RECENT JURY CHARGE DEVELOPMENTS

MARTIN SIEGEL, *Houston*
Law Offices of Martin J. Siegel

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MARTIN J. SIEGEL BIOGRAPHY

Law Offices of Martin J. Siegel
martin@siegelfirm.com
www.Siegelfirm.com

Bank of America Center
700 Louisiana, Suite 2300
Houston, Texas 70002
(713) 226-8566

Martin Siegel handles state and federal appeals for plaintiffs and defendants in commercial, product liability, civil rights, constitutional, and many other kinds of cases. Recent matters include briefing before and after international arbitration on behalf of a foreign commodities brokerage firm; representation of a Fortune 500 company arbitrating contractual claims; representation of claimants in two § 1983 excessive force cases in the U.S. Supreme Court and Fifth Circuit; representation of a California energy company in a multi-million dollar contract dispute in the Fifth Circuit; a constitutional challenge in the Fifth Circuit to a Houston ordinance allocating new taxi permits; *pro bono* representation of centers on criminal law and legal ethics at NYU, Stanford and other law schools as *amici* in a § 1983 wrongful imprisonment case in the U.S. Supreme Court; and briefing and argument in the Fifth Circuit's *en banc* decision establishing the standards governing motions to transfer and the appellate reviewability of transfer orders.

Siegel has written law review articles, Op-ed pieces, and articles for *Texas Lawyer* and *Litigation*, the magazine of the ABA's Section on Litigation, where he also serves on the national editorial board. He has taught as an adjunct professor and frequently speaks at CLE programs. He has repeatedly been named a "Texas Super Lawyer" for his appellate work.

Before opening his own practice, Siegel was a partner at Watts Law Firm. Notable cases included assisting in the recovery of a $43 million award for the founder of a securities trading firm after his ejection from the partnership (cited in the *National Law Journal*'s "Plaintiff's Hot List"), and recovery of an eight-figure settlement on behalf of Texas beer distributors wrongfully denied the right to sell their distributorship.

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Southern District of New York. Major cases included a suit under the Voting Rights Act following racial discrimination in a Bronx school board election, and the successful defense of federal laws intended to preempt state and local "sanctuary city" policies. In 1999, Siegel received DOJ's Director's Award for his trial defense of the CIA. In 2000-01, DOJ detailed him to serve as Special Counsel on the Senate Judiciary Committee.

From 1992 to 1994, Siegel was an associate in the Washington, D.C. office of Jenner & Block. He handled appellate, commercial, intellectual property and environmental cases. He also helped present a *habeas corpus* petition to a Maryland state court in a case that, upon reaching the U.S. Supreme Court, set new standards for effective capital defense.

Siegel earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, and his J.D., *cum laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Hon. Irving R. Kaufman on the U.S. Court of Appeals for the Second Circuit.

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I. PRESERVATION

"Parties and courts have long struggled with requirements for preserving charge error." *Cruz v. Andrews Restoration, Inc*., __ S.W.3d __, 2012 WL 1370851 (Tex., April 20, 2012).

A. Filing Preferred Charge Before Trial May Not Preserve Objection

In *Cruz*, the plaintiff filed his preferred charge before trial but failed to object to the charge later circulated by the court or otherwise obtain a ruling on differences between the Court's charge and its own:

> Here, Protech filed a proposed charge four days before the July 31 trial began. That charge included questions about Protech's reasonable and necessary attorney's fees, and each question included three subparts and answer blanks: one for preparation and trial, one for an appeal to the court of appeals, and one for an appeal to this court. Trial continued for two weeks, and the trial court gave the parties its proposed charge on August 8. That charge omitted the subpart dealing with fees for preparation and trial, although it included the other two subparts for appellate fees. Two days later, after an informal charge conference, the trial court conducted a formal charge conference. At that conference, Protech had only one objection: that Question No. 5, which inquired about the reasonableness and necessity of Protech's attorney's fees against Chubb, should include a ninth factor for jurors to consider when determining the reasonableness of such an award. … Protech made no other charge objections or requests.
>
> Protech nonetheless argues that the trial court's failure to include the relevant subparts in Questions 5, relating to attorney's fees against Chubb, and 14, which inquired about attorney's fees against Cruz, was a "clear refusal" to submit Protech's questions.

2012 WL 1370851 at * 12. Plaintiff's mere act of filing its preferred instructions with the court before trial, without more, failed to preserve its objection to the different charge actually given. The court noted that plaintiff failed to obtain the court's endorsement "refused" on its charge. *See id.* It also observed that the parties "had ample time to review the draft charge and point out discrepancies to the trial court." *Id.* at 13. In addition, the court recognized:

> 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. The bottom line: "Filing a pretrial charge… 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*.; *see also Faust v. BNSF Railway Co*., 337 S.W.3d 325, 331 (Tex. App. – Ft. Worth 2011) (same).

B. Courts Will be Lenient About the Specificity of the Objection to the Charge…

1. No-evidence objection to instructions and questions in verdict form also preserves complaint about submitting challenged issues in broad form.

In *Thota v. Young*, __ S.W.3d __, 2012 WL 1649163 (Tex., May 11, 2012), a medical malpractice case, plaintiff objected to an instruction on new and independent cause and a blank on the verdict form asking whether the decedent was contributorily negligent. Plaintiff claimed there was no evidence of negligence by the decedent or of any new and independent cause. But plaintiff did not separately argue that the charge improperly commingled defendant's negligence and the decedent's in a single broad form question in violation of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

The court nonetheless held that plaintiff's no-evidence objection sufficed to preserve its *Casteel* argument:

> In this case, a separate objection to the form of the charge question was not necessary to inform the trial court of Young's complaint – that the inclusion of Ronnie's contributory negligence and the instruction on new and independent cause should not be submitted to the jury…
>
> 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…
>
> 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.* at ** 11-12. The decision also contains useful *dicta* on preservation of charge error generally:
>
> Contrary to Dr. Thota's narrow and technical interpretation of our preservation of error requirements, we have never held that a no-evidence objection in this context is insufficient to preserve a broad-form complaint on appeal. *See, e.g., Romero,* 166 S.W.3d at 229; *Harris Cty*. 96 S.W.3d at 236; *Casteel*, 22 S.W.3d at 387, 389. Moreover, we have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance. *See Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451-52 (Tex. 1995) (per curiam) (citing *Payne*, 838 S.W.2d at 241) ("While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them").

Id. at * 10.

Similarly, in *McFarland v. Boisseau*, __ S.W. 3d __, 2011 WL 6282356 (Tex. App. – Houston [1st Dist.], December 15, 2011), defendants objected to inclusion of invalid bases of liability in the liability question but failed to object to a broad form damages question that could have compensated plaintiff based on the invalid liability theories. *See id* at * 5. Following decisions of the Fourteenth and Eleventh Courts of Appeals, the First Court held that a separate objection to the damages question was unnecessary for preservation. *See id.*

2. Objection about redundancy of instruction suffices to preserve objection about its substantive correctness

In *Continental Casualty Co. v. Baker*, 355 S.3d 375 (Tex. App. – Houston [1st Dist.] 2011), a worker's compensation case, the insurer objected to the inclusion of an instruction defining "producing cause" on the ground that it duplicated other instructions defining "injury," rendering the "producing cause" instruction "redundant and prejudicial." *See id.* at 384. The insurer did not object that the court erroneously defined "producing cause" or propose an alternate definition. *See id.* at 384-85.

Still, the court held that the insurer adequately preserved objection to the substance of the "producing cause" instruction. *See id.* Failure to proffer an alternative charge was unimportant and did not run

afoul of TEX. R. CIV. P. 278, mandating submission of a putatively correct charge, because the insurer's position was that the "producing cause" instruction should not have been given at all – effectively constituting the proffer of a substitute charge (that is, one lacking the objectionable definition). The court then reversed because the "producing cause" definition violated the Supreme Court's decision in *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211 (Tex. 2010). *See id.* at 385-86. Although *Crump* was not yet decided when the trial court charged the jury in *Baker*, its rule operated retroactively and required reversal. *See id.* "Considering that the parties lacked the benefit of the supreme court's decision in *Crump* at the time of trial, we hold that Continental's objection to the definition of producing cause adequately preserved error." *Id.* at 386.

C. … Except When They Won't

1. Objection that no federal standard applies to allegedly missing safety feature does not preserve objection that no standard governs the product risk or that rebuttal presumption of safety in TEX. CIV. PRAC. & REM. CODE § 82.008(a) should not be submitted to the jury in its instructions

In *Hamid v. Lexus*, ___ S.W.3d ___, 2011 WL 7074213 (Tex. App. – Houston [1st Cir.], December 22, 2011), the trial court decided to instruct the jury that it could presume Toyota was not liable if the car complied "with mandatory safety standards or regulations… applicable to the 2002 Lexus ES300 at the time of its manufacture and that governed the product risk that allegedly caused harm. Plaintiffs may rebut the presumption by establishing that the… [regulations] were inadequate to protect the public from unreasonable risk of injury or damage." *Id.* at * 2. Plaintiff objected to this instruction only as follows: "We don't think they're entitled to the presumption in this case because there is no Federal Motor Vehicle safety standard that applies to the VSC [the allegedly missing safety feature]. So they don't get the presumption." *Id.* at * 4. On appeal, plaintiff argued that this objection preserved three distinct arguments: (i) the presumption does not apply when no regulation relates to the alleged defect (here the lack of the safety feature), (ii) the cited regulation does not govern the product risk that caused injury, and (iii) the presumption should not be submitted as a jury instruction. *See id.*

The court held that only the first of these points was preserved by the plaintiff's objection. As for the second point: "During the charge conference, the Hamids did not identify the risk in question, discuss the evidence regarding the mandatory federal standards that were admitted, or identify the risks addressed by those standards. Indeed, they did not even mention the word 'risk.' The Hamids' objection was not focused on the admitted standards. Rather their argument was focused on the [missing safety feature] itself." *Id*. at * 4. Regarding the third point, "there was no discussion during the charge conference of allocating burdens of proof or production versus burdens of persuasion. Neither was there any contention about legislative history or case law on the use of presumption instructions generally. Instead, the Hamids' objection was directed at the use of the presumption instruction in this case based on the evidence." *Id.* at * 5. Thus, it too was waived.

2. Objection that specific causation is only for court when assessing reliability of expert testimony and should not be included in jury instructions does not preserve claim that instruction heightened plaintiff's burden of proof and commented on the weight of the evidence

In *Faust v. BNSF Ry. Co*., 337 S.W.3d 325 (Tex. App. – Ft. Worth 2011), a toxic tort case, the court instructed the jury that the plaintiff had to exclude other causes of her cancer in order to prove specific causation. *See id.* at 329-30. Plaintiff objected that the subject should not be included in the instructions and that doing so represented an improper shifting of "the court's gatekeeper function" from the court to jurors. *Id*. at 330.

The court held that this objection failed to preserve the plaintiff's appellate arguments that the instruction heightened her burden of proof and constituted a comment on the weight of the evidence presented at trial. By failing to mention these grounds for objecting to the instruction, plaintiff waived them. *See id.* at 330-31. Moreover, plaintiff's submission of instructions omitting the specific causation instruction did not cure the problem:

> Here, unlike in *Payne*, the Fausts are not complaining on appeal about the trial court's refusal to include in the charge a specifically requested question. Instead, they are complaining about the inclusion of an instruction that was not part of the proposed jury charge that they submitted to the trial court. The difference is significant because in *Payne*, the State timely made the trial court aware that it specifically desired the inclusion of the question in the charge. *Id*. In this case, there is nothing in the record to indicate that the Fausts timely made the trial court aware that they were objecting to the instruction on the grounds that it heightened their burden of proof and amounted to a comment on the weight of the evidence, including by merely omitting the specific

causation instruction from their proposed jury charge.

Id. at 331.

3. Objection to liability question as commingling different theories did not preserve objection that a separate damages question was wrongly submitted in broad form

In *Mariner Health Care of Nashville, Inc. v. Robins*, 321 S.W.3d 193 (Tex. App. – Houston [1st Dist.] 2010), a nursing home malpractice case, defendant objected to a liability question on the ground that plaintiffs could not recover under both wrongful death and survival theories. *See id.* at 212. On appeal, it attempted to use this objection as preservation of its claim that a separate question on damages should not have submitted claims for pain and mental anguish together. As the court held: "We disagree. An objection to one jury question that plaintiffs are not entitled to recover under two separately pleaded and legally cognizable theories applicable to a nursing-home negligence case is different from an objection to a different jury question that the type of damages recoverable under two separately pleaded theories should not be submitted in broad form." *Id.* at 212-13.

4. Reference to supportive authority at pretrial conference doesn't preserve error

In *Jimenez v. Wood County*, 660 F.3d 841 (5th Cir. 2011) (en banc), a § 1983 action, defendant alluded to case law in a pretrial conference that, if followed, would have precluded the jury instruction challenged on appeal. But because the conference involved only evidentiary issues rather than the content of the jury instructions and occurred before a different judge than the one who tried the case, the reference did not preserve the objection. *See id*. at 846 n. 6.

D. In Federal Court, Charge Objections Must Be Made at the Correct Time and Cannot Be Skipped Even if Foreclosed by Existing Precedent

In *Jimenez*, defendant claimed it preserved an objection to the jury charge by arguments made at a pretrial conference. But the court held that, under FED. R. CIV. P. 51(b) and (c), objections sufficient to preserve points on appeal can only be made after the district court has informed the parties of its proposed instructions. *See* 660 F.3d at 845-46. A discussion about a legal point held before the court provides the proposed instructions will not preserve error in the charge. *See id.*

The defendant in *Jimenez* also argued on appeal that any objection to the charge would have been futile in light of controlling Fifth Circuit precedent. *See id.* at 846. The court acknowledged that an objection would have had no possibility of success given then-governing law, but held that Rule 51 and Supreme Court precedent required the defendant to make it anyway. *See id.*

II. *CASTEEL* AND CONTRIBUTORY NEGLIGENCE + INFERENTIAL REBUTTAL: *THOTA V. YOUNG*

Casteel holds that reversible error is presumed when a broad form jury question includes more than one theory of liability and one or more is invalid. *See* 22 S.W.3d at 388. Similarly, the Texas Supreme Court has held that reversible error is presumed where unobtainable types of damages are mixed with valid ones in a broad form question. *See Harris County v. Smith*, 96 S.W.3d 230, 233-34 (Tex. 2002). The question in *Thota* was whether the same presumption of harm applies when a negligence question wrongly includes a blank for the plaintiff and the instructions also erroneously submit an inferential rebuttal theory.

The plaintiff in *Thota* alleged medical malpractice, while defendant claimed the decedent's failure to treat another condition contributed to his death. In response, plaintiff argued that not seeking treatment for the other condition was, at most, a failure to mitigate rather than contributory negligence. The trial court disagreed and included a blank for decedent's negligence as part of a single broad form negligence question. The court also included an instruction on new and independent cause. The jury answered "no" to the doctor's negligence and "yes" to the plaintiff's.

The court of appeals reversed, holding that inclusion of the contributory negligence blank and the instruction on new and independent cause were erroneous and that, under *Casteel*, reversal was required because it was impossible to tell if the jury's "no" answer to the doctor's negligence was improperly influenced by the errors. Although the Supreme Court previously held that erroneous inferential rebuttal instructions alone did not create a presumption of harm under the *Casteel* rule, *see Bed Bath & Beyond v. Urista*, 211 S.W.3d 753, 756-57 (Tex. 2006), the court of appeals held that the combined force of the new and independent cause instruction and the contributory negligence blank required a presumption of harm and reversal.

The Supreme Court reversed, holding that *Casteel's* analysis did not apply. Unlike when several theories are subsumed within a single question, the jury form in *Thota* contained a separate line for the doctor's negligence, to which the jury answered "no." Thus, there was no basis to speculate about whether the jury might have based its verdict on an improper consideration (the plaintiff's contributory negligence). *Id.* at * 12. As the Court put it:

> While *Casteel's* presumed harm analysis is necessary in instances where the appellate court cannot determine "whether the improperly submitted theories formed the sole basis for the jury's finding" because the broad-form question mixed valid and invalid theories of liability, *Casteel*, 22 S.W.3d at 389, or when the broad-form question commingled damage elements that are unsupported by legally sufficient evidence, *Harris Cnty*., 96 S.W.3d at 235, an improper inferential rebuttal instruction and improper defensive theory of contributory negligence presented in a broad-form question with separate answer blanks in a single-theory-of-liability case does not prevent the harmed party from obtaining meaningful appellate review. When a trial court abuses its discretion by including erroneous charge questions or instructions in a single-theory-of-liability case, our traditional harmless error analysis applies and the appellate courts should review the entire record to determine whether the charge errors probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1, 61.1; *Urista*, 211 S.W.3d at 757.

Id. at * 14. Declining to presume harm, the Supreme Court then asked whether harm actually occurred. It found none based on the erroneous contributory negligence blank because the jury independently found the doctor not negligent. *See id.* at ** 14-15. And it found none based on the new and independent cause instruction because, according to the Court, some evidence supported a finding that the doctor did not breach the standard of care, making it irrelevant that the jury may have separately misanalyzed the proximate cause element due to the legally incorrect instruction. *See id.* at * 16.

III. MANDATORY "BAD RESULT" INSTRUCTION COVERS REQUESTED "UNAVOIDABLE ACCIDENT" INSTRUCTION

In *Chesser v. Lifecare Mgmn't,* 356 S.W.3d 613 (Tex. App. – Ft. Worth 2011), a medical malpractice case, defendant objected to the court's refusal to give an unavoidable accident instruction, which states that the plaintiff's injuries may not have been caused by the negligence of any party. *See id.* at 635. The purpose of an unavoidable accident instruction is to inform jurors "that they do not have to place blame on a party to the suit if the evidence shows that conditions beyond the party's control caused the accident in question or that the conduct of some person not a party to the litigation caused it." *Id.* Defendants requested the instruction because they claimed the injuries plaintiff suffered "are recognized complications of the [procedure he underwent] and are complications that may occur without anyone's negligence. Appellees also contend that [plaintiff's] pre-existing conditions… could have been a cause of his injuries, entitling Appellees to an unavoidable accident instruction." *Id.* "An unavoidable accident instruction thus submits a defendant's inferential rebuttal defense – a defense that operates to rebut an essential element of the plaintiff's case by proof of other facts." *Id.*

The district court declined to submit the requested unavoidable accident instruction but did submit the "bad result" instruction mandated by TEX. CIV. PRAC. & REM. CODE § 74.303(e)(2), which provides: "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence." *Id.* at 636. The court of appeals held that this instruction adequately covered the defendants' theories: "[T]he bad result instruction sufficiently informed the jury that it could believe that [plaintiff] simply had a bad result with the [procedure] or that the bad result could have been caused by his pre-existing conditions and instructed the jury that a bad result alone would not support a negligence finding against Appellees." *Id.* (citations omitted). Given the similarity in the instructions and the broad discretion afforded trial judges in formulating the charge, the court of appeals refused to find error in omitting the unavoidable accident charge. *See id.* at 636-37.

IV. MISNOMER

In *Bank of America v. Barth*, 352 S.W.3d 7 (Tex. App. – Corpus Christi 2010), the jury form asked whether Bank of America Corp. committed various torts, though plaintiff actually sought recovery from an affiliated entity, Bank of America, N.A. Plaintiff's trial amendment corrected this error in his pleadings, but the jury form he submitted retained the wrong defendant as the potentially liable party. The jury therefore found Corp. liable rather than N.A., but the court entered judgment against N.A. *See id.* at 10-11.

The court of appeals held that plaintiff's trial amendment did not cure misnomer in the charge, which occurred later. As the court of appeals put it, "we conclude that the trial court erred in rendering a judgment against Bank of America, N.A. based on the jury's verdict because (1) the issue of Bank of America, N.A.'s liability was not submitted to the jury, (2) a judgment cannot be rendered on an omitted issue, and (3) the judgment did not conform to the verdict returned in this case. We further conclude that the error probably caused the rendition of an improper

judgment, as evidenced by the discrepancy between the jury's verdict and the judgment rendered by the trial court." *Id.* at 12.

The Supreme Court reversed. *See* 351 S.W.3d 875 (Tex. 2011). The court rejected N.A.'s argument that plaintiff committed misidentification rather than misnomer, distinguishing the two: "Misidentification – the consequences of which are generally harsh – arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. A misnomer occurs when a party misnames itself or another party, but the correct parties are involved. Courts generally allow parties to correct a misnomer so long as it is not misleading." *Id.* at 876-77 (citations and quotation omitted). Because N.A. agreed "it has not been misled," the Court rejected its claim of misidentification. *Id*. at 877. The Court also disagreed that judgment could not be entered against N.A. because the verdict form referred only to Corp. The trial record contained no evidence the two entities were different and N.A.'s corporate representative testified at trial that N.A. was the only entity involved in the dispute. *See id.* "Nothing in the record suggests that the jury could possibly have been confused, and its answers must be taken to be applicable to Bank of America, N.A." *Id.* As a result, the Court reinstated the judgment against N.A.

V. EXCLUSION OF OTHER CAUSES OF INJURY BELONGS IN INSTRUCTION, NOT ONLY ASSESSMENT OF EXPERT TESTIMONY

In *Faust*, a toxic tort case, the plaintiff objected to the following instruction: "In order to prove specific causation for exposure… the plaintiffs must exclude, with reasonable certainty, other causes of [plaintiff's] stomach cancer, such as her history of smoking cigarettes and her Helicobacter pylori infection." 337 S.W.3d at 329. Plaintiffs objected, arguing that the sole place for consideration of other causes was the trial court's decision to admit or exclude expert testimony under TEX. R. EVID. 702. *See id.* at 331.

The court of appeals disagreed, holding that the instruction was valid because plaintiffs were required to prove specific causation. *See id*. at 334 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (1997)). "The complained-of instruction is an accurate, albeit arguably incomplete, statement of the law," the court held, "identifying what [plaintiff] must show to raise a fact issue as to causation. And instructing the jury that other plausible causes of [plaintiff's] gastric cancer must be excluded with reasonable certainty assisted the jury by providing it with the standard it was required by law to apply in making its finding on a hotly-contested issue – causation." *Id.* at 335 (citations and quotations omitted). The court also held that any error in including the instruction would be harmless in any case, since some evidence supported a finding of alternate causation and the jury would not have thought it was supposed to assess the weight and credibility of the experts' testimony akin to the court's gatekeeping function. *See id.* at 337-38.

VI. NO ERROR IN USING "INJURY" RATHER THAN "DEATH" IN WRONGFUL DEATH CHARGE

In *THI of Tex. at Lubbock I, LLC v. Perea*, 329 S.W.3d 548 (Tex. App. – Amarillo 2010), a medical malpractice case, plaintiffs brought wrongful death and survival claims. The jury charge featured a single broad form question asking whether defendants' negligence proximately caused "the injury" in question. *See id.* at 565. Defendant objected on the ground that, as to the wrongful death claims, the jury should be asked if its negligence caused decedent's *death* rather than his injury: "If the jury were to believe that some act or omission by [defendant] caused an injury to Mr. Perea, but not his death, then the wrongful death beneficiaries would not be entitled to recover." *Id*. at 566.

The court of appeals found no error and refused to distinguish between injury and death in this context. Because there was no evidence of other causes of death, as distinct from injury, or request to hold the decedent contributorily negligent, any difference in meaning between the terms is immaterial: "Given the facts of this case and the similarity in the meanings of the terms 'injury' and 'death,' as a precipitant to damages, we cannot say that, as a matter of law, a reasonable juror would have been misguided by the trial court's instruction." *Id*. at 569. The court also rejected any claim that two separate negligence questions should have been asked – one for survivor claims using the term "injury" and one for the wrongful death claim using the word "death." "While trial courts should obtain fact findings on all theories pleaded and supported by the evidence, a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Id.*

VII. INSTRUCTIONS IN FELA CASES

In *CSX Transport., Inc. v. McBride*, 131 S. Ct. 2630 (2011), the Supreme Court reaffirmed the traditional standard for causation expressed over half a century ago in *Rogers v. Missouri Pacific Ry. Co*., 352 U.S. 500 (1957): "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 2636 (quoting *Rogers*, 352 U.S. at 506). The Seventh Circuit gave the following charge: "Defendant 'caused or contributed to'

Plaintiff's injury if Defendant's negligence played a part – no matter how small – in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence." *Id.* at 2635.

Based on the statutory text of FELA, longtime Supreme Court and circuit-level precedent, and practical difficulties with the common law proximate cause standard, the Court rejected the railroad's argument that the trial court should have instructed the jury using the common law understanding of proximate cause. The court also observed: "We regard the phrase 'negligence played a part – no matter how small,' as synonymous with 'negligence played any part, even the slightest,' and the phrase 'in producing the injury' as synonymous with the phrase 'in bringing about the injury.' We therefore approve both the Seventh Circuit's instruction and the 'any part, even the slightest, in producing the injury' formulation." *Id.* at 2639 n. 3. Similarly, the Court endorsed the formulation in the model federal jury instructions: "The fourth element [of a FELA action] is whether an injury to the plaintiff resulted in whole or part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff?" *Id.* at 2640 (quoting 5 L. Sand *et al*., *Modern Federal Jury Instructions – Civil* ¶ 89.02, pp. 89–38, 89–40, and comment (2010)). The dissent argues that the Seventh Circuit's phrasing risks runaway jury verdicts based on expansive notions of causation, but the majority responded: "Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their 'common sense' in reviewing the evidence… juries would have no warrant to award damages in far out 'but for' scenarios. Indeed, judges would have no warrant to submit such cases to the jury." *Id.* at 2643.