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 June 10, 2005

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

Merchandise does not ordinarily fall from the shelves of Bed, Bath and Beyond ("BBB") for no reason. But on September 19, 1998, trash cans stored atop a twelve-foot high shelf, along with other merchandise, fell into the aisle where Rafael Urista and his wife were shopping. BBB argues it was no one's fault; it just happened. It is undisputed that some of this merchandise struck Urista,[1]

[1] Q. Now, on the day of this incident, we don't have a dispute, do we, that trash cans fell and hit Mr. Urista on the head, do we?

A. Trash cans did fall. Other things were knocked down as well. I'm not sure exactly what hit Mr. Urista. It could have been a plate, for all I know.

Q. Could have been, its your –

A. Could have been a trash can too, definitely.

Testimony of David Traxler, district manager for Bed, Bath & Beyond.

but even if this were in dispute, it would not matter to this appeal. What matters here is whether the jury's exoneration of BBB, when all the evidence in the case indicates it caused the occurrence, was influenced by the trial court's inferential rebuttal instruction.

David Traxler, a district manager for BBB and its representative at trial, agreed that had BBB's employee, Reggie Neal, been doing his job properly the day of the accident Urista would not have been injured. Traxler was manager of the store on that day and was responsible for investigating the incident. He confirmed that neither Urista nor any other customer had caused the trash cans to fall. He agreed that the most likely cause was the inattention of BBB's employee, which he characterized as "simply a case of human error" rather than negligence.[2]

This was, in part, BBB's defense at trial, arguing that accidents can happen without fault. But instead of offering evidence to support this no-fault defense, BBB asked for, and obtained, two inferential rebuttal instructions, unavoidable accident and new and independent cause, even though

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[2] Q. If Reggie had been doing his job the way he was supposed to be doing it that day, and paying attention during that day, Mr. Urista would not have been injured, would he?

A. I don't believe so, no.

Q. And we've established that nobody else was involved in this, in causing Mr. Urista to get hit on top of the head and knock[ed] to the ground except Reggie; is that correct?

A. Right.

* * *

Q. If he's up there dealing with those trash cans in such a manner that it pulls them over and knocks them off, it would be Bed, Bath & Beyond's position that you weren't negligent that day?

A. I think he – again, I would speculate because I wasn't there. But I believe he caused the accident. I don't believe it was his intent or acting in an unsafe manner, it was simply a case of human error that he knocked a trash can over.

there was no evidence to support the submission of either instruction. BBB now concedes this was error.[3] The Court agrees[4] but concludes that the error was harmless. To reach this conclusion, the Court turns a blind eye to the conditional submission in the jury charge and focuses on evidence that is irrelevant to the jury's actual verdict.

The jury was given two inferential rebuttal instructions,[5] despite Urista's protest, and then asked the following two questions:

> **Question No. 1:**
>
> Did the negligence, if any, of Bed, Bath, and Beyond, Inc. proximately cause the occurrence in question?
>
> Answer "Yes" or "No"
>
> Answer: NO
>
> *If you have answered Question No. 1 "Yes" answer Question No. 2; otherwise, do not answer Question No. 2.*
>
> **Question No. 2:**

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[3] BBB concedes error but argues that it "is important to recognize here that the erroneous submission of an unavoidable accident instruction, as submitted here, does not equate to automatic harm or automatic reversal."

[4] In *Hill v. Winn Dixie Texas, Inc*., 849 S.W.2d 802,803 (Tex. 1992) we said that "[a]n unavoidable accident instruction is proper *only* when there is evidence that the event was proximately caused by a nonhuman condition and not by the negligence of any party to the event." (emphasis added).

[5] The jury was given the following instructions on new and independent cause and unavoidable accident:

> "New and independent cause" means the act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question and thereby becomes the immediate cause of such occurrence.
>
> An occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it.

> What sum of money, if paid now in cash, would fairly and reasonably compensate Rafael Urista *for his injuries, if any,* resulting from the occurrence in question?
>
> Answer: ___

(emphasis added). The first question asks if BBB's negligence caused the trash cans to fall, and the second question asks whether the falling trash cans caused Urista injury and how much BBB should pay.[6] The jury did not answer the question about Urista's "injuries, if any," because it was conditioned on an affirmative answer to the first question.

The Court, however, concludes that the erroneous, unavoidable accident instruction was harmless by assuming that had the jury answered the second question, it would have concluded that Urista was not injured by the falling trash cans. Only by mixing these two issues together – the one the jury answered and the one the jury did not – can the Court possibly justify its result in this case.

The Court explains that instead of relying on the unavoidable accident instruction the jury could have reasonably concluded "that Urista failed to carry his burden of proof"; i.e., failed to prove that he was struck and injured by the falling trash cans. ___ S.W.3d at ___. When the Court's explanation is divided in parts, as was the court's charge, the error becomes apparent. For the jury to have disbelieved that Urista *was struck*, it would first have to reject *both* Urista's and BBB's testimony on the subject. As the record stands, BBB had no support for its appellate assertion that the trash cans fell in the absence of fault (which is at the heart of the unavoidable accident

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[6] *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 n.2 (Tex. 1984)(explaining that while a proximate cause question inquires whether the defendant is liable for the event, the damages question inquires whether there is a causal link between the event and the plaintiff's injuries); *see also* Comment to Pattern Jury Charge 8.2 (explaining that the issue of the existence of a disputed injury is subsumed under a damages question, which includes the phrase "if any").

instruction). Urista testified that they fell, and BBB testified that "[Reggie] caused the accident" as a result of "human error." If the Court is right that any jury, at any time, may ignore uncontested evidence of fault on an "accidents happen" theory, then verdicts will cease to be tethered to the evidence presented at trial.

I suspect, however, that the driving force behind the Court's decision has more to do with the second part of its explanation – that Urista failed to prove that he was *injured* by the falling trash cans. I agree that BBB made a persuasive case that Urista was "not injured" by falling trash cans; therefore, had the jury reached Question 2, a "No" answer would have been difficult for Urista to overcome. Urista's credibility, undermined by his apparent exaggeration of damages, may well explain the jury's answer to Question 1, and the Court's disposition here. But we ask jurors to decide only the questions asked, without regard to the effect of their answers. The trial court in this case sanctioned the jury's deciding "who should win" (without regard to the evidence) by submitting an unavoidable accident instruction, and the Court today stamps its imprimatur on that practice.[7]

The Court's conclusion that Urista failed to carry his burden of proof is thinly reasoned, incorporating none of BBB's arguments on the subject. For example, BBB argues that Urista's evidence "was grossly lacking" because it failed to show that BBB had any actual or constructive knowledge that the trash cans posed an unreasonable risk of harm. While BBB might not reasonably expect a stack of feather pillows, falling from twelve feet, to injure a customer shopping below, it should expect it from a stack of trash cans. Moreover, Traxler testified that BBB had training videos

[7] *See* TEX. R. CIV. P. 226a ("You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.").

for its employees "show[ing] very similar accidents. Show[ing] people putting stuff up and dropping it on the other side." BBB was clearly aware of the potential problem. Assuming then that this contention goes to the duty of care, I have no difficulty imposing a duty on BBB to exercise reasonable care not to turn their stores into hard-hat areas when retrieving merchandise that BBB has chosen to store above its customers' heads rather than in stock rooms or warehouses.

BBB stored trash cans, and other items, on the uppermost shelves of its merchandise displays, stacking these cans inside one another to conserve space. The record further establishes that on the day of Urista's alleged injury, a BBB employee was on a ladder attempting to retrieve a trash can for another customer. Urista and his wife testified that Urista was injured when that employee caused the trash cans and other items to fall on him. BBB conceded that its employee was careless but characterized his conduct as human error rather than negligence.

I am not certain what distinguishes human error from negligence in this instance, but I do understand the testimony's relevance to the unavoidable accident instruction and to BBB's closing argument which emphasized the erroneous instruction to the jury in the following:

> You see, all of these facts preponderate that the accident did not happen like they say. And more importantly, it wasn't caused by Bed, Bath & Beyond's negligent conduct. Because the court tells you that there is such a thing as an unavoidable accident. I'm not saying that BB&B wasn't around and might have caused it, that doesn't mean they were negligent, and the court tells that to you.
>
> People have to understand that every accident is not caused by negligence. There's a lot of accidents in this world that are unavoidable accidents. That's what the Court says to you. It's only plaintiff's lawyers who say, every time there's an accident somebody has to be responsible because that's what they want. They want to create that type of litigation.
>
> And sometimes stuff happens. . . . it wasn't intended to happen, it just did.

Although BBB contends that there is ample evidence that the falling trash cans were not the cause of Urista's back injury, it cannot argue that the cans did not fall, and its contention that negligence played no part in causing them to fall is exceedingly weak. In fact, I agree with the court of appeals' suggestion that the jury's verdict was probably against the great weight of the evidence and that the unavoidable accident instruction was likely the sole basis for the jury's answer to the negligence question. 132 S.W.3d at 522, 523. I have found no other explanation for the jury's answer to Question 1.

The concurring opinion says there is evidence to explain the jury's refusal to find BBB negligent, but it does not explain what evidence that might be. Instead, it speculates that the trash can "may have been teetering on the shelf for a long time, and could have been dislodged by another customer rather than the employee." ___ S.W.3d at ____ (Brister, J. concurring). There is, of course, no evidence of this, and what evidence there is, such as BBB's investigation, and its conclusions about the occurrence,[8] are discounted as mere belief. *Id.*

I, however, agree with the concurrence that sometimes accidents happen when no one is negligent. Conversely, accidents happen at times when someone is negligent. And in the spirit of the concurring opinion, I would speculate that the latter is more often the case than the former. This is why inferential rebuttal instructions are the exception rather than the norm, and why an unavoidable accident instruction is proper only when there is evidence that the event was proximately caused by a condition or circumstance beyond the control of any party to the event. *See*

[8] In addition to the testimony of BBB's representative at trial, its incident report prepared at the time of the accident unequivocally recited that the falling trash cans had hit Urista in the head.

Hill v. Winn Dixie Texas, Inc., 849 S.W.2d 802, 803 (Tex. 1992).

The concurring opinion, however, suggests that the unavoidable accident instruction is a truism and that its inclusion in the charge can never be harmful error. But it is potentially true only in those cases in which there is evidence and therefore a question about whether conditions beyond a party's control caused the accident. *See Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 432 (Tex. 2005) ("The purpose of these instructions is *to advise the jurors, in the appropriate case*, that they do no 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.") (emphasis added); *see also Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex. 1995) (Unavoidable accident "instruction is most often used to inquire about the causal effect of some physical condition or circumstance such as fog, snow, sleet, wet or slick pavement, or obstruction of view, or to resolve a case involving a very young child who is legally incapable of negligence."). The views of the concurring justice simply cannot be reconciled with what we previously said in *Reinhart*:

> [E]xcept in certain types of cases, "courts should refrain from submitting an unavoidable accident instruction . . . due to the risk that the jury will be misled or confused by the perception that the instruction represents a separate issue distinct from general principles of negligence." (citations omitted). We are not alone in this concern. At least eighteen of our sister states, agreeing that the instruction confuses and misleads the jury, have prohibited its use in negligence cases. (footnote omitted). Ten other jurisdictions have severely limited the circumstances under which trial courts may instruct juries regarding unavoidable accident. (footnote omitted). And among the states that still retain the instruction, many courts have expressed concerns about its applicability in routine negligence cases. (footnote omitted). We share these reservations.

Id. at 472-73.

Finally, the Court justifies its result in this case by noting that erroneous instructions are almost never found to be reversible error. While I agree that such cases are rare, there are a number of reasons for this. Often, the evidence or other instructions in the case render the error harmless, or the harm is addressed in other issues.

For example, in *Dillard*, the appellant complained that the trial court had erred in not submitting an instruction on new and independent cause. *See Dillard,* 157 S.W.3d at 430. We have previously required such an instruction when the evidence raises a fact question on new and independent cause. *Dallas Ry.& Terminal Co. v. Bailey*, 250 S.W.2d 379, 384 (Tex. 1952); *Young v. Massey*, 101 S.W.2d 809, 810 (Tex. 1937). Although there was evidence to support its submission in *Dillard*, that same evidence also supported the instruction on unavoidable accident. Because of this overlap and because the jury was instructed on unavoidable accident, we concluded that the failure to give an additional instruction on new and independent cause was not required and therefore harmless. *See Dillard,* 157 S.W.3d at 433-34.

Reinhart v. Young involved the converse situation. 906 S.W.2d 471 (Tex. 1995). In that case, the jury was given two instructions, one on sudden emergency and another on unavoidable accident. The plaintiff objected only to the latter instruction. This Court concluded that the instruction was harmless error for three reasons: (1) the defendant introduced ample evidence at trial to support the jury's failure to find him negligent; (2) the plaintiff failed to object to the sudden emergency instruction which reiterated much of the unavoidable accident instruction; and (3) none of the witnesses or counsel referred to the term "unavoidable accident" during the trial. *Id*. at 473-74.

Although the Court apparently recognizes that the facts and circumstances in *Reinhart* are completely at odds with those here, it nevertheless concludes that the result should be the same: "As in *Reinhart*, the evidence in this case does not indicate 'that the unavoidable accident instruction in any way caused the case to be decided differently than it would have been without it.'" ___ S.W.3d at ___ (quoting *Reinhart*, 906 S.W.2d at 473). Thus, it does not apparently matter that (1) the *Reinhart* defendant introduced ample evidence that it was not negligent, while BBB virtually admitted that it was; (2) the *Reinhart* plaintiff failed to object to one of two overlapping inferential rebuttal instructions, while Urista objected to both, and the evidence did not support the submission of either instruction; or (3) the *Reinhart* defendant did not mention the offending instruction on unavoidable accident during the trial, while unavoidable accident was one of two significant themes[9] in BBB's defense, emphasized again by its attorney in his closing remarks.

Why then does the Court conclude that the instruction here was harmless? It can only be that the Court does not believe that Urista's injury was caused by the occurrence at BBB and that the jury would have so found had it answered the second, conditionally submitted question. But such speculation is beyond the purview of this Court. *See* TEX. CONST. art. V § 6; TEX. GOV'T CODE, § 22.225(a); *Choate v. San Antonio & A.P. Ry. Co.,* 44 S.W. 69 (Tex. 1898). The great weight, if not all, of the evidence is contrary to the jury's actual verdict of no negligence. I therefore cannot agree that the erroneous instruction here was harmless.

This case is a rarity, however, because ordinarily the issue of charge error will be subsumed

[9] The other defensive theme was that Urista was not injured by the falling trash cans, but as previously mentioned the jury did not reach that question because of the conditional submission.

under the court of appeals' analysis of the factual sufficiency of the evidence. Under that analysis, the court must likewise consider the entire record and all the evidence to determine whether a new trial should be granted. Any additional complaints of charge error are either collateral to that review or redundant. Thus, the court of appeals in this case might have rendered the same judgment by simply ruling on the factual sufficiency issue, but instead the court diverted its attention to the *Casteel* issue. *See Crown Life Ins. Co. v. Casteel,* 22 S.W.3d 378 (Tex. 2000).

On that subject, I agree with the Court that *Casteel* should not apply under the circumstances presented here. In *Casteel*, we concluded that it was error to submit a broad-form liability question which commingled valid and invalid theories of liability. *Id*. at 388-89. We found the error to be harmful under Texas Rule of Appellate Procedure 61.1 because it "affirmatively prevented the appellant from isolating the error and presenting its case on appeal." *Harris County v. Smith*, 96 S.W.3d 230, 233 (Tex. 2002) (citing *Casteel* and applying its rationale). In this case, unlike *Casteel*, we have a single liability theory, negligence, coupled with an unavoidable accident instruction that should not have been a part of the court's charge.

Whereas the charge error in *Casteel* prevented an appellate court from determining whether the jury's verdict might have been premised on an invalid legal theory, there is no similar mystery in this case. *See Casteel*, 22 S.W.3d at 388. The trial court instructed the jury that it would be misconduct to disregard the court's instructions, and it is reasonably clear that the jury therefore considered unavoidable accident and the other instructions when deciding the question of BBB's negligence. It is also apparent that the jury failed to find that BBB's negligence was a proximate cause of the occurrence in question. Unlike *Casteel*, the charge error in this case did not obscure

the verdict's meaning nor did it prevent Urista from presenting the consequences of that error to the appellate courts. *See Casteel*, 22 S.W.3d at 388 (citing second prong of harmless error standard in TEX. R. APP. P. 61.1, 44.1(a)); *Harris County*, 96 S.W.3d at 233 (same). In short, there is no uncertainty as to the jury's verdict. The issue then is not whether the error "probably prevented the appellant from properly presenting the case to the appellate courts" but rather as the Court says whether the error "probably caused the rendition of an improper judgment." TEX. R. APP. P. 61.1; *see also* TEX. R. APP. P. 44.1(a)(1).

Although I disagree that the charge error in this case presents a *Casteel* problem which affected the presentation of the appeal, I nevertheless agree with the court of appeals' judgment remanding the case for a new trial. The charge error in this case obviously confused the jury. This is apparent from its verdict and a review of the whole record which rebuts the jury's answer to the only question it considered. Because this Court does not confine its review to the verdict actually rendered in this case or the evidence supporting that verdict, I respectfully dissent.

David M. Medina
Justice

Opinion delivered: December 29, 2006