Opinion issued March 18, 2014

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01123-CV

ONCOR ELECTRIC DELIVERY COMPANY, LLC, Appellant

V.

MARCO MURILLO, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 0864374

OPINION ON REHEARING

In this personal injury lawsuit, appellant Oncor Electric Delivery Company, LLC ("Oncor") appeals a judgment rendered on a jury verdict against it and in favor of appellee Marco Murillo, an employee of Leo Gomez *d/b/a* AAA

Demolishing ("AAA"). Murillo sustained serious personal injuries from electrocution while he worked for AAA at a demolition site in Dallas. The jury found Oncor (the electricity provider to the site) and two of its co-defendants—Basic Industries, Inc. ("Basic") (the project manager) and Hunt Realty Investments, Inc. ("HRI") (the property developer)—liable for general negligence, and it assessed 60% of the responsibility for Murillo's injuries against Oncor, 10% against Basic, and 10% against HRI. It also found AAA, a responsible third party, to be 20% responsible for Murillo's injuries. Of the defendants found liable to Murillo, Basic and HRI settled with Murillo after submission of this appeal to the panel. Only Oncor's appeal remains pending.

Oncor challenges the judgment against it for general negligence, arguing in six issues that: (1) Murillo's only viable claim against Oncor was a claim for premises-defect liability—which was not submitted to the jury and therefore was waived; (2) even if applicable, the jury's verdict in Murillo's favor against Oncor on Murillo's general negligence claim was not supported by legally and factually sufficient evidence; (3) Murillo's exclusive remedy against Oncor was a claim for premises defect liability under Civil Practice and Remedies Code Chapter 95, which Murillo waived by not securing findings on the essential elements of premises defect liability; (4) expert testimony is required to prove the standard of care for power companies under the circumstances of this case, and Murillo failed

to establish that Oncor breached that standard; (5) Murillo's expert was unqualified; and (6) Oncor is entitled to remittitur for excessive damages for disfigurement found by the jury.[1]

Following the issuance of our September 26, 2013 opinion and judgment affirming the trial court's judgment against it, Oncor filed a motion for rehearing and en banc reconsideration. Oncor argued that the September 26, 2013 opinion erroneously held that Oncor owed Murillo any duty other than that owed by a premises occupier, that Oncor exercised control over the manner in which Murillo performed his work, and that Murillo's injury was a result of Oncor's contemporaneous negligent activity. We grant the motion for rehearing, withdraw our September 26, 2013 opinion and judgment, and issue this opinion and judgment in their stead. Our disposition remains unchanged. We dismiss as moot Oncor's motion for en banc reconsideration.

We affirm.

Background

Next Block 1-Dallas, LP ("Next Block") acquired a large tract of multiple adjacent properties, spanning several blocks in Dallas County. At the time, the properties housed nine dilapidated apartment complexes, including the Windfall

[1] In its appellate brief, Oncor asserts six overlapping detailed issues with subparts, which it then regroups and argues as four issues. We simplify and restate Oncor's six listed issues as stated above.

Apartments, which Next Block planned to demolish in order to redevelop the property. Next Block retained an affiliate of HRI, HRC-MJR Development, LLC ("HRC-MJR"), to provide development management services for the property. HRC-MJR assigned its employee, Scott Shipp, who was also an employee of HRI, to be the manager for the project.

A. Oncor's Involvement with the Project

Oncor (also referred to as TXU Electric Delivery Company in the testimony and trial exhibits) owned electricity transformers that stood on an electrical utility easement on the property, and it provided electric service to the apartments located on the property. Oncor used sets of transformers housed on concrete pads—one set for each apartment complex—to convert higher-voltage transmission line electricity to lower-voltage residential line electricity. Two of these concrete pads were located in front of the former Windfall Apartments. The pads, designated as Pads A and B, each housed a set of transformers. On each concrete pad, three opaque metal enclosures, or "boxes," stood in a row: the first and third enclosures housed and entirely enclosed a transformer, and the middle enclosure, known as the secondary enclosure, housed and entirely enclosed equipment that routed the lower-voltage electricity from the transformers into an underground line that headed toward the individual apartment electric meters. Cables carrying electricity

from the power lines to the transformers were connected to the transformers inside the metal boxes.

Each metal box had an exterior door and an interior door to the cylindrical transformer itself, each secured with locks. Standard safety warnings were posted on the metal boxes. On the exterior door to each box, a sign read:

WARNING
Energized Electrical Equipment Inside
KEEP OUT
MAY SHOCK, BURN, OR CAUSE DEATH
If Unlocked or Open
Immediately Call
Your TXU Office at
[toll free number]

On the interior door to the transformer, a sign read:

DANGER
KEEP AWAY
IMMEDIATELY CALL
DALLAS POWER & LIGHT CO.
[telephone number]
Contact with certain parts
within this box can cause
electric shock and death
KEEP AWAY

The signs included illustrations of a figure shocked by a dangerous-looking caricature of electrical voltage. Oncor employees carried keys to open the locks to the metal boxes and to the transformer boxes inside them.

B. Oncor's Responsibilities With Respect to the Demolition Project

In March 2007, Next Block and Oncor entered into a series of Discretionary Service Agreements ("DSAs") in which Oncor charged Next Block a "facilities relocation/removal charge" for the "partial removal of dist[ribution] Services to apt. properties." The agreements terminated upon "completion of removal." The agreement identified Shipp, the project manager for HRI, as the Next Block company customer representative and required customer notification to him in care of HRC-MJR. Under these DSAs, Oncor undertook the "partial removal of dist[ribution] Services to apt. properties" in exchange for Next Block's payment of a "facilities relocation/removal charge." The record indicates that Shipp had paid for all of the removals before June 2007.

The first stage of the property redevelopment project required asbestos abatement followed by the demolition of the old apartment buildings and removal of all improvements, including utilities. Basic hired AAA, Murillo's employer, to demolish one part of the project—the part associated with the Windfall Apartments. The demolition contractor also had salvage rights to any valuable materials found within the scope of the demolition work. As the apartments were very old, many had valuable copper plumbing and wiring within them. Likewise, the cables that distributed electricity to the transformers at each complex contained salvageable metal.

Next Block provided demolition plans and specifications to Basic. Pursuant to those plans, Basic was responsible for removing the utilities associated with the apartment buildings, including electricity and gas, except for those noted to remain. Shipp contacted Oncor regarding the electrical disconnection work. He testified that the contractor, Basic, had salvage rights to any copper in the cables that remained on the property after the metal transformer boxes had been removed. Shipp also testified that he told all contractors at the site that the Oncor transformers located on the property and any other Oncor facilities were Oncor's property and were to be left alone and treated as energized. Shipp testified that he told the contractors that the transformers were not within the scope of the demolition work and that no one but Oncor had the right to go into the transformer boxes. In particular, Shipp testified that he had that conversation with Leo Gomez, AAA's owner and worksite supervisor.[2] Basic and AAA cleared the land for five of the nine apartment complexes scheduled to be demolished.

The Windfall Apartments was the last complex to be cleared. On April 19, 2007, Shipp e-mailed Oncor and asked that it close all of the electricity accounts at the Windfall Apartments "due to demolition of these apartments" and "remove all meters and service from the property." The request listed multiple individual

[2] Gomez was not available to testify, and Murillo testified that he had been killed before the trial began.

apartment units. The next day, on April 20, Oncor e-mailed Shipp, stating that it would "complete the request" upon Shipp's provision of additional information.

Oncor's work records showed that its crews performed electrical relocation and transformer removal work throughout the multiple apartment complexes from April through July 2007. However, although the apartments were now unoccupied, the construction workers still needed electric power to operate their equipment during the asbestos abatement. Thus, also on April 20, Shipp requested that Oncor install a "temporary pole set" for the Windfall Apartments for temporary electricity for the work crews. An Oncor work crew led by Keith Albanese made the connection on April 24, reconnecting a previously de-energized utility pole.

On May 8, one of the transformers on Pad A malfunctioned due to a blown electricity meter. Oncor sent a crew to the scene and de-energized the transformers on Pad A. The transformers on Pad B remained energized. The six casing boxes in the utility easement at the Windfall Apartments were all connected to the same utility pole.

The contractors completed the asbestos abatement work in early June 2007, and, on June 7, Shipp requested that Oncor "please cancel the Continuing Service Agreements (CSA's) for the following apartments as soon as possible due to their scheduled demolition: Windfall Apartments." TXU responded on June 11: "Thank

you for your fax. Per your request, CSA [for the Windfall Apartments] ha[s] been cancelled for you effective 6/11/07. If you need any of these properties turned off, please provide a list of those addresses or account numbers."

Oncor work records dated June 12 indicate that on that day Oncor read the temporary meters, closed service on them, de-energized the utility pole, and removed the meters from the utility poles. But Oncor did not de-energize the cable to one of the transformers on Pad B. It remained energized. Nor did Oncor identify and produce for deposition or trial the employee who de-energized the utility pole on June 12. It claimed that it could not find him. Oncor did not tell anyone that it had de-energized only one of the two live cables on the last utility pole.

Murillo testified that Gomez, the owner of AAA and his supervisor, instructed his crew to salvage electric cables while they demolished the apartment buildings. Murillo confirmed with Gomez that there was no electricity throughout the project. No one on the AAA crew used a voltage tester or rubber gloves when working inside a transformer box. During the month of July, on Gomez's instruction, Murillo disconnected cables running to the transformer boxes without incident.

Murillo testified that before he and his co-workers arrived at an area the transformers inside the metal casing boxes were de-energized, but the electricity

cables still required removal and were bolted onto the metal casing boxes. During the demolition, Murillo noticed Oncor employees in the demolition area as the AAA crew did its work around the apartment complex. He stated that Oncor employees were at the site every day. The Oncor employees never spoke to the AAA crew. He stated that, at each site, Oncor waited for Murillo and his crew to salvage the de-energized copper cables from the metal casing boxes before Oncor lifted the metal boxes off the ground and hauled them off-site. Murillo then used a wrench to unbolt the cable for salvage and removal. According to Murillo's testimony, Oncor did not salvage any de-energized copper cables itself.

On the day before the accident, Murillo and his co-workers removed the cables from the three boxes on Pad A. On the day of the accident, July 25, Murillo noticed Oncor trucks parked on the street outside the construction fence about 500 feet away, but no Oncor employees were present at the work site. Only AAA employees were present. In the morning, Murillo and other members of the AAA crew removed the cables from two of the three metal boxes on Pad B without incident. The crew returned after lunch to remove the cables from the last of the Pad B boxes. Murillo testified that, like other transformer boxes from which AAA had salvaged copper cable, the exterior and interior cabinet doors on the boxes on Pad B were unlocked and open. Murillo reached inside the left metal box on Pad B, using work gloves and holding a wrench, to disconnect the copper cable

attached to the transformer. The transformer was energized. Murillo suffered a severe electrical injury.

After the accident, an Oncor representative arrived at the scene. The representative testified that he discovered four Oncor company locks cut open, lying on the ground, in front of Pad B where Murillo's injury occurred. Neither Murillo nor Oncor presented evidence as to who had cut off the locks. However, Murillo testified that the locks had been cut off a month earlier when he observed the boxes as police officers were arresting a person in front of them. And Oncor employee Albanese testified that although he did not remember removing the temporary pole or de-energizing the utility pole that he had previously re-energized to provide temporary power to the site, he and other Oncor workers would cut locks with bolt cutters "only if [he had] to" because he did not have a working key or if he had to remove "personal locks."

Oncor's maintenance and construction supervisor for the project, James Booker, testified that, prior to the day of the incident, no other Oncor crews were ever at the site of the accident and that no Oncor crew de-energized anything prior to the accident. He also testified that there was only one cable connection to the utility pole. However, he was not aware that Oncor employee Albanese had de-energized and re-energized the utility pole about one month before the accident; he was not aware that Oncor's records showed that the boxes on Pad A and Pad B

should have been closed for demolition purposes; and he was not aware that two cables had to be disconnected from the utility pole.

Larry Davis, another Oncor supervisor, testified that the utility pole at the site of the accident had two cables that had to be de-energized, and he stated that, although Booker might not have been aware of that fact, all Oncor work crews had access to the plans that would show the number and types of cables involved in any service call.

Jason Hagmeier, an Oncor employee, testified that he worked with Shipp on removing the transformers from the work site. Shipp would contact him and tell him which apartment buildings were slated for demolition. Hagmeier would then check Oncor's records regarding which transformers were involved for those buildings and "design a sketch to remove them." The removal plans were then passed on to an Oncor work crew to complete the removal. In return, Shipp made two payments to Oncor for the removal of the transformers.

Hagmeier also testified that, although he was not involved in the physical removal of the transformers from these particular apartment buildings, he knew Oncor's standard procedure for removing the transformers. He testified that the same crew would de-energize the cables, remove them from the boxes, and then remove the metal boxes. Thus, the power would be de-energized and the boxes removed on the same day. Hagmeier testified that the customer owned the

"service wire" that ran from the second box to the building, but all wires in the first and third boxes were owned and maintained by Oncor. He stated that the same crew that removed the transformer would pull whatever copper it could from the job site because part of the crew's job "was to salvage our copper that was owned by Oncor out of the transformers."

Hagmeier and other witnesses testified, however, that Oncor's standard procedure of same-day de-energizing of the cables, salvage of the copper, and removal of the transformer boxes was not followed on this demolition project. Shipp and Hagmeier both testified that there was no particular time frame during which Oncor was supposed to remove the transformers after being informed by Shipp that they were ready for removal. Shipp testified that "there was no time frame provided by Oncor" and that Oncor "provide[s] these type of services when [it] can get to them." Hagmeier testified that the removal of the transformers in this case was done pursuant to a DSA that did not provide a time frame for the removal. Hagmeier stated that he would inform Booker when a site was ready for a crew to remove the transformer, and Booker would schedule the crew, usually within six to seven weeks, depending on the existence of other, more urgent maintenance, weather, and other factors.

Hagmeier testified that he visited the pad site where Murillo was injured after the accident occurred. He took a photograph of the transformer boxes

because "the cables were removed and cut off," demonstrating to him that there had been "vandalism or theft of some sort." He also noticed that the locks around the accident site had been cut and were lying on the ground. Hagmeier testified that on other occasions when he met with Shipp at the job site he noticed that the locks in another part of the complex were in place. He testified that the work crew has keys for the locks and that "when they go out there to work the job site, they unlock the locks themselves."

C. Course of Proceedings

Murillo sued Oncor, together with the developer, HRI, the project manager, Basic, and the other contractors at the site. Gomez *d/b/a* AAA was named as a responsible third party. With respect to Oncor, Murillo alleged that Oncor had negligently failed to de-energize the transformer on Pad B on June 11, when it disconnected the temporary service to the Windfall Apartments, as it had done at an earlier point with Pad A, so that the electricity continued to run to that transformer during the demolition work. Oncor conceded at trial that it had not de-energized the Pad B transformer. It also adduced evidence that it had previously de-energized Pad A because a wiring problem had caused a temporary meter associated with Pad A to burn up.

The case was submitted to the jury on a broad form negligence theory with respect to all defendants. The jury charge defined the specific term "negligence"

as "failure to use ordinary care"; it defined "proximate cause" as "a substantial factor that brings about an event and without which the event would not have occurred"; and it defined "foreseeable" as meaning that "a person using ordinary care would have reasonably anticipated that his acts or failure to act would have caused the event or some similar event." Oncor objected to the charge, which was submitted by Basic, on the ground that the charge should have included instructions for finding liability on a premises defect theory, and the trial court overruled the objection.

In Jury Question No. 1, the jury found that Basic and Gomez *d/b/a* AAA "engaged in a joint enterprise." In Jury Question No. 2, the jury found that Next Block, HRC-MJR, HRI, and another defendant engaged in a joint enterprise.

Question No. 3 asked the jury whether any of the listed defendants, including Oncor, "exercise[d] or retain[ed] some control over the manner in which Marco Murillo's work in the transformer was performed, other than the right to order the work to start or stop or to inspect progress or receive reports." The jury answered "yes" with respect to Oncor, Basic, and HRI, and "no" with respect to the remaining listed defendants, who did not include Gomez. Question No. 4 asked, "Did the negligence, if any, of the persons named below proximately cause the injury in question?" The jury answered "yes" with respect to Oncor, HRI,

Basic, and Gomez, and "no" with respect to the three other defendants and Murillo himself.

In response to Question No. 5, the jury found Oncor to be 60% responsible for having "caused or contributed to cause the injury in [Question No.] 4." In response to Question No. 6, it assessed total damages of $7,770,000, including $2,000,000 for "[d]isfigurement sustained in the past" and $1,000,000 for future disfigurement, $2,500,000 for past pain and mental anguish, $500,000 for future pain and mental anguish, $1,000,000 for past physical impairment, $500,000 for future physical impairment, $200,000 for future medical care expenses, and $70,000 for past lost earning capacity. It awarded "0" damages to Murillo's spouse in response to Question No. 7, concerning loss of household services and loss of consortium; and it failed to answer Questions No. 8 and 9 concerning, respectively, an award of damages for gross negligence and exemplary damages. The trial court entered judgment on the verdict. Oncor, Basic, and HRI all appealed. Subsequently, Basic and HRI settled with Murillo. Only Oncor's appeal remains pending.

Review of the Jury's Finding of Negligence

In its first issue, Oncor contends that Murillo's only viable claim against it is one of premises defect, not of general negligence, which was the only claim submitted to the jury. It argues that because Murillo did not seek to submit jury

questions and instructions on a premises defect claim, he waived his only viable claim. Therefore, the judgment against it should be reversed and judgment rendered in its favor.

In its second issue, Oncor argues that, even if Murillo did have a viable negligence claim against it, the evidence was legally and factually insufficient to support the jury's verdict. It argues that the liability of an owner or occupier for general negligence on a premises liability theory requires proof that the defendant was in control of the land and that the plaintiff was injured by the contemporaneous negligence of that defendant and that, here, the record contains no evidence that Oncor was engaged in any negligent activity contemporaneous with Murillo's presence at the jobsite and no evidence that it controlled the details of Murillo's work. Without such evidence, it argues, it could not be liable for engaging in a negligent activity that caused Murillo's injuries.

Oncor contends that, at most, it exercised control over the premises where Murillo was injured and that Murillo could not prove its liability because Oncor had adequately warned Gomez and Murillo that the transformers were energized and dangerous, even if the metal box was open, and Oncor did not have actual or constructive knowledge that the locks had been cut and the doors to the metal box opened. Oncor also contends that, even assuming that it had a duty to keep the premises safe and to warn about the danger of the electricity to anyone who opened

the metal box, Murillo was a trespasser, as neither he nor his employer had permission to enter the Oncor transformer boxes or to remove Oncor's copper cables.

In its third issue, Oncor argues that Murillo's exclusive remedy against it was a claim under Civil Practice and Remedies Code Chapter 95 for damages caused by the negligence of a property owner arising from the failure to provide a safe workplace and that the trial court did not submit the proper legal duty with respect to it in the jury charge—liability on a premises-defect theory. It further contends that the trial court did not submit the jury instructions required on the elements of the theory set out in Chapter 95, requiring that the premises-liability defendant must have been in control of the premises, must have had knowledge of the dangerous condition that injured the plaintiff, and must have failed either to warn of the dangerous condition or to make the premises safe. It argues that, as a premises-defect defendant, it was entitled to the standard premises-defect jury instructions defining its duty to Murillo in a way that would have allowed the jury to consider its warnings to those who came near its energized transformers and the reasonable efforts it made as a premises owner to keep its premises safe. It contends that Murillo waived his premises-defect claim by not objecting to the failure to include instructions on the elements of a premises-defect claim in the

charge and by not securing findings on the essential elements of premises-defect liability.

We first address Oncor's arguments relating to the nature of the duty that it owed to Murillo. We will next address the issue of the sufficiency of the evidence supporting the jury's finding that Oncor's negligence was a proximate cause of Murillo's injury. Finally, we will address Oncor's remaining arguments included in its first three issues, regarding the necessity of a charge on alternative theories of liability, such as a premises-defect theory.

A. Oncor's Duty to Murillo

Oncor argues, in parts of its first and third issues, that it owed Murillo only the duty that a property owner owes to a trespasser. It further argues, in part of its second issue, that the record contains no evidence Oncor was engaged in any activity that harmed Murillo. Whether a defendant owes the plaintiff a duty, and the nature of the duty owed, are questions of law for the court. *See Nabors Drilling, U.S.A., Inc. v. Escoto,* 288 S.W.3d 401, 404 (Tex. 2009).

The Texas Supreme Court has consistently recognized that negligent-activity claims and premises-defect claims involve two independent theories of recovery that fall within the scope of negligence. *See Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214–15 (Tex. 2008). It has stated that although "[t]he lines between negligent activity and premises liability are sometimes unclear," there is a recognized

distinction between the two theories. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010). "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998); *see also Del Lago*, 307 S.W.3d at 776 ("[N]egligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe."). Thus, negligence in the context of a negligent activity claim means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have done or not done. *Timberwalk*, 972 S.W.2d at 753. Unlike a negligent activity claim, "a premises defect claim is based on the property itself being unsafe." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *see also Del Lago*, 307 S.W.3d at 787–88 (holding that negligence in premises defect context generally means failure to use ordinary care to reduce or eliminate unreasonable risk of harm created by premises condition about which owner or occupier of land is aware).

We disagree with Oncor's claims that this is exclusively a premises defect case and that Oncor's only duty to persons on the demolition site was the duty of ordinary care of a utilities easement owner in control of electricity distribution to

its customer. Oncor's argument overlooks the unusual and unique circumstances of this case. Oncor's involvement with the demolition project went beyond merely distributing electricity to its customer, Next Block. Oncor was aware of the demolition activity occurring at the work site and was itself involved in the demolition by providing temporary power and removing portions of its electric utility equipment on the site. It was in regular communication with Shipp, the project manager. Oncor not only generally controlled the safe distribution of electricity to its customer but also specifically controlled the disconnection of electricity and removal of meters and transformer boxes. Correspondingly, it was the only party that could have controlled the provision of electricity and the removal of its services from the site in a manner that was safe for the demolition workers who would otherwise come in contact with live electricity during the demolition process. It is undisputed that Oncor controlled the transformer itself and the flow of electricity to it. Oncor also controlled the disconnection of electricity from its transformers so that any workers involved in the demolition, salvage, and utility removal process could proceed safely.

Oncor argues, however, that its failure to turn off an existing energized electrical transformer was not contemporaneous with Murillo's injury on July 25 and is therefore insufficient to create liability for general negligence. Without evidence of contemporaneous conduct, it contends, Murillo's claim against it is "a

nonfeasance theory, based on [its] failure to take measures to make the property safe," and not an activity "based on affirmative, contemporaneous conduct by [Oncor] that caused the injury," and is therefore a premises-defect claim. *See Del Lago*, 307 S.W.3d at 776. Oncor further argues that its negligence merely furnished a condition that made Murillo's injury possible, so that there was no cause in fact, even on a premises-defect theory. *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005) (discussing causation in negligence context). It contends that nothing rises to a general duty on the part of a utility easement owner/occupier to recognize and prevent electrical contact during a construction project. In addition, it argues that because it posted warning signs on both the metal box and the transformer box inside it, showing the danger of the electricity to anyone who touched the live cable, it cannot be held liable for the dangerous condition that caused Murillo's injury. As support for its arguments, Oncor cites us to, inter alia, *Clayton W. Williams, Jr., Inc. v. Olivo*, *Keetch v. Kroger Co.*, and *Kroger Co. v. Persley*. Likewise, the dissent, accepting Oncor's argument, cites us to *Houston Lighting & Power v. Brooks*. We find Oncor's argument to be misdirected and the cases it cites inapplicable.

We conclude that this case is most similar to *Texas Department of Transportation v. Ramming*, a general negligence case. In *Ramming*, a car accident occurred at an intersection where the defendant's employee had turned off

a traffic signal for maintenance and testing activities. *See* 861 S.W.2d 460, 465–66 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The defendant, the Texas Department of Transportation, was found negligent for its act of turning off the traffic signals at an intersection as its "test/maintenance activity was ongoing at the time of the accident," proximately causing the plaintiff to be injured. *Id.* at 465. Similarly, here, Oncor failed to turn off electricity flowing to one of two cables on the utility pole servicing Pad B when it sent out a work crew to disconnect the remaining electricity flowing to the worksite in anticipation of ongoing demolition, salvage, and clearing operations. It thus negligently left electricity flowing through a live cable to one of the transformers scheduled to be removed during the demolition, salvage, and utility removal process in which Murillo, AAA, and Oncor's own workers were involved. Its negligent activity proximately caused Murillo to be injured when, during the course of that ongoing process, he entered the transformer box to disconnect the still-energized cable.

Just as, here, the trial court refused to submit premises-defect instructions with respect to Oncor along with its broad form negligence question, the *Ramming* court affirmed the trial court's refusal to submit a requested premises defect question to the jury. The *Ramming* court reasoned that a premises defect theory applies "when a traffic signal is functioning properly but then fails due to component failure, act of God, third party interference, or the non-

contemporaneous act of [the property owner in control]," which was not what had happened in the case. *Id.* Similarly, here, where Murillo was not injured because a condition occurred as a result of equipment failure, act of God, third party interference, or the non-contemporaneous act of the easement owner—but by the negligent acts of several defendants, including Oncor—the trial court refused to submit this case to the jury on a premises-defect theory with respect to Oncor. Like the negligent activity in *Ramming*, which consisted of the defendant's shutting off the light at the intersection where the plaintiff was injured while it performed maintenance and testing activities, here, the negligent activity consisted of Oncor's failing to disconnect one of the cables it had been charged with disconnecting and, instead, leaving live electricity flowing through that cable to the demolition site during the ongoing demolition, salvage, and utility removal process.

The *Ramming* court distinguished *Keetch*, relied upon here by Oncor. In *Keetch*, the supreme court had held there was no contemporaneous activity and that, therefore, the case should have been submitted on a premises defect theory. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). The *Ramming* court noted that *Keetch* involved a fall from water on the floor that occurred thirty minutes after water was sprayed on the plants in the store. 861 S.W.2d at 465 (citing *Keetch*, 845 S.W.2d at 264). It observed that, in contradistinction to its own

case, "[t]here was *no ongoing activity* when Keetch was injured," and, therefore, "[t]he trial court properly did not submit a negligent activity theory of liability *on these facts*," i.e., where the negligent activity had ended well before the slip. *Id.* (quoting *Keetch*, 845 S.W.2d at 264). The court pointed out, "In contrast, [the] test/maintenance activity [on the traffic light] was ongoing at the time of the accident. *There was no time gap*, much less a 30-minute gap, between the alleged negligent activity and the accident." *Id.* (Emphasis added.).

Here, as in *Ramming*, the plaintiff was injured by an ongoing activity of the defendant. Oncor negligently disconnected only one of the two live power cables attached to the single utility pole associated with Pad B, resulting in Oncor's *ongoing activity* of providing live electricity to one of the two remaining pads on the demolition site. Oncor breached its duty of care to provide electricity to the site in a safe manner, placing the demolition, salvage, and utility removal workmen on the site in danger from Oncor's negligently performed ongoing activity of providing electricity to the site.

We disagree with Oncor's and the dissent's contention that the premises defect cases of *Clayton W. Williams, Jr., Inc. v. Olivo*, *Houston Lighting & Power v. Brooks*, and *Kroger Co. v. Persley* present situations similar to this case. All involved one-time, non-ongoing events that created a dangerous condition not attributable to an ongoing activity of the premises owner.

In *Olivo*, an independent contractor suffered an injury after falling from a drill pipe rack onto drill thread protectors left on the ground and sued the general contractor on a general negligence theory. 952 S.W.2d 523, 526–27 (Tex. 1997). The supreme court observed that the case was "not a negligent activity case because Olivo alleges that he was injured by thread protectors previously left on the ground, not as a contemporaneous result of someone's negligence." *Id.* at 527. It held that the presence of the drill thread protectors that injured Olivo implicated "a premises defect that the *independent contractor* [Olivo's employer] allegedly created rather than a negligent activity [of the *defendant general contractor*]." *Id.* at 528 (emphasis added).

The supreme court opined that the general contractor could have been found liable to Olivo, the employee of the independent contractor, if it had retained the right to control or exercised control and was negligent "in exercising or failing to exercise control over the part of the independent contractor's work that created the dangerous condition." *Id.* at 528. However, that was not what happened in that case. By contrast, here, it is exactly what happened. Moreover, the simple negligence question submitted to the jury in *Olivo* asked only whether the general contractor's on-site representative was negligent. *See id.* at 529. The trial court in *Olivo* did not submit a jury question on the general contractor's control of the premises, or an instruction on the premises defect elements, or a negligence

question regarding the general contractor itself, so there were no jury findings against the general contractor on any of those issues. *Id.* The supreme court held that, because Olivo "did not secure proper jury findings on [his] only viable cause of action, premises defect, [he] waived that claim" and was not entitled to any relief from the general contractor or its agent. *Id.*

The circumstances present in *Olivo* and the legal implications of that case are thus entirely unlike those in this case. Olivo's claim was clearly a claim that he was injured by a condition of the premises: drill thread protectors previously left on the ground by his own employer, an independent contractor, that he contended the general contractor should have noticed and either removed or warned about. *Id.* at 526–27. Here, by contrast, Murillo did not claim that Oncor failed to use the ordinary care of a utilities easement owner to keep a utilities easement safe or that it failed to warn that its transformers were normally charged and that charged transformers are dangerous, as would be the case for a premises defect claim. Rather, Murillo claimed, and the evidence showed, that his injury was proximately caused by Oncor's own failure to exercise ordinary care in its provision of electricity to the demolition site when, through its own negligent failure to properly de-energize both cables from the utility pole in preparation for the demolition activity, it continued to distribute electricity to Pad B during ongoing demolition, salvage, and utility clearance operations with no indication that the single

transformer that injured Murillo remained energized after all of the other transformers had been disconnected so that demolition could proceed.

The dissent in this case agrees with Oncor, however, that this is a premises defect case, and it cites to *Houston Lighting & Power Co. v. Brooks*, 336 S.W.2d 603 (Tex. 1960), another premises defect case, as support for its argument. In *Brooks*, the defendant power company's high-voltage power lines complied with city ordinances and had a clearance of more than eight feet from the top and side of the hospital building where a construction workman, smoothing wet concrete on the unfinished third floor of an annex, touched the power lines with the aluminum handle of his broom and was injured. *Id.* at 604–05. Although there was some evidence that the power company knew construction was occurring on the site, no request had been made to the company to de-energize or otherwise protect its power lines prior to the accident, and the company did not know that concrete was going to be poured and smoothed on the day in question or that a fifteen or sixteen foot aluminum-handled mop would be used. *Id.*

The supreme court held that there was no evidence that the power company could have reasonably foreseen that a workman on the building would make contact with its lines and be injured; therefore, its negligence was not established. *Id.* at 605–06. Nor was there any evidence that the power company had actual knowledge of probable danger to the injured workman. *Id.* Moreover, the court

specifically clarified that whatever duty the power company owed Brooks was "as a member of the public and not as an employee or as an invitee" of the power company. *Id.* at 605. It expressly distinguished its holding from other cases "where the injured party was either an employee of the defendant or was doing some work at the invitation of and beneficial to the defendant. . . ." *Id.* at 607.

Here, by contrast, Oncor removed the electricity distribution services to the demolition site, including Pad B, so that the type of demolition and salvage work Murillo and others were doing—disconnecting the de-energized cables from the transformers so that Oncor could subsequently remove the transformer boxes—could be safely performed. However, Oncor only disconnected one of the two cables to the area where Murillo was injured, resulting in one of the two transformers on Pad B remaining powered during the demolition process in which Murillo was injured.

Kroger Co. v. Persley, likewise, is inapplicable. Like *Olivo* and *Brooks*, it too is a premises liability case, rather than a general negligence case. In *Persley*, the plaintiff slipped on water near a freezer display in the defendant grocery store. 261 S.W.3d 316, 318 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The evidence showed that the freezer's stocker had left the area at least fifteen minutes before, and the plaintiff admitted she did not see the stocker near the display when she slipped. *Id.* at 320–21. Thus, there was no evidence of an ongoing activity by

the store's employees; rather, there was evidence of a one-time spill. And there was no evidence that the store knew about the spill and yet failed to warn about it or take steps to wipe it up. So there was no premises defect liability. *Id.*

Here, in contrast to all of the premises liability cases cited by Oncor and the dissent, Oncor engaged in the ongoing activity of providing electricity to the demolition site, and Murillo alleged that Oncor performed that activity in a negligent manner and produced evidence to support his allegations. The ongoing flow of electricity to Pad B was entirely within Oncor's own control, and Oncor breached its duty to use ordinary care while engaged in that activity.

Oncor thus performed an activity on the property—controlling the distribution and cessation of distribution of electricity to the site so that demolition activities and the removal of its own transformers could safely proceed—and it had a duty to use ordinary care in the performance of that activity so that its activity would not proximately cause a foreseeable injury to workers on the site. *See Moritz*, 257 S.W.3d at 214 (holding that owner performing activity on property has duty to use ordinary care so that its activity does not proximately cause foreseeable injury); *West v. SMG*, 318 S.W.3d 430, 438 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding same). We conclude that Oncor owed this duty to all demolition, salvage, and utility removal workers on the site quite apart from the duty it owed as the owner of the electricity easement on the property. It is irrelevant, for

purposes of this appeal, that Oncor might also have owed Murillo the duty of a property owner to use ordinary care to reduce or eliminate an unreasonable risk of harm created by some condition on the premises. Premises defect and negligent activity are two separate theories. *See Del Lago*, 305 S.W.3d at 776.

Murillo's pleadings and the evidence presented at trial supported a conclusion that Murillo stated a negligent activity claim—i.e., Oncor's negligence in providing electricity to the demolition site proximately caused his injury. Thus, we conclude that Oncor owed a duty to distribute and cease to distribute electricity to the demolition site in a safe manner. *See Timberwalk*, 972 S.W.2d at 753 (negligence under negligent activity theory means doing or failing to do what a person of ordinary prudence in same or similar circumstances would have done); *Moritz*, 257 S.W.3d at 214; *West*, 318 S.W.3d at 438. The question, therefore, is whether Oncor breached this duty through its own negligent activity on the site.

B. Sufficiency of the Evidence Supporting the Jury's Finding of Negligence

Oncor argues, in its second issue, that the evidence was legally and factually insufficient to support its liability on a general negligence theory.

1. Standard of Review

In reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable

jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003) (holding that, in reviewing "no evidence" point, court views evidence in light that tends to support finding of disputed fact and disregards all evidence and inferences to contrary). To sustain a challenge to the legal sufficiency of the evidence to support a jury finding, we must find that: (1) there is a complete lack of evidence of a vital fact; (2) the court is barred by rules of evidence or law from giving weight to the only evidence offered to prove a vital fact; (3) there is no more than a mere scintilla of evidence to prove a vital fact; or (4) the evidence conclusively established the opposite of a vital fact. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004).

In reviewing a challenge to the factual sufficiency of the evidence, we "must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). The fact finder is the sole judge of witnesses' credibility; it may choose to believe one witness over another, and a reviewing court cannot impose its own opinion to the contrary. *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468. Because it is the factfinder's province to resolve conflicting evidence, we must assume that it resolved all conflicts in accordance with the verdict if reasonable

persons could do so. *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468. When an appellant attacks the factual sufficiency of an adverse finding on an issue on which it did not have the burden of proof, the appellant must demonstrate that the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176.

2. Analysis

To establish his right to recover from Oncor, Murillo had to prove the existence of a legal duty owed by Oncor to him, a breach of that duty, and damages proximately resulting from the breach. *See Urena*, 162 S.W.3d at 550; *West*, 318 S.W.3d at 437–38. We have already concluded that Murillo's pleadings and the evidence presented at trial supported a conclusion that Oncor engaged in the activity of providing electricity to a demolition site and that it owed a duty to do so in a safe manner.

The jury found that Oncor's negligence proximately caused Murillo's injuries, and we conclude that legally and factually sufficient evidence supports this finding. It is undisputed that Oncor knew of the demolition work occurring on the property and that it participated in the demolition by removing the distribution services from the apartments, which necessarily included disconnecting the electricity to the demolition site as the work progressed so that the transformer boxes could be disconnected from the electric cables, the copper in the cables

could be salvaged, and the boxes could be cleared from the site. Murillo testified that, on numerous previous occasions during the demolition process, Oncor employees had waited for Murillo and the AAA crew to unbolt the cables from the transformers before they lifted and hauled away its boxes. Murillo testified that when he reached each transformer box, the locks were already removed and he did not remove the locks himself.

It is also undisputed that, on June 12, over a month before Murillo's injury, Oncor read the temporary meters, removed them, and closed the temporary electrical account. The evidence established that, on June 12, although Oncor de-energized the cable to Pad A, it failed to de-energize the cable to Pad B that was located on the same utility pole. Thus, Oncor continued to supply electricity to Pad B while AAA conducted its demolition and salvage activities and while Oncor conducted its own utility removal activities. Booker, Oncor's maintenance and construction supervisor for the project, testified that he was unaware that Oncor employees had de-energized and re-energized the utility pole about one month before the accident; he was unaware that Oncor's records showed that the boxes on Pad A and Pad B should have been closed for demolition purposes; and he was unaware that two cables—not one—had to be disconnected from the utility pole to completely de-energize the transformers on Pad B. Hagmeier and Davis, other Oncor employees, testified regarding the proper procedure for de-energizing and

removing the transformers from the work site. Hagmeier and other witnesses testified that Oncor's standard procedure was not followed in this case.

Oncor relied on the testimony of some of its employees that Oncor never represented to any of the work crews that the entire pad was de-energized and that Oncor did not commit to a particular time frame for completing the removal of the transformers. However, this evidence is not so contrary to the weight of the evidence as to make the jury's verdict clearly wrong and unjust. *See Arias*, 265 S.W.3d at 468. The jury had ample evidence that it could have relied upon in determining that Oncor's activity on the site was performed in a negligent manner, proximately causing Murillo's injury. Murillo testified that he followed the same practice that his crew had employed to safely remove cables from multiple other transformers on the work site. He also testified that he observed Oncor employees waiting for his crew to remove the cables before Oncor removed its transformer boxes on previous occasions. Shipp had requested that Oncor de-energize the site where Murillo was injured, and Oncor's work records indicate that the crew sent on June 12 read the temporary meters, closed service on them, de-energized the utility pole, and removed the meters from the utility poles. However, after Murillo was injured on July 25, it was obvious that Oncor did not de-energize one of the cables to one of the transformers on Pad B. Oncor left it energized, and Murillo was seriously injured when he proceeded with his demolition work. Oncor failed

to identify or produce for deposition or trial the employee who de-energized the utility pole on June 12. It claimed it could not find him. Furthermore, it is undisputed that the only warnings on the transformers were the boilerplate warnings present on all transformers, which were insufficient to warn demolition workers that the transformer they had expected to be de-energized was actually still powered by live electricity.

We conclude that the evidence was legally and factually sufficient to support the jury's findings that Oncor retained some control over Murillo's work because it was the only party in a position to control the flow of electricity to the demolition site. Oncor owed Murillo and any other workman involved in demolition, salvage, and utility clearance operations on the demolition worksite at the Windfall Apartments a duty to provide electricity to the worksite in a safe manner, and the evidence is legally and factually sufficient that Oncor breached that duty by providing electricity and related services in a negligent manner when it failed to de-energize all of the cables from the utility pole. *See Wilson*, 168 S.W.3d at 822; *Arias*, 265 S.W.3d at 468.

The jury found that Oncor's negligence was the proximate cause of Murillo's injury. We conclude that this finding too was supported by legally and factually sufficient evidence. *See Wilson*, 168 S.W.3d at 822; *Arias*, 265 S.W.3d at 468. "Proximate cause has two elements: cause in fact and foreseeability," both of

which must be established by the evidence. *See Urena*, 162 S.W.3d at 551. "The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred." *Id.* If the defendant's negligence merely furnished a condition that made the injuries possible, there can be no cause in fact. *Id.*

Murillo's injury was clearly foreseeable under the circumstances of this case. First, it is undisputed that the Oncor work crew did not disconnect the electricity to one of the transformers on Pad B on June 12 when it went to the site to disconnect all of the electricity to that area, including neighboring Pad A, so that demolition of the Windfall Apartments could proceed. Thus, it was reasonable for the jury to have inferred that electricity would continue to flow to the box, creating a dangerous risk of electrocution for any worker who entered the box to disconnect the electric cables so that the transformers could be removed from the site. There was also sufficient evidence from which the jury reasonably could have concluded that AAA's crew would be present on the demolition site disconnecting the de-energized electric cables so that the transformer boxes could be removed, as well as salvaging copper from the disconnected electric cables inside transformer boxes from which the locks had been cut off, and that AAA's workers would be entering the boxes to disconnect the de-energized electric cables and salvage the copper without wearing protective equipment prior to removal of the transformers from

the site. Thus, there was sufficient evidence from which the jury could reasonably have concluded that the severe electrical injury Murillo suffered was foreseeable.

There was also sufficient evidence from which the jury could reasonably have concluded that Oncor's negligent failure to shut off the electricity to Pad B when it went to the site for that purpose and its leaving electricity running to that pad during the demolition, salvage, and utility removal process was a substantial factor that brought about Murillo's injuries and without which those injuries would not have occurred. *See id.* ("The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred."). Thus, we conclude that Oncor's negligence was a proximate cause of Murillo's injury.

We conclude that legally and factually sufficient evidence supports the jury's finding that Oncor's negligence was the proximate cause of Murillo's injury.

C. Adequacy of the Trial Court's Charge

In the remainder of its first, second, and third issues, Oncor argues that the trial court erred in submitting the jury charge on a general negligence theory rather than on a premises-defect theory of liability and that Murillo waived his claim against Oncor by failing to submit instructions consistent with a premises-defect theory. It therefore contends that judgment must be rendered in its favor.

1. Standard of Review

The trial court has great discretion in submitting the jury charge in a negligent activity/premises defect case. *Ramming*, 861 S.W.2d at 463. "This 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." *Id.* Texas Rule of Civil Procedure 277 mandates broad form submission "whenever feasible." TEX. R. CIV. P. 277; *Keetch*, 845 S.W.2d at 266.

If the plaintiff refuses to submit a theory of liability over the defendant's objection, so that no jury question is submitted on a controlling issue, the case may be reversed and judgment rendered. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44 (Tex. 2007) (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)). However, "if the plaintiff submits a jury question on his claim that is merely 'defective,' as opposed to 'immaterial,' the appropriate remedy is to remand for a new trial rather than to render judgment." *Id.* Remand is proper when a defective liability question is submitted. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *see also Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) (holding, where defective damages questions was submitted but there was some evidence supporting proper measure of damages, that remand rather than rendition was appropriate remedy).

Moreover, the supreme court has reversed and "remanded in the interest of justice when [its] decisions have altered or clarified the way in which a claim should be submitted to the jury." *Ledesma*, 242 S.W.3d at 45.

2. Analysis

We have already held that Oncor owed a duty to provide electricity to the work site in a safe manner and that the jury's finding that Oncor's negligence proximately caused Murillo's injury was supported by legally and factually sufficient evidence. Thus, we conclude that the trial court did not err in submitting this case to the jury on a negligent activity theory. The general negligence question was appropriate and sufficient, and a premises-defect instruction was neither necessary nor appropriate to establish Oncor's liability to Murillo in this case.[3] *See Ramming*, 861 S.W.2d at 465 ("Where, as here, the alleged facts support . . . an on-going activity [or] contemporaneous injury theory, then the case need not be presented to the jury in premises liability terms. Rather, a general negligence question is appropriate and sufficient."). A trial court has great discretion in submitting the jury charge so long as the questions submitted control the disposition of the case, are raised by the pleadings and evidence, and, where

[3] Because we conclude that the trial court did not err in submitting the case to the jury on a negligent activity theory, we need not address Oncor's arguments relating to a premises-defect theory, including its arguments regarding Murillo's status as licensee or trespasser or its own knowledge of the condition of the premises.

disputed, are properly submitted for the jury's deliberation. *Id.* at 463. Here, this is no ground for finding that the trial court abused its discretion in submitting a broad-form negligence question to the jury without including a premises-defect instruction with respect to Oncor.

However, Oncor's and the dissent's argument on this issue merits further response. Even if this case were properly characterized as a premises-defect case, a contention we reject, and even if the trial court's instructions were so defective that they failed to produce the jury findings necessary to Murillo's right to recover damages against Oncor for premises defect liability, as Oncor urges, Murillo's claim still would not be waived and the proper remedy for the submission of the defective instruction still would not be rendition of judgment in favor of Oncor.

The proper remedy in such circumstances would be remand for a new trial against Oncor with the submission of a proper instruction on premises liability in addition to a broad form negligence question, so long as there was some evidence to support a finding on the elements of premises liability theory. *See Ledesma*, 242 S.W.3d at 44 (holding that, "if the plaintiff submits a jury question on his claim that is merely 'defective,' as opposed to 'immaterial,' the appropriate remedy is to remand for a new trial rather than to render judgment"); *Spencer*, 876 S.W.2d at 157 (holding that remand is proper when defective liability question is submitted); *see also Arthur Andersen*, 945 S.W.2d at 817 (holding, where there was some

evidence supporting proper measure of damages, that remand rather than rendition was appropriate remedy).

Oncor and the dissent rely again on *Olivo* as support for their contention that Murillo waived his sole claim, that for premises liability, and thus rendition is required. And, again, *Olivo* is unlike this case. In *Olivo*, the plaintiff failed to request even a simple negligence question regarding the negligence of the defendant general contractor or its control of the premises; instead, the only negligence question submitted to the jury asked whether the general contractor's representative was negligent. 952 S.W.2d at 529. Here, by contrast, the trial court submitted a question regarding Oncor's control of the premises, together with a proper broad form negligence question. These were the controlling issues with respect to both general negligence and premises liability. All that was missing from the charge, had the case been a premises liability case, was an instruction to the jury on the common law elements of premises liability instructing the jury to consider (1) Oncor's "actual or constructive knowledge of some condition on the premises" that (2) "posed an unreasonable risk of harm" to Murillo and (3) Oncor's failure to "exercise reasonable care to reduce or eliminate the risk" so that (4) Murillos's injuries were proximately caused by the failure to use such care. *See id.* 528–29; *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983). Therefore, any defect in the charge was just that—a defect in failing to include

additional instructions, not the failure to submit a controlling issue justifying rendition, as had happened in *Olivo*. *See Ledesma*, 242 S.W.3d at 44–45 (distinguishing between cases in which rendition is justified and cases in which remand is appropriate). Moreover, even if we were to rule this case a premises-defect case, it would be in the course of clarifying how such a claim should be submitted—justifying remand in the interest of justice. *See id.* at 45.

Furthermore, even assuming that this case should have been submitted as a premises-defect case, there was evidence as to each of the elements of premises liability: (1) Oncor necessarily had actual or constructive knowledge of its negligent performance of its duty of controlling the distribution of electricity to the worksite during the demolition and utility removal process, and there is evidence that it knew that the transformer boxes were open and that workmen, including Murillo, were on the site removing the de-energized electric cables from the transformers so that the boxes could be removed; (2) Oncor knew that the condition of live electricity flowing to the worksite "posed an unreasonable risk of harm" to demolition workers on the site, including Murillo; and yet (3) it failed to secure the transformer boxes, to insist that its own workers remove the cables, salvage the copper, and remove the transformer boxes using protective gear, or to warn that the electricity might still be flowing to the site and must be checked; nor did it, in any other way, "exercise reasonable care to reduce or eliminate the risk"

of electrocution, (4) with the foreseeable result that Murillo's injuries were proximately caused by Oncor's failure to use such care.

Oncor's only warnings that the transformers might be energized and dangerous were the standard warnings on the transformer boxes, which were inapplicable to warn persons working on the demolition site in the legitimate expectation that Oncor had disconnected the utilities and that Oncor's negligence had created an ongoing danger to them of electrocution. Oncor knew that demolition and salvage operations had been ongoing at the site for two months at the time Murillo was injured.

Because there is at least some evidence on all of the elements of a premises-defect claim, rendition of judgment in Oncor's favor would be inappropriate, even if Murillo's only claim were indeed a premises liability claim, as Oncor contends, rather than a negligent activity claim, as we have held. *See, e.g.*, *Spencer*, 876 S.W.2d at 157 (holding that remand is proper when defective liability question is submitted). Thus, even if we were to agree with Oncor and the dissent that this case could have been presented to the jury as a premises liability case, our finding that the jury charge was defective would lead only to remand for an unnecessary and duplicative new trial on the same facts and the same evidence that was before the jury in the original trial in which the jury found that Oncor was negligent and that its negligence proximately caused Murillo's injuries.

We overrule Oncor's first, second, and third issues.

Expert Testimony

In its fourth issue, Oncor contends that expert testimony is required to prove the standard of care for power companies and that Oncor breached that standard. In its fifth issue, it contends that Murillo's expert was unqualified and that, therefore, his testimony was unreliable.

"Expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman." *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 90 (Tex. 2004). The determination of whether expert testimony is necessary is a question of law which may be determined by the appellate court. *Id.* at 89.

The expert about whom Oncor complains, Wayne Rogers, was an electrician with experience and qualifications as an electrician and with knowledge of the safety code applicable to residential and commercial uses of electricity. He testified that Oncor should have de-energized Pad B when it disconnected the power to the temporary pole in June, that the failure to do so was unreasonable, and that it created an extreme risk of injury. He also testified that Oncor violated the National Electric Safety Code by not having one person in charge of the project. Murillo's negligence claim against Oncor was predicated on Oncor's failure to de-energize the electricity to Pad B at the Windfall Apartments

demolition site and its continuing to distribute electricity to Pad B during ongoing demolition, salvage, and utility removal activities on the worksite. Expert testimony other than that of an electrician was not required to establish the standard of reasonable care applicable to Oncor as the distributor of electricity to the transformer. *See id.* at 89–90.

We overrule Oncor's fourth and fifth issues.

Remittitur

In its sixth issue, Oncor contends that it is entitled to remittitur for excessive damages for disfigurement found by the jury.

The final judgment awarded Murillo total damages of $7,770,000, including $2,000,000 for "[d]isfigurement sustained in the past" and $1,000,000 for future disfigurement, $2,500,000 for past pain and mental anguish, $500,000 for future pain and mental anguish, $1,000,000 for past physical impairment, $500,000 for future physical impairment, $200,000 for future medical care expenses, and $70,000 for past lost earning capacity.

"Disfigurement" is "that which impairs the appearance of a person, or that which renders unsightly, misshapen or imperfect, or deforms in some manner." *Figueroa v. Davis*, 318 S.W.3d 53, 64 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Compensation for disfigurement, like compensation for pain, suffering, and mental anguish, is included in non-economic damages. *Golden Eagle Archery,*

Inc. v. Jackson, 116 S.W.3d 757, 763 (Tex. 2003); *Figueroa*, 318 S.W.3d at 62. "The matter of future disfigurement is necessarily speculative and there is no mathematical yard stick by which one can measure damages for it." *Figueroa*, 318 S.W.3d at 64. "Each case must be judged on its own facts and considerable discretion must be vested in the jury." *Id.* (quoting *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 494 (Tex. App.—Houston [14th Dist.] 1989, no writ)). However, the evidence of non-economic damages must justify the amount awarded. *Bentley v. Bunton*, 94 S.W.3d 561, 605–06 (Tex. 2002); *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155, 165 (Tex. App.—Eastland 2009, pet. dism'd).

Oncor and Murillo have both presented cases showing a wide range of damages for past and future disfigurement awarded in past cases. *See, e.g.*, *Teel*, 299 S.W.3d at 165–67 (affirming $1,550,000 award for past and future disfigurement, plus other non-economic damages totaling $8,550,000, when both hands of sixteen-year-old were degloved by power roller machine); *Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 413 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated on other grounds) (affirming disfigurement award of $3,000,000, remitted to just under $2,000,000, for child whose foot had missing and misshapen toes and a damaged bottom following escalator accident); *Goldston Corp. v. Hernandez*, 714 S.W.2d 350, 353 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (affirming award of $25,000 for past and future

disfigurement for amputation of one toe, scars, and blackened instep at time of trial, eighteen months after injury).

Here, Murillo suffered permanent and significant deformity to his hands and forearms as a result of his electrocution. He had grade IV burns to both arms. He also suffered exposed muscles, tendons, and nerves in his arms. The nerves and tendons have little to no chance of regeneration, and Murillo had been left with no sensation in his thumb and in his fingers closest to his thumb. He also has no sensation in his forearms.

At the time of trial, Murillo had had ten surgical procedures, and the unchallenged expert testimony of his treating physician, Dr. Edward Melissinos, a reconstructive micro-surgeon, indicated that he might still need future surgical procedures. The surgeries included transferring nerves from his ankles to his hand and transferring skin from his thighs to his forearms. They also involved irrigating his forearms and implanting his back muscles into his forearms.

Dr. Melissinos testified that Murillo will need daily home physical therapy exercises for the rest of his life and will have a higher chance of future injury in the affected areas. He will likewise always have the probability of scar development and arthritis in the affected areas. He will always have limited range of motion and limited strength in the affected areas. Murillo himself testified that the loss of his ankle nerves weakened his legs. He needed help with life functions, such as using

the restroom, cleaning himself, feeding himself, getting dressed, and bathing, for a year and a half after his injury. He spends two to four hours a day on physical therapy.

Murillo's wife testified that he has low self-esteem. Murillo testified that he had felt frustrated throughout his recovery, had had lots of nightmares, felt as though his wife felt sorry for him, had had trouble accepting his deformities, and felt as though people were staring at him, so he tried to hide his arms. At trial, the jury was shown photos and videos of Murillo. They also were able to observe him over several days of trial.

Given the evidence of the severity of Murillo's wounds, the requirement of ten past operations involving skin grafts and muscle and nerve transfers from other parts of his body, the prospect of more operations and of future scarring and arthritis, and the ongoing effect of his injuries upon his appearance, self-esteem, and interaction with others, including his wife, we cannot say that the jury abused its wide discretion in awarding Murillo $2,000,000 for past disfigurement and $1,000,000 for future disfigurement—the only part of the damages award challenged by Oncor. We also note that the jury awarded no damages for loss of consortium.

We overrule Oncor's sixth issue.

Conclusion

We affirm the trial court's judgment against Oncor.[4] The judgment against the other defendants remains undisturbed.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Bland, and Sharp.

Justice Bland, dissenting.

[4] In its motion for rehearing, Oncor argues that it is entitled to remand "so that the trial court can amend the judgment to provide Oncor the settlement credit that it is entitled to under Civil Practice and Remedies Code section 33.012." However, we note that the final judgment already provides that the damages owed by Oncor to Murillo "shall be reduced by any sum, if paid, by its co-defendants to the satisfaction of this judgment" and that Oncor "shall have and recover from the other defendants whatever amounts the other defendants do not pay of the amount that is awarded against them by this judgment" to the extent that Oncor "pays more than 60% of the judgment against it." Thus, the judgment of the trial court already awards Oncor the relief it is requesting, and any issues arising out of the enforcement of the trial court's judgment are properly addressed to the trial court. *See* TEX. R. CIV. P. 621; *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982) ("The general rule is that every court having jurisdiction to render a judgment has the inherent power to enforce its judgments.").