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INTRODUCTION

This paper addresses a topic about which Texas appellate practitioners are well-versed—submission of the jury charge—but from a federal perspective. We begin with the standard of review, turn to the rules governing requests and objections to instructions (Federal Rule of Civil Procedure 51), and review the tools for preserving error and raising charge complaints when there is a preservation problem. We then turn to the form of the verdict and devote significant space to understanding the difference between general and special verdicts (Federal Rule of Civil Procedure 49), why special verdict forms are favored, and review preservation and other procedural issues associated with the form of the verdict. This paper concludes with a topic that has vexed Texas courts for more than a decade (the submission of multi-theory claims, damages theories, and defenses). This is an important set of topics for an appellate lawyer because of the many differences between state and federal jury charge practice and the role federal law has played in the evolution of Texas jury charge practice.

I. STANDARD OF REVIEW

Appellate complaints about the jury charge are reviewed for abuse of discretion. *Miles v. HSC-Hopson Servs. Co.*, 625 Fed. App'x 636, 640 (5th Cir. 2015). A two-part test is applied to an appellate jury-charge complaint. See *Navigant Consulting Inc. v. Wilkinson*, 508 F.3d 277, 293 (5th Cir. 2007). *First*, charge errors will lead to reversal “only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations.” *Colley*, 2010 U.S. App. LEXIS 8618, *4; *Taita Chem. Co. v. Westlake Styrene, LP*, 351 F.3d 663, 667 (5th Cir. 2003) (complaining party must show that the charge as a whole creates “substantial and ineradicable doubt whether the jury has been properly guided in its deliberations”); *Johnson v. Sawyer*, 120 F.3d 1307, 1315 (5th Cir. 1997) (appellant must demonstrate that “the charge as a whole creates substantial and ineradicable doubt about whether the jury has been properly guided in its deliberations”). *Second*, even if the charge is erroneous, reversal is only appropriate if, based on the entire record, it affected the outcome of the case. *Navigant*, 508 F.2d at 293; *Eagle Suspensions, Inc. v. Hellman Worldwide Logistics, Inc.*, 571 Fed. App'x 281, 292 (5th Cir. 2014) (ample of evidence of foreseeable consequential damages overcame challenge that the district court did not explicitly instruct the jury on “reasonable foreseeability”).

“Perfection” is not the standard; if the instructions are “generally correct,” any error is considered harmless. *Taita Chem.*, 351 F.3d at 667. Even erroneous jury instructions are not cause for reversal if the complained-of instruction could not have affected the result below. *Colley*, 2010 U.S. App. LEXIS 8619, *9; *Navigant*, 508 F.3d at 293 (“even where a jury instruction was erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.”) (internal quotations omitted). An instruction is harmless if it is “apparent that the jury did not consider” it or the instruction was immaterial to the jury’s ultimate determinations. *Id.* at *10; see *Martin v. MBank El Paso, N.A.*, 947 F.2d 1278, 1281 (5th Cir. 1991) (erroneous reasonable reliance instruction harmless because jury found no negligent misrepresentation); *Perry v. Chevron U.S.A., Inc.*, 887 F.2d 624, 628 (5th Cir. 1989) (erroneous contributory negligence instruction harmless because of jury’s no-causation finding).

A failure to give a particular instruction is harmful error only if the instruction (i) was substantially correct, (ii) was not substantially covered in the charge as a whole, and (iii) was so important that the failure to submit the instruction impaired the party’s ability to litigate a claim or defense. *Kanida v. Gulf Coast Med. Pers., L.P.*, 363 F.3d 568, 578 (5th Cir. 2004). Courts have found any error in failing to submit an instruction harmless when, for example, another instruction “clearly subsumes” an issue or the instruction does not correctly state the legal standard. *Thompson v. Connick*, 553 F.3d 836, 864 (5th Cir. 2008).

Courts have considered the failure to give an instruction in the damages context. An instructive example is the *Eagle Suspensions* case. 571 Fed. App'x 281 (5th Cir. 2014). The district court submitted a “loss of use” damages measure to the jury. *Id.* at 291. Although this was quite clearly a consequential damages measure, the district court did not state that these damages must be “reasonably foreseeable.” *Id.* On appeal, the Fifth Circuit held that the failure to include this additional instruction was not an abuse of discretion because the district court’s instruction did state that damages must have been “proximately caused by the defendant Hellman’s failure to comply with the agreement.” *Id.* The proximate-cause instruction did the work of a foreseeability instruction and was sufficient to survive appellate review. *Id.* Of note, the Fifth Circuit observed that “although the challenged instruction likely should have been rendered clearer and more

explicit for the ordinary juror, the instruction was nonetheless correct.” *Id.*

In contrast, if an instruction actually given improperly states the burden of proof on a defensive issue, reversal is appropriate. *SEC v. Snyder*, 292 Fed. App’x. 391, 405-07 (5th Cir. 2008) (reversing and remanding for new trial when defendant’s reliance on accounting in securities fraud case improperly required the defendant to show that he asked for and received advice on a specific point from his accountant, citing to cases involving reliance on counsel as factor to be considered in determining good faith). The burden-of-proof problem often arises in fiduciary-duty cases. In *Eagle Suspensions*, the defendant complained that the district court improperly shifted the burden of proof requiring the defendant to show that it complied with its fiduciary duties. 571 Fed. App’x at 292-93. Applying Texas fiduciary-duty law, the Fifth Circuit concluded that the district court correctly placed the burden on the defendant because there was sufficient evidence that a relationship of trust and confidence existed between the plaintiff and defendant. *Id.* at 293.

A new trial is the proper remedy when the judgment is reversed based on charge error. *Aero Int’l, Inc. v. United States Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983); *see also Hartsell*, 207 F.3d at 276 (Dennis, J., concurring) (disagreeing with majority’s limited remand and instead concluding that a new trial on issues of liability and damages was appropriate). To preserve an opportunity for a retrial based on a complaint that it was “impossible to know” whether the jury relied on insufficient evidence to support a trade-secrets claim in the context of a general verdict, the party was required to preserve that complaint by requesting a special verdict under Rule 49(a), a request for answers to questions under Rule 49(b), a charge objection under Rule 51, a verdict clarification, or a complaint about “inherent ambiguity” in the general verdict. *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 878 (5th Cir. 2013). The defendant raised none of these challenges at trial; therefore, the Fifth Circuit declined to consider the new-trial request. *Id.*

In a diversity case, state law governs the substance of a jury charge while federal law governs its form. *Broad Satellite Int’l, Inc. v. Nat’l Digital Television Ctr.*, 323 F.3d 339, 347 (5th Cir. 2003). “Unlike Texas courts, federal courts are free to tell juries the effects of their answers” or otherwise comment on the weight of the evidence. *Martin v. Texaco, Inc.*, 726 F.2d 207, 216 (5th Cir. 1984) (no error in telling the jury that plaintiff would not recover actual damages

based on Texas workers’ compensation law). This is true for both general and special verdicts, discussed in detail below. *See Perricone v. Kansas City So. R.R. Co.*, 704 F.2d 1376, 1378 (5th Cir. 1983) (“In a Rule 49(a) submission it is proper to tell the jury the effect of their answers to interrogatories.”).

II. INSTRUCTING THE JURY

The current version of Federal Rule of Civil Procedure 51 became effective in 2003. These amendments repeal the former Rule 51 and put into place a new rule—both structurally and substantively—that clarifies certain aspects of charge practice that the former rule did not address. According to the Advisory Committee, the purpose of these amendments is to “capture many of the interpretations that have emerged in practice” and “make uniform the conclusions reached by a majority of decisions on each point.” FED. R. CIV. P. 51 advisory committee’s notes. In addition, the Committee noted, “[a]dditions are made to cover some practices that cannot now be anchored in the text of Rule 51.” *Id.* That is, amended Rule 51 brings the procedural rules into line with established and accepted practices.

A. Requests

Rule 51(a) governs the timing of a party’s request for jury instructions. The rule widens a party’s opportunities to request jury instructions by creating two “phases” in which a requesting party may file requests for jury instructions *and* expressly grants district courts the authority to direct the parties to furnish a proposed jury charge before trial (although this was already the practice in most district courts).

The former rule did not expressly provide for a party to make a request for jury instructions “after the close of evidence” as the new rule does. And the new rule “replac[es] language that seemed to require parties to submit proposed instructions *only* at the close of evidence and during trial.” Judge Lee H. Rosenthal, *Developments in the Federal Rules of Civil Procedure*, THE ADVOCATE, Winter 2003, at 96 (emphasis added).

Under the new rule, at the “close of evidence or an earlier reasonable time” (*as directed by the trial court*), a party may request that the court instruct the jury as indicated in the requests. FED. R. CIV. P. 51(a)(1) The committee recognized that setting a pretrial request deadline (as many courts have) may prevent consideration of evolving legal and evidentiary issues. *See* FED. R. CIV. P. 51 advisory

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