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JURY CHARGE PERILS AND DILEMMAS

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I. THE FUTURE OF BROAD-FORM SUBMISSION AFTER *HARRIS COUNTY V. SMITH*

The mandate, if you will, since *Lemos v. Montez,* 680 S.W.2d 798 (Tex.1984), has been broad-form submission. The caveat, "whenever feasible" (*see* Tex. R. Civ. P. 277), has been construed to mean that in even very complex cases, there is usually a feasible way to submit broadly. After *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), and *Harris County v. Smith,* 96 S.W.3d 230 (Tex. 2002), are those days over?

A. Perils and Dilemmas in *Casteel*

In *Casteel*, the Supreme Court notes that three courts of appeals had held "that the submission of an invalid theory of liability in a single broad-form question is harmless if any evidence supports a finding of liability on a valid theory." *Casteel*, 22 S.W.3d at 388. But the court held that this type of error is not harmless as "[i]t is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law." *Id.*

The problem in *Casteel* was that "the jury was confronted with four liability theories [of the thirteen theories contained within the single liability question] available only to consumers, but was given no indication that Casteel was required to be a consumer to succeed under any of them. Given these facts, it is possible that the jury based Crown's liability solely on one or more of these erroneously submitted theories. At any rate, it is impossible for us to conclude that the jury's answer was not based on one of the improperly submitted theories." *Id.* at 389.

Here it is critical to note that there is no way the jury could know which theories were valid and which were invalid. There was no presumption that could be entertained that the jury in following the instructions and evidence was basing its verdict on a valid theory of liability.

Casteel and *Harris County* are often lumped together as standing for related propositions, as if *Harris County* somehow is a natural, an almost logically necessary, result from the principle stated in *Casteel*. There is a qualitative difference, however, between broadly combining valid and invalid theories in a single question and broadly combining theories, some of which are supported by evidence and some of which are not, in a single question.

B. Perils and Dilemmas in *Harris County*

In *Harris County v. Smith,* 96 S.W.3d 230 (Tex. 2002), the court held that the trial court committed harmful error by submitting a broad-form question on damages that included an element that did not have any evidentiary support. In Chief Justice Phillips' majority opinion it matters not whether the trial court error is in the submission of an invalid liability theory [*Casteel*] or, here, an unsupported element of damage. In both cases, the appellant, because all theories of liability/elements of damage are submitted within a single question, is prevented from demonstrating the consequences of the error on appeal. This is true. But hold on. Isn't there a difference between invalid theories and valid theories without evidentiary support? The dissent thought there was:

> The distinction between a broad-form submission that is unsupported by the substantive law, as presented in *Casteel*, and one that presents an element or theory that lacks evidentiary support, as presented in this case, has been recognized by the United States Supreme Court, by legal commentators, and by our own rules of civil procedure. In *Griffin v. United States*, 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), the Court observed:
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> Jurors are not generally equipped to determine whether a particular theory. . . submitted to them is contrary to law. [. . .] When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.
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> Although *Griffin* was a criminal case, I see no logical reason why this underlying premise should not apply in the civil context. Neither do legal commentators, who have recognized a logical distinction between technical legal deficiency, which is beyond the jury's realm of competence to recognize or correct, and evidentiary deficiency, which is uniquely within a jury's province:
>
> [i]t is ordinarily reasonable to presume that the jury reached its decision by considering the damage elements having support in the evidence.… In other words, even if there is no evidence or insufficient evidence of some element or elements of damages pleaded, there is a principled and sensible basis for concluding that there is no reversible error if the overall damage award is not excessive. Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L.REV. 601, 630 (1992).

Harris County, dissent at 238-39.

Broad-form submission, by definition, prevents the appellant from demonstrating the consequences of an error that is contained within a single question. Broad-form submission works under the assumption that the jury is capable of making the type of evidentiary judgments identified by the dissent in *Harris County*. When you reject that assumption, you reject broad-form submission.

In a car wreck case we really do not know whether the jury thought a party's negligence was based on speed, brakes, or lookout. After *Lemos* and before *Harris County*, we didn't care. We assumed that the jury followed the evidence and as long as speed, brakes, and lookout were all valid theories of liability, that was enough. After *Harris County*, can we still say this?

C. The Courts of Appeals Split Post-*Harris County* (Two Roads Diverge*)*

Post-*Harris County*, the Fort Worth Court of Appeals was faced with alleged charge error in a medical malpractice case. Appellants complained that "[e]ven if the record contains sufficient

evidence on one theory of negligence asserted by Plaintiff, … the record contains no evidence to support submission to the jury of any of the Plaintiff's other four theories of negligence. Thus, the trial court's refusal to submit limiting instructions…. which would have restricted the jury's consideration to only those negligence theories potentially supported by some conflicting evidence, constituted harmful error requiring reversal under" *Casteel* and *Harris County*. *Columbia Medical Center of Las Colinas v. Bush*, 122 S.W.3d 835, 857, n.8 (Tex. App.--Fort Worth 2003, pet. denied).

The Fort Worth Court held that separate negligent acts are not separate theories of liability. Only one theory of liability was pleaded: negligence. The "broad-form negligence special question submitted in this case simply does not present *Casteel/Harris County* error." Id. at 858.

The San Antonio Court of Appeals in *Laredo Medical Group Corp. v. Mireles*, 155 S.W.3d 417 (Tex. App. – San Antonio 2004, pet. denied), was faced with the broad submission of a *Sabine Pilot* (*Sabine Pilot Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985)) wrongful discharge case. The court found that of the four theories of liability subsumed within the broad-form question, three were not supported by legally sufficient evidence. The broad-form question precluded, of course, appellate review to determine whether the jury's affirmative answer was based on the theory with sufficient evidentiary support or one or more of the unsupported theories. Now, one could assume the jury did its job and based its decision on the evidence. The problem is that a broad-form question precludes us *knowing* which it was. Must we know? The Fort Worth court thought not. The San Antonio court, however, held that "the same policy concerns underlying *Casteel* and *Harris* apply here."

But isn't a *Sabine Pilot* case different from a straightforward negligence case? The San Antonio Court did not think so:

> We recognize that the Fort Worth Court of Appeals in *Columbia Medical Center v. Bush*, 122 S.W.3d 835, 858 (Tex. App--Fort Worth 2003, pet. denied), has reached the opposite result. In *Bush*, the court of appeals held that *Casteel* did not apply because the plaintiff submitted only one theory of liability, negligence. *Id. Bush*, however, is not binding precedent, and we are not required to follow it. Here, Mireles alleged one cause of action, a *Sabine Pilot* claim. However, three of her theories of liability were based on LMG's accounting practices. One was based on perjury. These allegations were completely distinct and based on completely different evidence. We, therefore, cannot hold that the submission of Question 1 was harmless."

Mireles at 427.

D. *Harris County*, Not House Bill 4, Explains The Unanimity Requirement For Negligence

Subsequent to the passage of the tort reform bill, House Bill 4, the Supreme Court substantially revised the standard jury instructions under Texas Rule of Civil Procedure 226a in response to

House Bill 4's requirement for unanimity on an exemplary damages verdict. The order requires that in a case where exemplary damages are sought, the jury must unanimously find liability on at least one claim for actual damages that will support an award of exemplary damages.

The order also required, per HB 4, that the jury's answers to both the exemplary liability question (e.g. gross negligence) as well as the exemplary damages question be unanimous. Many practitioners were confused when the Supreme Court also required unanimity to the underlying liability question (e.g. negligence) as that requirement is not found in HB 4. It was the logic of *Harris County* which required it.

Prior to HB 4, a 10-2 verdict would however, support an award of exemplary damages. HB 4's unanimity requirement for exemplary liability and damages raises the possibility that the jury could find negligence, for example, by a 10-2 vote and then gross negligence by a 12-0 vote. That finding, it was thought, would defy logic and common sense. But in a traditionally submitted case, all we know when we have a 10-2 verdict is that the same 10 jurors agreed to all the answers. A 10-2 verdict in that instance does not mean, however, that the jury did not answer one or more questions by 11-1 or unanimously, 12-0.

Rather than require unanimity on the negligence question, the Supreme Court could have assumed that the jury in doing their duty would follow basic logic and common sense. If the jury's unanimous exemplary verdict was predicated on a 10-2 actual damages verdict, one could assume that the jury had found negligence 12-0 (unanimously), but had answered one or more other questions (e.g. damages) 10-2. In that case, the certificate would be signed by only 10 jurors even though 12 were in agreement on negligence.

The problem is, however, that we don't *know* the jury answered the negligence question unanimously. We have to assume that the jury would act logically and use common sense. These are the assumptions the dissent makes in *Harris County*. The dissent assumes that the jury is capable of differentiating between theories supported by evidence and theories without such support. The *Harris County* majority *requires* that we know. The assumptions the dissent makes about our juries and the jury system are rejected. This rejection means that we have to *know* that the jury answered the negligence question unanimously.

E. Perils and Dilemmas Exacerbated: *Romero*

In *Romero v. KPH Consol, Inc.*, 166 S.W.3d 212 (Tex. 2005), the Supreme Court held it was reversible error to allow the jury, in apportioning responsibility for the plaintiff's injuries among a hospital, two physicians and a nurse, to consider the hospital's alleged malicious credentialing, of which the court concluded there was no evidence, along with the hospital's negligence, which had evidentiary support.

Question No. 1 submitted negligence. Question No. 2 submitted malicious credentialing; then Question No. 3 was broadly submitted as follows:

> What percentage of the conduct that caused the occurrence or injury do you find to be attributable to each of those found by you, in your answer to Question No. 1 and/or 2 to have caused the occurrence or injury?

The jury attributed 40% of the conduct to the hospital. The Romeros sought to avoid reversal by urging that because "there is evidence entirely apart from the malicious credentialing claim to support the jury's finding that Columbia [the hospital] was 40% at fault,…. any error in submitting the apportionment question cannot be said to have probably resulted in an improper judgment." *Romero,* at 226.

Justice Hecht, writing the opinion of the court, states that this was precisely the argument rejected in *Casteel* and *Harris County*.

> While the jury might well be misled by legally erroneous instructions or questions, since they are not expected to know the law and are instead obliged to follow the law given them in the charge, they are certainly expected to know and weigh the evidence and – the argument goes --are therefore not likely to be influenced in making their findings by being allowed to consider factors without evidentiary support. We specifically rejected this argument [in *Harris County*], and this case illustrates why. Having found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility. While in other instances a jury may simply ignore a factor in the charge that lacks evidentiary support, there are other instances -- and this case is one – where the jury is as misled by the inclusion of a claim without evidentiary support as by a legally erroneous instruction.

Romero, at 227.

The *Romero* Court, and the majority in *Harris County*, reassures us that it is not holding that the error of including a factually unsupported claim in a broad-form jury question is always reversible. *Romero,* like the majority in *Harris County*, further reassures us that its opinion is not a retreat from the broad-form mandate of Rule 277. But, in citing several federal appellate decisions, *Romero* makes clear that "unless the appellate court is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error is reversible." *Romero,* at 227-28.

F. Peril and Dilemma: The *Romero* Choice As A Hobson's Choice

It is helpful, at this point, to recall the words of Chief Justice Pope in his opinion in *Lemos v. Montez,* at 801 (Tex. 1984):

> We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. *Judicial history teaches that broad issues and accepted definitions suffice and that a workable*

> *jury system demands strict adherence to simplicity in jury charges*. [emphasis supplied].

We should compare these words from Chief Justice Pope with the words from *Romero* that may forever after be referred to as "*A Romero Choice*:"

> 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. The Romeros' argument assumes that it is so commonplace to come to the end of a jury trial and have no idea what claims are still legally and factually valid that the only safe course to avoid retrial is to parse out every issue in a separate jury question. Nothing in our review of thousands of verdicts rendered by juries across the State suggests that there is any validity to the assumption.

Romero, at 230.

That, of course, is a retrospective observation (i.e., *looking back* and analyzing thousands of cases *via* appellate review). *Looking forward to* the appeal of one's case prospectively (i.e., at the charge conference), determining which claims are factually valid is much more daunting, ambiguous and rarely as obvious. Certainly the highly respected trial judge who submitted the questions in *Romero* considered each question to have sufficient legal and factual support to justify its submission.

Looked at from this perspective (the only perspective that counts: the individual case now at the stage of the charge conference) the choice presented recalls the legendary Tobias Hobson (1554-1631), the Cambridge carrier who gave his customers a choice between the next horse or none at all. A Hobson's choice comes down to us through history as the option of taking what is offered or nothing; in other words, no choice.
Parsing out into separate questions every objected to issue about which one is at all insecure is the only safe thing to do. It is the advice many appellate specialists are giving their trial lawyers. Is it unfair to ask whether there is any real difference between a *Romero* Choice and a Hobson's Choice?

In refusing to insert a bright line between *Casteel* and *Harris County*, the Texas Supreme Court is telling us that the policy of requiring knowledge of a jury's thought processes, theory by theory, claim by claim, and element by element, is more important than the policy expressed by broad-form submission as described by Chief Justice Pope in *Lemos v. Montez*. I believe these two polices are distinct and irreconcilable, notwithstanding the reassurances found in *Romero* and in *Harris County* at 235-236.

II. THE PENULTIMATE PERIL AND DILEMMA: THE INFERENTIAL REBUTTAL

A. The Nature of the Inferential Rebuttal

In his 1959 book, Professor Gus M. Hodges described the nature of the inferential rebuttal:

> A party is entitled to submission of issues relating to facts which, if established, would disprove the existence of some essential elements of the opponent's cause of action or affirmative defense, if such are raised by the pleading and evidence. That is, in addition to submission of issues on the factual elements of plaintiff's cause of action and defendant's grounds of defense in the nature of confession and avoidance, the charge must include issues relating to facts which would establish the non-existence of some element of either. These issues are denial issues, in the sense, that they disprove some element of the opponent's case or defense. They are argumentative denials, or as generally termed, inferential rebuttals, rather than direct negatives. This is because they disprove by establishing the truth of a positive factual theory which is inconsistent with the existence of some factual element of the ground of recovery or defense relied upon by the opponent, and are therefore to be distinguished from a flat denial, a mere "no."
>
> They are "evidentiary issues" in the sense that they present evidence tending to show that some other issue should be answered in the negative. They are evidentiary issues also in the sense that a favorable answer on such an issue – an inferential rebuttal – cannot alone support a judgment; a negative answer to the opponent's direct issue submitting an element of his ground of recovery or defense is also necessary. Hodges, *Special Issue Submission in Texas*, § 15 (1959).

B. *Dillard*: The Contemporary View Of The Inferential Rebuttal

In *Dillard v. Texas Elec. Coop*., 157 S.W.3d 429 (Tex. 2005), the Supreme Court was called upon to decide whether the trial court abused its discretion in refusing to submit one of two different instructions on the defendants' inferential rebuttal defenses. This was an auto accident case in which the defendants claim that the cause of the accident was the presence of cattle on the roadway or the conduct of the owner of the cattle in allowing the cattle to be on the roadway.

At the charge conference, the defendants requested two inferential rebuttal instructions, one on unavoidable accident and the other on sole proximate cause. The trial court refused to give a sole proximate cause instruction, but gave the defendants an instruction on unavoidable accident. The court of appeals reversed and remanded the case concluding that the jury needed more than one inferential rebuttal instruction for a full consideration of the case.

Justice O'Neil, writing for the court, recognized that the purpose of inferential rebuttal instructions "is to advise the jurors, in the appropriate case, 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. *Reinhart v. Young*, 906 S.W.2d 471,472 (Tex. 1995)." *Dillard* at 432.

In *Dillard*, the Supreme Court re-affirms its belief that inferential rebuttal instructions serve a legitimate purpose, although the court acknowledges that in *Reinhart* both Justice Enoch concurring and Justice Hightower dissenting were of the opinion that the unavoidable accident instruction should be discarded.

The court also continues to be of the opinion that the form of the broad form question inquiring as to whether "the negligence, if any" of particular persons proximate caused an occurrence, potentially implies that the occurrence *was* caused by someone's *negligence*. *Dillard* at 433.

To me, a literal reading of the broad form question implies the opposite; "if any" means just that: there may be no negligence on the part of anyone. Further, this broad form language must be read with the additional instruction the jury receives on how to answer "yes" or "no." A preponderance of the evidence must be shown for a jury to answer "yes." If a party claiming that its opponent is negligent fails to carry her burden, then the jury is to answer "no." There seems to be nothing in these instructions that potentially implies someone should be negligent. If anything, a literal reading of the instructions shows that the default position is "no;" certainly not a potentially implied "yes."

Further, the court's use of certain language is curious. For instance, the court says that "*[u]nder the unavoidable-accident instruction that the trial court submitted*, TEC was free to argue to the jury that no one's conduct -- including Brown's -- caused the accident…" *Dillard*, at 433. (emphasis supplied). But it is the *evidence*, not the *instruction* that provides the basis for one arguing that no one's conduct caused the accident. One does not need the instruction in order to argue the evidence. The sole value of the instruction is as a comment on the weight of the evidence. Inferential rebuttals are the defendant's reasons why the plaintiff's question should be answered "no", but are presented as the words of the judge (the court's charge). "See, ladies and gentlemen of the jury," the argument goes, "not just me, but the court itself is telling you the reasons why you should answer no." A court should never put itself in a position where the lawyers can claim that the court has taken a side in the dispute.

The *Dillard* opinion recognizes such harm, citing us to "*Schuhmacher Co. v. Holcomb*, 142 Tex. 332 177 S.W.2d 951, 953 (1944) (holding defendant was entitled to both unavoidable-accident and sole-proximate-cause instructions, despite objection that this allowed defendant to 'slice two defenses from precisely the same facts).' For example, an occurrence caused by severe weather could justify either an unavoidable-accident or an act-of-God construction." *Dillard* at 434.

The Supreme Court seems to want to have it both ways: inferential rebuttal instructions serve a legitimate purpose yet we must be very careful when giving them because "giving multiple instructions on every possible rebuttal inference has the potential to skew the jury's analysis in the other direction." *Dillard* at 433.

I submit that the risk of the potential to skew the jury's analysis exists precisely because these instructions are comments on the weight of the evidence. There is no grammatical or other reason to give them and there are recognized harmful effects (this skewing of the jury's analysis) when giving them.

In any event, in *Dillard* the court held that the charge adequately informed the jury about the defendants' inferential rebuttal defenses and that it was error for the court of appeals to hold that the case should be retried "under a more elaborate and granulated charge." *Dillard*, at 434.

C. The Inferential Rebuttal has been a (Tolerated) Comment on the Weight of the Evidence Since the Beginning

The objection that inferential rebuttal instructions or issues are comments on the weight of the evidence is not a new one. In 1929, not long after Texas procedure began special issue practice, a *Texas Law Review* article questioned whether it was proper to submit to the jury a rebuttal theory:

> The only reason that has been given for the practice of submitting such a (rebuttal) theory to the jury is that attention may be called specifically to the facts … A charge of the court embracing the ultimate facts raised by the pleading requires the jury to consider all facts developed in evidence, but the submission of mere rebuttal theories places before the jury for special consideration what is really evidence. It is difficult to see how rebuttal defenses come to be viewed as real issues in the case; they are only for the jury to consider in determining whether the plaintiff has proved his allegations…. The rule is the ultimate facts must be submitted, not the evidentiary facts. Evidence offered merely to refute and deny plaintiff's allegation of facts constituting his cause of action should not be considered as ultimate facts raised by the pleadings. 8 *Texas Law Review*, 294-96 (1929).

In a *Texas Law Review* article from 1931, the concept of submitting rebuttal theories was again criticized as being an impermissible comment on the weight of the evidence:

> There is authority for the proposition that matters in rebuttal are not raised by the pleadings as issues, but are presented by the evidence only, are merely evidentiary facts going to prove or disprove the plaintiff's case and are not to be specially submitted. The submission of unavoidable accident may be criticized on the grounds that it is in contravention of the statute prohibiting a comment on the weight of the evidence by the trial judge. 10 *Texas Law Review*, 217, 219 (1931).

Indeed, Professor Hodges recognized the compelling nature of these criticisms: "It has been suggested that such issues amount to a comment on the weight of the evidence in that they single out particular portions of the evidence which are favorable to one side in the case and bring it to the attention of the jury. Notwithstanding the logical force of these contentions, it is quite clear that, under appropriate circumstances, they are to be submitted. Hodges, *Special Issue Submission in Texas*, § 15 (1959).

D. *Should* it be Tolerated?

The purpose justifying inferential rebuttal instructions is to bring to the jurors' attention the possibility that accidents can be caused by things other than the conduct of the parties to the suit (unavoidable accident), can be solely caused by persons not parties to the suit (sole proximate cause), can be caused by unforeseen events which do not occur in a natural and continuous sequence (new and independent cause), by some natural disaster (act of God), or by some sudden, unexpected, and unforeseeable event (emergency). Their function is to apprise the jury that it does not have to find one or the other of the parties to the suit responsible for the occurrence in question.

Current broad-form submission practice, however, already instructs the jury in this manner. For instance: "Answer 'Yes' or 'No' to all questions unless otherwise instructed. A 'Yes' answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a 'Yes' answer, then answer 'No.'"

Whatever merit once existed for the submission of inferential rebuttal instructions, there would not appear to be any basis for submitting these inferential rebuttal theories under the current practice. Inferential rebuttal theories have always been evidentiary facts tending to rebut the plaintiff's theory of recovery. Inferential rebuttal evidence is presented and subsequently argued by counsel to the jury. The court's charge should not contain what is, in effect, counsel's jury argument on why the jurors should answer "no" to the particular question. An inferential rebuttal instruction directs the jury's focus to one particular aspect of the case, and thus (in my view at least), represents an impermissible comment on the weight of the evidence.

III. THE ULTIMATE PERIL AND DILEMMA: THE INFERENTIAL REBUTTAL MEETS *HARRIS COUNTY (BED, BATH & BEYOND, INC. V. URISTA)*

I had hoped that the Supreme Court would release its opinion in No. 04-0332, *Bed, Bath & Beyond, Inc. v. Urista*, prior to the due date of this paper. A much better discussion of the issues awaits the opinion's release. In the interim, however, we can analyze some of the problems posed by this case.

Mr. Urista was allegedly injured when plastic trash cans fell from a store shelf while he was shopping at Bed, Bath & Beyond. At the trial, the judge, over Urista's objection, submitted the inferential rebuttal instruction on unavoidable accident (i.e., an occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it). Urista claimed there was no evidence to show that the trash cans fell because of a nonhuman condition.

The court of appeals in holding that the charge error was harmful and reversible stated:

> Here, as in *Casteel*, the single broad-form liability question erroneously commingled a valid negligence theory with an erroneous inferential rebuttal instruction that injected an invalid theory of "unavoidable accident." Although Urista objected timely and specifically, the trial court overruled his objection. As

> in *Casteel*, although we have concluded it likely, on reviewing the record, that the erroneous instruction formed the sole basis for the jury's finding that BBB was not negligent, we cannot determine this conclusively. Therefore, the trial court's error in including the instruction probably was reversible error that prevented Urista from presenting his case to this Court, and remand for a new trial is proper.

Urista v. Bed, Bath & Beyond, Inc. 132 S.W.3d 517, 523 (Tex. App.—Houston [1st Dist.] 2004, pet. granted), citing to *Casteel* and Tex. R. App. P. 44.1(a)(2).

The dissent agreed that it was error to submit the instruction but faulted the majority for reversing. The dissenting justice, in applying the harmless error rule, would have held that Urista did not demonstrate that he had suffered harm from the improper submission. The dissent disagreed with the majority that the evidence was sharply conflicting. The dissent also disagreed that *Casteel* was applicable as its holding has never been extended to instructions on defensive theories and further "such an extension is logically precluded because inferential rebuttal issues may not be submitted to the jury." *Urista*, at 524-26.

The issues raised in the majority and dissenting opinions are the issues brought forward by the parties in both their briefing and in oral argument before the Supreme Court, to-wit: what is the quantum of conflicting evidence required by *Reinhart v. Young*, 906 S.W. 2d 471 (Tex. 1995); is the harmless error analysis traditionally applied to assess error in submitted jury instructions now supplanted by the presumed error rule of *Casteel?*

Two roads diverged at *Harris County* and the question now is to what extent will the road taken there continue to complicate, confuse and confound the ability of practitioners to submit an error-free charge. Whatever faults there were to our broad-form submission practice, it is a fair question to ask, in the aftermath of *Harris County*, whether the cure is worse than the disease.

In oral argument in *Urista*, one of the Court members asked whether petitioner would have the same complaint if the rebuttal had been submitted as a question rather than as an instruction. It would be, quite frankly, amazing if we are now required to return to a practice abandoned several decades ago and submit inferential rebuttals as questions in order to maintain some kind of consistency and coherence with our allegiance to *Harris County*.

The bottom line for BBB at oral argument was its request that the Court apply harmless error analysis to find harmless any error in the submission of the instruction. It would certainly be a disappointment—intellectually speaking—if we wind up with an opinion that can be read as holding that there are two rules that govern submission in this area: the presumed error rule for plaintiffs and a robust harmless error analysis for defendants.

For those of us, who, like Chief Justice Pope, still believe that when all is said and done a workable jury system demands strict adherence to simplicity in jury charges, we can only hope that this Court recognizes the Chief Justice's wisdom before we get any further down the *Harris County* road. As Robert Frost instructed, the roads taken and not taken make all the difference.

There is no getting around the fact that simplicity in jury charges invariably assumes a certain level of confidence in our citizens that they, for the most part, get it right when they sit as jurors. At its most fundamental level, this assumption is grounded in the belief that we are fit to self-govern. Fundamentally, it is a belief in the validity and superiority of a democratic form of government.