentiary support – we just can't tell. But certainly we can. In this case, the jury was asked:

What sum of money . . . would fairly and reasonably compensate [each plaintiff] for [his or her] damages, *if any*, resulting from the occurrence in question?

Consider the elements of damages listed below and none other. ***Consider each element separately.*** Do not include damages for one element in any other element.

(Emphasis added). The jury was specifically instructed to consider each damage element separately and

to award damages only for those particular types of injury that the plaintiffs suffered. We have long held that “[a]n appellate court must assume that a jury properly followed the trial court’s instructions.” *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982); *see also Phillips v. Phillips*, 820 S.W.2d 785, 787 n. 2 (Tex. 1991); *Lancaster v. Fitch*, 246 S.W. 1015, 1016 (Tex. 1923). Only by presuming the opposite, that the jury *disregarded* the trial court’s instructions, can the Court conclude that the broad-form damage question here prevented Harris County from properly presenting its appeal. ___ S.W.3d at ___.

Even apart from the charge’s specific language in this case, the Court’s analysis glosses over a distinction that is critical in determining an erroneous submission’s harmful effect. Generally, a jury question can be erroneous for two reasons: (1) it fails to conform to the substantive law, and thus submits an invalid legal theory; or (2) it contains a valid legal theory, but there is no evidence to support its submission to the jury. In *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000), we confronted the former situation. There, the broad-form jury question commingled fourteen liability theories, four of which could not provide a basis for recovery because the plaintiff was not a consumer under the DTPA. 22 S.W.3d at 386-87. We noted that the jury “was given no indication that Casteel was required to be a consumer to succeed under any of [the liability theories],” and held that a single broad-form liability question that erroneously commingles valid and invalid liability theories is harmful “when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury’s finding.” *Id.* at 389. Our decision was based on the notion that “[i]t is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law.” *Id.* at 388. Thus, we determined it

“essential that the theories submitted be authorized and supported by the law governing the case.” *Id.* at 389. Just as we have recognized that “a judgment cannot be permitted to stand when a party is denied proper submission of a valid theory of recovery or a vital defensive issue,” *Exxon Corp. v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992) (citing *Texas & Pac. Ry. Co. v. Van Zandt*, 317 S.W.2d 528, 530 (1958)), we recognized in *Casteel* that a jury’s liability assessment is necessarily bound by the substantive law. 22 S.W.3d at 388-89; *see also Texas Workers’ Compensation Comm’n v. Garcia*, 893 S.W.2d 504, 529 (Tex. 1995). We did not abandon Rule 61.1’s standard for reversible error, but adhered to the governing principle that parties should only be held liable on valid legal grounds. *See* TEX. R. APP. P. 61.1.

This distinction between a broad-form submission that is unsupported by the substantive law, as presented in *Casteel*, and one that presents an element or theory that lacks evidentiary support, as presented in this case, has been recognized by the United States Supreme Court, by legal commentators, and by our own rules of civil procedure. In *Griffin v. United States*, 502 U.S. 46, 59 (1991), the Court observed:

Jurors are not generally equipped to determine whether a particular theory . . . submitted to them is contrary to law When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

Although *Griffin* was a criminal case, I see no logical reason why this underlying premise should not apply in the civil context. Neither do legal commentators, who have recognized a logical distinction between technical legal deficiency, which is beyond the jury’s realm of competence to recognize or correct, and

evidentiary deficiency, which is uniquely within a jury's province:

[i]t is ordinarily reasonable to presume that the jury reached its decision by considering the damage elements having support in the evidence In other words, even if there is no evidence or insufficient evidence of some element or elements of damages pleaded, there is a principled and sensible basis for concluding that there is no reversible error if the overall damage award is not excessive.

Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMUL. REV. 601, 630 (1992). Our own rules of civil procedure governing jury instruction recognize the distinction between legal and evidentiary deficiency:

(I) . . . Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. . . . (II) . . . It is your duty to consider the evidence and to determine fact issues . . . but I, as judge, will decide matters of law.

TEX. R. CIV. P. 226a.

The Court extends *Casteel's* presumed harm analysis beyond the commingling of valid and invalid liability theories to the commingling of legally valid damage elements, only one of which, in this case, lacks support, presumably because it considers insufficiency of proof akin to legal error. But I agree with the United States Supreme Court that this is "a purely semantical dispute":

It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

Griffin, 502 U.S. at 59-60 (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (1991)).

Painting with a broad brush, the Court posits no circumstances in which the commingling of elements with and without evidentiary support would allow the appellate court to determine whether the

jury's verdict was based on an unsupported element. If the present case does not pass muster, I find it hard to imagine a case in which the submission of any unsupported element, or instruction for that matter, will not require reversal. Despite the Court's purported "commitment" to broad-form submission, its decision will undoubtedly resurrect the granulated and confusing charges that we long ago abandoned. Cautious counsel will feel compelled to request granulated questions if, in the Court's own words, there is "doubt as to the legal sufficiency of the evidence" ___ S.W.3d at ___. This reasoning would apply equally to any doubts about factual sufficiency, or if a plaintiff wishes to preserve a challenge to a potential zero-damage award for a particular damage element. This approach severely undermines the strong preference for broad-form submission reflected in our rule's mandate to the trial courts that they "shall, whenever feasible, submit the cause upon broad-form questions." TEX. R. CIV. P. 277.

This retrenchment is unfortunate. The use of broad-form submission when feasible is important to the efficient functioning of our judicial system. Before 1973, our rules required trial courts to submit "each issue distinctly and separately." *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 648 (Tex. 1990). We adopted the current version of Rule 277 to eliminate many ill effects of the former special-issues practice, under which appeals proliferated because of inevitable conflicts in jury answers. *See E.B.*, 802 S.W.2d at 649. The broad-form rule was intended to increase our judicial system's efficiency by reducing the number of appeals and retrials. *Id.* The rule further "expedite[d] trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer." *Id.* Our adoption of Rule 277 was a deliberate choice, made in full recognition that it would be harder for litigants to successfully appeal:

The tension between presumed harm and harmless error has always been one of competing ideals – errorless trials versus judicial economy and finality. And the decision was made, long ago, after a protracted struggle, that the balance should be struck in favor of the latter.

Gilbreath & Cukjati, *Crown Life Ins. Co. v. Casteel – Return of the Prodigal Son*, THE APPELLATE ADVOCATE 5, 8 (2000) (citing Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952)); see RATLIFF ET AL., TEXAS COURTS: TRIAL & APPEAL 275 (7th ed. 2001-2002); see generally HODGES & GUY, THE JURY CHARGE IN TEXAS CIVIL LITIGATION (2d ed. 1988 & Supp. 1993); WRIGHT & MILLER, 9 FEDERAL PRACTICE & PROCEDURE § 2505, at 496 (1988 & Supp. 1993). Despite the Court’s protestations to the contrary, I fear that today’s decision signals a “retreat to the muck and mire of ‘separate and distinct’ special issues.” Sampson, *TDHS v. E.B.: The Coup de Grace for Special Issues*, 23 ST. MARY’S L.J. 221, 260 (1991).

The trial court’s error in this case did not probably cause an improper judgment, nor does it prevent us from properly considering Harris County’s evidentiary challenge on appeal. Rather than presume harm because the broad-form damage questions included an unsupported element, I would apply a traditional harmless error analysis. Because there was ample evidence to support the jury’s damage award under the properly submitted damage elements, I would affirm the trial court’s judgment. Because the Court holds otherwise, I respectfully dissent.

Harriet O’Neill

Justice

OPINION DELIVERED: December 19, 2002