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ARTICLES

CURRENT TRENDS IN TEXAS CHARGE PRACTICE: PRESERVATION OF ERROR AND BROAD-FORM USE

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I. INTRODUCTION

Over the past fifteen years there are two overwhelming charge issues with which Texas appellate courts have been wrestling—charge preservation of error and broad-form use. As the charge is the controlling document that the jury uses to decide the factual issues of the case, it is of extreme importance. If the charge is

wrong, then the jury's answer is likely wrong. Thus, in Texas, the charge is "a prolific source of appellate reversals."[3]

Before a party can complain on appeal about charge error, the error must be preserved.[4] Over the decades, the Texas Rules of Civil Procedure, as interpreted by Texas courts, have had a fairly certain set of procedures for preservation of charge error. True, these rules have been somewhat complicated—but not impossibly so. The Texas Supreme Court amended charge preservation of error practice in *State Department of Highways & Public Transportation v. Payne*,[5] wherein the court found that a defendant had preserved error when well-established precedent would have held otherwise.[6] In the years following *Payne*, the Texas Supreme Court and the intermediate courts of appeals have been inconsistent in their application of charge preservation of error.[7] The uncertainty in preservation of charge error is likely a result of a dilemma stemming from the fact that Texas courts use broad-form practice, while the charge preservation of error rules were created at a time when the courts used special issue submission practice.[8]

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3. 4 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE, § 22:1 (2d ed. 2001).

4. TEX. R. APP. P. 33.1; TEX. R. CIV. P. 274.

5. 838 S.W.2d 235 (Tex. 1992).

6. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 239-41 (Tex. 1992) (decrying the complexity attached to the rules governing whether an objection or a request properly preserves error and holding that the state's request was itself a sufficient objection to the omission of an element of the defendant's claim). The court went on to declare, "There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Id.* at 241.

7. *Compare* Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 637-38 (Tex. 1995) (holding that a request preserved error, despite the defendant's failure to use "substantially correct" language), *with* Union Pac. R.R. v. Williams, 85 S.W.3d 162, 169-70 (Tex. 2002) (finding the defendant's written request sufficient because it was substantially correct). The courts of appeals have also ruled inconsistently. *Compare* State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 790 (Tex. App.—Dallas 1997, pet. dism'd by agr.) (determining that while the requested question was not a "model of clarity," it was clear enough to notify the trial court of the problem and preserve error), *with* Tex. Natural Res. Conservation Comm'n v. McDill, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ) (explaining that requests must be in substantially correct wording to preserve error). These are just a few examples of the numerous inconsistent post-*Payne* opinions concerning preservation of error in jury charges.

8. *See generally* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 604-10 (1992) (giving an historical account of jury charge submission in Texas).

This Article addresses the issues and problems currently existing in Texas jury charge practice and form. Part II reviews the traditional Texas rules regarding preservation of error. Part III briefly states the conflict between charge rules and charge submission. In Part IV, the *Payne* opinion is examined, with specific focus on how the Texas courts of appeals have applied preservation of error rules since *Payne*. Finally, Part V examines the history of special submission versus broad-form use, and assesses the current trend regarding the use of broad-form.

II. General Rules of Preservation of Charge Error

There is no more difficult and intellectually strenuous part of a trial than creating the charge—whether by broad-form or by special submission. Accordingly, errors are common, and a party must know how to preserve that error in order to complain of it on appeal. Preservation of error is not merely an irritating inconvenience; there are several valid reasons behind requiring a party to preserve error before complaining on appeal:

> Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds. In addition, our preservation rules promote fairness among litigants. A party "should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." Moreover, we further the goal of accuracy in judicial decision-making when lower courts have the opportunity to first consider and rule on error. Not only do the parties have the opportunity to develop and refine their arguments, but we have the benefit of other judicial review to focus and further analyze the questions at issue. Accordingly, we follow our procedural rules, which bar review of this complaint, unless a recognized exception exists.[9]

Therefore, charge error must be preserved at the trial stage, and the error must be raised on appeal in order to justify reversing a judgment.[10]

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9. *In re* B.L.D., 113 S.W.3d 340, 350 (Tex. 2003) (citations omitted).

10. *See In re* V.L.K., 24 S.W.3d 338, 343-44 (Tex. 2000) (stating that "[a] party complaining of charge error must properly preserve error in the trial court and must raise the issue on appeal").

There are two general types of charge error: an error of omission and an error of commission. When there is a question, instruction, or definition that should be included in the charge, but is not, there is an error of omission.[11] Conversely, where there is a question, instruction, or definition that is in the charge, but it is incorrect, there is an error of commission.[12] The Texas Rules of Civil Procedure require charge error to be preserved by two general methods: objections and requests.[13] It is no coincidence that there are two types of charge errors and two methods to preserve charge error—they correspond with each other.

Objections are required to preserve complaints about questions, instructions, or definitions actually submitted in the charge—errors of commission.[14] A substantially correct written request is required to preserve error for the failure to submit questions relied upon by the requesting party—an error of omission.[15] Further, a written request is required to preserve error for the failure to submit any instruction or definition, regardless of which party relied upon it.[16] However, proper objections can also preserve error for

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11. *See* Nat'l Indem. Underwriters of Am. v. Washington, 119 S.W.2d 1071, 1072 (Tex. Civ. App.—1938, no writ) (stating that "errors of omission should be taken advantage of by requested issues correctly prepared").

12. *See id.* (noting that "[o]bjections to a charge are designed to reach errors of commission in the charge as prepared").

13. TEX. R. CIV. P. 274, 278; *see* Lyles v. Tex. Employers' Ins. Ass'n, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (explaining the functions of objections and requests).

14. TEX. R. CIV. P. 274 (stating that "[a]ny 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"); *see also* Irvin v. Parker, 139 S.W.3d 703, 707 (Tex. App.—Fort Worth 2004, no pet.) (finding that appellant had waived his complaint and failed to preserve error by not objecting to the charge); Schultz v. S. Union Gas Co., 617 S.W.2d 299, 302 (Tex. Civ. App.—Tyler 1981, no writ) (identifying that an objection is the method for preserving error when a definition is defective); *Lyles*, 405 S.W.2d at 727 (noting that the proper complaint when there is a defect in the charge is by objection).

15. TEX. R. CIV. P. 278 ("Failure to submit a [question,] definition[,] or instruction shall not be deemed a ground for reversal . . . unless a substantially correct [question,] definition[,] or instruction has been requested . . . ."); *see also* W.O. Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988) (explaining that the plaintiff's cause of action failed because he never requested a jury question on the issue of damages); Univ. of Tex. at Austin v. Ables, 914 S.W.2d 712, 715 (Tex. App.—Austin 1996, no writ) (citing TEX. R. CIV. P. 279) (finding that the plaintiff waived her intended claim by not properly submitting jury questions and because the question the jury was asked did not include an element of the claim).

16. *See* TEX. R. CIV. P. 278 (stating that "a party shall not be entitled to any submission of any question . . . not raised by affirmative written pleading by that party"); Tex.

the failure to submit a question relied upon by an opposing party.[17] These are the basic rules of charge preservation of error.

A. *The Request*

Texas Rule of Civil Procedure 273 states: "Either party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper."[18] Accordingly, each party must request the questions, instructions, and definitions that are necessary for the party to prevail.[19]

1. Questions

Texas Rule of Civil Procedure 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.[20]

Therefore, unless an omitted question is relied upon by the opposing party, a party must request a question or error in its omission is waived. However, where one or more elements of a claim or defense are submitted in the charge, the party opposing the claim or defense can either request or object to preserve error as to the omitted element.[21] In other words, if the opponent failed to submit an element of its claim or defense, the party can simply object to

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Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 637-38 (Tex. 1995) (expressing that petitioner was required to make a written request asking "for a substantially correct instruction" to raise that issue on appeal).

17. TEX. R. CIV. P. 278; *see Lyles*, 405 S.W.2d at 727 (clarifying that "[*o*]*bjection* . . . is the proper method of preserving complaint as to (1) an issue actually *submitted*, but claimed to be defective; or (2) *failure to submit*, where the ground of recovery or defense *is relied on by the opposing party*").

18. TEX. R. CIV. P. 273.

19. *See* TEX. R. CIV. P. 278 (stating that a party is not entitled to the submission of a question they did not raise by an affirmative written pleading).

20. *Id.*

21. *See* Morris v. Holt, 714 S.W.2d 311, 312-13 (Tex. 1986) (deciding that the defendant could properly preserve error by either objecting or requesting submission of the proper issue where the plaintiff relied on the missing issue because his pleadings asked for relief that could not be given under the submitted issues).

the omission (this preserves error and protects against implied findings).[22]

2. Definitions or Instructions

Additionally, a party must submit a request for an omitted instruction or definition, or else error is waived: "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."[23] This is an important rule because with broad-form submissions, the elements of a claim or defense often appear in the instructions and definitions.[24] Therefore, a request must be tendered by the party complaining of the judgment even if the instruction is in the opponent's claim or defense.

It should be noted that a question is arguably affirmatively wrong if it does not contain all of the required elements and is therefore an error of commission requiring an objection.[25] How-

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22. *See, e.g.*, Barton v. Davis, 441 S.W.2d 299, 301 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.) (overruling appellant's issue involving an incorrect theory of liability in the jury charge because appellant made no objection, and an "unobjected-to charge leaves room for all implied findings necessary to sustain the judgment").

23. TEX. R. CIV. P. 278; *see* Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (stressing the rule that in order to preserve error in regard to a complaint of the omission of an instruction, a party must request a substantially correct instruction in writing); *see also* Universal Servs. Co. v. Ung, 904 S.W.2d 638, 640 (Tex. 1995) (concluding that "[w]hile it is not always necessary for a party to explain the reasons for requested jury questions and instructions in order to preserve error if the requests are refused, in this case . . . [the] request did not make clear to the trial court the nature of its present complaint and thus did not preserve error"); *cf.* Tex. Employers' Ins. Ass'n v. Mallard, 143 Tex. 77, 182 S.W.2d 1000, 1002 (1944) (discussing whether Rule 279 required a requested definition in substantially correct form in light of the facts).

24. *See* TEX. R. CIV. P. 277 (stating that a "court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict"); City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 794 (Tex. App.—Dallas 1992, writ denied) (reiterating that instructions should only be given if they aid the jury in understanding the law).

25. *See* LOUIS S. MULDROW, AVOIDING AND PRESERVING ERRORS IN THE CHARGE A-4 (1993) (commenting that "if it can be said that the issue, definition or instruction is affirmatively erroneous, whether from including something that is improper or omitting something essential, the error is one of commission and is preserved by objection") (on file with the *St. Mary's Law Journal*).

ever, some courts have held that when a definition or instruction is omitted, the complaining party must both request and object.[26]

3. Timing of Requests

A party must make requests separately from any objections to the charge. "A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge."[27] If a party makes a request at the same time as it objects, it may waive both.[28] Generally, it is safe to present a party's requests at the beginning of the formal charge conference, but separate and apart from a party's objections.[29]

4. Form of Request

A request generally must be in writing—oral or dictated requests will not suffice.[30] It must be tendered to the court and not merely

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26. *See, e.g.*, Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (requiring a party to not only object to the trial court's failure to add a limiting instructions in its damages question, but also to request such an instruction); Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, no writ) (explaining that where the charge omits "an instruction relied on by the requesting party," the requesting party must tender a written request, make specific objections, and obtain a ruling).

27. TEX. R. CIV. P. 273; *see* Tex. Employers' Ins. Ass'n v. Eskeu, 574 S.W.2d 814, 818 (Tex. Civ. App.—El Paso 1978, no writ) (identifying that "[u]nder [TEX. R. CIV. P. 273], requests for special issues and instructions must be submitted separately from objections to the court's charge").

28. *See* Woods v. Crane Carrier Co., 693 S.W.2d 377, 379 (Tex. 1985) (describing complainant's failure to comply with Rule 273 and holding, "The trial judge properly overruled an objection containing an instruction improperly requested"); Templeton v. Unigard Sec. Ins. Co., 550 S.W.2d 267, 269 (Tex. 1976) (holding that petitioner failed to preserve error because he submitted his requests while making his objection). In *Templeton*, the petitioner erroneously made requests for a special issue while dictating his objections to the court reporter. *Id.* The supreme court held that the petitioner not only waived any complaint as to the requested special issue, but also waived his objection, since the objection relied upon the special issue's submission. *Id.*

29. *See, e.g.*, Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450, 451 (Tex. 1995) (per curiam) (deciding that while the plaintiff made a written request before trial, because he also raised the issue of the request after the charge was prepared and the request was separate from his objections, error was preserved). Where requests are made simultaneously with objections, error is not properly preserved, even if the trial judge overrules the requests separately. *Eskeu*, 574 S.W.2d at 818.

30. TEX. R. CIV. P. 278; *see also Woods*, 693 S.W.2d at 379 (explaining that the "myriad of interruptions and occasional confusion inherent in the charge conference mandates that all requests be in writing"); Fairfield Estates L.P. v. Griffin, 986 S.W.2d 719, 724 (Tex.

filed with the clerk.[31] A written request must be in substantially correct wording—in a form that would allow its submission as worded and not be affirmatively incorrect.[32] A request in substantially correct wording means that it is not subject to any valid objection.[33]

App.—Eastland 1999, no pet.) (finding defendants had waived their request by failing to submit it in writing); Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (determining that requested instructions were not properly given because they were merely dictated for the record instead of requested in writing); *cf.* Gulf Oil Corp. v. Williams, 642 S.W.2d 270, 273 (Tex. App.—Texarkana 1982, no writ) (overruling appellant's point of error dealing with a requested special issue, because no written requests appeared in the record). Where the trial court grants the request, the requirement that the request be in writing does not apply. *See, e.g.*, Patlyek v. Brittain, 149 S.W.3d 781, 789-90 (Tex. App.—Austin 2004, pet. denied) (holding that the trial court did not err in granting an oral request—general rule that oral requests will not preserve error does not apply when trial court grants request).

31. *See* TEX. R. CIV. P. 278 (noting that requests for questions, instructions, and definitions must be "in writing and tendered by the party complaining of the judgment"); *see also* Gen. Res. Org., Inc. v. Deadman, 907 S.W.2d 22, 32-33 (Tex. App.—San Antonio 1995, writ denied) (reasoning that "it was appellant's burden to request a jury issue in substantially correct wording on the issue and to secure a ruling on it by the trial court"); Lopez v. S. Pac. Transp. Co., 847 S.W.2d 330, 333 (Tex. App.—El Paso 1993, no writ) (concluding that because the complained of instructions were not "requested, tendered to or ruled upon by the trial court," error in their omission was waived); *Williams*, 642 S.W.2d at 273 (expressing that "requests must be tendered in writing to the judge").

32. TEX. R. CIV. P. 278 (hinging a party's entitlement to a question on whether it was "raised by affirmative written pleadings"); *see* Yellow Cab Co. v. Smith, 381 S.W.2d 197, 198 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.) (stating that "Rule 279, Texas Rules of Civil Procedure, requires a requested issue to be 'in substantially correct wording,' which is held to mean 'in such form as the court could properly submit as presented'" (quoting Thomas v. Billingsley, 173 S.W.2d 199, 200 (Tex. Civ. App.—Dallas 1943, writ ref'd))); *see also* Placencio v. Allied Indus. Int'l, Inc., 724 S.W.2d 20, 21 (Tex. 1987) (holding that the trial court's decision to refuse affirmatively incorrect jury issues was not erroneous).

33. *See Placencio*, 724 S.W.2d at 21 (stating, "[S]ubstantially 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" (quoting Modica v. Howard, 161 S.W.2d 1093, 1094 (Tex. Civ. App.—Beaumont 1942, no writ))); *see also* Adams v. Rhodes, 543 S.W.2d 18, 19 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (noting that a request is not substantially correct if its unchanged addition would be affirmative error if objected to on appeal); *Yellow Cab*, 381 S.W.2d at 198 (pointing out the deficiencies in the issue requested by the appellant); *Thomas*, 173 S.W.2d at 200 (stressing that "it was incumbent upon the defendant to object to the charge, or prepare and tender to the court, in due time, a requested issue in such form as the court could properly submit as presented").

In addition to the actual question being in substantially correct wording, a conditioning statement must also be correct.[34] There are cases that hold that a question or instruction is not in substantially correct wording where the party tendering such has failed to include a definition of an essential legal term used therein.[35] Conversely, a court can correctly refuse to submit a question or instruction that is accompanied by a defective definition.[36]

5. Obscured Requests

A party may not offer requests "en masse," i.e., tendering a complete charge.[37] The party should offer each question, instruction, and definition individually; a trial court should not have to sift through voluminous requests in order to submit those that are proper.[38] If a court submits some but not all of the requested ques-

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34. *See, e.g.*, U.S. Fid. & Guar. Co. v. Hernandez, 410 S.W.2d 224, 228 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.) (ruling that appellant did not request special issues conditioned upon other issues in substantially correct form).

35. *See, e.g.*, Select Ins. Co. v. Boucher, 561 S.W.2d 474, 478-79 (Tex. 1978) (determining that because a requested definition was not substantially correct, it was properly refused, and further holding that because the jury instruction lacked a necessary definition, the instruction itself was not substantially correct); Holland v. Lesesne, 350 S.W.2d 859, 863 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) (overruling appellant's point of error complaining about the trial court's failure to submit a requested issue, in part because appellant failed to define or explain several terms).

36. *See* Sherwin-Williams Paint Co. v. Card, 449 S.W.2d 317, 322 (Tex. Civ. App.—San Antonio 1970, no writ) (ruling that the trial court did not err in refusing to submit appellant's requested issue due to an incorrect and potentially misleading definition of an essential term).

37. *See* Munoz v. Berne Group, 919 S.W.2d 470, 472 (Tex. App.—San Antonio 1996, no writ) (deciding that tendering the instruction "in the form of an entire proposed charge, with nothing more, was insufficient to preserve error"); Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 666 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (determining that the appellant's en masse request was properly denied by the trial court, because appellant did not request issues separately); Crisp v. Sw. Bancshares Leasing Co., 586 S.W.2d 610, 615 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (refusing to rule that the trial court acted erroneously in rejecting an en masse submission containing seven special issues); *see also* Nat'l Fire Ins. v. Valero Energy Corp., 777 S.W.2d 501, 508 (Tex. App.—Corpus Christi 1989, writ denied) (stating that "[t]he court should not be required to pick through appellant's own tendered issues to construct an instruction to conform to an issue actually submitted; this is the responsibility of the party complaining that a necessary instruction is missing from the court's charge").

38. *Tempo Tamers*, 715 S.W.2d at 666; *Crisp*, 586 S.W.2d at 616; Griffey v. Travelers Ins. Co., 452 S.W.2d 725, 726 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (quoting Edwards v. Gifford, 137 Tex. 559, 155 S.W.2d 786, 788 (1941)); *see also* Freedom Homes of Tex., Inc. v. Dickinson, 598 S.W.2d 714, 719 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (holding that because plaintiff's special issues were incorrectly submitted en

tions, instructions, or definitions, then the requesting party will have to edit its requests to omit the portions that are already submitted.[39] Therefore, the simplest way to handle requests is to submit each question, instruction, and definition separately. However, a party should be careful not to obscure its proper requests by unfounded or meritless requests; otherwise, it may waive error by failing to submit a valid request.[40]

6. Request and Object

Some courts have held that when the complained of error is the omission of a question, instruction, or definition, the complaining party must *both* tender a substantially correct request *and* object to its omission.[41] The basis of this dual requirement apparently stems from the language of Rule 274, which states: "Any complaint . . . on account of any . . . omission . . . is waived unless specifically

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masse, it was not error for the trial court to refuse to submit an issue), *overruled on other grounds by* Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382, 387 (Tex. 1997) (per curiam); Davis v. Massey, 324 S.W.2d 242, 243 (Tex. Civ. App.—Waco 1959, no writ) (reasoning that a trial court does not err when it refuses requested issues submitted en masse, rather than individually); *cf.* Armellini Express Lines of Fla. v. Ansley, 605 S.W.2d 297, 307 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (determining "[w]hen special issues and instructions are submitted 'en masse' rather than submitting each issue and instructions or cluster of issues and instructions separately, no error is presented by the trial court's refusal to submit one specific issue or instruction, especially where any of the issues or instructions as requested was improper or was already included in the charge").

39. *See, e.g.*, *Tempo Tamers*, 715 S.W.2d at 667 (pointing out that "[b]ecause the substance of many of the issues requested by [appellant] was already submitted in the court's charge, the trial court could have properly have refused to submit those requests"). "The trial court may properly refuse to submit various phases or different shades of the same issue." *Id.* (citing TEX. R. CIV. P. 279).

40. TEX. R. CIV. P. 274 ("When the complaining party's objection, or requested question, definition, or instruction is . . . obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable."); Jon-T Farms v. GoodPasture, Inc., 554 S.W.2d 743, 751 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (holding that the appellant waived his right to complain of the trial court's denial of a request issue on appeal by submitting a convoluted collection of issues and instructions).

41. Sears, Roebuck & Co. v. Abell, 157 S.W.3d 886, 891 (Tex. App.—El Paso 2005, pet. denied); Texas Power & Light Co. v. Barnhill, 639 S.W.2d 331, 334-35 (Tex. App.—Texarkana 1992, writ ref'd n.r.e.); Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied); Johnson v. State Farm Mut. Auto. Ins., 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied); *Jon-T Farms*, 554 S.W.2d at 751.

included in the objections."[42] However, Rule 278 and Texas Supreme Court precedent negate the dual requirement of a request and objection in this situation.[43]

B. *The Objection*

Affirmative errors in the charge must be preserved by objection.[44] It does not matter which party has the burden of proof as to the submission, if a submission in the charge is incorrect, an objection will preserve error.[45] Further, error in the omission of the submission of an opposing party's claim or defense can be preserved by making an objection.[46] Rule 274 of the Texas Rules of Civil Procedure states, "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objec-

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42. TEX. R. CIV. P. 274; *see Abell*, 157 S.W.3d at 891 (opining that "[o]ne reason why both are required is found in the language of Rule 274").

43. *See* Morris v. Holt, 714 S.W.2d 311, 312-13 (Tex. 1986) (interpreting former Rule 279 (which is now part of Rule 278) and declaring that error could be preserved by either an objection or a request); *see also* Spencer v. Eagle Star Ins. Co., 876 S.W.2d 154, 157 (Tex. 1994) (construing Rule 274 to allow an objection to sufficiently preserve error for defective instructions and ruling that a request is unnecessary). Rule 278 clearly requires only a request to preserve error for a trial court's failure to include a question, definition, or instruction. TEX. R. CIV. P. 278 (expressing that the absence of a question, definition, or instruction "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").

44. *See* TEX. R. CIV. P. 274 (stating that any complaint as to an error in the charge must be specifically included in the objections, otherwise it will be deemed waived); *Spencer*, 876 S.W.2d at 157 (citing Moulton v. Alamo Ambulance Serv. Inc., 414 S.W.2d 444, 449-50 (Tex. 1967)) (expressing that "an objection is sufficient to preserve error in a defective instruction"); Religious of Sacred Heart of Tex. v. City of Houston, 836 S.W.2d 606, 613-14 (Tex. 1992) (stating that objection is the proper method of preserving a complaint, when the issue is submitted but defective).

45. *See* Holubec v. Brandenberger, 111 S.W.3d 32, 38-39 (Tex. 2003) (ruling that defendants properly preserved error by objecting to the defective affirmative defense submitted); *Religious of Sacred Heart*, 836 S.W.2d at 613-14 (holding that although petitioner had the burden of proof, respondent's objection to the erroneous submission in the charge was sufficient to preserve error); Fraze v. Pfleider, No. 09-04-189-CV, 2005 WL 1243091, at *6 (Tex. App.—Beaumont May 26, 2005, no pet.) (mem. op.) (ruling that party preserved error by objecting to improper wording of question to which it had the burden of proof); Boudreaux v. Culver, No. 01-03-01247-CV, 2005 WL 1111237, at *2 (Tex. App.—Houston [1st Dist.] May 5, 2005, no pet.) (mem. op.) (explaining that Rule 274 allows the party that is not relying upon the complained-of definition to only make an objection).

46. *See* TEX. R. CIV. P. 278 (explaining that if the question not submitted "is one relied upon by the opposing party," the complaining party can preserve error sufficiently by objection).

tion."[47] Otherwise, the party will waive the error.[48] Objections cannot incorporate previous objections made to other portions of the charge by reference.[49] Generally, a party must make its own charge objections.[50] However, a party can adopt another party's objections if the trial court expressly allows it.[51]

1. Timing of Objection

A party must raise its objections before the charge is read to the jury.[52] For example, in *Academy Corp. v. Interior Buildout & Turnkey Construction Inc.*,[53] the court held that an objection raised for the first time in a motion for judgment notwithstanding the ver-

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47. TEX. R. CIV. P. 274; *see* KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. v. Davis, 175 S.W.3d 379, 393 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that a general objection to the entire charge, that the damages were not properly defined, did not preserve error as to particular questions).

48. *See KMG*, 175 S.W.3d at 393 (holding that because appellants did not make a timely, specific objection, they waived any complaint about the submitted question).

49. TEX. R. CIV. P. 274 (stating that "[n]o objection to one part of the charge may be adopted and applied to any other part of the charge by reference only"); *see also* Verret v. Am. Biltrite, Inc., No. 02-04-00244-CV, 2006 WL 2507318, at *2 (Tex. App.—Fort Worth Aug. 31, 2006, pet. filed) (mem. op.) (noting that "[t]he rules of civil procedure expressly prohibit the 'same objection throughout' type of global objection to the charge").

50. *See* C.M. Asfahl Agency v. Tensor Inc., 135 S.W.3d 768, 795-96 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (asserting that simply "joining" a co-defendant's objections was not enough to preserve error—defendants "were required to present their own objections"); *cf.* Bohls v. Oakes, 75 S.W.3d 473, 477 (Tex. App.—San Antonio 2002, pet. denied) (recognizing that in cases with multiple defendants, each defendant is responsible for making his own objections).

51. Villegas v. Tex. Dep't of Transp., 120 S.W.3d 26, 37 (Tex. App.—San Antonio 2003, no pet.); Owens-Corning Fiberglas Corp. v Malone, 916 S.W.2d 551, 556-57 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998); *see* Celotex Corp v. Tate, 797 S.W.2d 197, 201-02 (Tex. App.—Corpus Christi 1990, writ dism'd by agr.) (holding that where the court allows it and the opposing party does not object, one party may rely on another party's objection "just as if it were its own").

52. TEX. R. CIV. P. 272; *see* Mitchell v. Bank of Am., N.A., 156 S.W.3d 622, 627-28 (Tex. App.—Dallas 2005, pet. denied) (noting that "[i]f the party does not present the objections to the court before the court reads the charge to the jury, he waives the objection"); *see also* Mo. Pac. R.R. Co. v. Cross, 501 S.W.2d 868, 872-73 (Tex. 1973) (opining that typographical mistakes would have been corrected had objections been made before the jury received the charge); Summit Mach. Tool Mfg. Corp. v. Great N. Ins. Co., 997 S.W.2d 840, 849 (Tex. App.—Austin 1999, no pet.) (adhering to the rule that objections must be made before the jury charge is read); Melendez v. Exxon Corp., 998 S.W.2d 266, 281 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (overruling the point of error where the party did not object before the charge was read).

53. 21 S.W.3d 732 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

dict waived any error for appellate review.[54] Agreements to make objections after the charge has gone to the jury will not be enforced.[55]

Objections are not required until the court submits the charge to the attorneys for inspection, and a reasonable time for inspection must be given by the court.[56] If the court does not provide a reasonable time to examine the charge, the party should: (1) object to the court's time limitation before any other objections to the charge, and (2) show how that time limitation harmed him, such as not being able to review and form objections to particular questions, instructions, and definitions.[57]

2. Form of Objection

Objections should "be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel."[58] Objections dictated outside the presence of the judge are not preserved.[59] The objection must be specific—it must point out with particularity the error and the grounds of com-

54. Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 742-43 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that any error was waived when the appellant's objection was raised for the first time in a motion for judgment notwithstanding the verdict).

55. *See Cross*, 501 S.W.2d at 872-73 (determining that it was erroneous for the trial court to agree to allow the parties to make their objections after the charge had been read to the jury); Suddreth v. Howard, 560 S.W.2d 511, 515-16 (Tex. App.—Amarillo 1978, writ ref'd n.r.e.) (failing to uphold an agreement between the trial court and the parties, stating that objections could be given after the jury received the charge, but would be "dated and filed in such a manner to appear that they were made before submission of the charge, and that no party would complain on appeal that the objections were not made before the case was presented to the jury").

56. TEX. R. CIV. P. 272 (giving parties and counsel "a reasonable time . . . in which to examine and present objections [to the charge] outside the presence of the jury").

57. *See* Bekins Moving & Storage Co. v. Williams, 947 S.W.2d 568, 575-76 (Tex. App.—Texarkana 1997, no writ) (concluding that where appellant had possession of the charge in essentially the same form as submitted for four days, adequate time for objection was given); Dillard v. Dillard, 341 S.W.2d 668, 675 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (opining that fifteen minutes was probably an insufficient amount of time to review the charge, but overruling the point of error since appellants failed to state how this time limitation harmed them).

58. TEX. R. CIV. P. 272.

59. *See* Brantley v. Spargue, 636 S.W.2d 224, 225 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.) (informing that an objection dictated outside the presence of the judge would be waived).

plaint.[60] The objection must be stated such that an appellate court can conclude that the trial court was "fully cognizant of the ground of the complaint" and deliberately chose to overrule it.[61] A party cannot adopt by reference prior objections to the charge.[62]

For example, a proper objection might state: "[Party] objects to question two, wherein it asks what the amount of damages are without an 'if any' after the term 'damages,' as it is a comment on the weight of the evidence and implies to the jury that the plaintiff has sustained some damages." The objection specifically points out what is objectionable, the legal basis for the objection, and applies the legal basis to the charge issue. Otherwise stated, it shows what, why, and where.

General objections are not sufficient to preserve error.[63] For example, courts have held that the following complaints, without explanation, are too general to preserve error: (1) complaining that a

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60. TEX. R. CIV. P. 274 (stating that "[a] party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection"); *see also* Castleberry v. Branscum, 721 S.W.2d 270, 276 (Tex. 1986) (affirming that "[t]he purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for complaint" (citing Brown v. Am. Transfer & Storage, 601 S.W.2d 931, 938 (Tex. 1980); Davis v. Campbell, 572 S.W.2d 660, 663 (Tex. 1978)). "An objection that does not meet both requirements is properly overruled and does not preserve error on appeal." *Castleberry*, 721 S.W.2d at 276.

61. McDonald v. N. Y. Cent. Mut. Fire Ins. Co., 380 S.W.2d 545, 550 (Tex. 1964); Bell v. Mo.-Kan.-Tex. R.R. Co. of Tex., 334 S.W.2d 513, 515-16 (Tex. Civ. App.—Fort Worth 1960, writ ref'd n.r.e.); *see also* TEX. R. APP. P. 33.1(a)(1)(A) (identifying that the record must show "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint").

62. TEX. R. CIV. P. 274; *see also* Verret v. Am. Biltrite, Inc., No. 2-04-244-CV, 2006 WL 2507318, at *2 (Tex. App.—Fort Worth Aug. 31, 2006, pet. filed) (mem. op.) (determining that the appellants failed to preserve error as to a "but for" instruction when they merely referred back to a similar objection); Robinson Drilling Co. v. Thomas, 385 S.W.2d 725, 728 (Tex. Civ. App.—Eastland 1964, no writ) (pointing out that Rule 274 prohibits adopting objections by reference).

63. *See* TEX. R. CIV. P. 274 (insisting that an objection "must point out distinctly the objectionable matter"); Carlton v. Cobank, Inc., No. 07-02-0258-CV, 2003 WL 1728493, at *3 (Tex. App.—Amarillo Apr. 1, 2003, pet. denied) (mem. op.) (emphasizing that an objection must describe "the objectionable matter and the grounds"); Delaney v. Scheer, No. 03-02-00273-CV, 2003 WL 247110, at *3 (Tex. App.—Austin Feb. 6, 2003, no pet.) (mem. op.) (noting that a general objection is not sufficient to preserve error); City of Brenham v. Honerkamp, 950 S.W.2d 760, 766 (Tex. App.—Austin 1997, writ denied) (explaining that if an objection is too general it is waived); Ron Craft Chevrolet, Inc. v. Davis, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (lamenting, "Appellant's objection to the submission of jury question number one was so general as to be almost meaningless").

definition is not a correct legal definition;[64] (2) the issue is a comment on the weight of the evidence;[65] (3) the instruction may confuse the jury;[66] (4) the issue may prejudice the jury toward a party;[67] (5) the issue is global;[68] (6) there is a variance between the pleadings and proof;[69] (7) the issue is too broad;[70] (8) the issue places an improper burden on the defendant;[71] (9) the issue does not inquire as to the correct measure of damages;[72] and (10) the instruction omits an essential element.[73]

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64. *See City of Brenham*, 950 S.W.2d at 766 (holding that the city's objection, based on incorrect legal definitions, was not specific enough); Motor 9, Inc. v. World Tire Corp., 651 S.W.2d 296, 301 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (declaring that a general objection to the legal definitions without pointing to the specific problem does not preserve error).

65. *See* Baker Material Handling Corp. v. Cummings, 692 S.W.2d 142, 145 (Tex. App.—Dallas 1985) (noting that a general objection that the charge comments on the weight of the evidence does not comply with Rule 274), *writ dismissed by agr.*, 713 S.W.2d 96 (Tex. 1986); Hickman v. Durham, 213 S.W.2d 569, 570 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.) (ruling that the objection did not explain how or why the charge is comment on the weight of the evidence).

66. *See* Castleberry v. Branscum, 721 S.W.2d 270, 276-77 (Tex. 1986) (observing that merely stating that the charge "may confuse the jury" is too general to preserve error).

67. *See id.* (stating that objecting that the charge may "prejudice the defendant" is not an adequate explanation).

68. *See* Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 938 (Tex. 1980) (noting that "[a]n objection to an issue which states that it is global . . . is no good").

69. *See id.* (announcing that "[i]f there [is] a variance between pleadings and proof, the distinct and specific variance or other defect must be stated in the objection or it is waived"); Ron Craft Chevrolet, Inc. v. Davis, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (noting that an objection to the pleadings that it is not proper support for the issue is not a sufficiently precise objection).

70. *See* Mathis v. State, 258 S.W.2d 200, 210 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.) (asserting that merely contending a matter is "too broad" is not particular enough to preserve error).

71. *See* McDonald v. N. Y. Cent. Mut. Fire Ins. Co., 380 S.W.2d 545, 549 (Tex. 1964) (establishing that simply saying a charge puts too great a burden on the defendant does not sufficiently direct the court's attention to any error).

72. *See* Whitson Co. v. Bluff Creek Oil Co., 156 Tex. 139, 293 S.W.2d 488, 493 (1956) (determining that a general objection stating that an issue does not properly address the measure of damages is not distinct enough to preserve error).

73. *See* Ford Motor Co. v. Maddin, 124 Tex. 131, 76 S.W.2d 474, 479 (1934) (stating that an objection which only points out the omission of the "essentials of a correct definition" is not enough to preserve error).

3. Obscured Objections

An objection may be waived if it is "obscured or concealed by voluminous unfounded objections."[74] Therefore, a party should not make an objection that is groundless, such as a factual sufficiency objection. This is a groundless objection because questions must be submitted, even if there is factually insufficient evidence to support them, so long as there is some probative evidence.[75] The test is whether by making voluminous objections, a party deprives the trial court of the real "opportunity to correct any errors in the charge."[76] It is not so much the number of objections that obscure, but the number of frivolous and patently meritless objections.[77] A

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74. TEX. R. CIV. P. 274; *see also* Monsanto Co. v. Milam, 494 S.W.2d 534, 537 (Tex. 1973) (showing that an objection may be waived because it is hidden by other general stock objections); Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324, 330-31 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (finding that "[s]ince [the party] used a 'laundry list' of objections to each of the special issues, and did not sufficiently apprise the trial court [of specific objections] . . . , that objection must be deemed waived"); Clarostat Mfg., Inc. v. Alcor Aviation, Inc., 544 S.W.2d 788, 792 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) (demonstrating that the inclusion of thirty-two groundless objections obscured the legitimate objections); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 100-01 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.) (asserting that a request may be legally insufficient where it is submitted in the form of an en masse bulk submission).

75. *See* Strauss v. LaMark, 366 S.W.2d 555, 558 (Tex. 1963) (holding that "[t]he district judge was required to submit [the issue] to the jury even though a negative answer might be contrary to the overwhelming preponderance of the evidence"); Hinote v. Oil, Chem. & Atomic Workers Int'l Union, 777 S.W.2d 134, 143 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (declaring that "[f]actual insufficiency of the evidence furnishes no basis for the refusal to submit an issue"); Smith v. State, 523 S.W.2d 1, 4 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (stating that if any probative evidence exists to support the issues, the court has a duty to submit them); *see also* Long Island Owner's Ass'n v. Davidson, 965 S.W.2d 674, 680 (Tex. App.—Corpus Christi 1998, pet. denied) (explaining that "[a] trial court bases its decision to submit jury questions on the basis of legal sufficiency, not factual sufficiency").

76. Northcutt v. Jarrett, 585 S.W.2d 874, 880 (Tex. Civ. App.—Amarillo 1979), *writ ref'd n.r.e.*, 592 S.W.2d 930 (Tex. 1979) (per curiam).

77. *See* Tefsa v. Stewart, 135 S.W.3d 272, 275-76 (Tex. App.—Fort Worth 2004, pet. denied) (deciding that the appellants' damages question complaint was obscured because of the addition of no-evidence objections to each damages element); Tex. Natural Res. Conservation Comm'n. v. McDill, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ) (holding that appellant's proposed instruction preserved error despite the fact that eleven separate instructions were requested); Baker Material Handling Corp. v. Cummings, 692 S.W.2d 142, 145-46 (Tex. App.—Dallas 1985) (rejecting appellees' argument that the seventeen general objections made by appellants obscured their specific objections), *writ dismissed by agr.*, 713 S.W.2d 96 (Tex. 1986). The number of objections violates Rule 274 when the trial court is deprived of error correcting opportunity. *Cummings*, 692 S.W.2d at 145-46 (citing *Northcutt*, 585 S.W.2d at 880).

party can reduce the volume of its objections by saving any complaints to the charge that can be effectively raised in a post-trial motion, such as legal insufficiency, until after trial.[78] Thus, a party will not obscure valid objections if it makes only those objections that are arguably valid and that are necessarily raised at the charge conference.

C. *Invited Error*

It should go without saying that a party cannot complain on appeal about a matter that it requested in the trial court. However, parties have tried to do so—to no avail.[79] For example, in *Brandywood Housing, Ltd., v. Texas Department of Transportation*,[80] the plaintiff asked the trial court to remove proximate cause from the jury charge, and thus could not argue on appeal that the charge should have included a proximate cause issue.[81]

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78. *See, e.g.*, Williams v. L.M.S.C. Inc., No. 01-03-00924-CV, 2005 WL 2469876, at *4 (Tex. App.—Houston [1st Dist.] Oct. 6, 2005, pet. denied) (mem. op.) (informing that legal and factual sufficiency points "'may be made for the first time after verdict'" (quoting TEX. R. CIV. P. 279)).

79. *See, e.g.*, Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 920 (Tex. 1993) (stressing that "[p]arties may not invite error by requesting an issue and then objecting to its submission"); Ne. Tex. Motor Lines, Inc. v. Hodges, 138 Tex. 280, 158 S.W.2d 487, 488 (1942) (noting "that a litigant cannot ask something of a court and then complain that the court committed error in giving it to him"); Christenberry v. Webber, No. 01-04-00109-CV, 2006 WL 304838, at *12 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, no pet.) (mem. op.) (identifying that when "a party requests an erroneous instruction in the jury charge that is actually submitted in the charge, that party cannot complain of the submitted instruction on appeal"); Brandywood Hous., Ltd, v. Tex. Dep't of Transp., 74 S.W.3d 421, 425 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (stating that "[a] litigant cannot ask something of the trial court and then complain on appeal the trial court gave it to him"). *But see* Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 846-47 n.4 (Tex. 2005) (finding that a party properly preserved error as to an instruction the party had previously agreed to during a pretrial hearing). In *Adderley*, the petitioner objected to an instruction similar to one it had included in a previous charge and agreed to at a pretrial hearing. *Id.* However, because the previous charge was superseded when the petitioner offered the instruction, and because pretrial hearings are not on the record, the supreme court held the error was preserved. *Id.*

80. 74 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

81. *Brandywood*, 74 S.W.3d at 425 (stressing that because the party had asked the trial court to remove proximate cause from the jury charge, that same party could not on appeal argue that the jury charge should have included proximate cause).

D. *Rulings on Requests or Objections*

The trial court must sign the request and either refuse it, grant it, or modify the request and grant it as modified.[82] Rule 276 states that:

> When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.[83]

The party must then file the request with the court's clerk.[84] Rule 276 provides that there shall be a written ruling on each request.[85] However, the Texas Supreme Court has held that although this rule requires the trial court to endorse "refused" on requests that are refused and to sign them officially, that error is also preserved by having an oral ruling on the record.[86]

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82. *See* TEX. R. CIV. P. 276 (detailing the procedure for refusals and modifications of jury charge submissions); *see also* Hirsch v. Hirsch, 770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ) (refusing to consider a request for point of error because it was not endorsed by the judge); Newman v. Deli Gas Pipelines Co., 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ) (explaining that "if a party desires to request definitions or special issues, he shall make his requests in writing and timely present them to the court, who shall note his ruling thereon, such as 'refused,' 'given,' or 'modified and given' as the case may be").

83. TEX. R. CIV. P. 276.

84. *See* Tex. R. Civ. P. 272 (mandating that the charge "be in writing, signed by the court, and filed with the clerk").

85. TEX. R. CIV. P. 276; *see* Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 181 (Tex. App.—Waco 1987, writ denied) (holding that the court would not allow a request to serve as a bill of exceptions that was not officially signed and endorsed indicating refusal).

86. *See* Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382, 386-87 (Tex. 1997) (holding that where the record clearly shows refusal by the court, error may be preserved even though the court did not sign the request), *overruled on other grounds by* Torrington Co. v. Stutzman, 46 S.W.3d 829, 840 n.9 (Tex. 2000). One court of appeals has held that

After making specific objections that inform the court of the objectionable language in the charge and why such language is objectionable, the party should ask the court to expressly rule on the party's objections. Texas Rule of Civil Procedure 272 states:

> The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and to the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.[87]

Oral or written rulings to objections are permitted and will preserve error.[88]

There is an issue regarding whether error is preserved—where a party objects to a charge or makes a request and even though the court does not expressly overrule it, the court does not alter the charge—and whether there can be an implied ruling on charge objections and requests. The Texas Rules of Civil Procedure would suggest that error is not preserved.[89] Consistent with the rules, in *Cogburn v. Harbour*,[90] the Texas Supreme Court held that there were no implied rulings on objections to the charge.[91] However, in *Acord v. General Motors Corp.*,[92] the court overruled that aspect of *Cogburn*, and stated: "We interpret the presumptive provision of Rule 272 to mean that if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity,

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where there is no written ruling and no oral ruling, any error is waived. Riddick v. Quail Harbor Condo. Ass'n, 7 S.W.3d 663, 675-76 (Tex. App.—Houston [14th Dist.] 1999, no pet).

87. TEX. R. CIV. P. 272.

88. *See, e.g.*, *Liedeker*, 958 S.W.2d at 386-87 (expressing that error may be preserved by either endorsement by the court or statements clearly preserved in the record).

89. *See* TEX. R. CIV. P. 272, 273, 276 (requiring objections to be "in writing," "written," and "signed," respectively).

90. 657 S.W.2d 432 (Tex. 1983) (per curiam), *overruled by* Acord v. Gen. Motors Corp., 669 S.W.2d 111 (Tex. 1984).

91. Cogburn v. Harbour, 657 S.W.2d 432, 432 (Tex. 1983) (per curiam) (ruling that "implied rulings are not sufficient"), *overruled by* Acord v. Gen. Motors Corp., 669 S.W.2d 111 (Tex. 1984).

92. 669 S.W.2d 111 (Tex. 1984).

overruled."[93] Accordingly, there can be implied or implicit rulings on charge objections where the objections are unambiguously presented to the trial court and the trial court fails to change the charge.[94]

Regarding requests, some courts hold that where there is a showing in the record that the trial court considered the request, but did not include it in the charge, that error is preserved.[95] Several courts have held that simply filing a request with the clerk, where the record does not show that it was ever presented to the trial court, will not preserve error.[96] Therefore, a party should always

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93. *Accord*, 669 S.W.2d at 114 (finding implied rulings to charge objections in Rule 272 and overruling *Cogburn*); *see also* TEX. R. CIV. P. 272 (stating that "[i]t shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon").

94. *See In re* D.R., 177 S.W.3d 574, 584 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that because the court did not make any changes to the charge, the objection is considered overruled).

95. *See, e.g.*, Primrose Operating Co. v. Jones, 102 S.W.3d 188, 197-98 (Tex. App.—Amarillo 2003, pet. denied) (finding that although the party did not "orally argue each question submitted by it to the trial court," the party's written requests, as well as its oral presentation, "were sufficient to call the trial court's attention to the issues and thus preserve the question for appellate review"); Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 657 (Tex. App.—Dallas 2002, pet. denied) (concluding that no waiver of error occurred because the appellants "offered instructions and objected when they were not submitted"); Oechsner v. Ameritrust Tex., N.A., 840 S.W.2d 131, 133 (Tex. App.—El Paso 1992, writ denied) (stating that " error is properly preserved even when the proposed instruction does not contain the judge's signature if 'the record clearly demonstrates that the instruction was "timely presented, opposing counsel knew it was before the trial court and the trial court clearly refused to submit it"'" (quoting Chem. Express Carriers, Inc. v. Pina, 819 S.W.2d 585, 589 (Tex. App.—El Paso 1991, writ denied))).

96. *See* Munoz v. Berne Group, Inc., 919 S.W.2d 470, 472 (Tex. App. —San Antonio 1996, no writ) (determining that while the proposed charge was tendered to the court, error was not preserved because nothing in the record shows that the requested instruction was properly brought to the court's attention); *see also* F.S. New Prods., Inc. v. Strong Indus., Inc., 129 S.W.3d 606, 622 (Tex. App.—Houston [1st Dist.] 2004) (rejecting appellant's argument that the trial court "implicitly denied the requested instruction by not including it in the court's charge," because "the record does not show that the trial court ruled, orally or in writing, or was otherwise aware of the requested instruction"), *rev'd on other grounds*, 49 Tex. Sup. Ct. J. 448, 2006 WL 662740 (Tex. Mar. 17, 2006); Hoffmann-La Roche, Inc. v. Zeltwanger, 69 S.W.3d 634, 652-53 (Tex. App.—Corpus Christi 2002) (reasoning that although appellant "filed with the court numerous jury instructions and questions[,] . . . there is no showing that [appellant] made the trial court aware of its complaint and obtained a ruling"), *rev'd on other grounds*, 144 S.W.3d 438 (Tex. 2004); *cf.* TEX. R. APP. P. 33.1(a)(1) (mandating that for error be preserved, the record must show that an objection was specific enough to bring the complaint to the court attention).

note on the record that it is submitting its request to the court.[97] However, it is always the safest course to obtain an express ruling by the trial court on any complaint.[98]

III. Conflict Between Charge Rules and Charge Submission

An inherent conflict currently exists in Texas charge practice. For the most part, the charge rules were written in the 1940s when Texas followed the special submission practice.[99] Elements of each claim or defense were submitted independently as questions.[100] Currently, Texas follows the broad-form submission practice where ultimate issues are submitted to the jury in only a few questions with instructions to define and explain the law.[101] Therefore, the charge preservation of error rules do not match the charge submission practice that currently exists.[102] This creates conflict and

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97. *See Munoz*, 919 S.W.2d at 472 (stating that "[i]n order to preserve a point for appellate review, a party must make its objection known to the court in a timely and clear fashion and obtain a ruling"). Because the record was void of any indication that the court was aware of the requested instruction, the appellate court could only state, "The judge may, or may not, have been aware that this requested instruction was tucked away in the requested charge." *Id.*

98. *See id.* (explaining that while an express ruling by the trial court is not the exclusive method to preserve error, a judge's express ruling does give rise to a legal presumption of error preservation).

99. *See* 34 T. Ray Guy & Nancy Saint-Paul, Texas Practice Series: The Jury Charge in Texas Civil Litigation § 5.4 (3d ed. 2006) (explaining that the early Texas preference for separate and distinct jury issues was adopted when Texas Rule of Civil Procedure 277 became law in 1941).

100. *Id.* (noting that "[u]nder early Texas caselaw and statutes, each issue of fact was submitted 'separately and distinctly' to the jury").

101. *See* Tex. R. Civ. P. 277 (stating that "[i]n 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"); *see also* Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 587 (1973) (noting that many special issues would be replaced by explanatory instructions in a jury charge). The 1941 version of Rule 277 was amended in 1973 to include the broad-form mandate. 34 T. Ray Guy & Nancy Saint-Paul, Texas Practice Series: The Jury Charge in Texas Civil Litigation § 1.3 (3d ed. 2006).

102. *See* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 240-41 (Tex. 1992) (outlining the problems created by the move from special to broad issue submission). The *Payne* court admitted that the change to broad issue submissions, while intended to alleviate some of the difficulties, actually caused greater complication. *Id.* at 240. The court further suggested that the basic problem arose from a discord in the charge preservation of error structure: "The flaws in our charge procedures stem partly from rules governing those procedures and partly from caselaw applying those rules." *Id.* at 241.

confusion as to the correct method to preserve error.[103]

For example, it has become less clear whether an omitted element is an error of commission, which requires an objection, or an error of omission, which requires a request. If a cause of action's four elements are submitted in their granulated form, four independent questions are submitted. If the court fails to submit one of the elements, the error is clearly one of omission which requires a request to preserve error.[104] However, in broad-form practice, all four elements would be in the same single jury submission.[105] If one of the elements is missing, is the error one of omission or commission? The authors believe that if the broad-form submission is not affirmatively correct, then it is an error of commission and an objection should be required to preserve error. Because the question does not have all required elements, it is affirmatively wrong, and thus an objection should be required and be sufficient to preserve error. As one commentator has stated:

> It seems that if the issue, definition or instruction which the court is submitting can be said to be correct, in form and substance, complaints about failure to include additional instruction[s] or language are really complaints about omissions, and thus require requests.
>
> On the other hand, if it can be said that the issue, definition or instruction is affirmatively erroneous, whether from including something that is improper or omitting something essential, the error is one of commission and is preserved by objection.[106]

Another area that creates confusion due to the conflict between the charge rules and the current practice is when an instruction comments on the weight of the evidence. Under broad-form prac-

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103. *Id.* at 240-41 (lamenting that because the confusion of the burden of proof broad-form causes among parties, it has become difficult to determine who the complaining party should be).

104. *See* TEX. R. CIV. P. 274 (requiring parties to object "on account of any defect, omission, or fault" in an instruction to preserve error).

105. *See* Isern v. Watson, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied) (explaining broad-form submission as possibly being a jury question that includes multiple elements of liability).

106. LOUIS S. MULDROW, AVOIDING AND PRESERVING ERRORS IN THE CHARGE A-4 (1993) (on file with the *St. Mary's Law Journal*); *see also* Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 449-50 (Tex. 1967) (determining that a failure to instruct on mitigation of damages was an erroneous submission which would be preserved by objection); Sutter v. Hendricks, 575 S.W.2d 308, 310 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (holding that an omission from the instruction of one of two statutory requirements rendered the submission erroneous, and thus preservable by objection).

tice, several causes of action may be submitted in one question.[107] As due process requires that the jury be properly instructed on the law, the use of broad-form questions requires the extensive use of instructions.[108] However, under the current charge rules and precedent interpreting them, excessive instructions in the charge can be a comment on the weight of the evidence. [109] Even if an instruction is correct and is supported by the evidence, it can still be a comment on the weight of the evidence.[110] Therefore, trial courts must delicately balance between submitting enough instructions to meet due process concerns and not submitting so many as to be a comment on the weight of the evidence. These are but two examples of the confusion and difficulty associated with broad-form use under rules that were created for special submission practice.

IV. THE TEXAS SUPREME COURT ATTEMPTS TO REMEDY THE CONFLICT—*STATE DEPARTMENT OF HIGHWAYS & PUBLIC TRANSPORTATION V. PAYNE*

Due to the inherent confusion created by the use of special submission charge rules with broad-form practice, the Texas Supreme Court ambiguously loosened the formal preservation of charge

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107. *See* Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 554-55 (Tex. 1986) (approving the expansive use of broad-form submissions, including when a single issue encompasses several theories of liability).

108. *See* TEX. R. CIV. P. 277 (ordering the court to "submit such instructions and definitions as shall be proper to enable the jury to render a verdict"); *see also* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000) (expressing 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"); *Island Recreational*, 710 S.W.2d at 555 (holding that the trial court should include appropriate instructions when requested); Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 587 (1973) (discussing the increase of jury instructions that results from broad-form submission).

109. *See* Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 663-64 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (explaining that "[a]n instruction is a comment on the weight of the evidence if the judge assumed the truth of a material controverted fact, exaggerated, minimized, or withdrew relevant evidence from the jury's consideration" (citing Moody v. EMC Servs., Inc., 828 S.W.2d 237, 244 (Tex. App.—Houston [14th Dist.] 1992, writ denied))).

110. *See* Hirdler v. Boyd, 702 S.W.2d 727, 729-30 (Tex. App.—San Antonio 1988, writ ref'd n.r.e.) (noting that in determining if a comment is impermissible, the entire charge must be taken into consideration). However, instructions that incidentally comment on the weight of evidence are not impermissible. *See* Bd. of Regents of N. Tex. State Univ. v. Denton Const. Co. 652 S.W.2d 588, 595 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (pointing out that the judge "may incidentally comment where the comment is necessary or proper as part of an explanatory instruction or definition").

rules found in the Texas Rules of Civil Procedure.[111] Undoubtedly, the court's attempt was a noble effort to simplify and streamline charge practice.[112] The new rule states that error is preserved when "the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling."[113] However, as shown below, this noble attempt has not gone smoothly; it has actually caused more confusion and difficultly than the traditional charge preservation of error rules.

A. State Department of Highways & Public Transportation v. Payne

In 1992, the Texas Supreme Court determined in *State Department of Highways & Public Transportation v. Payne* that a party preserved charge error when the Texas Rules of Civil Procedure held otherwise.[114] In *Payne*, the trial court attempted to charge the jury on a negligence case based upon a broad-form question and accompanying instructions.[115] However, an instruction in the charge was incorrect because it did not contain a required element.[116] Under the Texas Rules of Civil Procedure and prior precedent, the defendant should have objected to the instruction as being an affirmatively incorrect statement of the law. [117] Alternatively, the error was arguably an omission of a missing element requiring the party to submit a requested instruction in substantially correct wording.[118] The defendant did neither; rather, it objected

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111. *See* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992) (creating a new test for determining preservation of error in the jury charge).

112. *See id.* (proclaiming the new test as a starting point in "reduc[ing] the complexity that case law has contributed to charge procedures").

113. *Id.*

114. *Compare id.* (holding that the defendant preserved error for defective instruction with a timely request brought to the court's attention), *with* TEX. R. CIV. P. 274 (requiring parties to object to a defective instruction to preserve error).

115. *See Payne*, 838 S.W.2d at 239 (emphasizing that the trial court correctly used broad-form questions as required by Texas Rule of Civil Procedure 277).

116. *Id.* at 240.

117. *Id.* at 242 (Mauzy, J., joined by Doggett & Gammage, JJ., dissenting) (citing to statutory and case law in stressing that "[t]o preserve any contention that the trial court erroneously charged the jury on the State's duty to Payne, the State was required to object to the trial court's instructions" (citing TEX. R. CIV. P. 274; Yellow Cab & Baggage Co. v. Green, 154 Tex. 330, 277 S.W.2d 92 (1955))).

118. *See* TEX. R. CIV. P. 278 (describing that "[f]ailure to submit a[n] . . . instruction shall not be deemed a ground for reversal . . . unless a substantially correct definition or instruction has been requested").

on an unrelated ground.[119] The defendant did request a jury question—instead of an instruction—on the missing element, but the request was affirmatively incorrect as it misplaced the burden of proof.[120] Under prior precedent, the defendant waived its complaint.[121]

Notwithstanding the defendant's obvious failure to meet the strict requirements for preservation of error, the supreme court decided that error was preserved.[122] The court basically held that even though an objection was required, a request not in substantially correct wording preserved error because the defendant's "request is clearer than such an objection because it calls attention to the very element . . . omitted from the charge."[123] The court stated:

> The issue is not whether the trial court should have asked the jury the specific question requested by the State; rather, the issue is whether the State's request called the trial court's attention to the State's complaint . . . sufficiently to preserve [error] . . . .
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> . . . .
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> . . . There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.[124]

The court justified the outcome in *Payne* by stating that charge preservation of error rules were difficult, the courts of appeals had not consistently applied the rules, and trial lawyers had a difficult time knowing how to properly preserve error in the charge.[125]

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119. *See Payne*, 838 S.W.2d at 239 (quoting the defendant's objection). The defendant complained, incorrectly, that the charge given by the trial court "constitutes a comment upon the weight of the evidence and amounts to an instruction to the jury that there is, in fact, a special defect, removes that issue from the province of the jury and keeps it from being a fact issue as it should be." *Id.* Rather, as stated by the court, the issue of "[w]hether a condition is a premise defect or a special defect is . . . an issue of law for the court to decide." *Id.* at 238.

120. *Id.* at 239.

121. *See* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992) (Mauzy, J., joined by Doggett & Gammage, JJ., dissenting) (stating that according to Rule 274 the court should hold that defendant waived the error).

122. *See id.* (concluding that error was preserved despite a failure to satisfy the precise statutory requirements).

123. *Id.* at 240.

124. *Id.* at 239-41.

125. *Id.* at 241. The court discussed at length the policy arguments in favor of a looser application of the rules, describing charge preservation of error rules as "difficult," deci-

Thus, instead of clarifying the rules by taking more cases dealing with charge preservation of error or by amending the charge rules, the court set out a vague, one-sentence guideline for preserving error in the charge.

B. *Interpretation of* Payne

Soon after *Payne*, one commentator stated that three conclusions may be drawn from the *Payne* decision: (1) an objection may not have to be as specific as before, especially where a request enhances or adds specificity; (2) objections and requests may become interchangeable; and (3) a request may not have to be in "substantially correct" wording to preserve error.[126]

More recently, Texas Supreme Court Justice Dale Wainwright, in a concurring opinion, described *Payne* not as a change of the Texas Rules of Civil Procedure, but as a means of "focus[ing] appellate review on substantive issues and simplify[ing] the procedures for error preservation." [127] He explained that Texas Rule of Civil Procedure 276 governs the situation where an instruction is omitted from the charge, which requires a request, and that Rule 274 governs when a defective instruction is included in the charge, which requires an objection.[128] He stated that under Rule 274, where an objection is needed, *Payne* simply redefines and enlarges an "objection" to include a "request":

> In 1992, in [*Payne*], the Court took a significant step forward in this process by holding that in some cases a request can serve as an objection sufficient to preserve error in a jury charge. . . . Under *Payne*, a request can serve as an objection for preservation purposes as long as the trial court is aware of the complaint and issues a ruling.[129]

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sions of the courts of appeals as "flatly contradictory" in many cases, and compliance with the rules as "a labyrinth daunting to the most experienced trial lawyer." *Payne*, 838 S.W.2d at 240.

126. *See* LOUIS S. MULDROW, CHARGE ERRORS—DOES PAYNE EASE PAIN—OR WHAT? G-3 (1997) (on file with the *St. Mary's Law Journal*).

127. First Valley Bank of Los Fresnos v. Martin, 144 S.W.3d 466, 474 (Tex. 2004) (Wainwright, J., concurring).

128. *Id.* at 474-75.

129. *Id.* at 474 (quoting *Payne*, 838 S.W.2d at 240-41) (citations omitted).

Moreover, Justice Wainwright would overrule *Hernandez v. Montgomery Ward & Co.*,[130] where the court found that "'[a] request . . . is not a substitute for an objection.'"[131]

A similar view of *Payne* has been adopted by the First Court of Appeals in Houston. In *Elliott v. Whitten*,[132] the court found that an objection and verbal recitation of an omitted instruction were not sufficient to preserve error under Rule 278.[133] The court determined that a party must file a written request to preserve error in this situation; however, the court noted that *Payne* held that an objection can be broadened to include a request, but only where there is a commission in the charge, not an omission.[134]

However, notwithstanding the commentators and the authority above, there has been very little real analysis of *Payne* and its effect on charge preservation of error. As shown below, some courts, including the Texas Supreme Court, have completely ignored *Payne* and have cited to the Texas Rules of Civil Procedure. Other courts have used *Payne* as a "King's X" of preservation of error and have applied it to find preservation where the rules and precedent would hold otherwise.

C. *Post*-Payne *Texas Supreme Court Precedent*

Following its opinion in *Payne*, the Texas Supreme Court revisited charge error preservation in *Texas Department of Human Services v. Hinds*.[135] In *Hinds*, the defendant attempted to complain on appeal about the trial court's failure to submit an instruction

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130. 652 S.W.2d 923 (Tex. 1983), *overruled in part by* Acord v. Gen. Motors Corp., 669 S.W.2d 111 (Tex. 1984).

131. *Martin*, 144 S.W.3d at 476 (Wainwright, J., concurring) (quoting *Hernandez*, 652 S.W.2d at 925).

132. No. 01-02-00065-CV, 2004 WL 2115420 (Tex. App.—Houston [1st Dist.] Sept. 23, 2004, pet. denied) (mem. op.).

133. Elliott v. Whitten, No. 01-02-0065-CV, 2004 WL 2115420 at *12 (Tex. App.—Houston Sept. 23, 2004, pet. denied) (mem. op.) (explaining that "[b]ecause [R]ule 278 expressly requires a written submission to preserve error concerning an omitted instruction, our allowing a verbal objection or an oral recitation of the instruction in lieu thereof would rewrite [R]ule 278 judicially, in contravention of *Payne*").

134. *See id.* (stressing that "an oral objection or the reading of the instruction into the record, by itself, will not preserve error, even after *Payne*"). The court of appeals pointed out that because the rules do not explicitly prohibit requests substituting for objections, *Payne* could add flexibility to charge preservation without judicially rewriting the rules. *Id.* at 11.

135. 904 S.W.2d 629, 637-38 (Tex. 1995).

where the defendant's request for such was not in substantially correct wording.[136] The supreme court found that this preserved error for two reasons: (1) the defendant's instruction was taken from a concurring opinion of the Texas Supreme Court; and (2) the submitted instruction "called the trial court's attention to the causation element missing in [the] [q]uestion." [137] Interestingly, the court stated that under Rule 278, a party should make a written request when there is an error of omission.[138] Accordingly, the court may have backed away from any conclusion that a request and an objection are interchangeable.

In *Lester v. Logan*[139] the defendant requested a question, definitions, and instructions in the same document.[140] The trial court refused the document, and the court of appeals held that the defendant failed to preserve error in their omission by submitting the charge en masse (a complete charge) and not in substantially correct form, concluding that the trial court was not required to separate the good from the bad.[141] The supreme court denied the writ of error, but in so doing, disapproved of the lower court's holding on the charge error preservation issue.[142]

Similarly, in *Alaniz v. Jones & Neuse, Inc.*,[143] the plaintiff submitted a charge en masse at the beginning of trial, but at the charge conference simply objected to a missing element of damages.[144] The court of appeals held that the plaintiff waived any charge error because its charge submission was offered en masse and not in a timely fashion.[145] The supreme court disagreed and decided that, "[u]nder the reading of Rule 273 [that] *Payne* requires," a question could be submitted in a complete charge if it was not obscured and

136. Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 637-38 (Tex. 1995) (noting that defendant "did not request the instruction that should have been given").

137. *Id.* at 638.

138. *See id.* at 637 (stating that "[t]o complain of this error [of omission] on appeal, [defendant] was obliged to make a written request" (citing TEX. R. CIV. P. 278)).

139. 907 S.W.2d 452 (Tex. 1995) (per curiam).

140. Lester v. Logan, 907 S.W.2d 452, 453 (Tex. 1995) (per curiam) (denying a writ of error, and disapproving of the court of appeals's analysis of *Payne*).

141. *Id.*

142. *Id.* (noting that "in denying the application for writ of error, a majority of the court disapproves of the analysis of the court of appeals concerning this issue" (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992))).

143. 907 S.W.2d 450 (Tex. 1995) (per curiam).

144. Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450, 451 (Tex. 1995) (per curiam).

145. *Id.*

the court found that the defendant timely objected to the omission after it received the charge.[146]

In *Universal Services Co. v. Ung*,[147] the court found that a party did not preserve a complaint as to an omitted instruction even though the party requested that the instruction be submitted.[148] The party's request only referred to an earlier question, and the party failed to make it clear to the trial court that the requested instruction was also intended to apply to the subsequent question.[149] However, in *Southeastern Pipe Line Co. v. Tichacek*,[150] the court determined that a party preserved error as to the omission of a limiting instruction which rendered a question defective, even though the party failed to adequately object at the charge conference.[151] The court looked at the whole record, which indicated that there were several times the party had adequately explained its position before the charge conference.[152]

The specificity of a request was scrutinized in *Texas Workers' Compensation Insurance Fund v. Mandlbauer*.[153] The court stated that the trial court did not err in refusing to submit jury instructions and definitions relevant to a legal term not included in the charge.[154] Importantly, the court stated: "[F]or an instruction to be proper, it must (1) assist the jury; (2) accurately state the law; and (3) find support in the pleadings and the evidence."[155] This curious sentence would seem to imply that a request must be in substantially correct wording, i.e., accurately state the law. This same sen-

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146. *Id.* at 451-52 (finding that a question could be submitted in a complete charge if it was not obscured, and that there was a timely objection to the omission after the jury received the charge).

147. 904 S.W.2d 638 (Tex. 1995).

148. Universal Servs. Co. v. Ung, 904 S.W.2d 638, 640 (Tex. 1995).

149. *Id.* (finding that even though a party requested that the instruction be submitted to the jury, the party did not preserve error, because the trial court was not clear as to "the nature of its present complaint").

150. 997 S.W.2d 166 (Tex. 1999).

151. Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 172-73 (Tex. 1999).

152. *Id.* (concluding that error was properly preserved because the party "reurged its prior objections during the charge conference").

153. 34 S.W.3d 909 (Tex. 2000) (per curiam).

154. *See* Tex. Workers' Comp. Ins. Fund v. Mandlbauer, 34 S.W.3d 909, 911-12 (Tex. 2000) (per curiam) (stating that it was not a trial court's "abuse of discretion to refuse to define a term not used in the charge").

155. *Id.* at 912.

tence was used in *Union Pacific Railroad Company v. Williams*,[156] where the court failed to even refer to *Payne*.[157] The issue was whether the defendant preserved error on the omission of an instruction on foreseeability.[158] The court stated:

> An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. "Failure to submit [an instruction] shall not be deemed a ground for reversal of the judgment unless a substantially correct [instruction] has been requested in writing and tendered by the party complaining of the judgment."[159]

In applying this law to facts, the court held:

> Although we conclude that the trial court should have submitted a foreseeability instruction as it relates to Union Pacific's duty, we must still determine whether Union Pacific preserved error on its jury charge complaint. Under our procedural rules, a party must submit a written, "substantially correct" instruction to the trial court to complain on appeal that the trial court erroneously refused the instruction.
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> Here, Union Pacific submitted a written proposed instruction advising the jury that "you must be satisfied" that Union Pacific had knowledge about the dangerous condition. Williams argues that Union Pacific did not propose a "substantially correct" instruction, because Texas courts have consistently held that a jury charge's using the word "satisfy" to express the burden of proof is erroneous. This is because, in Texas, the term "satisfy" overstates the plaintiff's burden of proof—preponderance of the evidence—in ordinary civil cases.
>
> We conclude that Union Pacific's proposed instruction was substantially correct. . . . Accordingly, Union Pacific's request preserved error on its jury charge complaint, because the request was substantially correct.[160]

Therefore, the court used a traditional pre-*Payne* analysis requiring a substantially correct request in determining that Union Pa-

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156. 85 S.W.3d 162 (Tex. 2002).

157. *See* Union Pac. R.R. v. Williams, 85 S.W.3d 162, 162-71 (Tex. 2002) (lacking any reference to the *Payne* decision).

158. *Id.* at 167.

159. *Id.* at 166 (citations omitted) (quoting TEX. R. CIV. P. 278).

160. *Id.* at 166, 169-70 (citations omitted).

cific did preserve error. Likewise, in *St. Joseph Hospital v. Wolff*,[161] the supreme court cited to the Texas Rules of Civil Procedure instead of *Payne*, and held that the defendant preserved error as to a defective definition where it both objected and submitted a substantially correct request.[162] Later that same year, however, the *Payne* preservation of error test was relied upon in *Miga v. Jensen*,[163] in which the court decided that the defendant preserved error to an improper submission of damages by objecting to it.[164]

In *Holubec v. Brandenberger*,[165] the trial court submitted a question asserting one defense of the defendants; however, the question was not the one submitted by the defendants.[166] The defendants offered a written request for their defense, but it was not in substantially correct wording.[167] The defendants also objected to the question, but the objection was vague. [168] The court of appeals concluded that the defendants waived the submission of its version of the defense. [169] The Texas Supreme Court determined, however, that the defendants did preserve error because the defendants' motion for summary judgment earlier in the case clarified its charge objection.[170] Therefore, the court held that the defendants did preserve charge error where it "plainly sought the submission of their statutory defense" even though at trial the defendants' objection was vague and the defendants' request was incorrectly worded.[171]

Finally, the supreme court recently examined whether a party may preserve error in a charge that the party had previously agreed

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161. 94 S.W.3d 513 (Tex. 2002).

162. *See* St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 525 & n.31 (Tex. 2002) (noting that the petitioner had properly preserved error by specifically objecting and tendering an instruction).

163. 96 S.W.3d 207 (Tex. 2002).

164. *See* Miga v. Jensen, 96 S.W.3d 207, 213 & n.24 (Tex. 2002) (holding that error had been preserved where the court acknowledged that the respondent's objection was on the record) (quoting State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992)).

165. 111 S.W.3d 32 (Tex. 2003).

166. Holubec v. Brandenberger, 111 S.W.3d 32, 39 (Tex. 2003).

167. *Id.* at 38.

168. *See id.* (noting that the court of appeals determined that the defendants' objection was "naked" and lacked adequate explanation).

169. *Id.*

170. *Id.* at 38-39.

171. *Holubec*, 111 S.W.3d at 39 (ruling that the defendants' request plainly showed the submission they sought and also noting the defendants' objection was sufficient under Rule 274 of the Texas Rules of Civil Procedure).

to at a pretrial hearing. In *Sterling Trust Co. v. Adderley*,[172] the trial court submitted a defective instruction on a breach of fiduciary duty claim.[173] Basically, the trial court submitted the pattern jury charge instruction on breach of fiduciary duty, but the parties had limited the common law fiduciary duties by contract.[174] Thus, the instruction was overly broad and defective.[175] The defendant objected to the instruction at the charge conference.[176] Interestingly, the court found that the defendant did not waive error when he agreed to the instruction at a pretrial hearing or when his proposed charge had a similar instruction, because "the proposed charge was superseded by a subsequent amended charge that contained no such instruction, and the alleged pretrial agreement [was] not part of the record."[177] The court, citing *Payne*, stated that because the defendant "made a clear, timely objection and obtained a ruling, . . . it preserved error."[178]

D. *Courts of Appeals Reaction to* Payne

The courts of appeals have been similarly inconsistent in post-*Payne* charge preservation of error cases. The following is a description of how the courts of appeals have ruled upon previously well-founded preservation rules.

1. Requests in Substantially Correct Wording?

The requirement that a request be in substantially correct wording seems to have been overruled by the Texas Supreme Court in *Payne*, so long as the request brings the error to the attention of the trial court.[179] In *State Farm Lloyds, Inc. v. Williams*,[180] the court of

172. 168 S.W.3d 835 (Tex. 2005).

173. Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 846-47 (Tex. 2005) (identifying that the trial court submitted an improper instruction, "render[ing] the [jury] question defective").

174. *Id.* at 846-47 & n.4.

175. *Id.* at 847.

176. *Id.* at 846.

177. *Id.*

178. *Sterling Trust Co.*, 168 S.W.3d at 846-47 n.4 (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 239 (Tex. 1992)).

179. *See Payne*, 838 S.W.2d at 241 (creating the new test for preservation of charge error which includes an element of awareness of the complaint but lacks any element of substantially correct wording).

180. 960 S.W.2d 781 (Tex. App.—Dallas 1997, pet. dism'd by agr.).

appeals held that a request that was likely not in substantially correct wording—a general, broad damage question—did preserve error because it brought the omission to the court's attention.[181]

However, in *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*,[182] the court found that a party did not preserve error in the omission of a matter where the party submitted a request that was not in substantially correct wording and objected to the omission at the charge conference. [183] In the years since *Payne*, the "substantially correct wording" requirement has been kept alive by a number of courts of appeals decisions, many of which, interestingly, mention the *Payne* preservation of error test.[184]

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181. State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 790 (Tex. App.—Dallas 1997, pet. dism'd by agr.) (holding that the even though the appellees' request was "not exactly a model of clarity," error was preserved in light of "the supreme court's more recent interpretation of the jury charge rule").

182. 865 S.W.2d 68 (Tex. App.—Corpus Christi 1993, writ denied).

183. Tex. Commerce Bank Reagan v. Lebco Constructors, Inc., 865 S.W.2d 68, 76 (Tex. App.—Corpus Christi 1993, writ denied) (finding that the party "failed to preserve error by the tender of an instruction incorrectly limiting damages"); *see also* Tex. Natural Res. Conservation Comm'n v. McDill, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ) (requiring that requests be in substantially correct wording).

184. *See* ASEP USA, Inc. v. Cole, 199 S.W.3d 369, 377 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing the *Payne* test, but nonetheless discussing the necessity of a substantially correct written request); Vu v. Rosen, No. 14-02-00809-CV, 2004 WL 612832, at *4 n.1 (Tex. App.—Houston [14th Dist.] Mar. 30, 2004, pet. denied) (mem. op.) (holding that appellant failed to make the trial judge aware of her objection as required by *Payne*, but also explaining that the requests must be in substantially correct wording); City of Weatherford v. Catron, 83 S.W.3d 261, 272 (Tex. App.—Fort Worth 2002, no pet.) (recognizing the *Payne* preservation of error test, but deciding that any error was waived, "[b]ecause the objection was not clear enough to preserve error and the proposed definition was not a substantially correct statement of law"); Conde v. Gardner, No. 14-99-01102-CV, 2001 WL 931416, at *3-4 (Tex. App.—Houston [14th Dist.] Aug. 9, 2001, no pet.) (not designated for publication) (citing *Payne*, but nevertheless declaring that error was not preserved because the requested instruction was not substantially correct); Shamrock Commc'ns, Inc. v. Wilie, No. 03-99-00852-CV, 2000 WL 1825501, at *7 (Tex. App.—Austin Dec. 14, 2000, pet. denied) (not designated for publication) (explaining the court's obligation to use the *Payne* test, but stating that the requested instruction was missing several key elements, and therefore did not preserve error); City of Austin v. Travis County Landfill Co., 25 S.W.3d 191, 203 (Tex. App.—Austin 1999) (asserting that the party had not "properly preserved this complaint because there is no record of any 'substantially correct definition or instruction' submitted"), *rev'd on other grounds*, 73 S.W.3d 234 (Tex. 2002); *see also* Barnett v. Coppell N. Tex. Court Ltd., 123 S.W.3d 804, 826 (Tex. App.—Dallas 2003, pet. denied) (defining the minimum requirements of "substantially correct wording" in stating that the "jury charge must define those words and other technical phrases that have distinct legal meanings").

2. Objections the Same as Requests?

In spite of the *Payne* decision's more lenient review of preservation of error, several cases have held that there is still a clear-cut distinction between objections and requests.[185] For example, in *Conde v. Gardner*,[186] the court of appeals held that an objection was required under the rules and that the party's request did not preserve error.[187] Similarly, in *Doe v. Mobile Tapes, Inc.*,[188] the court of appeals decided that a party waives a complaint about an omission in the charge unless it submits a request in substantially correct wording.[189] This same analysis was followed in *Gilgon, Inc. v. Hart*,[190] and *Mason v. Southern Pacific Transportation Co.*,[191] where the courts held that an objection was not sufficient to preserve error where a request was required.[192] In fact, the *Gilgon* court expressly stated that the appellant was "mistaken in relying on *Payne* for the proposition that the 'one test' to determine if error has been preserved is whether the party made the trial court sufficiently aware of its complaint."[193] More recently, in *ASEP*

185. *See* Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc., 937 S.W.2d 60, 69 (Tex. App.—Houston [14th Dist.] 1996) (affirming that "[a] party is required to object when the court submits an erroneous question, instruction or definition," and stating that "[a] written request is required only when a question, instruction or definition is omitted"), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998); Mason v. S. Pac. Transp. Co., 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that an objection did not preserve error where Texas Rule of Civil Procedure 278 required separate submission of a requested instruction in writing); Gilgon Inc. v. Hart, 893 S.W.2d 562, 565-67 (Tex. App.—Corpus Christi 1994, writ denied) (discussing the different circumstances where objections and requests should be given).

186. No. 14-99-01102-CV, 2001 WL 931416 (Tex. App.—Houston [14th Dist.] Aug. 9, 2001, no pet.) (not designated for publication).

187. Conde v. Gardner, No. 14-99-01102-CV, 2001 WL 931416, at *3-4 (Tex. App.—Houston [14th Dist.] Aug. 9, 2001, no pet.) (not designated for publication).

188. 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001, no pet.).

189. Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (holding that "[c]omplaints regarding omitted instructions are waived unless the complaining party requests and tenders a substantially correct instruction in writing").

190. 893 S.W.2d 562 (Tex. App.—Corpus Christi 1995, writ denied).

191. 892 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

192. Gilgon, Inc. v. Hart, 893 S.W.2d 562, 565-67 (Tex. App.—Corpus Christi 1995, writ denied) (clarifying that where a request was required, an objection was not sufficient to preserve error); Mason v. S. Pac. Transp. Co., 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that "[a] party is required to request and tender to the trial court a substantially correct instruction in writing when the trial court omits the instruction from the jury charge").

193. *Hart*, 893 S.W.2d at 565.

USA, Inc. v. Cole,[194] the court held that to complain about an omission, a party must submit a request and show that an objection would not suffice.[195]

However, some appellate decisions have held that one form of complaint might be sufficient to preserve error where the other form is technically required. In *Matthiessen v. Schaefer*,[196] the trial court submitted the defendant's affirmative defense, but without a required element.[197] The plaintiff should have objected to this incorrect submission,[198] but instead submitted a request that was not in substantially correct wording.[199] The court of appeals noted the similarities between this case and *Payne*, and found that the request was sufficient to preserve error.[200]

In fact, the addition of a request has proven useful in preserving error in several courts of appeals decisions. In *Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*,[201] the court held that a request could be used to clarify and enhance an otherwise insufficient objection.[202] Similarly, in *Primrose Operating Co. v. Jones*,[203] the court of appeals held that a party preserved charge error that required an objection by making an insufficient objection that was supported by a written request offered en masse.[204] In *General*

194. No. 01-03-00816, 2006 WL 1228021, at *6 (Tex. App.—Houston [1st Dist.] May 4, 2006, no pet.)

195. ASEP USA, Inc. v. Cole, No. 01-03-00816, 2006 WL 1228021, at *6 (Tex. App.—Houston [1st Dist.] May 4, 2006, no pet.).

196. 900 S.W.2d 792 (Tex. App.—San Antonio 1995), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

197. Matthiessen v. Schaefer, 900 S.W.2d 792, 797 (Tex. App.—San Antonio 1995) (allowing the defendant's affirmative defense, even with missing key language from the jury charge), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

198. *See* TEX. R. CIV. P. 274 (mandating that complaints as to defective questions be preserved by objection).

199. *Matthiessen*, 900 S.W.2d at 797.

200. *Id.* at 798.

201. 879 S.W.2d 89 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

202. Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc., 879 S.W.2d 89, 110 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (stating that "[i]t would appear that in view of [*Payne*,] the objection, fortified by the requested instruction, is sufficient, and we so hold").

203. 102 S.W.3d 188 (Tex. App.—Amarillo 2003, pet. denied).

204. Primrose Operating Co. v. Jones, 102 S.W.3d 188, 197-98 (Tex. App.—Amarillo 2003, pet. denied) (stating that although a party failed "to orally argue each question submitted by it to the trial court," its written requests and oral presentation "were sufficient to call the trial court's attention to the issues and thus preserve the question for appellate review").

Agents Insurance Co. of America v. Home Insurance Co. of Illinois,[205] the court held that a general objection preserved error where a request added specificity.[206]

Other examples of cases which blur the line between objections and requests include *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*,[207] where the court of appeals held that a defendant's objection to a written instruction concerning a defense was sufficient to preserve error as to the omission of that defense as a separate charge question.[208] Likewise, in *Vecellio Insurance Agency, Inc. v. Vanguard Underwriters Insurance Co.*,[209] a party preserved error to the omission of a question by raising an objection.[210] These opinions' interpretation of *Payne* are characterized by the court of appeals's decision in *U.S. Restaurant Properties Operating L.P. v. Motel Enterprises, Inc.*,[211] which implies that a request and an objection can act for one another in preserving error.[212]

3. En Masse Requests?

The courts of appeals also fluctuate on whether requests offered en masse can still preserve error. In *Samedan Oil Corp.*, the court of appeals held that an en masse request did preserve error, so long

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205. 21 S.W.3d 419 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

206. Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Ill., 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (concluding that the party's "objection, coupled with its opposition to the partial summary judgment, were sufficient to preserve error").

207. 78 S.W.3d 425 (Tex. App.—Tyler 2001, pet. granted, judgm't vacated w.r.m.).

208. Samedan Oil Corp. v. Intrastate Gas Gathering, Inc, 78 S.W.3d 425, 445 (Tex. App.—Tyler 2001, pet. granted, judgm't vacated w.r.m.) (considering whether the trial court abused its discretion in refusing to submit the defense as a separate question, thus implicitly holding that error had been preserved).

209. 127 S.W.3d 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

210. Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co., 127 S.W.3d 134, 140, 140 n.2 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (allowing a party to preserve error by objecting to the omission of a question).

211. 104 S.W.3d 284 (Tex. App.—Beaumont 2003, pet. denied).

212. U.S. Rest. Props. Operating L.P. v. Motel Enters., Inc., 104 S.W.3d 284, 291 (Tex. App.—Beaumont 2003, pet. denied) (applying the *Payne* test to conclude that a request preserved an error which normally required an objection). Despite the more liberal review some appellate courts have given preservation of jury charge error in light of *Payne*, it is important to note that the trial judge still must be made aware of a party's complaint. *See, e.g.*, Celanese Ltd. v. Chem. Waste Mgmt., Inc., 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied) (concluding that, in spite of *Payne*, a party did not preserve error, because they made an insufficient objection and failed to request a proposed instruction).

as it was not obscured.[213] The court in *Texas Natural Resource Conservation Commission v. McDill*,[214] held that an instruction offered en masse was sufficient to preserve error even where the party did not point the request out to the trial court.[215] In *Primrose Operating Co.*, the court of appeals held that a party did preserve charge error requiring an objection by making an insufficient objection that was supported by a written request offered en masse—the court found the en masse request supported and clarified the insufficient objection.[216] Likewise, in *Varela v. Varela*,[217] the court held that a party did preserve error on an omitted instruction by raising an objection to the omission and by previously filing a complete charge.[218]

In *Munoz v. Berne Group, Inc.*,[219] however, the court of appeals held that a party failed to preserve error as to an omitted instruction where the party submitted a complete charge before trial that included the instruction, but failed to object or request such at the charge conference.[220] Further, the trial court did not mark "refused" on the complete charge.[221] The court stated that "[t]endering this instruction . . . in the form of an entire proposed charge, with nothing more, was insufficient to preserve error."[222] In *Hoffman-La Roche, Inc. v. Zeltwanger*,[223] the court held that a party waived a requested instruction where it was offered en masse

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213. *Samedan Oil*, 78 S.W.3d at 453.

214. 914 S.W.2d 718 (Tex. App.—Austin 1996, no writ).

215. Tex. Natural Res. Conservation Comm'n v. McDill, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ) (discounting the argument that the appellant's en masse request obscured its proposed instruction).

216. Primrose Operating Co., Inc. v. Jones, 102 S.W.3d 188, 197-98 (Tex. App.—Amarillo 2003, pet. denied).

217. No. 03-04-00505-CV, 2006 WL 821364 (Tex. App.—Austin Mar. 30, 2006, no pet.) (mem. op.).

218. Varela v. Varela, No. 03-04-00505-CV, 2006 WL 821364, at *2 n.3 (Tex. App.—Austin Mar. 30, 2006, no pet.) (mem. op.) (permitting a party that had previously filed a proposed thirty-page jury charge to preserve error on an omitted jury instruction by objection).

219. 919 S.W.2d 470 (Tex. App.—San Antonio 1996, no writ).

220. Munoz v. Berne Group, Inc., 919 S.W.2d 470, 472 (Tex. App—San Antonio 1996, no writ).

221. *Id.*

222. *Id.* (holding that to preserve a point for appellate review, a party must make its objection known to the court and obtain a ruling).

223. 69 S.W.3d 634 (Tex. App.—Corpus Christi 2002), *rev'd on other grounds*, 144 S.W.3d 438 (Tex. 2004).

with other instructions.[224] The court in *Riddick v. Quail Harbor Condominium Ass'n.*[225] decided that an en masse charge did not preserve error as to a requested instruction where nothing in record showed that the trial court was even aware of it, much less that the trial court ruled upon it.[226] Finally, in *Luensmann v. Zimmer-Zampese & Associates*,[227] the court ruled that an en masse written charge did not preserve error.[228]

4. Timing of Objections and Requests?

The courts of appeals appear to have loosened up on the requirement that a party must submit its requests and objections at the formal charge conference. In *Samedan Oil Corp.*, the court of appeals held that a written objection filed before the charge conference and before the final charge was submitted to the parties by the trial court, preserved error where the party re-urged its prior written objections in general at the charge conference.[229] In *Green Tree Financial Corp. v. Garcia*,[230] a party preserved error by objecting to the omission of an instruction at an informal charge conference.[231] The court of appeals in *In re Stevenson*[232] considered the discussion of a request during the informal charge conference

224. Hoffman-La Roche, Inc. v. Zeltwanger, 69 S.W.3d 634, 652-53 (Tex. App.—Corpus Christi 2002) (holding that error is preserved if the moving party made the trial court aware of the complaint and obtained a ruling), *rev'd on other grounds*, 144 S.W.3d 438 (Tex. 2004).

225. 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

226. Riddick v. Quail Harbor Condo. Ass'n, 7 S.W.3d 663, 675 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that error was not preserved because of a failure to object to the court's omission of the proposed instruction).

227. 103 S.W.3d 594 (Tex. App.—San Antonio 2003, no pet.).

228. Luensmann v. Zimmer-Zampese & Assocs., 103 S.W.3d 594, 599 (Tex. App.—San Antonio 2003, no pet.) (ruling that a written charge alone was not sufficient to preserve the error).

229. Samedan Oil Corp. v. Intrastate Gas Gathering, Inc., 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. granted, judgm't vacated w.r.m.) (allowing a charge submitted in an en masse request because it was not obscured (citing Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450, 451 (Tex. 1995))).

230. 988 S.W.2d 776 (Tex. App.—San Antonio 1999, no pet.).

231. Green Tree Fin. Corp. v. Garcia, 988 S.W.2d 776, 781-82 (Tex. App.—San Antonio 1999, no pet.) (allowing preservation of error when an objection was made during the informal charge conference). The court explained that "the timing of the objection does not appear to be determinative, provided that the trial court was sufficiently informed of the complaint." *Id.* at 781.

232. 27 S.W.3d 195 (Tex. App.—San Antonio 2000, pet. denied).

in determining that error in its omission had been preserved.[233] Interestingly, in *General Agents Insurance Co. of America, Inc.*, the court held that an argument made in opposition to a summary judgment motion assisted in clarifying an arguably vague objection at the charge conference.[234]

Spoliation instructions offered pre-trial provide a good example of the conflict regarding the timing of objections and requests. Texas Rules of Civil Procedure seem to require that instructions must be submitted to the trial court after the charge is delivered to the opposing attorneys.[235] Nevertheless, the court in *Hopper v. Swann*,[236] citing *Payne*, held that a party preserved error on an omitted spoliation instruction even though the instruction was only submitted to the trial court in a pre-trial hearing.[237] However, in *Crescendo Investments, Inc. v. Brice*,[238] the court determined that the party complaining about the omission of the spoliation instruction waived error by only raising it pre-trial and not during the charge conference.[239]

5. Written Requests?

There is an argument under *Payne* that a request no longer has to be in writing so long as the omission is brought to the attention of the trial court. For example, in *In re Stevenson*, the court held that a party preserved error in an omitted instruction from the charge by orally requesting it at the charge conference, referring to

233. *In re* Stevenson, 27 S.W.3d 195, 201 (Tex. App.—San Antonio 2000, pet. denied) (holding that trial court had been made aware of a proposed instruction when it was discussed in an informal conference and later read into the record).

234. Gen. Agents Ins. Co. of Am. v. Home Ins. Co. of Ill., 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (holding that error was preserved by a party's objection in addition to its opposition to the court's grant of partial summary judgment).

235. *See* TEX. R. CIV. P. 273 (requiring that requests be given "within a reasonable time after the charge is given to the parties or their attorneys for examination").

236. No. 12-02-00269-CV, 2004 WL 948526 (Tex. App.—Tyler Apr. 30, 2004, no pet.) (mem. op.).

237. Hopper v. Swann, No. 12-02-00269-CV, 2004 WL 948526 at *2 (Tex. App.—Tyler Apr. 30, 2004, no pet.) (mem. op.) (holding that a spoliation instruction requested in both pre-trial motion and brief served as the requisite objection (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992))).

238. 61 S.W.3d 465 (Tex. App.—San Antonio 2001, pet. denied).

239. Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 479 (Tex. App.—San Antonio 2001, pet. denied) (requiring that the spoliation issue be requested during trial or error is waived).

its en masse charge submitted before trial, and by reading the request into the record at the formal charge conference.[240] Likewise, the court in *In re M.P.*,[241] decided that under *Payne*, a dictated request did preserve error.[242]

However, in *Yazdi v. Republic Insurance Co.*,[243] the court of appeals held that a party failed to preserve an error of omission where it did not submit a written request even though it did provide an oral request at the charge conference.[244] Furthermore, in *Gragson v. M.E. & E. Welding & Fabrication, Inc.*,[245] the court explained that a dictated request did not preserve error: "[d]ictating a requested instruction to the court reporter is not sufficient to support an appeal based on the trial court's refusal to submit requested material."[246] Several other opinions have held that requests must be in writing.[247]

6. Requirement for Both Objection and Request

Historically, some courts have held that when the complained-of error is the omission of a question, instruction, or definition, the complaining party must both tender a substantially correct request

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240. *In re* Stevenson, 27 S.W.3d 195, 200-01 (Tex. App.—San Antonio 2000, pet. denied).

241. 126 S.W.3d 228 (Tex. App.—San Antonio 2003, no pet.).

242. *In re* M.P., 126 S.W.3d 228, 230-31 (Tex. App.—San Antonio 2003, no pet.) (holding that dictation followed by objection to the omission preserves the error).

243. 935 S.W.2d 875 (Tex. App.—San Antonio 1996, writ denied).

244. *See* Yazdi v. Republic Ins. Co., 935 S.W.2d 875, 879 (Tex. App.—San Antonio 1996, writ denied) (requiring tender of written request to preserve error).

245. No. 06-00-00044-CV, 2001 WL 1190087 (Tex. App.—Texarkana Oct. 10, 2001, pet. denied) (not designated for publication).

246. Gragson v. M.E. & E. Welding & Fabrication, Inc., No. 06-00-00044-CV, 2001 WL 1190087, at *7 (Tex. App.—Texarkana Oct. 10, 2001, pet. denied) (not designated for publication) (holding that dictation to the court reporter does not preserve error).

247. *See* Pasley v. Pasley, No. 07-03-0540-CV, 2005 WL 1992255, at *4 (Tex. App.—Amarillo Aug. 18, 2005, no pet.) (mem. op.) (noting the insufficiency of party's dictated questions without a separate written request (citing TEX. R. CIV. P. 278)); Elliott v. Whitten, No. 01-02-00065-CV, 2004 WL 2115420, at *12 (Tex. App.—Houston [1st Dist.] Sept. 23, 2004, pet. denied) (mem. op.) (expressing, "Because Rule 278 expressly requires a written submission to preserve error concerning an omitted instruction, our allowing a verbal objection or an oral recitation of the instruction in lieu thereof would rewrite Rule 278 judicially"); *In re* A.A.B., 110 S.W.3d 553, 557 (Tex. App.—Waco 2003, no pet.) (explaining the charge preservation rules, and noting that while criminal procedure allows for a written or dictated request, the civil rules require a written request).

and object to its omission.[248] However, Texas Supreme Court precedent contradicts the dual requirement of a request and objection.[249] Under the more liberal *Payne* standard, it seems that this dual requirement would no longer be recognized.[250] Nonetheless, some courts of appeals seem to once again ignore *Payne* and find waiver where the party did not both tender a request and object to an omission.[251]

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248. *See* Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (holding that an error is not preserved unless the complaining party requests an instruction in addition to objecting); Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied) (requiring both a specific objection and a written request to preserve error); Johnson v. State Farm Mut. Auto. Ins., 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied) (deciding that appellant's requested issue was insufficient to preserve error because a specific objection was also necessary); Tex. Power & Light Co. v. Barnhill, 639 S.W.2d 331, 334-35 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.) (pointing out the appellant's mistakes in not making a distinct objection and in failing to tendering a substantially correct instruction).

249. *See* Morris v. Holt, 714 S.W.2d 311, 312 (Tex. 1986) (stating that a written request is sufficient to preserve error). The Texas Supreme Court reviewed Texas Rule of Civil Procedure 279 and clearly expressed that where the missing issue is relied on by an opposing party, a party may either request an issue or make an objection. *Id.* (citing TEX. R. CIV. P. 279).

250. *See* Conquest Drilling Fluids, Inc. v. Tri-Flo Int'l, Inc., 137 S.W.3d 299, 307 (Tex. App.—Beaumont 2004, pet. granted) (stating that, under *Payne*, a substantially correct request for an omitted question is sufficient to preserve error where no objection to the omission is made (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 240-01 (Tex. 1992))).

251. *See* Sears, Roebuck & Co. v. Abell, 157 S.W.3d 886, 891 (Tex. App.—El Paso 2005, pet. denied) (explaining that "[i]f the error is in the omission of an instruction relied on by the requesting party, three steps are required by the [r]ules to preserve error: a proper instruction must be tendered in writing and requested prior to submission; a specific objection must be made to the omission of the instruction; and the court must make a ruling" (citing Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied))); Fraser v. Baybrook Bldg. Co., No. 01-02-00290-CV, 2003 WL 21357316, at *3 (Tex. App.—Houston [1st Dist.] June 12, 2003, pet. denied) (mem. op.) (overruling appellants' issue because they failed to object to the charge and request an instruction as required); Busse v. Pac. Cattle Feeding Fund #1, Ltd., 896 S.W.2d 807, 818 (Tex. App.—Texarkana 1995, writ denied) (deciding that even though the appellants tendered a proper instruction, their failure to raise an objection at the charge conference waived any complaint); Equitable Res. Mktg. Co. v. U.S. Gas Transp., Inc., No. 05-99-00619-CV, 2001 WL 533808, at *7 (Tex. App.—Dallas May 21, 2001, no pet.) (not designated for publication) (holding that a party's submission of proper instructions, without a subsequent objection to their omission at the charge conference, precluded raising the issue on appeal).

E. Payne *Conclusion*

As the cases above indicate, the end result of the Texas Supreme Court's *Payne* opinion is great confusion and uncertainty in charge preservation of error. This uncertainty may help parties that fail to properly preserve error, but nothing is guaranteed. It *is* certain, however, that the *Payne* confusion makes it all but impossible for either side to properly evaluate their chances for success on appeal.

As one justice of the Texas Supreme Court stated, if a rule in the Texas Rules of Civil Procedure "does not mean what it says," then the supreme court has an obligation to change it.[252] Pursuant to this statement, in the early 1990s, the court commissioned a committee to revise the charge rules.[253] The committee first offered the court its recommended new charge rules in 1995.[254] The court made revisions and sent the rules back, and in 1996 the committee resubmitted its final draft of the rules.[255] However, ten years later, the court has still not acted upon the committee's recommendation.

What is the Texas Supreme Court waiting on? There is even greater confusion now than before *Payne*, which was intended to clarify charge preservation of error and make it simpler for trial attorneys.[256] The end result, as illustrated above, is an apparent ad hoc system where the courts decide charge preservation of error on a case-by-case basis, occasionally making up the rules as they go—sometimes courts cite to *Payne*, sometimes they do not;[257] some-

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252. *See* McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 344 (Tex. 1993) (Gonzalez, J., concurring) (opining that if a Texas Rule of Civil Procedure does not stand for what its language expresses, the court should change it).

253. William V. Dorsaneo, III, *Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 676 (2000) (noting that the Jury Charge Task Force was commissioned in 1991 by the Supreme Court of Texas). This task force was created to research and investigate specific trouble areas within Texas jury charge procedure and report recommendations "to the Supreme Court Advisory Committee." *Id.*

254. *Id.* at 706.

255. *Id.*

256. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 240-01 (Tex. 1992) (discussing the flaws in broad-form charge submission and creating a test to help remedy them).

257. *Compare* Vu v. Rosen, No. 14-02-00809-CV, 2004 WL 612832, at *4 n.1 (Tex. App.—Houston [14th Dist.] Mar. 30, 2004, pet. denied) (mem. op.) (citing to *Payne*), *with* City of Austin v. Travis County Landfill Co., 25 S.W.3d 191, 203 (Tex. App.—Austin 1999) (making no mention of *Payne*), *rev'd on other grounds*, 73 S.W.3d 234 (Tex. 2002).

times the request has to be in substantially correct wording, sometimes it does not;[258] sometimes there is a difference between a request and an objection, sometimes there is not;[259] sometimes an en masse request will preserve error, sometimes it will not;[260] and sometimes a party has to make a specific objection in the charge conference, where at other times a general objection will suffice if it can be arguably clarified by some earlier action.[261]

The only certainty is that the trial court now has more responsibility for formulating the charge than ever before. The charge rules, as stated in the Texas Rules of Civil Procedure, were designed to protect the trial judge.[262] Before *Payne*, if a party wanted something in the charge, he had to give it to the trial court in writing and it had to be correct; otherwise, the trial court would have to remember and visualize what an oral request was and do legal research to determine the correct wording.[263] However, under

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258. *Compare* City of Weatherford v. Catron, 83 S.W.3d 261, 272 (Tex. App.—Fort Worth 2002, no pet.) (finding that error was waived because a request's language was not substantially correct), *with* State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 790 (Tex. App.—Dallas 1997, pet. dism'd by agr.) (relying upon *Payne* in finding that an unclear request preserved error).

259. *Compare* Conde v. Gardner, No. 14-99-01102-CV, 2001 WL 931416, at *3-4 (Tex. App.—Houston [14th Dist.] Aug. 9, 2001, no pet.) (not designated for publication) (deciding that a party's request did not preserve error where an objection was required), *with* Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co., 127 S.W.3d 134, 140, 140 n.2 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (allowing an objection asking for an omitted question to preserve error).

260. *Compare* Tex. Natural Res. Conservation Comm'n v. McDill, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ) (determining that en masse request did not prevent the trial court from examining the proposed instructions), *with* Munoz v. Berne Group, Inc., 919 S.W.2d 470, 472 (Tex. App—San Antonio 1996, no writ) (explaining that "[t]endering this instruction to the court in the form of an entire proposed charge, with nothing more, was insufficient to preserve error").

261. *Compare* Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 479 (Tex. App.—San Antonio 2001, pet. denied) (expressing that vague spoliation issues raised pretrial were not enough to preserve a complaint about the lack of a "missing documents" issue in the charge), *with* Gen. Agents Ins. Co. of Am. v. Home Ins. Co. of Ill., 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (holding that appellant preserved error where its objection was backed up by an earlier opposition to the summary judgment granted).

262. *Cf.* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992) (opining that the jury charge rules should be applied in a manner that ensures the trial court is aware of the specific complaint and is able to rule on it).

263. *See* Woods v. Crane Carrier Co., 693 S.W.2d 377, 379 (Tex. 1985) (explaining the necessity for effective rules and procedures in the difficult stage of jury charge drafting). In explicating on the need for written requests, the court stated, "Phrasing of issues and

Payne, the trial judge now has to do just that—he has to be cognizant of every nuance and potential objection or request to the charge, no matter when made, and he has the burden to go forth and determine the correct wording. This method of preparing the charge is unfair to the trial judge. The parties' attorneys are in a far better position to do the legal research and determine what the law is than the trial judge—who by necessity is a generalist. It does not appear as though the court will remedy this confusion any time soon; the proposed charge rules are still waiting.

An alternative is that courts could begin using special submissions more extensively, which would clarify the formal charge rules and eliminate the need for *Payne*. Special submission is starting to make a slight comeback with the supreme court's holding in *Crown Life Insurance Co. v. Casteel*[264] and its progeny.[265] However, because attorneys and judges are accustomed to broad-form, a return to special submission is unlikely.[266] Therefore, for attorneys, par-

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instructions requires the judge's careful consideration which is possible only upon reading and rereading of the requests. To expect a judge, after hearing oral and length[y] requests just once, to weigh their merits for inclusion in a charge ignores realities." *Id.*

264. 22 S.W.3d 378 (Tex. 2000).

265. *See* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000) (holding when a broad-form question is submitted that incorporates several theories of liability, harmful error occurs if "the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory"). The court explained that harmful error will not occur where questions are submitted in such a way that the appellate court can discern whether the verdict was based upon an invalid theory. *Id.* at 389. Furthermore, the court dismissed concerns that its rule went against the broad-form mandate of Texas Rule of Civil Procedure 277 by noting that broad-form is only required "whenever feasible." *Id.* at 389-90 (quoting TEX. R. CIV. P. 277). A plethora of Texas Supreme Court and Texas courts of appeals decisions have analyzed and adopted the *Casteel* Court's interpretation of Rule 277. *See, e.g.*, Harris County v. Smith, 96 S.W.3d 230, 232-36 (Tex. 2002) (extending *Casteel* to apply in the situation of broad-form damage questions); Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 426-28 (Tex. App.—San Antonio 2004, pet. denied) (sustaining the appellant's *Casteel* argument and holding that the trial court was aware of the appellant's broad-form submission complaint). *But see* Bed, Bath, & Beyond, Inc. v. Urista, 50 Tex. Sup. Ct. J. 334, 2006 WL 3825300, at *2 (holding that harm is not presumed when an inferential rebuttal issue is improperly submitted with a broad-form negligence question), *rev'g* 132 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2004) (opinion on rehearing). *Urista* limited the *Casteel* and *Harris County* holdings "to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements" and refused to expand those holdings to include improperly submitted inferential rebuttal issues. *Urista*, 2006 WL 3825300, at *2.

266. The Rule 277 mandate for broad-form usage was adopted in 1988. William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46

ties, and trial judges, there is only one certainty in Texas jury charge procedure—more *Payne*.

V. Broad-Form vs. Special Submission

The charge is made of three components: questions, instructions, and definitions.[267] How these components are formulated has alternated back and forth over the past century. The basic debate is whether the components should be formulated to create a broad-form charge or a special submission charge.[268] Under broad-form practice, questions are drafted generally and include most or all elements of a claim and can include multiple causes of action.[269] Likewise, in broad-form practice, much of the charge is contained in instructions to the general questions.[270] Basically, the jury is asked to find conclusions without having to agree on specific facts. The Texas Supreme Court has described this practice:

> Under broad-form submission rules, jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result. Thus, jurors may agree that a defendant failed to follow approved safety practices without deciding each reason that the defendant may have failed to do so.[271]

The other alternative is special submission practice where each element of a claim is independently submitted by its own question. As each element of a claim is independently submitted, there are

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SMU L. Rev. 601, 609 (1992); *see* Tex. R. Civ. P. 277 (mandating that broad-form questions be used "whenever feasible").

267. Tex. R. Civ. P. 278 ("The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence."); *see also* Tex. R. Civ. P. 275 (requiring the court to read the questions, definitions, and instructions of the charge to the jury).

268. *See generally* William L. Davis, *Tools of Submission: The Weakening Broad-Form "Mandate" in Texas and the Roles of Jury and Judge*, 24 Rev. Litig. 57 (2005) (describing the longstanding Texas debate concerning special and broad-form jury charge submission).

269. *See, e.g.*, Isern v. Watson, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied) (defining broad-form submission as including "more than one independent ground of liability in the same question").

270. Tex. R. Civ. P. 277 (directing the trial court to "submit such instructions and definitions as shall be proper to enable the jury to render a verdict"); *see also* City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 794 (Tex. App.—Dallas 1992, writ denied) (emphasizing that the trial court should only give instructions that help the jury "understand the meaning and effect of the law").

271. Dillard v. Tex. Elec. Coop., 157 S.W.3d 429, 434 (Tex. 2005) (citing Burk Royalty Co. v. Walls, 616 S.W.2d 911, 924 (Tex. 1981)).

more questions, but fewer instructions. The purpose of special submission is for the jury to make more discrete findings and have the trial court reach conclusions based on those findings.

The following is a general history of charge submission practice and a statement on where Texas currently stands on the broad-form versus special submission debate.

A. *History of Charge Submission Practice*

Prior to 1913, Texas used both a special and a general charge.[272] Many of these early charges allowed the jury to decide in a general fashion which party should win.[273] However, as courts and attorneys became more sophisticated, general charges contained more and more instructions to properly limit the jury to the legal requirements for the claim or defense; these jury instructions became so long and complicated that courts viewed an errorless charge as almost impossible.[274]

In 1913, the Texas Legislature mandated that trial courts submit issues distinctly and separately in order to remedy some of the confusion created by broad-form charges.[275] In 1922, in the context of a negligence case, the Texas Supreme Court held in *Fox v. Dallas Hotel Co.*[276] that issues should be submitted "distinctly and separately."[277] The court explained the trial court's duty in a jury trial:

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272. *See* TEX. REV. CIV. STAT. ANN. CH. 13, art. 1328 (1895) (stating that "[t]he verdict of a jury is either a general or a special verdict"); Shifflet v. Morelle, 68 Tex. 382, 4 S.W. 843, 844 (1887) (explaining that juries can return general verdicts, "although special facts may be stated as the ground's of the jury's conclusion"); Charles R. "Skip" Watson Jr., *The Court's Charge to the Jury*, *in* STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED CIVIL TRIAL COURSE 13 (2003) (discussing Texas jury charge process prior to 1913).

273. Charles R. "Skip" Watson Jr., *The Court's Charge to the Jury*, *in* STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED CIVIL TRIAL COURSE 13 (2003) (describing jury charges in the early part of the century as being so broad as to basically ask who should win and how much should he get).

274. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984) (noting that accumulated instructions prior to 1913 made it nearly impossible to have an errorless charge).

275. *See* Act of March 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, 113 (mandating that in all jury trials, issues "be submitted distinctly and separately, and without being intermingled"), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

276. 111 Tex. 461, 240 S.W. 517, 522 (1922).

277. Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517, 522 (1922) (holding each issue must be submitted "distinctly and separately"), *overruled by* Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981).

> 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.[278]

However, occasions of broad-form use were still found in a few non-negligence cases.[279] In 1941, the Supreme Court adopted former Rule 277 that required issues in all cases to be submitted "distinctly and separately."[280]

Special submission practice had its own troubles. Under special submission practice, there would likely be several questions on a single theory of recovery.[281] These lengthy and complicated charges often caused many problems for juries, lawyers, and courts.[282] In particular, conflicting jury findings were especially troublesome under special submission practice.[283] For example, a

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278. *Id.*

279. *See* Howell v. Howell, 147 Tex. 14, 210 S.W.2d 978, 979-80 (Tex. 1948) (allowing submission of a single broad issue to the jury); *see also* William L. Davis, *Tools of Submission: The Weakening Broad-Form "Mandate" in Texas and the Roles of Jury and Judge*, 24 REV. LITIG. 57, 63 n.13 (2005) (listing cases where broad-form was allowed); Jack Pope & William G. Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1, 4 (1979) (noting many instances of broad-form submissions in non-negligence cases).

280. TEX. R. CIV. P. 277 (Vernon 1941, superseded 1973) (requiring issues to be submitted "distinctly and separately"); *see* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 607 (1992) (explaining the history of Rule 277). It is important to note, however, that a separate and distinct requirement was never mandated in non-negligence cases like it was in negligence cases. *Burk Royalty*, 616 S.W.2d at 925. Thus, a split set of procedures existed between negligence and non-negligence cases until the 1973 rule modification. *Id.* (citing Roosth & Genecov Prod. Co. v. White, 152 Tex. 619, 262 S.W.2d 99 (1953)).

281. *See, e.g.*, *Fox*, 240 S.W. at 522 (clarifying that "it was the statutory right of defendant in error to have the issue presented by each complete plea submitted separately to the jury, just as plaintiff in error had the right to have submitted each issue, entitling her to recover, which she pleaded and proved").

282. *See* Jack Pope & William G. Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1, 2 (1979) (enumerating some of the problems attached to special submission: "conflicts, confusion, delays, waste of trial and appellate time, reversals, metaphysics, and the unique system that had developed for trial of personal injury suits"); *see also* Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984) (stating that "[i]n 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective").

283. *See* Jack Pope & William G. Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1, 2 (1979) (noting that conflicts were among the major problems associated with "the fragmentation of jury issues"); *see also* Barclay v. C. C. Pitts Sand & Gravel Co., 387 S.W.2d 644, 650 (Tex. 1965) (Pope, J., concurring) (criticizing special submission

jury might have found that the defendant was a proximate cause of the accident that was the basis of the suit and also have found that the sole proximate cause of the accident was an act of God.[284]

In 1973, the Texas Supreme Court amended Rule 277 to once again allow a trial court to submit broad-form questions: "It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly." [285] Thus, it was no longer objectionable for a trial court to submit its charge in broad-form. For example, the jury could simply be asked whether a party was negligent.[286] Thereafter, the Texas Supreme Court found in several opinions that trial courts should strive to use broad-form submissions and simplify jury charges.[287] The Court stated, "Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges."[288]

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requirement: "The problems of the special issue charge are those of profusion, conflicting answers, and confusion to the jurors"), *overruled by Burk Royalty*, 616 S.W.2d at 925.

284. *See, e.g.*, Jones Fine Bread Co. v. Cook 154 S.W.2d 889, 891 (Tex. Civ. App.—Waco 1941, no writ) (reversing and remanding case because of irreconcilable jury findings). In asking the jury to determine what caused the automobile accident at issue, the court gave the following special issues: "'Do you find from a preponderance of the evidence that the failure to have a light or lantern on his wagon on the part of plaintiff at the time of the collision in question, if you have so found, was not the sole cause of the collision in question,'" and "'Do you find from a preponderance of the evidence that the blinding lights of another automobile was not the sole cause of the collision in question?'" *Id.* at 890. The jury answered "no" to both questions, which the court of appeals determined resulted in conflicting jury issues: "From this verdict it appears that the collision complained of was proximately caused by the negligence of appellant, Manning, and also that it was caused solely by conduct and occurrences over which neither appellant had any control whatsoever." *Id.* at 890-91.

285. *See* Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (opinion on rehearing) (quoting the 1973 version of Rule 277).

286. *See* Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 255 (Tex. 1974) (holding that a general inquiry of whether defendant was negligent is not error).

287. *See* Harris County v. Smith, 96 S.W.3d 230, 235 (Tex. 2002) (noting court's commitment to broad-form submission); *see also Burk Royalty*, 616 S.W.2d at 925 (overruling pre-1973 cases that mandated distinct and separate submission); Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 937 (Tex. 1980) (interpreting the 1973 amendment to require abolishment of the "distinctly and separately" requirement). *See generally* Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577 (1973) (analyzing the 1973 changes to Rule 277).

288. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

B. *Broad-Form Use "Whenever Feasible"*

In 1988, the Texas Supreme Court once again amended the rules and stated that a trial court should use broad-form where possible: "In all jury cases the court shall, *whenever feasible*, submit the cause upon broad-form questions."[289] The court defined "whenever feasible" to mean "in any or every instance in which it is capable of being accomplished."[290] The court also stated, "[S]ubmission of a single question relating to multiple theories may be necessary to avoid the risk that the jury will become confused and answer questions inconsistently. The goal of the charge is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely."[291]

One of the most extreme cases of broad-form practice can be found in a 1990 Texas Supreme Court opinion. In *Texas Department of Human Services v. E.B.*,[292] a jury decided to terminate the parental rights of the defendant under a broad-form question that submitted two alternative statutory bases for termination.[293] The court of appeals reversed the judgment because the broad-form question allowed the jury to terminate the defendant's parental rights without a finding by all ten jurors on the same basis.[294] Essentially, if six jurors agreed as to one statutory basis, and the other six jurors agreed to another statutory basis, but no ten jurors agreed as to the same basis, the question allowed the jury to terminate the defendant's parental rights.[295] In other words, even though ten jurors were not required to make a particular finding of fact, they were allowed to make a legal conclusion. The court of appeals held that the use of the broad-form questions invaded the

289. TEX. R. CIV. P. 277 (emphasis added); *see also* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 609 (1992) (explaining that the phrase "whenever feasible" was added in early 1988).

290. Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (opinion on rehearing).

291. Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999); *see* Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 123 & n.2 (Tex. App.—Waco 2006, pet. filed) (holding that the trial court erred in not submitting issues in broad-form).

292. 802 S.W.2d 647 (Tex. 1990) (opinion on rehearing).

293. *E.B.*, 802 S.W.2d at 648.

294. *Id.* at 649.

295. *Id.*

province of the trial court as they asked the jury to determine the ultimate legal issue and not a particular fact.[296]

The Texas Supreme Court reversed the court of appeals and affirmed the trial court's judgment terminating the defendant's parental rights.[297] The court held that it did not matter whether a court of appeals could determine whether the same jurors agreed as to the same statutory basis, all that mattered was whether all ten jurors agreed that the defendant endangered the child by doing one or the other of the items listed in the statute.[298] Therefore, the court gave seeming carte blanche to trial courts to submit ultimate issues to juries—juries no longer had to find particular facts, only the outcome.

C. *Once Again, Rebirth of Special Issues*

In 1992, the Texas Supreme Court started a retreat from absolute broad-form use in holding that a trial court does not reversibly err in submitting issues separately and distinctly.[299] The court held that even though the charge rules require broad-form when feasible, the trial court's failure to submit a properly requested broad-form question is not per se harmful error where the granulated questions contain the proper elements of the theory. [300]

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296. E.B. v. Tex. Dep't Human Servs., 766 S.W.2d 387, 390 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).

297. *E.B.*, 802 S.W.2d at 649.

298. *See id.* (holding that if jurors agree that a mother endangered her child, they do not necessarily need to agree on what specific violation of the statute in question constituted the endangerment).

299. *See* H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258, 260 (Tex. 1992) (holding that the court's refusal to give a tendered broad-form question was not harmful error).

300. *See id.* (allowing use of granulated questions if the questions "fairly submitted to the jury the disputed issues of fact"); *see also* Escoto v. Estate of Ambriz, No. 13-02-171-CV, 2006 WL 1553786, at *10 (Tex. App.—Corpus Christi June 8, 2006, no pet.) (refusing to require broad-form submission when the governing law is unsettled); Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 655 (Tex. App.—Dallas 2002, pet. denied) (noting that a broad-form question is not always feasible if dealing with separate theories of liability); Isern v. Watson, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied) (refuting a party's argument that broad-form submission is mandatory in Texas); Miller v. Wal-Mart Stores, Inc., 918 S.W.2d 658, 663 (Tex. App.—Amarillo 1996, writ denied) (allowing granulated questions, provided the questions fairly present the issues to the jury); Sanchez v. Excelo Bldg. Maint., 780 S.W.2d 851, 853-54 (Tex. App.—San Antonio 1989, no writ) (noting that trial courts have discretion to determine feasibility of broad-form submission). *But see* Exxon Pipeline Co. v. Zwahr, 35 S.W.3d 705, 713 (Tex. App.—Houston [1st Dist.] 2000) (reasoning that reversible error is committed if the submission of several questions instead

It should be noted that there are problems in submitting ultimate issues to the jury in broad-form. Problems arise where one of the bases for the finding is not legally permissible, where there is no evidence to support it, or where the basis is improperly defined. [301] Where a jury answers "yes" to a broad-form question, is it answering yes to the permissible ground or some defective ground? The problem for the losing party on appeal is being able to show harm—did the jury base its decision on a permissible ground (no harm) or a defective ground (harm)? In *Westgate, Ltd. v. State*,[302] the court held that not only was special issue use not harmful error, but it may actually be preferred where the law is unsettled regarding one cause of action.[303]

In 2000, the Texas Supreme Court addressed this issue and held that broad-form use is not always possible, and that its use may be reversible error. In *Casteel*, a single broad-form liability question commingled valid and invalid liability theories, and the party complaining of such on appeal made a timely and specific objection.[304] The court of appeals previously concluded that the trial court's submission, although error, was harmless because one or more of the valid liability theories were supported by sufficient evidence.[305] The Texas Supreme Court did not agree, "concluding that the error was harmful because the erroneous submission, over timely objection, affirmatively prevented the appellant from isolating the error and presenting its case on appeal."[306] The court stated, "[W]hen a

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of a single broad-form question harms a party), *rev'd on other grounds*, 88 S.W.3d 623 (Tex. 2002).

301. *See, e.g.*, Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 227 (Tex. 2005) (determining the effect of including factually unsupported claims in a broad-form jury charge); Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 387-90 (Tex. 2000) (examining the harm of a broad-form question that incorporates an invalid theory of liability). Juror comprehension is also vitally important: "It 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.

302. 843 S.W.2d 448 (Tex. 1992).

303. *See* Westgate. Ltd. v. State, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (opining that "when the governing law is unsettled might very well be a situation where broad-form submission is not feasible"); *see also Escoto*, 2006 WL 1553786, at *10 (refusing to require broad-form submission when the governing law is unsettled).

304. *See* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 392 (Tex. 2000) (holding that inclusion of invalid theories in broad-based question required new trial).

305. Crown Life Ins. Co. v. Casteel, 3 S.W.3d 582, 594-95 (Tex. App.—Austin 1998), *rev'd*, 22 S.W.3d 378 (Tex. 2000).

306. Harris County v. Smith, 96 S.W.3d 230, 233 (Tex. 2002) (discussing its *Casteel* decision).

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."[307] The supreme court held that if there is a good chance that there is an improper theory of liability or damages, then those theories should be submitted in granulated questions: "[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."[308] Moreover, it is harmful error to submit them in a broad-form question.[309]

The court has expanded the *Casteel* holding to damage elements without evidentiary support. In *Harris County v. Smith*,[310] the trial court submitted a pair of broad-form damage questions.[311] The de-

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307. *Casteel*, 22 S.W.3d at 388. The court cited to its previous holding in *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015, 1016 (1923). In *Lancaster*, the trial court submitted a negligence issue with instructions regarding three distinct theories of negligence liability. *Id.* at 1015-16. After the jury returned a verdict for the plaintiff, the defendant established on appeal that one of the theories was improperly submitted. *Id.* at 1016. The court of appeals held, however, that the error was harmless because the verdict could have been based one of other properly submitted theories. *Id.* The Supreme Court disagreed:

> The jury may have found for [plaintiff] on each of the two issues properly submitted. On the other hand, as authorized by the pleading and the charge of the court, they may have found for [plaintiff] only on the issue that was improperly submitted. In order for courts to be able to administer the law in such cases with reasonable certainty and to lay down and maintain just and practical rules for determining the rights of parties, it is necessary that the issues made and submitted to juries, and upon which they are required to pass, be authorized and supported by the law governing the case.

Id.

308. *Casteel*, 22 S.W.3d at 390; *see also* Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 637 (Tex. 1995) (contending that a trial court should instruct a jury in a manner that helps the jury adequately decide the case).

309. *Casteel*, 22 S.W.3d at 388. Interestingly, the same problem can occur in a bench trial. When confronted with situation, a party must seek additional findings of fact and conclusions of law that specifically point out the error or else it is waived. *Id.* at 387-88; *see also* Harris County v. Smith, 96 S.W.3d 230, 232 (Tex. 2002) (noting that petitioner's objection was sufficiently specific); Tagle v. Galvan, 155 S.W.3d 510, 515 (Tex. App.—San Antonio 2004, no pet.) (noting that a defendant waives his right to objection on certain points of error by not objecting to the broad-form question at trial (citing Thomas v. Oldham, 895 S.W.2d 352, 359-60 (Tex. 1995))).

310. 96 S.W.3d 230 (Tex. 2002).

311. *Harris County*, 96 S.W.3d at 231 (asking two broad-form damages questions).

fendant objected that there was no evidence of several of the damage elements and that submitting them in a broad-form question was improper, but the objections were overruled.[312] The court of appeals agreed that the question was improper, but "concluded that the error was harmless because there was ample evidence on properly submitted elements of damage to support the jury's awards."[313] The Texas Supreme Court disagreed, concluding that: (1) "the trial court clearly erred when it did not sustain the objection and correct the charge";[314] (2) "*Casteel*'s reasoning [applied] to broad-form damage questions";[315] and (3) "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."[316]

Before *Harris County*, there was a debate as to whether *Casteel*, which dealt with the submission of a legally impermissible claim with permissible claims, would apply when the challenge was not to the legality of a claim, but instead to the claim's evidentiary support.[317] Some argued that although a jury may not be trusted to discern impermissible claims from permissible ones, a jury was uniquely qualified to determine the factual basis for claims.[318] In other words, a court of appeals could trust that the jury would find for the claim or award a damage amount that was supported by the evidence and ignore those that were not.

After *Harris County*, the supreme court once again addressed whether *Casteel* applies to claims regarding the improper submis-

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312. *Id.* at 231-32.

313. *Id.* at 232.

314. *Id.*

315. *Id.* at 233.

316. *Harris County*, 96 S.W.3d at 234 (quoting Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000).

317. *See In re* J.M.M., 80 S.W.3d 232, 248 (Tex. App.—Fort Worth 2002, pet. denied) (noting that while *Casteel* dealt with "commingled valid and invalid theories," the appellant in this case argued that the theories were submitted incorrectly "because they were supported by no evidence").

318. *See* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 630 (1992) (opining that "it is ordinarily reasonable to presume that the jury reached its decision by considering the damage elements having support in the evidence"); *see also* Griffin v. United States, 502 U.S. 46, 59 (1991) (explaining that while jurors are not prepared to determine the legal sufficiency of an issue, "[q]uite 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").

sion of claims without evidentiary basis with claims that have evidentiary basis in the same broad-form question. In *Romero v. KPH Consolidation, Inc.*,[319] a plaintiff sued several doctors and a hospital in a personal injury case.[320] The plaintiff raised claims for negligence and malicious credentialing against the hospital.[321] In the first question, the jury determined that the hospital was negligent, and in the second question, the jury determined that the hospital committed malicious credentialing.[322] In the third question, the jury apportioned liability between the doctors and the hospital finding that the hospital was forty percent responsible, and in so doing, considered the hospital's negligence and malicious credentialing.[323] However, there was no evidence to support the jury's finding that the hospital committed malicious credentialing.[324] The Texas Supreme Court reversed the judgment and framed the issue as follows:

> The argument was made in *Harris County* that even if it is reversible error to include legally invalid claims with legally valid ones in a single jury question, the same rule should not apply when all the claims are valid but some lack support in the evidence. While the jury might well be misled by legally erroneous instructions or questions, since they are not expected to know the law and are instead obliged to follow the law given them in the charge, they are certainly expected to know and weigh the evidence—and the argument goes—are therefore not likely to be influenced in making their findings by being allowed to consider factors without evidentiary support. We specifically rejected this argument, and this case illustrates why. Having found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility. While in other instances a jury may simply ignore a factor in the charge that lacks evidentiary support, there are other—instances and this case is one—where the jury is as misled by the inclusion of a claim without evidentiary support as by a legally erroneous instruction. In all circumstances in which "[a] trial court's error in instructing a jury to consider erroneous matters, whether an invalid liability theory or an unsupported element of damage, prevents the appellant from dem-

319. 166 S.W.3d 212 (Tex. 2005).
320. Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 219 (Tex. 2005).
321. *Id.* at 214.
322. *Id.* at 225.
323. *Id.* at 219, 225.
324. *Id.* at 225.

> onstrating the consequences of the error on appeal", the same analysis must be applied.
>
> We do not hold that the error of including a factually unsupported claim in a broad-form jury question is always reversible. Rule 44.1(a)(2) requires that the error, to be reversible, "probably prevented the appellant from properly presenting the case to the court of appeals." But unless the appellate court is "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it", the error is reversible. We have no such reasonable certainty here; on the contrary, we are reasonably certain that the jury *was* significantly influenced by the erroneous inclusion of the factually-unsupported malicious credentialing claim in the apportionment question. Accordingly, we conclude that the error requires reversal of the judgment.[325]

One of the most interesting aspects of this case is that the supreme court found it may not be reversible error where a claim is improperly submitted due to a lack of evidence.[326] A court of appeals can affirm the judgment where it is reasonably certain that the jury was not significantly influenced by the incorrect submission. For example, in *Texas Department of Assistive & Rehabilitative Services v. Abraham*,[327] the court of appeals held that because there was evidence of all theories of liability, there was no issue with the broad-form submission.[328] However, the court held in the alternative that even if there was such an error, it was not reversible:

> Even had the district court erred by including a participation theory of liability in the first jury question, we hold that such error was harmless. The error of including a factually unsupported claim in a broad-form jury question is not always reversible. To be reversible,

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325. *Romero*, 166 S.W.3d at 227-28 (citations omitted); *see also* Heritage Hous. Dev., Inc. v. Carr, No. 01-04-00096-CV, 2006 WL 2192564, at *8 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, no pet.) (interpreting *Romero* to mean that error is reversible, unless it is highly probable that the issue lacking legally sufficient evidence did not significantly affect the jury's decision (citing *Romero*, 166 S.W.3d at 227-28)).

326. *See Romero*, 166 S.W.3d at 227 (finding that error involving a claim that is improperly submitted because it is not supported by evidence is not necessarily reversible error).

327. No. 03-05-00003-CV, 2006 WL 191940 (Tex. App.—Austin Jan. 27, 2006, no pet.) (mem. op.).

328. Tex. Dep't of Assistive & Rehabilitative Servs. v. Abraham, No. 03-05-00003-CV, 2006 WL 191940, at *7 n.8 (Tex. App.—Austin Jan. 27, 2006, no pet.) (mem. op.) (holding that there was no broad-form issue because there was evidence of all theories of liability).

> the erroneous instruction must have "probably prevented the appellant from properly presenting the case to the court of appeals." Here, the underlying conduct upon which the jury found liability was the same, whether characterized as participation or opposition. On this record, we are "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it." Consequently, we find that any error in the jury instruction was harmless.[329]

The Texas Supreme Court has not directly addressed whether the inclusion in a broad-form question of a ground of recovery or damages that is improperly defined is harmful error. However, language from the court's prior opinions leads to the conclusion that it would be harmful error: "It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law,"[330] and "a litigant today has a right to a fair trial before a jury properly instructed on the issues 'authorized and supported by the law governing the case.'"[331] Thus, a party has the right to have the jury properly instructed and has a right to present harm to the court of appeals. Just like a theory of liability or damages that has no evidence to support it or that is not legally permissible, a theory that is improperly defined and that is included in a broad-form question should create harmful error.

Another potential *Casteel* issue is whether it is harmful error to include a damage or liability theory in a broad-form question where there is factually insufficient evidence to support it. In *Harris County*, the Supreme Court stated that its reasoning did not apply to "'potential' errors, such as . . . factual insufficiency."[332] However, the dissent in *Harris County* argued that its extension may encompass factual sufficiency complaints.[333] Of course, a trial court should submit a question even if there is factually insufficient evidence to support it—the first time that a factual sufficiency com-

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329. *Id.* (citations omitted).

330. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000).

331. Harris County v. Smith, 96 S.W.3d 230, 234 (Tex. 2002).

332. *See id.* at 235 (addressing the dissent's contention that the court's decision will be misapplied to objections to errors like factual insufficiency).

333. *See id.* at 239 (O'Neill, J., joined by Enoch & Hankinson, JJ., dissenting) (arguing that the court's holding in this case leads to the assumption that submission of any factually insufficient element would mandate reversal).

plaint can be raised is in a motion for new trial.[334] However, just because a trial court has to submit an issue that has factually insufficient evidence in support of it does not mean that the trial court can submit that defective issue in a broad-form question with other theories that have factually sufficient evidence in support of them.[335] Moreover, in that instance, a party challenging the factual sufficiency of the evidence would not be able to tell whether the jury answered yes to the factually insufficient theory or some other valid theory.[336] The logical basis of *Casteel* would seem to apply to factual sufficiency complaints. However, this issue has yet to be decided.

One issue that is currently percolating among the courts of appeals is whether the improper use of broad-form applies solely to claims or defenses, or whether it also applies to discrete factual theories. In *Columbia Medical Center v. Bush*,[337] the court of appeals held that there was not a broad-form problem where the plaintiff had one claim (negligence) and multiple factual theories to support it, some of which lacked evidentiary support.[338] While the trial court did not charge the jury to consider any particular factual theory (act of negligence), the court of appeals determined that the

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334. *See* TEX. R. CIV. P. 324(b)(2) (stating that a motion requesting a new trial is required for a party to assert that there was inadequate factual evidence to back the jury's decision); Strauss v. LaMark, 366 S.W.2d 555, 558 (Tex. 1963) (expressing that "[t]he district judge was required to submit [the issue] to the jury even though a negative answer might be contrary to the overwhelming preponderance of the evidence"); Long Island Owner's Ass'n, Inc. v. Davidson, 965 S.W.2d 674, 680 (Tex. App.—Corpus Christi 1998, pet. denied) (claiming that trial courts consider legal sufficiency when submitting questions to a jury, not factual sufficiency); Hinote v. Oil, Chem. & Atomic Workers Int'l Union, 777 S.W.2d 134, 143 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (asserting that factually insufficient evidence does not prompt a court to fail to submit an issue); Smith v. State, 523 S.W.2d 1, 4 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (contending that a court should submit issues as long as the issues have some probative value).

335. *See* Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 227-28 (Tex. 2005) (quoting Braun v. Flynt, 731 F.2d 1205, 1206 (5th Cir. 1984)) (holding that error in "including a factually unsupported claim in a broad-form jury question" is reversible if the appellate court cannot determine whether the jury was improperly influenced by such claim).

336. *See, e.g.*, Formosa Plastics Corp., USA v. Kajima Int'l, Inc., No. 13-02-00385-CV, 2004 WL 2534207, at *24 (Tex. App.—Corpus Christi Nov. 10, 2004, no pet.) (Castillo, J., dissenting) (stating that appellant argued that broad-form use denied it the chance to challenge damage findings by legal or factual sufficiency, because the findings cannot be traced to a sole source).

337. 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. denied).

338. Columbia Med. Ctr. of Las Colinas v. Bush, 122 S.W.3d 835, 858 (Tex. App.—Fort Worth 2003, pet. denied).

trial court did not err in refusing the defendant's limiting instruction ordering the jury to consider only particular pleaded acts of negligence that were supported by the evidence.[339]

However, in *Laredo Medical Group Corp. v. Mireles*,[340] the court of appeals stated that it disagreed with *Bush* and held that the trial court erred in submitting broadly one cause of action where three of the four factual theories had no supporting evidence.[341] Importantly, the question contained express written instructions on the four factual theories.[342] The difference between the two cases, however, is that in *Bush* the charge did not instruct the jury as to any particular factual theory, whereas in *Mireles*, the charge did expressly present the four theories, some of which had no support.[343] An older Texas Supreme Court case supports the reasoning of *Mireles*. In *Lancaster v. Fitch*,[344] the court held that it was harmful error where multiple factual negligence theories were submitted in one broad-form question, and one of the theories was incorrectly submitted.[345] However, the Texas Supreme Court would also seem to support the holding in *Bush* due to its recent opinion in *Bed, Bath & Beyond, Inc. v. Urista*.[346] In *Urista*, the court held that the *Casteel* harm analysis would not apply to the improper submission of an inferential rebuttal issue in a broad form question.[347] The court stated: "When, as here, the broad-

339. *Id.* at 857-59; *see also* Sunbridge Healthcare Corp. v. Penny, 160 S.W.3d 230, 254 (Tex. App.—Texarkana 2005, no pet.) (holding that valid and invalid damage elements were not mixed in a broad-form charge where the acts supporting liability supported a pattern of neglect).

340. 155 S.W.3d 417 (Tex. App.—San Antonio 2004, pet. denied).

341. Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 427 (Tex. App.—San Antonio 2004, pet. denied) (stating that the court reached a different conclusion than that in *Bush* and holding that it was error for the trial court to submit one cause of action where there was no evidence to support three of the four factual theories).

342. *Id.* at 425-26.

343. *Compare Bush*, 122 S.W.3d at 859 (stating that the charge did not tell the jury to consider any certain fact regarding the negligence theory), *with Mireles*, 155 S.W.3d at 425-26 (listing the four factual theories given in the charge).

344. 112 Tex. 293, 246 S.W. 1015 (1923).

345. Lancaster v. Fitch, 112 Tex. 293, 246 S.W. 1015, 1016 (1923) (discussing the harmful error that may result from submitting multiple factual negligence theories in one broad-form question is harmful error); see also Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000) (citing Lancaster with approval).

346. 50 Tex. Sup. Ct. J. 334, 2006 WL 3825300 (Tex. Dec. 29, 2006).

347. Bed, Bath & Beyond, Inc. v. Urista, 50 Tex. Sup. Ct. J. 334, 2006 WL 3825300, at *2 (Tex. Dec. 29, 2006).

form questions submitted a single liability theory (negligence) to the jury, *Casteel*'s multiple-liability-theory analysis does not apply."[348] Accordingly, it is unclear whether the *Casteel* harm analysis applies when discrete factual theories of a cause of action are submitted in a broad-form question and one of those factual theories should not have been.

D. *Can* Casteel*'s Analysis Be Extended to Defensive Instructions?*

The Texas Supreme Court cases dealing with broad-form error have mostly dealt with the plaintiff's claims for relief—either liability theories, damage elements, or proportionate responsibility issues.[349] However, the logic behind these cases should equally apply to affirmative defenses, such as where a defendant submits a broad-form affirmative defense question that includes multiple defenses, some of which are inappropriate, and the jury finds in the affirmative. In this circumstance, the court of appeals should reverse and remand for new trial because the question has precluded the plaintiff from presenting the error to the court of appeals.

This issue has been addressed by the Dallas Court of Appeals. In *Pantaze v. Welton*,[350] the trial court submitted one broad-form question that included three affirmative defenses.[351] The jury found in the affirmative to the question.[352] The court of appeals reversed the judgment and remanded for new trial:

> As noted above, the trial court submitted the Weltons' affirmative defenses of oral modification, waiver, and equitable estoppel in a single broad-form question. The question asked for a single answer as to whether payment was excused, and the jury answered the question affirmatively. On the record before us, we cannot tell whether the

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348. *Id.*

349. See Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 219 (Tex. 2005) (dealing with submission of proportionate responsibility issues); Harris County v. Smith, 96 S.W.3d 230, 231 (Tex. 2002) (discussing submission of damage elements); *Casteel*, 22 S.W.3d at 387 (focusing on submission of liability theories).

350. No. 05-96-00509-CV, 1999 WL 673448 (Tex. App.—Dallas Aug. 31, 1999, no pet.).

351. Pantaze v. Welton, No. 05-96-00509-CV, 1999 WL 673448, at *3 (Tex. App.—Dallas Aug. 31, 1999, no pet.) (not designated for publication) (noting that the trial court submitted a single broad-form question containing defenses of "oral modification, waiver, and equitable estoppel").

352. *Id.*

> jury based its answer on a finding of waiver, which was improperly submitted, or on equitable estoppel, which was properly submitted. Thus, we conclude the erroneous submission of the Weltons' affirmative defense of waiver was harmful.[353]

However, the Texas Supreme Court recently addressed whether broad-form error is presumed where an erroneous inferential rebuttal issue is submitted in the jury charge. In *Bed, Bath & Beyond, Inc. v. Urista*,[354] the plaintiff sued the defendant under a negligence cause of action. [355] The trial court submitted an unavoidable accident instruction and a new and independent cause instruction in the broad-form negligence question; however, there was no evidence to support the unavoidable accident instruction.[356] The jury answered the broad-form question in favor of the defendant.[357]

On appeal, the appellate court relied on *Casteel* and held that "although we have concluded it likely . . . 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 . . . ."[358]

The supreme court acknowledged its holdings in *Casteel* and *Harris County*, but limited these cases to situations where multiple liability theories or multiple damage elements are included in a broad-form question.[359] The court explained "[w]e have never extended a presumed harm rule to instructions on defensive theories such as unavoidable accident, and we decline to do so now."[360] While theories of liability and elements of damage can be submitted separately in the charge, Texas Rule of Civil Procedure 277 ex-

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353. *Id.* at *6.

354. 50 Tex. Sup. Ct. J. 334, 2006 WL 3825300 (Tex. Dec. 29, 2006).

355. Bed, Bath & Beyond, Inc. v. Urista, 50 Tex. Sup. Ct. J. 334, 2006 WL 3825300, at *1 (Tex. Dec. 29, 2006) (explaining that the plaintiff had been injured while shopping at defendant retail store).

356. *Id.* at *6 (Medina, J., joined by Jefferson, J., dissenting) (noting that no evidence supported the inclusion of the inferential rebuttal instruction).

357. *Urista*, 2006 WL 3825300, at *1 (majority opinion).

358. Urista v. Bed, Bath & Beyond, Inc., 132 S.W.3d 517, 519 (Tex. App.—Houston [1st Dist.] 2004) (opinion on rehearing).

359. *Urista*, 2006 WL 3825300, at *2.

360. *Id.*

presses that inferential rebuttal questions cannot, and thus must instead be given as instructions.[361] The court stated: "although harm can be presumed when meaningful appellate review is precluded because valid and invalid liability theories or damage elements are commingled, we are not persuaded that harm must likewise be presumed when proper jury questions are submitted along with improper inferential rebuttal instructions."[362] Accordingly, when a trial court improperly submits inferential rebuttal instructions in a broad-form question, there is no *Casteel* broad-form complaint, and an appellate court should use a traditional harmless error analysis in considering whether the submission "probably caused the rendition of an improper judgment."[363]

It should be noted that the court limited the holding in *Urista* to inferential rebuttal issues. It did not hold generally that the *Casteel* harm analysis would not apply to other defensive issues such as affirmative defenses. The reasoning of *Pantaze* shows that the *Casteel* harm analysis should be extended to affirmative defenses. Where there is one affirmative answer to a broad-form question that contains multiple affirmative defenses, one of which is improper, an appellate court cannot determine whether the jury found for the correctly submitted theory or the defective theory. Even if those theories are submitted as instructions in a broad-form liability question, the *Casteel* harm analysis should apply. Under that circumstance, the appellate court would not know whether the jury determined that the plaintiff failed to carry his burden of proof on the elements of his claim or whether the jury incorrectly found that an affirmative defense applied.

E. *Preserving Broad-Form Error*

The complaining party has the burden to timely and specifically object to the improper element of damage or liability theory and the inclusion of such in a broad-form question.[364] Clearly, the fail-

361. *Id.* (TEX. R. CIV. P. 277).

362. *Id.*

363. *Id.* at *3 (quoting TEX. R. APP. P. 61.1(a))

364. *See In re* B.L.D., 113 S.W.3d 340, 349 (Tex. 2003) (affirming that a party must specifically object to the use of a broad-form charge to preserve error); *In re* A.V., 113 S.W.3d 355, 362 (Tex. 2002) (quoting Harris County v. Smith, 96 S.W.3d 230, 231 (Tex. 2002)) (stating that preserving a complaint requires a party to timely object to a specific element in a broad-form question due to a lack of evidence); Conley v. Driver, 175 S.W.3d

ure to object will waive a party's right to complain on appeal about the improper use of broad-form.[365] However, it is less clear what type of objection is necessary to preserve a complaint as to the use of a broad-form question. The issue is whether a party's objection must expressly complain about the inclusion of the improper submission in the broad-form question—is it sufficient to simply object to a portion of a submission on the basis that it is improper without objecting to its inclusion in a broad-form question?

The Texas Supreme Court re-examined this type of error in *Casteel*, where the trial court submitted multiple DTPA grounds in a single question with one answer blank.[366] However, the defendant objected to the question on the basis that the plaintiff did not have standing to assert one of those grounds.[367] On appeal, the plaintiff argued that the defendant waived its broad-form use objection by only making a more general objection.[368] The Supreme Court disagreed:

> Casteel contends that Crown waived any defect in the liability question by failing to preserve error at the trial court. In particular, Casteel argues that Crown's objection was not specific enough because Crown objected to the question generally, instead of to each subsection. We disagree. Crown preserved error by obtaining a ruling on its timely objection to the question on the ground that Casteel did not have standing to pursue any DTPA-based Article 21.21 claims because he was not a consumer.[369]

A fair reading of *Casteel* would indicate that solely objecting to an element of the question is sufficient to preserve error on the

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882, 885 n.2 (Tex. App.—Texarkana 2005, pet. denied) (holding that party must request that damage elements be separately submitted, otherwise any error is waived); *see also* Roberts v. Whitfill, 191 S.W.3d 348, 357 (Tex. App.—Waco 2006, no pet.) (deciding that the party preserved error by requesting that the questionable elements be placed in separate question).

365. *See* City of Houston v. Levingston, No. 01-03-00678-CV, 2006 WL 2076034, at *21 (Tex. App.—Houston [1st Dist.] July 27, 2006, no pet.) (holding that the City's failure to object to the broad-form question at trial precludes the city from challenging the evidentiary basis of individual damage awards); Best Disposal Servs. v. Burch, No. 10-04-00188-CV, 2005 WL 762619, at *1 (Tex. App.—Waco Mar. 30, 2005, pet. denied) (mem. op.) (ruling that an objection must be made at trial to preserve error regarding a broad-form question).

366. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 387 (Tex. 2000).

367. *Id.*

368. *Id.*

369. *Id.* at 378, 387-88.

inclusion of the element in a broad-form question. [370] There is other precedent that a simple no-evidence objection will suffice to preserve error. [371] In other words, a party does not have to specifically object to the inclusion of the theory in the broad-form question but can simply object to it not being supported by evidence.

However, in *Harris County*, the defendant had objected to the liability theory on the basis that it was not supported by the evidence and that it should not be included in the broad-form question.[372] The Texas Supreme Court stated: "A timely objection, plainly informing the court that a specific element of damages *should not be included in a broad-form question* because there is no evidence to support its submission, therefore preserves the error for appellate review." [373] However, the court's statement does not indicate that some lesser objection will not also preserve error.

The court quoted its *Harris County* language, but with added strength in *In re A.V.*:[374] "To preserve [a complaint as to the use of a broad-form question], 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 . . . .'"[375] Otherwise, the trial court will not know that the party is complaining of the use of the broad-form question:

> The record is clear—and [the appellate] 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

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370. *See* Mo. Pac. R.R. Co. v. Limmer, 180 S.W.3d 803, 822 (Tex. App.—Houston [14th Dist.] 2005, pet. filed) (claiming that the analysis in *Casteel* governs objections to the charge regardless of whether the parties objected to the manner in which the charge was presented).

371. *See, e.g.*, Wal-Mart Stores, Inc. v. Redding, 56 S.W.3d 141, 150 n.5 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (determining that a *Casteel* objection was preserved where defendant simply objected that there was no evidence to support future damages but did not object to the form of the question); Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc., 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (reviewing appellant's complaint where he objected that no evidence existed of an express contract).

372. Harris County v. Smith, 96 S.W.3d 230, 236 (Tex. 2002) (emphasis added).

373. *Id.* at 232.

374. 113 S.W.3d 355 (Tex. 2003).

375. *In re* A.V., 113 S.W.3d 355, 362 (Tex. 2003) (quoting *Harris County*, 96 S.W.3d at 236).

> trial court on notice to submit a granulated question to the jury. Because [the appellate] did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.[376]

However, in *In re A.V.*, the party failed to raise even a no-evidence objection to any challenged theory,[377] and arguably, any language that a party had to further object to the use of the broad-form question would likely be dicta. Notwithstanding, other courts have held that a specific objection is required that points out to the trial court that the party is complaining of the use of the broad-form question in that it will prevent the party from determining whether the jury decided the case on an impermissible theory.[378]

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376. *Id.* at 363 (citiation omitted).

377. *Id.* at 362.

378. *See* City of Houston v. Levingston, No. 01-03-000678-CV, 2006 WL 2076034, at *21 (Tex. App.—Houston [1st Dist.] July 27, 2006, no pet.) (claiming that when a broad-form question is used, it is hard to decide what the jury found regarding individual elements, so a party must specifically challenge all the elements of the question to appeal the ruling); Kemp v. Havens, No. 14-05-00060-CV, 2006 WL 1140319 (Tex. App.—Houston [14th Dist.] Apr. 27, 2006, no pet.) (mem. op.) (holding that since error was not preserved because appellant did not request that the trial court include the element of the broad-form question that was factually insufficient in a separate question from the element having evidentiary sufficiency); KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. v. Davis, 175 S.W.3d 379, 393 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (declaring that because appellants did not make a specific objection in a timely manner, their complaint that damages awarded were "based on a legally incorrect measure of damages" was waived); Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 428 (Tex. App.—San Antonio 2004, pet. denied) (asserting that a party preserved error because the record was clear that the trial court knew the complaint was about the use of the broad-form question); Barnett v. Coppell N. Tex. Court, Ltd., 123 S.W.3d 804, 820 (Tex. App.—Dallas 2003, pet. denied) (stating that the party waived broad-form use by not objecting to such even though it did object to submission of underlying claim); Town of Flower Mound v. Teague, 111 S.W.3d 742, 754 n.7 (Tex. App.—Fort Worth 2003, pet. denied) (noting that *Casteel* and *Harris County* were not applicable because the party failed to complain about the submission of the broad-form question and about an element of the question's lack of evidentiary basis); Baribeau v. Gustafson, 107 S.W.3d 52, 60 (Tex. App.—San Antonio 2003, pet. denied) (holding that a party could not appeal the use of a broad-form question because his objection was not specific enough to notify the trial court of the complaint); Norfolk S. Ry. Co. v. Bailey, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.) (asserting that error was not preserved because of a party's failure to object to the submission of the broad-form question); Durban v. Guajardo, 79 S.W.3d 198, 206-07 (Tex. App.—Dallas 2002, no pet.) (denying the appellant's *Casteel* argument due to lack of objection specificity); El Paso Ref., Inc. v. Scurlock Permian Corp., 77 S.W.3d 374, 386 (Tex. App.—El Paso 2002, pet. denied) (indicating that the party waived its right to appeal on issues to which it failed to specifically object at trial); Columbia/HCA Healthcare Corp. v. Cottey, 72 S.W.3d 735, 747 (Tex. App.—Waco 2002, no pet.) (determining that appellants' failure to specifically

Recently, in *Romero*, the Texas Supreme Court recognized that this issue still exists, but expressly refused to decide whether a general no-evidence challenge is sufficient or whether a more detailed broad-form objection is required.[379] Interestingly, the preservation of error issue in *Romero* involved the trial court giving the defendant a choice of having an apportionment question submitted on two liability theories, one of which was incorrect, or having two separate apportionment questions, one for each liability theory.[380] The trial court stated that having two apportionment questions would cure any problem of whether one of the theories was not appropriately supported by evidence.[381] The defendant objected to the two apportionment questions on the basis that they were legally incorrect and they constituted a comment on the weight of the evidence.[382] The trial court did not submit the two questions, but only submitted one conditioned upon both liability theories.[383] The defendant objected, arguing that it would be impossible to tell if the judgment was based upon a correct legal basis, but failed to request two apportionment questions.[384]

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object to combined damages in the charge waived any later complaint); Molina v. Moore, 33 S.W.3d 324, 328 (Tex. App.—Amarillo 2000, no pet.) (explaining that error is preserved when a broad-form question having multiple theories is submitted to the jury as long as the party's objection was timely and specific (citing Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388-89 (Tex. 2000))).

379. *See* Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 229 & n.55 (Tex. 2005) (declaring that "the issue whether an objection must be made to the form of the submission [is] 'a close and difficult question'" (quoting Pan E. Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1124 (5th Cir. 1988), *superseded on other grounds by* TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 2003))). In *Romero*, the petitioners raised a no-evidence objection and an objection that the question was improperly worded to include a non-viable claim; the court expressly declined to rule on whether a party had to do both to preserve error. *Romero*, 166 S.W.3d at 225-29.

380. *Id.* at 228 (noting that the trial court offered to submit two separate jury questions after defense counsel objected to including two theories of liability in a single jury question).

381. *Id.*

382. *Id.*

383. *Id.* at 229 (noting that the trial court eventually overruled the defendant's objection to the single apportionment question).

384. *Romero*, 166 S.W.3d at 228. The defendant's objection to the one apportionment question was: "In Question No. 3, we object to . . . the inclusion of the Question No. 2 inquiry, . . . what we believe is a legally non-viable theory—which is the malice issue— . . . along with a negligence theory resulting in a single percentage inquiry, which, of course, as a result of [*Casteel*] would basically make it impossible to determine that there was a legally legitimate basis upon which rendition of judgment could be had." *Id.*

The plaintiff argued on appeal that the defendant waived any objection to the single apportionment question by objecting to the two apportionment questions.[385] The supreme court disagreed and held that the defendant preserved error:

> But the Romeros' argument simply ignores the fact that Columbia's objection to the malicious credentialing question was correct, and had the trial court sustained it, there would have been no problem with the apportionment question. The overruling of that objection created the problem in the single apportionment question that the Romeros requested, to which Columbia also objected, also correctly. No more was required of Columbia to preserve its complaints.[386]

Apparently, following this holding, a party will not waive a broad-form complaint by objecting to the submission of the issues separately and distinctly.

Until a definitive statement is made by the Texas Supreme Court, a cautious party should make two objections: (1) that a theory is incorrectly submitted because it is not recognized, has no evidence to support it, or is incorrectly defined; and (2) that the theory should not be submitted in a broad-form question because doing so will prevent the party from determining whether the jury relied upon it or a proper theory in answering the broad-form question. Otherwise, the party may waive a complaint as to the use of broad-form. Regarding the specificity of the objection, one court has held that solely objecting to the use of broad-form will not preserve error where the party does not explain why broad-form is improper.[387] Another court has held that objecting to a damages question and asking for separate blanks is specific enough to preserve a broad-form objection.[388]

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385. *Id.* at 229.

386. *Id.*

387. *See* Zieger v. Tex. Dep't of Family & Protective Servs., No. 03-03-00690-CV, 2005 WL 2043812, at *8 (Tex. App.—Austin Aug. 25, 2005, pet. denied) (mem. op.) (holding that the defendant's objection to the broad-form jury charge, without more, preserved nothing more than "a general objection to the use of broad-form submission in termination cases").

388. *See* Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V., No. 13-03-048-CV, 2006 WL 1431221, at *13 (Tex. App.—Corpus Christi May 25, 2006, no pet.) (determining that the appellant's objection properly preserved error in the damages question by stating they should be separated out).

If a complaint about broad-form use is not preserved, the court of appeals will review the jury's finding against all of the evidence in the record and presume that the jury made a finding based upon a permissible cause of action or damage element.[389] For example, in *Thomas v. Oldham*,[390] the Texas Supreme Court held that if the party against whom a broad-form damage question is submitted does not object to it, the reviewing court must review the legal sufficiency of the evidence supporting the whole verdict.[391] In that case, a broad-form damage question asked for consideration of five separate damage elements in arriving at a single damage amount.[392] In reaching its verdict, the jury made notations in the margin next to each of the five elements of damage.[393] These notations totaled $500,000, which was the amount of the verdict.[394] On appeal, the defendant challenged the verdict, arguing that there was no evidence to support the amounts noted by the jury on two of the five elements.[395] The court rejected the argument, observing that the jury's margin notations were not in legal effect "separate damage awards for purposes of evidentiary review."[396] The court concluded that because the defendant had not asked for separate damage findings, it could only challenge the legal sufficiency of the evidence supporting the whole verdict.[397]

F. *Broad-Form vs. Special Submission Conclusion*

Each method of charge submission has certain advantages and each has certain drawbacks. The biggest advantage to the broad-form practice is its simplicity for the jury—the jury only has to answer a few questions. Furthermore, there are fewer conflicting

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389. *See* Harris County v. Smith, 96 S.W.3d 230, 232 (Tex. 2002) (interpreting *Thomas v. Oldham*, 895 S.W.3d 352 (Tex. 1995)).

390. 895 S.W.2d 352, 360 (Tex. 1995).

391. *See Thomas*, 895 S.W.2d at 360 (noting that the respondents did not "argue that the evidence favorable to this verdict, considered as a whole, is legally insufficient to support it").

392. *Id.* at 359.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Thomas*, 895 S.W.2d at 359.

397. *See Harris County*, 96 S.W.3d at 232 (expressing that because the respondent in *Thomas* failed to ask for separate damage findings, its only challenge would have been to the legal sufficiency of the verdict as a whole (citing *Thomas*, 895 S.W.2d at 360)).

findings. Generally, it is easier to affirm a judgment based upon a broad-form charge because it is more difficult to determine why the jury found what it found. Alternatively, the biggest advantage for the special submission practice is that an appellate court has more findings to review. It is easier for an appellate court to review a special submission charge and determine how the jury decided the case and whether those findings were appropriate under the facts and law.

At its base, the debate between broad-form and special submission goes to the proper function of the jury. Broad-form practice allows the jury to determine the ultimate issue—who should win. The jury does not determine independent, discrete facts. Because the jury determines the ultimate issue, there is not much for the trial court to do but enter the judgment based upon the finding. Under special submission practice, however, the jury determines facts and the trial court applies the law to the findings to determine which party wins. The debate boils down to simplicity and expediency versus accuracy. As shown above, the Texas Supreme Court has swayed back and forth over the past century and is continuing to sway. Recently, the court defended the trend back to more special issue and accuracy by stating:

> The reversible error rule of *Casteel* and *Harris County* neither encourages nor requires parties to submit separate questions for every possible issue or combination of issues; the rule *does* both encourage and require parties not to submit issues that have no basis in law and fact in such a way that the error cannot be corrected without retrial. If at the close of evidence a party continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether. The Romeros' argument assumes that it is so commonplace to come to the end of a jury trial and have no idea what claims are still legally and factually valid that the only safe course to avoid retrial is to parse out every issue in a separate jury question. Nothing in our review of thousands of verdicts rendered by juries across the [s]tate suggests that there is any validity to the assumption.
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> . . . This Court's adoption of broad-form jury submissions was intended to simplify jury charges for the benefit of the jury, the parties, and the trial court. It was certainly never intended to permit, and

> therefore encourage, more error in a jury charge. We continue to believe, as we stated in *Harris County*, that "[w]hen properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury." But "it is not always practicable to submit every issue in a case broadly," and broad-form submission cannot be used to broaden the harmless error rule to deny a party the correct charge to which it would otherwise be entitled.[398]

Accordingly, the court seems willing to continue the trend of emphasizing accuracy in the verdict rather than expediency.

VI. CONCLUSION

There are two looming issues in current Texas charge practice—preservation of error and broad-form use. At the present time, the Texas Rules of Civil Procedure generally mandate that objections are to be used to preserve incorrect questions, definitions, and instructions within the jury charge, whereas written requests will preserve erroneous omissions from the charge. While this seems straightforward, the confusion stems from the unpredictable and sometimes ambiguous ways the courts have interpreted these rules in the almost fifteen years since the *Payne* preservation of error test. While *Payne* instructs appellate courts to simply focus on whether the trial judge was aware of the complaint, some courts apparently have been hesitant to ignore the requirements of the Texas Rules of Civil Procedure. The most logical option to remedy the existing inconsistencies is to adopt new charge preservation of error rules that more closely mirror the current charge practice.

Texas has undergone several swings between broad-form practice and special submission practice over the past century, each time in an attempt to remedy the shortcomings and difficulties of the requirements in place. Consistency has been difficult because both practices have their merits and drawbacks, and every few decades, the other side's grass has looked greener. For now, broad-form jury charges are being used, and the authors anticipate this practice will continue. Texas jury charges, however, will be tem-

398. Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 230 (Tex. 2005) (quoting *Harris County*, 96 S.W.3d at 235).

pered with a concern for fairness and accuracy—broad-form "whenever feasible."[399]

In the end, the Texas Supreme Court has clearly shown an interest in the accuracy of jury charges because accurate jury charges lead to accurate jury findings. This interest has manifested itself in two main areas: charge preservation of error and broad-form use. The quest for accuracy has made it easier to preserve error and more difficult to properly use broad-form submissions. These two concepts are related simply because the supreme court wants to make it easier for appellate courts to review jury findings.

399. TEX. R. CIV. P. 277.