PREPARING THE CHARGE, THE CHARGE CONFERENCE, AND PROTECTING THE RECORD

DAVID F. JOHNSON, *Fort Worth*
Winstead PC

State Bar of Texas
CIVIL APPELLATE PRACTICE 101
September 9, 2020

CHAPTER 5

DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
www.txfiduciarylitigator.com
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

BOARD CERTIFICATIONS:

*Board Certified – Civil Appellate Law, Civil Trial Law, and Personal Injury Trial Law – Texas Board of Legal Specialization

*Board Member of the Texas Board of Legal Specialization

AWARDS AND HONORS:

* Named One of Tarrant County's Top Attorneys by Fort Worth's 360 West Magazine in 2017-2020
* Named as a Best Lawyer in America in 2013-2020
* Named by Fort Worth Texas Magazine as One of Tarrant County's Best Lawyers in 2004-2020
* Named by Texas Monthly as a "Super Lawyer" in 2013-2020
* Named by Texas Monthly as a "Texas Rising Star" in 2004, 2006-2012
* Named One of Fort Worth Business Press's "Power Attorney" in 2014
* Named One of D Magazine's "Best Lawyers Under 40 in Dallas" in 2004, 2006, 2007
* Named One of D Magazine's "Best Lawyers in Dallas" for appellate law in 2008-2010
* Named One of Fort Worth Business Press's "Forty Under Forty" in 2003
* Named Top Author in 2016 and 2019-2020 in JD Supra's 2017 Readers' Choice Awards

CURRENT LEGAL EMPLOYMENT:

*Managing Shareholder of Winstead PC's Fort Worth Office
-Civil Appellate and Trial Practice
-Fiduciary Litigation Emphasis

EDUCATION:

Baylor University School Of Law, Waco, Texas, Juris Doctor, *Magna Cum Laude*, 1997
Baylor University, Waco, Texas, B.B.A. in Accounting, 1994

ARTICLES AND CLE MATERIALS:

David has published over twenty (20) law review articles on topics including experts, summary judgments, charge practice, preservation of error, voir dire, and other topics. David's articles have been cited as authority by federal courts, the Texas Supreme Court, the Texas courts of appeals located in Waco, Texarkana, Tyler, Beaumont, and Houston, and cited by McDonald and Carlson in their Texas Civil Practice treatise and William V. Dorsaneo in the Texas Litigation Guide and in the Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over hundred and fifty (150) continuing legal education courses.

TABLE OF CONTENTS

PREPARING THE CHARGE, THE CHARGE CONFERENCE, AND PROTECTING THE RECORD

I. INTRODUCTION AND SCOPE OF ARTICLE[1]

"Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury." Tex. R. Civ. P. 271.

The charge is the document that the court gives the jury to decide the case – it frames the controlling factual issues. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985). As one commentator stated: "It is, of course, the function and responsibility of the jury to find facts, and the function and responsibility of the trial judge to determine what questions of fact shall be submitted to the jury. It is the charge and its responsive verdict that judge and jury must cooperate in order to carry out their respective functions and responsibilities." HODGES AND GUY, THE JURY CHARGE IN TEXAS CIVIL LITIGATION, 34 TEXAS PRACTICE § 1 (1988).

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 this document is wrong, then the jury's answer is likely wrong. Thus, in Texas the charge is "a prolific source of reversals." JURY TRIAL: CHARGE, MCDONALDS TEXAS CIVIL PRACTICE, § 22:1. However, before a party can complain on appeal about an error in the charge, the error must be preserved. Over the decades, the Texas Rules of Civil Procedure as interpreted by Texas courts had a fairly certain set of rules for preservation of charge error. True, these rules are somewhat complicated—but not impossibly so. Without amending a single rule, the Texas Supreme Court placed great uncertainty in preservation of charge error in the case of *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992), wherein the Court found that a defendant had preserved error when well-established precedent would have held otherwise. Notwithstanding *Payne*, a party will properly preserve error by following the Texas Rules of Civil Procedure as interpreted by pre-*Payne* precedent.

This article will address the basic purpose of the charge in Texas state court, the on-going debate of whether the charge should be submitted in broad form or special issue, the methods of preserving error in the charge, the effect of omissions in the charge, appellate review, and other charge issues. The article will also address ethical considerations in preparing a charge and participating in a charge conference.

II. COMPONENTS OF THE CHARGE: QUESTIONS, INSTRUCTIONS, AND DEFINITIONS

The parties to a suit are entitled to have the trial court submit disputed fact issues to the jury. *Bel-Ton Elec. Serv. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996); *Aero Energy, Inc. v. Circle C. Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985). Submitting the controlling issues to the jury in a logical, simple, clear, fair, correct, and complete manner is the goal of the jury charge. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999). A "controlling issue" is an issue that requires a factual determination to render judgment in the case. *Smooth Solutions Ltd. P'ship v. Light Age, Inc.*, No. 04-08-00093-CV, 2009 Tex. App. LEXIS 4695, 2009 WL 1804846, at **3-4 (Tex. App.—San Antonio June 24, 2009, no pet.).

The trial court has broad discretion in framing the issues for the jury, and this discretion is solely limited by the requirement that the charge be limited to the controlling issues of fact. *Doe v. Mobile Tapes, Inc.*, 43 S.W.3d 40, 50-51 (Tex. App.—Corpus Christi 2001, no pet.). A controlling issue may be submitted via questions, instructions, and definitions—or a combination of all three. *Id.* So long as the charge is legally correct, the trial court has broad discretion regarding the submission of questions, definitions, and instructions. *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648, 673 (Tex. App.—Dallas 2018, pet. dism'd by agr.).

A. Questions

In the charge, the trial court asks the jury to answer certain questions to resolve the factual issues in the case. A question should be supported by the pleadings and evidence: "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." Tex. R. Civ. P. 278; *see also Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). Further, "a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleadings by that party." Tex. R. Civ. P. 278. Accordingly, if an issue is properly pleaded and is supported by some evidence, a litigant is entitled to have questions relevant to a controlling issue submitted to the jury. *Triplex Comm., Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995). *See also Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *Komet v.*

[1] This paper is an updated version of a prior law review article: William G. "Bud" Arnot, III & David Fowler Johnson, *Current Trends in Texas Charge Practice: Preservation of Error and Broad-Form Use*, 38 ST. MARY'S L.J. 371, 383 (2007)

Graves, 40 S.W.3d 596, 603 (Tex. App.—San Antonio 2001, no pet.); *Mexico Industries, Inc. v. Banco Mexico Somex, SNC*, 858 S.W.2d 577 (Tex. App.—El Paso 1993, writ denied); *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Tex. App.—Houston [1st Dist.] 1992, no writ). "The trial court has broad discretion in submitting jury questions so long as the questions submitted fairly place the disputed issues before the jury." *McIntyre v. Comm'n for Lawyer Discipline*, 247 S.W.3d 434, 443 (Tex. App.—Dallas 2008, pet. denied); *see also Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322, 351(Tex. App.—Beaumont 2010, pet. denied).

However, a trial court should not submit a jury question that is not supported by any evidence, *See Green Int'l v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997), and should not submit a question that is established as a matter of law. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992). A court should not submit legal issues to the jury. *Elec. Reliability Council of Tex., Inc. v. Met Ctr. Partners -4, Ltd.*, No. 03-04-00109-CV, 2005 Tex. App. LEXIS 7787 (Tex. App.—Austin September 22, 2005, no pet) (mem. op.) (complaint that question submitted legal and factual issues was waived by failing to object). Lastly, a trial court does not have to give more than one question asking the same thing: "A judgment shall not be reversed because of the failure to submit other various phases or different shades of the same question." Tex. R. Civ. P. 278; *Corey v. Rankin*, No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224 (Tex. App.—Houston 14th Dist., Nov. 13, 2018, no pet.).

B. Instructions

In addition to questions, a trial court should submit instructions that help frame the question: "The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." Tex. R. Civ. P. 277. An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012); *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Dryzer v. Bundren*, No. 07-12-00167-CV,2014 Tex. App. LEXIS 4875, 2014 WL 1856849 (Tex. App.—Amarillo May 6, 2014, pet. denied); *Greer v. Seales*, No. 09-05-001-CV, 2006 Tex. App. LEXIS 1524 (Tex. App.—Beaumont January 2, 2006, no pet.); *Hogue v. Blue Bell Creameries, L.P.*, 922 S.W.2d 566, 570-71 (Tex. App.—Texarkana 1996), *writ denied per curium*, 930 S.W.2d 88 (Tex. 1996); *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 207 (Tex. App.—Corpus Christi 1974, writ ref'd n.r.e.). The trial court has considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997); *Wichita Cty. v. Hart*, 917 S.W.2d 779, 783-84 (Tex. 1996). When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *Texas Workers' Com. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000).

Although uncommon, a trial court can reversibly err in failing to submit a proper instruction. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388 (Tex. 2016) ("While trial courts have wide discretion in determining the necessity of explanatory instructions and definitions in the jury charge, the trial court must give definitions of legal and other technical terms."); *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998); *Standley v. Sansom*, 367 S.W.3d 343, 350 (Tex. App.—San Antonio 2012, pet. denied). For example, in *Hogue v. Blue Bell Creameries*, the plaintiff filed a lawsuit against her former employer alleging that she was fired in retaliation for filing a worker's compensation claim. 922 S.W.2d 566, 571 (Tex. App.—Texarkana 1996, writ denied). Under worker's compensation retaliation claims, the fact that the employee filed a worker's compensation claim does not have to be the "sole" cause of the employee's firing--it only has to "contribute" to the firing. *Id*. The plaintiff offered an instruction that would have cleared up any confusion about what causation was necessary, but the trial court denied the instruction. *Id*. The plaintiff lost and appealed. The court of appeals held that the trial court did err because the issue of causation was an important issue and the trial court should have charged the jury as to the plaintiff's correct burden. *Id*.; *see also, Watson v. Brazos Elec. Power Coop*., 918 S.W.2d 639, 643-44 (Tex. App.—Waco 1996, no writ) (trial court erred in failing to submit spoliation instruction where supported by evidence).

Trial courts can reversibly err in submitting inappropriate instructions. *See, e.g*., *Dryzer v. Bundren*, No. 07-12-00167-CV,2014 Tex. App. LEXIS 4875, 2014 WL 1856849 (Tex. App.—Amarillo May 6, 2014, pet. denied); *United Enters. v. Erick Racing Enters.*, No. 07-01-0467-CV, 2002 Tex. App. LEXIS 9271, at *19 (Tex. App.—Amarillo Dec. 31, 2002, pet. denied). Reversible error may result from the inclusion in the charge of unnecessary jury instructions focusing the jury's attention on issues not belonging in the case. *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 469-70 (Tex. App.—San Antonio 1998, pet. denied) (citing *Lemos v. Montez*, 680 S.W.2d 798, 799 (Tex. 1984)). The error is harmful because "the court's instructions become the law of the case and are to be accepted by the jury as the guide on which they must rely." *Middleton*, 982 S.W.2d at 471 (citing *Texas Power & Light Co. v. Lovinggood*, 389 S.W.2d 712, 717 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.)).

When liability is asserted based upon a provision of a statute or regulation, a jury charge should track the language of the provision as closely as possible. *Toennies v. Quantum Chem. Corp*., 998 S.W.2d 374, 377 (Tex. App.—Houston [1st Dist.] 1999), *aff'd*, 47 S.W.3d 473 (Tex. 2001); *Borneman v. Steak & Ale, Inc.*, 22 S.W.3d 411,

413 (Tex. 2000); *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co*., 601 S.W.2d 931, 937 (Tex. 1980); *Housing Authority of El Paso v. Guerra*, 963 S.W.2d 946, 953 (Tex. App.—El Paso 1998, writ denied); *Depriter v. Tom Thumb Stores, Inc*., 931 S.W.2d 627, 629 (Tex. App.—Dallas 1996, writ denied); *Reed v. Israel Nat. Oil Co., Ltd.*, 681 S.W.2d 228 (Tex. App.—Houston [1st Dist.] 1984, no writ). Instructions should only provide a minimum amount of information needed to guide a jury's decision making process. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 822 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The purpose of broad form charge submissions—simplifying the charge—would be undermined if a court were to submit complex instructions with each question. *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984). Instructions should only point a jury to legally relevant matters. *Exxon Corp. v. Perez*, 842 S.W.2d 629 (Tex. 1992). Consequently, a general instruction that does not concern a relevant issue is improper even if it is a correct statement of the law. *Acord v. General Motors Corp*., 669 S.W.2d 111, 116 (Tex. 1984). Lastly, an instruction should not inform the jury of the effect of its answers, *See Mobile Chemical Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974), and should not constitute a comment on the weight of the evidence. *Acord v. General Motors Corp.*, 669 S.W.2d at 116.

After the jury has retired for deliberations, the trial court may supplement its instructions "touching any matter of law," and the trial court may also supplement its instructions in response to a question from the jury during deliberations. Tex. R. Civ. P. 286; *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648 (Tex. App.—Dallas 2018, pet. dism'd by agr.).

C. Definitions

In addition to questions and instructions, a trial court should submit definitions of the controlling legal terms in the charge. The purpose of a definition is to allow the jurors to understand the legal terms and phrases used in the charge so that they can properly answer the questions and render a verdict. *Oadra v. Stegall*, 871 S.W.2d 882, 890 (Tex. App.—Houston [14th Dist.] 1994, no writ). However, a court should only define legal or technical terms. *Allen v. Allen*, 966 S.W.2d 658, 660 (Tex. App.—San Antonio 1998, pet. denied); *Turner v. Roadway Express, Inc*., 911 S.W.2d 224, 227 (Tex. App.—Fort Worth 1995, writ denied).

The failure to define a legal or technical term in the charge can be harmful error requiring reversal. For example, in *Southwestern Bell Tel. Co. v. John Carlo Tex., Inc*., the trial court reversibly erred in failing to define "justification" where the entire factual dispute in the suit involved whether one party's conduct was justified. 843 S.W.2d 470, 472 (Tex. 1992). The Texas Supreme Court reversed the judgment stating: "To ask the jury to resolve this dispute without a proper legal definition to the essential legal issue was reversible error." *Id*.

III. BROAD-FORM VS. SPECIAL SUBMISSION

How the components of the charge are formulated has changed 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. Under broad form practice, questions are drafted generally and include most or all elements of a claim and can include multiple causes of action. *Island Rec. Dev. v. Republic of Texas Sav.*, 710 S.W.2d 551, 554 (Tex. 1986). Under broad form practice, much of the charge is contained in instructions to general questions. Basically, the jury is asked to find conclusions without having to agree on specific facts. The Texas Supreme Court has described this practice as:

> 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. Similarly, the jurors here could have unanimously found Bumstead negligent, even if half believed the negligent act was overloading his truck and half believed it was failing to warn oncoming traffic--acts that preceded two different collisions.

Dillard v. Texas Elec. Corp., 157 S.W.3d 111, 429 (Tex. 2005) (citing *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981)).

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 more questions, but fewer instructions. The point of special submission is for the jury to find more discrete facts and have the trial court to reach a conclusion 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 a general charge. Charles R. Watson, Jr., *The Court's Charge to the Jury*, ADVANCED CIVIL TRIAL COURSE, pg. 13 (State Bar of Texas 2003). Many of these early charges allowed the jury to decide in a general fashion which party should win. 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. WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE, § 122.02[1] (2004).

Accordingly, in 1913 the Texas Legislature allowed trial courts to submit issues distinctly (special submission) if one of the parties so requested in order to remedy some of the confusion created by broad form charges. Charles R. Watson, Jr., *The Court's Charge to the Jury*, ADVANCED CIVIL TRIAL COURSE, pg. 17 (State Bar of Texas 2003). In 1922, the Texas Supreme Court held in *Fox v. Dallas Hotel Co.*, that issues should be submitted "distinctly and separately." 111 Tex. 461, 240 S.W. 517, 512 (1922). The Court stated: "the duty of the court in trials by jury [is to first,] submit all the controverted fact issues made by the pleadings; second, to submit each issue distinctly and separately, avoiding all intermingling; and third, to give such explanation and definition of legal terms as shall be necessary to enable the jury to answer each issue." *Id*. at 521-22.

This ruling was formalized in 1941 with the adoption of former Rule 277 that similarly required that issues be submitted "distinctly and separately." Tex. R. Civ. P. 277 (superceded) (pre-1973 version of Rule required issues to be submitted "distinctly and separately")*; William V. Dorsaneo, III, Broadform Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 606 (1992).

However, special submission practice had its own troubles. Under special submission practice, there would likely be several questions on a single theory of recovery. These lengthy and complicated charges often caused many problems for juries, lawyers, and courts. In particular, conflicting jury findings were especially troublesome under special submission practice. For example, a jury may find that the defendant is a proximate cause of the accident made the basis of the suit and also find that the sole proximate cause of the accident is an act of god.

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 the issue broadly." Tex. R. Civ. P. 277 (superceded) (1973 version stated that it would be discretionary with the court whether to submit separate questions or whether to submit them broadly); *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). A trial court submitting a claim in broad form was no longer objectionable. Thereafter, the Texas Supreme Court found in several opinions that trial courts should strive to use broad form submissions and simplify jury charges. *See, e.g., Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *see also, Harris County v. Smith*, 96 S.W.3d at 230. For example, 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." *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

B. Broad Form "When Feasible"

In 1988, the Court once again amended the Rules and stated that a trial court should use broad form if possible: "In all jury cases the court shall, *whenever feasible*, submit the cause upon broad-form questions." Tex. R. Civ. P. 277 (emph. added); *see also Texas Department of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("Unless extraordinary circumstances exist, a court must submit such broad-form questions."). The court defined "whenever feasible" to mean "in any or every instance in which it is capable of being accomplished." *Id*.

As the Texas Supreme Court 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." *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999); *see also, Texas Genco, L.P. v. Valence Operating Co*., No. 10-04-00365-CV, 2006 Tex. App. LEXIS 448 n.2 (Tex. App.—Waco January 18, 2006, pet. filed) (trial court erred in not submitting issues in broad form).

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.*, a jury determined to terminate the parental rights of the defendant under a broad form question that submitted two alternative statutory basis for termination. 802 S.W.2d at 647. 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. 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. 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 question invaded the province of the trial court as it asked the jury to determine the ultimate legal issue and not a particular fact.

The Texas Supreme Court reversed the court of appeals and affirmed the trial court's judgment terminating the defendant's parental rights. 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. *See id*. at 649. 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. 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. *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 260 (Tex. 1992).

Furthermore, there are problems in submitting ultimate issues to the jury in broad form. Problems arise where one of the basis for the finding is not legally permissible, where there is no evidence to support it, or where the basis is improperly defined. 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*, the Court held that not only was the use of special issues not harmful error, but it may actually be preferred where the law was unsettled regarding one cause of action. 843 S.W.2d 448 (Tex. 1992).

In 2000, the Texas Supreme Court addressed this issue and held that the presumption that submissions should be in broad form is not absolute. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 1999). It is not always practicable to submit every issue in a case broadly. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). In fact, "broader is not always better." *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) (quoting Muldrow & Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, 48 BAYLOR L. REV. 815, 853 (1996)). If there is a good chance that there is an improper theory of liability or damage, then those theories should be submitted in granulated questions: "[W]hen a 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." *See id.; see also, Texas Dept. of Human Servs.* v. *Hinds*, 904 S.W.2d 629, 637 (Tex. 1995). Moreover, it is harmful error to submit them in a broad-form question.[2] *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); *In re J.M.M.*, 80 S.W.3d 232, 247 (Tex. App.—Fort Worth 2002, pet. denied).

In *Crown Life Insurance Company v. 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. 22 S.W.3d 378 (Tex. 2000). The court of appeals 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. *Crown Life Ins. Co. v. Casteel*, 3 S.W.3d 582, 594-95 (Tex. App.—Austin 1998), *rev'd and remanded*, 22 S.W.3d 378 (Tex. 2000). The Texas Supreme Court disagreed, 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: "When a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d at 388. *See also In re Commitment of Jones*, No. 19-0260, 2020 Tex. LEXIS 569 (Tex. June 19, 2020); *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747(Tex. 2012) (*Casteel* does not apply when one theory of liability is not invalid).

Furthermore, the Court expanded the *Casteel* holding to damage elements without evidentiary support. In *Harris County v. Smith*, the trial court submitted two broad-form damage questions. 96 S.W.3d 230 (Tex. 2002). The defendant objected that there was no evidence of several of the damage elements and that submitting them in a broad form question was improper. The trial court overruled the objections. The court of appeals concluded that the error was harmless because there was ample evidence to support several of the properly submitted elements of damage.

[2] 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 points out the error or else it is waived. *Tagle v. Galvan*, 155 S.W.3d 510, 515 (Tex. App.—San Antonio 2004, no pet.).

The Texas Supreme Court reversed the court of appeals. It found that: (1) the trial court clearly erred when it did not sustain the objection and correct the charge, (2) *Casteel's* reasoning applied to broad-form damage questions, and (3) the error was harmful because it prevented the court of appeals from determining whether the jury based its verdict on an improperly submitted element of damage. *Id*.

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 the evidentiary support therefore. Some argued that although a jury may not be trusted to discern impermissible claims from permissible ones, that the jury was uniquely qualified to determine the factual basis for claims. 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 Court once again addressed whether *Casteel* applies to claims the improper submission of claims without evidentiary basis with claims that have evidentiary basis.

In *Romero v. KPH Consolidated, Inc*., a plaintiff sued several doctors and a hospital in a personal injury case. 166 S.W.3d 212, 225-27 (Tex. 2005). The plaintiff raised claims for negligence and malicious credentialing against the hospital. 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. In the third question, the jury apportioned liability between the doctors and the hospital finding that the hospital was forty percent (40%) responsible and in so doing considered the hospital's negligence and malicious credentialing. However, there was no evidence to support the jury's finding that the hospital committed malicious credentialing. The Texas Supreme Court reversed the judgment and framed the issue thusly:

> 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 demonstrating 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.

Id. at 227-28.

One of the most interesting aspects of this case is that the Court found that it may not be reversible error where a claim is improperly submitted due to a lack of evidence. 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*, the court of appeals held that because there was evidence of all theories of liability, there was no broad form issue. No. 03-05-00003-CV, 2006 Tex. App. LEXIS 721, *21 n. 8 (Tex. App.–Austin January 27, 2006, no pet.). However, the court held in the alternative that even if there was such an error, that 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, 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.

Id.

The Court has trended away from *Casteel* regarding defensive issues that are submitted in a broad form questions. In *Bed, Bath & Beyond, Inc. v. Urista*, the Court held that *Casteel*'s presumed harm analysis does not apply to broad-form questions based on a single theory of liability that are submitted with improper inferential rebuttal instructions. 211 S.W.3d 753 (2006). The Court explained:

> We specifically limited our holdings in *Casteel* and *Harris County* to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements. We have never extended a presumed harm rule to instructions on defensive theories such as unavoidable accident, and we decline to do so now. . . . When, as here, the broad-form questions submitted a single liability theory (negligence) to the jury, *Casteel*'s multiple-liability-theory analysis does not apply. Moreover, when a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply. Unlike alternate theories of liability and damage elements, inferential rebuttal issues cannot be submitted in the jury charge as separate questions and instead must be presented through jury instructions. Therefore, 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.

Id. Because it held that *Casteel*'s presumed harm analysis did not apply to the inferential rebuttal question, the Court applied the traditional harmless error analysis, which considers whether the instruction "probably caused the rendition of an improper judgment." *Id*. at 757. After reviewing the entire record, the Court concluded that there was some evidence the plaintiff failed to meet his burden of proof and therefore held that the unavoidable accident instruction did not probably cause the jury to render an improper verdict. *Id*. at 758-59.

Similar to the *Urista* opinion, the Court further held that *Casteel* does not apply to new and independent cause instruction or contributory negligence where the question had separate answer blanks for the parties. In *Thota v. Young*, the Court reviewed whether the inclusion of a contributory negligence and new and independent cause instruction in a negligence question. 366 S.W.3d 678 (Tex. 2012). Regarding the contributory negligence submission, the Court stated:

> Even if Young is correct [and the submission was in error], *Casteel*'s presumed harm analysis does not apply because the separate answer blanks allow us to determine whether the jury found Dr. Thota negligent. Unlike *Casteel*, which involved thirteen independent grounds for liability with one answer blank for the defendant's liability, here, the charge provided two separate blanks for the jury to answer the single-theory-of-liability question. The charge mirrors the Texas Pattern Jury Charges's longstanding use of separate blanks when multiple parties' negligence are in issue. The only theory of liability asserted against Dr. Thota was negligence, and the jury's findings on that theory are clear: Dr. Thota was not negligent. We hold that this charge question simply does not raise a *Casteel* issue, and the court of appeals erred in applying *Casteel*'s presumed harm analysis.

Id. Regarding the new and independent cause instruction, the Court held:

> [E]ven assuming the new and independent cause instruction in this charge constituted error, it does not raise a *Casteel* issue. Like *Urista*, this case involves a single liability theory—negligence—so *Casteel*'s multiple-liability-theory analysis does not apply. Moreover, as we noted in *Urista*, "when a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply." Inferential rebuttal issues are distinct from theories of liability and damage elements because they "cannot be submitted in the jury charge as separate questions and instead must be presented through jury instructions." Like the inferential rebuttal instruction on unavoidable accident in *Urista*, the new and independent cause instruction "was given in reference to the causation element of the plaintiff's negligence claim." While appellate courts may

> presume harm when meaningful appellate review is precluded because the submitted charge mixes valid and invalid theories of liability or commingles improper damage elements, the courts do not presume harm because of improper inferential rebuttal instructions on defensive theories. Therefore, assuming without deciding that the submission of the new and independent cause instruction was an abuse of discretion, we hold that this charge error does not present a *Casteel* problem.

Id. at 692-93.

The Court held that the submission must be in error before *Casteel* issue can apply. In *Ford Motor Co. v. Castillo*, a jury determined that a settlement agreement was procured by fraud. 444 S.W.3d 616 (Tex. 2014). The Court held that the liability question did not support *Casteel's* presumed harm where the question did not submit an improper ground for relief but an arguably improperly defined element:

> On the second element, Ford was required to produce evidence establishing that the note was sent by or at the direction of the plaintiffs or their agents or representatives with knowledge it was false. Ford's theory was that Cantu, as plaintiffs' representative, directed Cortez to send the note. Castillo argues that this element presents a *Casteel* problem. We held in *Casteel* that harmful error will be presumed when a broad-form jury question contains both valid and invalid theories of liability, and the jury's answer fails to specify on which theory it rests. Castillo argues that the doctrine of presumed harm is triggered with this element, because the word "or" requires Ford to present legally sufficient evidence of each possible way the element might be established. The argument misunderstands *Casteel*. *Casteel* issues do not arise in every situation where a jury has more than one legal theory to choose from when answering a single question. Instead, *Casteel* issues arise when one of the choices presented to the jury on a single, indiscernible question is legally invalid. Castillo does not argue the legal invalidity of the element and thus *Casteel* does not apply.

Id. at 621.

The Court, however, has continued to hold that where a plaintiff submits a claim in a charge that is wrong and where the reviewing court cannot determine whether the jury found for the wrong ground or a correct one, that *Casteel* does apply. In *Columbia Rio Grande Healthcare, L.P. v. Hawley*, the liability question to the jury asked whether the hospital's negligence was a proximate cause of the plaintiff's injuries. 284 S.W.3d 851, 863 (Tex. 2009). The jury was instructed that the hospital could "act only through its employees, agents, nurses, and servants." *Id*. The charge, however, did not define "agent." There was evidence in the case of a physician's negligence, and the hospital requested that the jury be instructed that the physician was not its agent. *Id.* The trial court refused. The Texas Supreme Court held that while the case presented "a different jury charge problem" than *Casteel* did, the trial court's error "effectively preclude[d] reviewing courts from determining whether the jury found liability on an invalid basis, preclude[d] determination of whether the error probably caused the rendition of an improper judgment, and [was] harmful because it prevent[ed] proper presentation of the case on appeal." *Id*. at 865.

In *Texas Commission on Human Rights v. Morrison*, the liability question asked about the single theory of employer retaliation. 381 S.W.3d 533, 535 (Tex. 2012) (per curiam). The plaintiff complained of several adverse actions taken by her employer, including the denial of a promotion, but liability could not be based on the denied promotion because the plaintiff had not included that particular action in her EEOC complaint. *Id*. at 535, 537. Over the employer's objection, the trial court submitted a single question asking whether the employer took "adverse personnel actions" against the plaintiff. *Id.* at 536. The plaintiff argued on appeal, that there was no charge error because "no invalid theory was directly submitted to the jury." *Id.* at 537. The Court rejected that argument, and even though the employer had not requested a limiting instruction, held that the error in overruling the objection was presumed harmful. *Id*. at 536-38.

So, even in a single-claim submission, *Casteel* can apply where the instructions do not limit the jury to a proper basis for liability. This precedent does seem at odds with the *Urista* and *Thota* opinions. In *Urista* and *Thota*, the Court held that *Casteel* does not apply where the trial court actually submitted incorrect instructions that would allow a jury to find for a defendant on incorrect theories. But in *Columbia* and *Morrison*, the Court held that Casteel does apply where the trial court failed to submit limiting instructions and would allow a jury to find for a plaintiff on potentially incorrect theories. One would think that actually submitting incorrect theories would be more harmful than omitting limiting instructions to avoid improper theories.

In *Benge v. Williams*, the liability question asked about a single claim of negligence in a medical case. 548 S.W.3d 466, 475 (Tex. 2018). "Dr. Benge was negligent, Williams claimed, in allowing Dr. Giacobbe to assist, failing to disclose her involvement, improperly supervising her, and failing to promptly detect the bowel perforation." *Id*. The plaintiff later disclaimed recovery for the defendant's nondisclosure. *Id*. The defendant

requested that the jury be instructed that it could not consider the nondisclosure in deciding whether he was negligent. *Id*. The Texas Supreme Court held that

> Because the trial court refused the instruction, we cannot determine whether it was the basis for the jury's finding. As in *Hawley* and *Morrison*, as well as *Casteel*, because an appellate court cannot determine whether the jury found liability on an improper basis, we must presume that the error in denying Dr. Benge's limiting instruction was harmful. The rule "both encourage[s] and require[s] 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."

Id.

The Texas Supreme Court has not directly addressed yet whether the inclusion in a broad form question of a ground of recovery or damages that is improper due to it being improperly defined is harmful error. However, language from the Court's prior opinions leads to the conclusion that it would be harmful error: 1) "It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law," *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d at 388; and 2) "[A] litigant today has the right to a fair trial before a jury properly instructed on the issues 'authorized and supported by the law governing the case." *See Harris County v. Smith*, 96 S.W.3d at 234. Thus, a party should have the right to have the jury properly instructed and have 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." *Id.* at 235. However, the dissent in *Harris County* argued that its extension may encompass factual sufficiency complaints. *See id.* at 239. Of course, a trial court should submit questions even if there is factually insufficient evidence to support them – the first time that a factual sufficiency complaint can be raised is in a motion for new trial. Tex. R. Civ. P. 324(b); *Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963) ("The 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 v. Davidson*, 965 S.W.2d 674, 680 (Tex. App.—Corpus Christi 1998, pet. denied); *Hinote v. Oil, Chem. & Atomic Workers Int'l Un.* 777 S.W.2d 134, 143 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Smith v. State*, 523 S.W.2d 1 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). However, just because a trial court has to submit an issue that has factually insufficient evidence in support of it, that 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. 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. *See e.g., Formosa Plastics Corp. v. Kajima Int'l, Inc*., 216 S.W.3d 436 (Tex. App.—Corpus Christi November 10, 2004, pet. denied) (Castillo, J, dissenting) (stating that appellant argued that broad form use denied it the chance to challenge damage findings by legal or factual sufficiency). The logical basis of *Casteel* would seem to apply to factual sufficiency complaints. However, this issue has yet to be decided.

The Texas Supreme Court cases dealing with broad form error have all dealt with the plaintiff's claims for relief – either liability theories, damage elements, or proportionate responsibility issues. However, the logic behind these cases should equally apply to affirmative defenses. For example, 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.

For example, in *Pantaze v. Welton*, the trial court submitted one broad form question that included three affirmative defenses. No. 05-96-00509-CV, 1999 Tex. App. LEXIS 6564 (Tex. App.—Dallas August 31, 1999, no pet.). The jury found in the affirmative to the question. 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 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.

Id. at *16-17. *See also Med. Imaging Sols. Group, Inc. of Tex. v. Westlake Surgical, LP*, 554 S.W.3d 152, 157(Tex. App.—San Antonio 2018, no pet.) ("we need not decide if *Casteel's* reasoning applies when valid and invalid affirmative defenses are commingled in a single broad-form question because the broad-form question in this case did not commingle valid and invalid affirmative defenses.").

In *Brannan Paving GP v. Pavement Markings, Inc.*, the court of appeals reviewed whether Casteel would apply when an improper affirmative defense was submitted with a broad form liability theory. 446 S.W.3d 14. 23-25 (Tex. App.—Corpus Christi 2013, pet. denied). The court stated:

> We hold the trial court's inclusion of a valid theory of liability and an improperly-included affirmative defense instruction in the same question with only one answer blank created the type of confusion that the Casteel presumed-harm analysis was designed to address. The erroneous inclusion of an affirmative-defense instruction is different than the erroneous inclusion of an inferential-rebuttal instruction, which the supreme court has excluded from the *Casteel* presumed-harm analysis. "Inferential rebuttal defenses are distinct from affirmative defenses in that an inferential rebuttal, as the name implies, rebuts part of the plaintiff's cause of action, while an affirmative defense relieves the defendant of liability even if all the elements of the plaintiff's cause of action are established." An affirmative defense "provides an independent reason why the plaintiff should not recover." Applied here, the jury had two independent bases on which it could find Brannan Paving should not recover on its breach of contract claim. We are unable to determine which ground the jury chose, and we cannot tell what effect the inclusion of the affirmative-defense instruction on waiver had on the jury.

Id. See also Zurich Am. Ins. Co. v. Coastal Cargo of Tex., Inc., 596 S.W.3d 381, 386 (Tex. App.—Houston [1st Dist.] 2020, pet. filed) (charge question improperly defined contract for defendant and defense verdict had to be reversed due to *Casteel*).

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 affirmative defenses. The reasoning of *Pantaze v. Welton*, shows that the *Casteel* harm analysis should be extended to affirmative defenses. No. 05-96-00509-CV, 1999 WL 673448 (Tex. App.—Dallas Aug. 31, 1999, no pet.). 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 a 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.

D. 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. *In the interest of BLD*, 113 S.W.3d 340 (Tex. 2003) (party must specifically object to broad form charge error to preserve error); *In re AV*, 113 S.W.3d 355, 362-63 (Tex. 2002); *Conley v. Driver*, No. 06–03-00085-CV, 2005 Tex. App. LEXIS 8787 n. 2 (Tex. App.—Texarkana October 25, 2005, pet. denied) (party must request that damage elements be separately submitted otherwise any error is waived). *See also, Roberts v. Whitfill*, No. 10-04-0030-CV, 2006 Tex. App. LEXIS 2203 *21 (Tex. App.—Waco March 22, 2006, no pet.) (party preserved error by requesting that questionable element be placed in separate question). Clearly, the failure to object will waive a party's right to complain on appeal about the improper use of broad form. *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995); *City of Houston v. Levingston*, 221 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Best Disposal Servs. v. Burch*, No. 10-04-00188-CV, 2005 Tex. App. LEXIS 2588 (Tex. App.—Waco March 30, 2005, pet. denied) (mem. op.). However, it has been less clear what type of objection is necessary to preserve a complaint as 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. In other words, 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 first re-examined this type of error in *Crown Life Insurance Company v. Casteel*, where the trial court submitted multiple DTPA grounds in a single question with one answer blank. 22 S.W.3d 378, 387-88 (Tex. 2000). However, the plaintiff did not have standing to assert one of those grounds. At trial, the defendant objected to the question on the basis that the plaintiff did not have standing to assert one of the grounds. On appeal, the plaintiff argued that the defendant waived its broad form use objection by only making a more general objection. 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.

Id.

In *Harris County v. Smith*, the 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." 96 S.W.3d at 236. The court stated that 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. However, the Court's statement does not indicate that some lesser objection will not also preserver error.

The Court made a stronger statement in *In re A.V.*: "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.'" 113 S.W.3d 355 (Tex. 2003). 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 Puig does not dispute - that he never objected to the question being submitted to the jury in broad form. In *Harris County v. Smith* and *Crown Life v. Casteel*, we emphasized the importance of a specific objection to the charge to put a trial court on notice to submit a granulated question to the jury. Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.

Id. However, in *In re A.V.*, the party failed to raise even a no-evidence objection to any challenged theory, and arguably any language that a party had to further object to the use of the broad form question would likely be dicta.

In *Romero v. KPH Consolidated, Inc.*, the 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. 166 S.W.3d 212, 225-27 (Tex. 2005) (appellant 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) (citing *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988) for the proposition that the issue whether an objection must be made to the form of the submission "a close and difficult question"). Several courts of appeals have held that the more lenient standard should apply. *See, e.g., Mo. Pac. R.R. Co. v. Limmer*, 180 S.W.3d 803 (Tex. App.—Houston [14th Dist.] 2005), *rev'd on other grounds*, 299 S.W.3d 78 (Tex. 2009); *Schrock v. Sisco*, 229 S.W.3d 392 (Tex. App.—Eastland 2007, no pet.). "[O]nce a party objects to the inclusion of invalid bases for liability in the charge, this objection also preserves error for any impact the wrongful inclusion has on other charge questions." *McFarland v. Boisseau*, 365 S.W.3d 449, 454-55 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Limmer*, 180 S.W.3d at 823; *Schrock*, 229 S.W.3d at 395). *But see Zermeno v. Garcia*, No. 14-17-00843-CV,2019 Tex. App. LEXIS 3766 (Tex. App.—Houston [14th Dist.] May 9, 2019, pet. denied).

In *Thota v. Young*, the Court addressed whether a party had to object to the form of the question as well as to the improper inclusion of an instruction. 366 S.W.3d 678 (Tex. 2012). The Court concluded that an objection to the form was not necessary:

> Young made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. In addition to Young's timely and specific objections at the charge conference, Young submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory of the case. This was sufficient to place the trial court on notice that Young believed the evidence did not support an inclusion of Ronnie's contributory negligence or instruction on new and independent cause, and our procedural rules require nothing more. By making timely and specific objections that there was no evidence to support the disputed items submitted in the broad-form charge and raising these issues for the court of appeals to consider, Young properly preserved these issues for appellate review; Young did not have to cite or reference *Casteel* specifically to preserve the right for the appellate court to apply the presumed harm analysis, if applicable, to the disputed charge issues.

Id.

In *Texas Comm'n on Human Rights v. Morrison*, the Court held that an objection (without any requests) was sufficient to preserve a *Casteel* error. 381 S.W.3d 533, 537(Tex. 2012). It further held that "*Casteel* error may be preserved without specifically mentioning *Casteel*." *Id*.

In *Burbage v. Burbage*, the Court addressed what is required to preserve a *Casteel* error. 447 S.W.3d 249, 256 (Tex. 2014). The Court stated:

> Our rules of procedure establish the preservation requirements to raise a jury-charge complaint on appeal. The complaining party must object before the trial court and "must point out distinctly the objectionable matter and the grounds of the objection." Under Rule of Civil Procedure 274, "[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." As a general rule, preservation requires (1) a timely objection "stating 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, unless the specific grounds were apparent from the context," and (2) a ruling. Stated differently, the test ultimately asks "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." Importantly, the "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."

Id. The Court concluded:

> Chad argues that the court impermissibly combined valid and invalid theories of liability when the broad-form damages question incorporated privileged statements. Chad did not make a Casteel-type objection to form; thus, to preserve error, Chad must have raised some specific objection to the submission of Questions 5 through 10. He did not. Thus, we hold that Chad's failure to object waives his right to complain of the charge on appeal.

Id. at 258.

In *Benge v. Williams*, the Court held that the defendant preserved error on a *Casteel* issue by making an objection to the charge even without a requested question or instruction. 548 S.W.3d 466, 476 (Tex. 2018).

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. *Title Source, Inc. v. Housecanary, Inc.*, No. 04-19-00044-CV 2020 Tex. App. LEXIS 4116 (Tex. App.—San Antonio June 3, 2020, no pet. history). Regarding the specificity of the objection, courts have held that solely objecting to the use of broad form will not preserve error where the party does not explain why the broad form is improper. *Ziegler v. Tex. Dep't of Family & Prot. Servs.*, No. 03-03-00690-CV, 2005 Tex. App. LEXIS 6976 (Tex. App.—Austin August 25, 2005, no pet.) (mem. op.). Another court has held that objecting to a damage question and asking for separate blanks for each damage element is specific enough to preserve a broad form objection. *Gunnerman v. Basic Capital Mgmt*, No. 05-04-01388-CV, 2006 Tex. App. LEXIS 1472 (Tex. App.—Dallas February 23, 2006, no pet.).

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 cause of action or damage element that is permissible. For example, in *Thomas v. Oldham*, the 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. 895 S.W.3d 352 (Tex. 1995). In that case, a broad-form damage question asked the jury to consider five separate elements in arriving at a single damage amount. In reaching its verdict, the jury made notations in the margin next to each of the five elements of damage. These notations totaled $ 500,000, which was the amount of the verdict. 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. 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." *Id*. at 359. The Court further said 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. *See Id*. at 360.

E. 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 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 ultimate issues—who should win. The jury does not determine independent, discreet facts. As the jury determines the ultimate issue, there is not that 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. 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 State suggests that there is any validity to the assumption.
>
> . . .
>
> 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 "when 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.

Romero v. KPH Consol. Inc., 166 S.W.3d 212, 230 (Tex. 2005). Accordingly, the Court seems willing to continue the trend of emphasizing accuracy in the verdict rather than expediency.

IV. GENERAL RULES OF PRESERVATION OF CHARGE ERROR

The law is hard—otherwise everyone would do it. And 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 do occur, 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 important prudential reasons behind requiring a party to preserve error before complaining of such 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.

In the interest of B.L.D., 113 S.W.3d 340, 350 (Tex. 2003). *See also Burbage v. Burbage*, 447 S.W.3d 249, 256 (Tex. 2014) ("Our procedural rules are technical, but not trivial. We construe such rules liberally so that the right to appeal is not lost unnecessarily. But when an objection fails to explain the nature of the error, we cannot make assumptions. Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. Affording courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal. Therefore, charge error must be preserved at the trial court stage, and the error must be raised on appeal in order to justify reversing a judgment."); *In the interest of VLK*, 24 S.W.3d 338, 343-44 (Tex. 2000).

The rules relating to preservation of the charge are contained in the Texas Rules of Civil Procedure—Rules 271 through 279. These rules were originally created in the 1940s when Texas courts followed the special submission practice in submitting the charge. Currently, Texas follows a broad form submission practice. Due to the inherent conflict between rules developed for special submission applying to broad form practice—the Texas Supreme Court ambiguously loosened the strict rules of error preservation found in the Texas Rules of Civil Procedure. However, it is clear that a party will preserve error if it follows the preservation of error rules found in the Texas Rules of Civil Procedure; therefore, those traditional and time tested rules are set forth below.

The timing of the preservation of error is very important. Trial courts normally start the charge making process before the trial actually begins. The trial court may request that each party submit a complete proposed charge before trial. During the trial, the court may hold informal charge conferences with the parties to flesh out what the formal charge will be. Usually, these conferences are not recorded on the record. Although it is important for a party to attend these various conferences and argue its legal positions, the only conference that is relevant for the purpose of preservation of error is the official charge conference, which should always be done on the record.

The rules require charge error to be preserved by objections and requests. Objections and requests, however, do not serve the same purpose or function and, generally, are not interchangeable. "We may generalize at this point and observe that objections preserve complaints of errors of commission, while requests preserve complaints of omission." *Louis S. Muldrow, Avoiding and Preserving Errors in the Charge*, (1993); *see also, Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322, 351(Tex. App.—Beaumont 2010, pet. denied); *R&R Contrs. v. Torres*, 88 S.W.3d 685, 695 (Tex. App.—Corpus Christi 2002, pet. dism.); *Hartnett v. Hampton Inns, Inc.*, 870 S.W.2d 162, 166 (Tex. App.—San Antonio 1993, writ denied); *Lyles v. Texas Employers' Ins. Ass'n.*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (". . .a request for submission is the method of preserving the right to complain of omission of, or failure to submit an issue which is relied on by the complaining party. Objection, however, is the proper method of preserving complaint as to an issue actually submitted, but claimed to be defective.").

Proper objections are required to preserve complaints about questions, instructions, or definitions actually submitted in the charge—commission. Tex. R. Civ. P. 274 ("Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objection."); *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923, 924 (Tex. 1983); *Schultz v. Southern Union Gas Co.*, 617 S.W.2d 299, 302 (Tex. Civ. App.--Tyler 1981, no writ). A substantially correct written request is required to preserve error for failure to submit questions relied upon by the requesting party—omission. Tex. R. Civ. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal . . . unless a substantially correct . . . [instruction] has been requested."); *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988); *University of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.—Austin 1996, no writ). 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—omission. Tex. R. Civ. P. 278; *Department of Human Services v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995). However, proper objections can also preserve error for failure to submit a question relied upon by an opposing party. Tex. R. Civ. P. 278; *Lyles v. T.E.I.A.*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.). These are the basic rules of charge preservation of error.

A. The Request

Rule 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." Tex. R. Civ. P. 273. Accordingly, each party must request the questions, instructions, and definitions that are necessary for the party to prevail. Tex. R. Civ. P. 278.

1. Questions

Rule 278 states: "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one

relied upon by the opposing party." Tex. R. Civ. P. 278; *Indus. III v. Burns*, No. 14-13-00386-CV, 2014 Tex. App. LEXIS 9447 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied). 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. *See id.; Island Rec. Dev. Corp. v. Republic of Texas Sav*., 710 S.W.2d 551 (Tex. 1986); *Texas Employers' Ins. Ass'n v. Mallard*, 182 S.W.2d 1000, 1002 (Tex. 1944); *McDill v. Tex. DOT*, No. 03-03-00705-CV, 2005 Tex. App. LEXIS 5691 (Tex. App.—Austin July 21, 2005, no pet.) (party waived claim by failing to request question even though it was pled, there was evidence to support, and it was argued in closing statement). However, where one or more elements of a claim or defense are submitted in the charge, then the party opposing the claim or defense can either request or object to preserve error as to the omitted element. *Morris v. Holt*, 714 S.W.2d 311 (Tex. 1986). In other words, if the opponent failed to submit an element of its claim or defense, then the party can simply object to the omission (this preserves error and protects against implied findings, which are discussed later in this paper).

2. Definitions or Instructions

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." Tex. R. Civ. P. 278; *Universal Servs. Co. v. Ung.*, 904 S.W.2d 638, 640 (Tex. 1995); *State v. Harrington*, 407 S.W.2d 467, 479 (Tex. 1966); *Tex. Dep't of Family & Protective Servs. v. Parra*, 503 S.W.3d 646, 666-67(Tex. App.—El Paso 2016, pet. denied) (party waived objection to undefined term by failing to submit request); *Shelby Distributions, Inc. v. Reta*, 441 S.W.3d 715, 720 (Tex. App.—El Paso 2014, no pet.) (party waived error in charge by failing to request and tender a substantially correct instruction to the trial court); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied). This is an important rule because with broad form submissions the elements of a claim or defense often appear in instructions and definitions. 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.

However, it should be noted that a question is arguably affirmatively wrong if it does not contain all required elements. If the question is affirmatively wrong, it is an error of commission requiring an objection. It must be noted that some courts have held that when a definition or instruction is omitted, that the complaining party must both request and object. *Wright Way*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, no writ); *Jim Walter Homes*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ).

3. Timing of Requests

Requests must be made after the court gives the charge to the parties but before the case is submitted to the jury and separate and apart from the objections to the charge. Tex. R. Civ. P. 273; *Templeton v. Unigard Security Ins. Co.*, 550 S.W.2d 267, 269 (Tex. 1976); *Indus. III v. Burns*, No. 14-13-00386-CV, 2014 Tex. App. LEXIS 9447 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied). "A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court "within a reasonable time after the charge is given to the parties or their attorneys for examination." *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 831 (Tex. 2012). The Texas Supreme Court has held that trial courts have discretion to require parties to make objections and requests before the jury is read to the jury so long as court provide a "reasonable tine" to review the charge and make their objections and requests: "we hold that Rule 272 affords trial courts the discretion to set a deadline for charge objections that precedes the reading of the charge to the jury as long as a reasonable amount of time is afforded for counsel to examine and object to the charge." *Kingfisher Marine Serv. L.P. v. Tamez*, 443 S.W.3d 838, 847 (Tex. 2014).

As stated before, the Rule provides that requests must be made before the case is submitted to the jury. Parties cannot agree to submit them later. *Missouri Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). However, in *Neal v. Guidry*, the court held that a request made after the charge was submitted to the jury was sufficient to preserve error where the trial court ordered objections to be made at that time. No. 03-17-00525-CV 2019 Tex. App. LEXIS 3884 (Tex. App.—Austin May 15, 2019, pet. denied). The court stated:

> This is not a case where the parties agreed to submit objections after the charge was read and the court consented to the parties' agreement. Rather, the court here directed the parties to state their objections after the charge was read and the jury had begun its deliberation, and the court even pronounced that neither party had waived objections to the court's charge by complying with its directive. Common sense mandates that a party, compelled by the court's ruling to state its objections to the charge after the jury has begun its deliberations, does not waive its complaint.

Id. Presumably, the court of appeals did not feel that the complaining party should have to object to the trial court's improper order.

If a party makes a request at the same time as he objects, he may waive both: "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." *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985); *Meyers v. 8007 Burnet Holdings, LLC*, No. 08-19-00108-CV, 2020 Tex. App. LEXIS 560, n. 7 (Tex. App.—El Paso Jan. 22, 2020, pet. denied); *T.E.I.A. v. Eskeu*, 574 S.W.2d 814 (Tex. Civ. App.—El Paso 1978, no writ). 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.

4. Form of Request

A request must be in writing—oral or dictated requests will not suffice. Tex. R. Civ. P. 278; *Meyers v. 8007 Burnet Holdings, LLC*, No. 08-19-00108-CV, 2020 Tex. App. LEXIS 560 (Tex. App.—El Paso Jan. 22, 2020, pet. denied); *Fairfield Estates L.P. v. Griffin*, 986 S.W.2d 719, 724 (Tex. App.—Eastland 1999, no pet.); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied). They must be tendered to the court and not just filed with the clerk. Tex. R. Civ. P. 278*; General Res. Org. Inc. v. Deadman*, 907 S.W.2d 22, 23 (Tex. App.—San Antonio 1995, writ denied) (filing requests with clerk not sufficient).

They must be in substantially correct wording—in a form that would allow their submission as worded and that they are not affirmatively incorrect. Tex. R. Civ. P. 278; *Placencio v. Allied Indus. Int'l., Inc*., 724 S.W.2d 20 (Tex. 1987); *Duncan v. Woodlawn Mfg., Ltd.*, 479 S.W.3d 886 (Tex. App.—El Paso 2015, no pet.); *Indus. III v. Burns*, No. 14-13-00386-CV, 2014 Tex. App. LEXIS 9447 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied); *Yellow Cab Co. v. Smith*, 381 S.W.2d 197, 198 (Tex. App.—Waco 1964, writ ref'd n.r.e.). In *Burrus v. Reyes*, the appellate court held that a party waived a complaint about the trial court submitting a contract formation question without instructing the jury on the elements of a contract. 516 S.W.3d 170, 193(Tex. App.—El Paso 2017, pet. denied). The party submitted a handwritten document to the trial court entitled "jury charge comments" stating that she would "like to include the elements for a contract" in the jury charge, but she did not specify what elements she meant by that request and further failed to tender a proposed jury instruction to that effect. *Id*.

A request in substantially correct wording means that it is not subject to any valid objection. *See Placencio v. Allied Indus. Intern. Inc.*, 724 S.W.2d 20 (Tex. 1987) ("Substantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, and that is not affirmatively incorrect."); *Adams v. Rhodes*, 543 S.W.2d 18 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Yellow Cab Co. v. Smith*, 381 S.W.2d 197 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.); *Thomas v. Billingsley*, 173 S.W.2d 199 (Tex. Civ. App.—Dallas 1943, writ ref'd).

In addition to the actual question being in substantially correct wording, a conditioning statement must also be correct. *U.S. Fidelity & Guaranty Co. v. Hernandez*, 410 S.W.2d 224 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.). 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. *See e.g., Select Ins. Co. v. Boucher*, 561 S.W.2d 474 (Tex. 1978); *Holland v. Lesesne*, 350 S.W.2d 859 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.). Conversely, a court can correctly refuse to submit a question or instruction that is accompanied by a defective definition. *Sherwin-Williams Paint Co. v. Card*, 449 S.W.2d 317 (Tex. Civ. App.—San Antonio 1970, no writ).

5. Obscured Requests

A party may not offer requests "en masse," i.e., tendering a complete charge. *Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); *Munoz v. The Berne Group*, 919 S.W.2d 470 (Tex. App.—San Antonio 1996, no writ); *National Fire Ins. v. Valero Energy*, 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied). 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. *Tempo Tanner, Inc. v. Crow-Houston Four Ltd.*, 715 S.W.2d 658, 666-67 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Armellini Exp. Lines of Florida v. Ansley*, 605 S.W.2d 297, 307 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ("When special issues and instructions are submitted 'en masse' rather than submitting each issue and instruction 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."); *Freedom Homes of Texas, Inc. v. Dickinson*, 598 S.W.2d 714, 719 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *Davis v. Massey*, 324 S.W.2d 242 (Tex. Civ. App.—Waco 1959, no writ); *Griffey v. Travelers Ins. Co.*, 452 S.W.2d 725 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

If a court submits some but not all of a requested question, instruction, or definition, then the requesting party will have to edit its request to omit the portions that are submitted. 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 in failing to submit a valid request. *Jno-T Farms v. GoodPasture, Inc.*, 554 S.W.2d 743, 751 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

6. Request and Object

Some courts have held that when the complained of error is the omission of a question, instruction, or definition, then the complaining party must both tender a substantially correct request and object to its omission. *See, e.g., Mohamed Ahmed v. Hinga Mbogo*, No. 05-17-00457-CV,2018 Tex. App. LEXIS 5849 (Tex. App.—Dallas July 30, 2018, pet. denied); *B&P Dev., LLC v. Knighthawk, LLC*, No. 04-15-00575-CV, 2017 Tex. App. LEXIS 2650 (Tex. App.—San Antonio March 29, 2017, no pet.); *Fort Worth Indep. Sch. Dist. v. Palazzolo*, 498 S.W.3d 674, 681(Tex. App.—Fort Worth 2016, pet. denied); *Sear v. Abell*, 157 S.W.3d 886 (Tex. App.—El Paso 2005, pet. denied); *Texas Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 335 (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). The basis of this dual requirement seems to be the language in Rule 274 that states: "Any complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections."

However, Rule 278 and Texas Supreme Court precedent would contradict the dual requirement of a request and objection in this situation. *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986); *American Teachers Life v. Bruggette*, 728 S.W.2d 763, 763 (Tex. 1987); *Clarostat Mfg., Inc. v. Alcor Aviation, Inc.*, 544 S.W.2d 788 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). In *Morris v. Holt*, the Texas Supreme Court dealt with an argument that a party who did not have the burden of proof on an issue waived error regarding an omission by failing to object and by only tendering a request. 714 S.W.2d at 312-13. The Court disagreed, and held that were Rule 279 stated that an objection would be "sufficient" to preserve error, it did not limit preservation to objections: "Rule 279 permits a party in Morris' position to preserve error as to the trial court's failure to submit an issue by making a timely, specific objection or by requesting submission of the issue in substantially correct form." *Id*.

B. The Objection

Affirmative errors in the charge must be preserved by objection. Tex. R. Civ. P. 272, 274; *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *Religious of Sacred Heart v. City of Texas v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992). 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. *Holubec v. Brandenberger*, 111 S.W.3d 32, 38-39 (Tex. 2002); *Religious of Sacred Heart v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992); *Daily v. McMillan*, 531 S.W.3d 822 (Tex. App.—Texarakana 2017, no pet.); *Bridges v. Lakes at King Estates*, No. 13-16-00626-CV, 2018 Tex. App. LEXIS 9699 (Tex. App.—Corpus Christi November 29, 2018, no pet.); *Fraze v. Pfleider*, No. 09-04-189-CV, 2005 Tex. App. LEXIS 4021 (Tex. App.—Beaumont May 26, 2005, no pet.) (party preserved error by objecting to improper wording of question to which it had burden of proof); *Boudreaux v. Culver*, No. 01-03-01247-CV, 2005 Tex. App. LEXIS 3499 (Tex. App.—Houston [1st Dist.] May 5, 2005, no pet.) (if instruction is in charge and is defective, a party can preserve error by solely objecting to it).

Further, error in the omission of the submission of an opposing party's claim or defense can be preserved by making an objection. Tex. R. Civ. P. 278. "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection." Tex. R. Civ. P. 274; *KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. K.G. v. Davis*, No. 01-02-00344-CV, 2005 Tex. App. LEXIS 1904 (Tex. App.—Houston [1st Dist.] March 10, 2004, no pet.) (mem. op.) (general objection to charge in whole that he damages were not properly defined did not preserve error as to particular questions). Otherwise, the party will waive the error. *Id.* Objections cannot incorporate other objections that a party has made to other portions of the charge by reference. Tex. R. Civ. P. 274. Generally, a party must make its own charge objections. *See, e.g., C.M. Asfahl Agency v. Tensor Inc.*, 135 S.W.3d 768 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Bohls v. Oakes*, 75 S.W.3d 473, 477 (Tex. App.—San Antonio 2002, pet. denied). However, a party can adopt another party's objections if the trial court expressly allows it. *Villegas v. TexDOT*, 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 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998); *Celotex Corp v. Tate*, 797 S.W.2d 197, 201-02 (Tex. App.—Corpus Christi 1990, writ dism. by agr.).

1. Timing of Objection

A party must raise its objections before the charge is read to the jury. Tex. R. Civ. P. 272; *Missouri Pac. Ty. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973); *Corey v. Rankin*, No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224 (Tex. App.—Houston 14th Dist., Nov. 13, 2018, no pet.); *Wackenhut Corp. v. Gutierrez*, 358 S.W.3d 722, 725 (Tex. App.—San Antonio 2011, no pet.) (holding charge complaint was waived when the complaining party affirmatively stated it had no objection at the charge conference and made no objection until after the charge was read to the jury); *Mitchell v. Bank of America, N.A.*, 156 S.W.3d 622 (Tex. App.—Dallas 2005, pet. denied). For example, in *Academy Corp. v. Interior Buildout & Turnkey Const. Inc*., the court held that an objection raised for the first time in a motion for judgment notwithstanding the verdict was waived. 21 S.W.3d 732, 743 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Agreements to make objections after the charge has gone to the jury will not be enforced. *See Mother Earth Commerce. Servs. v. Kerst*, No. 06-06-00103-CV, 2007 Tex. App. LEXIS 6704 (Tex. App.—Texarkana August 23, 2007, no pet.) (waived issue where specific complaint was not raised in charge conference); *Palacio v. CNC Invs., Ltd., L.L.P.*, No. 05-06-00261-CV, 2007 Tex. App. LEXIS 4203 (Tex. App.—Dallas May 30, 2007, no pet.) (same); *Summit Machine Tool Manufacturing Corp. v. Great Northern Ins. Co.*, 997 S.W.2d 840 (Tex. App.—Austin 1999, no pet.) (same); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 281 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (waived objection raised for first time in motion for new trial); *Suddreth v. Howard*, 560 S.W.2d 511, 516 (Tex. App.—Amarillo 1978, writ ref'd n.r.e.). *See Summit Machine Tool Manufacturing Corp. v. Great Northern Ins. Co.*, 997 S.W.2d 840 (Tex. App.—Austin 1999, no pet.) (waived objection raised first time on appeal); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 281 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (waived objection raised for first time in motion for new trial).

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. *See Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (15 minutes too short, but error was harmless). The Texas Supreme Court has held that trial courts have discretion to require parties to make objections and requests before the charge is read to the jury so long as court provides the parties a "reasonable time" to review the charge and make their objections and requests: "we hold that Rule 272 affords trial courts the discretion to set a deadline for charge objections that precedes the reading of the charge to the jury as long as a reasonable amount of time is afforded for counsel to examine and object to the charge." *Kingfisher Marine Serv. L.P. v. Tamez*, 443 S.W.3d 838, 847 (Tex. 2014).

One court has questioned whether a trial court can require the parties to submit an agreed charge or any objections before trial. *Edwards v. Chevrolet*, No. 02-19-00058-CV, 2020 Tex. App. LEXIS 2814 (Tex. App.—Fort Worth April 2, 2020, no pet.). It seems nonsensical that a trial court could require the parties to have an "agreed" charge; parties rarely agree on every aspect of a charge. A trial court cannot require a party to waive an objection. Further, a trial court should not be allowed to require objections and requests to be made before the close of all the evidence. Once again, the trial court has to submit all issues that have been pled and supported by evidence. Tex. R. Civ. P. 278; *see also Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). A party does not know what issues, instructions, and definitions to object to (at least as to no-evidence) before the close of the evidence. So, a trial court must afford the parties a reasonable amount of time to review the charge and make objections and requests on the record after the close of the evidence and before the charge is read to the jury. If it does not, the trial court definitely commits error and likely commits reversible error.

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; 2) request additional time; and 3) show how that time limitation harmed him, i.e., not able to review and form objections to particular questions, instructions, and definitions.

2. Form of Objection

Objections should be presented to the court in writing or may be dictated to the court reporter in the presence of the judge and opposing counsel. Tex. R. Civ. P. 272. Objections dictated outside the presence of the judge are not preserved. *Brantley v. Spargue*, 636 S.W.2d 224 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.). The objection must be specific—it must point out with particularity the error and the grounds of complaint. Tex. R. Civ. P. 274; *Monsanto Co. v. Milam*, 494 S.W.2d 534, 536-37 (Tex. 1973); *David v. Campbell*, 572 S.W.2d 660 (Tex. 1978); *Castleberry v. Branscrum*, 721 S.W.2d 270 (Tex. 1986) ("[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 . . . An objection that does not meet both requirements is properly overruled and does not preserve error on appeal."); *Meyers v. 8007 Burnet Holdings, LLC*, No. 08-19-00108-CV, 2020 Tex. App. LEXIS 560 (Tex. App.—El Paso Jan. 22, 2020, pet. denied); *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Properties, L.C.*, 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied) ("Where a party's objections are too general and too profuse it cannot be said that the trial court was fully cognizant of the grounds of the objection and deliberately chose to

overrule it."). 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. Tex. R. App. P. 33.1; *Murphy v. Am. Rice, Inc*., No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031 (Tex. App.—Houston [1st Dist.] March 9, 2007, no pet.); *McDonald v. New York Central Mut. Fire Ins. Co.*, 380 S.W.2d 545, 550 (Tex. 1964); *see also Bell Missouri-Kansas-Texas Ry. Co. of Texas*, 334 S.W.2d 513 (Tex. Civ. App.—Fort Worth 1960, writ ref'd n.r.e.). A party cannot adopt by reference prior objections to the charge. Tex. R. Civ. P. 274; *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 728 (Tex. Civ. App.—Eastland 1964, no writ).

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. Tex. R. Civ. P. 274 (objection "must point out distinctly the objectionable matter."); *Carlton v. Cobank, Inc*., 2003 Tex. App. LEXIS 2798 (Tex. App.—Amarillo April 1, 2003, pet. denied) (mem. op.); *City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.–Austin 1997, writ denied); *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.–El Paso 1992, writ denied).

For example, courts have held that the following – without explanation – are too general to preserve error: 1) complaining that a definition is not a correct legal definition; *see City of Brenham v. Honerkamp*, 950 S.W.2d at 766; *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); 2) the issue is a comment on the weight of the evidence; *see Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145 (Tex. App.—Dallas 1985, writ dism'd); *Hickman v. Durham*, 213 S.W.2d 569 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.); 3) the instruction may confuse the jury; *see Castleberry v. Branscrum*, 721 S.W.2d 270 (Tex. 1986); *Meyers v. 8007 Burnet Holdings, LLC*, No. 08-19-00108-CV, 2020 Tex. App. LEXIS 560 (Tex. App.—El Paso Jan. 22, 2020, pet. denied); 4) the issue may prejudice the jury toward a party; 5) the issue is global; *see Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980); 6) there is a variance between the pleadings and proof; *see id*.; 7) the issue is too broad, *see Mathis v. State*, 258 S.W.2d 200 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.); 8) the issue places an improper burden on the defendant; *see McDonald v. New York Cent. Mut. Fire Ins. Co*., 380 S.W.2d 545 (Tex. 1964); 9) the issue does not inquire as to the correct measure of damages; *see Whitson Co. v. Bluff Creek Oil Co*., 293 S.W.2d 488 (Tex. 1956); 10) the instruction omits an essential element; *see Ford Motor Co. v. Maddin*, 76 S.W.2d 474 (Tex. Comm. App. 1934); 11) the issue is not supported by the pleadings; *see Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 938 (Tex. 1980); *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied); and 12) the issue is incomplete; *Sam Rayburn Mun. Power Agency v. Gillis*, 2018 Tex. App. LEXIS 5743 (Tex. App.—Beaumont July 26, 2018, pet. denied).

3. Obscured Objections

An objection may be waived if it is obscured by voluminous unfounded objections. Tex. R. Civ. P. 274; *see also, Monsanto Co v. Milam*, 494 S.W.2d 534 (Tex. 1973); *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Properties, L.C*., 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied) ("where a party's objection is obscured or concealed among voluminous, general, unfounded objections, it will not preserve error."); *Clarostat Mfg. Inc. v. Alcor Aviation, Inc.*, 544 S.W.2d 788 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 330 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). Therefore, a party should not make an objection that is groundless, e.g., there is factually insufficient evidence to support the submission of a question (questions must be submitted even if there is factually insufficient evidence to support them so long as there is some evidence). *Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963) ("The 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 v. Davidson*, 965 S.W.2d 674, 680 (Tex. App.—Corpus Christi 1998, pet. denied); *Hinote v. Oil, Chem. & Atomic Workers Int'l Un.* 777 S.W.2d 134, 143 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Smith v. State*, 523 S.W.2d 1 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

The test is whether by making voluminous objections, a party deprives the trial court of the real opportunity to correct errors in the charge. *Northcutt v. Jarrett*, 585 S.W.2d 874 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.). It is not so much the number of objections that obscure, it is the number of frivolous and patently meritless objections that obscure an objection. *Tefsa v. Stewart*, 135 S.W.3d 272, 275-76 (Tex. App.—Fort Worth 2004, pet. denied) (four general objections waived objection on appeal); *Texas Nat. Resource Com'n. v. McDill*, 914 S.W.2d 718 (Tex. App.—Austin 1996, no writ) (1 in 11 objections was not obscured); *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142 (Tex. App.—Dallas 1985, writ dism) (1 in 17 objections was not obscured). Besides meritless objections, a party should also forego making objections to the charge that can just as effectively be raised in a post-

trial motion, e.g., legal insufficiency objections. *See e.g., Williams v. L.M.S.C. Inc.*, No. 01-03-00924-CV, 2005 Tex. App. LEXIS 8299 (Tex. App.—Houston [1st Dist.] October 6, 2005, pet. denied) (mem. op.) (legal and factual sufficiency points may be raised for the first time after the verdict). 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.

4. Standard Introduction and Conclusion to a Party's Objections to the Charge

Although not required, most attorneys will begin and end their objections to the charge with a formal introduction and conclusion. The following is an example of a party beginning its objections to the charge:

> Now comes [party] after the conclusion of the evidence and prior to reading the charge to the jury, and in the presence of the court, opposing counsel, and the court reporter, at a time separate from its requests, and makes the following objections . .

Then after the objections, the party may conclude by stating:

> The above objections were duly and timely presented to the court by dictation to the court reporter, in the presence of the court and all counsel, prior to submission of the charge to the jury, and the court hereby finds that these objections are: "Overruled." (by the court)

Louis S. Muldrow, Avoiding and Preserving Errors in the Charge, (1993). By making these or similar pronouncements before and after its objections, a party will clarify the record and will foreclose complaints as to the timeliness of the objections, presence of the court, rulings, and other matters.

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. *See e.g., General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993); *Sentinel Integrity Sols., Inc. v. Mistras Grp., Inc.*, 414 S.W.3d 911 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Christianberry v. Webber*, No. 01-04-00109-CV, 2006 Tex. App. LEXIS 1142 (Tex. App.—Houston [1st Dist.] February 9, 2006, no pet.); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 785 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("a party waives claimed error in the charge when that party proposes to submit a substantially similar charge to the jury"); *Brandywood Hous., Ltd, v. Tex. DOT*, 74 S.W.3d 421, 425 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Northeast Motor Lines, Inc. v. Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (1942); *compare Sterling Trust Co. v. Adderly*, 168 S.W.3d 835, 846-47 (Tex. 2005) (party did not waive error by submitting in a previous charge a similar instruction to which it objected). For example, in *Brandywood Housing., Ltd, v. Tex. DOT*, the plaintiff asked the trial court to remove proximate cause from the jury charge, and could not on appeal argue that the charge should have included a proximate cause issue. 74 S.W.3d at 425.

In *Wal-Mart Stores Tex., LLC v. Bishop*, the trial court submitted an instruction requested by the defendant. 553 S.W.3d 648 (Tex. App.—Dallas 2018, pet. dism'd by agr.). When the defendant complained about the instruction on appeal, the court of appeals held: "The trial court overruled an objection by Bishop, and submitted Walmart's proposed language to the jury. Walmart cannot now complain that Question 1 'did not advise jurors that Wal-Mart was negligent only if Gajurel was negligent.'" *Id.*

D. Complaints On Appeal Should Be Consistent With Trial Court Complaint

A party must raise charge error on appeal to preserve the error. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, n17 (Tex. 2019) (Here, no party raises the issue of charge error, and no party objected to the jury charge on that basis; in fact, the parties explicitly agreed to the form of question four with a single blank for actual damages. Therefore, although we note that question four arguably intermingles compensatory damages for diminution in value with damages for loss of warranty value, damages that Bombardier argues are unsupported, we express no opinion on the validity of question four under our broad-form damages question precedent.").

Objections to the charge and requests for instructions must comport with the arguments made on appeal. *Brazos Contrs. Dev., Inc. v. Jefferson*, 596 S.W.3d 291 (Tex. App.—Houston [14th Dist.] December 19, 2019, no pet.); *Bruce v. Cauthen*, 515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *Cont'l Cas. Co. v. Baker*, 355 S.W.3d 375, 383 (Tex. App.—Houston [1st Dist.] 2011, no pet.). If the objection at trial is not the same as the complaint on appeal, the issue has not been preserved for review. *Id.*; *Wal-Mart Stores Tex., LLC v. Bishop*, 553

S.W.3d 648 (Tex. App.—Dallas 2018, pet. dism'd by agr.); *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W.3d 145, 159-60 (Tex. App.—Austin 2017, pet. denied).

E. Rulings on Requests or Objections

1. Rules of Civil Procedure

The trial court must sign the request and either deny it, grant it, or modify the request and grant it as modified. Tex. R. Civ. P. 276; *University of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.—Austin 1996, no writ); *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ). Rule 276 states:

> 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, the 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.

Tex. R. Civ. P. 273. The party must then file the request with the court's clerk. Tex. R. Civ. P. 276. This Rule provides that there must be a written ruling on each request. *Greenstein, et. al. v. Burgess Marketing*, 744 S.W.2d 170 (Tex. App.—Waco 1987, writ ref'd n.r.e.). The Texas Supreme Court has held that although this Rule requires the trial court to endorse "refused" on requests that are refused and sign them officially, that error is also preserved by having an oral ruling on the record. *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386-87 (Tex. 1997), *overruled on other grounds*, *Torrington Co. v. Stutzman*, 46 S.W.2d 829 (Tex. 2000). One court of appeals has held that where there is no written ruling and no oral ruling, that 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).

After making specific objections that inform the court of the objectionable language in the charge and why such is objectionable, the party should ask the court to give an express ruling as to its objections. Rule 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.

Tex. R. Civ. P. 272; *Mo. Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973) (holding that failure to object before charge is read to jury waives complaint); *Mohamed Ahmed v. Hinga Mbogo*, No. 05-17-00457-CV,2018 Tex. App. LEXIS 5849 (Tex. App.—Dallas July 30, 2018, pet. denied) (request did not count as an objection) (party waived objections by failing to obtain express ruling); *Sentinel Integrity Sols., Inc. v. Mistras Grp., Inc.*, 414 S.W.3d 911, 919-20 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (party waived objection by failing to obtain ruling on objection before charge was submitted to the jury). Oral rulings on objections are not only permitted, they are the norm. It is imperative that a charge conference be on the record so that a trial court's oral rulings on charge objections are in the record.

2. Rules of Appellate Procedure

The Texas Rules of Appellate Procedure now allow for preservation of error where there is an express or an implicit ruling. Texas Rule of Appellate Procedure 33.1 states:

> (a) In general. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated 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, unless the specific grounds

were apparent from the context; and (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Appellate Procedure; and

(2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1. Under Rule 33.1, a trial court can rule either expressly or implicitly—an implied ruling will suffice to preserve error. Tex. R. App. P. 33.1(a)(2)(A); *Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied).

The real issue is whether error is preserved where a party objects or requests to a charge, and even though the court does not expressly overrule it, the court does not alter the charge. The Texas Rules of Civil Procedure would suggest that error is not preserved. Tex. R. Civ. P. 272, 273, 276. In *Cogburn v. Harbour*, the Texas Supreme Court held that there were no implied rulings to objections to the charge. 657 S.W.2d 432 (Tex. 1983). However, in *Acord v. G.M. Corp.*, the Texas Supreme 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, overruled." 669 S.W.2d 111, 114 (Tex. 1984) (Rule 272 provides that "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."). 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. *State v. Colonia Tepeyac, Ltd.*, 391 S.W.3d 563 (Tex. App.—Dallas 2012, no pet.) (appellate court found implicit ruling where there were twenty five pages of discussion about a charge submission, no ruling, but the charge did not change); *In the interest of D.R.*, No. 01-00-00582-CV, 2005 Tex. App. LEXIS 6702 (Tex. App.—Houston [1st Dist.] August 18, 2005, pet. denied).

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. *See e.g., Primrose Operating Co. v. Jones*, 102 S.W.3d 188, 197-98 (Tex. App.—Amarillo 2003, pet. denied); *Rossell v. Central West Motor Stages, Inc*., 89 S.W.3d 643, 657 (Tex. App.—Dallas 2002, pet. denied); *Oechsner v. Ameritrust Tex., N.A.*, 840 S.W.2d 131 (Tex. App.—El Paso 1992, writ denied).

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. *See, e.g., F.S. New Prods. v. Strong Indus*., 129 S.W.3d 606, 622-23 (Tex. App.—Houston [1st Dist.] 2004), *rev'd in part on other grounds*, 221 S.W.3d 550 (Tex. 2006); *Hoffman La Roche, Inc. v. Zeltwanger*, 69 S.W.3d 634, 652-53 (Tex. App.—Corpus Christi 2002, pet. granted); *Munoz v. Berne Group*, 919 S.W.2d 470 (Tex. App.—San Antonio 1996, no writ); *but see, Matthiessen v. Schaefer*, 900 S.W.2d 792, 797 (Tex. App.—San Antonio 1995, writ denied); *see also, Chavez Constr. Inc. v. McNeeley*, No. 01-03-00766-CV, 2005 Tex. App. LEXIS 6930 (Tex. App.—Houston [1st Dist.] August 25, 2005), rev'd w/o op., 2006 Tex. LEXIS 33 (Tex. Jan. 20, 2006) (Citing TRAP 33.1, party must present proposed instruction to the trial court). Therefore, a party should always note on the record that it is submitting its request(s) to the court. However, it should be noted that it is always the safest course to obtain an express ruling by the trial court on any complaints.

F. Must Include Charge Conference and Requests in the Appellate Record

In order to show error, a party appealing alleged charge error must present a record to the court of appeals to prove that the issue was preserved. For example, courts have held that where there is no transcript of the charge conference, that any objection to the wording of a question or instruction is waived. *See, e.g., Ortiz v. Martinez*, No. 01-05-00984-CV, 2007 Tex. App. LEXIS 3805 (Tex. App.—Houston [1st Dist.] May 17, 2007, no pet.); *In re Marriage of Walston*, No. 10-05-00193-CV, 2007 Tex. App. LEXIS 3609 (Tex. App.—Waco May 9, 2007, pet. dism). Moreover, a party waives an objection to an omission where the record does not contain a properly tendered request. *In re Marriage of Walston*, 2007 Tex. App. LEXIS at 3609; *Murphy v. Am. Rice, Inc*., No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031 (Tex. App.—Houston [1st Dist.] March 9, 2007, no pet.). Accordingly, a party should always have the charge conference transcribed and should request that it be included in the reporter's record. Moreover, all requests should be filed with the court clerk, and a party should request that those be included in the clerk's record.

V. CONFLICT BETWEEN CHARGE RULES AND CHARGE SUBMISSION

There is an inherent conflict in charge practice in Texas. For the most part, the charge rules were written in the 1940s when Texas followed the special submission practice. Elements of each claim or defense were submitted

independently as questions. Currently, Texas follows the broad form submission practice—ultimate issues are submitted to the jury in only a few questions with elaborate instructions to define the law and the correct requirements. Therefore, the charge preservation of error rules do not match the charge submission practice that currently exists. This creates a conflict and some confusion as to the correct method to preserve error. As another commentator has artfully stated:

> [T]he civil jury charge remains an enigma for most Texas trial and appellate lawyers. The reason is simple: It has been an enigma for the Supreme Court of Texas for at least three decades. During that time, the courts sought to require the submission of questions inquiring only about ultimate issues although its rules of procedure and standard of review assume the jury will be asked to make findings on every necessary element of claims and defenses. The shift to submitting those elements in instructions created the confusion we experience today.

Charles R. Watson, Jr., *The Court's Charge to the Jury*, ADVANCED CIVIL TRIAL COURSE, pg. 1 (State Bar of Texas 2003). One problem that arises due to this conflict is that it is less clear whether an omitted element is an error of commission, which requires an objection, or an error of omission, which requires a request. For example, if a claim existing of four elements were submitted in their granulated form, then four independent questions would be submitted. If one of the elements was missing, the error would clearly be one of omission—requiring a request. Conversely, in a broad form question, all four elements would be in the same single jury submission. If one of the elements is missing, is the error one of omission or commission? The author believes 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. As the question did not have all required elements, it was affirmatively wrong—an objection should be required and 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 instructions 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.

Louis S. Muldrow, Avoiding and Preserving Errors in the Charge, A-4 (1993); *see also Moulton v. Alamo Ambulance Service, Inc.*, 414 S.W.2d 444 (Tex. 1967) (failure to instruct on mitigation of damages was an erroneous submission preservable by objection); *Sutter v. Hendricks*, 575 S.W.2d 308 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (omission from instruction of one of two statutory requirements rendered the submission erroneous, and thus preservable by objection).

Another area that creates confusion due to the conflict between the charge rules and the current practice is comments on the weight of the evidence. Under broad form, several causes of action may be submitted in one question. As due process requires that the jury be properly instructed on the law, the use of broad form questions require the extensive use of instructions. However, under the current charge rules, and precedent interpreting them, excessive instructions in the charge can be a comment of the weight of the evidence. Even if an instruction is correct and is supported by the evidence, it can still be a comment of the weight of the evidence. Therefore, trial courts have a very delicate balance between submitting enough instructions to meet due process concerns and not submit so many as to be a comment of the weight of the evidence.

VI. *PAYNE* AND ITS EFFECT ON PRESERVATION OF ERROR

Due to the inherent confusion that has been created by the use of special submission charge rules with broad form practice, the Texas Supreme Court has ambiguously loosened the formal preservation of charge rules found in the Texas Rules of Civil Procedure. Instead of amending the Texas Rules of Civil Procedure that control preservation of error in the charge, the Court simply stated that error is preserved when: "the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." As shown below, this has caused a tremendous amount of confusion.

As several Justices have stated: "Rather than make such changes by judicial decree, the better practice is to enact these reforms in conjunction with our rulemaking procedure . . . . A statute or rule could provide the precision that is lacking in the Court's opinion." *In re Allied Chem. Corp.*, 227 S.W.3d 652, 666 (Tex. 2007) (Jefferson, C.J., dissenting); *see also Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 22 (Tex. 2014) (Guzman, J., dissenting); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 216 (Tex. 2001) (Baker, J., concurring). The Constitution requires the Texas Supreme Court to "promulgate rules of civil procedure for all courts not inconsistent with the laws of the state

as may be necessary for the efficient and uniform administration of justice in the various courts." Tex. Const. art. V, § 31; *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d at 22 (Tex. 2014) (Guzman, J., dissenting). To gather input, the Court appointed a Supreme Court Advisory Committee in 1940 to recommend rules of administration and procedure—which the Court continues to rely on to this day. The committee—composed of fifty-two distinguished judges, professors, and attorneys—"solicits, summarizes, and reports to the Court the views of the bar and public." *Id*. It is fair to say that the Court should not ignore the Texas Rules of Civil Procedure and promulgate a new error preservation rule without amending the Rules and going through the Advisory Committee. But in *Payne*, it did just that.

A. *Payne*

In 1992, the Texas Supreme Court determined in *State Department of Highways and Transportation v. Payne* that a party preserved charge error when precedent and the Texas Rules of Civil Procedure held otherwise. 838 S.W.2d 235 (Tex. 1992). In *Payne*, the trial court attempted to charge the jury on a negligence case based upon a broad form question and accompanying instructions. However, an instruction in the charge was incorrect because it did not contain a required element. 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. Alternatively, the error was arguably an omission of a missing element requiring the party to submit a requested instruction in substantially correct wording. The defendant did neither. It did not object to the instruction on the basis that it omitted an essential element; rather, it objected on an unrelated ground. It did submit a requested jury question [rather than an instruction] on the missing element, but the request was affirmatively incorrect as it misplaced the burden of proof. Under prior precedent, the defendant waived its complaint.

Notwithstanding the defendant's failure to meet the strict requirements for preservation of error, the Texas Supreme Court held that the defendant did preserve error. The Court basically held that even though an objection was required, that 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." *Id*. 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. . . . There should be 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. The Court justified the outcome in *Payne* thusly:

> In our State's procedural jurisprudence, there are no rules more recondite than those pertaining to the preparation of the jury charge. As Professor McDonald observed forty years ago: "No aspect of procedure has developed a greater tangle of perplexities than that which embraces the rules as to the charge of the court to the jury." The passage of time has not improved things. Dozens of cases decided since Professor McDonald wrote, many of them flatly contradictory, attest to myriad uncertainties in preserving complaints of error in the jury charge. The rules governing charge procedures are difficult enough; the caselaw applying them has made compliance a labyrinth daunting to the most experienced trial lawyer. Today, it is fair to say that the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial.
>
> The preparation of the jury charge, coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly subserves the fair and just presentation of the case. Yet that is our procedure. To preserve a complaint about the charge a party must sometimes request the inclusion of specific, substantially correct language in writing, which frequently requires that even well prepared counsel scribble it out in long-hand sitting in the courtroom. The rules of procedure require that the judge endorse each request with specific language, although sometimes this requirement is ignored. Sometimes a request is not sufficient and may not even be appropriate; instead, counsel must object. The objection must be specific enough to call the court's attention to the asserted error in the charge. It is not clear whether a request will serve as an objection or an objection as a request. Rather than attempt to decide under the

> pressure of the courtroom and in peril of losing appellate rights, whether an objection or a request is called for, cautious counsel might choose to do both in all cases--request and object. But if they are not kept separate, or if an appellate court later decides that the duplication obscured the real complaint, counsel's precaution may still result in a decision that the complaint was waived.
>
> The procedure has been further complicated by our adoption of broad issue submission, a change intended to have the opposite effect. When special issue practice flourished in Texas, it was easier to determine which party had responsibility for submission of a particular matter to the jury, and which party had the obligation to object to misstatements in order to preserve error. That practice, however, had a host of troubles of its own, causing this Court to reject it in the last decade in favor of broad form submission. Now, however, it is impossible to determine which party has responsibility for each part of a charge.
>
> Because many instructions in a broad form charge bear upon elements of proof not easily divisible among the parties, it is hard to know who should complain. Recently it was argued before this Court that a party who objected to any submission at all of an issue proposed by his opponent, waived that objection if, alternatively, he proposed different language more favorable to his position. The process is becoming worse, not better.

Id. at 240-41. The Court's justification for throwing away fifty years of precedent was a concern for the trial lawyer who does not know how to preserve charge error because of conflicting courts of appeals' opinions. Instead of clarifying the rules by taking more cases dealing charge preservation of error or by amending the charge rules, the Court set out a vague, ambiguous one sentence description of preserving error in the charge.

B. Interpretation of *Payne*

The fundamental change in *Payne* is that the trial court now has unprecedented responsibility in drafting the charge. Soon after *Payne*, one commentator stated that one may draw three conclusions 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. *See Louis S. Muldrow, Charge Errors – Does Payne Ease Pain – Or What?* (1997).

Former Texas Supreme Court Justice Wainwright oddly stated in a concurrence that *Payne* did not change the Texas Rules of Civil Procedure. *First Valley Bank v. Martin*, 144 S.W.3d 466 (Tex. 2004) (Wainwright, J., concurring). He stated 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. He stated that under Rule 274 where an objection is allowed that *Payne* simply redefines and enlarges an "objection" to include a "request":

> In 1992, in *State Department of Highways & Public Transportation v. 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. We explained that "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." 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.

See id. Moreover, he would overrule *Hernandez v. Montgomery Ward*, 652 S.W.2d 923, 925 (Tex. 1983), where the Court found that a request is not a substitute for an objection.

This rather narrow view of *Payne* has similarly been adopted by the Fourteenth District Court of Appeals in Houston. In *Elliott v. Whittier*, the court found that an objection and verbal recitation of an omitted instruction was not sufficient to preserve error under Rule 276. No. 01-02-0065-CV, 2004 Tex. App. LEXIS 8555 (Tex. App.—Houston [14th] September 23, 2004, pet. denied). The court held that to preserve error in this situation a party must file a written request and limited *Payne* to hold that an objection can be broadened to include a request – but only where there is a submission in the charge not an omission. *See Id.*

However, other than 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 Supreme Court, have completely ignored *Payne* and cited to the Texas Rules of Civil Procedure. Other courts have used *Payne* as a King's X of preservation of error and have used 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*. In *Hinds*, the defendant attempted to complain on appeal about the trial court's failure to submit an instruction where the defendant's request for such was not in substantially correct wording. 904 S.W.2d 629, 637-38 (Tex. 1995). The Texas Supreme Court found that this preserved error for two reasons: (1) the defendant's instruction was taken from a concurrence of a Supreme Court opinion, and (2) the submitted instruction called the trial court's attention to the causation element missing in the question. *Id.* Interestingly, the Court stated that under Rule 278 a party should make a written request when there is an error of omission. Accordingly, the Court may have backed away from a conclusion that a request and an objection are interchangeable.

In *Plainsman Trading Co. v. Crews*, a party argued that the trial court erred in refusing to submit an instruction. 898 S.W.2d 786, 791 (Tex. 1995). Although the Court did not address preservation of error, the Court referenced Rule 278 in its determination: The requested instruction incorrectly stated the law and was thus properly refused. *See* TEX. R. CIV. P. 278 (requiring that requested questions, definitions, and instructions be tendered to the court in substantially correct form.)." *Id*. at 791

In *Lester v. Logan*, the defendant requested a question, definitions, and instructions in the same document. 907 S.W.2d 452 (Tex. 1995). The trial court refused the document, and upon appeal, the court of appeals found that the defendant failed to preserve error in their omission by submitting them en masse – the trial court was not required to separate the good from the bad. The Texas Supreme Court denied the writ of error, but in so doing disapproved of the lower court's holding on the charge error preservation issue.

In *Alaniz v. Jones & Neuse*, the plaintiff submitted a complete charge at the beginning of trial, and then at the charge conference simply objected to a missing element of damages. 907 S.W.2d 450 (Tex. 1995). The court of appeals held that the plaintiff waived any charge error because its charge submission was offered en masse, i.e. a complete charge, and not in a timely fashion, i.e. before trial and not after the charge was given to the parties as is required by Rule 273. The Texas Supreme Court disagreed. The Court found that a question could be submitted in a complete charge if it was not obscured and found that the defendant timely objected to the omission after it received the charge.

In *Universal Services Co. v. Ung*, 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. 904 S.W.2d 638 (Tex. 1996). The Court stated that the party's request only referred to an earlier question, and that the party did not make it clear to the trial court that the requested instruction was also intended to apply to the subsequent question.

In *S.E. Pipe Line Co. v. Tichacek*, the Court found that a party preserved error as to the omission of a limiting instruction which rendered a question defective although the party failed to adequately object at the charge conference. 997 S.W.2d 166, 172-73 (Tex. 1999). The Court looking at the whole record that indicated several times the party had adequately explained its position before the charge conference.

In *Texas Workers' Compensation Insurance Fund v. Mandlbauer*, 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. 34 S.W.3d 909, 912 (Tex. 2000). Importantly, the Court stated: "Further, for 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." *Id.* This curious sentence would seem to imply that a request must be in substantially correct wording, i.e., accurately state the law.

In *Union Pacific Railroad Company v. Williams*, the Texas Supreme Court seems to have forgotten about *Payne*. 85 S.W.3d 162 (Tex. 2002). In *Williams*, the Court faced an issue of whether the defendant preserved error on the omission of an instruction on foreseeability. 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.
>
> . . . .
>
> 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. 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.

Id. at 169-70. Accordingly, the Court used a traditional pre-*Payne* analysis requiring a substantially correct request in determining that Union Pacific did preserve error.

In *St Joseph Hospital v. Wolff*, the Court held that the defendant did preserve error as to a defective definition where the defendant both objected to the definition and submitted a substantially correct request. 94 S.W.3d 513, 525 (Tex. 2002). The interesting aspect of this case is that the Court once again failed to cite to *Payne* and cited to the Texas Rules of Civil Procedure. Whereas, in *Miga v. Jenson*, the Court cited to *Payne* and the *Payne* preservation of error test in holding that a defendant preserved error to an improper submission of damages by objecting to it. 96 S.W.3d 207 (Tex. 2002).

In *Holubec v. Brandenberger*, the trial court submitted a question asserting one of the defendant's defenses, however, the question was not the one submitted by the defendant. 111 S.W.3d 32, 38-39 (Tex. 2002). The defendant offered a written request for his defense, but it was not in substantially correct wording. The defendant also objected to the question, but the objection was vague. The court of appeals held that the defendant waived the submission of its version of the defense. The Texas Supreme Court held, however, that the defendant did preserve error because the defendant's summary judgment earlier in the case clarified its charge objection. Therefore, the Supreme Court held that the defendant did preserve charge error where it "plainly sought the submission of [its] statutory defense" even though at trial the defendant's objection was vague and the defendant's request was incorrectly worded. *Id*.

In *Sterling v. Trust Co. v. Adderley*, the trial court submitted a defective instruction on a breach of fiduciary duty claim. 168 S.W.3d 835, 846-47 (Tex. 2005). Basically, the trial court submitted the pattern jury charge instruction on breach of fiduciary duty, but the parties had contractually limited the common law fiduciary duties via a contract. Thus, the instruction was overly broad and defective. The defendant objected to the instruction in the charge conference. Citing *Payne*, the Court found that the defendant had preserved error. *See id.* at 247 n.4. Interestingly, the Court found that the defendant did not waive error by agreeing to this instruction in an earlier pretrial hearing and by submitting a proposed charge that included 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. The Court held that because the defendant made a clear, timely objection and obtained a ruling, it preserved error.

In *Baylor Univ. v. Coley*, the Court determined that although a plaintiff's request did preserve error even if it was a comment on the weight of the evidence, the trial court correctly refused it on a different ground. 221 S.W.3d 599 (Tex. 2007). In this case, Justice Johnson wrote a lengthy concurrence describing pre and post *Payne* Supreme Court precedent that a request had to be in substantially correct wording. *See id*. Justice Johnson would have found the same result—that the trial court did not err in refusing the request—but for the reason that the plaintiff's instruction was not substantially correct. This opinion highlights the differences on the Court regarding charge preservation of error and the conflicting authority that the Court has created.

In *Ford Motor Co. v. Lederma*, the Court determined that a defendant had preserved error on an erroneous instruction. 242 S.W.3d 32 (Tex. 2007). The defendant merely objected that the instruction, which was from the pattern jury charge, was not a correct statement of the law. However, the Court found otherwise. First, the Court cited to the *Payne* standard for preserving error. *Id*. Then, even though the error was one of commission that required a specific objection, the Court stated that a request had to be in substantially correct wording. The Court concluded that "The objection, proposed question and instruction, and supporting authorities provided the trial court with a plain objection identifying the error in the charge that we recognize today, 'with sufficient specificity to make the trial court aware of the complaint.'" *Id*. The Court obviously felt that the irrelevant request was sufficient to give specificity to the vague objection and helped to preserve error.

In *Transcon. Ins. Co. v. Crump*, the trial court submitted an incorrect definition of producing cause by failing to include but-for causation. 330 S.W.3d 211, 225(Tex. 2010). Under the Rules, an objection on the record during the formal charge conference should have been required to preserve error. In this case, however, *prior to trial*, the defendant objected to the definition. *Id*. At some point the defendant tendered an instruction that included but-for causation. The Court held that this request was sufficient to preserve error. The Court also noted that the instruction was in substantially correct wording and therefore "sufficed to preserve its complaint." *Id*. So, though the Court seemed to allow a request to substitute an objection, it still required the request to be in correct wording.

In *Cruz v. Andrews Restoration, Inc*., the Court concluded that the mere filing of a pretrial charge that included a subpart of a question that was omitted from the final charge did not sufficiently alert the trial court to the issue. 364 S.W.3d 817, 819 (Tex. 2012). Importantly, the Court took time to opine on charge preservation:

> Payne's cure must not worsen the disease. Trial courts lack the time and the means to scour every word, phrase, and omission in a charge that is created in the heat of trial in a compressed period of time. A proposed charge, whether drafted by a party or by the court, may misalign the parties; misstate the burden of proof; leave out essential elements; or omit a defense, cause of action, or (as here) a line for attorney's fees. Our procedural rules require the lawyers to tell the court about such errors before the charge is formally submitted to a jury. Tex. R. Civ. P. 272. Failing to do so squanders judicial resources, decreases the accuracy of trial court judgments and wastes time the judge, jurors, lawyers, and parties have devoted to the case.

Id. The Court held that the plaintiff had failed to preserve error:

> Here, the parties had ample time to review the draft charge and point out discrepancies to the trial court. The charge that was ultimately submitted to the jury was forty pages long and contained thirty-two questions, most of which had multiple subparts. Protech can complain on appeal only if it made the trial court aware, timely and plainly, of the purported problem and obtained a ruling. *Payne*, 838 S.W.2d at 241. Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue.

Id. Regarding preliminary charge submissions before the formal charge conference, the Court opined:

> A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court "within a reasonable time after the charge is given to the parties or their attorneys for examination." Tex. R. Civ. P. 273 (emphasis added). Notwithstanding our rules, we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. Id. Again, trial court awareness is the key.
>
> Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record, whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review.

Id.

In *Wackenhut Corp. v. Gutierrez*, the court cited to *Payne* and held that a party preserved an objection to a spoliation instruction by objecting and obtaining a ruling pre-trial. 453 S.W.3d 917, 920 (Tex. 2015). There apparently was no objection raised at the formal charge conference. *Id*. The Court held:

> In light of Wackenhut's specific reasons in its pretrial briefing for opposing a spoliation instruction and the trial court's recognition that it submitted the instruction over Wackenhut's objection, there is no doubt that Wackenhut timely made the trial court aware of its complaint and obtained a ruling. Under the circumstances presented here, application of Rules 272 and 274 in the manner Gutierrez proposes would defeat their underlying principle.

Id.

D. Court of Appeals Reaction to *Payne*

Due to the odd wording of the *Payne* decision—the Texas Supreme Court does not change rules by opinion, yet formulating a new test for charge preservation of error—and the less than consistent Supreme Court opinions since *Payne*, the courts of appeals have been understandably inconsistent in 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. In *State Farm Lloyds v. Williams*, the court of 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. 960 S.W.2d 781, 790 (Tex. App.—Dallas 1997, writ dism.).

However, in *Texas Commerce Bank v. Lebco Constructors*, 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. 865 S.W.2d 68 (Tex. App.—Corpus Christi 1993, writ denied). *See also AlliedSignal, Inc. v. Moran*, 231 S.W.3d 16 (Tex. App.—Corpus Christi 2007, pet. filed) (trial court properly refused a request that was not substantially correct); *Texas Natural Resource Conserv. Comm'n v. McDill*, 914 S.W.2d 718 (Tex. App. –Austin 1996, no writ) (requires request be in substantially correct wording). In *Conde v. Gardner*, the court of appeals held that a request for a definition that was not in substantially correct wording did not preserve error. No. 14-99-01102-CV, 2001 Tex. App. LEXIS 5579 (Tex. App.—Houston [14th Dist.] August 9, 2001, no pet.) (not desig. for pub.). In *Shamrock Communications, Inc. v. Wilie*, the court held that the tendered request did not preserve error because it was too narrow to be in substantially correct wording. 2000 WL 1825501 (Tex. App.—Austin 2000, pet. denied) (not desig. for pub.). In *City of Weatherford v. Canton*, the court held that a request for a definition was not sufficient where it was not is substantially correct wording. 83 S.W.3d 261, 271-72 (Tex. App.—Fort Worth 2002, no pet.). In *City of Austin/Travis County Landfill Co., L.L.C. v. Travis County Landfill Co., L.L.C.*, the court held that a request did not preserve error where it was not in substantially correct wording. 25 S.W.3d 191, 203 (Tex. App.—Austin 1999), *rev'd on other grounds*, 73 S.W.3d 234 (Tex. 2001). In *Vu v. Rosen*, the court held that a request must be in substantially correct wording. No. 14-02-00809-CV, 2004 Tex. App. LEXIS 2795, n. 1 (Tex. App.—Houston [14th Dist.] March 30, 2004, pet. denied) (mem. op.); *see also Barnett v. Coppell N. Tex. Const. Ltd.*, 123 S.W.3d 804, 826 (Tex. App.—Dallas 2003, pet. denied). In *Burrus v. Reyes*, the appellate court held that a party waived a complaint about the trial court submitting a contract formation question without instructing the jury on the elements of a contract even though the party had a written and oral request for the elements. 516 S.W.3d 170, 193 (Tex. App.—El Paso 2017, pet. denied); *Duncan v. Woodlawn Mfg., Ltd.*, 479 S.W.3d 886 (Tex. App.—El Paso 2015, no pet.) (requests must be in substantially correct wording); *Raymond v. Pizza Venture of San Antonio, LLC*, No. 04-17-00061-CV, 2018 Tex. App. LEXIS 3628 (Tex. App.—San Antonio May 23, 2018, no pet.) (same).

2. Objections the Same as Requests?

Several cases have held that there is still a distinction between objections and requests. *See, e,g,, Tex. Dep't of Family & Protective Servs. v. Parra*, 503 S.W.3d 646, 666-67 (Tex. App.—El Paso 2016, pet. denied) (party waived objection to undefined term by failing to submit request); *Laird v. Benton*, No. 01-16-00462-CV, 2017 Tex. App. LEXIS 2026 (Tex. App.—Houston [1st Dist.] March 9, 2017, no pet.); *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Properties, L.C.*, 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied); *Contreras v. Sec. Well Serv. , Inc.*, No. 04-03-00149-CV, 2004 Tex. App. LEXIS 1977 *10 (Tex. App.—San Antonio March 3, 2004, pet. dism) (mem. op.); *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998); *Mason v. Southern Pacific Transportation Co.*, 892 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Gilgon Inc. v. Hart*, 893 S.W.2d 562 (Tex. App.—Corpus Christi 1994, writ denied). For example, in *Conde v. Gardner*, the court of appeals held in that case that an objection was required under the Rules and that the party's request did not preserve error. No. 14-99-01102-CV, 2001 Tex. App. LEXIS 5579 (Tex. App.—Houston [14th Dist.] August 9, 2001, no pet.) (not desig. for pub.). In *Doe v. Mobile Tapes, Inc.*, the court of appeals held that a party waived a complaint about an omission in the charge unless it submitted a request in substantially correct wording. 43 S.W.3d 40, 50-51 (Tex. App.—Corpus Christi 2001, no pet.). In *Gilgon, Inc. v. Hart*, the court held that an objection was not sufficient to preserve error where a request was required. 893 S.W.2d 562 (Tex. App.—Corpus Christi 1994, writ denied). In *Mason v. Southern Pac. Transp. Co.*, the court held that an objection did not preserve error where a request was required. 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied). In *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Properties, L.C.*, the court held that a party waived an objection even though it submitted a request: "tendering a proposed jury question or

instruction will not suffice to preserve error when a proper objection has not been made to the question or instruction submitted." 323 S.W.3d 322, 350-52(Tex. App.—Beaumont 2010, pet. denied). In *Sam Rayburn Mun. Power Agency v. Gillis*, the court held that the appellant had not preserved error by tendering a request when an objection was required: "A request for submission is required to preserve the right to complain of a trial court's failure to *submit* a question; whereas, an objection is required to preserve a complaint as to a *defective* question." 2018 Tex. App. LEXIS 5743 (Tex. App.—Beaumont July 26, 2018, pet. denied).

However, in some cases, courts have held that one might be sufficient to preserve error where the other is technically required. In *Sloane v. Goldberg B'Nai B'Rith Towers*, the court of appeals held that the party preserved error in an omitted question by objecting. 577 S.W.3d 608 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The court stated:

> Here, the trial court discussed the requested question and instruction on the record at the charge conference and explained at some length why the court was refusing to submit the question and instruction. Sloane made the trial court aware of his complaint and obtained a ruling on the record at the charge conference. This was sufficient to preserve the jury charge issue for our review.

Id. *See also Mohamed Ahmed v. Hinga Mbogo*, No. 05-17-00457-CV,2018 Tex. App. LEXIS 5849 (Tex. App.—Dallas July 30, 2018, pet. denied) (request did not count as an objection).

In *Matthiessen v. Schaefer*, the trial court submitted the defendant's affirmative defense but without a required element. 900 S.W.2d 792 (Tex. App.—San Antonio 1995, writ denied). The plaintiff should have objected to this incorrect submission. The plaintiff, however, submitted a request that was not in substantially correct wording. The court of appeals held that this was sufficient to preserve error. In *Stewart & Stevenson v. Serv.-Tech., Inc*., the court of appeals held that a request could be used to clarify and enhance an otherwise insufficient objection. 879 S.W.2d 89, 110 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Similarly, in *Primrose Operating Co., Inc. v. Jones*, 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 that was offered en masse. 102 S.W.3d 188 (Tex. App.—Amarillo 2003, pet. denied). In *General Agents Ins. Co. of America, Inc. v. Home Ins. Co. of America*, the court held that a general objection preserved error where a request added specificity. 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dism'd by agr.). In *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc*., 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. 78 S.W.3d 425, 445 (Tex. App.—Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). In *U.S. Rest. Props. Operating L.P. v. Motel Enters., Inc.*, 104 S.W.3d 284, 291 (Tex. App.—Beaumont 2003, pet. denied) and *Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied) the courts held that a request and an objection could act for one another and preserve error. In *In re Marriage of Walston*, the court held that a party could preserve error on the submission of an erroneous question by objection or by submitting a request. No. 10-05-00193-CV, 2007 Tex. App. LEXIS 3609 (Tex. App.—Waco May 9, 2007, pet. dism.).

3. <u>En Masse Requests?</u>

The Texas Supreme Court has held that requests offered en masse can still preserve error so long as they are not obscured. In *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc*., the court of appeals held that an en masse request did preserve error so long as it was not obscured. 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). In *Texas Natural Resource Conservation Commission v. McDill*, the court of appeals 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. 914 S.W.2d 718, 723-24 (Tex. App.—Austin 1996, no writ). In *Primrose Operating Co., Inc. v. Jones*, 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 that was offered en masse. 102 S.W.3d 188 (Tex. App.—Amarillo 2003, pet. denied). The court found the en masse request supported and clarified the insufficient objection. *Id*. *See also In re Commitment of Brady*, No. 09-09-00360-CV,2011 Tex. App. LEXIS 4502 (Tex. App.—Beaumont June 16, 2011, no pet.) (stating rule that requests can be en masse so long as they are not obscured).

However, in *Munoz v. The Berne Group*, 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. 919 S.W.2d 470 (Tex. App.—San Antonio 1996, no writ). Further, the trial court did not mark "refused" on the complete charge. The court stated that "tendering this instruction . . . in the form of an entire proposed charge, with nothing more, was insufficient." *Id.* In *Hoffman-La Roche, Inc. v.*

Zeltwanger, the court held that a party waived a requested instruction where it offered it en masse with other instructions. 69 S.W.3d 634, 652 (Tex. App.—Corpus Christi 2002, pet. granted). In *Riddick v. Quail Harbor Condominium*, the court held that an en masse charge did not preserve any error where there was nothing in record that showed that trial court was even aware of it must less ruled upon it. 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In *Luensmann v. Zimmer-Zampese & Assocs. Inc*., the court held that a en masse written objections did not preserve error. 103 S.W.3d 594, 599 (Tex. App.—San Antonio 2003, no pet.). In *Laird v. Benton*, the court held that an en masse charge submitted before trial did not preserve error where nothing in the record indicated that the omitted instruction was brought to the trial court's attention. No. 01-16-00462-CV, 2017 Tex. App. LEXIS 2026 (Tex. App.—Houston [1st Dist.] March 9, 2017, no pet.).

4. Timing of Objections and Requests

The courts of appeals appear to have loosened up on the requirement that a party submit its requests and objections at the formal charge conference. In *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc*., 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. 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). In *Green Tree Finance Corp. v. Garcia*, the court of appeals held that a party preserved error by objecting to the omission of an instruction at an informal charge conference. 988 S.W.2d 776, 781-82 (Tex. App.—San Antonio 1999, no pet.). In *In re Stevenson*, the court of appeals considered the discussion of a request during the informal charge conference in determining that error in its omission had been preserved. 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied). In *Murphy v. Am. Rice, Inc*., the court reviewed a pre-trial hearing and summary judgment hearing in determining that an objection was vague. No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031 (Tex. App.—Houston [1st Dist.] March 9, 2007, no pet.). In *General Agents Ins. Co. of America, Inc. v. The Home Ins. Co. of Illinois*, 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. 21 S.W.3d 419 (Tex. App.—San Antonio 2000, pet. dism'd by agr). In *Conditt v. Morato*, court held that party preserved error in objecting to charge by referring to earlier argument because trial court was "aware" of the complaint. No. 02-06-214-CV, 2007 Tex. App. LEXIS 7532 (Tex. App.—Fort Worth September 13, 2007, pet. denied). In *Ibarra v. City of Laredo*, the court held that an objection at an informal charge conference and ruling on a request was sufficient to preserve error. No. 04-10-00665-CV,2012 Tex. App. LEXIS 5741 (Tex. App.—San Antonio July 18, 2012, no pet.). In *Fort Worth Indep. Sch. Dist. v. Palazzolo*, an affirmative defense that was submitted before the formal charge conference, along with an objection during the charge conference, was sufficient to preserve error. 498 S.W.3d 674, 680 (Tex. App.—Fort Worth 2016, pet. denied). In *Neal v. Guidry*, the court held that a request made after the charge was submitted to the jury was sufficient to preserve error where the trial court ordered objections to be made at that time. No. 03-17-00525-CV 2019 Tex. App. LEXIS 3884 (Tex. App.—Austin May 15, 2019, pet. denied).

Other courts appear to require more strict timing rules. In *Nowlin v. Keaton*, the court held that an objection and request at an informal charge conference was not sufficient to preserve error. 2015 Tex. App. LEXIS 5632 (Tex. App.—Austin June 4, 2015, no pet.). In *Indus. III v. Burns*, the court questioned whether error was preserved on the omission of two claims where the party relied on a draft charge submitted before trial and on objections at the charge conference. No. 14-13-00386-CV, 2014 Tex. App. LEXIS 9447 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied).

A good example of conflicting cases regarding the timing of objections and requests is whether a spoliation instruction that is solely offered pre-trial will preserve error in its omission – instructions must be submitted to the trial court after the charge is delivered to the attorneys. Tex. R. Civ. P. 273. Citing *Payne*, the court in *Hopper v. Swann* 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. No. 12-02-00269-CV, 2004 Tex. App. LEXIS 4020 (Tex. App.—Tyler April 30, 2004, no pet). However, in *Cresendo Ins. Co. v. Brice*, the court held that the party complaining about the omission of the spoliation instruction waived error in its omission by not raising at the charge conference. 61 S.W.3d 465, 478-79 (Tex. App.—San Antonio 2006, no pet.). In *Wackenhut Corp. v. Gutierrez*, the court held that a charge complaint about a spoliation instruction was waived when the complaining party affirmatively stated it had no objection at the charge conference and made no objection until after the charge was read to the jury 358 S.W.3d 722, 725 (Tex. App.—San Antonio 2011, no pet.).

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 its en masse

charge submitted before trial, and by reading the request into the record at the formal charge conference. 27 S.W.3d 195, 200-01 (Tex. App.—San Antonio 2000, pet. denied). In *In re M.P.*, the court held that under *Payne*, a dictated request did preserve error. 126 S.W.3d 228, 230-31 (Tex. App.—San Antonio 2003, no pet.). In *Indian Oil Co., LLC v. Bishop Petroleum, Inc.*, the court held that the appellant preserved error by objecting to an omission and verbally reading in the proposed question. 406 S.W.3d 644 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

However, in *Yazi v. Republic Ins. Co.*, 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. 935 S.W.2d 875, 878 (Tex. App.—San Antonio 1996, writ denied). Furthermore, in *Gragson v. ME & E Welding & Fabrication, Inc.*, the court held that a dictated request did not preserve error: "Dictating 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." 2001 WL 1190087 (Tex. App.—Texarkana 2001, pet. denied). In *Elliott v. Whittier*, the court found that an objection and a dictated instruction was not sufficient to preserve error regarding an omitted instruction. No. 01-02-0065-CV, 2004 Tex. App. LEXIS 8555 (Tex. App.—Houston [1st Dist.] September 23, 2004, pet. denied) (mem. op.). In *Pasley v. Pasley*, the court held that a dictated question did not preserve error and referred to the Texas Rules of Civil Procedure that require a written request in substantially correct wording. No. 07-03-0540-CV, 2005 Tex. App. LEXIS 6680 (Tex. App.—Amarillo August 18, 2005, no pet.) (mem. op.). In *Meyers v. 8007 Burnet Holdings, LLC*, a dictated request made at the same time as an objection did not preserve error. No. 08-19-00108-CV, 2020 Tex. App. LEXIS 560 (Tex. App.—El Paso Jan. 22, 2020, pet. denied);

6. Object and Request

Historically, some courts held that when the complained of error is the omission of a question, instruction, or definition, then the complaining party must both tender a substantially correct request and object to its omission. *Texas Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 335 (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). However, Texas Supreme Court precedent would contradict the dual requirement of a request and objection in this situation. *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986); *American Teachers Life v. Bruggette*, 728 S.W.2d 763, 763 (Tex. 1987).

Under the more liberal *Payne* standard, it would seem that this dual requirement would no longer be recognized – however, some courts of appeals seem to ignore *Payne* and find waiver where the party did not both request and object to an omission. *Sear v. Abell*, 157 S.W.3d 886 (Tex. App.—El Paso 2005, pet. denied); *Fraxier v. Baybrook Bldg. Co.*, No. 01-02-00290-CV, 2003 Tex. App. LEXIS 4956 *7-*8 (Tex. App.—Houston [1st Dist.] June 12, 2003, pet. denied); *Equitable Res. Mktg. Co. v. U.S. Gas Transp., Inc.*, No. 05-99-00619-CV, 2001 Tex. App. LEXIS 3274 (Tex. App.—Dallas May 21, 2001, no pet.) (not design. for pub.); *Busse v. Pac. Cattle Feeding Fund No 1., Ltd.*, 896 S.W.2d 807, 818 (Tex. App.—Texarkana 1995, writ denied); *Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

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 will make it impossible for either side to properly evaluate their chances for success on appeal.

As the Texas Supreme Court stated, if one of the rules in the Texas Rules of Civil Procedure "does not mean what it says," then the Supreme Court has a duty to change it. *McConnell v. Southside I.S.D.*, 858 S.W.2d 337 (Tex. 1993). Pursuant to this statement, in the early 1990s, the Court commissioned a committee to revise the charge rules. Charles R. Watson, Jr., *The Court's Charge to the Jury*, ADVANCED CIVIL TRIAL COURSE, pg. 17 (State Bar of Texas 2003). The committee first offered the Court its recommended new charge rules in 1994, the Court made edits and sent the rules back to the committee, and in 1996, the committee resubmitted its final draft of the rules. *Id.; William V. Dorsaneo, III, Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 706 (2000). However, the Court has still not acted upon the committee's recommendation.

There is even greater confusion now than there was before *Payne* – which was intended to clarify charge preservation of error and make it simpler for all those trial attorneys that just could not figure it out. The end result is an apparent *ad hoc* system where the courts—even the same court—decide charge preservation of error on a case-by-case basis making up the rules as they go. Sometimes courts cite to *Payne*, sometimes they do not. Sometimes the request has to be in substantially correct wording, sometimes it does not. Sometimes there is a difference between a request and an objection, sometimes there is not. Sometimes an *en masse* request will preserve error, sometimes it

will not. Sometimes a party has to make a specific objection in the charge conference, sometimes a general objection will suffice if it can be arguably clarified by some earlier action.

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. For example, 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 a oral request was and do legal research to determine the correct wording. However, under *Payne*, the trial judge now has to do just that. She or he has to be cognizant of every nuance and potential objection or request to the charge, no matter when made, and the judge 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 fix this mess any time soon. The proposed charge rules are still waiting.

Another alternative is that courts could begin using more special submissions, which would make the formal charge rules make more sense and would eliminate the need for *Payne*. Special submission is making a comeback with the Supreme Court's holding in *Crown Life Insurance Company v. Casteel*, 22 S.W.3d 378 (Tex. 2000), and its progeny. However, now that attorneys and judges are used to broad form, it is unlikely that special submission will truly make a comeback. Therefore, for attorneys, parties, and trial judges, there is only one thing to look forward to – more *Payne*.

VII. PLEADINGS TO SUPPORT SUBMISSIONS

A trial court should deny the submission of an issue that is not raised by the pleadings. Tex. R. Civ. P. 278 (court shall submit instructions which are raised by written pleadings and evidence); *Alaniz v. Jones & Neuse, Inc*., 907 S.W.2d 450 (Tex. 1995); *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 248, 259 (Tex. 1992); *Scott v. Atchison, Topeka, and Santa Fe Ry. Co*., 572 S.W.2d 273 (Tex. 1978); *De Leon v. Red Wing Brands of Am., Inc.*, No. 05-15-01517-CV, 2017 Tex. App. LEXIS 8229 (Tex. App.—Dallas August 28, 2017, no pet); *Jamar v. Patterson*, 910 S.W.2d 118, 122 (Tex. App.—Houston [14th Dist.] 1995, writ denied). However, a party can waive a complaint that a submission is not supported by proper pleadings. Generally, pleading complaints are waived by failing to object and informing the trial court of the nature of the complaint. *In re D.T.M.*, 932 S.W.2d 647, 652 (Tex. App.—Fort Worth 1996, no writ). The Texarkana Court of Appeals has provided an insightful recitation of the two general types of pleading defects, and what is necessary to preserve error:

> There are two kinds of waiver with regard to pleadings. The first type of waiver exists where the defect in a party's pleading is apparent at the time of the exchange of the pleadings. TEX. R. CIV. P. 90 states:
>
> Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account . . . .
>
> Under this rule, all defects, omissions, and faults in pleadings that are apparent must be raised by a written special exception. The broad language of this rule seemingly implies that a special exception may be urged at any time before the charge to the jury in a jury trial or before the judgment is signed in a nonjury trial. This is logically incorrect. A party asserting a special exception to an apparent defect must do so as soon as possible, or the defect will be waived. The open-ended language of the rule apparently was placed there to accommodate for pleadings that are late-filed after the trial begins.
>
> The second kind of waiver is where the pleading error is not apparent until the time of trial and evidence is offered on a nonpleaded matter. Unpleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they had been raised by the pleadings. The party who allows a claim or defense to be tried by consent may not raise the pleading deficiency for the first time on appeal. Rule 67 allows a court to address all issues on which evidence has been presented. The rule applies to situations where a party does not plead an issue and at trial presents evidence of that issue. The opposing party waives any objection to the pleading defect when he does not object at trial to the offer of evidence or the submission of the issue in the charge.
>
> Though somewhat similar, Rules 67 and 90 apply to different situations. Rule 67 applies where the pleadings are sufficient on their face but at trial evidence is offered that exceeds the scope of the

> pleadings. Rule 90 applies where the pleadings are deficient on their face at the time of the exchange of the pleadings. In this circumstance, the opposing party must raise the error of the pleading deficiency in a special exception. Further, the party must reassert the objection to the apparent pleading defect at the offer of evidence and at the charge conference.

Hickey v. Mayberry, No. 06-97-00109-CV, 1998 Tex. App. LEXIS 5328 (Tex. App.—Texarkana August 28, 1998, no pet.) (not designated for publication). *See also, Laura E. Spatz, Rule 90 Special Exceptions*, 48 BAYLOR L. REV. 907, 918-19 (1996); *William T. Deffebach & George E. Brown, Comment, Waiver of Pleading Defects and Insufficiencies in Texas*, 36 TEX. L. REV. 459, 459-61 (1958).

If a party can review an opponent's pleading and determine that it is objectionable, e.g., missing an element of a claim or defense, then it has an obligation to raise the objection in writing and file it with the court before trial. Under those circumstances, if the party waits until trial to raise an objection, the objection should be waived. If the opponent's pleading is not noticeably objectionable before trial, but becomes so during trial with the offer of evidence, e.g., unpled claim or defense, then the complaining party can properly raise an objection at trial that there is no pleading to support the admission of evidence or a question in the charge. If the party fails to object to the offer of evidence at trial, then the party tries the issue by consent and waives its complaint.

However, an issue is not tried by consent where the evidence that supports the unpled issue is also relevant to an issue that is pled. *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993); *Hirsch v. Hirsch*, 770 S.W.2d 924 (Tex. App.—El Paso 1989, no writ); *San Antonio v. Lopez*, 754 S.W.2d 749 (Tex. App.—San Antonio 1988, no writ). Because the evidence is relevant to a pled issue, it is not subject to an objection when offered. Further, as the evidence is relevant to a pled issue there is no notice to the opposing party that the evidence is offered to support an unpled issue.

Lastly, a party that fails to properly plead an issue may request a trial amendment to ensure that its pleadings conform to the evidence offered at trial. Tex. R. Civ. P. 66. A trial court should generally grant the trial amendment; however, it has discretion to refuse a trial amendment where the opposing party objects to the amendment and either (1) presents evidence of surprise or prejudice, or (2) shows that the amendment asserts a new cause of action or defense, which is presumed prejudicial on its face. Tex. R. Civ. P. 63, 66; *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994); *Libhart v. Copeland*, 949 S.W.2d 783, 797 (Tex. App.—Waco 1997, no writ); *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658 (Tex. App.—Amarillo 1996, writ denied); *Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied). A trial court will not err in refusing to submit a question on an issue that is tried by consent unless the party relying on the issue seeks a trial amendment to expressly plead the issue. *Gibbons v. Berlin*, 162 S.W.3d 335 (Tex. App.—Fort Worth 2005, no pet.).

VIII. TEXAS PATTERN JURY CHARGES

The State Bar of Texas authored a multi-volume set of books that give examples for questions, instructions, and definitions – the Texas Pattern Jury Charge. Trial courts usually look to the Texas Pattern Jury Charge as a sacred script and are not likely to deviate from it. And for the most part, Texas appellate courts have looked favorably upon the submissions found in the Texas Pattern Jury Charge. *See e.g., H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 24 (Tex. 1998); *Pacencio v. Allied Indus. Int'l., Inc*., 724 S.W.2d 20 (Tex. 1987); *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875-76 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.). In fact, the Texas Supreme Court has encouraged the "bench and bar" to use the Texas Pattern Jury Charges. *Fleishman v. Guadiano*, 651 S.W.2d 730, 731 (Tex. 1983)

However, there have been occasions where Texas courts have not followed the Pattern Jury Charge. *See e.g., State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996); *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989). If a case is reversed due to an error in a charge submission endorsed by the Pattern Jury Charge, then the appellate court should remand for new trial and not render judgment. *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996). In the law, there are usually several different ways of doing something correctly. The charge is no different. There are usually several different correct potential submissions, and the Texas Pattern Jury Charge is intended to provide one example of a correct submission. Even though a party wants to use a charge submission from the Texas Pattern Jury Charge, it should still carefully research the law and make sure that the submission is indeed correct, complete, and properly places the burden of proof.

IX. COMMENT ON THE WEIGHT OF THE EVIDENCE

In Texas, courts have noted the prohibition of comments on the weight of the evidence as long ago as 1853, and today this prohibition is so well understood that the reported decisions of such almost invariably involve inadvertent, rather than deliberate, violations. *See e.g. Texas & Pacific Railway Co. v. Murphy*, 46 Tex. 356 (1853).

Prior to 1973, Rule 272 stated, "the judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence . . . ." *See former* TEX. R. CIV. P. 272 (1972). The rules were amended, and the prohibition against comments on the weight of the evidence was qualified and moved to Rule 277. Currently, Rule 277 states:

> The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

Tex. R. Civ. P. 277. Thus, as one court stated, "Rule 277 carries forward that strict prohibition against commenting upon the weight of the evidence with one limited exception. A court may incidentally comment where the comment is necessary or proper or a part of an explanatory instruction or definition." *First National Bank of Amarillo v. Jarnigan*, 794 S.W.2d 54, 61-62 (Tex. App.—Amarillo 1990, writ denied).

There are many types of comments on the weight of the evidence. However, the two most prevalent types of comments on the weight of the evidence that require reversal are 1) where the court submits an issue that suggests the trial court's opinion concerning the matter about which the jury is asked, *Southmark Management Corp. v. Vick*, 692 S.W.2d 157, 160 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); and 2) where the court submits a question, instruction, or definition that assumes the truth of a material controverted fact, or exaggerated, minimized, or withdrew some pertinent evidence from the jury's consideration, s*ee Alvarez v. Missouri-Kansas-Texas R.R. Co.*, 683 S.W.2d 375, 377-78 (Tex. 1984); *Grenier v. Joe Camp, Inc*., 900 S.W.2d 848, 850 (Tex. App.—Corpus Christi 1995, no writ); *Redwine v. AAA Life Ins. Co.*, 852 S.W.2d 10, 14 (Tex. App.—Dallas 1993, no writ); *Moody v. EMC Serv., Inc*., 828 S.W.2d 237, 244 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Transamerica Ins. Co. Of Texas v. Green*, 797 S.W.2d 171, 175 (Tex. App.—Corpus Christi 1990, no writ); *First Nat'l Bank v. Jarnigan*, 794 S.W.2d at 61; *American Bankers Ins. Co. v. Caruth*, 786 S.W.2d 427, 434 (Tex. App.—Dallas 1990, no writ); *Lively Exploration Co. v. Valero Transmission Co*., 751 S.W.2d 649, 653 (Tex. App.—San Antonio 1988, writ denied); *see also Hodges and Guy, The Jury Charge in Texas Civil Litigation*, 34 TEXAS PRACTICE §6, pg 34 (1988) ("In connection with the submission of a question, the error most frequently found to constitute comment on the weight of the evidence is the assumption of a controverted fact--that is, commenting by implicitly advising the jury that a fact is established when it is actually in dispute.").

The first prevalent type of comment on the evidence that requires reversal is where the court suggests its opinion about a matter given to the jury to decide. This normally occurs where a court adds unnecessary, surplus instructions to a jury question. In *Maddox v. Denks Chemical Corp*., the court impermissibly instructed the jury that generally landowners are not liable for injuries to independent contractors. 930 S.W.2d 668, 671-72 (Tex. App.—Houston [1st Dist.] 1996, no writ). The court of appeals held that even though the instruction was legally correct, it was an impermissible comment on weight of the evidence. *Id.* In reversing, the court stated, "we believe that such an instruction encouraged the jury to favor [the defendant's] evidence over [the plaintiff's], and thus it was reasonably calculated to cause and probably did cause the rendition of an improper verdict." *Id*.; *see also Acord v. General Motors Corp*., 669 S.W.2d 111, 116 (Tex. 1984); *Levermann v. Cartell*, 393 S.W.2d 931, 935 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). Other courts have held that comments on the weight of the evidence did not cause harm where the issue was not hotly contested. *Epps v. Deboise*, 537 S.W.3d 238 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

The second prevalent type of comment on the evidence that requires reversal is where a court assumes as true a material fact and fails to submit a question on it. *In re Commitment of Shelton*, No. 02-19-00022-CV, 2020 Tex. App. LEXIS 3216, n.7 (Tex. App.—Fort Worth April 16, 2020, no pet.); *American Bankers Ins. Co. of Fla. v. Caruth*, 786 S.W.2d 427 (Tex. App.—Dallas 1990, no writ) (impermissible comment on weight of evidence when, after examining entire charge, it is determined that judge assumed truth of material controverted fact or exaggerated, minimized, or withdrew some pertinent evidence from jury's consideration); 34 Nancy Saint-Paul, *Texas Practice Series: The Jury Charge in Texas Civil Litigation* § 3.22 (2019) ("[t]he instructions in the jury charge ordinarily may not advise the jury that a fact issue has been conclusively established as a matter of law since that instruction might unduly influence the jury's answers about the other facts in the case"). In *Transamerica Insurance Company of Texas v. Green*, the court submitted an issue that assumed the plaintiff's wage rate estimate. 797 S.W.2d at 175. The appellate court reversed the verdict stating that the jury should have been allowed to decide the plaintiff's wage rate. *Id*. In *First National Bank of Amarillo v. Jarnigan*, the trial court improperly assumed that drafting multiple legal documents was a single transaction. 794 S.W.2d at 61-62. This issue was controverted and should have gone to the jury. *Id*. In *Texas Employers Insurance Association v. Percell*, the court mistakenly submitted several issues that assumed the plaintiff had injuries. 594 S.W.2d 182, 183-84 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.). The

trial court's assumption of a controverted fact required reversal. *Id.* In *Associates Investment Company v. Cobb*, a court erred in assuming that the buyer of a truck lost 440 working days after the conversion of his truck by defendant. 386 S.W.2d 578 (Tex. Civ. App.—Beaumont 1964, no writ). There are other cases where the trial court assumed a controverted fact and caused a reversal of the judgment. *Mooney v. Aircraft v. Altman*, 772 S.W.2d 540, 541-43 (Tex. App.—Dallas 1989, writ denied); *Aetna Casualty & Surety Co. v. Martin Surgical Supply Co*., 689 S.W.2d 263, 272 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Shihab v. Express-News Corporation*, 604 S.W.2d 204, 210-11 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *Otto Vehle & Reserve Law Officers Ass'n v. Brenner*, 590 S.W.2d 147, 150 (Tex. Civ. App.—San Antonio 1979, no writ). However, where unnecessary jury instructions are not likely to influence the jury and the case is not close, the instruction will not require reversal. *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995). Further, an incidental comment on the weight of the evidence is not cause for reversal. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995); *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 24 (Tex. 1998).

X. BURDEN OF PROOF

The court must place the proper burden of proof on each question. *TEIA v. Olivarez*, 694 S.W.2d 92, 93-94 (Tex. App.—San Antonio 1985, no writ). Generally, this is done such that the party with the burden of proof has the burden to obtain an affirmative finding to the question. *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). To properly place the burden of proof, the court's jury charge must be worded so that the jury's answer indicates that the party with the burden of proof on that fact established the fact by a preponderance of the evidence. *Maxus Energy Corp. v. Occidental Chem. Corp*., 244 S.W.3d 875, 883(Tex. App.—Dallas 2008, pet. denied); *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). For example, if a plaintiff has the burden to prove that the defendant was negligent, a charge question on that issue may read: "Do you find from the preponderance of the evidence that [Defendant] was negligent, if any, in the incident made the basis of this suit?" If the plaintiff sustains his burden, the jury will find in the affirmative.

In some issues it is difficult to determine who has the burden of proof and how to word the question – particularly using broad form. In those cases, the burden of proof can be properly explained in an instruction. *Walker v. Eason*, 643 S.W.2d 390, 391 (Tex. 1982); *Hoppenstein Props., Inc. v. Schober*, 329 S.W.3d 846, 854 (Tex. App.—Fort Worth 2010, no pet.) *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ). Indeed, Rule 277 provides that "[t]he placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question." Tex. R. Civ. P. 277. "Thus, the Rules of Civil Procedure contemplate that the jury can be instructed about applying the burden of proof in two ways: [by] an admonitory instruction or by placement of the burden through the question." *In re Commitment of Beasley*, No. 09-08-00371-CV, 2009 Tex. App. LEXIS 8664, 2009 WL 3763771, at *7 (Tex. App.—Beaumont Aug. 6, 2009, pet. denied).

A preponderance of the evidence is the burden of proof for all Texas civil cases unless the case involves "extraordinary circumstances, such as when we have been mandated to impose a more onerous burden." *Ellis Cty. State Bank v. Keever*, 888 S.W.2d 790, 792 (Tex. 1994). A court should instruct the jury on the correct burden of proof. *Durant v. Anderson*, No. 02-14-00283-CV, 2020 Tex. App. LEXIS 2319 (Tex. App.—Fort Worth March 19, 2020, no pet.).

To preserve error, a party need only object to the question as improperly shifting the burden of proof. *Maxus Energy Corp. v. Occidental Chem. Corp*., 244 S.W.3d 875, n. 8 (Tex. App.—Dallas 2008, pet. denied).

XI. CONDITIONAL SUBMISSIONS

Generally, a charge may condition the answering of one submission on an affirmative finding of a prior submission. A jury question is conditionally submitted when the jury is instructed to answer the question contingent upon its answer to some other question, whether the predicate answer be in the affirmative or in the negative. Roy W. McDonald & Elaine A. Grafton Carlson, *Jury Trial: Charge*, 4 TEXAS CIVIL PRACTICE § 22:30[a]; 71 TEX. JUR. 3d. Trial & Alternative Dispute Resolution § 281 (2002). Commentators have noted certain advantages of conditional submissions: "The judicious employment of conditions has many advantages. It may simplify the charge, clarify the jury's task, avoid findings on immaterial questions, prevent the risk of comment on the weight of the evidence, or forestall conflicting findings." McDonald & Carlson § 22:30[a]. *Turner v. Precision Surgical, L.L.C.*, 274 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

The Rules even expressly provide for conditional submissions: "The court may predicate the damage question or questions upon affirmative findings of liability." Tex. R. Civ. P. 277. For example, a damage question may be conditioned as follows: "If you found yes in response to Question No. 1 [the liability question], then answer Question No. 2 [the damages question], otherwise do not answer Question No. 2." The problem arises when the conditional submission is incorrect. A party must object to the improper conditioning or else the error is waived. *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987); *Matthews v. Candlewood Builders, Inc*., 685 S.W.2d 649, 650

(Tex. 1985); *Cimco Refrigeration, Inc. v. Bartush-Schnitzius Food Co*., NO. 02-14-00401-CV, 2018 Tex. App. LEXIS 2976 (Tex. App.—Fort Worth April 26, 2018, pet. denied); *Envtl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 631, 652 n.28 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (collecting cases to support holding that failure to object to conditioning instructions waived error arising from the jury's failure to answer question when answer could not be implied and holding that lack of objection waived right to new trial to have jury answer questions); *Richard Rosen, Inc. v. Mendivil*, No 08-04-00077-CV, 2005 Tex. App. LEXIS 9792 (Tex. App.—El Paso November 23, 2005, no pet.) (party waived error by failing to object at formal charge conference).

An improper conditioning deprives a party of the submission of a proper question, and if properly objected to, can constitute reversible error. *Turner v. Precision Surgical, L.L.C*., 274 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Varme v. Gordon*, 881 S.W.2d 877, 881 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (harmful); *but see, Byrne v. Harris Adacom Network Servs. Inc.*, 11 S.W.3d 244, 248-49 (Tex. App.—Texarkana 1999, pet. denied)(harmless); *Owens-Corning Fiberglass Corp v. Martin*, 942 S.W.2d 712, 723 (Tex. App.—Dallas 1997, no writ).

If the jury should have answered the conditionally submitted question, but did not do so because of an erroneous conditioning statement, then the error is treated as an omitted submission. This omitted submission will lead to waiver or deemed findings under Rule 279 just as in other cases of omission. *Little Rock Fun. v. Dunn*, 222 S.W.2d 985 (Tex. 1949). The scary thing about this situation is that the unanswered submission is treated as an omission even though the submission appeared in the charge. In order to avoid waiver or deemed findings, the party must object to the conditioning statement, which, as stated above, will also preserve error. *See id.; see also, Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963).

XII. DAMAGE QUESTIONS

"Show me the money!" The point of most trials is to compensate one party for the other party's actions or inactions. Accordingly, damage questions in the charge are of utmost importance. A trial court has the duty to appropriately frame the damage questions under the existing substantive law by either placing the correct standard in the damage question itself or by providing appropriate instructions. *Jackson v. Fontaine's Clinics, Inc*., 499 S.W.2d 87, 90 (Tex. 1973); *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 642-43 (Tex. App.—Austin 2000, pet. denied). If the court provides a wrong legal instruction to measure damages, then the complaining party must object to the incorrectly submitted measure. If the complaining party does not object, then error is not preserved. *Laird v. Benton*, No. 01-16-00462-CV, 2017 Tex. App. LEXIS 2026 (Tex. App.—Houston [1st Dist.] March 9, 2017, no pet.) (failure to object to wrong measure of damage waived complaint); *Beach Capital P'ship, L.P. v. DeepRock Venture Partners LP*, 442 S.W.3d 609, 618 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("The error preservation requirements of Rule 274 apply to incorrect measures of damages, just as to other aspects of the jury charge."); *Kamat v. Prakash*, 420 S.W.3d 890, 909 (Tex. App.—Houston [14th Dist.] 2014, no pet.). At least one court has held that that in addition to an objection, the party should also argue that an alternative measure should be submitted. *Dernick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 487(Tex. App.—Houston [1st Dist.] 2015, pet. denied).

It is error to simply submit a broad damage question with no accompanying instructions—"What sum do you find reasonably compensates the plaintiff for its injuries, if any, resulting from the occurrence in question." *Jackson v. Fontaine's Clinics, Inc*., 499 S.W.2d 87 (Tex. 1973); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). The Texas Supreme Court has stated: "Damages must be measured by a legal standard and that standard must be used to guide the factfinder in determining what sum would compensate the injured party . . . . We hold that this submission was fatally defective because it simply failed to guide the jury to a finding on any proper legal measure of damages." *Id. See also, Osoba v. Bassichis*, 679 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd); *Texas Cookie Co. v. Hendricks & Peralta*, 747 S.W.2d 873 (Tex. App.—Corpus Christi 1988, writ den.); *National Fire Ins. v. Valero Energy*, 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied); *Chrysler Corp. v. McMorries*, 657 S.W.2d 858 (Tex. App.—Amarillo 1983, no writ).

If a damage issue is broadly submitted without any proper instructions, how are the parties supposed to preserve error? *Tan Duc Constr. Ltd. Co. v. Tran*, NO. 01-14-00539-CV, 2017 Tex. App. LEXIS 5369 (Tex. App.—Houston [1st Dist.] June 13, 2017, pet. denied) (court held complaint waived where defendant mentioned at the charge conference that the damage question did not have a limiting instruction, but did not object, and the instruction desired was not substantially correct); *Lakeway Land Co v. Kizer*, 796 S.W.2d 820, 825 (Tex. App.—Austin 1990, writ denied); *Corum Management v. Aguayo Enterprises*, 755 S.W.2d 895, 899 (Tex. App.—San Antonio 1988, writ denied); *County Management, Inc. v. Butler*, 650 S.W.2d 888, 890 (Tex. App.—Austin 1983, writ dism. by agr.). *See also, Jefferson County Drainage Dist. v. Hebert*, 244 S.W.2d 535 (Tex. Civ. App.—Austin 1951, writ ref'd n.r.e.) (error in submitting broad damage questions is not fundamental error – the complaining party must preserve error).

If the complaining party did not have the burden of proof, then that party can object to the submission. Tex. R. Civ. P. 278; *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc*., 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). Several courts, including the Texas Supreme Court, have held that a party with the burden of proof must submit a request for an appropriate limiting instruction. *Cameron v. Terrell & Garrett, Inc*., 618 S.W.2d 535 (Tex. 1981); *Fidelity & Cas. Co. v. Underwood*, 791 S.W.2d 635 (Tex. App.—Dallas 1990, no writ); *Osoba v. Bassichis*, 679 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd). The Beaumont Court has held that a party with the burden of proof should object to the broad damage question. *Stewart v. Moody*, 597 S.W.2d 556 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (issue was erroneously submitted as worded and an objection preserved error). The Corpus Christi and Austin Courts have held that the party with the burden of proof should both object to the broad damage question and submit a request for an appropriate limiting instruction. *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901 (Tex. App.—Austin 1991, no writ); *National Fire Ins. v. Valero Energy*, 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied).

The real issue is whether the broad damage question is an error of omission or commission. If the broad form question is affirmatively wrong, then the party with the burden of proof should be able to object to its submission. If, however, it is not affirmatively wrong, then the party with the burden of proof should be required to submit a request to preserve error. The Author would suggest that to be safe a party should always request a correct limiting instruction and should also make a specific objection to the broad question. *See Louis S. Muldrow, Recurring Charge Problems – The Damage Issue*, (1992).

One last issue regarding damage submissions, is that a party should tender damage questions that properly segregate the damages due to each plaintiff, due from each defendant, and due on each individual claim. *See e.g., Minnesota Mining & Mfg. Co. v. Nishika, Ltd.*, 953 S.W.2d 733, 739 (Tex. 1997) (segregate between plaintiffs); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389-90 (Tex. 1997) (segregate between claims); *Wingate v. Hajdik*, 795 S.W.2d 717, 719-20 (Tex. 1990) (segregate between defendants). The harm is that the court will not know what finding goes to what claim or party. If the submitted question does not segregate out the damage findings, then the defendant should object to the failure to segregate. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Otherwise, the party will waive any error in failing to segregate damage amounts. *Conley v. Driver*, 175 S.W.3d 882, 885 (Tex. App.—Texarkana 2005, pet. denied).

XIII. TIMING ISSUES

Courts often request that the parties submit complete proposed charges before trial. However, this is merely an informal charge exchange. The charge is usually officially created after the close of the evidence and before the closing arguments. Rule 272 states: "[The charge] shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside of the presence of the jury. . ." Tex. R. Civ. P. 272. Accordingly, after the trial court creates a draft of the charge, it submits it to the parties for examination. The amount of time that a court gives the parties to examine the charge is in its discretion. *Bekins Moving & Storage Co. v. Williams*, 947 S.W.2d 568, 575 (Tex. App.—Texarkana 1997, no writ). If there is inadequate time to review the proposed charge, then a party must object to the amount of time and state: 1) that the party was not given sufficient time to review the charge; 2) the amount of time given; 3) the amount of time needed; 4) that the charge was too lengthy to examine in the time provided; and 5) the lack of time prevented the party from properly reviewing the charge, and therefore, caused the party to not be able to make a proper record for appeal. *Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. App.—Austin 1960, writ ref'd n.r.e.).

After examination, the parties should then submit any requests that they may have for an omitted question, definition, or instruction: "Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination." Tex. R. Civ. P. 273. After the trial court either denies the parties' requests or admits them, the parties shall have an opportunity to make objections to the charge on the record before the charge is read to the jury. Tex. R. Civ. P. 272. The trial court will then either sustain an objection and amend the charge, or it will deny the objection. After the court finalizes the charge, it will call in the jury, and read the charge: "Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions." Tex. R. Civ. P. 275. A trial court does not err in amending the written charge after oral argument to correct errors. *Board of Regents v. S&G Constr. Co.*, 529 S.W.2d 90, 98 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *overruled on other grounds, Federal Sign v. TSU*, 951 S.W.2d 401, 408 (Tex. 1997).

XIV. INFERENTIAL REBUTTALS

One interesting and somewhat forgotten aspect of a charge is the impact of inferential rebuttals. The first step is to understand what an inferential rebuttal is. A party defending against a claim can potentially allege three different

types of denials: 1) a direct denial; 2) an avoidance denial; or 3) an inferential rebuttal denial. A direct denial argues that the opposing party has not proved an element of his or her claim, i.e., the plaintiff has not proven by a preponderance of the evidence that the defendant breached a duty owed to the plaintiff. *See generally*, E. Wayne Thode, *Imminent Peril and Emergency in Texas*, 40 TEX. L. REV. 441, 463-64 (1962). Because a direct denial directly attacks an element of the opponent's claim or defense, at trial the burden of production and persuasion is on the opponent who has alleged the claim or defense to prove every element of such (the burdens are not on the party making the direct denial).

As a leading commentator describes, "[d]enials strike directly at the plaintiff's claim, imposing on him or her the burden of proving the elements which they put in issue, and opening the way for the defendant to offer evidence negating such elements." MCDONALD TEXAS CIVIL PRACTICE, PLEADING: ANSWER, § 9:44 (citing *Carr v. Austin Forty*, 744 S.W.2d 267 (Tex. App.—Austin 1987, writ denied)). Additionally, a party making a direct denial has never been entitled to an independent submission of his direct denial issue in the charge as such issue is included in the opponent's charge issue. *United States Fidelity & Guar. Co. v. Morgan*, 379 S.W.2d 537 (Tex. 1966); *Ross v. Texas Employers Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954); *Wright v. Traders & Gen. Ins. Co.*, 132 Tex. 172, 123 S.W.2d 314 (1939); *see also* R. Mike Borland, *Disjunctive Submission of Inferential Rebuttal Issues*, 33 BAYLOR L. REV. 147 n. 6 (1981).

An avoidance denial, more commonly called an affirmative defense, is not a denial of an element of the plaintiff's claim; rather, it sets forth an independent reason why the plaintiff should not recover even though all of the elements of the plaintiff's claim may be established. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 212 (Tex. 1996); *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991). An affirmative defense allows a defendant to avoid liability for a plaintiff's claim although all of the plaintiff's claim's elements are proven. In other words, even though a party may be able to establish every element of its claim or defense, there is some independent reason that the party should not be entitled to recover under its claim or be protected by its defense. At trial the party alleging an affirmative defense has the burden of persuasion and production to support such. *Love v. State Bar of Texas*, 982 S.W.2d 939 (Tex. App.—Houston [1st Dist.] 1998, no writ); *Garcia v. Rutledge*, 649 S.W.2d 307 (Tex. App.—Amarillo 1982, no writ); *Albritton v. Henry S. Miller Co.*, 608 S.W.2d 693 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). Further, a party who supports an affirmative defense by both pleadings and evidence is entitled to an independent submission in the charge as to that issue. Tex. R. Civ. P. 278.

An inferential rebuttal issue is somewhere between a direct denial and an avoidance denial. It is a defensive theory that, if decided in the party's favor, would disprove by inference the existence of an essential element of one of the opposing party's grounds of recovery. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). Therefore, it is a defensive issue that is contradictory of the opposing party's claim. *Texas Workers' Compensation Fund v. Mandlbour*, 988 S.W.2d 750, 752 (Tex. 1999); *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978); *Smith v. Red Arrow Freight Lines*, 460 S.W.2d 257, n.3 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.). Basically, an inferential rebuttal issue is an independent set of facts that acts to disprove the existence of one of the elements of the opposing party's claim. *Weitzeil Constr. Inc. v. Outdoor Environs.*, 849 S.W.2d 359, 365 (Tex. App.—Dallas 1993, writ denied). The Texas Supreme Court has stated that an inferential rebuttal theory disproves "by establishing the truth of a positive factual theory is inconsistent with the existence of some factual element of the ground of recovery . . . relied upon by the opponent," and its "basic characteristic . . . is that it presents a contrary or inconsistent theory from the claim relied upon for recovery." *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). Examples of inferential rebuttals include: 1) unavoidable accident, *see Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379 (1952); 2) sole proximate cause, *see Home Ins. Co. v. Gillum*, 680 S.W.2d 844, 849 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); 3) new and independent cause, *see Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674 (Tex. 1998); 4) self-defense, *see Foster v. H.E.Butt Grocery*, 548 S.W.2d 769 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.); 5) independent contractor, *See Oliver v. Marsh*, 899 S.W.2d 353, 357 (Tex. App.—Tyler 1995, no writ); 6) certain statutory exclusions, *see Traders Ins Co. v. Liggins*, 625 S.W.2d 780, 784 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.); and 7) an act of God, *see Scott v. Atchison, Topeka & Santa Fe Railway Co.*, 572 S.W.2d 273 (Tex. 1978).

There has been much debate over the past regarding whether inferential rebuttals should be submitted in the charge. Some argue that the positions they represent can be argued to the jury without the necessity of a charge submission, and that any submission is simply a comment of the weight of the evidence. The Texas Supreme Court held that inferential rebuttals can still be submitted. *Dillard v. Texas Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005). But the Court held that if several inferential theories address the same factual theory—act of god and emergency—that the party is only entitled to a charge submission of one theory. *Id.* The stacking of inferential rebuttal theories on the same basic theory could amount to a comment on the weight of the evidence by the trial court.

A. How Inferential Rebuttals are Submitted in the Charge

Historically, inferential rebuttal issues were submitted to the jury as a special issue, e.g., "Do you find that the collision was not the result of an unavoidable accident?" *Colorado & S.Ry. Co. v. Rowe*, 238 S.W. 908, 909-10 (Tex. Com. App. 1922, holding approved). The party relying upon the inferential rebuttal theory had the burden to request the issue in the charge. HODGES AND GUY, at § 72. However, several problems arose with the use of inferential rebuttal issues in the charge. The most important of those problems was inconsistent findings by the jury, i.e., yes the defendant was the proximate cause of the accident and yes the accident was an act of god. HODGES AND GUY, at § 72 (citing Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273, 283 (1955)). Regarding inconsistent findings, the Texas Supreme Court stated:

> The only legitimate purpose to be served in submitting unavoidable accident is to call the matter to the attention of the jury, so that it will not be overlooked, and so that the jury will understand that they do not necessarily have to find that one or the other parties to the suit was to blame for the occurrence complained of. This purpose is fully accomplished when the jury is told that the occurrence in question was an unavoidable accident if it happened without the negligence of either of the parties to the suit.

Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449, 452 (1941).

Effective September 1, 1973, Texas Rule of Civil Procedure 277 was amended to prohibit the submission of inferential rebuttal theories as charge questions, but allowed such to be submitted as instructions to be placed with the plaintiff's issue. Tex. R. Civ. P. 277; *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984); *Burns v. Union Std. Ins. Co.*, 593 S.W.2d 309, 311 (Tex. 1980); *Paul Mueller Co. v. Alcon Labs, Inc.*, 993 S.W.2d 851 (Tex. App.–Fort Worth 1999, no pet.); *Perez v. Weingarten Realty Invest.*, 881 S.W.2d 490, 496 (Tex. App.—San Antonio 1994, writ denied); *Berry Prop. Mgmt., Inc., v. Bliskey*, 850 S.W.2d 644, 662-63 (Tex. App.—Corpus Christi 1993, writ dism. by agr.); *Kemp v. Rankin*, 530 S.W.2d 324, 325 (Tex. App.—Amarillo 1975, no writ). Texas Rule of Civil Procedure 277 currently states, "The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. Inferential rebuttal questions shall not be submitted in the charge." Tex. R. Civ. P. 277, 278. Further, the party relying upon the instruction has the duty to provide the trial court with a request for his inferential rebuttal instruction in substantially correct wording. Tex. R. Civ. P. 278 ("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."); *Oliver v. Marsh*, 899 S.W.2d 353 (Tex. App.—Tyler 1995, no writ); *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824 (Tex. App.—El Paso 1993, writ denied). Therefore, inferential rebuttal theories are currently submitted in the charge as an instruction.

B. Pleading Inferential Rebuttals

Before 1941, a general denial was sufficient to support an inferential rebuttal issue when it was raised by the evidence. *See e.g., Wright v. Traders & General Ins. Co.*, 132 Tex. 172, 123 S.W.2d 314, 315 (1939). "Such a rule was logical, in a sense, because the fact submitted by the inferential rebuttal issue denied or rebutted some element of the opponent's cause of action or defense, and could therefore be said to be put in issue by a mere denial in pleading – although the general denial gave little if any notice of inferential rebuttal theories." HODGES AND GUY, at § 72. Thereafter, the rules changed to require that a party who wanted a submission of a special issue in the charge had to specifically plead that issue.

Texas Rule of Civil Procedure 279 (now rule 278) became effective September 1, 1941, and stated that a party was not entitled to the submission of a special issue (charge question) raised only by a general denial. *See* Tex. R. Civ. P. 279 (1941), now found in Tex. R. Civ. P. 278. Currently, that Rule states, "a party shall not be entitled any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party." Tex. R. Civ. P. 278. Consequently, after this Rule was adopted and became effective, a defendant who did not affirmatively plead an inferential rebuttal issue was not entitled to a special issue in the charge on it; however, the defendant was still entitled to introduce evidence of such and argue that the plaintiff did not meet his burden of proof on his cause of action due to the inferential rebuttal theory. *See e.g., Rash v. Ross*, 371 S.W.2d 109, 113 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); *Quintanilla v. TEIA*, 250 S.W.2d 751 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); *Lincoln County Mut. Fire Ins. Co. v. Smith*, 232 S.W.2d 637, 640 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.); *Salley v. Black, Swalls & Bryson*, 225 S.W.2d 426 (Tex. Civ. App.—San Antonio 1949, writ dism'd). The sole basis for having to plead an inferential rebuttal theory after 1941 was Rule 279's provision requiring a pleading to support a charge issue. *See e.g., Isenhower v. Bell*, 365 S.W.2d 354 (Tex. 1963); *Structural Metals, Inc. v. Impson*, 469 S.W.2d 261, 267 (Tex. App.—Corpus Christi 1971), *rev'd on other grounds*, 487 S.W.2d 694, *set aside by*, 16 Tex. Sup. Ct. J. 41 (Tex. 1972).

Currently, the rationale behind the prohibition against submitting inferential rebuttal theories not supported by the pleadings is no longer in effect because inferential rebuttal theories are currently placed in charge instructions rather than independent charge questions. Correspondingly, courts have held that a general denial is sufficient to support an instruction or definition on an inferential rebuttal theory. *Erickson v. Deayala*, 627 S.W.2d 475, 478-79 (Tex. App.—Corpus Christi 1981, no writ); *Missouri Pacific R. Co. v. United Transports, Inc.*, 518 S.W.2d 904, 910 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). As one court has stated, "it is only where a defendant desires to introduce evidence of fact which does not tend to rebut the facts of the plaintiff's case, but which shows independent reason why the plaintiff should not recover upon the case slated and proved, that a defendant must bear the burden of pleading affirmatively." *Taylor v. Gentry*, 494 S.W.2d 243 (Tex. Civ. App.—Fort Worth 1973, no writ). Indeed, because the inferential rebuttal theory does not set forth independent grounds but rather attacks the opposing party's prima facie case, it is not an affirmative defense and Texas Rule of Civil Procedure 94 does not require a party to plead an inferential rebuttal before he or she can rely upon it in trial. *Walzier v. Newton Trucking Co.*, 27 S.W.3d 561 (Tex. App.—Amarillo 2000, no pet.); *Erikson v. Deayala*, 627 S.W.2d 475, 478 (Tex. App.—Corpus Christi 1981, no writ); *Missouri Pacific R. Co. v. United Transports, Inc*., 518 S.W.2d 904, 910 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). However, since 1973, some courts hold that a party must plead an inferential rebuttal theory before they are entitled to submit it in the charge as an instruction. *Scott v Atchison Topeka & Santa Fe Railroad Co.*, 572 S.W.2d 273 (Tex. 1978); *National Union Fire Ins. Co. v. Kwistkowski*, 915 S.W.2d 662 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that if instruction has been raised by evidence and pleadings it should be submitted); *Reid v. Best Waste Sys*., 800 S.W.2d 644, 646 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Heritage Manor, Ins., v. Tidball*, 724 S.W.2d 952, 955 (Tex. App.—San Antonio 1987, no writ); *Director, State Employees Workers' Compensation Div. v. Bass*, 703 S.W.2d 397, 398 (Tex. App.—Beaumont 1986, no writ); *Live Oak v. Ingham*, 644 S.W.2d 566 (Tex. App.—El Paso 1982, writ ref'd n.r.e.); *Cooper v. Boyer*, 567 S.W.2d 555 (Tex. App.—Waco 1978, writ ref'd n.r.e.). These opinions incorrectly cite authority that rely upon pre-1973 practice where inferential rebuttals were submitted as charge questions and had to be plead for such. Further, Rule 278 states, "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." Tex. R. Civ. P. 278. Pursuant to this Rule, courts have held that for an instruction to be proper, it must be supported by some pleading. *Rao v. Rodriguez*, 995 S.W.2d 661 (Tex. 1999); *Whiteside v. Watson*, 12 S.W.3d 614 (Tex. App.—Eastside 2000, vacated for settlement); *Mayes v. Stewart*, 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Joseph Hosp. v. Wolff*, 999 S.W.2d 579 (Tex. App.—Austin 1999, no pet.); *Wyler Indus. Works Inc. v. Garcia*, 999 S.W.2d 494 (Tex. App.—El Paso 1999, no pet.); *Bean v. Baxter Healthcare Corp*., 965 S.W.2d 656 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *wens Corning Fiberglass Corp. v. Martin*, 942 S.W.2d 712 (Tex. App.—Dallas 1997, no writ). Correspondingly, a party may argue that based upon this provision, a party has to specially plead an inferential rebuttal theory. However, as stated before, a general denial is sufficient to raise an inferential rebuttal, and no special pleading requirements should now affect inferential rebuttal practice.

XV. DISJUNCTIVE SUBMISSIONS

"The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists." Tex. R. Civ. P. 277; *Turner v. Precision Surgical, L.L.C*., 274 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2008, no pet.). "The disjunctive submission provision contained in Rule 277 was added to the jury charge rules in 1940 as an exception to separate and distinct submission." William V. Dorsaneo III, *Revision & Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 714 (Summer 2000). "Accordingly, disjunctive submission is simply one type of broad-form submission." *Id*.

A disjunctive submission has been described as "an 'either/or' question posed in a manner that necessarily prevents the two factual alternatives inquired about from being found to exist concurrently." R. Mike Borland, Comment, *Disjunctive Submission of Inferential Rebuttal Issues*, 33 BAYLOR L. REV. 147, 148 (Winter 1981). Accordingly, Rule 277 allows the trial court to submit, disjunctively, the existence of two mutually exclusive propositions when conflicting answers are possible. *Lake LBJ Mun. Util. Dist. v. Coulson*, 692 S.W.2d 897, 908 (Tex. App.—Austin 1985), *rev'd on other grounds*, 734 S.W.2d 649 (Tex. 1987); *Warren v. Denison*, 563 S.W.2d 299, 304-05 (Tex. Civ. App.—Amarillo 1978, no writ); *see also Mustang Pipeline Co. v. Driver Pipeline Co*., 134 S.W.3d 195, 200 (Tex. 2004) (suggesting disjunctive jury question that allowed jury to determine which of two parties committed first material breach of contract); *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978) (indicating that submission of disjunctive jury issues is appropriate when two alternative grounds of recovery are developed through pleadings and submitted issues).

A disjunctive question might ask: "Do you find from a preponderance of the evidence that the plaintiff received an injury on [date], which included her hip and back, or was such injury confined to her left foot and leg below the

knee." *Burns v. Union Standard Ins. Co.*, 593 S.W.2d 309 (Tex. 1980). As previously stated, one problem with submitting two questions dealing with the same issue (claim question and defense question) is the potential for inconsistent jury findings. Accordingly, the rules and case law provide that certain defenses can be submitted as instructions to the opposing party's question on its claim. However, this subjugates the defense to a lesser level of importance as the claim. Accordingly, a trial court has the option to submit a question in the disjunctive – either this or that. This elevates the defense from a mere instruction to a position of equal importance in the question itself. *R. Mike Borland, Disjunctive Submission of Inferential Rebuttal Issues*, 33 BAYLOR L. REV. 147, 154-54 (1981).

However, the two issues must be true opposites (either one or the other is true, but not both) in order for them to be properly placed in a disjunctive submission. *Rathmill v. Morrison*, 732 S.W.2d 6, 11 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Lake LBJ Municipal Utility District v. Coulson*, 692 S.W.2d 897 (Tex. App.—Austin 1985, no writ). The current text of Rule 277 contemplates the disjunctive submission of issues in one jury question, but an early advisory opinion indicates that issues may be submitted disjunctively in separate questions, with one being conditioned, or predicated, on a negative answer to the other. *Compare* Tex R. Civ. P. 277 ("The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.") (emphasis added) *with* Subcomm. on Interpretation of R. of Civ. P., State Bar of Tex., Op., 8 TEX. B. J. 281, 281-82 (1945) and *ASEP USA, Inc. v. Cole*, 199 S.W.3d 369, 378 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (concluding that trial court did not err in submitting to jury "apparently contradictory theories of breach of contract and promissory estoppel," in case in which charge instructed jury to answer promissory-estoppel question only if it had already answered "no" to prior breach-of-contract question). *See also Turner v. Precision Surgical, L.L.C.*, 274 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (disjunctive submission by conditional submission was not in error).

Further, certain commentators have opined that "[d]isjunctive submissions . . . should be used sparingly and with great caution" because they "run the danger of either misplacing the burden of proof (when one of two options must be shown by a preponderance of the evidence and the other need not be) or of unduly limiting the jury's choices (when the jury in fact has more than two choices—e.g., the plaintiff was negligent, the defendant was negligent, or the negligence of neither party was shown by a preponderance of the evidence)." The Honorable Joe Brown, Jack Hebdon, & C.L. Mike Schmidt, Personal Injury, 5 TEXAS PRACTICE GUIDE § 13:112 (West Group, 2nd ed., 2008)

XVI. IMMATERIAL SUBMISSIONS

A finding is immaterial only if the trial court should not have submitted the question to the jury or, even if properly submitted, other findings rendered the question immaterial. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 506 (Tex. 2018) (quoting *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)); *Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997). A jury finding may be immaterial if its answer can be found elsewhere in the verdict, or if the finding cannot alter the effect of the verdict. *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 402 (Tex. 2017); *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986); *Mouton v. Beeline Trucking Co.*, 753 S.W.2d 820, 822 (Tex. App.—Houston [14th Dist.] 1988, no writ). For example, a "none" answer on the damages issue renders the liability issue immaterial. *Garza v. San Antonio Light*, 531 S.W.2d 926, 929 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). Another type of immaterial jury question is a question that seeks a pure legal conclusion. *Medical Towers v. St. Luke's Epis. Hosp.*, 750 S.W.2d 820, 826 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

A complaint about the jury's answer to an immaterial question can be raised for the first time after verdict and after the jury is dismissed, i.e., in a motion for judgment notwithstanding the verdict. *Cortez v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113 (Tex. App.—San Antonio 2004), *aff'd*, 159 S.W.3d 87 (Tex. 2005) (court of appeals sustained trial court's disregarding immaterial question where complaint was raised for first time in motion for judgment notwithstanding the verdict). The Texas Supreme Court has stated: "A party must lodge an objection in time for the trial court to make an appropriate ruling without having to order a new trial." *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999). However, a trial court can disregard an immaterial finding sua sponte after the verdict. *Clearlake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

The Texas Supreme Court has held that a complaint that a jury's answer is immaterial is not a jury charge complaint. *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 402 (Tex. 2017). Accordingly, a party need not object to a jury question to later argue that it is immaterial. *Id*. ("BP preserved error on the immateriality issue by raising these concerns post-verdict in a motion for judgment in disregard, in a motion for judgment notwithstanding the verdict, and in a motion for new trial."); *Musallam v. Ali*, 560 S.W.3d 636 (Tex. 2018); *Corey v. Rankin*, No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224 (Tex. App.—Houston 14th Dist., Nov. 13, 2018, no pet.); *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 703-04 (Tex. 2007). *See also Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000) (recognizing that questions that do not submit essential predicates render an answer

immaterial). A party can raise immateriality in a post-verdict motion. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d at 506; *Corey v. Rankin*, 2018 Tex. App. LEXIS 9224.

XVII. THE JURY'S VERDICT

A. Pre-Verdict Issues

After the jury has retired for deliberations, the trial court may supplement its instructions "touching any matter of law," and the trial court may also supplement its instructions in response to a question from the jury during deliberations. Tex. R. Civ. P. 286; *Wal-Mart Stores Tex., LLC v. Bishop,* 553 S.W.3d 648 (Tex. App.—Dallas 2018, pet. dism'd by agr.).

A juror should vote based on her "deliberate judgment, sound reflection, and conscientious convictions." *Kindy v. Willingham*, 146 Tex. 548, 209 S.W.2d 585, 587 (Tex. 1948). To determine whether a charge was impermissibly coercive, an appellate court will "analyze the propriety of a particular charge by its terms, and in the light of the circumstances under which it was given." *Stevens v. Travelers Ins. Co.*, 563 S.W.2d 223, 228-29 (Tex. 1978). A charge "addressed specifically to the minority jurors of a deadlocked panel is expressly and inherently coercive." *Id*.

If a party suspects that the jury did not reach its verdict in a proper manner, the party may challenge the verdict on the basis that the verdict was the result of "chance or lot" or that the court's charge, including an *Allen* charge, was impermissibly coercive. *Id*. *See also In re Commitment of Jones*, No. 19-0260, 2020 Tex. LEXIS 569 (Tex. June 19, 2020). In *Allen v. United States*, the United States Supreme Court upheld a federal trial court's charge urging jurors to continue deliberating and to consider the views of their fellow jurors. 164 U.S. 492, 501-02 (1896). In Texas, *Allen* charges are permitted so long as they are not impermissibly coercive. *See Stevens*, 563 S.W.2d at 228-29.

B. Post-Verdict Issues

Once the jury has filled out the charge, the jury returns it to the court and it becomes the jury's verdict. Texas Rule of Civil Procedure 290 states: "A verdict is a written declaration by a jury of its decision, comprehending the whole or all the issues submitted to the jury, and shall be either a general or special verdict, as directed, which shall be signed by the presiding juror of the jury." Tex. R. Civ. P. 290. However, there is no special form that the jury must fill out. *See id.* at 291. When the jurors agree as to a verdict, they are brought into the court room where they deliver the verdict to the court:

> When the jury agree upon a verdict, they shall be brought into court by the proper officer, and they shall deliver their verdict to the clerk; and if they state that they have agreed, the verdict shall be read aloud by the clerk. If the verdict is in proper form, no juror objects to its accuracy, no juror represented as agreeing thereto dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court.

Tex. R. Civ. P. 293; *Thomas v. Oil & Gas Bldg., Inc*., 582 S.W.2d 873, 880 (Tex. App.—Corpus Christi 1979, writ ref'd n.r.e.).

Once the verdict is read, either party has the right to have the jury polled:

> A jury is polled by reading once to the jury collectively the general verdict, or the questions and answers thereto consecutively, and then calling the name of each juror separately and asking the juror if it is the juror's verdict. If any juror answers in the negative when the verdict is returned signed only by the presiding juror as a unanimous verdict, or if any juror shown by the juror's signature to agree to the verdict should answer in the negative, the jury shall be retired for further deliberation.

Tex. R. Civ. P. 294. The right to poll the jury must be specifically requested and ruled upon; it will be waived if not requested or not ruled upon. *Suggs v. Fitch*, 64 S.W.3d 658, 660 (Tex. App.—Texarkana 2001, no pet.); *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 585 (Tex. App.—Corpus Christi 1993, writ denied). However, once a party asks to poll the jury, the court has no discretion and must do so. *Pate v. Texline Feed Mills, Inc*., 689 S.W.2d 238, 243 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

In order to be valid, at least ten jurors in a twelve member jury, or five jurors in a six member jury, must agree as to each and every answer given in the verdict. Tex. R. Civ. P. 292; *Palmer Well Servs. v. Mack Trucks, Inc.*, 776 S.W.2d 575, 576 (Tex. 1989); *Gonzalez v. Gutierrez*, 694 S.W.2d 384, 390-391 (Tex. App.—San Antonio 1985, no writ); *McCauley v. Charter Oak Fire Ins. Co.*, 660 S.W.2d 863, 866 (Tex. App.—Tyler 1983, ref. n.r.e.). A verdict can be based upon the unanimous agreement of nine jurors where the other three are dead or disabled. A court must

be careful, however, in dismissing a juror who is not disabled because the case will be reversed if both parties do not agree to proceed with only eleven jurors. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995); *Fiore v. Fiore*, 946 S.W.2d 436, 438 (Tex. App.—Fort Worth 1997, writ denied). However, when a juror is improperly dismissed but an alternate juror who has heard the evidence takes his or her place, there is no reversible error as a full jury of twelve hears the case and renders the verdict. *Schlafly v. Schlafly*, 33 S.W.3d 863, 868-870 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Where less than a unanimous verdict is rendered, all of the jurors agreeing in the verdict must sign the verdict form. Tex. R. Civ. P. 292. However, any error in the failure to sign a non-unanimous verdict is waived where a party fails to object or ask that the jury be polled and does not raise the issue until after the jury is dismissed. *Phippen v. Deere and Co.*, 965 S.W.2d 713, 718-719 (Tex. App.—Texarkana 1998, no pet.). If the same jurors did not agree as to each answer, i.e., ten agree as to liability but a different ten agree as to damages, then the verdict is defective, and the court should require the jury to continue deliberations. *Gonzalez v. Guteirrez*, 694 S.W.2d at 390. If the same ten jurors cannot agree as to the same answers, the court should declare a mistrial.

A party must object if the verdict is defective before the jury is discharged–otherwise, the defects will be waived. *Spring Window Fashions Div. Inc. v. Blind Maker, Inc.*, No. 03-03-00376-CV, 2005 Tex. App. LEXIS 5949 (Tex. App.—Austin July 29, 2005, no pet.); *Norwest Mortg., Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied). If the verdict is defective, the trial court may ask the jury to further deliberate in order to correctly answer the charge. Tex. R. Civ. P. 295. Additionally, the trial court must instruct the jury in writing how the verdict is defective, i.e., clerical error, incomplete, in conflict, or not responsive. *Id.; see also, Elbar, Inc. v. Claussen*, 774 S.W.2d 45, 55 (Tex. App.—Dallas 1989, no writ). Once the court discharges the jury, however, it has no authority to recall it for additional deliberations. *In re Bradle*, 83 S.W.3d 923, 927 (Tex. App.—Austin 2002, orig. proc.); *Branham v. Brown*, 925 S.W.2d 365, 368 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Wanda Petroleum Co. v. Reeves*, 385 S.W.2d 688, 690-91 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.). *See also Burchfield v. Tanner*, 142 Tex. 404, 178 S.W.2d 681, 683 (Tex. 1944). Once a jury is discharged from their oaths, they are subject to contact with and influence by the parties and others so that the jury cannot be reconstituted. *Caylat v. Houston E. & W. Ry. Co.*, 113 Tex. 131, 252 S.W. 478, 482-83 (Tex. 1923).

One type of error that can exist in a verdict is clerical error. Clerical errors are mistakes or omissions that prevent the verdict as announced or transcribed from reflecting the verdict actually arrived at by the jury. *Hoffman v. Deck Masters, Inc*., 662 S.W.2d 438, 442-443 (Tex. App.—Corpus Christi 1983, no writ) (motion for new trial may be supported by affidavits of all jurors indicating that unanimous clerical error was made in announcing or transcribing the jury's verdict, but not by affidavits showing that jurors unanimously misconstrued language of charge); *see also*, William V. Dorsaneo, TEXAS LITIGATION GUIDE, §123 (2003). A trial court can correct a clerical mistake in the verdict if the issue is raised prior to the time the jury is discharged. After the jury is discharged, however, the only remedy for a clerical error is to set aside the verdict and grant a new trial. *In re Bradle*, 83 S.W.3d at 927.

Furthermore, a partial or incomplete verdict can also be defective. A partial verdict is not defective if it will sustain a judgment. *Garcia v. Spohn Health Sys. Corp.*, 19 S.W.3d 507, 510 (Tex. App.—Corpus Christi 2000, pet. denied)*; Stalder v. Bowen*, 373 S.W.2d 824, 827 (Civ. App.—Dallas 1964, ref. n.r.e.). In other words, the verdict must be such that the prevailing party is entitled to judgment notwithstanding what the jury may have found as to the unanswered jury questions. *See id*. The unanswered questions must be immaterial. *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986) (A jury question is immaterial only if its answer can be found elsewhere in the charge or if it cannot alter the effect of the verdict). However, a partial verdict is defective where it has unanswered questions that are supported by some evidence and that have an effect on the judgment. *See id*. If there is a defective partial verdict, and a party points the defect out, the trial court should request that the jury to further deliberate. *See id.*; *Estate of Barrera v. Rosamond Village Ltd. Pshp*., 983 S.W.2d 795, 799 (Tex. App.—Houston [14th Dist.] 1998, no pet.). If the jury is still not able to answer all material questions, then the trial court must declare a mistrial and cannot render a judgment based upon the incomplete verdict. *Fleet v. Fleet*, 711 S.W.2d at 2-3; *Estate of Barrera v. Rosamond Village Ltd. Pshp*., 983 S.W.2d at 799. Error in rendering judgment on a defective partial verdict will not be waived, if the complaining party objects to the incomplete verdict before the jury is discharged and requests that the jury further deliberate. However, a party who fails to object to a defective partial verdict waives the right to have the jury make a determination on the unanswered questions, waives the right to have the trial court make findings, and waives the right to appeal on the issue. *Osterberg v. Peca*, 12 S.W.3d 31, 56 (Tex. 2000) (party who requested the trial court to accept an incomplete verdict waived the recovery of attorney's fees); *In re Bradle*, 83 S.W.3d at 927; *Horn v. Atchison, Topeka & Santa Fe Railway Co.*,519 S.W.2d 894, 897-898 (Tex. Civ. App.—Beaumont 1975, ref. n.r.e.).

Another type of defective verdict is a verdict that contains a conflict. As the court in *Isern v. Watson*, stated:

> In order for conflicting findings to destroy each other, one finding must be such as would warrant a judgment for one of the parties, and the other finding would warrant a judgment for the other party. In addition, the existence of a claimed irreconcilable conflict between certain findings becomes immaterial if there "remains at least one finding supporting the judgment which is not in conflict with any other". Also, to present a conflict the jury findings must concern the "same subject matter." When testing an alleged conflict, specific findings control over general or ambiguous findings and if a conflict is apparent, the court will disregard general or ambiguous findings to resolve it. Any apparent conflict in a jury's verdict should be reconciled if it can be done reasonably in light of the pleadings, the evidence, the answers to other issues and the verdict as a whole. In making such determination, the court must consider the entire charge and all of the verdict.

942 S.W.2d 186 (Tex. App.—Beaumont 1997, pet. denied).

Where a verdict contains irreconcilable conflicting findings, the trial court should send the jury back to deliberations and instruct them regarding the conflict. Tex. R. Civ. P. 295; *Pon Lip Chew v. Gilliland*, 398 S.W.2d 98, 101 (Tex. 1966). If the jury is unable to answer the charge without the conflict, then the trial court should declare a mistrial. *Continental Nat'l Bank v. Hall-Page tire Co.*, 318 S.W.2d 127, 129 (Tex. Civ. App.—Fort Worth 1958, no writ); *Trinity Universal Inc. Co. v. Chafin*, 229 S.W.2d 942, 947 (Tex. Civ. App.—San Antonio 1950, ref. n.r.e.). However, if the complaining party fails to make an objection to the trial court's receipt of the conflicting verdict or make any objections as to the jury's conflicting findings before the jury was discharged, it waives any alleged error as to any conflict in the jury findings. *Spring Window Fashions Div. Inc. v. Blind Maker, Inc.*, No. 03-03-00376-CV, 2005 Tex. App. LEXIS 5949 (Tex. App.—Austin July 29, 2005, no pet.); *Woods v. McLeaish*, No. 08-02-00534-CV, 2003 Tex. App. LEXIS 10641 (Tex. App.—El Paso December 18, 2003, no pet.) (mem. op.); *Isern v. Watson*, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23 (Tex. App.—Corpus Christi 1993, writ denied).

In sum, both parties should carefully review the jury's verdict for any omission, defect, or mistake. If one is found that harms the party, it should immediately point it out to the trial court and ask for further deliberations. If the court will not allow further deliberations, or if further deliberations are fruitless, the party should request a mistrial.

XVIII. OMISSIONS FROM THE CHARGE

A party should request the questions, instructions, and definitions that are necessary for a jury to find the facts to support each element of its claims or defenses. The issue frequently arises as to what happens if a claim or an element of a claim is omitted from the charge.

A. Claim or Defense Completely Omitted

Texas Rule of Civil Procedure 278 requires the trial court to submit requested questions to the jury if supported by the pleadings and the evidence. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *Indus. III v. Burns*, No. 14-13-00386-CV, 2014 Tex. App. LEXIS 9447 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied). If timely raised and properly requested as part of the charge, a judgment must be reversed when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence. *Hunt v. Baldwin*, 68 S.W.3d 117, 127 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Autry v. Dearman*, 933 S.W.2d 182, 188 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

At least one court has been strict regarding what is necessary to preserve this issue for appeal. *Bus. Prod. Supply v. Marlin Leasing Corp.*, No. 13-11-00371-CV,2013 Tex. App. LEXIS 10920, 2013 WL 7141350, at *6(Tex. App.—Corpus Christi Aug. 29, 2013, pet. denied). In *Marlin*, a party submitted requests for omitted claims and requested that they be included. Id. The trial court stated that they had been dismissed by directed verdict when they had not. The party did not challenge the court on that statement. On appeal, the court of appeals held that the party waived the claims: "This leaves two possibilities. One is that the trial court was simply mistaken about the status of the claim, thinking the claim was dismissed when it was actually still pending. If so, it was BPS's obligation to make the trial court aware of the mistake. A simple objection would have sufficed. By failing to object, BPS waived the error." *Id*.

However, if the party fails to properly request a submission of a claim or defense, then a different rule prevails. "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Tex. R. Civ. P. 279; *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 281 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd). Where a party fails to submit any element of its claim or affirmative defense, that claim or defense is waived unless the evidence conclusively establishes it under the law. *Gulf States Utils. Co. v. Law*, 79 S.W.3d 561, 565 (Tex. 2002); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222-23 (Tex. 1992); *Harmes v. Arklates Corp*., 615 S.W.2d 177, 179

(Tex. 1981). Rule 279's waiver only applies where a claim is completely omitted; if part of the claim has been submitted, then Rule 279 provides for implied or express findings by the trial court on omitted elements. *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 281 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd).

If the evidence does prove the claim or defense as a matter of law, then there is no waiver as a jury question is not required. *Brown v. Bank of Galveston*, 963 S.W.2d 511, 515 (Tex. 1998). The party should move for a directed verdict to obtain a judgment on the claim that has been proved as a matter of law.

B. Claim or Defense Partially Omitted

When only part of a claim or defense is omitted, the missing elements potentially may be expressly found by the trial court or implied in support of the judgment by the court of appeals:

> When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment.

Tex. R. Civ. P. 279. As the Texas Supreme Court described: "[W]hen some but not all elements of a claim or cause of action are submitted to and found by a jury, and there is no request or objection with regard to the missing element, a trial court may expressly make a finding on the omitted element, or if it does not, the omitted element is deemed found by the court in a manner supporting the judgment if the deemed finding is supported by some evidence." *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002); *see also, State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995); *Ramos v. Frito-Lay, Inc*., 784 S.W.2d 667, 668 (Tex. 1990). Basically, when no party objects to the omission, then the omitted element is presumed to be tried to the court. *Gulf States Util. Co. v. Law*, 79 S.W.3d 561, 565 (Tex. 2002); *Doe v. Mobile Tapes, Inc.*, 43 S.W.3d 40, 50-51 (Tex. App.—Corpus Christi 2001, no pet.). The trial court can make an express finding on this omitted element at any time before rendition of the judgment. Tex. R. Civ. P. 279.

As Rule 279 requires, the omitted element that a party desires to have implied must have been necessarily referable to elements that were submitted. Tex. R. Civ. P. 279. The necessarily referable requirement is intended to give parties fair notice of, and an opportunity to object to, a partial submission. *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 144 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). If an element is not necessarily referable to a particular cause of action, then the opposing party has not been put on notice of the plaintiff's reliance on that cause of action, and therefore an objection to the charge is not necessary to preserve error and defeat any implied findings. *Ramos v. Frito Lay, Inc*., 784 S.W.2d 667, 668 (Tex. 1990).

In order for a trial court to make a finding on an unobjected-to, omitted element, the party seeking the finding must request that the court make the finding, the requesting party must provide notice of the request to all other parties, there must be a hearing, and the court must provide an express finding in writing. Tex. R. Civ. P. 279. Afterwards, the court should render judgment based upon the jury's verdict and its express finding.

If the trial court does not make an express finding, then the court of appeals will imply that the missing finding was made in support of the court's judgment. *Longview Energy Co. v. Huff Energy Fund*, 533 S.W.3d 866, 875 (Tex. 2017) (deemed findings required when element of independent ground of recovery was submitted to and found by jury, other elements were omitted without objection, submitted element was necessarily referable to same ground of recovery as omitted elements, and sufficient evidence supported findings); *Gulf States Util. Co. v. Low*, 79 S.W.3d 561, 564 (Tex. 2002); *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 281 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd); *TXU Portfolio Mgmt. Co., L.P. v. FPL Energy, LLC*, No. 05-08-01584-CV,529 S.W.3d 472, 2016 Tex. App. LEXIS 9094 (Tex. App.—Dallas Aug. 18, 2016, no pet.). This implied finding must be in support of the trial court's judgment—the finding will not be found in favor of the verdict if the judgment and verdict conflict. *Logan v. Mullis*, 686 S.W.2d 605, 609 (Tex. 1985). However, the deemed finding must be supported by some evidence, and a party can challenge on appeal the legal sufficiency of the evidence to support a deemed finding. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228-29 (Tex. 2011); *Holubec v. Brandenberger*, 111 S.W.3d 32, 38-39 (Tex. 2002); *Texas Genco, L.P. v. Valence Operating Co*., No. 10-04-00365-CV, 2006 Tex. App. LEXIS 448 n.2 (Tex. App.—Waco January 18, 2006, pet. denied).

For example, in *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp*., the plaintiffs sued the defendant for breach of gas contracts and tortious interference with gas-related contracts they had with third

parties. 798 S.W.2d 274, 275 (Tex. 1990). The plaintiffs obtained a jury verdict in their favor under both theories of recovery. *Id*. at 275, 277. The charge included a damages question for breach of contract, but it did not have a separate damages question for tortious interference because the parties (mistakenly) agreed that the plaintiffs' damages were the same under either theory of recovery. *See id*. at 278. The Texas Supreme Court held that the defendant, rather than the plaintiffs, waived any error resulting from the failure to include a damages question for tortious interference. Citing Rule 279 and prior decisions, the Court observed that a "cluster of jury questions on tortious interference was submitted to the jury" and concluded that the defendant's "failure to object to the omission of a tort damages question as part of that cluster alone waived the requirement of submitting the correct damages issue to the jury." *Id*. Thus, the defendant was "bound by a deemed finding of actual tort damages" so long as it was supported by sufficient evidence. *Id*. at 278-79. *See also Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 281 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd).

However, a trial court cannot imply a finding on an omitted element against a party that preserved error as to the omission. Tex. R. Civ. P. 279; *Texas Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Primrose Operating Co., Inc. v. Jones*, 102 S.W.3d 188 (Tex. App.—Amarillo 2003, pet. denied); *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 781-82 (Tex. App.—San Antonio 1999, no pet.). If the party without the burden of proof preserves error as to the omission, then the trial court must render judgment against the party that had the burden of proof on the missing element if the element is essential to the claim or defense and it is not established as a matter of law. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989).

XIX. APPELLATE REVIEW

A. Standard of Review

Generally, in reviewing a trial court's submission of jury questions, appellate courts employ an abuse of discretion standard. Tex. R. Civ. P. 277; *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Doe v. Mobile Tapes, Inc*., 43 S.W.3d 40, 50-51 (Tex. App.—Corpus Christi 2001, no pet.); *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 89 (Tex. App.—San Antonio 1988, writ denied). The trial court has broad discretion in submitting the jury charge and it abuses that discretion only when it acts without reference to any guiding principles. *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d at 649. When submitting the jury charge, a trial court is afforded more discretion when submitting instructions than when submitting questions. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 496 (Tex. App.—San Antonio 1994, writ denied).

However, charge error has a dual standard of review, and which aspect of the standard applies depends upon the type of issue involved. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). If the ruling resolves an issue of fact, a reviewing court may not reverse unless "the trial court could reasonably have reached only one decision." *Id.* at 839-40. If, however, the ruling rests upon "determining what the law is or applying the law to the facts," the "trial court has no 'discretion.'" *Id*. at 840. Accordingly, "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.; see H.E. Butt Grocery Co. v. Bilotto*, 928 S.W.2d 197, 199 (Tex. App.—San Antonio 1996), *aff'd on other grounds*, 985 S.W.2d 22 (July 14, 1998); *see also W. Wendell Hall, Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 446-47 (1998). For example, whether a definition misstates the law is a question of law that is reviewed under a *de novo* standard. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2002). Further, the court of appeals has a *de novo* standard over issues that assert a legal question on the effect of the jury findings. *Texas Genco, L.P. v. Valence Operating Co*., No. 10-04-00365-CV, 2006 Tex. App. LEXIS 448 n.2 (Tex. App.—Waco January 18, 2006, pet. denied).

B. Harmful Error Analysis

Generally, if error is found in the charge, then an appellate court must review the pleadings, the evidence, and the entire charge to determine if the error was harmful. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986); *Knoll v. Neblett*, 966 S.W.2d 622, 633 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). To reverse a judgment based on error in the charge, an appellant must show that the error 1) probably caused the rendition of an improper judgment; or 2) probably prevented the appellant from properly presenting the case to the court of appeals. Tex. R. App. P. 44.1(a); *In re Commitment of Jones*, No. 19-0260, 2020 Tex. LEXIS 569 (Tex. June 19, 2020); *Timberwalk Apts. v. Cain*, 972 S.W.2d 756 (Tex. 1998).

It should be noted that several commentators have suggested that presumed harm should apply to the charge, such that, the appellee has the burden to prove that charge error could not have affected the outcome of the case. *Muldrow & Underwood, Application of the Harmless Error Standard to Errors in the Charge*, 48 BAYLOR L. REV. 815 (1996); *Charles R. Watson, Jr., The Supreme Court and the Broad Form Jury Charge, Practicing Before the Texas Supreme Court*, pg 5 (2004).

In *In re Commitment of Jones*, the Texas Supreme Court held that a trial court erred when it refused to give a party a necessary charge instruction. No. 19-0260, 2020 Tex. LEXIS 569 (Tex. June 19, 2020). The Court stated that

Rule 44.1(a) provides two independent ways that an error can be harmful; the improper judgment prong and the prevented-from-presenting prong. Regarding the first prong, the Court held:

> Under the improper-judgment prong, an appellate court must review the entire record to determine whether the trial court's error probably caused the rendition of an improper judgment. In the jury-instruction context, that inquiry focuses on what the jury could be expected to consider and conclude based on the information presented to it, such as the evidence the trial court admitted and the instructions the trial court submitted.

Id. Regarding the second prong, the Court stated:

> The prevented-from-presenting prong, on the other hand, generally applies when something prevents an appellate court from evaluating harm under the improper-judgment prong. For example, when a trial court submits both valid and invalid theories of liability in a single broad-form jury question, it is impossible to determine whether the jury based its verdict on the valid theory or the invalid one. The trial court's error in that circumstance is harmful because an appellate court cannot determine from the record whether the error probably caused the rendition of an improper judgment. Thus, the proper inquiry under the prevented-from-presenting prong is whether the appellate court can review the record to determine whether the trial court's error probably caused the rendition of an improper judgment. If the trial court's error prevents the appellate court from doing so, the error is harmful unless, at least in the jury-instruction context, the appellate court is "reasonably certain that the jury was not significantly influenced by" the error.

Id. Ultimately, the Court concluded that the failure to provide an instruction that it only takes a 10 to 2 verdict to find that the defendant was not a sexually violent predator was not harmful where the jury unanimously held that the defendant was such a predator. *Id.*

C. Render or Remand

Generally, if a party with the burden of proof submits an incorrect charge submission on the correct legal theory, then the case should be remanded for new trial. *Borneman v. Steak & Ale, Inc*., 22 S.W.3d 411, 413 (Tex. 2000). If a party with the burden of proof submits the wrong legal theory in the charge, then the court of appeals should render judgment for the party without the burden of proof. *State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). If there is a *Casteel* or *Harris* broad form submission error, the court of appeals should reverse and remand for a new trial on both liability and damages. *Walmart Stores v. Redding*, 56 S.W.3d 141, 150 n.5 (Tex. App.—Houston [14th Dist.] 2001, no pet).

D. Sufficiency of the Evidence Review

Texas Rule of Civil Procedure 279 provides that "[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was made by the complainant." Tex. R. Civ. P. 279; *Musallam v. Ali*, 560 S.W.3d 636 (Tex. 2018). While a party may preserve a no evidence issue by objecting to submission of the issue to the jury, a motion for judgment notwithstanding the verdict or motion to disregard the jury's answer will also preserve error. *Musallam v. Ali*, 560 S.W.3d at 636; *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). A party does not forfeit the right to later challenge the legal sufficiency of the evidence to support it by failing to object in the charge conference. *See Simon v. Henrichson*, 394 S.W.2d 249, 257 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.) ("Objection of no evidence can be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party or not." (citing Tex. R. Civ. P. 279)). Evidence is legally insufficient "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Regal Fin. Co. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010).

To challenge a jury's finding on a broad form liability question that encompassed several liability theories, the challenging party should challenge the evidence to support an element of each liability theory. *Prudential Ins. Co. v. Jefferson Assocs*., 896 S.W.2d 156, 160 (Tex. 1995). To challenge a jury's damage finding where multiple elements of damages are submitted with one blank, the challenging party must argue that the evidence on the whole did not support the entire damage award. *Price v. Short*, 931 S.W.2d 677, 688 (Tex. App.—Dallas 1996, no writ). Further, a party can challenge the sufficiency of the evidence to support a trial court's finding on an omitted element – either

express or implied. *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353, 364 (Tex. App.—Corpus Christi 1994, no writ).

If a complaining party raised a proper objection to the charge error, then the evidence is reviewed against the correct legal issue. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 407 (Tex. 2016); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002). However, one interesting appellate twist to consider is that where there is unobjected to charge error, the evidence should be reviewed against the charge as submitted. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d at 407; *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 254 (Tex. 2008). The Texas Supreme Court stated:

> The Osterbergs could instead be arguing that when a court submits a defective issue to the jury, an appellate court should review the sufficiency of the evidence against the question and instruction that the trial court should have submitted -- not the one actually submitted -- even if the defect was never brought to the court's attention and the question or instruction never requested. That assertion is misguided. . . [I]t is the court's charge, not some other unidentified law that measures the sufficiency of the evidence when the opposing party fails to object to the charge.

Osterberg v. Peca, 12 S.W.3d 31, 55 (Tex. 2000) (citing Tex. R. Civ. P. 272, 274, 278, 279 and *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985)); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 609 (Tex. 1964)). *See also Southwestern Bell v. Garza*, 164 S.W.3d 607, 618 (Tex. 2004) (court need not consider whether charge given without objection accurately states the law); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (sufficiency measured in light of the charge given without objection even though the charge did not accurately state the law); *Akin Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. And Research Corp.*, 232 S.W.3d 883, 894 (Tex. App.—Dallas 2007, pet. filed); *but see Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied) (evidence required to support deemed and omitted element in question even though no objection to the question being defective).

Even if another legal theory was argued to the jury and explained by the lawyers in argument, a court of appeals is bound by the instructions given to the jury and presume that the jury followed those instructions. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 861-62 (Tex. 2009). "Statements from lawyers as to the law do not take the place of instructions from the judge as to the law. It is the trial court's prerogative and duty to instruct the jury on the applicable law." *Id*. at 862.

Most of the cases applying *Osterberg* do so without discussing whether the issue submitted was defective or incomplete. *See e.g., Ancira Enterprises, Inc. v. Fischer*, 178 S.W.3d 82, 93 (Tex. App.—Austin 2005, no pet.) (applying definition of "malice" actually submitted to the jury rather than the stricter definition applicable in a retaliation suit); *National Plan Administrators, Inc. v. National Health Ins. Co.*, 150 S.W.3d 718, 745 (Tex. App.—Austin 2004, no pet.) (courts charge used to measure sufficiency when there was no objection to omitted elements); *In Re Estate of Bean*, 206 S.W.3d 749, 759-60 (Tex. App.—Texarkana 2006) (measuring sufficiency with charge that failed to define boundaries of a mineral estate); *Scottsdale Ins. Co. v. National Emergency Servs., Inc.*, 175 S.W.3d 284, 300-01 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (reviewing sufficiency based on charge that failed to instruct the jury on the purchase of "substantially similar" replacement insurance rather than charge that should have been given). A defective charge is one that attempts to request a finding on a recognized cause of action, but does so without limiting instructions or other questions which properly restrict the question to the facts and law applicable to the case. *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999) (discussing distinction between defective and immaterial issues); *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994) (issue inquiring about unfair insurance practices that failed to define the practices deemed unfair pursuant to the statute was defective).

There is authority that where the charge is incomplete, the sufficiency of the evidence is measured against the charge that should have been given. *Tractebel Energy Marketing, Inc. v. E.I. Du Pont De Nemours and Co.*, 118 S.W.3d 929, 932 (Tex. App.—Houston [14th Dist.] 2003, no pet.)). An incomplete charge is one that omits an element of a claim or defense. *See* Tex. R. Civ. P. 279; *see also, In Re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002) (considering charge that omitted child's best interest as element of termination of parental rights); *Emerson Elec. Co. v. American Permanent Ware Co.*, 201 S.W.3d 301, 310 (Tex. App.—Dallas 2006, no pet.) (discussing failure to submit an issue on rejection or revocation of acceptance as omitted elements of breach of contract claim).

In *Country Village Homes, Inc. v. Patterson*, the court of appeals reviewed the legal and factual sufficiency of the evidence against the actual charge submitted regarding single business enterprise and other related claims. No. 01-03-01240-CV, 2007 Tex. App. LEXIS 6627 (Tex. App.—Houston [1st Dist.] August 16, 2007), jdmt vacated w/o reference to merits, *County Vill. Homes, Inc. v. Patterson*, 2008 Tex. LEXIS 195 (Tex., Mar. 7, 2008). The defendant

argued that the charge should have submitted a question dealing with fraud, and because the plaintiff failed to submit such a question, its claims fell as a matter of law.

The court of appeals stated that if that complaint dealt with an omitted claim, then the plaintiff would have waived it by not requesting its inclusion. However, if the fraud finding was simply an omitted element of a single business enterprise claim, then although it was omitted, it would be implied in favor of the trial court's judgment. The court of appeals ultimately held that the plaintiff was not required to obtain an independent finding on fraud; it was an omitted element. Moreover, the court reviewed the legal and factual sufficiency of the evidence to support the single business enterprise theory under the charge as given because the defendant failed to raise an objection at trial.

XX. ETHICAL CONSIDERATIONS

Although any number of ethical issues can arise in the preparation and presentation of the charge, the most likely ethical issue an attorney may deal with is the obligation to cite correct legal authority to the trial court and opposing counsel. Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct states, in part: "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Tex. Disc. R. Prof. C. 3.03. The comments to this rule state:

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Tex. Disc. R. Prof. C. 3.03 cmt 3.

Accordingly, a lawyer has an ethical duty to cite correct legal authority to a court. *In re Colonial Pipeline Co*., 960 S.W.2d 272 (Tex. App.—Corpus Christi 1997, orig. proceeding) (ordered relator to show cause why appellate sanctions should not be issued due to the relator's failure to cite to controlling legal authority). A lawyer may not ethically cite an incorrect proposition of law to the trial court in hopes that it makes its way into the charge without opposing counsel discovering it and objecting to it. Further, an attorney cannot ethically sit by and allow an attorney for a co-plaintiff or co-defendant to cite an incorrect proposition of law to a trial court without disclosing controlling authority contrary to that position.

Further, a lawyer may not cite incorrect propositions of law to opposing counsel. Rule 4.01 states: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Tex. Disc. R. Prof. C. 4.01(a). Accordingly, a party cannot knowingly cite incorrect law to the opposing counsel.

There is no other place in a trial where a trial court depends on the attorneys as heavily as in the preparation of the charge. No trial judge can be an expert on every aspect of the law. An attorney has the ethical duty to ensure that the trial court follows correct legal precedent. These ethical duties are even more important currently. The Texas Supreme Court's relaxation of the rules of error preservation in the *Payne* opinion places even more of the burden on the poor trial court to prepare a correct charge. As the Texas Disciplinary Rules show, the creation of the charge is truly a team effort, and each side must be honest and up front with the Court regarding the correct legal standards.

XXI. CONCLUSION

This article was intended to provide the basic rules and considerations that an attorney practicing in Texas state court should be aware of: the basic make-up of the charge, participating in a charge conference, preserving error, ethical considerations, and standards of review. Certainly, this paper could have been longer—however, the intent was to give a trial attorney a reasonably digestible paper to review before delving into the battlefield of the charge.