IN THE SUPREME COURT OF TEXAS

NO. 04-0332

BED, BATH & BEYOND, INC.,
PETITIONER,

v.

RAFAEL URISTA,
RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued September 28, 2005

JUSTICE GREEN delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE HECHT and JUSTICE WILLETT joined.

JUSTICE MEDINA filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON joined.

In this case we decide whether an unavoidable accident instruction given to the jury caused reversible error and requires a new trial. We conclude that because the record does not support a finding that the trial court's submission of the instruction probably caused the rendition of an improper judgment, TEX. R. APP. P. 61.1(a), any error in including the instruction in the jury charge

was harmless. Accordingly, we reverse the court of appeals' judgment and remand the case to that court for consideration of the remaining issues.

I

While shopping at a Bed, Bath & Beyond, Inc. ("BBB") store, Rafael Urista claims he was hit on the head and knocked unconscious by plastic trash cans that fell from a twelve-foot-high shelf. According to Urista's wife, a BBB employee on a ladder in the adjacent aisle on the other side of the shelf was attempting to retrieve merchandise with a broom when the trash cans fell. Although the BBB employee was not called to testify at trial, Urista's wife stated that the employee came around the aisle and observed the scene before returning to assist his customer. After learning of the incident, the BBB store manager approached the Uristas and completed an accident report. At that time, Urista declined the manager's offer of assistance and did not report being knocked unconscious or that he had been injured. The Uristas resumed shopping before leaving the store.

Five weeks later, Urista sued BBB claiming that the trash can incident caused him severe back injuries. The BBB store manager conceded during his testimony at trial that the employee working on the other side of the shelf probably caused the trash cans to fall, but he believed the employee had been acting in a safe manner when the incident occurred.

Urista's testimony revealed that he had previously been treated for back pain due to prior work-related injuries. Urista's physician testified that although Urista's medical records initially showed a diagnosis of "work-related" injuries, he later, at the request of Urista's attorney, changed Urista's medical records to reflect that the injuries were caused by the BBB incident. At the close

of Urista's case, BBB moved for an instructed verdict, which was denied. BBB rested without calling any witnesses.

The trial court submitted the case to the jury in a broad-form charge. The liability question asked: "Did the negligence, if any, of Bed, Bath, and Beyond, Inc. proximately cause the occurrence in question?"[1] Over Urista's objection, the trial court also included two inferential rebuttal instructions in the charge, including this "unavoidable accident" instruction: "An occurrence may be an 'unavoidable accident,' that is, an event not proximately caused by the negligence of any party to it." In its brief, BBB conceded that this instruction should not have been submitted. In a ten-to-two verdict, the jury answered "NO" to the liability question and thus did not reach the conditionally submitted damages question.[2] In accordance with the verdict, the trial court rendered a take-nothing judgment in favor of BBB.

In a divided opinion, the First Court of Appeals held on rehearing that the trial court erred when it submitted the unavoidable accident instruction and that it was likely, although not conclusively established, that the erroneous instruction formed the sole basis for the jury's negative answer to the liability question. 132 S.W.3d 517, 523 (Tex. App.—Houston [1st Dist.] 2004, pet. granted). The court concluded that the erroneous instruction "probably was reversible error that

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[1] The jury charge defined negligence as "the failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances." Proximate cause was defined as "that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred." In addition, the charge specified that "the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom."

[2] The damages question asked what sum of money would fairly and reasonably compensate Urista for his injuries, if any, resulting from the occurrence.

prevented Urista from presenting his [appeal]." *Id.* (relying on *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000)); TEX. R. APP. P. 44.1(a)(2). The court accordingly reversed the trial court's judgment and remanded the case for a new trial. 132 S.W.3d at 523. The court declined to reach Urista's remaining issues, including whether the jury's failure to find negligence was against the great weight and preponderance of the evidence.

II

Assuming the unavoidable accident instruction should not have been submitted, we must now consider whether submitting the instruction constituted harmful error.[3] *See, e.g.*, *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001); *Timberwalk Apartments, Inc. v. Cain*, 972 S.W.2d 749, 755 (Tex. 1998); *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995).

A

Urista argues, and the court of appeals agreed, that our holding in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), controls this case. In *Casteel*, we held: "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." *Id.* at 389. Recognizing that broad-form submission should be used when feasible, we explained that granulated submission should be used when a liability theory is uncertain. *Id.* at 390. We later extended the *Casteel* holding to broad-form questions that commingle damage elements when an element is

[3] The dissent says the Court "agrees" with BBB that the trial court erroneously submitted the unavoidable accident instruction. ___ S.W.3d at ___. This is incorrect. Because BBB conceded the instruction was improper, we do not reach that question.

unsupported by legally sufficient evidence. *Harris County v. Smith*, 96 S.W.3d 234, 235 (Tex. 2002). Under *Casteel* and *Harris County*, we presume that the error was harmful and reversible and a new trial required when we cannot determine whether the jury based its verdict solely on the improperly submitted invalid theory or damage element. *Id.*; *Casteel*, 22 S.W.3d at 388. We must now decide whether to extend *Casteel* again, this time to presume harmful error in the submission of an erroneous unavoidable accident instruction.

We specifically limited our holdings in *Casteel* and *Harris County* to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements. *Harris County*, 96 S.W.3d at 235; *Casteel*, 22 S.W.3d at 388. We have never extended a presumed harm rule to instructions on defensive theories such as unavoidable accident, and we decline to do so now. Unavoidable accident is not an alternative theory of liability but is "an inferential rebuttal issue that requires plaintiffs to prove the nonexistence of an affirmative defense," *Lemos v. Montez*, 680 S.W.2d 798, 800 (Tex. 1984), or "seeks to disprove the existence of an essential element submitted in another issue," *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). In this case, the unavoidable accident instruction was given in reference to the causation element of the plaintiff's negligence claim. When, as here, the broad-form questions submitted a single liability theory (negligence) to the jury, *Casteel*'s multiple-liability-theory analysis does not apply. Moreover, when a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply. Unlike alternate theories of liability and damage elements, inferential rebuttal issues cannot be submitted in the jury charge as separate questions and instead must be presented through jury

instructions. TEX. R. CIV. P. 277. Therefore, although 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.

Because we hold that *Casteel* does not control this case, we need not undertake the reversible error analysis applied in presumed harm cases, which requires a determination of whether the error "probably prevented the petitioner from properly presenting the case to the appellate courts." *Harris County*, 96 S.W.3d at 235; TEX. R. APP. P. 61.1(b). Instead, we apply traditional harmless error analysis and consider whether the instruction "probably caused the rendition of an improper judgment." Tex. R. App. P. 61.1(a); *see Quantum Chem. Corp.*, 47 S.W.3d at 480.

B

An incorrect jury instruction requires reversal only if it "was reasonably calculated to and probably did cause the rendition of an improper judgment." *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995); Tex. R. App. P. 61.1(a). To determine whether the instruction probably caused an improper judgment, we examine the entire record. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998).

A review of the record in this case reveals at least two reasons why we cannot conclude that the unavoidable accident instruction probably resulted in an improper judgment. First, as we explained in *Dillard v. Texas Electric Cooperative*, the inclusion of an improper unavoidable accident instruction is ordinarily harmless and indeed can serve an explanatory role:

The standard broad-form question is structured such that the jury is not asked

> whether any particular person was negligent, but whether "the negligence, if any," of particular persons proximately caused an occurrence. There is at least a potential implication in this phraseology that the occurrence *was* caused by *someone's* negligence. We see no harm in explaining to the jury through an inferential rebuttal instruction that no such implication is intended.

157 S.W.3d 429, 433 (Tex. 2005) (citation omitted). The truth is, sometimes accidents are no one's fault, and an unavoidable accident instruction, like the one in this case, simply explains to the jury that they are not required to find someone at fault. In this instance, the jury was reminded that it could consider the possibility that the trash cans fell for reasons other than someone's negligence. That kind of a jury instruction does not by itself amount to harmful error. *Id.*

Second, it is reasonable to conclude that Urista failed to carry his burden of proof. BBB chose to defend this case principally by attacking Urista's credibility. Urista and his wife were the only witnesses to his being struck in the head by the trash cans. And while this claim was not directly challenged by BBB, as it would have been difficult to do so in the absence of other witnesses, BBB did vigorously challenge Urista's claim to have been injured as a result of the incident. As we have already noted, the evidence at trial showed that after the incident occurred, Urista declined the manager's offer of assistance and did not report being knocked unconscious or that he had been injured. Moreover, he continued with his shopping before leaving the store. Urista also admitted that he had a pre-existing back injury, that he did not complain of pain immediately after the accident, that medical tests taken after the incident did not reveal any changes in Urista's back, and that Urista's medical records describing his injuries as work-related were changed by Urista's doctor, at the request of Urista's lawyer, to say the injuries were caused by the BBB accident. After hearing this evidence, the jury could quite reasonably have disbelieved Urista's

testimony that he had actually been struck by the trash cans that fell off the shelf. In short, the jury could simply have concluded that Urista failed to prove that BBB was negligent and, accordingly, answered the negligence question negatively without regard to the unavoidable accident instruction. But in any event, we cannot conclude that the instruction caused the case to be decided differently than it likely would have been without the instruction.[4] *See Reinhart*, 906 S.W.2d at 473.

The court of appeals relied on *Reinhart v. Young* to hold that the unavoidable accident instruction was harmful in this case. 132 S.W.3d at 522. In *Reinhart*, we held that submission of an unavoidable accident instruction was not reversible error when the defendant introduced ample evidence to support the jury's finding of no negligence, thus prompting a unanimous jury verdict in the defendant's favor. 906 S.W.2d at 473-74. Although *Reinhart* is factually distinguishable from this case to the extent that BBB did not introduce evidence of its own and the jury verdict was not unanimous, our holding in *Reinhart* still does not compel us to conclude that the submission of the unavoidable accident instruction requires reversal. Because BBB did not bear the burden of disproving Urista's claim of negligence, we cannot say that BBB's failure to introduce "ample" evidence to support the jury's defense verdict dictates a new trial. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987) (recognizing the fundamental rule that a plaintiff bears the burden of

[4] The dissent notes that the jury only answered the question related to causation of the "occurrence in question," meaning the falling trash cans, and did not reach the question about causation of Urista's injuries. Because the dissent doubts that negligence played any part in causing the trash cans to fall, the dissent concludes that "the unavoidable accident instruction was likely the sole basis for the jury's answer to the negligence question." ___ S.W.3d at ___. We disagree with that conclusion. As we held in *Dillard*, an inferential rebuttal instruction eliminates the implication that the occurrence must necessarily have been caused by someone's negligence. 157 S.W.3d at 433. Instructing the jury that it may consider the possibility that the occurrence was the result of something other than negligence is not harmful. *Id.* In addition, based on the language of the jury question, we cannot assume that the jury's negative answer is the result of the instruction when the jury could have concluded that Urista failed to establish that BBB was negligent, or that any such negligence was a proximate cause of the occurrence, or that Urista was even struck by the falling trash cans.

proving the elements of negligence to establish tort liability). When, as here, the defendant's cross-examination provides a sufficient basis for discrediting the plaintiff's claims, supporting the jury's verdict in its favor, we cannot conclude that the instruction probably caused the jury to render an improper verdict. Nor is the lack of a unanimous verdict in a case with an erroneously submitted instruction always an indicator of harmful error, although it might be in another case.[5]

In reaching our conclusion in *Reinhart*, we also observed that the plaintiff failed to object to another inferential rebuttal instruction that was similar to unavoidable accident (sudden emergency) and that the defendant did not emphasize the unavoidable accident theory during the trial. In contrast, the court of appeals in this case noted that Urista specifically objected to the inclusion of the unavoidable accident instruction and that BBB's counsel referenced the instruction in closing argument. But we are still not persuaded that those factual distinctions compel a harmful error conclusion. As in *Reinhart*, the evidence in this case fails to indicate "that the unavoidable accident instruction in any way caused the case to be decided differently than it would have been without it." 906 S.W.2d at 473.

Though numerous courts have addressed unavoidable accident instructions, only the court below and one other have held that erroneous submission of the instruction constituted reversible error.[6] *See Hudkill v. H.E.B. Food Stores, Inc.*, 756 S.W.2d 840, 844 (Tex. App.—Corpus Christi

[5] The lack of unanimous verdict may be a strong indicator of reversible error when a trial court's error in allocating peremptory challenges resulted in an unfair trial as a matter of law. *See Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 644-45 (Tex. 1986); *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979).

[6] *See, e.g.*, *Reinhart*, 906 S.W.2d at 473-74; *Hill v. Winn Dixie Tex., Inc.*, 849 S.W.2d 802, 803-04 (Tex. 1993); *Fethkenher v. Kroger Co.*, 139 S.W.3d 24, 34 (Tex. App.—Ft. Worth 2004, no pet.); *Norman v. Good Shepherd Med. Ctr.*, 2001 Tex. App. LEXIS 5571 (Tex. App.—Dallas 2001, no pet.) (not designated for publication); *Gates v. Astroworld, Inc.*, 1999 Tex. App. LEXIS 4631 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (not designated for

1988, no pet.). The Thirteenth Court of Appeals found that a note submitted by the foreman during jury deliberations "clearly indicate[d] the jury based its verdict on the alluring but improper theory of unavoidable accident." *Id.* Without such a clear indication that the instruction affected the jury's decision, every other Texas court to consider an improperly submitted unavoidable accident instruction has found any error to be harmless.[7] Likewise, when considering the entire record in this case, which provides no clear indication that the instruction probably caused the rendition of an improper verdict, we must conclude that the trial court's submission of the instruction was harmless.

* * *

Because the court of appeals misapplied *Casteel* and erroneously concluded that the trial court's submission of the unavoidable accident instruction was reversible error, we reverse the court of appeals' judgment. We remand the case to the court of appeals for consideration of Urista's remaining issues.

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PAUL W. GREEN
JUSTICE

OPINION DELIVERED: December 29, 2006

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publication); *Ordonez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 272 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Cortinas v. Gonzales*, 1998 Tex. App. LEXIS 2064 (Tex App.—San Antonio 1998, pet. denied); *DeLeon v. Pickens*, 933 S.W.2d 286, 293 (Tex. App.—Corpus Christi 1996, writ denied); *Wisenbarger v. Gonzales Warm Springs Rehab. Hosp.*, 789 S.W.2d 688, 694 (Tex. App.—Corpus Christi 1990, writ denied).

[7] *See Reinhart*, 906 S.W.2d at 473-74; *Hill*, 849 S.W.2d at 803-04; *Fethkenher*, 139 S.W.3d at 34; *Norman*, 2001 Tex. App. LEXIS 5571, at *21; *Gates*, 1999 Tex. App. LEXIS 4631, at *5; *Ordonez*, 984 S.W.2d at 272; *Cortinas*, 1998 Tex. App. LEXIS 2064, at *11; *DeLeon*933 S.W.2d at 293; *Wisenbarger*, 789 S.W.2d at 694.