IN THE SUPREME COURT OF TEXAS

NO. 01-0910

FIRST VALLEY BANK OF LOS FRESNOS, NORWEST BANK OF TEXAS, N.A., AND WELLS FARGO BANK (TEXAS), N.A., PETITIONERS

v.

SAM MARTIN, RESPONDENT

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

Argued January 28, 2004

JUSTICE WAINWRIGHT concurring.

The Court today decides that Sam Martin failed to prove that there was an absence of probable cause in his lawsuit for malicious prosecution against First Valley Bank of Los Fresnos. I join the Court's opinion. Alternatively, First Valley contended that negligent conduct is insufficient to state a claim for malicious prosecution; intentional conduct is required. The Court does not reach that issue. First Valley also raises a waiver issue that needs to be settled. Martin asserts that the Bank failed to preserve error on the question of whether malicious prosecution may be predicated on negligent conduct or only on intentional conduct because the Bank did not follow the technical requirements of Rule 276 of the Texas Rules of Civil Procedure in objecting to the charge. I write to address this waiver issue.

I.

Martin sued First Valley for negligence and misrepresentation arising from its efforts to collect a $30,000 loan from him. Martin claims that First Valley provided an investigator with false information which the investigator turned over to the district attorney's office. The district attorney's office convened a grand jury which indicted Martin for the crime of hindering a secured creditor's collection efforts. *See* TEX. PEN. CODE §32.33(e). After being cleared of the criminal charge on an apparent technicality, Martin filed a civil action against First Valley claiming the bank did not disclose to the investigator all material information. The civil case proceeded to trial.

After plaintiff rested, the trial court heard First Valley's motions for directed verdict. First Valley argued that Martin's petition only alleged negligence and, because under Texas law malicious prosecution is an intentional tort, it was entitled to a directed verdict. After the hearing, Martin sought leave to file a Third Amended Original Petition, which for the first time alleged malicious prosecution. The trial court allowed the trial amendment over the objection of First Valley that the amendment added an intentional tort in the middle of trial when the case had been tried solely on negligence. Later that same afternoon, First Valley submitted its "Requested Jury Instructions and Questions." First Valley's proposed charge, set forth below, instructed the jury that malicious prosecution required intentional conduct.

> Do you find that First Valley Bank procured the criminal prosecution of Sam Martin?
>
> You are instructed that a person procures a criminal prosecution if his actions were enough to cause the prosecution and, but for his actions, the prosecution would not have occurred. A person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, *unless the person provides information which*

> *he knows is false*. A criminal prosecution may be procured by more than one person. *Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288 (Tex. 1994).

(emphasis added). First Valley's requested submission included blanks at the bottom of the page labeled "refused" and "modified as follows." The trial judge checked "modified as follows," placed brackets around First Valley's procurement instruction, and signed the request.

The trial court held a formal charge conference the next morning. During the charge conference First Valley objected to the question on malicious prosecution on no evidence grounds but did not reiterate its position that the procurement instruction was an incorrect statement of the law. The trial court overruled First Valley's evidentiary objection and presented the court's charge to the jury. The court defined malicious prosecution such that it could be satisfied by either inadvertence or intentional conduct.

> "Procurement" means: A person procures a criminal prosecution if his actions were enough to cause the prosecution, and but for his actions the prosecution would not have occurred. A person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, *unless the person fails to fully and fairly disclose all material information known to him or knowingly provides false information*. A criminal prosecution may be procured by more than one person.

(emphasis added). This charge tracks the Pattern Jury Charge. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 6.4 (2002).

II.

First Valley argues that the trial court's definition of procurement misstates the law and that its complaint is preserved because its request was marked "modified as follows" and signed in

substantial compliance with Rule 276. *See* TEX. R. CIV. P. 276. Martin, on the other hand, argues that First Valley failed to comply with Rule 276 which, to preserve asserted error, requires the phrase "modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" to be included by the trial judge in his order modifying a proposed submission. *See id*. Therefore, Martin claims that error is waived. I believe that First Valley preserved its complaint and that Rule 276 does not govern preservation of charge error in this case. Rule 274 applies.

III.

Texas Rules of Civil Procedure 271 through 279 govern preservation of error in the jury charge. Traditionally, the manner of preserving charge error too often created technical traps through procedures that elevated form over substance. Through rule changes and opinions, we have endeavored to focus appellate review on substantive issues and simplify the procedures for error preservation. In 1992, in *State Department of Highways & Public Transportation v. Payne*, the Court took a significant step forward in this process by holding that in some cases a request can serve as an objection sufficient to preserve error in a jury charge. 838 S.W.2d 235, 240 (Tex. 1992). We explained that "[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Id*. at 241. Under *Payne*, a request can serve as an objection for preservation purposes as long as the trial court is aware of the complaint and issues a ruling. *Id*. at 240-41. *But see Hernandez v. Montgomery Ward*, 652 S.W.2d 923, 925 (Tex. 1983) ("A request

for another charge is not a substitute for an objection."), *overruled on other grounds by Acord v. General Motors*, 669 S.W.2d 111 (Tex. 1984).

The parties dispute whether alleged error arising from the trial court's submission of an allegedly defective instruction on procurement was preserved. The parties and the court of appeals analyze this preservation issue under Rule 276. Rule 276 provides that when an instruction is "requested" and the trial judge modifies it, to preserve error the judge must specify how the instruction was modified, endorse "exception allowed" on the request and sign it. TEX. R. CIV. P. 276. If this procedure is properly followed, the party requesting the instruction is entitled to appellate review without the necessity of preparing a formal bill of exceptions. *Id*. Rule 276 governs preservation where a requested instruction, question, or definition is required; however, that is not this case.

Rule 274 governs this case. Rule 274 provides:

> A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

TEX. R. CIV. P. 274. It is clear that to preserve a complaint that an instruction in a charge is defective, the party who does not rely on the instruction need only object, and a request in substantially correct language is not required. *See* TEX. R. CIV. P. 274; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994) ("[A]n objection is sufficient to preserve error in a defective instruction. A request of substantially correct language is not required."); *Payne*, 838 S.W.2d at 241; *Angelina Cas. Co. v. Holt*, 362 S.W.2d 99, 101 (Tex. 1962) ("The law is that where

the court gives a definition which is defective, an objection by the opposite party is sufficient to preserve his rights, and it is not necessary for him to tender a correct definition."); *Johnson v. Johnson*, 869 S.W.2d 490, 492 (Tex. App.—Eastland 1993, writ denied) ("[T]he proper method of preserving error as to a question, definition, or instruction actually submitted is by objection, regardless of whether the issue is relied upon by the complaining party."); *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 809 S.W.2d 514, 521 (Tex. App.—San Antonio 1991) (noting in the case of a defective instruction "the defect may properly be called to the court's attention by an objection without requesting a substantially correct instruction in writing"), *rev'd in part on other grounds*, 844 S.W.2d 198 (Tex. 1992); *Tex. Gen. Indem. Co. v. Moreno*, 638 S.W.2d 908, 914 (Tex. App.—Houston [1st Dist.] 1982, no writ) ("Only if an instruction is omitted is a request a prerequisite to preserving the complaint."); *Lyles v. Tex. Employers' Ins. Ass'n*, 405 S.W.2s 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) ("If the *definition* is *given*, but is claimed to be *defective*, under Rule 274 *objection* is the means of preserving the complaint.").

Payne speaks directly to this point. In *Payne*, the State complained about an erroneous multipart instruction on governmental liability for special defects that left out the requirement that plaintiff prove lack of knowledge of the special defect. 838 S.W.2d 238-39. The State then submitted a question on lack of knowledge to bring its complaint about the instruction to the trial court's attention. Responding to the assertion that the State's request waived error because it could only preserve error by objecting to a defective instruction, we held that the State's request satisfied its obligation to object. *Id*. at 239.

It is also clear under Rule 278 that a party who complains on appeal that an instruction is entirely omitted from the jury charge must submit the requested instruction in writing and in substantially correct wording to the trial judge to preserve the point on appeal. TEX. R. CIV. P. 278; *Lyles*, 405 S.W.2d at 727. Rules 274 and 278 cannot both apply in this case.

An interpretation that a party who is not relying on an alleged defective instruction is required to adhere to Rule 278 and the Rule 276 submission and endorsement requisites conflicts with the language of Rule 274 and settled Rule 274 jurisprudence. Moreover, it makes no sense to erect a higher hurdle for a party who complains by written request to an instruction compared to one who simply verbalizes an objection on the record. Compliance with Rule 276's endorsement requirements is not necessary for a written request in this situation. Rule 276 will continue to govern preservation of error for a party relying on requested definitions, questions, and instructions in a charge. Rule 274 governs preservation of charge error when the party's obligation is simply to object to a defective instruction, which he must do timely and plainly, and obtain a ruling. *See Texas Emp. Ins. Ass'n v. Mallard*, 182 S.W.2d 1000, 1002 (Tex. 1994) ("[W]hen, as here, the court's charge does contain a definition, but some is unsatisfactory to the [complaining party], Rule 274 is applicable.").

In this matter, the instruction on procurement was neither relied on by First Valley, nor omitted from the trial court's charge. *See* TEX. R. CIV. P. 278. The bank asserted that it was defective. Therefore, First Valley's request is not subject to Rule 276. Instead, as the instruction was claimed to be defective, all that was required of First Valley was an objection. *See* TEX. R. CIV.

P. 274; *Spencer*, 876 S.W.2d at 157 (holding that the applicable rule in this type case is Rule 274). The technical requirements of Rule 276 did not come into play.

The question remaining is whether First Valley's request serves as an adequate objection. I would hold that it does.

V.

Payne rejects a formalistic reliance on the word "object" in Rule 274 and instead embraces the purpose of the rule, which is to make the trial court aware of the objectionable matter. *See Payne*, 838 S.W.2d at 240; *Alaniz v. Jones & Neuse*; 907 S.W.2d 450, 451-52 (Tex. 1995) (per curiam).

The trial proceedings previously described are quite illuminating. They show that during the hearing on Martin's trial amendment, First Valley made the trial court aware of its opposition to any assertion of negligence as a basis for Martin's malicious prosecution claim, a position First Valley reasserted by submitting a procurement instruction that also rejected negligence as a basis for the tort. Further, the procurement instruction submitted to the jury by the trial court was a material deviation from First Valley's proposed instruction that would have been difficult to overlook. *See Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288, 293 (Tex. 1994); *cf. Tex. Employers' Ins. Ass'n v. Jones*, 393 S.W.2d 305, 307-08 (Tex. 1965) (noting that no difference between the trial court's definition and controlling authority was distinctly pointed out). And finally, the signature of the trial judge on First Valley's proposed charge, his bracketing the language of the disputed instruction in the bank's request and his noting that the instruction was modified indicates his rejection of First Valley's instruction in favor of the charge submitted. It can hardly be disputed that the trial court

was aware of First Valley's complaint and the grounds for it, and that the court overruled the bank's complaint.

Under a common sense application of Rule 274, First Valley preserved its complaint that the trial court's instruction on procurement misstated the law. I would overrule *Hernandez* to the extent that any vestige of its statement that "[a] request for another charge is not a substitute for an objection" still casts a shadow over this issue. *See Hernandez*, 652 S.W.2d at 925.

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J. Dale Wainwright
Justice

OPINION DELIVERED: September 3, 2004