Affirmed and Memorandum Opinion filed February 24, 2026.

In The

Fourteenth Court of Appeals

NO. 14-25-00120-CV

KIMBERLY COTTON, Appellant

V.

A&D INTERESTS, INC. D/B/A HEARTBREAKERS GENTLEMEN'S CLUB, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 22-CV-2341

M E M O R A N D U M O P I N I O N

Kimberly Cotton appeals the trial court's final judgment in her personal injury action against her employer, A&D Interests, Inc. Cotton was injured when she slipped and fell off a curb in front of the establishment where she had just finished a shift. She alleged premises liability and general negligence against A&D—which is a nonsubscriber to the Texas Workers' Compensation System—based on the allegedly slippery condition of the curb. A jury found that A&D was

not negligent and, instead, Cotton's own negligence caused her injuries. In three issues on appeal, Cotton contends that the trial court erred in (1) making a factual determination that she was not in the course and scope of her employment at the time of the injury, (2) submitting only premises liability to the jury and not also general negligence, and (3) charging the jury on contributory negligence. Concluding that any error was harmless, we affirm.

Background

Cotton was working at Heartbreakers night club as an employee of A&D when she clocked out and then walked out of the club at 1:43 a.m. It was reportedly a foggy, "soupy" night. Cotton explained that as she walked toward her vehicle in the club parking lot, she noticed a club patron, who Cotton knew had recently lost his mother. Cotton said that after she stopped to offer her condolences to the patron, she began to step off the curb near the front of the club to continue walking to her vehicle, when she slipped and fell face first onto the parking lot surface. Further, according to Cotton, the curb was painted red and had become slippery from the foggy, humid conditions. Cotton alleged that significant injuries to her ankle resulted from the incident. A&D denied that the curb presented a dangerous condition and presented evidence that the paint on the curb was a specialty "porch and patio antislip" variety. Cotton was unable to prove any prior instances where anyone had slipped on the curb. Cotton further maintained that A&D had never apprised her of the dangerous condition.

At the charge conference, Cotton proposed two separate negligence questions, one for ordinary negligence in which she listed various duties an employer owes an employee and one for premises liability. The question of whether Cotton was in the course and scope of her employment was debated at several points. Ultimately, the trial court submitted the following question to the

jury:

QUESTION NO. 1

> Did the negligence, if any, of those named below proximately cause the injury in question?
>
> With respect to the condition of the premises, Heartbreakers was negligent if—
>
> 1. the condition posed an unreasonable risk of harm, and
>
> 2. Heartbreakers knew or reasonably should have known of the danger, and
>
> 3. Heartbreakers failed to exercise ordinary care to protect Kimberly Cotton from the danger, by both failing to adequately warn Kimberly Cotton of the condition and failing to make that condition reasonably safe.
>
> "Ordinary care," means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.
>
> "Negligence," means 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" means a cause that was a substantial factor in bringing about an injury, and without which cause such injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the injury, or some similar injury, might reasonably result therefrom. There may be more than one proximate cause of an injury.

The charge then provided a blank for A&D and a blank for Cotton. The jury answered "No" for A&D but "Yes" for Cotton. In Question 2, the charge instructed the jury that if they answered "Yes" in Question 1 for more than one of those

listed, it should then "[a]ssign percentages of responsibility only to those you found caused or contributed to cause the injury." Although, under the instructions, the jury should not have answered Question 2, it answered by assigning "100%" to Cotton and "0%" to A&D. The trial court then entered a take-nothing judgment favoring A&D.

Relevant Law

All of Cotton's appellate complaints pertain to the submission of the charge to the jury. We review a trial court's submission of jury questions and instructions for an abuse of discretion. *See, e.g.*, *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009). The trial court is required to submit the questions, instructions, and definitions raised by the pleadings and the evidence. *See Harris Cnty. v. Smith*, 96 S.W.3d 230, 236 (Tex. 2002). To elaborate, the trial court's discretion is subject to the requirement that the questions submitted must control the disposition of the case, be raised by the pleadings and evidence, and properly submit the disputed issues for the jury's deliberation, but a judgment should not be reversed because of a failure to submit other and various phases or different shades of the same question. *See* Tex. R. Civ. P. 277, 278; *Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367, 382–83 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663, 674 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

To the extent feasible, the court must submit broad-form jury questions. Tex. R. Civ. P. 277. Moreover, a jury should not be burdened with surplus instructions, even those that accurately state the law. *Johnson v. Nat'l Oilwell Varco, LP*, 574 S.W.3d 1, 10 (Tex. App.—Houston [14th Dist.] 2018, no pet.). When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *See*

Tex. R. Civ. P. 277, 278; *Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 911 (Tex. 2000). We may reverse and remand based on jury-charge error only if such error was reasonably calculated and probably did cause the rendition of an improper judgment, considering the pleadings, the evidence presented at trial, and the charge in its entirety. *See* Tex. R. App. P. 44.1(a)(1); *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986).

Discussion

Cotton asserts that because A&D was a workers' compensation nonsubscriber and she was injured in the course and scope of her employment: (1) she could sue for both premises liability and general negligence based on specific employer duties under *Austin v. Kroger*, and (2) A&D could not assert contributory negligence pursuant to Labor Code section 406.033(a). Tex. Labor Code § 406.033(a); *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015).[1] Consequently, in her three appellate issues, Cotton complains that the trial court erred in (1) making a factual determination that she was not in the course and scope of her employment at the time of the injury, (2) submitting only premises liability to the jury and not also general negligence, and (3) charging the jury on

[1] Labor Code section 406.033(a) provides in relevant part as follows:

> (a) In an action against an employer by or on behalf of an employee who is not covered by workers' compensation insurance . . . to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that:
>
> (1) the employee was guilty of contributory negligence . . . .

As will be discussed in more detail below, in answering a certified question from the Fifth Circuit, the Texas Supreme Court explained in *Austin* that an employee of a nonsubscriber may be entitled to pursue liability based on both premises liability and general negligence, depending on the evidence in a particular case. 465 S.W.3d at 215–17.

contributory negligence. We will discuss each issue in turn, but as will be seen, their resolutions are interconnected.

Course & Scope

Cotton first contends that the trial court erred in determining that she was not in the course and scope of her employment at the time of her injury. We begin by noting that it is somewhat unclear from Cotton's briefing whether she intended to raise this complaint solely as a factual sufficiency issue—asserting that the jury should have made the determination instead of the court—or whether she also intended to raise the complaint as a legal sufficiency challenge—asserting that she conclusively proved that the injury occurred while she was in the course and scope of her employment.

A&D argues that Cotton waived her argument that course and scope was for the jury when she failed to request a charge question on the issue, citing Texas Rule of Civil Procedure 279, among other authority. However, regardless of whether Cotton preserved her factual sufficiency complaint or raises a legal sufficiency complaint, we conclude that any error regarding the course and scope issue was harmless because, as explained below: (1) she has not demonstrated an entitlement to the general negligence question she requested in addition to the premises liability question submitted to the jury, and (2) any error in submitting contributory negligence to the jury was harmless under Texas Supreme Court precedent. *See* Tex. R. App. P. 44.1(a)(1); *Island Recreational*, 710 S.W.2d at 555. Accordingly, we overrule her first issue.

General Negligence

In her second issue, Cotton contends that the trial court erred in refusing to submit her proposed general negligence question to the jury in addition to the

premises liability question that was submitted. She appears to assert that she was entitled to both instructions under *Austin* simply because she was injured in the course and scope of her employment while on her employer's property, but *Austin* does not support that conclusion.

To the contrary, *Austin* reconfirms long-standing Texas law that in the premises liability context, a nonsubscriber employer owes the same duty to its employee acting in the course and scope of their employment as any landowner owes to any invitee. 465 S.W.3d at 201–202. Moreover, the court explained that "[w]hen an injury arises from a premises condition, it is often the case that any resulting claim sounds exclusively in premises liability[.]" *Id*. at 216.

The *Austin* court also recognized, however, that when the facts of a particular case dictate, an employee may additionally pursue ordinary negligence theories of recovery against an employer because "when the landowner is also an employer and the invitee is also its employee, this additional relationship *may give rise* to additional duties, such as a duty to provide necessary equipment, training, or supervision." *Id*. at 215 (emphasis added). In *Austin* itself, for example, the supreme court agreed with the Fifth Circuit that the plaintiff should not be allowed to pursue both a negligent activity and a premises defect theory of recovery based on the same injury. *Id*. (citing *Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 197 (5th Cir. 2014) (per curiam)). However, the supreme court further concluded that the plaintiff could pursue a necessary-instrumentalities claim against the employer because he alleged the employer had negligently failed to provide him with a "necessary instrumentality," thus also proximately causing his injury.[2] *Austin*, 465

[2] Specifically, the employee in *Austin* alleged that his employer had failed to provide him with the "Spill Magic system" that the employee handbook required be available at the store and which the employee could have used to remedy the dangerous condition on the premises. 465 S.W.3d. at 216.

S.W.3d. at 216.

Thus, Austin does not stand for the proposition that an employee is entitled to both a premises liability question and an ordinary negligence question simply because the employee was injured in the course and scope of her employment while on her employer's property, as Cotton suggests. It does, however, stand for the proposition that an employee may be entitled to an additional negligence question when raised by the actual facts of the case. The additional negligence question that Cotton proposed reads in relevant part as follows:

QUESTION 1:

> Did the negligence, if any and however slight, of A&D Interests, Inc., proximately cause the injuries in question?
>
> Under Texas law, an employer has an absolute, continuous, and non-delegable duty to:
>
> 1. furnish a reasonably safe place to work,
> 2. warn employees of hazards of their employment that are not commonly known or already appreciated,
> 3. supervise employees' activities,
> 4. hire competent co-employees,
> 5. furnish reasonably safe instrumentalities with which to work,
> 6. provide safety regulations, and
> 7. train employees in the safe use and handling of products and equipment used in and around an employer's premises or facilities.
>
> "NEGLIGENCE" means failure to use ordinary care, that is, failing to do that which an employer of ordinary prudence would have done under the same or similar circumstances or doing that which an employer of ordinary prudence would not have done under the same or similar circumstances. . . .

Although Cotton did list some of these employer duties in her pleadings, she does not on appeal attempt to either (1) explain why these duties should have been submitted to the jury in addition to the premises liability duties already submitted,

or (2) cite or discuss any trial evidence supporting the submission of the additional duties listed in her proposed question. Cotton also failed to do either of these things during the charge conference in which she requested the additional negligence question. We further note that several of the employer duties listed in Cotton's proposed charge are already subsumed within Question 1 in the charge as submitted, for example, the duties to provide a safe place to work and to warn of any hazards.

As set forth above, a trial court is only required to submit questions and instructions that are raised by the pleadings and supported by evidence. *See* Tex. R. Civ. P. 277, 278; *Smith*, 96 S.W.3d at 236. A court need not and should not submit multiple phrasings or shades of the same question. *See* Tex. R. Civ. P. 278; *Eurecat*, 527 S.W.3d at 382–83. Nothing in *Austin* obviates these requirements. Because Cotton has not established that she was entitled to an additional ordinary negligence question in addition to the premises liability question, we overrule her second issue.

Contributory Negligence

Lastly, in her third issue, Cotton asserts the trial court erred in submitting contributory negligence to the jury, both by listing her name in Question 1 and asking what percentage of responsibility should be assigned to her in Question 2. As Cotton points out, when a nonsubscriber is sued for personal injuries incurred in the course and scope of employment, the employer may not assert contributory negligence as a defensive issue. *See* Tex. Labor Code § 406.033(a). She insists that asking the jury about her negligence was directly contrary to section 406.033(a) and thus reversible error.

However, when the answer to a particular jury question cannot alter the overall effect of the verdict, a reviewing court should consider the question to be

immaterial. *See Thota v. Young*, 366 S.W.3d 678, 694 (Tex. 2012); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). Similar to *Thota*, the charge's definition of proximate cause in the present case clearly informed the jury that "[t]here may be more than one proximate cause of an injury"; thus, the jury was aware that it could have found both parties responsible and then assigned percentages of responsibility in response to the next question in the charge. 366 S.W.3d at 694. But, instead, the jury found A&D did not proximately cause Cotton's injury, and any answer regarding Cotton's responsibility could not have altered the verdict and was therefore immaterial. *Id*. Accordingly, any error in submitting the question of Cotton's contributory negligence was rendered harmless by the jury's finding of no negligence as to A&D. *Thota*, 366 S.W.3d at 694; *Alvarado*, 897 S.W.2d at 752; *see also Alford v. Singleton*, No. 14-17-00504-CV, 2018 WL 5621472, at *2 (Tex. App.—Houston [14th Dist.] Oct. 30, 2018, no pet.) (mem. op.); *Mattingly v. Swisher Int'l, Inc.*, No. 03-17-00510-CV, 2018 WL 454787, at *4 (Tex. App.—Austin Jan. 11, 2018, pet. denied) (mem. op.). We therefore overrule Cotton's third issue. *See* Tex. R. App. P. 44.1(a)(1); *Island Recreational*, 710 S.W.2d at 555.

Having overruled each of Cotton's issues, we affirm the trial court's judgment.

/s/ Maritza M. Antú
Justice

Panel consists of Justices Jewell, McLaughlin, and Antú.