# Crown Life Ins. Co. v. Casteel -- *Return of the Prodigal Son*

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## 1. Introduction

Introducing his 1952 article on the harmless error doctrine, Justice Calvert observed that Texas appellate courts have a track record of circumventing rules designed to prevent reversals based on technicalities. Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1, 1 (1952). He proceeded to endorse the efforts underway at that time to abolish the last vestiges of the doctrine of presumed harm, adopted by the Texas Supreme Court in 1864. Guardedly, Justice Calvert concluded that the supreme court seemed to be developing – slowly but surely – a policy of refusing to reverse judgments except where an error "contributed in a substantial way to bring about an unjust result." *Id.* at 17-18.

Justice Calvert's qualified optimism was fitting. Almost 30 years later, Justice Pope was still cautioning that "judicial expectations for perfect trials find presumed harm continually contending for a revival." *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). Proving him right, the supreme court this year stepped back into the quicksand of presumed harm in *Crown Life Ins. Co. v. Casteel*, 43 Tex. Sup. Ct. J. 348 (January 29, 2000). This article will explore whether *Casteel* represents an ill-advised revival of the presumed harm doctrine or a justifiable narrowing of the harmless error rule.

## 2. *Crown Life Ins. Co. v. Casteel*

In *Casteel*, the trial court submitted a single broad-form question on the issue of the defendant's liability. The question instructed the jury on 13 independent grounds of recovery. Four of the 13 grounds should not have been submitted because the plaintiff lacked standing to assert those claims. Nevertheless, the court of appeals held that the error was harmless because the defendant did not "affirmatively demonstrate that the error probably caused rendition of an improper judgment." *Casteel v. Crown Life Ins. Co.*, 3 S.W.2d 582, 593-95 (Tex. App.–Austin 1999).

The supreme court, however, disagreed because it was *possible* the jury based the defendant's liability on one of the erroneously-submitted theories of recovery. 43 Tex. Sup. Ct. J. at 354. The court deemed the error harmful because a reviewing court is "often unable to determine the effect of this error." *Id.* As authority, the court cited Rule of Appellate Procedure 61, which embodies the harmless error rule:

> **61.1 Standard for Reversible Error.** No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of:
>
> (a) probably caused the rendition of an improper judgment; or
>
> (b) probably prevented the petitioner from properly presenting the case to the appellate courts.

TEX. R. APP. P. 61.1; *see also* TEX. R. APP. P. 44.1. Referencing subsection (b), the Court declared, "it is impossible for us to conclude that the jury's answer was not based on one or more of the improperly submitted theories." 43 Tex. Sup. Ct. J. at 354.

For additional support, the court looked to a 1923 decision in which it confronted a similar situation. *See Lancaster v. Fitch*, 246 S.W. 1015 (Tex. 1923). In *Lancaster*, the trial court submitted a general negligence question with instructions regarding three distinct theories of liability, one of which should not have been submitted. *Id.* at 1015-16. Citing Rule

62a, an early version of the harmless error rule promulgated by the Texas Supreme Court in 1912, the court of appeals found the error harmless because the jury could have based its verdict on either of the properly submitted theories. *Id.* at 1016. The supreme court, however, reversed because the jury might have found for the plaintiff on the theory of liability that was improperly submitted. *Id.*

Embracing *Lancaster* like a long-lost friend, the *Casteel* court declared that erroneously commingling valid and invalid theories of recovery in a single question must be deemed harmful error because "it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." 43 Tex. Sup. Ct. J. at 355. The court did, however, leave room for an exception in cases where there is an independent basis for affirming the judgment. *Id.*

**3. Redefining "probably prevented"**

The stated basis for the ruling in *Casteel* was not the more familiar reversible error standard of "probably caused rendition of an improper judgment." Instead, the court relied on the provision in Rule 61.1 requiring reversal when an error "probably prevented the appellant from properly presenting the case to the appellate courts." TEX. R. APP. P. 61.1(b); *see also* TEX. R. APP. P. 44.1(b). In doing so, the court made an innovative – if not unprecedented – use of that component of the rule.

"The purpose of the second prong of the [reversible error rule] is to provide a new trial when a party, due to no fault of its own, is unable to develop the record below, resulting in the appellate court's inability to consider the appellant's arguments." *Hooper v. Sanford*, 968 S.W.2d 392, 394 (Tex. App.–Tyler 1997, no pet.). Thus, courts have traditionally limited the "probably prevented" prong of the reversible error standard to situations where, for example, the trial court refused to make findings of fact or prevented a party from making a bill of exceptions. *See Hogan v. Credit Motors, Inc.* 827 S.W.2d 392, 396 (Tex. App.–San Antonio 1992), *writ denied per curiam*, 841 S.W.2d 360 (Tex. 1992); *Prudential Securities, Inc. v. Shoemaker*, 981 S.W.2d 791, 794-95 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *see also Rogers v. Rogers*, 561 S.W.2d 172, 173-74 (Tex.1978) (appellant unable to obtain a statement of facts); *Mountain Corp. v. Rose*, 737 S.W.2d 22, 24-25 (Tex. App.–El Paso 1987, writ denied) (no record made of default proceedings). The rule has also been applied when a trial court refuses to state the particulars of good cause for imposition of a sanction. *See Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 710 (Tex. App.–Houston [1st Dist.] 1998, no pet.).

The *Casteel* court may have felt compelled to rely on the "probably prevented" provision in Rule 61.1 because – at least from a strict mathematical perspective – the trial court's error could not be said to have "probably caused rendition of an improper judgment." Remember that only 4 of the 13 grounds of recovery were improperly submitted. Thus, the possibility the jury found for the plaintiff on an improper ground was, at most, 31%. Yet, the requirement in subsection (a) of Rule 61.1 – that the error "probably" caused error – requires a greater than 50% chance. "Probably" means "in a probable manner." *See Aultman v. Dallas Railway & Terminal Co.*, 260 S.W.2d 596, 600 (Tex. 1953). "Probable" conveys a meaning of "more likely than not." *Fibreboard Corporation v. Pool*, 813 S.W.2d 658, 681 (Tex. App.–Texarkana 1991, writ denied).

In any event, *Casteel* appears to be the first use of the "probably prevented" portion of the rule in connection with an error in the charge. *Cf. Larson v. Ellison*, 217 S.W.2d 420, 421-22 (Tex. 1949) ("Nor is there anything in the record suggesting that [petitioner] was prevented by reason of this charge from fully presenting his case to the Court of Civil Appeals."). Which raises the question: was the court's inventive use of that provision appropriate?

**A. Textualism betrayed?**

Consider the *Casteel* court's justification for reversing the judgment: "it is impossible for us to conclude that the jury's answer was not based on one of the improperly submitted theories." 43 Tex. Sup. Ct. J. at 354. True, but does that really mean the error "probably prevented the appellant from properly

presenting the case to the appellate courts"? The answer – at least under the traditional application of the rule – is no.

The appellant, Crown Life, was fully capable of presenting the error to the court of appeals. Strictly speaking, nothing the trial court did prevented Crown Life from presenting its arguments to the appellate courts. For example, the trial court did not deny Crown Life the right to object to the charge. And both the court of appeals and the supreme court were able to determine the effect of the error – a verdict that might have been based on a legally invalid theory of recovery.

Nonetheless, the supreme court opted for an expansive interpretation of the "probably prevented" prong of the reversible error rule. Under *Casteel*, an appellant is prevented from properly presenting an error to the appellate courts when the *effect* of the error cannot be pinpointed or fully ascertained. Taken to its logical extreme, that reasoning would encompass a wide range of potential trial court errors.

### B. How slippery the slope?

Inevitably, the supreme court will be forced to define the outer boundaries of its reasoning in *Casteel*. Until it does so, however, an appellate court could reasonably rely on *Casteel* to order a new trial whenever it is impossible to pinpoint the actual effect of any error in the charge. For example, reversal is arguably proper under *Casteel* just about anytime a trial court submits an improper instruction in the charge – it is always impossible to fully ascertain what effect a particular instruction has on the jury. Indeed, one court appears to have taken a step in that direction. *See Kansas City Southern Railway Co. v. Stokes*, No. 06-99-00085-CV, 2000 WL 231943 (Tex. App.–Texarkana 2000, no pet. h.).

In *Stokes* – a FELA case – the trial court submitted an instruction advising the jury that the defendant had a duty to publish and enforce adequate operating and safety rules. *Id.* at *3. The court of appeals held the instruction was improper and, citing *Casteel*, declared: "Because of the way this charge was drafted, it is impossible for us to determine that the jury's answer was not based on this improperly submitted duty instruction." 2000 WL 231943 at *4. The court held that its inability to determine whether the jury's answer was based on the improper instruction required it to find that the instruction "was reasonably calculated to and probably did cause rendition of an improper judgment." *Id.* In other words, the *Stokes* court relied on *Casteel* but invoked the "probably caused rendition of an improper judgment" portion of the reversible error rule rather than the "probably prevented" prong.

### 4. Echoes of the past.

The similarities between *Casteel* and older decisions applying the presumed harm rule are striking. For example, in *Bailey v. Mills*, 27 Tex. 434 (1864), which dealt with an erroneous instruction in the charge, the court applied the presumed harm rule stating, "it is impossible to know what effect the instruction had. . . ." *Id.* at 438. Compare that statement with this language from *Casteel*: "it is impossible for us to conclude that the jury's answer was not based on one of the improperly submitted theories." 43 Tex. Sup. Ct. J. at 354.

Or consider this reasoning from *Texas Employers' Ins. Ass'n v. Frankum*, 220 S.W.2d 449 (Tex. 1949), where the supreme court applied the presumed harm rule to a charge error:[1] "the findings of the jury may have been based upon a ground not pleaded at all, or upon a ground that would not constitute good cause. There is no way of knowing what factors the jury took into consideration in answering the issue in the affirmative. . . ." Here is the *Casteel* court's equivalent observation: "it is possible that the jury based Crown's liability solely on one or more of these erroneously submitted theories." 43 Tex. Sup. Ct. J. at 354.

Perhaps even more remarkable, however, is *Casteel*'s reliance on *Lancaster v. Fitch*, 246 S.W. 1015 (Tex. 1923), which was decided before the court promulgated rules 434 and 503 (embodying the harmless error rule) and during the era when the court

[1] *See* Calvert, 31 TEX. L. REV. at 14.

was actively applying the presumed harm rule. In fact, Justice Calvert specifically identified *Lancaster* as a harbinger of the demise of Rule 62a, the supreme court's first attempt at implementing the harmless error approach. *See* Calvert, 31 TEX. L. REV. at 5.

In relying on *Lancaster*, the supreme court apparently forgot its earlier admonition that cases decided before adoption of rules 434 and 503 "have little value as precedents" because they were decided under the presumed harm doctrine. *See Aultman v. Dallas Ry. and Terminal Co.*, 260 S.W.2d 596, 600 (Tex. 1953) (involving improper jury argument). In any event, the conclusion is inescapable: the supreme court has revived the presumed harm rule under the "probably prevented" component of the reversible error rule.

**5. A justified retreat from an overly harsh rule, or a pandora's box?**

Certainly one could argue that an incremental movement of the pendulum back toward presumed harm is not such a bad idea. It is hard to argue with the *Casteel* court's observation that "it is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law." 43 Tex. Sup. Ct. J. at 354. And, at least in the abstract, there is something to be said for an analytical approach that prevents a defendant from being held liable when there is a distinct possibility the jury based its liability finding on an improper ground.

But by focusing exclusively on those concerns, the court begged the question. The tension between presumed harm and harmless error has always been one of competing ideals – errorless trials versus judicial economy and finality. And the decision was made, long ago, after a protracted struggle, that the balance should be struck in favor of the latter. *See* Calvert, 31 Tex. L. Rev. 1-18.

If the scales are now to be weighted more heavily in favor of fundamental fairness, then where should the line be drawn? Should *Casteel* be limited to charge errors identical to the one in that case, or should it be applied more broadly, as in *Stokes*? In a recent petition for review filed by one of the authors, it was argued that *Casteel* ought to apply to the reverse situation, where a trial court submits a jury question so *narrow* that it is an improper, old-style special issue. *See Byrne v. Harris Adacom Network Services, Inc.*, Cause No. 00-0162. The gist of the argument was that the error, found harmless by the court of appeals, should be deemed harmful because it was impossible to determine what effect the improperly restrictive wording had on the verdict.[2] The supreme court denied the petition.

Three other concerns. First, *Casteel* may cause trial judges to be gun-shy of broad form submission and thus erode the progress achieved in the prolonged struggle to implement true broad form submission. Second, *Casteel* is likely to promote a blurring of the distinction between the two components ("probably prevented" and "probably caused") of the reversible error rule, which is exactly what happened in *Stokes*. Finally, *Casteel's* revival of presumed harm may trigger unchecked growth of a doctrine once described as "paralyzing." *See* Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 147 (1926). Courts may begin to embrace the notion that a new trial is necessary whenever the *possibility* exists that *any* type of charge error affected the jury's verdict.

**6. Conclusion**

Two decades ago, Justice Pope observed that "[t]he harmless error rule is one that ebbs and flows" and that presumed harm has a habit of "creep[ing] back into the practice. . . ." *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). Appellants, slaughter the fatted calf. The prodigal son has returned.

[2] The trial court submitted fraud by asking whether the defendant made a promise using the exact words quoted in the jury question. Thus, the question prevented the jury from considering whether the defendant made a comparable statement as well as the defendant's nonverbal conduct and the surrounding circumstances.