IN THE SUPREME COURT OF TEXAS

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NO. 04-0916
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BAYLOR UNIVERSITY, PETITIONER,

v.

BETTY A. COLEY, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS
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Argued October 19, 2005

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, concurring.

I concur in the Court's judgment.

By its first issue Baylor challenges the court of appeals' determination that Coley, who had the burden to plead, prove, and obtain findings on her cause of action, properly preserved jury charge error when the proposed instruction she requested, which the trial court refused, was "wrong" as determined by this Court. Citing Texas Rule of Civil Procedure 278, *Union Pacific Railroad Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002) and *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995), Baylor questions whether Coley preserved error as to the trial court's proposed jury instruction by "bring[ing] to the trial court's attention" her contention that she disagreed with the proposed instruction and timely submitting a proposed instruction which Baylor contends was not substantially correct because it directly commented on the weight of the evidence.

In *Union Pacific Railroad Company* this Court considered whether the trial court erred by refusing to give a proposed instruction on foreseeability in a Federal Employers' Liability Act claim. We "granted Union Pacific's petition for review to determine: (1) whether Union Pacific was entitled to a jury instruction on foreseeability as it relates to duty; and (2) if so, whether Union Pacific preserved its complaint that the trial court erred in refusing to submit Union Pacific's proposed instruction." 85 S.W.3d at 165. We first analyzed whether foreseeability was properly a part of the jury's consideration when material facts involving foreseeability were disputed. We held that it was, and that "when the evidence about foreseeability as it relates to the railroad's duty is disputed, the trial court should instruct the jury about this element so it can resolve the factual issue." *Id*. at 169. Then, citing Rule 278, we said "[u]nder our procedural rules, a party must submit a written, 'substantially correct' instruction to the trial court to complain on appeal that the trial court erroneously refused the instruction." *Id*. We went on to hold that "Union Pacific's request preserved error on its jury charge complaint, because the request was substantially correct." *Id*. at 170.

In *Plainsman Trading Company* we considered a situation similar to that before us now. Plainsman urged that the trial court erred in refusing to submit what we determined was an erroneous instruction. The question of preservation of error was not addressed. Instead, we referenced Rule 278 in our determination: "The requested instruction incorrectly stated the law and was thus properly refused. *See* TEX. R. CIV. P. 278 (requiring that requested questions, definitions and instructions be tendered to the court in substantially correct form)." *Plainsman Trading Co.*, 898 S.W.2d at 791.

Our statement in *Union Pacific* referencing preservation of error could be read as implying that a requested instruction must be substantially correct for error to be preserved for appellate review. Rule 278 provides, as relevant here, that "[f]ailure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." In regard to error preservation, Rule 278 must be read in conjunction with the other rules of civil procedure. Rule 272 requires that the proposed jury charge be given in writing to the parties or their attorneys with a reasonable time given for them to examine and present objections before the charge is read to the jury. Rule 272 provides that "[a]ll objections not so presented shall be considered as waived," but the rule does not require that the proposed instructions be substantially correct in order to avoid waiver. Because Coley timely presented her proposed instruction according to Rule 272, she preserved error for appellate review to determine if the instruction she presented is substantially correct and if so, whether the trial court erred in refusing to submit it. *See* TEX. R. CIV. P. 278; *Plainsman Trading Co.*, 898 S.W.2d at 791.

I agree with Baylor that the proposed instruction is not substantially correct because it assumes a controverted material fact and would have been a direct comment on the weight of the evidence. *See* TEX. R. CIV. P. 277 ("The court shall not in its charge comment directly on the weight of the evidence . . . ."). A requested instruction that is affirmatively incorrect is not "substantially correct" as that term is used in Rule 278's requirement that proposed questions and instructions be substantially correct. *See Placencio v. Allied Indus. Int'l*, 724 S.W.2d 20, 21 (Tex. 1987).

In *Placencio*, we considered proposed jury issues regarding a defensive theory. The trial court refused to submit the issues. The court of appeals reversed. In noting that the situation was controlled by language which is now found in Rule 278, we said:

> This situation is controlled by TEX. R. CIV. P. 279 which provides that the trial court's failure to submit an issue shall not be a ground for reversal of the judgment unless the issue was tendered in substantially correct wording. . . . Issue No. 4, as tendered by Allied, is affirmatively incorrect because it assumes material controverted facts. . . . Because the issue as submitted by Allied assumed the truth of material controverted facts, it would have constituted a comment on the weight of the evidence.
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> If in spite of an implied comment, Allied's Issue No. 4 could be deemed "substantially correct," the trial court would have been forced to choose between (1) submitting it and possibly being reversed in the event of appeal by Placencio, or (2) refusing it and being reversed in the event of appeal by Allied. We will not impose such a dilemma upon a trial judge. It was Allied's duty to present the judge with an issue that was not affirmatively incorrect. We hold that the trial court's refusal to submit an affirmatively incorrect issue does not justify reversal.

Id. at 21-22.

Coley claimed that Baylor constructively discharged her by materially and substantially breaching her employment contract. She claimed that when she was granted tenure she was tenured in the particular position of librarian and that Baylor *de facto* removed her tenure rights when it changed her title and duties. Baylor denied that Coley was tenured in the particular position of librarian. According to Baylor, Coley was granted tenure only in a general field and her title change and modified duties did not erode her tenure, breach her employment contract, or result in a constructive discharge.

When the trial court's proposed charge was presented to the parties, Coley objected to the court's proposed constructive discharge instruction because it "does not fit the facts of this particular case, nor does it allow the plaintiff to even argue the facts of this particular case . . . and there is no instruction that relates to constructive discharge in a situation where there is a contract of the nature of the contract in this case." Coley then requested that the jury be instructed,

> either . . . conjointly with that instruction or separately from that instruction, to read as follows:
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> > You are instructed that if you find and believe from the evidence that the change in Betty Coley's duties, as ordered by Baylor's agents, Dr. Roger Brooks and Dr. Avery Sharp, required Betty Coley to *take a subordinate position, or one substantially different in its work and duties from the position for which she was tenured*, then you should find that Betty Coley was constructively and wrongfully discharged from her *tenured position*. (emphasis added).

The trial judge refused to submit her requested instruction. The charge was submitted to the jury with the court's proposed Jury Question 1 and instruction as set out in the Court's opinion. The jury answered "No" to Question 1 and the trial court entered a take-nothing judgment. The court of appeals noted that Coley's proposed question and instruction "are not entirely correct," but reversed the judgment because the trial court's instruction on constructive discharge did not properly submit Coley's theory of recovery. 147 S.W.3d 567, 570-71.

Coley does not challenge the court of appeals' determination that the trial court did not err by refusing to submit her proposed breach of contract jury question. Examining both her proposed question and proposed instruction on constructive discharge, however, is illuminating as to her view of her case. Neither contained any standard for the jury to use in determining constructive discharge

other than instructing the jury that if her change in duties required her to take a subordinate position or one substantially different in its work and duties from "the position for which she was tenured" then she was constructively discharged. But, both assumed that she was employed in a tenured "position" as opposed to a tenured "field." The question of tenured position versus tenured field was the source of serious disagreement between the parties during trial. Coley urged that she was employed and tenured in a particular librarian position with particular duties; Baylor asserted she was not. Coley contended that there was no factual dispute on the matter because Baylor's President admitted the school's policy was that tenure rights were for a *position*. Baylor countered by pointing to testimony from Baylor's President that tenure entitled an individual to certain kinds of responsibilities in a *field*, but it did not entitle someone to a certain *position*. Because there was evidence on both sides of the issue, both Coley's requested jury question and requested instruction which referred to Coley's "tenured position" assumed the truth of a material controverted fact and both were affirmatively incorrect.

The instruction Coley submitted contained more than the implied comments on the evidence addressed in *Placencio*. Her requested instruction directly assumed a material controverted matter in her favor. If the trial court had given Coley's instruction, effectively the only question left for the jury would have been whether the uncontroverted change in her duties resulted in her taking a subordinate position or one substantially different in its work and duties from her position as librarian. If the jury so found, then the jury instruction required that the jury "should find that Betty Coley was constructively and wrongfully discharged from her tenured [librarian] position." Had the

trial court given the instruction Coley requested, its effect is demonstrated by a jury argument which her counsel could have made based on the instruction:

> Ladies and gentlemen, we have been arguing with Baylor for many months now over whether Betty Coley was employed and tenured in her position as librarian, or whether Baylor employed and tenured her in an area or field so that they could move her from job to job. Now, at last, the judge has told Baylor, and you, in these instructions, that she was tenured in her position as librarian. So, when Baylor moved her from that tenured librarian position and reduced her job duties to those of a subordinate position or moved her to a position substantially different from that of her librarian position, they breached her employment contract and constructively discharged her.

The court of appeals stated that Coley contended the trial court erred by refusing to submit her instruction. 147 S.W.3d at 569. In considering Coley's issue, however, the court said that Coley contended the trial court incorrectly defined the term "constructive discharge" and held that the constructive discharge instruction did not properly submit Coley's theory to the jury. *Id*. at 571. The reversal was in error because Rule 278 precludes reversal unless a substantially correct instruction was requested in writing and tendered by Coley. She did not do so. I agree with Baylor's assertion in its first issue. Coley's proposed instruction was not substantially correct because it contains a direct comment on the weight of the evidence. *See* TEX. R. CIV. P. 277; *Placencio*, 724 S.W.3d at 20-21.

Phil Johnson
Justice

OPINION DELIVERED: April 20, 2007