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Jury Charge Update 2023

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Table of Contents

I. Introduction	3
II. Recent SCOTX Opinions	3
A. <i>Matter of Estate of Poe</i> (Tex. June 2022): Submission of immaterial question can be harmful error.....	3
B. <i>Memorial Herman</i> (Tex. April 2022): Charge must be interpreted by its plain language and cannot be judicially revised to support the judgment.	4
C. <i>Kansas City Southern RR</i> : Pet. Granted—Potential <i>Casteel</i> error when one liability theory is preempted by federal law.	5
D. <i>Schindler Elevator</i> : Pet. Granted—Potential charge error arising from instructions on <i>res ipsa loquitur</i> and spoliation.	6
III. Procedures and Preservation	6
A. Pretrial preparation	7
1. Pleadings	7
2. Initial draft charge.....	8
3. Discovery	9
4. Pretrial motions	9
5. Pretrial proposed charges	9
6. Pretrial conference.....	11
7. Charge notebook and materials.....	11
B. Informal charge conference	12
C. Formal charge conference	13
1. Overview of when to request, object, or both	13
2. Requests	15
a. Must be specific, substantially correct, in writing, and timely.....	16
b. Cannot comment on the weight of the evidence.	18
c. Questions	20
d. Instructions and definitions	21
e. Inferential rebuttals	22
3. Objections.....	23
4. Omitted elements.....	26
5. Invited error	27
6. Trial by consent.....	28
7. Rulings	29
8. Post-verdict sufficiency challenges	30

IV. Broad vs. Granulated Form (*Casteel* Error) 31
V. Appellate Review 34
 A. Abuse of discretion standard of review34
 B. Harmful error34
 C. Argument on appeal must be consistent with argument in trial court.....36
 D. Briefing waiver36

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I. Introduction

Jury charge practice in Texas is one of the most complicated tasks that counsel will encounter in civil litigation. To do it correctly requires close attention to detail and significant advance preparation. Because of the fast pace of trial, this is truly an area that lead trial counsel should delegate to another lawyer on the team (ideally experienced appellate counsel) who can be focused on the charge issues before, during, and after trial.

Many excellent CLE papers have been published on detailed aspects of charge procedures, preservation, and strategy. I encourage any practitioner who is preparing to handle a jury charge to review several different papers and create a personal outline of critical steps.

This paper begins with a case law update to alert you to about the most recent Supreme Court of Texas decisions and pending cases regarding jury charge issues. Next, I endeavor to provide you with practical guidance about charge practices, both before and during trial. I interviewed several trial court judges about this topic, and I have included their anonymous “tips from the bench” in the relevant sections below. In Section IV, I summarize the history and ongoing debate about broad-form versus granulated submissions in the charge—*i.e.*, *Casteel* issues—and discuss two recent opinions on this topic. Finally, I address appellate review of charge error. Approximately 40 recent intermediate court opinions (issued in 2022-2023) are covered in Sections III-V.

II. Recent SCOTX Opinions

The Supreme Court of Texas has not issued an opinion in 2023 expressly regarding jury charge practices. Its two most recent opinions on this topic, issued in April and June 2022, are discussed below. However, in the 2023 term, the Court granted petitions and heard argument in two cases regarding potential jury charge errors. These two matters are also discussed below.

A. *Matter of Estate of Poe* (Tex. June 2022): Submission of immaterial question can be harmful error.

Following the death of Dick Poe, a successful businessman and car-dealership owner, one of his sons (Richard Poe) sued Dick’s Estate and other parties claiming that Dick had engaged in self-dealing and breached his fiduciary duties in manners detrimental to Richard’s interests. *Matter of Estate of Poe*, 648 S.W.3d 277, 281 (Tex. 2022). The charge was hotly contested. The probate court submitted four questions to the jury. Defendants objected that the first three presented legally-improper theories based on “informal” fiduciary duties. *Id.* at 282-83. Defendants objected to the fourth question, which presented their statutory “safe harbor” defense, because it instructed the jury on multiple unsupported elements. *Id.* at 283. The jury found in favor of plaintiff on Questions 1-3, and against defendants on Question 4. In a bifurcated phase of trial, the trial court rendered a take-nothing verdict in favor of some defendants but declared a share transfer made by Dick to be

invalid, and ordered a return of \$3.2 million (for the benefit of plaintiff) on this basis. Both sides appealed. *Id.* at 284.

The main issue in the supreme court was whether the submission of erroneous “informal duty” Questions 1-3 was harmless, given that the jury found against defendants on their safe harbor affirmative defense in Question 4. The Court first provided a helpful summary of the harmless error legal standards applied to jury charge practice. *Infra*, Section V.C. The Court then agreed with defendants that the submission of Questions 1-3, although immaterial, was harmful because it “confused or misled the jury” when answering question 4, which was material to the judgment. *Id.* at 286. “[D]ue to the erroneous submission of the informal-fiduciary-duty theory, a significant amount of Richard’s evidence and argument regarding the share issuance focused on its alleged unfairness to *Richard*,” which was not the operative issue, rather than fairness to the corporation, which was critical for purposes of the safe harbor defense. *Id.* at 291-92 (emphasis in original). The Court further agreed with defendants that the submission of Questions 1-3 was improper because “as a matter of law, a corporation’s director cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder.” *Id.* at 289.

Second, the supreme court held “that Question 4 [regarding the safe harbor defense] was improper because it included extraneous instructions not supported by the evidence.” *Id.* at 290. “[T]he probate court abused its discretion by instructing the jury that it could find the share issuance valid and enforceable based on the two conditions in Section 21.418(b)(1) when there was no evidence that could support a finding of either.” *Id.* at 291. This error was harmful because it “probably caused the rendition of an improper judgment.” *Id.* at 292.

B. *Memorial Herman (Tex. April 2022): Charge must be interpreted by its plain language and cannot be judicially revised to support the judgment.*

This opinion concerns how a court should interpret ambiguous jury findings. As the Court has consistently held in interpreting statutes and contracts, the Court applied a plain language interpretation and refused to rewrite the charge to retroactively comport with the judgment. *Mem’l Hermann Health Sys. v. Gomez*, 649 S.W.3d 415, 423-26 (Tex. 2022).

Dr. Gomez, a heart surgeon, sued his former employer (the hospital) for defamation and business disparagement, alleging the hospital made statements about Dr. Gomez’s mortality rates that damaged his reputation and his practice. Dr. Gomez requested this question: “Did Memorial Hermann publish inaccurate data related to the mortality rates of Dr. Gomez’s patients?” The trial court sustained the hospital’s objection to this question on the ground that it was too vague. The charge instead asked about an alleged statement by a hospital employee that “the data [about Gomez] needed to be shared,” and then asked, “Did Memorial Hermann publish the statement?” Dr. Gomez agreed to this question.

During deliberations, the jury sent out a note indicating it was confused by the question. The note asked: “Does the court want to know if the exact statement as quoted was published or if the data referred to in the statement is being published?” *Id.* at 422. Trial court told jury to answer the questions to the best of its ability. The jury found in favor of Dr. Gomez and awarded him \$6.3 million. The court of appeals affirmed.

The supreme court reversed based on the plain language of the charge in the context of the case. “[T]he charge must be viewed as a whole, and interpreted in the light of its entire content, of the issues between the parties, and of the evidence relevant thereto.” *Id.* at 423. “When faced with ambiguous jury findings, a reviewing court must interpret the charge such

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