Affirmed and Memorandum Opinion filed May 25, 2017.

In the

Fourteenth Court of Appeals

NO. 14-16-00007-CV

SHANNON NEWMAN, Appellant

V.

CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2012-44618

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

The trial court submitted Shannon Newman's personal-injury claim against CenterPoint Energy Houston Electric, LLC, to the jury based on the duty of care a premises owner owes to a licensee. The jury found in favor of CenterPoint, and the trial court rendered a take-nothing judgment. Newman challenges the judgment in three issues. He argues that the trial court erred by refusing to submit his proposed jury questions regarding: (1) CenterPoint's general negligence and

negligent activity as a premises owner and (2) even if the case properly was submitted as a premises- defect case, Newman's status as an invitee instead of a licensee. On the premises claim, Newman challenges the sufficiency of the evidence to support the jury's finding on the lack of gross negligence by CenterPoint. Finding no merit in Newman's issues, we affirm the trial court's judgment.

I. BACKGROUND

On August 8, 2011, Shannon Newman was working as a telephone lineman for Max-Tel Communications, a subcontractor for AT&T. Max-Tel's job was to install a new line of telephone cable for AT&T on certain utility poles. The poles at issue originally were staked and built sometime in the late 1940s in the City of Houston's "road right-of-way" pursuant to a franchise agreement. CenterPoint owned these poles at the time. AT&T and CenterPoint jointly utilized these poles for their telephone and power lines, respectively, subject to a 1978 General Agreement for Joint Use of Wood Poles entered into between CenterPoint's predecessor Houston Lighting & Power Co. (HL&P) and AT&T's predecessor Southwestern Bell Telephone Co.

CenterPoint's primary power line was attached to the poles at issue using skip-span construction, which means the line is attached to every other pole. The power line was attached to Pole #2 and skipped Pole #4 adjacent to the east. While installing the new telephone line, Newman was using a chain hoist attached to Pole #2. As Newman grabbed the chain hoist to let it loose, he "tugged it one good time." Just then, the primary power line attached to the top of Pole #2 came in contact with a grounded bolt on the top of Pole #4. This contact caused "excessive current to flow," which blew the fuse on Pole #2. When the fuse blew, a piece of metal flew off and impaled Newman's right hand.

According to Newman, this contact occurred because the sag in the power line above Pole #4 was below the minimum vertical clearance height of two and a half feet as provided in the National Electric Safety Code, which presented an unreasonably dangerous condition. Newman filed suit against CenterPoint. In his live petition, he alleged that he suffered severe personal injuries as a result of CenterPoint's breach of its duties sounding in general negligence and "additionally or in the alternative" premises liability. With regard to premises liability based on a dangerous condition, Newman alleged that he was an invitee or alternatively a licensee on the premises occupied by CenterPoint. Newman also alleged that CenterPoint's acts and omissions amounted to gross negligence pursuant to section 41.001(11) of the Texas Civil Practice and Remedies Code.

The trial court granted CenterPoint's motion for directed verdict with regard to Newman's claim of gross negligence under section 41.001.[1] With regard to Newman's negligence claim, Newman requested a jury question based on general negligence as to CenterPoint.[2] Newman also requested a jury question based on the negligent activity of CenterPoint as the premises owner.[3] If there was no negligent activity by CenterPoint as the premises owner, Newman requested a jury question asking whether, on the occasion in question, Newman was an invitee or a

[1] Newman does not challenge this ruling on appeal.

[2] Newman's requested question on negligence provided: "'Negligence,' means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances." *See* State Bar of Tex., Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation PJC 2.1, 4.1 (2014).

[3] Newman's requested question on negligent activity provided: "With respect to CenterPoint, 'negligence' means the failure to exercise ordinary care to maintain its power line in a condition that would render it safe to those who CenterPoint knew or, in the exercise of reasonable care should have known, had the right to come into close proximity to the power line."

licensee on the premises as to CenterPoint.[4] Newman further requested a jury question based on the duty of care a premises owner owes to an invitee.[5] The trial court refused all of these requests.

Question 1 of the jury charge asked: "Did the negligence, if any, of the persons or entities named below proximately cause the occurrence in question?" Question 1 named CenterPoint, Newman, and designated responsible third parties Max-Tel and AT&T. In pertinent part, question 1 provided:

> With respect to the condition of the premises, CenterPoint[] was negligent if:
>
> 1. The condition posed an unreasonable risk of harm, and
> 2. CenterPoint[] had actual knowledge of the danger, and;
> 3. Shannon Newman did not have actual knowledge of the danger; and

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[4] Newman's requested question on his status provided:

> On the occasion in question, was Newman an invitee or a licensee on the premises?
>
> Newman was an "invitee" if he was on the premises at the express or implied invitation of CenterPoint for a purpose connected with CenterPoint's business that did or might have resulted in a mutual economic benefit to CenterPoint and Newman. One who is an invitee cannot be a licensee at the same time.
>
> Newman was a "licensee" if he was on the premises with the permission of CenterPoint but without an express or implied invitation. That is, he was a licensee if he was on the premises only because CenterPoint allowed him to enter and not because of any business or contractual relations with, or enticement, allurement, or inducement to enter by, CenterPoint.

[5] Newman's requested premises question (if his status was that of an invitee) provided:

> With respect to the condition of the premises, CenterPoint was negligent if—
>
> 1. the condition of the premises posed an unreasonable risk of harm, and
> 2. CenterPoint knew or reasonably should have known of the danger, and
> 3. CenterPoint failed to exercise ordinary care to protect Newman from the danger, by both failing to adequately warn Newman of the condition of the premises and failing to make that condition reasonably safe.

4. CenterPoint[] failed to exercise ordinary care to protect Shannon Newman from the danger, by both failing to adequately warn Shannon Newman of the condition and failing to make that condition reasonably safe.

. . .

"Ordinary care" when used with respect to the conduct of CenterPoint[] as an owner of a premises, means that degree of care that would be used by an owner of ordinary prudence under the same or similar circumstances.

. . .

"Proximate cause," means a cause that was a substantial factor in bringing about an occurrence, and without which cause such occurrence would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person or entity using ordinary care would have foreseen that the occurrence, or some similar occurrence, might reasonably result therefrom. There may be more than one proximate cause of an occurrence.

The jury answered "No" as to all the named parties. Question 2 asked: "Was CenterPoint[]'s gross negligence, if any, a proximate cause of the occurrence in question?" Question 2 provided:

CenterPoint[] was grossly negligent, as that term is used in this Question, with respect to the condition of its premises if—

1. the condition of its premises posed an unreasonable risk of harm, and
2. CenterPoint[] both failed to adequately warn Shannon Newman of the danger and failed to make its condition reasonably safe, and
3. CenterPoint[]'s conduct was more than momentary thoughtlessness, inadvertence, or error of judgment. In other words, CenterPoint[] must have either known or been substantially certain that the result or a similar result would occur, or it must have displayed such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the persons affected by it.

The jury answered "No." The jury did not reach the charged questions on percentage of responsibility and damages.

The trial court rendered final judgment on the jury's verdict in CenterPoint's favor. Newman filed a motion for new trial, which was overruled by operation of law. Newman timely appealed.

II. ANALYSIS

A. Jury-charge issues

1. Standard of review

Texas Rule of Civil Procedure 278, entitled "Submission of Questions, Definitions, and Instructions," requires a trial court to submit questions, instructions, and definitions raised by the written pleadings and the evidence. Tex. R. Civ. P. 278; *4901 Main, Inc. v. TAS Auto., Inc.*, 187 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2006, no pet.). We review a trial court's jury-charge rulings for an abuse of discretion. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727 (Tex. 2016); *TAS Auto., Inc.*, 187 S.W.3d at 630; *see In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000) ("The trial court has considerable discretion to determine necessary and proper jury instructions."); *Hatfield v. Solomon*, 316 S.W.3d 50, 57 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("[T]he trial court enjoys broad discretion so long as the charge is legally correct."). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

If the trial court abused its discretion, we will reverse only if the error was harmful. *Sw. Energy Prod.*, 491 S.W.3d at 728. A charge error harms the appellant only if it "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case" on appeal.

See Tex. R. App. P. 44.1(a); *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012).

2. Newman's requested negligence questions

The trial court refused to submit Newman's requested questions on general negligence and negligent activity by a premises owner. In his first issue, Newman contends that he was entitled to these "controlling" jury questions because CenterPoint owed him a duty sounding in general negligence and, failing that, a duty of care owed by a premises owner engaging in contemporaneous activity. We consider the facts surrounding the occurrence in question to determine the question of law of whether a particular duty exists. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *Jackson v. NAACP Houston Branch*, No. 14-15-00507-CV, 2016 WL 4922453, at *10 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, pet. denied) (mem. op.).

a. General negligence

First, Newman argues that CenterPoint as an electricity provider owed a duty of ordinary care to him with regard to its electrical system, including poles and wires, and the provision of electricity. For this proposition, Newman primarily relies on the intermediate appellate court case *Houston Lighting & Power Co. v. Brooks*, 319 S.W.2d 427, 431 (Tex. Civ. App.—Houston 1958), *rev'd*, 336 S.W.2d 603 (Tex. 1960). *Brooks* involved a suit for damages for personal injuries stemming from electrical contact between the aluminum handle of the mop the plaintiff was using to finish a cement floor and a high-voltage transmission line owned and maintained by electrical provider HL&P. At the time of the incident, the plaintiff was employed by a company working on a hospital construction project. The appeals court affirmed the trial court's judgment based on the verdict in favor of the plaintiff. However, the Supreme Court of Texas reversed and rendered judgment, holding that HL&P did not owe any duty sounding in general

negligence to the plaintiff as a member of the general public where there was no showing that HL&P reasonably anticipated his injury. *See* 336 S.W.2d at 606, 608.

Newman argues that CenterPoint knew individuals like him would be in close proximity to CenterPoint's power line based on the existence of the General Agreement. However, general knowledge about the possibility that employees of a subcontractor for AT&T at some point might perform work near CenterPoint's power line without more does not mean that CenterPoint reasonably could anticipate the incident and injury. The *Brooks* Court rejected a similar foreseeability argument based on evidence that HL&P had general knowledge about the ongoing hospital construction. *See id.* at 605–06 (although HL&P had knowledge of building construction "incidental to furnishing electricity," record failed "to show any facts which would be a basis for holding that [HL&P] could reasonably anticipate the time for pouring concrete on top of the second floor"). The circumstances indicate Newman did not contact CenterPoint about, and there is no evidence that CenterPoint had knowledge of or reasonably anticipated, Max-Tel's line expansion work on the poles at issue. *Brooks* does not support a duty of ordinary care here based on general negligence.[6] *See id.* at 606 ("If the reason to anticipate injury is not established, then no duty arises to act to prevent such an unanticipated injury."); *Oncor Elec. Delivery Co., LLC v. Murillo*, 449 S.W.3d 583, 593 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (en banc) (citing

[6] Nor do the other cases upon which Newman relies. The overriding issue in *Grant v. Southwestern Electric Power Co.* was the scope and interpretation of a public utility tariff filed with the Public Utility Commission where the facts involved injury from an electrical shock occurring in the customer's home, not on the utility's premises. 20 S.W.3d 764, 767–68, *aff'd in part, rev'd in part on other grounds*, 73 S.W.3d 211 (Tex. 2002). *City of Brady, Texas v. Finklea*, 400 F.2d 352 (5th Cir. 1968), does not bind our court. *See Kamat v. Prakash*, 420 S.W.3d 890, 900 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In any event, *Finklea* is distinguishable because it involved negligent construction of a transformer pole. 400 F.2d at 355–57.

Brooks, 336 S.W.3d at 606).

Consistent with its position below, CenterPoint argues that "[t]he en banc case of *Oncor Electric Delivery Co. v. Murillo* is almost directly on point, and it refutes Mr. Newman's argument that he was entitled to a different jury question based on . . . general negligence." Like the trial court, we find *Oncor* to be persuasive. In *Oncor*, the plaintiff, who was working for a salvage contractor involved in the demolition of an apartment complex, received an electric shock and was injured when he reached inside a transformer box to disconnect a copper cable. *Id.* at 587–88. Oncor was the electric utility that held an electrical easement on the property and owned the transformer box. *Id.* at 585–86. The plaintiff sued Oncor, and the case was submitted to the jury on a general negligence theory. *Id.* at 585. The First Court of Appeals, sitting en banc, reversed the submission of such general negligence question and rendered judgment for Oncor, holding that the case should have been submitted under a theory of premises liability. *Id.* at 595.

The *Oncor* court considered but rejected the plaintiff's position that Oncor was not a premises owner or occupant and instead should be subjected to liability under general negligence where Oncor was the easement holder and the party that controlled the transformers on the property. *Id.* at 590–91. Similarly, here, CenterPoint had control of its poles and power lines located in the "road right-of-way" subject to a franchise with the City. Therefore, CenterPoint "qualified as an occupier of the premises for the purposes of creating a duty in tort." *See id.* at 591.

Newman nevertheless argues that his case is not a premises case. Newman contends that unlike the plaintiff in *Oncor*, who was actively reaching into Oncor's transformer box when he was injured, Newman was standing in Max-Tel's bucket truck, well below CenterPoint's primary power line, at the time of the incident.

However, Newman was performing his work on, and had his chain hoist wrapped around, Pole #2. He was in the process of "letting the hoist loose" from this pole when the power surge occurred on Pole #4 and blew the fuse on Pole #2. Newman acknowledged that he was working in "close proximity" to CenterPoint's power lines and fuses. In any event, "the relevant inquiry" for purposes of determining whether a defendant has a duty and may be subjected to liability for a premises claim does not turn on the precise physical location of the plaintiff or whether he was touching certain equipment at the exact moment of the incident, but rather on "whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant had the responsibility to remedy it." *See id.* at 590–91 (quoting *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002)). The circumstances here meet this inquiry—Newman's theory of liability was based on CenterPoint's control over its utility poles and primary power line located in the right-of-way and CenterPoint's failure to remedy or warn about the dangerous condition of its line attached to Pole #2 that allegedly sagged too close to the top of Pole #4.

Based on the facts surrounding the occurrence in question, we conclude that the trial court did not abuse its discretion when it refused to submit Newman's general-negligence question.

b. Negligent activity by a premises owner

Newman also argues that the trial court erred by refusing to submit his requested alternative question as to the negligent activity of CenterPoint. We conclude that the circumstances did not warrant the submission of a negligent-activity question and therefore Newman was limited to a premises-defect theory of recovery.

Texas courts have recognized that negligent activity and premises defect are

distinct, independent theories of recovery. *Id.* at 591 (citing cases); *see Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 50 (Tex. 2015) (discussing negligent activity of premises owner and premises defect as two distinct "categories of negligence"). Negligent activity is a "malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury." *Abutahoun*, 463 S.W.3d at 50 (citing *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010)); *Oncor*, 449 S.W.3d at 591 (same). Premises liability is a "nonfeasance theory based on the owner's failure to take measures to make the property safe." *Abutahoun*, 463 S.W.3d at 50; *Oncor*, 449 S.W.3d at 591. "A finding of liability for 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.'" *Oncor*, 449 S.W.3d at 591–92 (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)); *see Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). To find a premises owner liable for a premises defect, the plaintiff's injury must have been injured as a result of a dangerous condition existing on the premises. *Oncor*, 449 S.W.3d at 592; *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 909 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

CenterPoint again points to *Oncor* as persuasive authority. In *Oncor*, the plaintiff's claim was that Oncor had failed to turn off an existing energized transformer. 449 S.W.3d at 592. The *Oncor* court determined that, "[w]ithout evidence of contemporaneous conduct," the plaintiff's claim was "'a nonfeasance theory, based on [Oncor's] failure to take measures to make the property safe,' and not an activity 'based on affirmative, contemporaneous conduct by [Oncor] that caused the injury.'" *Id.* at 593 (alterations in original). The court particularly noted that "Oncor did not contemporaneously energize the transformer while [the

plaintiff] worked, or tell anyone at the worksite that it had been switched off when in fact it was not." *Id.* In other words, because there was no evidence that Oncor engaged in any affirmative activity contemporaneous with the plaintiff's injury, "Oncor's duty was, at most, that of an occupier of the premises." *Id.* at 594.

Similarly, the facts here support that the trial court was correct when it submitted Newman's case based on premises defect. Newman's claim was that CenterPoint failed to take measures to remedy its low-hanging primary power line or at the least to warn Newman about this unreasonably dangerous condition. But Newman presented no evidence to show that CenterPoint engaged in any affirmative activity contemporaneous with Newman's injury. The evidence reflected that there was no CenterPoint crew present at the Max-Tel job site. Neither Newman nor anyone at Max-Tel contacted CenterPoint to inform it about the job or to request that CenterPoint de-energize the power line. The evidence instead reflects that the last time CenterPoint had any personnel working in the area was June 2011, about two months before Newman's injury.

Even so, Newman argues that this is a negligent-activity case because of "CenterPoint's ongoing omissions in maintaining [its] energized power lines" for more than 60 years. The alleged ongoing omission in maintenance pertained to CenterPoint's failures to inspect and either repair or warn about a low-hanging power line, which according to Newman "allowed an unreasonably dangerous condition to be active at all times." Newman has not presented, nor have we found, any authority supporting such a position.[7] To the contrary, Newman's

[7] Newman mistakenly analogizes his case to *Gattis Electric, Inc. v. Mann*, No. 03-14-00080-CV, 2015 WL 5096475 (Tex. App.—Austin Aug. 26, 2015, pet. denied) (mem. op.), which involved a plaintiff who received an electric shock when accessing an overfilled junction box. However, the applicable duty in that case fell under "general negligence principles" based on the type of relationship between the subcontractor and the injured worker plaintiff. *Id.* at *5. In *Gattis*, even though the plaintiff was not the subcontractor's employee, the undisputed

argument does not accurately characterize negligent-activity cases as Texas law defines them. *See Olivo*, 952 S.W.2d at 527; *Oncor*, 449 S.W.3d at 591–92; *Wal-Mart Stores, Inc. v. Garza*, 27 S.W.3d 64, 67 (Tex. App.—San Antonio 2000, pet. denied).

Texas courts have refused to find negligent activity in the context of allegedly "contemporaneous omissions," i.e., where the dangerous condition arose or had been created at some previous time and where there was no evidence of any activity by the premises owner contemporaneous to the occurrence. *See, e.g.*, *Keetch*, 845 S.W.2d at 264 (facts did not support negligent activity where plaintiff was injured by slipping and falling 30 minutes after chemical allegedly was sprayed on the store floor); *Choice v. Gibbs*, 222 S.W.3d 832, 836 n.4 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (substitute op.) ("The gravamen of Choice's complaint, however, is not that of negligent activity but that the homeowners were negligent in failing to keep the premises safe from a known,

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evidence established that the subcontractor exercised supervising authority over the worker. *Id.* Moreover, the plaintiff in *Gattis* was not injured as a contemporaneous result of the subcontractor's actions, so *Gattis* does not support Newman's argument for applying negligent-activity principles here.

To the extent that Newman relies on our case *Custom Transit, L.P. v. Flatrolled Steel, Inc.*, 375 S.W.3d 337, 364 (Tex. App.—Houston [14th Dist.] 2012, pet. denied), for the proposition that the law provides for negligent-activity claims in the context of "contemporaneous omissions," we disagree. Although in *Custom Transit* we used the word "omissions" in our discussion of the law on negligent activity, this language appears to mirror that employed by the dissent in *Del Lago Partners*. *Custom Transit*, 375 S.W.3d at 361 (citing *Del Lago Partners*, 307 S.W.3d at 788 (Wainwright, J., dissenting)). None of the cases we cited in our discussion in *Custom Transit*, including *Keetch*, the majority opinion in *Del Lago Partners*, and *Crooks*, contains this "omissions" language. *Custom Transit*, 375 S.W.3d at 364; *see also State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2008). Moreover, when we applied the law in our analysis in *Custom Transit*, we did not employ any "omissions" language in concluding that the record revealed no evidence to support negligent activity. 375 S.W.3d at 365–67 ("A negligent activity claim focuses on whether Flatrolled was injured 'by or as a contemporaneous result of the activity itself,' *see Keetch*, 845 S.W.2d at 264, or whether there was 'affirmative, contemporaneous conduct' by Richway that caused Flatrolled's injury, *see Del Lago Partners, Inc.*, 307 S.W.3d at 776.").

dangerous condition, that is, exposed electrical wires." (citing *Keetch*, 845 S.W.2d at 264)); *Crooks v. Moses*, 138 S.W.3d 629, 639 (Tex. App.—Dallas 2004, no pet.) (facts did not support negligent activity where plaintiff was injured by bonfire explosion an hour after bonfire was lit where "[a]t the time of the explosion, neither the firefighter nor any appellee was monitoring the fire or actively doing anything in regard to it"); *Pifer v. Muse*, 984 S.W.2d 739, 742 (Tex. App.—Texarkana 1998, no pet.) ("Leaving the lighted candle and the gun was not an ongoing activity of Muse. Rather, it simply created a condition that ultimately allowed Pifer's injury to occur."); *Exxon Corp. v. Garza*, 981 S.W.2d 415, 420 (Tex. App.—San Antonio 1998, pet. denied) ("According to Garza, the transformer fire that precipitated his fall was caused by one of the improper connections. He was not injured by or as a contemporaneous result of the negligent installation."). In rejecting Newman's argument that CenterPoint's "ongoing omissions" constituted a negligent activity, we likewise "decline to eliminate all distinction between premises conditions and negligent activities." *See Keetch*, 845 S.W.2d at 264.

Based on the facts surrounding the occurrence in question, we conclude that the trial court did not abuse its discretion when it refused to submit Newman's negligent-activity question. We overrule Newman's first issue.

3. Newman's requested questions concerning his alleged status as an invitee

In his second issue, Newman challenges the trial court's refusal to submit jury questions related to his status as an invitee on CenterPoint's premises.

We already have determined that Newman's theory of liability properly falls under premises defect. Premises liability is a special form of negligence in which the premises owner's duty generally is determined by the plaintiff's status as an

invitee, licensee, or trespasser. *Plasencia v. Burton*, 440 S.W.3d 139, 144 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). An invitee enters land with the owner's knowledge and for the mutual benefit of both. *Plasencia*, 440 S.W.3d at 144 (citing *Mayer*, 278 S.W.3d at 909). A licensee enters and remains on land with the owner's consent and for the licensee's own convenience, on business with someone other than the owner. *Id.* (citing *Mayer*, 278 S.W.3d at 910). A trespasser enters another's property without lawful authority, permission, or invitation. *Id.*

If a person is an invitee, then the property owner has a duty to use reasonable care to warn of or remedy conditions creating an unreasonable risk of harm that the owner either knew about or should have discovered by the exercise of reasonable care. *Id.* If a person is a licensee, as was submitted to the jury here, then the property owner has a duty to refrain from injuring that person willfully, wantonly, or through gross negligence; further, the owner who has actual knowledge of a dangerous condition unknown to the licensee has a duty to warn the licensee or make safe the dangerous condition. *Id.* If a person is a trespasser, then the property owner has a duty not to cause injury willfully, wantonly, or through gross negligence. *Id.*

When the status of the plaintiff is at issue, the plaintiff has the burden to establish his status. *See Pogue v. Allright, Inc.*, 375 S.W.2d 533, 537 (Tex. Civ. App.—Austin, 1964, writ ref'd n.r.e.). The trial court need not submit a question on the plaintiff's status where the evidence is undisputed and the issue can be determined as a matter of law. *See W. R. Grimshaw Co. v. Zoller*, 396 S.W.2d 477, 480 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (no jury issue required where plaintiff "was an invitee at this place under the undisputed evidence"); *see also Dickinson Arms-REO, L.P. v. Campbell*, 4 S.W.3d 333, 337 (Tex. App.—

Houston [1st Dist.] 1999, pet. denied) (facts showed plaintiff was invitee as matter of law).

First, Newman argues that because he was an employee of a subcontractor to AT&T, he qualified as an invitee of CenterPoint. Newman cites *Shell Chemical Co. v. Lamb*, 493 S.W.2d 742, 746 (Tex. 1973), which provides that a general contractor owes the same duty to employees of its subcontractor as the duty owed by a premises owner to a business invitee. However, Newman was not an employee of a subcontractor to CenterPoint as general contractor. *See Daniels v. Univ. of Tex. Health Sci. Ctr.*, No. 01-03-00997-CV, 2004 WL 2613282, at *3 (Tex. App.—Houston [1st Dist.] Nov. 18, 2004, no pet.) (mem. op.) (where there is no "general contractor-subcontractor relationship" *Lamb* is inapplicable). While the General Agreement provides for AT&T's and CenterPoint's joint use of the poles, it does not state, nor does it follow, that AT&T and CenterPoint each act as general contractors to the other party's subcontractors. Therefore, Newman fails to raise a fact issue on his status as an invitee of CenterPoint based on *Lamb*.

CenterPoint does not dispute that Newman "had permission to be on CenterPoint's pole by virtue of the [General Agreement] between CenterPoint and AT&T." Mere consent of the owner does not render an individual an invitee. Under Texas law, in the absence of some relation that inures to the mutual benefit of the plaintiff and the owner, or to the benefit of the owner, the injured party must be regarded as a mere licensee and not an invitee. *Burton Constr. & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 602 (Tex. 1954); *Cowart v. Meeks*, 111 S.W.2d 1105, 1107 (Tex. 1938); *Mayer*, 278 S.W.3d at 909–10; *Mendez v. Knights of Columbus Hall*, 431 S.W.2d 29, 32 (Tex. Civ. App.—San Antonio 1968, no writ). The undisputed evidence indicates that Newman was working for his employer Max-Tel, which was performing a job to install telephone cable under a contract

with AT&T. Max-Tel's sole "contract was with AT&T" and Max-Tel's only communications were with AT&T. No evidence showed Newman entered the premises to perform any work or service that would have inured to the mutual benefit of Newman and CenterPoint or to CenterPoint's economic benefit. *See Am. Indus. Life Ins. Co. v. Ruvalcaba*, 64 S.W.3d 126, 134 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (general test is whether at time of incident plaintiff had "present business relations" with defendant and plaintiff's visit involved "at least a potential pecuniary profit" to owner).

Next, Newman relies on *Texas Power & Light Co. v. Holder*, 385 S.W.2d 873 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.), to support his alleged status as an invitee of CenterPoint.[8] In *Holder*, where the plaintiff was injured by an uninsulated power line, the jury found that the plaintiff was an invitee of the defendant electrical utility at the time of the incident. *Id.* at 877–78. The appellate court rejected a legal-sufficiency challenge to the plaintiff's status and affirmed the judgment in his favor. *Id.* at 884–86.[9] We distinguish *Holder* because in that case the television cable company that employed the plaintiff had a direct contractual relationship with the defendant regarding the use of its poles. *Id.* at 884–85. Therefore, it was an "established fact that there was a mutual financial interest involved between the two companies." *Id.* at 886. Here, however, AT&T, not

[8] Newman is incorrect that the Supreme Court of Texas adopted the court of appeals' opinion in *Holder*. *See Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 781 n.3 (Tex. 2008) (notation "writ ref'd n.r.e." means Supreme Court of Texas is not satisfied that appellate opinion correctly declared the law but instead presented no error requiring reversal of the judgment).

[9] With regard to the defendant's consent, the facts in *Holder* revealed that the defendant permitted the cable company to use the defendant's poles upon oral notice, the defendant had been notified of the cable company's planned extension work, the plaintiff had been installing his television attachments on the same poles and on the same day as the defendant's employee was installing meter loops, and also that same day the plaintiff had been assured by the defendant's employee that the pole at issue was safe. 385 S.W.2d at 885–86.

Max-Tel, was the only party with a direct contractual relationship with CenterPoint.

Newman insists that he was an invitee as to CenterPoint because of the mutual business interest of AT&T and CenterPoint as outlined in their General Agreement. However, the General Agreement does not support Newman's status as an invitee of CenterPoint. Again, the contractual relationship was between AT&T and CenterPoint, not between Newman's employer Max-Tel and CenterPoint. The legal presumption is that parties contract only for themselves and not for the benefit of third parties. *See MCI Telecomm. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 650, 651 (Tex. 1999). Accordingly, any mutual benefit of AT&T and CenterPoint existing by virtue of the General Agreement related to the "safe condition and thorough repair" of each party's attachments would not attach to Newman through third party Max-Tel. Newman points to, and we have uncovered, no contract language to "evidence a clear intent" otherwise. *See id.* at 650, 651. In fact, the General Agreement expressly required the other party's written consent for assignment of the contract "to any firm, corporation, or individual." There was no evidence that any portion of the General Agreement was so assigned to Max-Tel or Newman.[10]

Under these circumstances, Newman failed to raise a fact issue regarding his status on the premises as an invitee of CenterPoint. Therefore, the trial court did not abuse its discretion by submitting the case based on the duty of care a premises owner owes to a licensee. We overrule Newman's second issue.

[10] Under the General Agreement, AT&T and CenterPoint sought to disclaim any invitee status for the employees of the other party, providing that when such employees went "upon the poles of the other [party] for any purpose they shall do so as bare licensees." Although Newman and CenterPoint both suggest otherwise, this provision does not affect Newman's status because he was not an employee of AT&T or CenterPoint.

B. Gross-negligence issue

As we already have concluded, the trial court properly submitted the case under a theory of premises defect where Newman was a licensee. Question 1 asked whether CenterPoint's negligence, if any, was a proximate cause of the occurrence. Question 1 was based on the duty of a premises owner who has actual knowledge of a dangerous condition unknown to the licensee to warn of or make safe the dangerous condition. *See Mayer*, 278 S.W.3d at 910. The jury answered "No." Newman does not bring any sufficiency challenge regarding this finding.

A premises owner also has a duty to refrain from injuring a licensee such as Newman through gross negligence. *See id.* That is, another way that a plaintiff can prevail as a licensee is by proving that the premises owner committed gross negligence. *See id.* Question 2 asked whether CenterPoint's gross negligence, if any, was a proximate cause of the occurrence. Question 2 provided that CenterPoint was grossly negligent if: (1) the condition of its premises posed an unreasonable risk of harm; (2) CenterPoint failed to adequately warn Newman of the danger and failed to make its condition reasonably safe; and (3) CenterPoint's conduct was more than momentary thoughtlessness, inadvertence, or error of judgment such that it either knew or was substantially certain that the result would occur, or displayed such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of Newman. Newman did not object to this question. The jury answered "No."

To successfully challenge the legal sufficiency of an adverse finding on an issue on which a party had the burden of proof, the party must conclusively establish all vital facts in support of that issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). Evidence is conclusive only if

reasonable people could not differ in their conclusions, which depends on the facts of each case. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). When performing a factual-sufficiency review, we consider and weigh all of the evidence, and only may set aside a verdict if the finding is against the great weight and preponderance of the evidence such that it is clearly wrong and manifestly unjust. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761–62 (Tex. 2003); *Dow Chem.*, 46 S.W.3d at 242. We keep in mind that we may not merely substitute our judgment for that of the jury and that the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Golden Eagle Archery*, 116 S.W.3d at 761.

In his final issue, Newman argues that "[t]he jury's finding that [CenterPoint] was not grossly negligent was against the great weight and preponderance of the evidence and should therefore be reversed and rendered." Newman contends the evidence proves as a matter of law that the sagging primary power line posed an unreasonable risk of harm, that CenterPoint failed to warn Newman and make the condition reasonably safe, and that CenterPoint's actions showed a conscious indifference to Newman's safety. Newman points to evidence that the poles and power lines at issue were installed in the late 1940s and that CenterPoint has not measured vertical clearance of the line for over 60 years. Newman's expert witness E.P. Hamilton provided his opinion that the primary power line sagged too low in violation of the Code, "probably" within two feet of the top of Pole #4. Hamilton opined that this excessive sag presented a foreseeable, unreasonably dangerous condition.

However, there also was evidence that when CenterPoint designs and installs its power lines, it calculates and accounts for changes in sag levels and "ultimate sag" due to weather and time. The record contains evidence that CenterPoint uses

a multi-tier system to inspect poles and lines, including pole inspection every ten years, a "grid-hardening" circuit inspection every five years, and "as you go" inspections performed by CenterPoint field personnel. There was evidence that a few days before the incident Max-Tel employees installing cable on Pole #4 did not report any hazards such as a low-hanging primary power line to CenterPoint. There was evidence that a CenterPoint troubleshooter had performed a transformer repair at the same intersection in June 2011 and did not notice anything unusual concerning Pole #4. CenterPoint's expert Frederick Brooks testified that skip-span construction complies with the Code, and that the primary power line above Pole #4 did not sag excessively and did not present an unreasonable safety hazard at the time of the incident. Based on his own mathematical calculations, Brooks also explained that a small movement of two inches in the poles toward each other could result in a "notable" drop in the primary power line of as much as two feet, seven inches.

Within this issue, Newman argues for reversal and rendition. At the same time, he employs the "great weight and preponderance" language of a factual-sufficiency challenge, and requests reversal and remand. To the extent that Newman seeks reversal and rendition of judgment in his favor, we conclude that he has failed to conclusively establish all the vital facts to support CenterPoint's gross negligence. *See Dow Chem.*, 46 S.W.3d at 241. Likewise, to that extent that Newman seeks reversal and a new trial, we conclude that he has failed to demonstrate that the jury's adverse finding on gross negligence was against the great weight and preponderance of the evidence as to be manifestly unjust. *See Golden Eagle Archery*, 116 S.W.3d at 761–62; *Dow Chem.*, 46 S.W.3d at 242. We overrule Newman's third issue.

III. CONCLUSION

Having overruled all of Newman's issues, we affirm the trial court's judgment in favor of CenterPoint.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.