Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

OPINION

No. 04-11-00305-CV

SAECO ELECTRIC & UTILITY, LTD.,
Appellant

v.

Christopher D. **GONZALES**,
Appellee

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2009-CI-16576
Honorable Janet P. Littlejohn, Judge Presiding

Opinion by: Sandee Bryan Marion, Justice
Dissenting Opinion by: Catherine Stone, Chief Justice

Sitting: Catherine Stone, Chief Justice
Sandee Bryan Marion, Justice
Steven C. Hilbig, Justice

Delivered and Filed: April 18, 2012

REVERSED AND REMANDED

Appellant, Saeco Electric & Utility, Ltd. (Saeco), appeals the trial court's order denying its motions for judgment notwithstanding the verdict and rendering final judgment in favor of appellee, Christopher D. Gonzales. Because we are constrained to conclude the case should have been submitted to the jury on a premises defect theory rather than general negligence, we

reverse. However, as set forth below, we believe the interests of justice warrant the case be remanded for a new trial.

FACTUAL BACKGROUND

On June 16, 2009, Gonzales was involved in a multi-vehicle motor vehicle accident at the intersection of Evans Road and Highway 281 South in San Antonio. Gonzales was uninjured, but his vehicle was damaged as a result of the collision. Following the accident, Gonzales moved his vehicle off the roadway and into a parking lot in a shopping center overlooking the intersection. He then returned to the accident scene in order to provide his information to the investigating police officer. Gonzales was directed by another police officer to move off the roadway and to wait on the section of land located at the northwest corner of the intersection. Gonzales stood in this area and spoke with an EMS technician while waiting for the investigating officer. Shortly after this, the ground underneath Gonzales suddenly caved in, causing his left leg to enter the hole created in the ground. A metal grounding rod entered Gonzales's body at the back of his left leg and transected his body over his penis to his right abdominal cavity. At least twelve inches of the rod penetrated his body.

Gonzales was taken to the hospital and later diagnosed with a urethral stricture, intractable pain from scar tissue, permanent damage to his perineal nerve, impotence, and Post Traumatic Stress Disorder (PTSD)—all as a result of the rod entering his body. It was later discovered that the eighteen-inch diameter, seven-foot deep hole was created when an old wooden traffic-signal pole had been removed from the intersection. However, the five-eighths inch diameter, seven-foot long, metal grounding rod associated with the wooden pole had not been removed from the hole when the pole was pulled. This is the metal rod that entered Gonzales's body.

Prior to Gonzales's injury, construction work was being performed on the traffic signals and turn lanes at the same intersection by a general contractor, Ram Building Services, LLC (Ram), and its subcontractor, Saeco, under Ram's contract with the City of San Antonio (the City). Saeco, as a subcontractor, was specifically hired to remove the old wooden pole, install a new aluminum traffic pole, and install pedestrian-crossing push buttons at the northwest corner of the intersection of Evans Road and Highway 281. As part of the project, Saeco was supposed to remove the metal grounding rod following the removal of the wooden pole or cut the rod off below ground level. Saeco was then supposed to backfill the hole. After this, Saeco had to wait for the City to construct new turn lanes over the highway before completing its project.

On June 1, 2009, Saeco removed the wooden pole and backfilled the hole. Gonzales's injury occurred about two weeks later. Saeco returned to the same location on August 4, 2009, after the turn lanes were completed by the City, to finish its project and install the signs on the new pole for pedestrian-crossing push buttons. At this time, Saeco's employees discovered the hole with the old metal grounding rod still inside. Saeco then removed the metal grounding rod and properly backfilled the hole. However, prior to this, Saeco was unaware of Gonzales's injury.

Gonzales filed suit against Saeco, Ram, and the City, asserting violations of the Texas Tort Claims Act and negligence claims. In his pleadings, Gonzales claimed he was an invitee on the premises, and he sought recovery of actual damages based on his personal injuries. After settlements with the City and Ram, a jury trial against Saeco began in January 2011. The jury returned a verdict in favor of Gonzales, awarding actual damages in the amount of $5,529,709.88, which the trial court reduced to $5,175,246.37 after the application of settlement credits. Following the verdict, the trial court signed a final judgment, overruling Saeco's initial

motion for judgment notwithstanding the verdict. Saeco timely filed a second motion for judgment notwithstanding the verdict and a motion for new trial, both of which the trial court denied. Saeco timely filed a notice of appeal.

DISCUSSION

On appeal, Saeco argues the trial court erred in denying its motions for judgment notwithstanding the verdict and rendering final judgment on the jury's verdict. Saeco contends this was error because Gonzales failed to request and obtain findings from the jury on the essential elements of his only viable claim—a premises defect action. As a result, Saeco claims the broad-form negligence question that was submitted to the jury is immaterial and not a controlling issue.

A trial court may disregard a jury finding and enter a judgment notwithstanding the verdict (JNOV) if the finding is immaterial or if there is no evidence to support one or more of the jury findings on issues necessary to liability. *See* TEX. R. CIV. P. 301; *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Williams v. Briscoe*, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.). This court reviews a JNOV under a legal sufficiency or "no evidence" standard of review. *Guzman v. Synthes (USA)*, 20 S.W.3d 717, 719–20 (Tex. App.—San Antonio 1999, pet. denied). In determining whether there is no evidence to support a jury verdict, we consider the evidence favorable to the jury's verdict and reasonable inferences that tend to support it. *Id.* at 720. No evidence exists when the record discloses a complete absence of evidence that supports a vital fact. *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 666 n.9 (Tex. 1990). A question is "immaterial" when it should not have been submitted to the jury, it calls for a finding beyond the province of the jury, such as a question of law, or when it was properly

submitted but has been rendered immaterial by other findings. *Se. Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999); *Spencer*, 876 S.W.2d at 157.

A. Jury Charge

At the pre-trial hearing and the charge conference, discussions concerning the issue of how liability would be submitted to the jury focused on the issues of: (1) whether and how Ram's negligence, as the general contractor, would be submitted to the jury, and (2) the issue of non-delegable duty as it related to Ram and Saeco. Saeco argued that Ram, as the general contractor, was solely liable to Gonzales because Ram had a non-delegable duty to third parties and could not delegate its duty of care to its independent contractor, Saeco. Saeco based this argument on the theory that Ram contracted with the City to perform an inherently dangerous activity (excavating a hole). The trial court rejected this theory concerning non-delegable duty; however, the trial court indicated Saeco could include an instruction regarding non-delegable duty in its proposed jury charge. Both parties were asked to submit their proposed charges at the beginning of the second week of trial.

Gonzales's proposed charge included only a damage question because he argued Saeco had judicially admitted its liability. As a result, Gonzales did not submit any liability question—neither negligent activity nor premises defect—in his proposed charge. Conversely, Saeco's proposed charge included a broad-form negligence question that submitted the liability of both Saeco and Ram, tracking the form found in Texas Pattern Jury Charges, 65.2. Saeco also proposed a proportionate responsibility question and an instruction on non-delegable duty.

Ultimately, the charge submitted to the jury included the broad-form negligence question proposed by Saeco,[1] as well as a question on proportionate liability and a question on damages. Importantly, Gonzales did not object to the submission of the broad-form negligence question proposed by Saeco. The jury ultimately found Saeco 100% liable.

B. Negligent Activity vs. Premises Defect

On appeal, Saeco contends Gonzales's only viable claim for recovery is one for premises defect, as opposed to negligent activity, because Gonzales's pleadings and evidence alleged injury from a dangerous condition on the property and not as a contemporaneous result of someone's negligence or some negligent activity. As such, Saeco argues Gonzales's recovery is predicated upon an affirmative jury finding of the *Corbin* elements. *See Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983). Saeco contends that a simple negligence question cannot support a recovery for a premises defect claim without the *Corbin* elements included as an instruction or definition. Gonzales counters that a simple general negligence question is appropriate because Saeco did not own or control the premises and the *Corbin* elements can only be submitted against the owner or occupier of the property.

Negligent activity and premises defect are independent theories of recovery. *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997). "Generally, to recover on a negligent activity theory, one must have been injured by or as a contemporaneous result of an activity." *Rendleman v. Clarke*, 909 S.W.2d 56, 60 (Tex. App.—Houston [14th Dist.] 1995, writ

[1] The broad-form negligence question submitted to the jury read as follows:

> Did the negligence, if any, of the persons named below proximately cause the occurrence in question?
>
> Answer "Yes" or "No" for each of the following:
>
> a. Saeco Electric & Utility, Ltd. _____
>
> b. Ram Building Services, LLC _____

dism'd) (citing *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)). However, to recover on a premises defect theory, one must be injured by a condition on the property created by the activity. *Keetch*, 845 S.W.2d at 264.

In *Keetch*, the Texas Supreme Court provided guidance in determining whether an injury results from a premises defect as opposed to a negligent activity. *Id.* Keetch was injured after slipping on a grocery store's floor thirty minutes after a chemical substance was deposited on the floor in the floral section. *Id.* at 263. The chemical substance was left on the floor after the store employees had sprayed the substance on flowers. *Id.* The court, in rejecting the theory that the grocery store's employees were conducting a negligent activity, noted there was no "ongoing" activity by the store employees at the time of the injury. *Id.* at 264. Thus, the court reasoned that while Keetch "may have been injured by a condition created by the spraying . . . she was not injured by the activity of spraying." *Id.* The court concluded that the case was properly a premises defect case and not a case based on negligent activity. *Id.*

Here, the excavation work at the intersection took place on June 1, 2009, and the injury to Gonzales occurred approximately two weeks later on June 16, 2009. It is undisputed that Saeco was not at the intersection on June 16 and that it did not go back to the jobsite to complete its work until August 4, 2009. In order "to establish that an injury was the contemporaneous result of a negligent activity, the evidence must show that the alleged negligent activity occurred near both the time and location of the injury." *Kroger Co. v. Persley*, 261 S.W.3d 316, 320 (Tex. App.—Houston [1st Dist.] 2008, no pet.). As such, we conclude Gonzales was injured as a result of a condition on the premises and not as a contemporaneous result of Saeco's negligent activity. *See Keetch*, 845 S.W.2d at 264; *Olivo*, 952 S.W.2d at 529; *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 259 (Tex. 1992).

Still, in order to be liable for a premises defect as opposed to general negligence, possession and control must be shown. *Rendleman*, 909 S.W.2d at 60. On appeal, Gonzales claims that Saeco was not in possession or control because it was neither an owner nor occupier of the premises; therefore, the instruction and question presented to the jury on general negligence was correctly submitted.[2] In other words, Gonzales contends that a negligent activity charge was sufficient to support liability against Saeco because a premises defect claim can only be asserted against a possessor, owner, or occupier of land—Saeco was none according to Gonzales.

However, while it is ordinarily the possessor of a premises that has the duty to use reasonable care to keep the premises safe for invitees, liability may extend to one who is not the owner or the occupier, but who is in control of the premises. *Olivo*, 952 S.W.2d at 527; *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986). In other words, a premises defect claim can be asserted against a contractor who is a non-owner or non-occupier of the premises if the contractor had the right to control the condition that caused the injury. *Rendleman*, 909 S.W.2d at 60; *see also* RESTATEMENT (SECOND) OF TORTS § 384 (1965) (stating subcontractor has same liability as possessor but only for such harm as is done by the specific work entrusted to him). Thus, liability depends on control—which creates a duty on the controller to use reasonable care to make the premises safe for invitees. *Page*, 701 S.W.2d at 835. "'Control' means 'power or

[2] The Comment to Pattern Jury Charge 65.2 describes when to use this negligence instruction: "PJC 65.2 should be used to submit the conduct of other parties, such as a contributorily negligent plaintiff or a third-party defendant who is not an owner or occupier of a premises." State Bar of Tex., *Texas Pattern Jury Charges—Negligence and Ordinary Care of Plaintiffs or of Defendants Other Than Owners or Occupiers of Premises* PJC 65.2 (2010); *cf.* State Bar of Tex., *Texas Pattern Jury Charges—Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2010) (listing the *Corbin* elements in a sample jury question to be used "in most premises liability cases in which it is undisputed that the plaintiff was an invitee"). At least one appellate court has interpreted PJC 65.2 to apply "to the negligent activities of parties other than owners and occupiers who do not create the dangerous condition on the premises but whose concurrent negligent activity is also a cause of the injury for purposes of determining proportionate responsibility." *Reinicke v. Aeroground, Inc.*, 167 S.W.3d 385, 388 n.4 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Following this logic, PJC 65.2 is not applicable here because Saeco admittedly created the condition, even if it did not own or occupy the premises.

authority to guide or manage.'" *Bay, Inc. v. Ramos*, 139 S.W.3d 322, 326 (Tex. App.—San Antonio 2004, pet. denied) (citing *Rendleman*, 909 S.W.2d at 60 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 285 (9th ed. 1991))). As a result, for a contractor to be liable in negligence, "its supervisory control must relate to the condition . . . that caused the injury." *Olivo*, 952 S.W.2d at 528.

Consequently, to succeed on a premises defect claim, a plaintiff must establish the defendant's right to control the defect-producing work and a breach of that duty according to the premises defect elements established in *Corbin*. 648 S.W.2d at 296. These elements are:

> (1) Actual or constructive knowledge of some condition on the premises by the defendant;
>
> (2) That the condition posed an unreasonable risk of harm;
>
> (3) That the defendant did not exercise reasonable care to reduce or eliminate the risk; and
>
> (4) That the defendant's failure to use such care proximately caused the plaintiff's injuries.

Id.

We believe the evidence raised the issue of a premises defect. Testimony by Julio Ramon, the owner of Ram, indicated it was Saeco's scope of the work to backfill the hole left from the removal of the old wooden pole. Further, Ramon indicated that Saeco agreed to be bound by contract to all terms and conditions of the main contract between Ram and the City and to assume "all of the obligations and responsibilities which" Ram assumes towards the City. *See Lowe's Home Ctrs., Inc. v. GSW Mktg. Inc.*, 293 S.W.3d 283, 289 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("A plaintiff can prove the right to control by evidence of a contractual agreement that explicitly assigns the possessor that right."); *Coastal Marine Serv. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (opining that a party can prove "right of control" by evidence

of a contractual agreement). Ramon also indicated that Ram did not "anywhere agree to provide employees or supervision or anything to Saeco in any of their contracts." Ramon testified, "I'm telling you, we didn't have a crew there because there was nothing for Ram to do. The work that had to be done was only Saeco's work." Similarly, Robert Chapman, the owner of Saeco, testified that "as between Saeco and Ram, Saeco had 100 percent of the responsibility to get that job done as far as installing the light standards and getting that pole out."

In addition, Ramon stated that Saeco had not yet completed the work at the intersection when Gonzales was injured because Saeco went back to finish the work in early August. Webb Berry, Saeco's supervisor for the project, testified that Saeco was not able to do all of the "work at the same time," but that Saeco "did part [of the project] at a time and [that they] were scheduled to come back and forth on this job." Berry also testified that "on June 16 when this accident happened, work was not complete [by Saeco] out there." Further, Ramon testified the City had not yet accepted Saeco's work at the time of Gonzales' injury. Additionally, the evidence indicates that proper backfill of the hole by Saeco did not occur until Saeco returned to the site in August.

Gonzales's argument infers that a different and lesser standard of care applies to defendants who create dangerous conditions on property they do not own than applies to defendants who own or control the premises on which dangerous conditions exist. However, "[t]his contention ignores the fundamental principle that negligence and premise defect are independent theories of recovery, rather than mere standards of care within a single theory that could differ among classes of defendants." *Reinicke v. Aeroground, Inc.*, 167 S.W.3d 385, 388 n.4 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Additionally, "even a trespasser can be subject to liability for a condition he creates on land only if the *Corbin* elements are present, *i.e.*,

the condition poses an unreasonable risk of harm to others and the trespasser should recognize it as such." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 381 (1965)).

Importantly, if a plaintiff submits a broad-form negligence question to a jury in a premises defect cause of action, then the charge must also include a question about the defendant's right to control the defect-producing work. *Olivo*, 952 S.W.2d at 529. A jury's finding on the right to control establishes the duty element. *Id.* Additionally, instructions that incorporate the *Corbin* elements must be included with the negligence questions. *Id.* The Texas Supreme Court has noted that "[w]e have explicitly required that the trial court submit the *Corbin* elements in a premises defect case." *Id.* The court reasoned that a question simply about negligence relates only to the theory that a defendant was liable for negligent activities but it does not determine the defendant's actual or constructive knowledge. *Id.*

Alternatively, because a preference exists for broad-form submission of jury questions, it may be appropriate to submit a general negligence question in a premises defect case; however, this question must be accompanied by an instruction that defines "the controlling element of [a defendant's] actual or constructive knowledge of the premises defect. The fact that the owner or occupier created a condition on the property that posed an unreasonable risk of harm may support an inference of knowledge, but the jury must still find that the owner or occupier knew or should have known of the condition . . . ." *Rendleman*, 909 S.W.2d at 60–61.

A trial court must "submit the questions, instructions and definitions . . . which are raised by the written pleadings and the evidence." TEX. R. CIV. P. 278. Here, because the pleadings and the evidence presented at trial raised the issue of a premises defect—but the only question submitted to the jury was a broad-form submission on negligence—we conclude Gonzales was required to request an instruction or obtain a jury finding on the *Corbin* elements. Furthermore,

although Gonzales's pleadings may be liberally construed to include general negligence claims along with premises defect claims, "[w]hen the alleged injury is the result of the condition of the premises, the injured party can recover only under a premises liability theory." *Wyckoff v. George C. Fuller Contracting Co.*, 357 S.W.3d 157, 163 (Tex. App.—Dallas 2011, no pet.) (citing *Warner*, 845 S.W.2d at 259). Consequently, "'adroit phrasing of the pleadings to encompass . . . any other theory of negligence' does not affect application of premises liability law." *Id.* (quoting *McDaniel v. Cont'l Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex. App.—Dallas 1994, writ denied)). Accordingly, Gonzales's claim is limited to premises defect. *See Warner*, 845 S.W.2d at 259 (determining plaintiff's claim could only be a premises defect theory, although her petition alleged specific acts of negligence, because "it is undisputed that she was injured by a condition of the premises . . . rather than a negligently conducted activity").

C. Can the missing *Corbin* elements be deemed?

Gonzales asserts that because Saeco is the party who submitted the general negligence question without the *Corbin* elements, Saeco cannot now on appeal challenge his right to recovery on the basis of the missing elements. Saeco counters that Gonzales had the burden to seek a finding on the *Corbin* elements and the missing *Corbin* elements related to actual or constructive knowledge may not be deemed.

The Texas Supreme Court has stated that it is a plaintiff's burden to obtain affirmative answers to jury questions pertaining to the necessary elements of his cause of action. *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990). "If an entire theory were omitted from the charge it would be waived; and [the defendant] would indeed have no duty to object." *Id.* (citing TEX. R. CIV. P. 279). Omitted elements are deemed found only when they comprise part of a complete and independent ground of recovery and other elements referable to that ground are

submitted and answered. *Id.* In such a case, if no objection is made, the omitted elements are deemed found, but they must be supported by some evidence. *Id.*

Here, although "premises liability is a special form of negligence," the two theories and the elements of each remain separate and distinct. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 775, 778 (Tex. 2010); *see also Olivo*, 952 S.W.2d at 529. Accordingly, we conclude the elements of a premises defect claim cannot be deemed from the submission of the general negligence question presented to the jury in this case. As already mentioned, no question was asked concerning whether Saeco was in control and no question was asked concerning Saeco's actual or constructive knowledge of the dangerous condition. *See Rendleman*, 909 S.W.2d at 60–61. Additionally, Saeco was under no duty to object because it was Gonzales's burden to ensure the proper instructions or affirmative answers were obtained on his cause of action.

D. Alternative Theories of Recovery

Still, Gonzales may be entitled to recover from Saeco based on the general negligence question if Saeco judicially admitted its liability or if Saeco invited the trial court to err in submitting the question on general negligence.

1. Judicial Admission

Pretrial, Gonzales took the position that Saeco had judicially admitted its liability in a Motion for Finding of Law filed by Saeco wherein Saeco sought a determination that Ram was responsible for Saeco's negligence because Ram had a non-delegable duty under its contract with the City. At trial, Gonzales contended Saeco also judicially admitted liability based on Chapman's (owner of Saeco) testimony that Saeco had 100% of the responsibility. Gonzales claims Saeco's trial counsel further admitted liability in his closing argument when he referred to

Chapman's testimony, indicating Chapman inferred "yeah, we're responsible." Based on this evidence, Gonzales declined to submit a proposed jury question on any theory of liability.

A judicial admission is a formal waiver of proof, dispensing with the production of evidence on an issue and barring the admitting party from disputing it. *Sherman v. Merit Office Portfolio, Ltd.*, 106 S.W.3d 135, 140 (Tex. App.—Dallas 2003, pet. denied). The required elements for a judicial admission are: (1) a statement made during a judicial proceeding; (2) that is contrary to an essential fact or defense asserted by the person making the statement; (3) that is deliberate, clear, and unequivocal; (4) that, if given conclusive effect, is consistent with public policy; and (5) that is not detrimental to the opposing party's theory of recovery. *Id.* However, in order for testimony to be a judicial admission, the witness's intention must be as "an act of waiver, and not merely a statement of assertion or concession, made for some independent purpose." *Id.* Furthermore, "'[m]ere testimony, though it come from a party, is not by intention an act of waiver. A witness is not selling something or giving something away, but simply reporting something. The testimony of parties to a suit must be regarded as evidence, not as facts admitted.'" *Id.* (quoting *U.S. Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 228 (Tex. Civ. App.—San Antonio 1951, writ ref'd)).

Here, prior to trial, Gonzales filed special exceptions to Saeco's fourth amended original answer in which he asked the trial court to recognize Saeco's admission of liability in Saeco's Motion for Finding of Law. At the pre-trial hearing, the trial judge denied this special exception. Similarly, although Saeco's owner stated Saeco was 100% responsible for the excavation project, we conclude this testimony did not rise to the level of a judicial admission. Instead, this testimony was more directed at the establishment of control and duty. It does not appear to be clearly intended "as an act of waiver." *Id.* Additionally, it does not address the actual or

constructive knowledge of Saeco concerning the dangerous condition. As such, we conclude Saeco did not judicially admit its liability.

2. Invited Error

Gonzales also contends Saeco invited the trial court to err by requesting the general negligence question that was ultimately submitted to the jury. Gonzales argues Saeco waived its jury charge error complaints when the trial court submitted the question and definition of negligence that Saeco itself proposed.

Generally, the invited error doctrine applies when a party requests a court to make a specific ruling and then complains about the ruling on appeal. *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 646 (Tex. 2009); *see also Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) ("Parties may not invite error by requesting an issue and then objecting to its submission.")

In support of his contention, Gonzales cites the case of *Del Lago Partners, Inc. v. Smith*, in which the plaintiff believed claims of both negligent activity and premises defect applied to his case. 307 S.W.3d at 775. In that case, the defendant objected to the submission of a negligent activity theory. *Id.* The trial court agreed and submitted only a question on premises defect. *Id.* On appeal, the defendant complained the question of negligent activity should indeed have been submitted to the jury. *Id.* The Texas Supreme Court ruled the defendant "cannot now obtain a reversal on grounds that the jury should have decided the facts under a theory of liability that [the defendant] itself persuaded the trial court not to submit to the jury." *Id.*

Gonzales maintains that *Del Lago* is similar to his case because Saeco, like the defendant in that case, did not have the burden of proof. Also, Saeco, like the defendant in *Del Lago*, alleged for the first time after the verdict that the trial court had submitted the wrong theory of

liability. Further, Gonzales contends his case goes beyond *Del Lago* because Saeco did more than just persuade the trial court not to submit a particular theory of liability—Saeco actually submitted the very question and definition about which it now complains.

We disagree with Gonzales. The facts here are distinguishable from *Del Lago* because the plaintiff in that case actually sought submission on both theories of liability to the jury. Here, Gonzales did not tender a liability question to the trial court at all and failed to object to the negligence question as submitted by Saeco. Accordingly, we conclude Saeco's broad-form submission on negligence did not rise to the level of invited error because Gonzales—the party with the burden—did not submit any liability question nor object to the general negligence question when Saeco proposed it.[3]

In conclusion, no basis exists on which Gonzales may recover under the general negligence theory presented to the jury. As a result, reversal of the trial court's judgment is warranted in this case—there is no evidence to support the jury's findings on liability because no instructions or questions were asked concerning Saeco's right to control or Saeco's actual or constructive knowledge of the dangerous condition it created.

[3] We note the recent decision in *Nowak Constr. Co., Inc. v. Avalos*, in which the El Paso Court of Appeals decided the defendant, Nowak, waived its argument that a premise defect theory should have been submitted to the jury because it had requested the case be submitted under a general negligence theory. No. 08-10-00261-CV, 2012 WL 473500, at *4 (Tex. App.—El Paso Feb. 12, 2012, no pet. h.). Nowak, the party without the burden, submitted a proposed charge under general negligence. *Id.* at *3. The plaintiff, Avalos, did not object to this submission. *Id.* at *4. After the jury verdict was returned in Avalos's favor, Nowak sought a JNOV complaining that Avalos should have submitted his claim to the jury as a premises defect claim and not a general negligence claim. *Id.* at *4. The trial court denied the JNOV. *Id.* Although the facts in *Nowak* are somewhat similar as here, we find this case distinguishable in three important aspects. First, Nowak had specially excepted to Avalos's petition that alleged a premises defect claim. *Id.* at *3 n.5. Thus, Nowak had already objected to submission of the claim on a premise defect theory when it requested its proposed charge on general negligence and before it complained about the submitted charge in its JNOV and on appeal. Here, Saeco never complained about submission of the case on a premise defect theory before its JNOV. Second, it is not clear whether or what theory of liability Avalos submitted in his proposed charge. Here, Gonzales failed to tender any theory of liability to the trial court in his proposed charge. Third, a question on control was submitted to the jury which asked "whether Nowak exercised or retained control over the manner in which trench safety was performed." *Id.* Here, no question was asked regarding Saeco's control of the worksite.

E. Render vs. Remand

Accordingly, we must next determine whether a rendition or remand is appropriate. Saeco argues Gonzales waived his right to recover when he failed to request or obtain findings on the *Corbin* elements in the jury charge. Likewise, Saeco contends that Gonzales cannot recover because he failed to request or submit any question on liability. As such, Saeco argues this court must render judgment in its favor.

We begin by noting that because "the distinction between premises liability claims and negligent activity cases, and the requirement that the *Corbin* elements be submitted in premises liability cases," are well-established, rendition, and not remand, is normally the appropriate disposition. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000); *see also Olivo*, 952 S.W.2d at 529; *Keetch*, 845 S.W.2d at 266. Nevertheless, remand is appropriate when the interests of justice require it. TEX. R. APP. P. 43.3. Additionally, "[a]s long as there is a probability that a case has, for any reason, not been fully developed, an appellate court has discretion to remand for a new trial rather than render a decision." *Ahmed v. Ahmed*, 261 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Similarly, "remand is appropriate if a case needs further development because it was tried on an incorrect legal theory or to establish and present evidence regarding an alternate legal theory." *Id.* (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992); *Morrow v. Shotwell*, 477 S.W.2d 538, 541 (Tex. 1972); *Davis v. Gale*, 160 Tex. 309, 330 S.W.2d 610, 613 (1960); *Tex. Dep't of Pub. Safety v. Valdez*, 956 S.W.2d 767, 770 (Tex. App.—San Antonio 1997, no pet.); *Schwartz v. Pinnacle Commc'ns*, 944 S.W.2d 427, 433 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

In this case, the testimony and evidence presented at trial centered on the contractual duties between Saeco and Ram, and whether Ram had a non-delegable duty. Saeco took the

position at trial that it was not liable to Gonzales and argued it was Ram who was liable because Ram had a non-delegable duty. Saeco attempted to shift the blame to Ram for liability and proportionate responsibility. Saeco submitted its proposed charge with the general negligence question in order to submit to the jury the negligence of Ram. As a result and as already noted, Saeco proposed a question on general negligence.

One week after the jury's verdict, Saeco argued the wrong theory of liability was submitted to the jury and, as a result, Saeco was entitled to a judgment notwithstanding the verdict. At the hearing on Saeco's motion for JNOV, the court initially stated, "You know, that's real interesting . . . because it was [Saeco's] proposed charge that I used in order to prepare the Charge of the Court. Are you saying that was abandoned because now you want to claim premises defect?" Later in the hearing, the court stated, "I used your client's charge. I used the Saeco charge . . . ." The trial court then stated, "Well, [I am] kind of surprised that . . . you're now claiming that it's a premises defect claim, because this is the first time I have heard that. First time." At the conclusion of the hearing, the trial court denied the motion. Although we have concluded Saeco's conduct did not rise to invited error, it is clear the trial court relied on Saeco's proposed question in preparing the court's charge. Therefore, we conclude that remanding, rather than rendering judgment, is in the interests of justice because this case was ultimately tried on an incorrect legal theory. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) ("It is essential that the theories submitted be authorized and supported by the law governing the case."). We also believe the interests of justice allow the parties to present evidence upon the legal theory on which Gonzales can recover—premises defect.

CONCLUSION

We reverse the decision of the trial court and remand the case for further proceedings consistent with this opinion.[4]

Sandee Bryan Marion, Justice

[4] We do not address appellant's remaining issue on appeal because it is not dispositive. TEX. R. APP. P. 47.1.