

**THE JURY CHARGE**

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## THE JURY CHARGE

This paper is designed to provide simple, straight-forward answers to some of the most common and frustrating questions surrounding the charge and to provide an updated on recent significant charge cases.

### I. WHY IS THE JURY CHARGE IMPORTANT?

First, the charge is important to understand and shape the scope of the parties' claims and defenses. The jury charge should be drafted and used as a roadmap for the case. The goal "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. 3d 661, 664 (Tex. 1999). In the early stages of litigation, the charge can be helpful in identifying the claims and defenses, developing evidence to prove or disprove claims and defenses, and shaping the story counsel intends to tell the jury at trial. The charge aids in crafting discovery and preparing summary-judgment motions.

Second, the charge is important for trial preparation. The charge helps identify relevant evidence that is admissible at trial and evidence you need to succeed at trial.

Third, the charge should be used throughout trial. The charge is a useful checklist at trial, to make sure you develop evidence of each element and defense and evidence you need to support submission of requested questions, instructions, and definitions.

Lastly, the charge is particularly important for a successful appeal. Preservation is crucial to presenting charge error to the court of appeals.

### II. KEY RULES AND CASES TO KEEP HANDY WHEN DRAFTING AND OBJECTING TO THE JURY CHARGE

You need to familiarize yourself with the below key rules and supreme court opinions. This list is not exhaustive.

- *Horton v. Kansas City So. Ry. Co.*, 2023 WL 4278230 (Tex. Jun. 30, 2023).
- *Transcontinental Ins. v. Crump*, 330 S.W.3d 211 (Tex. 2010).
- *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753 (Tex. 2006).
- *Dillard v. Texas Elec. Co-op.*, 157 S.W.3d 429 (Tex. 2005).
- *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005).
- *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002).
- *Crown Life Ins. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).
- *State Dept. of Highways & Public Transp. Co. v. Payne*, 838 S.W.2d 235 (Tex. 1992).
- TEX. R. CIV. P. 271–279.

### III. RECENT CASES

#### A. Recent SCOTX case on premises liability jury charge.

In *HNMC v. Chan*, 683 S.W.3d 373 (Tex. 2024), the Texas Supreme Court reaffirmed that "a jury's affirmative answer to an ordinary negligence question cannot support a recovery for

injury caused by a premises defect” because a negligent activity question generally “does not include the essential elements of a defendant’s liability for failing to exercise reasonable care in warning about or making safe a dangerous premises condition.” (citations omitted). Assuming the issue is properly preserved, “the remedy for submitting a negligent activity question when the defendant’s duty sounds in premises liability is rendition of a take-nothing judgment.”

*Chan* is also important on the question of whether a duty exists. The court held that when existing duty or no-duty rules address whether a duty exists for a class of cases, it is error to apply the *Phillips* factors to create a case-specific new duty. *Id.* at 380-81.

#### **B. Pending SCOTX *Casteel* case.**

In *Horton v. Kansas City S. Ry. Co.*, 2023 WL 4278230 (Tex. June 30, 2023, reh’g granted), a railroad crossing case, the plaintiff presented two negligent claims: the railroad failed to properly maintain the crossing by “raising the crossing grade over time to form a ‘humped crossing’” and that it failed to replace a missing yield sign. The two separate negligence questions were submitted in one question, over the defendant’s objection. As to the first negligence claim, the court rejected the defendant-appellant’s argument that a federal statute preempted the plaintiff’s humped-crossing state-law claim.

As to the second negligence theory, the court agreed with the railroad’s argument that there was no evidence to support the plaintiff’s claim that the failure to replace a missing yield sign at the crossing was a proximate cause of the accident. Although there was evidence that “adding a yield sign to an already existing crossbuck sign would help alert drivers and cause them to look for an oncoming train before actually crossing an otherwise unprotected track,” that evidence did not show “that, more likely than not, the absence of the yield sign proximately caused Rigsby to proceed into the train’s path.”

Finally, in its June 2023 opinion, the court held that there was *Casteel* error because the broad-form negligence question included two separate negligence questions, one of which had no evidentiary support. The Court rejected the plaintiff’s argument “that the *Casteel* rule applies only when a broad-form question permits a liability finding based on a theory or ground that is legally ‘invalid’ as opposed to, as here, a ground lacking sufficient evidence.” 2023 WL 4278230, at \*17. “Our precedent has rejected that argument.” *Id.*

A discussion of the pending motion for rehearing is contained below.

#### **C. Brand New Opinion and One Pending Jury Charge SCOTX case.**

In *Bruce v. Oscar Renda Contracting*, 657 S.W.3d 453 (Tex. App.—El Paso 2022), *rev’d per nom Oscar Renda Contracting, Inc. v. Bruce*, No. 22-0889, 2024 WL 1945099 (Tex. May 3, 2024), a negligence case, the jury found that Renda Contracting negligently and with gross negligence installed a pipeline near plaintiffs’ homes, damaging their homes, and awarded punitive damages. The punitive damages were not bifurcated.

The verdict certificate referred to the punitive damage questions by the wrong numbers and, thus, did not include an option for the jury to certify that its exemplary damages award was unanimous.

But Question 7 instructed the jury that it could only find gross negligence if that finding was unanimous and if its finding of simple negligence in Question 1 was also unanimous. The jury answered “yes” to Question 7. Question 8 asked what sum of money should be awarded for exemplary damages. The instruction on Question 8 stated that the question should only be answered if the jury answered “yes” to Question 7, but the instruction did not require the jury’s answer to Question 8 to be unanimous. The jury awarded \$825,000 in exemplary damages.

The verdict certificate showed that the verdict was not unanimous; only ten jurors signed the certificate. When the trial court polled the jury, two jurors responded that the verdict was not their individual verdict. Renda Contracting, however, did not complain before the jury was discharged. When the homeowners moved for judgment on the jury’s verdict, Renda Contracting objected to the award of exemplary damages because the verdict was not unanimous. The trial court signed a final judgment that disregarded the award of exemplary damages.

A split court of appeals reversed and remanded with instructions to enter a judgment on the jury’s verdict. First, the court held that Renda Contracting waived any challenge to the questions pertaining to exemplary damages by not objecting before the charge was read to the jury. *Id.* at 460. The court further stated that “rule 226a requires the trial court to give the jury an ‘additional certificate’ to be signed by the presiding judge” setting forth the unanimity requirement. *Id.* at 459. The majority reasoned that Renda Contracting had waived its challenge regarding uniformity by failing to properly and timely object to the verdict before the jury was discharged. *Id.* at 462. If a timely objection had been made before the jury was discharged, the trial court could have provided the jury with an amended verdict form, thereby giving the jurors the option to certify that they had (or had not) unanimously agreed on the issue of exemplary damages. *Id.* at 463.

The Supreme Court reversed the court of appeals and reinstated the trial court’s judgment. The Court noted that in addition to failing to include “critical instructions” on the burden of proof and the unanimity requirement, it also failed to use the special verdict form set forth in Rule 226a. Those omissions barred the recovery of punitive damages because Section 41.003 places the burden on a claimant seeking exemplary damages “to secure unanimity” and this burden may not be shifted. “[I]t is the plaintiff who must seek clarification to the extent that it asserts the divided verdict inaccurately represents the jury’s vote as to a particular question.” *Id.* at \*4. A plaintiff bears the burden to secure a unanimous verdict and to seek confirmation as to unanimity for the amount of exemplary damages after the jury returned a divided verdict.

The court rejected the argument that *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000) mandated that the verdict be accepted in the absence of any objection to the charge. But *Osterberg* only applies to evaluate the legal sufficiency of the evidence, not to measure unanimity.

The court rejected the plaintiff’s contention that error was waived because Defendant did not object to the charge or the form of the verdict. The defendant’s objection to the judgment was sufficient to preserve the issue for appeal. “It is the plaintiff who must challenge a divided verdict as infirm or in need of clarification.” *Id.* at \*6.

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