Affirmed in part, Reversed in part, and Remanded; Opinion Filed January 13, 2021

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00439-CV

JOHN PANIAGUA; AND HERMELINDA MARAVILLA CORONA, JOSE CAMERINO MARAVILLA, SR., AND MARGARITA MARAVILLA, INDIVIDUALLY, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JOSE CAMERINO MARAVILLA, DECEASED, AND AS NEXT FRIEND OF S.L.M.S., E.H., L.A.S., AND J.J.M., MINORS, Appellants
V.
WEEKLEY HOMES, LLC, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-02097

MEMORANDUM OPINION

Before Justices Molberg, Carlyle, and Smith[1]
Opinion by Justice Carlyle

Construction worker Jose Camerino Maravilla was electrocuted and his co-worker John Paniagua was injured while working on a home being built by appellee Weekley Homes, LLC. Mr. Paniagua and several of the decedent's relatives

[1] Justice Smith has substituted on the submission panel and has reviewed the briefs and record in this case.

(collectively, appellants) sued Weekley and others for negligence, gross negligence, and premises liability.

Weekley filed a motion for summary judgment, which the trial court granted. Then, the trial court severed appellants' claims against Weekley and denied appellants' motions for (1) leave to designate experts late and (2) reconsideration and new trial. In two issues on appeal, appellants challenge the summary judgment, several evidentiary rulings, and the denial of their motion for reconsideration and new trial. We reverse in part and remand in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

On May 31, 2016, Mr. Paniagua and the decedent were working for the decedent's brother, Leobardo Maravilla, an independent contractor Weekley hired to provide framing and cornice work on new townhomes under construction near Love Field. Appellants' May 24, 2018 live petition alleged Mr. Paniagua and the decedent were "storing scaffolds and during the process stepped on concrete flooring or driveway that electrocuted [them]." According to the petition, (1) "[t]he cement floor or driveway where Plaintiffs were working was near two electrical poles and the cement floor or driveway surrounding same were wet from rainfall which occurred immediately prior to or during the electrocution," and (2) "[t]here were not any warnings posted about the work-site/premise including that the temporary power poles and lines could cause the surface area to become energized."

Weekley filed a general denial answer and, following discovery, an August 23, 2018 combined traditional and no-evidence motion for summary judgment. In its summary judgment motion, Weekley asserted (1) "this case is governed by Chapter 95 of the Texas Civil Practice and Remedies Code ('Chapter 95') and thus, Weekley is not liable for Decedent's death or Paniagua's alleged injuries, as both were employees of a subcontractor who died and suffered bodily injury, respectively, while performing construction and repair work on an improvement to Weekley's real property"; (2) "[n]o employee of Weekley was present at the time of the accident, and Weekley did not have knowledge that the T-Poles had allegedly energized the ground where Maravilla and his crew were working"; (3) "Decedent and Paniagua were hired by Maravilla, an independent contractor, to help complete the siding and cornice work Weekley subcontracted out to Maravilla"; and (4) "[a]s Maravilla's employees, Decedent and Paniagua were also independent contractors."

Weekley argued:

> At the time of the accident, Decedent and Paniagua were apparently moving scaffolding at one of the townhouses at the Project. The scaffolding was used by Maravilla and his crew to install siding on the homes. In the context of Chapter 95, "improvement" is broadly defined as "all additions to the freehold except for trade fixtures that can be removed without injury to the property.". . . These townhouses included cement driveways, including the cement driveway which Plaintiffs allege was energized by the T-Poles. Therefore, Plaintiffs' claims are claims for the death or injury of an employee of a subcontractor that arise from the condition of an improvement to real property where the subcontractor was constructing, repairing, renovating, or modifying the improvement. . . . [Thus] Chapter 95 applies to their claims.

(citations omitted).

Weekley contended appellants could not meet their Chapter 95 burden to "establish that Weekley exercised or retained control over the manner in which Decedent and Paniagua performed their work and had actual knowledge of the danger or condition resulting in Decedent's death and Paniagua's alleged injuries." Alternatively, Weekley argued that even if Chapter 95 is inapplicable, "Plaintiffs cannot produce any evidence, or, in the alternative, more than a scintilla of probative evidence, to prove their negligence, premises liability and/or gross negligence claims."

The evidence attached to Weekley's summary judgment motion included (1) excerpts from depositions of Mr. Paniagua, Leobardo Maravilla, and Weekley's "builder for the project" John Holmes, and (2) declarations of Mr. Holmes and Weekley's general counsel John Burchfield (the declarations) stating Weekley hired Leobardo Maravilla to perform "framing and cornice work" on a townhome project and "Weekley owned the real property where the [project] was located, including the particular tract of land where the house under construction and involved in the incident at issue was located."

Mr. Paniagua testified in his deposition:

> Q. Did you tell Leobardo that you didn't want to work in the rain?
> A. Yes.
> Q. What did he say?
> A. He said that John [Holmes] said we got to move the scaffolds. . . . And I—me and Jose were talking about leaving already. And Leobardo

was, like: Well, John wants us to move these scaffolds at least so we can come back and go to work the next day right away. . . .
. . . .
Q. Okay. So let's—let's go back and—and go through the time sequence. It started raining about 4 o'clock?
A. Yes.
Q. Was it a little bit of rain or a lot of rain?
A. It was just drizzling at first.
Q. Okay. Was there any light[]ning that were [sic] aware of?
A. I didn't see light[]ning.
Q. Did you ever see any light[]ning?
A. Uh-uh.
. . . .
Q. Did you ever hear any thunder sounds like light[]ning at a distance or . . .
A. No, sir. I just—it was just cloudy.
Q. Did anyone go to their phone or otherwise, find out what the weather forecast was—
A. No, sir.
Q. —from your crew? No?
A. No, sir.
Q. So it started raining, but it was a light rain at first?
A. Yes.
Q. And when it started raining, did y'all initially stop work?
A. No.
Q. So when it started raining lightly, you just continued to work?
A. Yeah. . . . I mean, once it was raining, John told us: Well, go do this. Go and work inside. . . . We thought it was going to be over. So we were working inside the garage. . . .
Q. What time did John leave that day?
A. I don't know exactly the time. It was—it was around the time that we were moving the scaffolds though. Around 5:00, I want to say.
. . . .
Q. You didn't hear John give any instruction to Leobardo about staying there working in the rain?
A. No, I didn't hear it.
Q. Okay. But somebody told you that's what happened?
. . . .
A. When we were putting up the scaffolds and I told [Leobardo] I had a—I told him: I ain't going to work in the rain. I don't want—I want to go home earlier. And he told me: Well, John said we got to finish it.

> Q. So did he say that John said: You got to finish it even if it's thundering and light[]ning outside?
> A. He just—he didn't say it like that. He just said: We have—John said we have to finish it. He didn't be—he wasn't elaborate.
> . . . .
> Q. Okay. What was the weather doing when you were in the process of moving this—this scaffolding at the time of the accident? Was it still raining?
> A. Yes, it was raining.
> Q. Was it—was it raining lightly or hard or how was it raining?
> A. It wasn't hard. It wasn't, like, real—it wasn't drizzling anymore. It was—but it was a hard rain. We were getting wet, though.
> Q. Was there any light[]ning?
> A. I don't recall seeing any light[]ning.

Mr. Holmes testified (1) he directed the project's "subcontractors" "on how to put the home together and how we need to do that"; (2) at the start of the project, he told Leobardo Maravilla that "homemade, job-made, wooden scaffolds" could not be used on Weekley projects and Leobardo Maravilla would need to purchase new scaffolding; (3) when he left the job site on the day of the accident, he told Leobardo Maravilla to go home at that time because of the rain; and (4) it is "absolutely not" possible that he instructed Leobardo Maravilla and his crew to finish moving the scaffolding before they left that day.

Leobardo Maravilla testified (1) after Mr. Holmes told him to buy new scaffolding, Weekley mailed him a $3,500.00 check and Mr. Holmes drove him to a building supply store and told him which scaffolding system to purchase; (2) his crew was moving that scaffolding at the time of the accident; and (3) Mr. Holmes

"will always demand to me to work a certain way" and "didn't allow me to freely do what I know how to work." Leobardo Maravilla also stated in his deposition:

> Q. Did you think that working in the rain was dangerous?
> A. Yes.
> Q. Did you tell your workers to work in the rain anyway?
> A. No.
> Q. Why did they work in the rain?
> A. That day we worked because John [Holmes] told us to.
> Q. John told you to work inside while it was raining and to work outside when it wasn't raining? Is that what he told you?
> A. Yes.
> Q. John never told you to go out and work in a thunderstorm while working on scaffolding, did he?
> A. No, but we had to do the whole job completely. He wanted us to finish that house that day because he needed to pass inspection the next day.
> . . . .
> Q. But you knew it was your job and your responsibility to make sure you did it safely, correct?
> A. Yeah, when we went outside it wasn't raining anymore, but everything was wet.
> Q. Okay. So you thought it was safe enough to work when you went back out and started doing this work, correct?
> A. Yes, because it wasn't raining no more.
> Q. So if you thought that it was too dangerous to work, it was raining too hard or it was lightning, you would not have gone back out and put your crew in danger, would you?
> A. No. I've never—every time that it's been raining I stop working, but nobody had stopped me in all my life that I worked. I will stop when it will be raining, and nobody would stop me from going.
> Q. Right. You make the decision whether it's safe to work, correct?
> A. I felt the pressure from him telling me I couldn't leave, I have to stay and work.
> Q. But he wasn't telling you you had to work in a rainstorm, was he?
> A. Yeah, to—by telling me to—asking me to stay, he knew it was going to rain, and it was raining.
> . . . .
> Q. Did John Holmes tell you to try to move aluminum scaffolding during the rain?

A. Yes, because we had to finish the upper part, the front.
. . . .
Q. Did you think that maybe you should come in the next morning and put that last leg of the scaffolding up instead of trying to do it in the evening?
A. Yeah, but since it wasn't raining, yeah.
Q. Sorry. Say that again.
A. Since it wasn't raining, we wanted to finish it out.

Appellants filed an "objection" contending Mr. Holmes's and Mr. Burchfield's declarations were "legally insufficient," "amount[ed] to no evidence," and "should be stricken." Appellants contended that because the declarations constituted Weekley's only evidence regarding Chapter 95's purported applicability, Weekley "cannot meet its burden . . . to conclusively prove that Chapter 95 bars Plaintiffs' claims."

Appellants also filed a summary judgment response in which they asserted (1) "[t]here is a genuine issue of fact regarding whether Chapter 95 applies"; (2) regardless of Chapter 95's applicability, summary judgment is improper because the evidence shows that "though it was raining, Defendant's employee and authorized representative John Holmes insisted that Leobardo Maravilla and his crew continue working on the job site to . . . move the aluminum scaffolding, which it purchased for them to use there to do their work," and the written safety information Weekley provided to Leobardo Maravilla acknowledged Weekley's required "compliance with applicable OSHA standards"[2] that included "[s]afe

[2] OSHA is the U.S. Department of Labor's Occupational Safety and Health Administration.

source of electricity (not hot-wired T-pole)"; and (3) with regard to their premises liability claim, even if the dangerous condition on the premises was "open and obvious," the evidence shows "it was necessary that the invitees use the unreasonably dangerous premises" and Weekley "should have anticipated that the invitee was unable to avoid the unreasonable risks despite the invitee's awareness of them."

The evidence attached to appellants' summary judgment response included a November 23, 2016 OSHA Inspection Report that stated in part, "According to witnesses, on the day of the incident, the job had been stopped due to rain and thunder. When the crew returned to work and attempted to move the 48-foot scaffold leg, it started to rain again. The crew continued to work." The OSHA report concluded "[t]he cause of the incident is unknown."

On September 27, 2018, following a hearing,[3] the 116th Judicial District Court of Dallas County granted Weekley's summary judgment motion without stating the grounds for its ruling. Two months later, the claims against Weekley were severed and transferred to the 298th Judicial District Court of Dallas County because a related case was pending there.

On January 15, 2019, appellants filed a combined motion for reconsideration and new trial in the 298th Judicial District Court regarding the summary judgment

[3] The appellate record does not include a reporter's record.

order. The motion restated appellants' arguments regarding Chapter 95's inapplicability and Mr. Holmes requiring Leobardo Maravilla and his crew to move the metal scaffolding during the rain "so they finish [sic] their decking work on that house before they left that jobsite on May 31, 2016." Additionally, appellants stated that on January 11, 2019, another defendant in the case produced a report of that same date in which electrical engineering expert K. Derek Longeway concluded "no 120-volt short circuit in the muddy earth or puddles could have caused the decedent's electrocution and that the electrical burns to his feet were caused by a higher voltage."

Appellants asserted in their motion that Mr. Longeway's report (1) "notes that the OSHA report documents witnesses observing a thunderstorm on May 31, 2016 through 5 p.m., when it had intensified, which continued until just before 6 p.m., when OSHA documented that the electrocutions occurred"; (2) states he "obtained a lightning verification report, which documented cloud-to-ground lightning activity within one mile of that location and multiple lightning strikes of varying intensity and polarity between 5:13 and 5:37 p.m. that day, plus a great number of cloud-to-cloud lightning strikes within a mile of that location"; and (3) "explains his professional opinion that, to a reasonable degree of engineering certainty, it is most probable that Mr. Maravilla was electrocuted as a result of an indirect lightning strike resulting in energized rebar within poured concrete, energized underground copper water pipes, and energized ground rods of that house's electrical system."

The motion's attachments included a copy of Mr. Longeway's report.[4] Further, appellants supplemented their motion with "their safety expert, Russ Elveston, P.E.'s report and authenticating affidavit . . . in which Mr. Elveston explains why Defendant should not have had the decedent and Mr. Paniagua working in that storm at the time of their electrocutions and thereby exercised some control over what they were doing at the time." Appellants also sought to designate Mr. Longeway and Mr. Elveston as experts.

[4] Mr. Longeway's report stated, in relevant part:

> The OSHA report documented that witnesses observed a thunderstorm during the day of the accident. Historic weather data recorded on the day of the accident via the weather station at Dallas Love Field (DAL) documented thunder was detected just after 2 p.m. Just before 4 p.m., light rain was detected along with the continuing thunder. The data shows that the thunderstorm continued through 5 p.m. when it had grown in intensity into a heavy thunderstorm, which continued until just before 6 p.m. Just after 6 p.m. the intensity of the storm had subsided; however, the thunderstorm continued for nearly another hour. The OSHA report documented the accident/event time to have occurred at 6 p.m. on the date of loss.
>
> . . . .
>
> During my analysis of the incident, I obtained a lightning verification report . . . which documented cloud-to-ground lightning activity within one mile of the accident location. The verification report documented multiple lightning strikes within a mile of the accident location of varying intensity and polarity between 5:13 p.m. and 5:37 p.m. Oncor Electric Delivery prepared a lightning study for May 31, 2016 . . . . In addition to several cloud-to-ground recorded lightning strikes, the study also documented a great number of cloud-to-cloud lightning strikes within a mile of the accident location.
>
> . . . .
>
> . . . [T]he lightning current can conduct to the structure and energize rebar within the concrete slab . . . Lightning current can also conduct to the underground copper water piping system and . . . can conduct to the ground rod of the electrical system and energize the grounding system in such a manner that damages appliances and fixtures. In these last two instances, if an occupant of the structure is in contact with a plumbing fixture, say taking a shower, or an electrical appliance, then there is a great probability that the individual will be shocked or electrocuted from the lightning event. This scenario is an example of how a direct lightning strike to a nearby object can also indirectly cause damage, injury or death. These are know[n] as the effects of an indirect lightning strike.
>
> To a reasonable degree of engineering certainty, it is my professional opinion that it was most probable Mr. Maravilla was electrocuted as a result of an indirect lightning strike.

Weekley moved to strike appellants' designation of those two experts as untimely. Additionally, in its response to the motion for reconsideration and new trial, Weekley contended (1) "this is not a new theory of liability"; (2) "[r]egardless of the **cause** of the electrocution, Plaintiffs' **theory of liability** against Weekley has remained the same—that Weekley allegedly ordered Plaintiffs to move the metal scaffolding in the rain and knew that it was dangerous to do so"; (3) the trial court granted Weekley's summary judgment motion "on this theory of liability, ruling that Plaintiffs had no evidence that Weekley exercised sufficient control over Plaintiffs' work or that Weekley had actual or constructive knowledge of the alleged dangerous condition—i.e., the allegedly defective T-Poles"; (4) "Plaintiffs' Motion does nothing more than rehash the same arguments which [the trial court] rejected and cites to the same 'evidence' which [the trial court] ruled constituted no evidence at all"; (5) "[t]he only '**newly discovered**' evidence Plaintiffs' Motion cites is a report . . . in which Mr. Longeway concludes that the electrocution was caused by an indirect lightning strike"; (6) "Plaintiffs' new, curious strategy of arguing that a lightning strike—an Act of God—caused the electrocution completely undermines Plaintiffs' claims against Weekley"; and (7) appellants' "new" evidence is not "so material that it would probably produce a different result if a new trial was granted" because "even if a lightning strike did cause the electrocution, which Weekley disputes, this does not raise a genuine issue of material fact as to whether Weekley

had actual knowledge of the alleged danger or condition—lightning," which Chapter 95 requires.

Appellants then filed a motion for leave to designate experts late, arguing (1) there was good cause and no unfair surprise or unfair prejudice because appellants provided the expert reports to Weekley as soon as they obtained them and (2) the expert reports are "controlling on a material issue and not cumulative."

The trial court denied appellants' motions for leave to designate experts late and for reconsideration and new trial without stating the bases for those rulings.

SUMMARY JUDGMENT ANALYSIS

We review an order granting or denying a motion for summary judgment de novo. *Lujan v. Navistar, Inc*., 555 S.W.3d 79, 84 (Tex. 2018). Under the traditional summary judgment standard, the movant has the burden to show no genuine issue of material fact exists and he is entitled to summary judgment as a matter of law. TEX. R. CIV. P. 166a(c). The movant must establish his right to summary judgment on the grounds expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. TEX. R. CIV. P. 166a(i). A no-evidence motion for summary judgment is improperly granted if the nonmovant presented more than a scintilla of probative evidence to raise a genuine issue of material fact

on the challenged elements. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions." *Id.* at 601.

In reviewing both traditional and no-evidence summary judgments, we consider the evidence in the light most favorable to the nonmovant. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009). We credit evidence favorable to the nonmovant if reasonable jurors could and disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Where, as here, the trial court's order granting summary judgment does not specify the grounds relied on, we affirm if any of the summary judgment grounds presented to the trial court are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

The trial court erred by granting traditional summary judgment because Weekley did not conclusively establish Chapter 95's applicability.

Texas Civil Practice and Remedies Code Chapter 95 affords liability protection to property owners by imposing heightened evidentiary requirements on claimants. *See* TEX. CIV. PRAC. & REM. CODE §§ 95.001–.003; *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 561 (Tex. 2016). If Chapter 95 applies, it is the plaintiff's

sole means of recovery. *Ineos*, 505 S.W.3d at 561. The chapter applies only to a claim:

> (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and
>
> (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

TEX. CIV. PRAC. & REM. CODE § 95.002.

Though our supreme court has broadly defined an "improvement" to include "all additions to the freehold except for trade fixtures [that] can be removed without injury to the property," Chapter 95 "only applies when the injury results from a condition or use of the same improvement on which the contractor (or its employee) is working when the injury occurs." *Ineos*, 505 S.W.3d at 567–68 (citing *Hernandez v. Brinker Int'l, Inc*., 285 S.W.3d 152, 157–58 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (concluding Chapter 95 did not apply where contractor servicing air-conditioning unit on restaurant's roof fell through "soft-spot" in roof, because claim arose from condition of roof, which contractor did not repair or modify)).

A property owner seeking Chapter 95's protection bears the burden to establish the chapter applies by presenting summary judgment evidence that conclusively establishes all section 95.002 elements have been met. *See Lopez v. Ensign U.S. S. Drilling, LLC*, 524 S.W.3d 836, 842 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Cox v. Air Liquide Am., LP*, 498 S.W.3d 686, 689 (Tex. App.—

Houston [14th Dist.] 2016, no pet.); *Montoya v. Nichirin-Flex, U.S.A., Inc.*, 417 S.W.3d 507, 511 (Tex. App.—El Paso 2013, no pet.). If the property owner establishes Chapter 95 applies, the burden then shifts to the plaintiff to establish control and actual knowledge. *See Ineos*, 505 S.W.3d at 567–69; TEX. CIV. PRAC. & REM. CODE §§ 95.002–.003.

Here, appellants challenge Chapter 95's applicability in their first issue and subpart (A) of their second issue. They contend that because Weekley's "only evidence" supporting applicability was the declarations, which are "legally insufficient" and "amount to no evidence," the trial court erred "when it failed to find that [Weekley] never conclusively proved that Chapter 95 of the Civil Practice & Remedies Code applied to it." Appellants assert:

> "For chapter 95 to apply to" Appellants' "claims against" [Weekley], "the evidence must show" that [Weekley] "owned real property that was used primarily for business purpose," at the time of Mr. Paniagua's and the decedent's on-the-job injuries there; and that Appellants "sued for damages caused by" [Weekley's] "negligence, . . . that resulted in the . . . ' personal injury, . . . or . . . death,'. . . of a contractor and . . . that arose from the condition or use of an improvement to real property where the contractor constructs, repairs, renovates, or modifies the improvement." . . . [O]nly after "the defendant has" established "that chapter 95 applies to" it does "the burden" shift to "the plaintiff; . . . 'to establish both prongs of section 95.003.'"

(quoting TEX. CIV. PRAC. & REM. CODE § 95.002; *Gorman v. Meng*, 335 S.W.3d 797, 802–03 (Tex. App.—Dallas 2011, no pet.), *disapproved on other grounds by First Tex. Bank v. Carpenter*, 491 S.W.3d 729, 732–33 (Tex. 2016)).

Though the bulk of appellants' section 95.002 legal sufficiency argument on appeal pertains to that section's first prong—Weekley's burden to show ownership of the property where the accident occurred—appellants' broad contentions in their appellate brief encompass and quote both prongs, describe Weekley's burden to conclusively establish both, and cite authority explaining that burden, *see Gorman*, 335 S.W.3d at 803. Thus, we treat appellants' section 95.002 complaint as fairly including a legal sufficiency challenge as to both prongs.[5] *See* TEX. R. APP. P. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."); *see also St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 213 (Tex. 2020) (per curiam) ("We construe the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality."); *accord Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, – S.W.3d –, No. 19-0343, 2020 WL 7413725, at *2–3 (Tex. Dec. 18, 2020) (per curiam).

Even assuming without deciding that consideration of the declarations was proper, we cannot conclude Weekley satisfied its subsection 95.002(2) burden. In its summary judgment motion, Weekley quoted the supreme court's definition of

[5] To the extent appellants' trial court arguments did not specifically address subsection 95.002(2), "a summary-judgment nonmovant may raise, for the first time on appeal, the legal sufficiency of evidence supporting grounds for relief presented by the movant." *Old Am. Ins. Co. v. Lincoln Factoring, LLC*, 571 S.W.3d 271, 276 n.7 (Tex. App.—Fort Worth 2018, no pet.) (citing *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 512 (Tex. 2014); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)).

"improvement," then stated the townhomes on which Leobardo Maravilla and his crew were installing siding "included cement driveways, including the cement driveway which Plaintiffs allege was energized by the T-Poles." In support of that assertion, Weekley cited only the portions of appellants' live petition described above.

To the extent Weekley intended to rely on the position that because the townhomes "included" freehold additions, all such additions constituted a single improvement for subsection 95.002(2) purposes, that position has been specifically rejected. *See Hernandez*, 285 S.W.3d at 156–58 (rejecting property owner's position that Chapter 95 should be read as: "This chapter applies only to a claim . . . that arises from the condition or use of *the building* where the contractor or subcontractor constructs, repairs, renovates, or modifies the *building (including fixtures subsumed as part of the improvement)*."); *accord Ineos*, 505 S.W.3d at 567 (citing *Hernandez* in concluding "gas process system" portion of defendant's petrochemical plant was the "improvement" to be considered in Chapter 95 analysis); *Cox*, 498 S.W.3d at 690 (concluding supreme court's definition of improvement "does not mean that everything attached to a structure may be regarded collectively as a single improvement").

Moreover, though Weekley bore the burden to conclusively establish appellants' claims arose "from a condition or use of the same improvement on which the contractor (or its employee) [was] working when the injury occur[red]," *see*

Ineos, 505 S.W.3d at 567, Weekley cited no evidence supporting that requirement. *See MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 815 (Tex. App.—Dallas 2012, no pet.) ("Pleadings do not constitute summary judgment evidence."). Thus, the trial court erred to the extent it concluded Chapter 95 applied. *See Lopez*, 524 S.W.3d at 842 ("A defendant proves Chapter 95 applies by presenting evidence conclusively establishing that all elements of section 95.002 have been met."); *Garcia v. Nunez*, No. 05-17-00631-CV, 2018 WL 6065254, at *3 (Tex. App.—Dallas Nov. 20, 2018, no pet.) (mem. op.) (concluding that where property owner "adduced no evidence that § 95.002(2)'s requirements were satisfied," Chapter 95 was inapplicable).

The trial court abused its discretion by denying appellants' motion for reconsideration and new trial regarding no-evidence summary judgment.

We review a trial court's denial of a motion for reconsideration/new trial for abuse of discretion. *See Hermosillo v. K. Hovnanian Homes-DFW, LLC*, 329 S.W.3d 181, 185 (Tex. App.—Dallas 2010, no pet.). The general test for abuse of discretion is whether the trial court acted without regard to any guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004).

To prevail on a motion for reconsideration/new trial based on newly discovered evidence, the movant must show he became aware of the evidence after trial, he could not have discovered the evidence earlier in the exercise of due diligence, the evidence is not cumulative, and the evidence is so material that it

would probably produce a different result if a new trial was granted. *Hermosillo*, 329 S.W.3d at 185.

Here, at the time of the trial court's September 27, 2018 summary judgment ruling, appellants maintained the decedent and Mr. Paniagua were injured by electricity from T-poles while moving metal scaffolding in the rain. On appeal, appellants state they are no longer asserting that allegation and cite no evidence the T-poles were a causation factor. Even assuming without deciding the trial court did not err by initially granting summary judgment on all three of appellants' claims based on the absence of causation evidence regarding the T-poles, we conclude for the reasons below that the trial court erred by subsequently denying appellants' motion for reconsideration and new trial as to no-evidence summary judgment on their negligence and premises liability claims.[6]

[6] Weekley asserts in its appellate brief (1) appellants' complaints regarding the denials of their motions to late-designate experts and for reconsideration and new trial present nothing for this Court's review because appellants' "conclusory" assertions in their appellate brief regarding those complaints are "insufficient from a preservation standpoint"; (2) because appellants "only specifically challenge the summary judgment under Chapter 95" and do not "indicate" in their appellate brief that they are "challenging the summary judgment on Weekley's alternative grounds," this Court "must accept the validity of Weekley's unchallenged alternative grounds and affirm the trial court's summary judgment"; and (3) "even if Plaintiffs' brief is construed over-generously from a preservation standpoint," their brief "fails to specify the probative evidence that was before the trial court when it granted summary judgment, as to each element of their claims," and "the no-evidence summary judgment must be upheld for this further reason."

As we stated above, "[w]e construe the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality." *St. John Missionary Baptist Church*, 595 S.W.3d at 213. We "generally hesitate to turn away claims based on waiver or failure to preserve the issue." *Id*. "To that end, Rule 38.1 provides that an issue statement 'will be treated as covering every subsidiary question that is fairly included.'" *Id*. at 213–14 (citing TEX. R. APP. P. 38.1(f)). Further, "[w]e have often held that a party sufficiently preserves an issue for review by arguing the issue's substance, even if the party does not call the issue by name." *Id.* at 214. This is because "appellate courts should reach the merits of an appeal whenever reasonably possible." *Id*.

Appellants' brief in this Court (1) describes why the trial court should have allowed the late designation of experts and abused its discretion by denying the motion for reconsideration and new trial

Appellants' motion for leave to designate experts late

In order to establish what evidence the trial court properly should have considered when ruling on the motion for reconsideration and new trial, we must first address appellants' challenge to the denial of their motion to designate experts late. *See Walker v. Schion*, 420 S.W.3d 454, 457 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("[I]n the summary-judgment context, we cannot consider evidence that was excluded by the trial court unless that evidentiary ruling is timely and successfully challenged on appeal.").

Unless otherwise ordered by the trial court, a party must designate experts ninety days before the end of the discovery period. TEX. R. CIV. P. 195.2(a). A party who fails to timely amend or supplement a discovery response may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness, other than a named party, who was not timely identified, unless the court finds "(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly

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and (2) asserts this Court "should find that Mr. Elveston's and Mr. Longeway's reports go to the merits of Appellants' claims and causes of action against [Weekley] and that, as a result, the trial court abused its discretion by not granting Appellants leave to designate them late and by denying their [motion for reconsideration and new trial]." Additionally, appellants' arguments pertaining to their issues 2(B), 2(C), and 2(D) address the elements of their three claims, describe the corresponding evidence in the record, and assert that such evidence shows they met their burden regarding "the no-evidence portion of [Weekley's] motion." On this record, we conclude appellants' complaints and challenges as to which Weekley alleges briefing insufficiencies are properly before this Court. *See id*. at 213–14; *see also Lion Copolymer Holdings*, 2020 WL 7413725, at *2.

prejudice the other parties." TEX. R. CIV. P. 193.6(a). The party seeking to introduce the evidence or call the witness bears the burden of establishing good cause or lack of unfair surprise or unfair prejudice. TEX. R. CIV. P. 193.6(b). A trial court's exclusion of an expert who has not been properly designated can be overturned only for an abuse of discretion. *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam).

The record shows (1) Mr. Longeway's report was based almost entirely on his inspection of the job site's deactivated electrical lines and (2) the lines' deactivation could be performed only by the electric delivery company and was not completed until November 30, 2018. Appellants received Mr. Longeway's report on January 11, 2019, and filed their motion for reconsideration and new trial, with that report attached, several days later.

Weekley's response to the attempted late designation focused only on Mr. Elveston's report and did not specifically address good cause or unfair surprise or prejudice as to Mr. Longeway. Additionally, Weekley's response to appellants' reconsideration/new trial motion stated (1) "this is not a new theory of liability"; (2) "[r]egardless of the **cause** of the electrocution, Plaintiffs' **theory of liability** against Weekley has remained the same"; (3) "Plaintiffs' Motion does nothing more than rehash the same arguments which [the trial court] rejected and cites to the same 'evidence' which [the trial court] ruled constituted no evidence at all"; and

(4) appellants' "new" evidence is not "so material that it would probably produce a different result if a new trial was granted."

We conclude the record supports findings of both good cause and lack of unfair surprise or prejudice regarding Mr. Longeway's late designation and contains no basis for the trial court's rejection of those findings.[7] *See* TEX. R. CIV. P. 193.6. Thus, the trial court abused its discretion by denying appellants' late-designation motion as to Mr. Longeway. *See id*.; *see also VSDH Vaquero Venture, Ltd. v. Gross*, No. 05-19-00217-CV, 2020 WL 3248481, at *4 (Tex. App.—Dallas June 16, 2020, no pet.) (mem. op.) (reversing trial court's order striking untimely-disclosed evidence where "trial court could reasonably only reach one decision" as to absence of unfair surprise or prejudice and failed to do so). In light of that conclusion, we consider Mr. Longeway's report in addressing the trial court's denial of appellants' motion for reconsideration and new trial.

Appellants' negligence claim

To prevail on a negligence claim, a plaintiff must establish a legal duty, a breach of that duty, and damages proximately caused by the breach. *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017). The two elements of proximate cause are cause in fact and foreseeability. *Id*. Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries and, without it, the

[7] Because we do not rely on Mr. Elveston's report in our analysis below, we need not reach a conclusion regarding appellants' late designation of him.

harm would not have occurred. *Id.* Harm is foreseeable if a person of ordinary intelligence should have anticipated the danger created by an act or omission. *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018).

Generally, one who employs an independent contractor has no duty to ensure the contractor performs its work in a safe manner. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001). But when a general contractor exercises some control over the manner in which a subcontractor's work is performed, he may be liable unless he exercises reasonable care in supervising the subcontractor's activity. *Id.*; *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). The general contractor's duty of care is commensurate with the control it retains over the independent contractor's work. *Lee Lewis Constr.*, 70 S.W.3d at 783. A general contractor can retain the right to control an aspect of an independent contractor's work or project so as to give rise to a duty of care to that independent contractor's employees in two ways: by contract or by actual exercise of control. *Id.*

General supervisory control that does not relate to the activity causing the injury is not sufficient to create a duty. *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 785 (Tex. App.—Dallas 2013, no pet.). Thus, merely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to impose a duty. *Id.*; *see also Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 611 (Tex. 2002) ("[M]ere promulgation of safety policies does not establish actual control."). There also must be a nexus

between a general contractor's retained supervisory control and the condition or activity that caused the injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357–58 (Tex. 1998) (per curiam). The right to control must be more than a general right to order work to stop and start, or to inspect progress. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (per curiam).

In order to have actual control, a general contractor "must have the right to control the means, methods, or details of the independent contractor's work to the extent that the independent contractor is not entirely free to do the work his own way." *Union Carbide Corp. v. Smith*, 313 S.W.3d 370, 375 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *Ellwood Tex. Forge Corp. v. Jones*, 214 S.W.3d 693, 700 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)). A general contractor has actually exercised control of a premises when the general contractor knew of a dangerous condition before an injury occurred and approved acts that were dangerous and unsafe. *Dow Chem. Co.*, 89 S.W.3d at 609 (citing *Lee Lewis Constr.*, 70 S.W.3d at 784).

Here, Weekley describes Leobardo Maravilla as its "subcontractor" and the record supports that description.[8] In subpart (B) of their second issue, appellants contend, "The trial court committed reversible error when it failed to find that there

[8] Weekley also asserts it was the property's owner at the time of the accident, though appellants dispute that assertion. Weekley's ownership of the property would not change our analysis. *See Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004) ("Generally, the duties owed by premises owners and general contractors to employees of an independent contractor are the same.").

is a genuine and material fact question regarding whether [Weekley] exercised some control over the manner, methods, means, and/or details of the work which the decedent Jose Camerino Maravilla and John Paniagua were doing at the time of their on-the-job electrocutions and thereby owed a duty to them, which it breached and thereby proximately caused or at least contributed to the decedent's death, Mr. Paniagua's injuries, and Appellants' resulting damages."

Appellants argue Weekley's duty was based on the actual exercise of control, as evidenced by Leobardo Maravilla's testimony that Mr. Holmes "will always demand to me to work a certain way," "didn't allow me to freely do what I know how to work," required him to purchase new scaffolding, took him to the building supply store, directed him to buy the aluminum scaffolding his employees were using on the day of the accident, and told him to stay at the project site and continue working even though Mr. Holmes left due to weather conditions. According to appellants, Mr. Holmes did not act with reasonable care, and thus breached Weekley's duty, by, while present on the job site, telling Leobardo Maravilla's crew to stay and finish their framing and cornice work using metal scaffolding even though, as evidenced by the OSHA report, there had been thunder at the job site earlier that day and the rain continued on and off. Additionally, appellants contend Mr. Longeway's report provided further evidence of lack of reasonable care, as well as the sole evidence of proximate cause, because it stated that while Leobardo Maravilla's crew continued their work in the ongoing "thunderstorm," there were

numerous lightning strikes in the area that likely energized the rebar in the wet concrete on which they were standing while holding onto the metal scaffolding, thus causing their injuries.

We agree with appellants that the evidence described above constitutes more than a scintilla of evidence that Weekley owed a duty to Leobardo Maravilla's employees arising from actual exercise of control and there was a nexus between Weekley's retained supervisory control and the condition or activity that caused the injury. *See Lee Lewis Constr.*, 70 S.W.3d at 784 (concluding evidence supported actual control where superintendent overseeing mandatory use of fall-protection equipment witnessed and approved of contractor's fall-protection systems); *Morales v. Alcoa World Alumina L.L.C.*, No. 13-17-00101-CV, 2018 WL 2252901, at *10 (Tex. App.—Corpus Christi–Edinburg May 17, 2018, pet. denied) (mem. op.) (concluding evidence raised fact issue regarding duty where owner provided performance guidelines and controlled draining process necessary to contractor's work). Further, we conclude the evidence raises a genuine issue of material fact as to whether (1) the harm in question would not have occurred without Weekley's act or omission and (2) a person of ordinary intelligence should have anticipated the danger created by requiring performance of the project's framing and cornice work

with metal scaffolding on that stormy day.[9] *See Bustamante*, 529 S.W.3d at 456; *Bos*, 556 S.W.3d at 303.

In light of those conclusions, we also conclude appellants should have prevailed on their motion for reconsideration and new trial regarding their negligence claim because they showed Mr. Longeway's January 11, 2019 report is not cumulative as to that claim, is so material that it would probably produce a different result on that claim in a new trial, was not known to them until after summary judgment was granted, and could not have been discovered earlier in the exercise of due diligence. *See Hermosillo*, 329 S.W.3d at 185. Thus, the trial court abused its discretion by denying appellants' motion for reconsideration and new trial as to their negligence claim. *See id*.

Appellants' premises liability claim

A premises owner or occupier has a duty to invitees—which include independent contractors—to use ordinary care to reduce or to eliminate an unreasonable risk of harm created by a premises condition that it knew about or should have known about. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005);

[9] Weekley argues in a footnote on appeal that "Plaintiffs' current lightning strike theory . . . absolves Weekley of liability because Texas law has long recognized that a party is not responsible for injury or loss caused by an Act of God." To the extent Weekley contends the involvement of lightning, alone, negates any negligence claim as a matter of law, we disagree. *See McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App.—Amarillo 2003, pet. denied) ("[F]or one to be insulated from liability [regarding an 'act of God'], it must be shown that 1) the loss was due directly and exclusively to an act of nature and without human intervention, and 2) no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury. Furthermore, the act of nature must be unusual or unprecedented. Yet, it need not be the sole, greatest, or harshest violent act ever experienced. Instead, it need only be so unusual that it could not have been reasonably expected or provided against." (citations omitted)).

see also Redinger, 689 S.W.2d at 417 (in premises liability context, general contractor on construction site is charged with same duty as owner or occupier). With respect to pre-existing conditions, an owner or occupier has a duty to inspect the premises and warn of concealed hazards the owner knows or should have known about. *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004). As to conditions arising later, an owner has no duty unless it retains a right to control the work that created the condition. *Id*. The elements of a premises liability claim are (1) actual or constructive knowledge of some condition on the premises, (2) an unreasonable risk of harm posed by the condition, (3) failure to exercise reasonable care to reduce or eliminate the risk, and (4) injuries proximately caused by the failure to use reasonable care. *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996) (per curiam).

Though an owner or occupier generally has no duty when a premises danger is "open and obvious," an exception applies when the invitee necessarily must use the unreasonably dangerous premises and, despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 204, 208 (Tex. 2015). In such cases, the danger's obviousness and the invitee's appreciation of it may be relevant to an owner's defense based on the invitee's proportionate responsibility, but the invitee's awareness itself does not relieve the owner of its duty to make the premises reasonably safe. *Id*. at 204.

Here, appellants contend in subpart (C) of their second issue, "The trial court committed reversible error when it failed to find that there is a genuine and material fact question regarding whether [Weekley] had actual or constructive knowledge of a condition on the premises which posed an unreasonable risk of harm, of which it failed to warn Mr. Paniagua and the decedent or which it failed to make reasonably safe and thereby breached its duty to them and proximately caused or contributed to the decedent's death and Mr. Paniagua's injuries."

The same evidence described above in our negligence analysis—which includes Mr. Longeway's report and Leobardo Maravilla's testimony regarding Mr. Holmes's selection of the scaffolding and his instruction that they finish the work despite the weather conditions—constitutes more than a scintilla of evidence that Weekley had constructive knowledge of a premises condition that posed an unreasonable risk of harm and failed to exercise reasonable care to reduce or eliminate the risk, which proximately caused appellants' injuries. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997) (concluding facts presented premises defect case where independent contrator's employee at oil drilling site slipped while on catwalk and was injured when he landed on equipment left on ground). To the extent the danger was open and obvious, the same evidence also raises a material fact question as to whether Mr. Paniagua and the decedent were required to use the unreasonably dangerous premises and were incapable of taking precautions that would adequately reduce the risk. *See Austin*, 465 S.W.3d at 204.

We conclude appellants should have prevailed on their motion for reconsideration and new trial regarding their premises liability claim because they demonstrated Mr. Longeway's January 11, 2019 report is not cumulative as to that claim, is so material that it would probably produce a different result on that claim in a new trial, was not known to them until after summary judgment was granted, and could not have been discovered earlier in the exercise of due diligence. *See Hermosillo*, 329 S.W.3d at 185. Thus, the trial court abused its discretion by denying appellants' motion for reconsideration and new trial as to their premises liability claim. *See id*.

Appellants' gross negligence claim

To establish a gross negligence claim, a plaintiff must show two elements: (1) when viewed objectively from the actor's standpoint, the act or omission complained of involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have had actual, subjective awareness of the risk involved, but still proceeded in conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE § 41.001(11); *Medina v. Zuniga*, 593 S.W.3d 238, 247 (Tex. 2019); *see also Durham v. Accardi*, 587 S.W.3d 179, 183 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("[A] plaintiff must prove all elements of negligence as a prerequisite to a gross negligence claim.").

Under the first, objective element, an extreme risk is "not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311 (Tex. 2014) (per curiam). As to the subjective element, "actual awareness means the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." *Id.*; *see also Ineo*s, 505 S.W.3d at 568 ("Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge, which can be established by facts or inferences that a dangerous condition could develop over time."). Circumstantial evidence may suffice to prove either element. *Boerjan*, 436 S.W.3d at 311; *see also Ineos*, 505 S.W.3d at 568 ("Circumstantial evidence establishes actual knowledge only when it 'either directly or by reasonable inference' supports that conclusion.").

Appellants contend in subpart (D) of their second issue that the trial court committed reversible error by failing to find they satisfied their summary judgment burden to show "[Weekley's] conduct involved an extreme degree of risk of harm, of which it had actual, subjective awareness, but it proceeded with conscious indifference to the rights, safety, or welfare of others." According to appellants,

> Mr. Longeway noted that the OSHA report documents witnesses observing a thunderstorm on May 31, 2016 through 5 p.m, when it had intensified, and continued until just before 6 p.m., when OSHA documented that the electrocutions occurred, and that that thunderstorm continued until nearly 7 p.m. He also obtained a lightning verification report, which documented cloud-to-ground lightning activity within one mile of that location and multiple lightning strikes of varying

> intensity and polarity between 5:13 and 5:37 p.m. that day, plus a great number of cloud-to-cloud lightning strikes within a mile of that location. From this evidence, it is reasonable to infer that Mr. Holmes kn[e]w of the extreme danger of a direct or indirect lightning strike where the decedent, Mr. Paniagua, and Leobardo were working after he insisted that they carry the legs of that metal scaffolding in that stormy and rainy weather and set that scaffolding up, so they could finish covering the framing of that townhouse and the decking for its roof before the City inspector showed up to green- or red-tag it the next day.

(citations to record omitted).

Though the OSHA report stated that "[a]ccording to witnesses, on the day of the incident, the job had been stopped due to rain and thunder," that report does not state the time such thunder occurred or identify the witnesses. Mr. Longeway's report describes recorded thunder and lightning strikes in the area but does not show Weekley knew of those. There is no evidence Mr. Holmes actually knew of any thunder or lightning at the time he left the job site or afterward, or that he actually knew thunder had occurred at the site earlier in the day. To the extent appellants contend Weekley's knowledge that it was raining at the time of the accident supports a reasonable inference of actual, subjective awareness of lightning, we disagree.[10] *See Medina*, 593 S.W.3d at 247; *Ineos*, 505 S.W.3d at 668.

We conclude appellants did not meet their burden to show more than a scintilla of probative evidence to raise a genuine issue of material fact regarding the

[10] We do not suggest appellants could meet their no-evidence summary judgment burden only by showing Weekley knew when and where lightning would strike. If the evidence showed that a witness at the job site heard thunder as Mr. Holmes was preparing to leave or that Mr. Holmes had been made aware of weather reports showing thunder or lightning in the area at that time, a different conclusion might be warranted. *See Medina*, 593 S.W.3d at 248.

"actual, subjective awareness" element of their gross negligence claim. Thus, the trial court did not err by denying their motion for reconsideration and new trial as to that claim.

* * *

We affirm the trial court's summary judgment as to appellants' gross negligence claim, reverse the summary judgment as to appellants' negligence and premises liability claims, and remand this case to the trial court for further proceedings consistent with this opinion.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

190439F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN PANIAGUA; AND HERMELINDA MARAVILLA CORONA, JOSE CAMERINO MARAVILLA, SR., AND MARGARITA MARAVILLA, INDIVIDUALLY, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JOSE CAMERINO MARAVILLA, DECEASED, AND AS NEXT FRIEND OF S.L.M.S., E.H., L.A.S., AND J.J.M., MINORS, Appellants

No. 05-19-00439-CV V.

WEEKLEY HOMES, LLC, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-02097. Opinion delivered by Justice Carlyle. Justices Molberg and Smith participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** in part and **AFFIRMED** in part. We **REVERSE** that portion of the trial court's judgment granting summary judgment as to appellants' negligence and premises liability claims, **AFFIRM** the trial court's judgment as to appellants' gross negligence claim, and **REMAND** this case to the trial court for further proceedings consistent with this Court's opinion.

It is **ORDERED** that appellants JOHN PANIAGUA; AND HERMELINDA MARAVILLA CORONA, JOSE CAMERINO MARAVILLA, SR., AND MARGARITA MARAVILLA, INDIVIDUALLY, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JOSE CAMERINO MARAVILLA, DECEASED, AND AS NEXT FRIEND OF S.L.M.S., E.H., L.A.S., AND J.J.M.,

MINORS, recover their costs of this appeal from appellee WEEKLEY HOMES, LLC.

Judgment entered this 13th day of January, 2021.