

State Bar of Texas
Appellate Section

Lunch & Learn Webinar:
January 17, 2025 || 12:00 – 1:00 p.m.

Don't *Casteel* My Charge Error:
What happens with *Casteel*
after the Supreme Court's Decision in *Horton*

Presented by:
Jody Sanders
Kelly Hart

Don't *Casteel* My Charge Error

The Texas Rules of Civil Procedure require that a trial court “shall, whenever feasible, submit the cause upon broad-form questions.”¹ But trial practice looked different when that rule was promulgated. If you ever want to see an appellate lawyer break out in hives, show them a proposed jury charge with all broad form questions. In modern practice, whether broad-form is “feasible” in a particular case is in the eye of the beholder.

While broad form does have advantages—streamlined jury presentation; more difficult for a defendant to appeal; fewer jury issues—it comes with drawbacks. Ever since the Texas Supreme Court decided *Crown Life Insurance v. Casteel* nearly 25 years ago, broad form builds in risks for both sides.² This paper will discuss what *Casteel* is, where it stands today, and how it impacts trial and appellate practice.

And recently, the Supreme Court dramatically changed the standards, which leaves the application of *Casteel* moving forward mired in doubt.

A. What is *Casteel* and why should I care?

Put simply, *Casteel* has become the appellate lawyer shorthand for “break up your broad form submissions.” It arose from a case in which Casteel sold insurance policies as an agent of Crown Life Insurance. Casteel sold policies that he represented had vanishing premiums (*i.e.* pay a lot up front then not much later). But some of his clients sued Casteel and Crown Life, alleging that Casteel was wrong and that his actions violated the DTPA, the incorporated insurance statutes, and common law. Casteel also sued Crown

Life under the DTPA and insurance statutes. The trial court submitted a single, broad-form question on Crown Life’s liability to Casteel, which instructed on 13 grounds for recovery including violations of the DTPA’s laundry list and the incorporated insurance statutes. But the question required only a single “Yes” or “No” answer on Crown Life’s liability. The jury found for both Casteel and the plaintiffs against Crown Life.

The case ultimately made its way to the Texas Supreme Court on whether Casteel could properly bring DTPA and Insurance Code claims because he was an agent rather than a “consumer.” The Supreme Court held that certain of the DTPA claims required consumer status—which Casteel lacked—but the insurance statute violations did not.

This left the court to confront what to do with the trial court’s broad-form submission. The court of appeals had concluded that this submission was harmless, despite ruling that Casteel lacked standing for some of his claims. But the Supreme Court disagreed.

The court of appeals based its harmless-error conclusion on Texas Rule of Appellate Procedure 61.1(a)(1), which required a showing that the error probably caused the rendition of an improper judgment. The court of appeals concluded that, because some evidence supported liability on a valid theory—the insurance statutes—any error was harmless.

The Supreme Court disagreed and held that the court of appeals analyzed harm under an incorrect standard. Instead, the Supreme Court held that the error created harm under the second prong of the rule because it “probably prevented the petitioner from

¹ Tex. R. Civ. P. 277.
Casteel paper

² 22 S.W.3d 378 (Tex. 2000).

properly presenting the case to the appellate courts.”³

As the court explained, “when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence could have supported the jury’s conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds.”⁴ Thus, the court concluded that “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.”⁵

In so holding, the court rejected a broad reading of Rule 277 to mandate broad-form questions in every case and put the onus on the trial court to separate claims when necessary. “[W]hen the trial 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.”⁶ The court then remanded for a new trial.

B. From *Casteel* to *Bed, Bath & Beyond*—expansion of presumed harm.

With *Casteel* on the books, the Supreme Court warned claimants and trial courts that mixing invalid theories with valid ones in a single broad-form question ran the risk of a new trial. It also offered a solution—split out liability theories. But while *Casteel* answered the question about liability, it left open the many other potential broad-form iterations outside of liability questions. In the next decade, however, the Supreme Court had to confront those as well.

1. *Casteel* covers broad-form damage questions.

Two years after *Casteel*, the court was faced with how to address a broad-form damage submission that included valid and invalid damage elements in *Harris County v. Smith*.⁷ There plaintiffs sued the county after a collision involving a sheriff’s deputy. The trial court submitted a single broad-form damage question for the husband with four elements, including loss of earning capacity. It also submitted a single broad-form question for the wife with three elements, including physical impairment. Harris County objected that no evidence supported those specific elements. The jury awarded damages to both. The court of appeals held that no evidence supported the husband’s loss of earning capacity or the wife’s physical impairment but found no harm because evidence supported the other damage elements. The court of appeals held that

³ 22 S.W.3d at 388; *see also* Tex. R. App. P. 44.(a)(2).

⁴ 22 S.W.3d at 388.

⁵ *Id.*

⁶ *Id.* at 390.

⁷ 96 S.W.3d 230 (Tex. 2002).

Casteel was limited to “key issues” like liability submissions.

The Supreme Court reversed the court of appeals’ determination and held that *Casteel* also applied to damage submissions. The court reiterated that the harm from a mixed broad-form question came from the inability to present error on appeal: “[T]he trial court’s charge error in this case caused actual harm because it prevented Harris County from properly presenting its case to the appellate courts.”⁸

The court rejected complaints that its decisions would end broad-form submission and suggested that the solution came from breaking out questionable theories or elements: “submitting alternative liability standards permits the appellate court to settle the law and render the correct judgment. Similarly, it would be contrary to judicial economy to insist on broad-form submission when a specific objection raises substantial concern that a particular theory of liability will infect the proposed broad-form question with error.”⁹ “And in a case such as this one, asking the jury to record its verdict as to each element of damages when there is doubt as to the legal sufficiency of the evidence will permit the losing party to preserve error without complicating the charge or the jury’s deliberations.”¹⁰

2. *Casteel* covers proportionate-responsibility submissions.

The Supreme Court next had to address what happens when a party submits separate liability questions, but includes only a single

proportionate responsibility question predicated on all theories. In *Romero v. KPH Consolidation, Inc.*, it held that *Casteel* governed as well.¹¹

There the plaintiffs sued a hospital for negligently delaying a blood transfusion and for malicious credentialing of a surgeon. The jury was given separate liability questions for each theory, but had only a single proportionate responsibility question to apportion fault that it was instructed to answer if it found liability under either theory. The jury found liability on both theories, apportioned fault, and awarded actual and exemplary damages. The court of appeals reversed, holding that no evidence supported malicious credentialing and, thus, new trial was required because the jury might have apportioned fault differently. But it held that the harm came because the error probably resulted in an improper judgment.

The Supreme Court reviewed and agreed that no evidence supported the malicious credentialing theory. And it agreed that new trial was proper, but not based on the harm articulated by the court of appeals but because, like *Casteel*, it prevented the appellate courts from determining whether the jury based its determination on the erroneous charge (*i.e.* it prevented the appellant from properly presenting its case on appeal). Indeed, the court went further and held that “[h]aving found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility.”¹² The court remanded for a new trial.

⁸ *Id.* at 235.

⁹ *Id.* at 235-36.

¹⁰ *Id.* at 236.

¹¹ 166 S.W.3d 212 (Tex. 2005).

¹² *Id.* at 227.

Like *Harris County, Romero* also brushed off suggestions that *Casteel* required separate submissions of every theory, element, and aspect of a case. “The jury charge in this case needed one less question—the question on malicious credentialing, for which there was no evidence—to be free of error, and reversal could have been avoided with one more question, which the trial court offered to the Romeros and they rejected.”¹³

The court’s discussion instead put the onus on the party submitting its claims to choose wisely what to submit or run the risk of a new trial. “[T]he 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.”¹⁴

3. *Casteel* does not apply to defensive instructions like inferential rebuttals.

The Supreme Court tapped the brakes on *Casteel* expansion in *Bed, Bath & Beyond v. Urista*.¹⁵ There the plaintiff sued for negligence after a store employee knocked trash cans off a high shelf onto the plaintiff. The trial court submitted a single broad form negligence question and included, over the plaintiff’s objection, an unavoidable accident

instruction. The jury found no liability and the plaintiff appealed. The court of appeals reversed holding that the unavoidable accident instruction was error and that it implicated *Casteel* and required a new trial.

The Supreme Court declined an extension of *Casteel*’s presumed-harm analysis into defensive instructions and held that it was limited to questions relating to liability and damages. The court rejected a comparison of an improper defensive instruction to an invalid liability theory. “[A]lthough 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.”¹⁶ Because *Casteel* did not apply, the court followed the traditional harm analysis to determine whether the error probably caused the rendition of an improper judgment. The court concluded that it did not.

4. *Casteel*-like harm may apply to improperly refused instructions.

In *Columbia Rio Grande Healthcare, L.P. v. Hawley*, the Supreme Court dealt with the failure to give an instruction and the ensuing harm.¹⁷ A plaintiff sued the hospital for negligence. The question at trial asked whether the hospital was negligent and instructed the jury that the hospital acted through its “employees, agents, nurses, and servants.”¹⁸ The hospital requested an independent contractor instruction that would

¹³ *Id.* at 230.

¹⁴ *Id.*

¹⁵ 211 S.W.3d 753 (Tex. 2006).

¹⁶ *Id.* at 757.

¹⁷ 284 S.W.3d 851 (Tex. 2009).

¹⁸ *Id.* at 863.

have told the jury that a particular doctor's negligence could not be considered. The trial court rejected it. The Supreme Court held that this was error and then addressed whether the failure to give was harmful.

The hospital urged the court to apply *Casteel's* presumed-harm analysis because the court could not tell whether the jury based its negligence finding on that doctor's acts as a potential agent. The court contrasted the case with *Casteel*, noting that "the harm question presented in *Casteel* is different from that presented here because here the charge did not submit an invalid theory to the jury."¹⁹ But the court held that it created a similar harm to *Casteel* "because the jury could have found Columbia liable based on Dr. Valencia's acts or omissions under the charge as given, and there is no way for Columbia or an appellate court to tell if it did so."²⁰ This prevented proper presentation on appeal and required a new trial.

C. *Casteel* does—and does not—apply to a single-theory-of-liability case?

In more recent years, the Supreme Court has started to rein in *Casteel's* boundaries. But in doing so, it left confusion about where it applies or not.

In *Thota v. Young*, the Supreme Court confronted whether *Casteel* applied in a case involving only a single theory of liability and determined that it did not.²¹ *Thota* involved a medical malpractice claim in which the plaintiff alleged multiple grounds for negligence. The doctor argued contributory negligence and various defensive issues like

unavoidable accident, new and independent cause, and pre-existing condition. The charge included only a single negligence question with one blank for the plaintiff and one for the defendant, with instructions on new and independent cause and unavoidable accident. It also included a comparative negligence question and damages questions.

The jury found the plaintiff, but not the doctor, negligent. The trial court entered a take-nothing judgment and denied a new trial. The court of appeals reversed, holding that the contributory negligence question and new and independent cause instructions constituted harmful error. The court of appeals applied *Casteel*, holding that contributory negligence represented an invalid theory that triggered presumed harm.

The Supreme Court rejected this argument and held that *Casteel* did not apply because multiple blanks for the negligence question "allow us to determine whether the jury found Dr. Thota negligent."²² Citing *Urista*, it also rejected application of *Casteel* to the new and independent cause instruction. The court warned that extending *Casteel* this far into a single-liability theory case would render broad-form submission a nullity: "If presumed harm analysis were required, then our fundamental commitment to submitting broad-form questions, whenever feasible, would routinely be discarded for separate, granulated submissions to the jury."²³

Yet in *Texas Commission on Human Rights v. Morrison*, the Supreme Court seemed to backtrack on its single-theory-of-liability limitation.²⁴ Morrison sued the state

¹⁹ *Id.* at 865.

²⁰ *Id.*

²¹ 366 S.W.3d 678.

²² *Id.* at 691.

²³ *Id.* at 693.

²⁴ 381 S.W.3d 533 (Tex. 2012) (per curiam)

claiming retaliation in her employment. The trial court submitted a broad-form liability question that let the jury find liability based on undefined “adverse personnel actions.” The state objected and requested a question that would have limited the jury’s consideration only to termination.

The court held that the broad submission created a *Casteel* error by allowing the jury to find liability based upon the plaintiff’s denied promotion—an issue she failed to include in her EEOC submission. As a result, it could not be a basis for liability. The court found harm because it was impossible to tell whether the jury based its verdict on that theory. Its opinion did not address the single theory of liability limitation.

It again seemed to backtrack on the single-theory-of-liability limitation in *Benge v. Williams*.²⁵ There a plaintiff brought a healthcare liability claim and offered evidence at trial that the doctor (1) improperly used an inexperienced resident and (2) failed to disclose the resident’s involvement. But the plaintiff did not seek recovery based upon the nondisclosure. The trial court submitted a broad-form negligence question over the defendant’s objection that potentially allowed the jury to reach a verdict based upon the nondisclosure. The jury found the doctor negligent. The court of appeals reversed and remanded for a new trial.

Citing *Hawley* and *Morrison*, the Supreme Court seemed to walk back its single-theory limitation: “[W]e have twice held that when the question allows a finding of liability based on evidence that cannot support recovery, the same presumption-of-harm rule

must be applied.”²⁶ The court looked at the evidence and argument presented to the jury suggesting that the nondisclosure led to the plaintiff’s injury. The court held that the trial court’s failure to instruct that the jury could not consider nondisclosure prevented an appellate court from determining whether that was a basis for the jury’s verdict and implicated *Casteel* harm.

Yet the court rejected that the error was about the admission of the evidence. Instead, it maintained that it was about the charge error in failing to exclude nondisclosure as a basis for the jury’s consideration. “Whether Dr. Benge has an evidentiary complaint or not, the complaint he makes is that the charge allowed the jury to consider what he did or did not tell Williams about Dr. Giacobbe’s involvement in the surgery in deciding negligence, even though Williams does not seek recovery on that basis.”²⁷

The court followed suit in *Interest of J.W.*, a parental termination case involving multiple statutory grounds for termination.²⁸ The court submitted one question on father’s termination that included three predicate grounds in a broad-form submission over father’s objection. The jury found for termination and father appealed, arguing insufficient evidence for the termination grounds and, alternatively, *Casteel* error from the broad form if any single theory was unsupported by evidence. The court of appeals found sufficient evidence.

The Supreme Court granted review and determined that legally-insufficient evidence supported one of the termination grounds. Because the father properly objected to the broad-form submission, the court considered

²⁵ 548 S.W.3d 466, 475 (Tex. 2018)

²⁶ *Id.* at 475.

²⁷ *Id.* at 476.

²⁸ 645 S.W.3d 726 (Tex. 2022).

the harm from that error. The court applied *Casteel* and found harm because “the broad-form charge erroneously, and over Father’s objection, commingled a valid termination ground supported by sufficient evidence (Subsection (O)) with an invalid termination ground supported by legally insufficient evidence (Subsection (D)).”²⁹ The court held that this prevented it from determining whether the jury based its verdict on the improper ground and, thus, required a new trial.

D. *Horton* changes the rules.

Until recently, the Supreme Court’s *Casteel* decisions seemed relatively straightforward. A broad-form submission—whether liability, damages, proportionate responsibility—that included both valid and invalid elements or theories created harm that required a new trial. It appeared from those cases that “invalid” included claims or elements with both legal defects (*i.e.* jurisdictionally barred, preempted, etc.) and those unsupported by legally-insufficient evidence.

Then in 2023 the Supreme Court threw it into disarray with *Horton v. Kansas City Railway Company*.³⁰ *Horton* involved a fatal car/train collision at a crossing. The plaintiffs sued for negligence under two theories: (1) that the railroad had negligently maintained the rails to create a “humped” crossing and (2) the it had failed to replace a missing yield sign at the crossing. The trial court submitted a single broad-form question on negligence and the jury found negligence for both the plaintiff and defendant. It also determined that each bore 50% responsibility. The court

of appeals reversed, holding that federal law preempted the humped crossing claim and, because that created an invalid claim for *Casteel* purposes, new trial was required.

The Supreme Court took the case and initially affirmed, but on different grounds. It held that federal law did not preempt the humped crossing claim, but that legally insufficient evidence supported the yield-sign claim. It applied *Casteel* and ordered a new trial solely on the humped crossing claim.

Both parties moved for rehearing and the Supreme Court granted Horton’s, which included a challenge to the determination of whether the case created *Casteel* error that necessitated a new trial.

On rehearing, the Supreme Court kept in place its determination about the viability of the negligence claims, but rewrote its *Casteel* and harm analysis. In doing so, the court upended *Casteel* precedent and created new rules that leave *Casteel*’s vitality and application somewhat in doubt.

Under the new analysis, *Casteel* error creates a rebuttable presumption of harm. Thus, even when it applies, the prevailing party can avoid harm by showing “that the alleged error does not probably prevent the appellant from presenting the appeal.”³¹ That must leave the reviewing court “reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.”³² But even if *Casteel* does not apply, harm still may exist under either prong of the harmful error rule.

²⁹ *Id.* at 751.

³⁰ No. 21-0769, 2023 WL 4278230 (Tex. June 30, 2023), *w/drawn and superseded on rehearing by* 2024 WL 3210468 (Tex. June 28, 2024).

³¹ *Id.* at *20.

³² *Id.*

More importantly, the court finally clarified the conflict in its precedent over whether *Casteel* applies in a single-theory-of-liability case: “[O]ur decisions have not limited *Casteel*’s presumed-harm rule to cases in which a broad-form question submits multiple liability theories or causes of action. Instead, we have applied it in cases where a jury charge, as a whole, permits the jury to reach a finding based on a legally invalid theory or allegation presented to the jury.”³³

But the biggest change came in the court’s discussion of how broadly *Casteel* applies. Despite cases like *Benge*, *Interest of J.W.*, and *Harris County*, where the court reversed because the jury heard claims that lacked evidence, *Horton* changed the rule. After *Horton*, a claim/theory/element is no longer “invalid” for *Casteel* purposes when it is unsupported by legally sufficient evidence.

The court justified its change by citing to *Ford Motor Co. v. Castillo*, a case in which the court concluded that *Casteel* did not apply because the defendant had not challenged the legal invalidity of a particular element.³⁴ The court’s opinion does not mention, however, that *Castillo* predated *Benge* and *Interest of J.W.* where the court reversed cases based on theories and allegations unsupported by evidence.

The court also based its new rule on its optimistic view that “[h]arm may also be less likely if the jury charge merely presents the supported and unsupported theories or allegations as alternatives the jury may disregard, as in *Castillo*” (which involved an

element with several disjunctive grounds).³⁵ The court reasoned that harm will be more likely “if the trial court expressly instructs the jury that it must base a finding on a factually unsupported theory or allegation,” which the court believed could create harm even outside of *Casteel* error.³⁶

The court instead believed that “when a theory or allegation is invalid only because no evidence supports it, harm is far less likely because nothing prevents the jury from reaching a valid and proper finding based on the evidence it heard.”³⁷ In the court’s view, a jury is better able to decide whether a theory lacks evidentiary support rather than legal invalidity. Thus, “reviewing courts should not *presume* harm when a broad-form submission permits a jury to make a finding based on a theory or allegation that is invalid only because it lacks evidentiary support.”³⁸

Instead, reviewing courts in that scenario must review the entire record to determine harm under the Rule’s other prong—whether the error probably caused the rendition of an improper judgment.

Applying that standard, the court held that harm was lacking in *Horton* because the plaintiff did not emphasize the yield-sign claim during trial.

E. *Casteel* post-*Horton*: what now?

With *Horton*’s new distinction, what happens now? It certainly creates a thorny maze for practitioners. The first question should be, what makes something legally invalid? We know it’s not a lack of evidence, but what

³³ *Id.* at *22.

³⁴ *Id.* at *22-23 (discussing *Castillo*, 444 S.W.3d 616, 621 (Tex. 2014).

³⁵ *Id.* at *23.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

suffices? It appears from cases that things like preemption, jurisdictional bars (like EEOC), and the like. But what about a claim barred by the statute of limitations? Especially where the jury has to find facts to make that determination? We don't know.

And how do we treat claims that are legally unsupported by evidence? Just because *Casteel* harm does not apply, does that change the practice? Should parties still ask for separate blanks, questions, submissions, etc.? Or, drawing from cases like *Benge* is the better practice to submit proposed instructions telling the jury to disregard the theory/allegation that the defendant contends is unsupported?

Part of the answer comes from how to preserve *Casteel* errors. So let's look at that first.

F. How do you preserve a *Casteel* (or now *Horton*) error?

The key to a proper *Casteel* error is preservation. From the beginning, the Supreme Court made clear that the error required specific preservation: "When a single broad-form liability question erroneously commingles valid and invalid liability theories *and the appellant's objection is timely and specific*, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding."³⁹

But "specific" leaves some room for interpretation. In the absence of any objection, though, courts will not engage in a *Casteel* analysis and will look only to

whether "one of the grounds submitted to the jury is a valid ground[.]"⁴⁰

But what constitutes "specific" depends somewhat on the case. In *Casteel*, for example, the Supreme Court held that the defendant did not waive error by failing to object to each subsection of the instructions it claimed covered an invalid claim. Instead, the court held that the defendant properly 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."⁴¹

Then in *Harris County*, the court made a more direct statement on what preservation required: "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."⁴²

In *Romero*, the court was faced with a unique situation. The defendant objected to the submission of the malicious credentialing question. But the trial court offered—and the defendant rejected—two separate proportionate responsibility questions. The plaintiffs pointed to this to argue that the defendant waived error, but the Supreme Court disagreed, holding that it properly objected both to the liability question and predicating proportionate responsibility on both theories: "We need not consider whether *Columbia* was required to object not only to the lack of evidence for the malicious credentialing claim but also to the form of the

³⁹ *Casteel*, 22 S.W.3d at 389 (emphasis added); see also *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 229, n.17 (Tex. 2019) (holding that broad-form damage question might present *Casteel* error but that no party complained).

⁴⁰ *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003).

⁴¹ *Id.* at 387-88.

⁴² *Harris County*, 96 S.W.3d at 236.

apportionment question that included the claim because it did both.”⁴³

The court did reject, however, the argument that the defendant effectively waived error by refusing two questions: “But the Romeros’ argument simply ignores the fact that Columbia’s objection to the malicious credentialing question was correct, and had the trial court sustained it, there would have been no problem with the apportionment question.”⁴⁴

In *Thota*, the Supreme Court again rejected arguments about an enhanced preservation requirement. The court rejected any suggestion that a party must specifically reference *Casteel* and held that “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.”⁴⁵

In *Morrison*, the Supreme Court reaffirmed that “*Casteel* error may be preserved without

specifically mentioning *Casteel*.”⁴⁶ The defendant there objected to a charge that allowed liability for “adverse personnel actions” without specifying the specific grounds. The court rejected a requirement that the defendant provide a specific requested question to preserve error, holding that the trial court was on notice of the overbroad nature of the submission.

In *Burbage v. Burbage*, the trial court submitted ten separate questions—one for each allegedly defamatory statement by the defendant.⁴⁷ It then submitted broad-form damage questions based upon the answers. If any statement was an invalid basis, then it created *Casteel* error as to the damages. But the court did not reach the issue because it held that the defendant failed to preserve error.

First, the court noted that *some* charge objection is necessary to raise *Casteel*, preventing an ambush by post-trial motion: “If we allowed litigants to raise a *Casteel* issue with no valid objection, either to liability or submission form, those litigants could use a post-trial motion to raise a lack of evidence on the liability question, thus bypassing the crucial step of allowing the trial judge to correct any errors in the charge.”⁴⁸ There, the defendant objected to questions that implicated a qualified privilege, but did not raise any objection to their submission. The court held that this was fatal: “Chad’s objection to qualified privilege, in order to preserve error, needed to distinctly raise the issue of withdrawing Questions 5 through 10 from the jury. By its

⁴³ *Romero*, 166 S.W.3d at 229.

⁴⁴ *Id.*

⁴⁵ *Thota*, 366 S.W.3d at 691.

⁴⁶ *Morrison*, 381 S.W.3d at 536.

⁴⁷ 447 S.W.3d 249, 253 (Tex. 2014)

⁴⁸ *Id.* at 256.

language, it does not do this.”⁴⁹ The court held that this waived his right to appeal.

What should he have done? At least, there should have been an objection to the submission of the disputed questions for something like no evidence, conclusively established truth/privilege, or the like. Even better, an additional objection to the broad-form damage question based upon the improperly submitted questions.

In *Emerson Electric v. Johnson*, the Supreme Court held that a party failed to preserve a *Casteel* challenge to a proportionate responsibility question based on two theories.⁵⁰ There, the plaintiff obtained a verdict on both design and marketing defect claims. Ultimately, the Supreme Court affirmed, holding that sufficient evidence supported the design-defect claim. Because it found the design-defect claim sufficient, it declined to review the legal sufficiency of the marketing-defect claim because it afforded the same relief.

In its reply brief, Emerson claimed error under *Romero* for including a proportionate responsibility question predicated on both theories. The Supreme Court held that this error was not preserved because Emerson objected to the proposed charge with two questions and requested that they be combined. Further it did not make the trial court aware of any *Casteel* error.

The court appeared to impliedly answer the question left open in *Romero*—that a defendant must object to both the lack of evidence supporting a claim and an apportionment question predicated on more than one ground of recovery.

Of course, this now remains in doubt after *Horton*. If a lack of evidence for a claim no longer suffices to invoke *Casteel*, what is necessary to preserve error?

Here’s some potential best practices to try to preserve error under both *Casteel* and *Horton*, particularly if it’s not clear whether the defect is legal or evidentiary validity:

- Object to legal insufficiency of whatever ground you challenge—a theory, claim, allegation, etc. Also object to the specific grounds for legal invalidity or at least make the court aware that you believe, in addition to no evidence, that there is a legal impediment to submission.
- Ask the trial court to separate them out or include separate blanks. Provide a draft question if necessary, while making clear you don’t agree to the submission of the underlying claim, only the form.
- Provide a draft instruction telling the jury specifically not to consider the theory, claim, allegation you believe unsupported by evidence.
- Make a record, in the trial court, of why you think the jury will necessarily consider the improper ground in the absence of an instruction or split out blanks (e.g. list some of the witnesses/testimony, how much the attorney referred to the theory in opening, arguments, examinations).
- Point out to the trial court any instructions that would require the jury to make a finding based on

⁴⁹ *Id.* at 258.

⁵⁰ 627 S.W.3d 197, 210 (Tex. 2021).

invalid theories, elements,
allegations.

Just because *Casteel* harm does not necessarily apply to legal insufficiency does not mean that errors in their combined submission won't cause harm. So track those issues during the trial to have a list of how much they came in. This will help in making the record. Consider including it in the directed verdict. Also consider addressing it in motion for new trial under both *Casteel* and traditional harm.