**In The**

# *Court of Appeals*

## *Ninth District of Texas at Beaumont*

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**NO. 09-10-00057-CV**

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**ROSALIND HALL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ESTHER JOLIVETTE, DECEASED, JAMES WEISNER, AND GWENDOLYN WASHINGTON, Appellants**

**V.**

**CHRISTUS HEALTH SOUTHEAST TEXAS D/B/A ST. ELIZABETH HOSPITAL, Appellee**

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**On Appeal from the 136th District Court**
**Jefferson County, Texas**
**Trial Cause No. D-173,522**

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## MEMORANDUM OPINION

Rosalind Hall, individually and as representative of the Estate of Esther Jolivette, deceased, James Weisner, and Gwendolyn Washington sued Christus Health Southeast Texas d/b/a St. Elizabeth Hospital for alleged negligence. A jury found in favor of Christus. In one issue, appellants challenge the trial court's denial of their requested broad-form liability question. We affirm the trial court's judgment.

## Background

Jolivette underwent pacemaker surgery at St. Elizabeth Hospital. Before the surgery, Jolivette, who suffered from dementia, pulled her arms away to prevent medical personnel from drawing blood, removed the cuff when medical personnel attempted to check her vital signs, removed her cardiac leads, and got out of bed unassisted. A posey vest restraint was ordered, but was not available or used.

Jolivette's doctor first attempted to perform the surgery with Jolivette under conscious sedation, but the surgery was unsuccessful because Jolivette would not remain still on the operation table and was "moving vigorously." A different doctor later performed surgery with Jolivette under general anesthesia. There were no rails on the catheterization laboratory table on which the procedure was performed. Soft wrist restraints were available, but not used. When emerging from the anesthesia, Jolivette's body suddenly flipped to the right and she fell off the catheterization table. A nurse was standing near the catheterization table, but could not prevent Jolivette from falling. Another nurse was pushing a stretcher into the room at the time Jolivette fell. According to the anesthesiologist, Jolivette emerged from anesthesia faster than he anticipated and her roll from the table was so quick that he had no opportunity to stop the fall. After Jolivette's fall, her doctor had the pacemaker tested and had x-rays taken, which showed that the pacemaker was functioning normally.

After Jolivette recovered from anesthesia, she was transferred to a hospital room. A sling immobilizer was eventually provided for Jolivette's arm, but Jolivette was alone and unrestrained in her hospital room and did not want to wear the sling. Nurses subsequently found Jolivette between the bedrails. A nurse notified Jolivette's doctor that Jolivette was moving her arms and refusing to wear the sling, so Jolivette's doctor ordered the administration of Ativan, a chemical restraint. A sitter was provided at the request of Jolivette's daughter.

The next day, Jolivette's doctor learned that Jolivette's pacemaker leads had become dislodged. He believed that the leads became dislodged sometime between Jolivette's fall and the next morning and were possibly dislodged as a result of Jolivette moving her arms. Appellants' expert witness believed that Jolivette's fall began the lead dislodgments and that her further movement possibly led to further dislodgment of the leads. Jolivette's doctor performed another surgery to repair the dislodged leads. During this surgery, medical personnel ensured that extra people surrounded Jolivette as she emerged from anesthesia and a stretcher was obtained while Jolivette was still under anesthesia. After the surgery, a sitter remained with Jolivette overnight.

After being released from the hospital, Jolivette had to be assisted and could no longer engage in the types of activities in which she participated before the surgery. Several months later, Jolivette died.

Two jury trials have been conducted in this case. At the first trial, the trial court submitted the following questions to the jury: (1) "Did the negligence, if any, of St. Elizabeth Hospital, its nurses, or employees, proximately cause Ms. Jolivette's fall from the catheterization procedure table on November 4, 2003?" and (2) "Did the negligence, if any, of the St. Elizabeth Hospital, its nurses or employees, proximately cause Ms. Jolivette's pacemaker leads to become displaced after the procedure in the cath lab?" The jury answered "no" to the first question and "yes" to the second question. The trial court signed a final judgment against Christus.

Appellants did not appeal the trial court's judgment. However, Christus appealed, and this Court found the evidence factually insufficient to support a finding that "Christus's failure to apply post-operative restraints on Jolivette proximately caused the dislodgement of her pacemaker leads." *Christus Health Southeast Tex. v. Hall*, No. 09-07-074 CV, 2008 Tex. App. LEXIS 5316, at **10, 18 (Tex. App.—Beaumont July 17, 2008, no pet.) (mem. op.). We reversed and remanded the case for a new trial. *Id*. at *18. Appellants did not appeal our ruling to the Texas Supreme Court.

At the second trial, on remand, appellants objected to the trial court's failure to include a broad-form liability question in the jury charge and submitted the following proposed jury question: "Did the negligence, if any, of St. Elizabeth Hospital, its nurses, or employees proximately cause the occurrence in question?" The trial court denied this request:

> Your tendered [question] is marked as refused and will be filed with the records of the Court and your objection is overruled given that the defendant's position that the fall is -- has been previously decided and should not be submitted, that theory. I think that it would be an appellate court to the extent it were to revisit this case would be unable to determine were the jury to answer both questions -- to answer that broad form question yes and award damages, they would be unable to determine which theory of liability the jury rendered its verdict on; and for that reason, the objection is overruled.

The trial court submitted the following questions to the jury: (1) "Did the negligence, if any, of St. Elizabeth Hospital proximately cause Ms. Jolivette's fall from the catheterization procedure table on November 4, 2003?" and (2) "Did the negligence, if any, of the St. Elizabeth Hospital proximately cause Ms. Jolivette's pacemaker lead or leads to become displaced after the procedure in the catheterization laboratory?" The jury answered "no" to both questions. The trial court signed a final judgment in accordance with the jury's findings. Appellants appeal the trial court's judgment.

The Jury Charge

In their sole issue, appellants contend that the trial court abused its discretion by refusing to submit their requested broad-form liability question and that the submission of a granulated jury question constituted harmful error.

We review charge error for an abuse of discretion. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). Rule of Civil Procedure 277 provides that a trial court shall, whenever feasible, submit the cause to the jury upon broad-form questions. Tex. R. Civ. P. 277. "A trial court has considerable discretion in submitting broad-form

jury questions." *Commercial Bank of Tex., N.A. v. Luce*, 92 S.W.3d 636, 640 (Tex. App.—Beaumont 2002, no pet.). "But the questions must properly submit the controlling fact issues for the jury's determination." *Id.* Although the Texas Supreme Court has expressed a general preference for broad-form submission, "Rule 277 is not absolute; rather, it mandates broad-form submission 'whenever feasible.'" *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000); *Harris Cnty. v. Smith*, 96 S.W.3d 230, 235 (Tex. 2002). "[W]hen the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Casteel*, 22 S.W.3d at 390. "It may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability." *Id.* "When a single broad-form liability question erroneously commingles valid and invalid liability theories . . . 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. "[W]hen questions are submitted in a manner that allows the appellate court to determine that the jury's verdict was actually based on a valid liability theory, the error may be harmless." *Id.*

We will not reverse unless an error of law probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals. Tex. R. App. P. 44.1(a); *see Casteel*, 22 S.W.3d at 388. The trial

court's refusal to submit a broad-form liability question does not amount to harmful error when the charge submits the disputed issues of fact and incorporates a correct legal standard for the jury to apply. *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 259-60 (Tex. 1992); *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 915 (Tex. App.—Austin 2008, no pet.).

In this case, the trial court's comments at trial indicate concern that the issue of whether Christus's negligence proximately caused Jolivette's fall from the catheterization table, which was decided adversely to appellants in the first trial and was never appealed, was not subject to retrial. The trial court was apparently concerned that, if this issue was not subject to retrial, a broad-form liability question had the potential to commingle valid and invalid theories of liability, which would prevent an appellate court from determining the basis for liability.

Appellants, however, contend that our remand of this case for a new trial effectively reversed the jury's verdict in its entirety and was not a partial remand. Appellants further contend that the trial court's "conclusion that a granulated liability question was necessary for appellate review was a mistake of law and . . . an abuse of discretion." Appellants maintain that the granulated jury question constituted harmful error for several reasons. First, they argue that they pleaded negligence broadly and did not limit their allegations to those specified in the petition. Second, they contend the questions were likely to confuse the jury by creating the false impression of a "two step

inquiry—first whether [Christus's] negligence cause[d] the fall, and second whether that caused the leads to become dislodged." Appellants complain that the first question did not ask whether Jolivette's fall caused dislodgment of the pacemaker leads and that the second question suggested that it "was not directed at post-fall causes, such as the failure to monitor and failure to use appropriate restraints or a sitter." Third, they contend that the questions were likely to confuse the jury by presenting "an either/or situation, with the two questions presenting alternate causes, rather than both the fall and the subsequent arm movements both being contributing causes[.]" Finally, appellants maintain that the charge influenced the jury's verdict. They base this argument on a note from the jury, in which the jury asked: "If we say no to questions #1 [and] #2 can we ask the hospital for compensation on expenses due to the fall?" According to appellants, the jury believed Christus was negligent, but the negligence they found did not fit within the questions submitted in the trial court's charge.

Assuming without deciding that the trial court abused its discretion by denying appellants' requested broad-form liability question, any error is harmless. According to appellants' petition and the testimony of their expert witnesses, Christus allegedly committed a number of "acts, wrongs, and/or omissions[,]" which include failing to (1) "adequately monitor Ms. Jolivette in the post-anesthesia recovery period, allowing her to fall from the cath lab table at a time she was medically unable to protect herself[,]" (2) "adequately monitor Ms. Jolivette in the postoperative recovery returning to her hospital

room, after she had already . . . been observed on numerous occasions that she was high fall risk, including after an actual fall[,]" (3) "provide adequate supervision with a sitter or adequate restraints to prevent Ms. Jolivette from activities that more likely than not led to her pacemaker lead dislodgment[,]" and (4) "recognize and insist on more effective chemical or physical restraints after the initial postoperative care was ineffective in preventing such physical movement by Ms. Jolivette." These allegations all relate to two disputed issues: whether Christus's negligence proximately caused Jolivette's fall from the catheterization table and whether Christus's negligence proximately caused Jolivette's pacemaker leads to become dislodged. These disputed issues were presented to the jury in the trial court's charge, and the granulated jury question encompasses the negligent acts that appellants allege Christus committed.

Accordingly, we conclude that the trial court's charge contained the proper elements of a negligence action, fairly submitted to the jury the disputed issues, and incorporated the correct legal standard for the jury to apply. *See Warner*, 845 S.W.2d at 260. Under these circumstances, we cannot say that the alleged error probably caused the rendition of an improper judgment or prevented appellants from properly presenting their case on appeal. *See* Tex. R. App. P. 44.1(a); *Casteel*, 22 S.W.3d at 388. Because any alleged error in the trial court's failure to submit a broad-form liability question and the submission of a granulated jury question is harmless, we overrule appellants' sole issue

and affirm the trial court's judgment. *See Warner*, 845 S.W.2d at 260; *see also Bechtel Corp.*, 271 S.W.3d at 915.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 10, 2011
Opinion Delivered June 16, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.