No. 13-0961

IN THE SUPREME COURT OF TEXAS

OCCIDENTAL CHEMICAL CORPORATION,

Petitioner,

v.

JASON JENKINS,

Respondent.

From the First Court of Appeals at Houston

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This is a premises-liability case in which the court of appeals held that former owners of real property in Texas are forever liable for conditions of improvements they made to their properties -- even years or decades after they conveyed the properties to someone else.
Trial Court:	The Honorable Tracy Christopher, 295th Judicial District Court, Harris County, Texas.
Trial Court Disposition:	After a jury trial, the trial court rendered judgment that Plaintiff Jason Jenkins take nothing on his claims against Occidental Chemical Corporation ("Occidental") based on Texas's statutes of repose. (10.CR.2829-30 [App. tab B].
Parties in the Court of Appeals:	Appellant/Plaintiff: Jason Jenkins Appellee/Defendant: Occidental Chemical Corporation
Court of Appeals:	First Court of Appeals at Houston. Opinion by Justice Brown, joined by Justices Jennings and Sharp. Justice Keyes dissented from the denial of *en banc* reconsideration.
Appellate Disposition:	The court of appeals reversed the trial court's take-nothing judgment and directed the trial court to render judgment for Jenkins on the jury's verdict for $9,167,459.50 in damages (less the jury's findings on proportionate responsibility). *See Jenkins v. Occidental Chem. Corp.*, No. 01-09-01140-CV, 2011 WL 6046527 (Tex. App.—Houston [1st Dist.] Nov. 17, 2011) (withdrawn) [App. tab C]. After Occidental filed a motion for rehearing and motion for en banc reconsideration, the court of appeals withdrew its first opinion and issued a second opinion reaching the same conclusion. *See Jenkins v. Occidental Chem. Corp.*, No. 01-09-01140-CV, 2013 WL 556388 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013) (withdrawn) [App. tab D]. After Occidental filed a second motion for en

banc reconsideration, the court of appeals withdrew its second opinion and issued a third opinion reaching the same conclusion. *See Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14 (Tex. App.—Houston [1st Dist.] 2013, pet. filed) [App. tab E]. Occidental subsequently filed a third motion for en banc reconsideration. The en banc court requested a response to the motion, but ultimately denied the motion over Justice Keyes's dissent.

STATEMENT OF JURISDICTION

The Court should exercise its discretionary jurisdiction over this petition, which challenges the court of appeals's unprecedented imposition of never ending liability on Texas property owners. The Court has jurisdiction under TEX. GOV'T CODE § 22.001(a)(2), 22.001(a)(3), and 22.001(a)(6) because:

- the court of appeals's holding that a person injured by an allegedly defective condition of real property may evade the proof requirements of a premises-defect claim by recharacterizing his claim as one for negligent activity is directly contrary to this Court's decisions in *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992), and *In re Texas Department of Transportation*, 218 S.W.3d 74, 77-78 (Tex. 2007);

- the court of appeals's opinion openly disagrees with the recent decision of another Texas court of appeals on a key issue of premises-liability law, *compare Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 36-37 (Tex. App.—Houston [1st Dist.] 2013, pet. filed) *with Wyckoff v. George C. Fuller Contracting Co.*, 357 S.W.3d 157, 163 (Tex. App.—Dallas 2011, no pet.) (applying *Keetch* rule to claim based on allegedly defective improvement);

- the court of appeals's holding that former real-property owners are forever liable to third parties injured by conditions they created on their former properties -- purportedly based on this Court's decision in *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962) -- is contrary to the plain language of *Strakos* itself, which expressly bars liability for contractors after a "substantial period of time" has passed, *id.* at 791-92;

- the court of appeals's holding that a person claiming to have been injured by a defectively designed product need not demonstrate the elements of Texas' strict-liability statute is directly contrary to this Court's decision in *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999);

- the case's key question presented -- whether former owners of real property in Texas are forever liable for conditions of improvements

they made on their properties -- is of obvious critical importance to the jurisprudence of Texas; and

- the case involves the construction of Texas's statutes of repose.

ISSUES PRESENTED

1. Under Texas law, is Occidental—a former owner of a chemical plant in Bayport, Texas—liable for injuries allegedly caused by a defective condition of an improvement Occidental built on the property six years before it conveyed the property to Plaintiff Jenkins's employer and fourteen years before the accident at issue occurred?

    a. Did the court of appeals correctly reject application of this Court's premises-defect-versus-negligent-activity dichotomy -- adopted in *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992), and *In re Texas Department of Transportation*, 218 S.W.3d 74, 77-78 (Tex. 2007) -- because it felt that applying this Court's rule would unreasonably restrict Jenkins's recovery?

    b. Did the court of appeals err in holding that under this Court's decision in *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962), former owners of real property are forever liable in "negligence" for the conditions of improvements they built on their properties before conveying the properties to someone else?

    c. Did the court of appeals correctly reject application of this Court's decision in *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999) -- which held that all product-liability-design claimants suing after 1993 must demonstrate the elements prescribed in Texas's strict-liability statute -- in order to allow Jenkins to recover in "negligent design"?

2. Do Texas' ten-year statutes of repose for design and construction protect Occidental from being held liable for its role in improving its former chemical plant fourteen years before Jenkins's injury?

    a. Did the court of appeals erroneously reject application of Texas's statute of repose for construction because Occidental's employees did not physically hammer all the nails and turn all the screws -- even though Occidental paid for the improvement, hired a company to build and install the improvement, designed, approved, and set the specifications for the improvement, and provided or purchased the materials to construct the improvement?

b. Did the court of appeals correctly reject application of Texas's statute of repose for design because one of the engineers who worked on the team of engineers who designed the plant improvement was not yet licensed -- even though multiple others undisputedly were, and the jury found that the improvement was designed under the supervision of a licensed engineer?

STATEMENT OF FACTS

Jason Jenkins was injured in April 2006 while using a pH-balancing system at a chemical plant in Bayport, Texas. (5.RR.240-41, 246-48, 250, 253-54) At the time of Jenkins's injury, the plant was owned, operated, and controlled by Jenkins's employer, Equistar Chemicals, LP. (5.RR.89, 102; 8.RR.156; *see* 3.RR.123) Equistar was not legally related to Occidental Chemical Corporation, the company which the court of appeals held liable for the injury. (*See* 4.RR.16, 8.RR.153-54) Occidental was a former owner of the plant and had designed and constructed the pH-balancing system in 1992 -- fourteen years before Jenkins's injury. (4.RR.16; *see* 3.RR.75, 123) Occidental sold the plant, along with all of its improvements, to Equistar in 1998 -- eight years before Jenkins's injury. (4.RR.16; 5.RR.89, 96; 8.RR.9, 156; *see* 3.RR.75, 123) Jenkins was injured the first time he used the system (5.RR.241, 250, 253-54), and no other person has ever been injured using the system. (8.RR.35, 178-79; *see* 3.RR.75, 142)

Occidental Developed a pH-Balancing System to Make the Plant Safer.

Ironically, Occidental developed the pH-balancing system for the sole purpose of enhancing employee safety.[1] (8.RR.10-11, 36-37) In 1992, Occidental

[1] During trial, the pH-balancing system was referred to as the "Acid Addition System." (*E.g.*, 6.RR.150; 10.CR.2636) This is actually a misnomer because the system was developed to permit a technician to add acid or amine to raise or lower pH levels as necessary. (5.RR.173) The terms pH-balancing system and Acid Addition System will be used interchangeably herein.

production manager Kathryn Hanneman decided to re-examine the way in which the plant kept its triethylene-glycol product within customer pH specifications. (8.RR.10-11) Previously, technicians climbed railcar ladders with containers of acid to manually add acid to product-filled railcars. (8.RR.11) To make the process safer, Hanneman put together a design team to develop a new system. (*Id.*) The team included Hanneman and five additional engineers, including process engineer Neil Ackerman. (8.RR.11-12) Of those team members, Hanneman and two others were licensed engineers; Ackerman was not yet licensed. (8.RR.12; DX 43, 44, 45)

Hanneman was the leader of the design team and "owner of the [pH-balancing] asset." (8.RR.11, 84) She participated in and approved the design of the system, and also provided "engineering services and oversight." (8.RR.29-30, 148-49; DX 9) For example:

- Hanneman reviewed and approved by signature design drawings of the system (8.RR.29-30; DX 9);
- she made suggested revisions to the isometric portion of the system, including mandating that the system be welded and seamless to prevent leaks (8.RR.29-30; DX 9);
- she determined the system's height to ensure it would be accessible and appropriately sized for both male and female technicians (8.RR.32-33); and
- she served as the lead for the safety reviews of the project and the post-installation testing of the system before it was put into operation (8.RR.33-34).

Hanneman and other team members also conducted laboratory tests to determine which acids were the most effective. (8.RR.13) They conducted site visits to evaluate the area of the plant where the system should be added. (*Id*.) They surveyed the operating technicians to determine the best approaches to system-related issues. (*Id*.) They considered multiple design options for the pH-balancing system before selecting a final design. (8.RR.14-15) They performed a final safety evaluation before finalizing the system. (8.RR.33-34, 112) And the team required that a safety manager review and approve the final design. (8.RR.27)

Although Hanneman designated Ackerman to be the "originator" of the project (*i.e.*, to start the modification process), the evidence is undisputed that Ackerman did not have "any authority to finalize and approve the design" of the pH-balancing system. (8.RR.62, 149) Instead, he was charged with circulating design changes "for approval" by Hanneman and others, "coordinating" meetings between "the right people" at "the right time," and serving as the "facilitator" and "custodian for the paperwork." (5.RR.145; 8.RR.62-63, 84, 149)

In short, the design process was the joint work of a multi-disciplined team -- not a solo project by Ackerman. (5.RR.145; 8.RR.11-12) Nonetheless, Jenkins convinced the court of appeals that Ackerman supposedly designed the system by himself and that his role somehow *precluded* Hanneman's design, planning, and

inspection work. *See Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 22 (Tex. App.—Houston [1st Dist.] 2013, pet. filed). The conclusive evidence, however, showed otherwise.

In fact, the Hanneman team "d[id]n't do anything individually." (8.RR.64) Rather, the pH-balancing system was developed by a "team of people" -- including Hanneman and other licensed engineers -- that "collaborate[d] to come up with the best solution." (5.RR.145; 8.RR.11-12, 64, 71, 94; DX 43, 44, 45) Indeed, Ackerman himself admitted that no one person "unilaterally" created the design, and that the design process was "an effort between processing engineering, mechanical engineering and design to come up with a design."[2] (5.RR.145)

In addition to using its own licensed engineers to design, plan, and inspect the pH-balancing system (5.RR.145; 8.RR.10-15, 29-30, 32-34, 64, 71, 94, 148-49; DX 9, 43, 44, 45), Occidental also was integrally involved in the construction of the system (8.RR.31-32, 149). Specifically, the Hanneman team ordered the system parts and hired a contractor to put the parts together pursuant to

[2] These admissions are entirely consistent with the assertions of Jenkins's counsel during trial. Notably, before switching theories on appeal, trial counsel instructed witnesses that he was "not suggesting that" Ackerman designed the system "all by himself" (8.RR.71), and that whenever he asked a witness about the design process, he was asking about the conduct of the entire team -- *not* just the individual being questioned (*see, e.g.*, 8.RR.118 [instructing Hanneman that "[w]hen I am saying 'you,' I mean Oxy"]; 5.RR.167 [instructing Ackerman that when counsel was asking about Ackerman's role, he did not mean Ackerman individually but instead the entire "team in 1992"]; 5.RR.161 [Jenkins's counsel stating that the "primary cause blamed [for the accident] was the design that -- not you [Ackerman], but your team came up with for the acid addition pot project"]).

Occidental's required design specifications. (8.RR.31-32, 59, 71, 149) The team also procured the vessel, pots, and nozzle for the design. (8.RR.31) And the piping for the system was either purchased by the team or brought in from Occidental's own parts inventory. (*Id.*) Occidental's in-house construction and maintenance force then constructed the piping for the system. (8.RR.31-32) Occidental also employed contractors to perform the "physical labor" to install other parts of the system. (8.RR.58-59)

The system was "built as any other piece of plant structure, to be a permanent part of the plant." (8.RR.23) Occidental "installed an I-beam structure . . . anchor-bolted to the concrete pad with its permanent specification bolts." (8.RR.24) The system was then cemented into the floor "with concrete, making it a permanent installation." (*Id*.) Thus, as the jury found (and as Jenkins did not contest post-trial), the system was designed and constructed as an improvement -- *i.e*., an integral, permanent, cemented-in part of the chemical plant -- not personalty. (8.RR.15, 23-24; 10.CR.2642)

Occidental Sold the Plant to Jenkins's Employer in 1998, and Eight Years Later, Jenkins Was Injured at the Plant.

In 1998, Occidental sold the chemical plant to Equistar. (4.RR.16; 5.RR.96; 8.RR.9, 156; *see* 3.RR.75, 123) As part of the sale, Occidental handed over all plant records to Equistar, including any records relating to the pH-balancing system. (8.RR.143-44; *see* 3.RR.148) Occidental retained no control over the

records, how they were stored, or whether they were retained. (8.RR.143-44, 156) At the time of the sale, there had never been an accident involving the pH-balancing system. (8.RR.35, 178-79)

In April 2006 -- eight years after the sale -- Equistar's board-panel operator requested that Jenkins adjust the pH-level in the pH-balancing system. (5.RR.240-241; 7.RR.95-96) Recognizing that Jenkins was relatively new to the job, another Equistar employee, Lawrence Collins, asked Jenkins if "he had done the job before" and whether "he needed [Collins] to go out with him to do it." (7.RR.95-97) Jenkins responded -- untruthfully -- that he "had done it before" and therefore did not need any assistance. (7.RR.96-97; *see* 5.RR.241) If Jenkins had answered Collins truthfully, Collins would have "insisted" on helping Jenkins with the task and "would have been right by his side" as he added acid to the pH-balancing system. (7.RR.97)

Instead, Jenkins went to the system alone, consulted the operating instructions, added acid to the system, and then left. (5.RR.242-46) Later that day, Jenkins received another call from the board-panel operator requesting that he readjust the pH level again because it had not reached the right level. (5.RR.247) Jenkins returned to the system, removed the lid from the top, looked down into the equipment, and noticed residual acid in the funnel. (5.RR.248-50) At that point, Jenkins should have called for help or stopped; under no circumstances should he

have opened the valve to the pot while standing over the funnel, which he did. (7.RR.137, 140; 8.RR.180) When Jenkins opened the valve between the acid pot and the funnel, acid shot out of the system, severely and permanently injuring his eyes. (5.RR.253-54)

At the time of Jenkins's injury, Occidental had no control, possession, or ownership of the plant premises, its operation, or its employees. (8.RR.156) That authority belonged exclusively to Equistar. (*Id.*) There have been no other injuries related to the system at any time before or after Jenkins's accident in 2006. (8.RR.35, 178-179)

The Jury Finds for Jenkins on Liability and for Occidental on the Statutes of Repose, and the Trial Court Renders a Take-Nothing Judgment Based on the Statutes of Repose.

In November 2007, Jenkins sued multiple companies, including Occidental, for strict tort liability, negligence, and breach of warranty. (1.CR.1-10)[3] Jenkins later sued Equistar (1.CR.157-68), but after Equistar filed for bankruptcy, Jenkins successfully moved to sever Equistar from the suit. (2.CR.373-74, 382-83)

By the time the case was tried in June 2009, Occidental was the only remaining defendant. (*See* 2.CR.370, 382-83; 10.CR.2744-45) During trial, Jenkins pursued only a "negligent design" claim. (9.RR.36-44; 10.CR.2636; *see*

[3] Similar to his products-liability claim, Jenkins's negligence claim against Occidental was based on Occidental's alleged negligence in designing, manufacturing, and marketing the pH-balancing system and failing to warn Jenkins about its alleged defects. (1.CR.5-8)

10.RR.47) He further stipulated that he did not seek recovery on premises-liability grounds (10.RR.50-53), and that the pH-balancing system was not placed into the stream of commerce (7.RR.78-79).

After a two-week trial, the trial court submitted a single liability issue against Occidental and questions on proportionate liability, damages, and Occidental's defense under two statutes of repose. (10.CR.2634-44) In relevant part, the jury found that:

- Occidental's negligent design proximately caused the occurrence in question (Question No. 1);[4]
- the negligence of Jenkins and Equistar also proximately caused the occurrence in question (Question Nos. 2 and 3);
- the percentage of responsibility attributable to Occidental, Jenkins, and Equistar was 75%, 5%, and 20%, respectively (Question No. 5);
- Jenkins sustained $9,649,957.40 in past and future damages resulting from the occurrence in question (Question No. 6);
- the Acid Addition System was an improvement to real property (Question No. 7); and
- the Acid Addition System was designed under the supervision of one or more persons employed by Occidental who were registered or licensed engineers (Question No. 9).

[4] For purposes of determining whether Occidental was negligent, Question No. 1 required (1) the jury to measure Occidental's conduct against the care that would be exercised by a "company engaged in the manufacture of like or similar equipment," and (2) Jenkins to additionally prove that there was a "safer alternative design." (10.CR.2636)

(10.CR.2634-44)[5]

Both parties moved for judgment. (10.CR.2647-59, 2746-72) Based on Occidental's affirmative defense of the statutes of repose, the trial court rendered judgment that Jenkins take nothing from Occidental. (10.CR.2826, 2829-30)

The Court of Appeals Reverses and Orders That Judgment Be Rendered for Jenkins.

On appeal, a panel from the Houston First Court of Appeals (comprised of Justices H. Brown, Jennings, and Sharp) concluded that Texas's statutes of repose do not bar recovery from Occidental and that Occidental is liable in negligence for improvements it made when it owned the plant. (*See* App. tab C) Accordingly, the court below reversed the trial court's take-nothing judgment and remanded the case for entry of judgment for Jenkins based on the jury's findings on liability, proportionate responsibility, and damages. (*Id.* at 35)

In response to Occidental's motion for rehearing and motion for en banc reconsideration, the panel withdrew its original opinion and issued a second opinion reaching the same result. (*See* App. tab D) Occidental then filed a second motion for en banc reconsideration, and the panel again withdrew its opinion and issued a third opinion that also reached the same result. (*See* App. tab E)

[5] In Question No. 8, the jury failed to find that the system was designed by one or more persons employed by Occidental who were registered or licensed engineers. (10.CR.2642)

Occidental's third motion for en banc reconsideration was denied over Justice Keyes's dissent. All three opinions reached the same result -- *i.e.*, former owners of real property in Texas are perpetually liable for their alleged "negligence" in creating premises conditions, even years after the former owners have conveyed the property to third parties and no longer have any ownership, possession, or control of the property. (App. tab D at 19; App. tab E at 39)

SUMMARY OF THE ARGUMENT

Jenkins was injured while working at a chemical plant that Occidental sold to Jenkins's employer, Equistar, eight years before his accident. Nonetheless, the court of appeals reversed the trial court's judgment that Jenkins take nothing from Occidental and directed the trial court to render judgment for Jenkins based on Occidental's allegedly negligent design of a pH-balancing system it constructed as a plant improvement fourteen years before Jenkins's accident.

In reaching this unprecedented result, the court of appeals ignored the law in Texas and virtually every other jurisdiction holding that a former premises owner owes no duty and is not subject to liability for personal injuries caused by an allegedly dangerous condition after the sale of the property. By imposing a duty upon Occidental in circumstances where none has ever been recognized, the court of appeals adopted a never-ending liability theory that radically changes Texas law and puts Texas outside the mainstream of American jurisprudence. Under the

court of appeals's new regime, Texas premises-liability law would no longer couple a duty with the legal status and premises control that would allow the duty to actually be discharged. This is an unprecedented expansion of tort liability for owners of real property in Texas. And the court of appeals only compounded its error when it refused to apply two separate ten-year statutes of repose for construction and design, thereby upending decades of reliance on those statutes to prevent untimely claims.

For these reasons, as further discussed below, the Court should reverse the court of appeals's judgment and render judgment that Jenkins takes nothing.

ARGUMENT

I. The Court of Appeals Broke New Ground and Undermined the Predictability of Texas Premises-Liability Law by Holding that Former Owners of Real Property in Texas Are Forever Liable in "Negligence" for Conditions or Improvements They Created While They Owned Their Former Properties.

A. Because Jenkins was injured by a condition of the property, his claim is for premises liability -- not negligence.

This Court has long distinguished between causes of action based on negligent activities and those based on premises defect. *In re Tex. Dep't of Transp.*, 218 S.W.3d 74, 77 (Tex. 2007); *see State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998); *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992). A negligent-activity claim requires that the person be injured by or as a

"contemporaneous" result of the activity itself. *Keetch*, 845 S.W.2d at 264. In contrast, a premises-defect claim is based on the property itself being unsafe. *Id.*

Jenkins was injured by an alleged condition of the property itself -- the pH-balancing system, which was a real-property improvement. He was not injured as a result of some activity by Occidental contemporaneous with the occurrence. Indeed, the supposed negligent activity that Jenkins complains of -- *i.e.*, Occidental's design of the pH-balancing system -- occurred fourteen years before Jenkins's injury.

Under similar circumstances, Texas courts have uniformly held that when, as here, the injury is the result of the premises condition, the injured party can recover only under a premises-defect theory.[6] For example, in *In re Texas Department of Transportation*, the parents of a passenger who drowned when her car slid into a river near a bridge sued the Texas Department of Transportation for negligence in "fail[ing] to use ordinary care in designing, inspecting, [and] maintain[ing]" the bridge. 218 S.W.3d at 75-76, 78. Because these activities were not "actively ongoing at the time of the accident" and, at best, "causes of the

[6] *See H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 259 (Tex. 1992); *Williams v. Adventure Holdings, L.L.C.*, No. 05-12-01610-CV, 2014 WL 1607374, at *5 (Tex. App.—Dallas Apr. 22, 2014, pet. denied) (mem. op.); *Brinker v. Evans*, 370 S.W.3d 416, 421 (Tex. App.—Amarillo 2012, pet. denied); *Wyckoff v. George C. Fuller Constr. Co.*, 357 S.W.3d 157, 163-64 (Tex. App.—Dallas 2011, no pet.); *Billmeier v. Bridal Shows, Inc.*, No. 2-08-314-CV, 2009 WL 1176441, at *4 (Tex. App.—Fort Worth Apr. 30, 2009, no pet.) (mem. op.).

conditions at the scene of the accident," this Court concluded that the parents "properly pled only a cause of action for premises or special defect" as to the bridge. *Id.* at 78. They could not assert a "contemporaneous-activity negligence cause of action." *Id.*

Thus, an injured party cannot avoid application of premises-liability law by "adroit phrasing of the pleadings to encompass design defects . . . or any other theory of negligence." *Williams*, 2014 WL 1607374, at *5; *Billmeier*, 2009 WL 1176441, at *4; *McDaniel v. Continental Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex. App.—Dallas 1994, writ denied). Nor can a plaintiff circumvent the requirements of premises-liability law by alleging that the defendant negligently designed some structure. *See In re Tex. Dep't of Transp.*, 218 S.W.3d at 78. Yet, that is precisely what Jenkins did here.

In a misguided attempt to avoid application of premises-liability law, Jenkins instead alleged that Occidental negligently designed, manufactured, and marketed the pH-balancing system. (1.CR.164) Jenkins did not allege, and could not prove, that such activities were actively ongoing at the time of the accident. Because, at best, these allegedly negligent activities would be the causes of the condition at the scene of the accident -- not contemporaneous activities that proximately caused the accident -- Jenkins's claim is solely for premises defect. *See In re Tex. Dep't of Transp.*, 218 S.W.3d at 78.

Jenkins did not plead or obtain jury findings on the essential elements of a premises-defect claim. (*See* 1.CR.157-68; 10.CR.2634-44) In fact, he affirmatively stated to the trial court that he did not seek to recover on a premises-liability claim. (10.RR.50-53) Jenkins's tactical decision to avoid the requirements of Texas premises-liability law is fatal to his personal-injury claim. *See, e.g.*, *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997) (simple negligence question, unaccompanied by premises-defect elements, cannot support recovery under a premises-defect case); *Wal-Mart Stores, Inc. v. Bazan*, 966 S.W.2d 745, 747 (Tex. App.—San Antonio 1998, no pet.) (plaintiff waived his only viable claim against department store when he failed to obtain jury findings on elements of premises liability and instead requested a general negligence instruction).

1. Under Texas law, former property owners owe no duty and are not subject to liability for allegedly dangerous conditions on the property after conveyance.

The reason Jenkins tried to plead around a premises-liability claim is self-evident: Occidental, as a former property owner, owed no duty to Jenkins and cannot be held liable for any allegedly dangerous conditions on the property that it conveyed to Equistar eight years before Jenkins's injury. Specifically, under section 352 of the *Restatement* (*Second*) *of Torts*, a former property owner

generally owes no duty to third parties for injuries caused by allegedly dangerous conditions on property previously owned:

> [A] vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

RESTATEMENT (SECOND) OF TORTS § 352 (1965);[7] *see Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997) (the term "vendor" refers only to "a former owner of land"). Because "[t]he vendee is required to make his own inspection of the premises," the vendor is "not responsible to him for the[] defective condition [of the premises], existing at the time of transfer." RESTATEMENT (SECOND) OF TORTS § 352 cmt. a. Nor is the vendor "liable to any third person who may come upon the land, even though such entry is in the right of the vendee." *Id.*

Section 352 of the *Restatement* is consistent with Texas law. As the Texas courts of appeals, including this very court of appeals, have previously recognized, a former owner of real property is "generally not liable for injuries caused on real property after the conveyance." *First Fin. Dev. Corp. v. Hughston*, 797 S.W.2d 286, 291 (Tex. App.—Corpus Christi 1990, writ denied) (citing cases); *see Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 367-68 (Tex. App.—Houston [1st

[7] Section 353 of the Restatement provides a limited exception to the rule stated in section 352 when a vendor actively conceals or fails to disclose a dangerous condition of which it is aware. *Id.* § 353. This limited exception is not at issue in this case.

Dist.] 1994, writ denied); *Beall v. Lo-Vaca Gathering Co.*, 532 S.W.2d 362, 364-66 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). This is true even when the former property owner was involved in creating or designing the allegedly dangerous condition. *See Hughston*, 797 S.W.2d at 289-92; *Beall*, 532 S.W.2d at 363-66. The court of appeals's decision to the contrary, which holds Occidental liable for injuries that occurred on property Occidental conveyed years earlier, has not only made unsound law, it has created a conflict with its own precedent and the decisions of its sister courts that necessitates this Court's intervention.

2. The overwhelming majority of states similarly hold that a former property owner owes no duty and is not perpetually liable for creating an allegedly dangerous condition on its property.

The court of appeals's decision to hold a former owner forever liable for conditions of improvements it made to its property also squarely conflicts with the law in the overwhelming majority of states and other recognized legal authorities. Courts in forty-two states, including Texas, follow the basic principles set forth in sections 352 and 353 of the *Restatement* (*Second*) *of Torts* and recognize that a former landowner owes no duty to subsequent landowners or third parties for injuries caused by allegedly dangerous conditions on the land it previously owned. (*See* Chart of States Adopting RESTATEMENT (SECOND) OF TORTS §§ 352 or 353 or Similar Rule [App. tab I]) As Dean Prosser has observed: "[T]he purchaser is expected to make his own examination and draw his own conclusions as to the

condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defects existing at the time of transfer." W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 64, at 447 (5th ed. 1984).

Rejecting this mainstream law, the court of appeals instead held that the critical focus should be on Occidental's work designing and constructing the pH-balancing system -- not on Occidental's status as a former landowner. *See Jenkins*, 415 S.W.3d at 28-31, 36-39. When faced with this precise issue, other courts throughout the country uniformly have refused to adopt this approach. Instead, they have held that even when the former landowner designed or constructed the improvement or condition that later caused the plaintiff's injury, the former owner, who is no longer in control of the property at the time of injury, is not liable. (*See* App. Tab I) For example:

- In *Gresik v. PA Partners, L.P.*, 33 A.3d 594 (Pa. 2011), the Pennsylvania Supreme Court declined to hold a former owner of a steel mill liable for its alterations to the mill's furnaces that resulted in a deadly explosion ten years after the alterations and six years after the sale of the property. *Id.* at 595, 599-600. In so doing, the court rejected the plaintiffs' contention that the defendant's status as a prior owner was irrelevant and that the focus should be only on its negligent alteration of the furnaces. *Id.* at 596-97. Although the court recognized that liability may be imposed on independent contractors even after they relinquish control of real property, the court concluded that this rule does not apply to former property owners who improve their own property. *Id.* at 599-600. Thus, the court held that plaintiffs had no cause of action against the former plant owner, even though it may have created the dangerous condition. *Id.*

- In *Preston v. Goldman*, 720 P.2d 476 (Cal. 1986), the California Supreme Court specifically considered whether "former owners, allegedly negligent in constructing an improvement on their property, [should] be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control." *Id.* at 476. In answering that question in the negative, the court rejected the plaintiff's assertion that the defendants' liability should be evaluated based on "their roles as designers and builders" and not upon their "status as landowners." *Id.* at 481. Instead, the court concluded that the defendants' status as landowners takes precedence over their status as "creator" of the improvement and that no liability could attach because the defendants did not have possession or control of the property at the time of the injury. *Id.* at 481, 487.

- In *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249 (Mont. 1989), the Montana Supreme Court likewise held that former owners of an oil separator facility, who had rebuilt the facility and its components, were not liable for the death of the buyer's employee from an accidental gas release. *Id.* at 1256-57. Because the defendants did not own and were not in possession of the facility at the time of the injury, the court concluded that, even as builders of the facility, they could not be liable for negligence once they sold the facility and released all control of it. *Id.*[8]

Accord Conley v. Stollings, 679 S.E.2d 594, 597-600 (W. Va. 2009) (former property owners owed no duty to ATV driver who was killed after running into an unmarked steel cable installed by former owners because they sold the property "almost two months before the accident occurred"); *Century Display Mfg. Corp. v. D.R. Wager Constr. Co.*, 376 N.E.2d 993, 997-98 (Ill. 1978) (prior owner of

[8] The court also rejected the plaintiff's strict-liability claim because the facility was not a "product," the defendants were not in the business of selling separator facilities, and the alleged product did not reach the stream of commerce. *Id.* at 1252-56. The same is true here with respect to the pH-balancing system. (*See* Part I.B, below)

manufacturing plant was not liable for fire when new plant owner had inspected the property before purchase and had a "reasonable opportunity to discover the dangerous condition complained of [*i.e.*, tanks and pipes containing flammable material] and to take the necessary precautionary measures to protect against it"); *Carlson v. Hampl*, 169 N.W.2d 56, 57 (Minn. 1969) (former owner was not liable for negligent construction of stairway because he was no longer in control of the property at the time of the injury and "[t]he general rule is that a prior owner of real estate is not liable for injury to a purchaser or a third person caused by the condition of the premises existing at the time the purchaser took possession"). The well-reasoned decisions of all these courts demonstrate why imposing liability upon Occidental years after it sold the plant places the court of appeals's decision far outside the mainstream of American jurisprudence.

3. Public policy also supports the absence of any duty owed by a former property owner.

Holding Occidental liable for Jenkins's injuries also undermines sound public policy. A central tenet of all premises-liability law is that one who owns, occupies, or controls property should be responsible for its condition. *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 426 (Tex. 2011). Only an owner or possessor of property holds the right to enter and inspect the property and take reasonable measures to warn of, or remedy, any existing dangerous condition.

Likewise, only one who owns, occupies, or controls the property has the right to decide who may enter the property. *See Preston*, 720 P.2d at 487.

Conversely, one who no longer owns or controls property cannot be held responsible for dangerous conditions on the property because that person does not have the legal right to go on the property to effectively warn of danger or prevent injuries that might otherwise be caused by the dangerous condition. *See Allen Keller*, 343 S.W.3d at 426 (defendant owed no duty to make premises safe by warning of the dangerous condition because it did not own the property and "was not in a position to erect permanent signs or other devices to warn the public of the [condition]"); *accord Preston*, 720 P.2d at 487. Nor can any such person dictate who may enter onto the property. The law does not impose a legal duty upon one who has no legal way to discharge that duty.[9] Thus, public policy also supports the notion that Occidental should not be liable for Jenkins's injuries.

4. As a former property owner, Occidental owed no duty to Jenkins.

Applying the principles discussed above, Occidental owed no duty to Jenkins once it sold and relinquished all control over the property, and it cannot be

[9] In addition to the reasons discussed above, the absence of a duty is also grounded in the historic doctrine of caveat emptor. Under that doctrine, "in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer." RESTATEMENT (SECOND) OF TORTS § 352 cmt. a. As to sales of land, this rule has retained much of its original force. *Id*

held liable for any injuries that occur on the property years later. The court of appeals erred in concluding otherwise.

The evidence conclusively shows that Occidental sold the chemical plant to Equistar in 1998. (8.RR.156) At the time of that sale, there had never been any accidents involving the redesigned pH-balancing system that was put into operation in 1992. (8.RR.178-79) Occidental handed over all plant records to Equistar. (8.RR.143-44)[10] Thereafter, Occidental had no control over the plant, including the improvements, plant operations, and plant employees or visitors. (8.RR.156) Rather, that authority belonged to Equistar, the new plant owner. (*Id.*)

Without ownership, possession, or control of the plant, Occidental could not assess the continued safety of, modify, or cure any alleged deficiencies associated with the pH-balancing system. It could not train, supervise, or control the persons who worked with the pH-balancing system. And it could not provide safeguards for or warnings to any persons using the system or on the property. Occidental simply had no means to prevent Jenkins's injury, which occurred eight years after Occidental sold the plant to Equistar.

In nonetheless holding Occidental, a former property owner, liable for injuries sustained years after Occidental conveyed its plant and relinquished all

[10] Jenkins has never claimed -- let alone presented evidence -- that Occidental withheld or concealed any information about the system from Equistar.

control over it, the court of appeals abandoned clearly binding legal principles. It also ignored the *Restatement*, well-settled Texas law and Texas public policy, and case authority from nearly every other jurisdiction. The court of appeals's decision makes Texas an outlier. Based on the conclusive evidence, Occidental owed no duty to Jenkins as a matter of law.

5. Occidental does not owe a duty under the court of appeals's dual-capacity theory of liability to Jenkins or anyone else who enters the property after Occidental sold the plant.

The court of appeals recognized that the duty to warn or make property safe has never been extended to defendants who did not own, occupy, or control the premises at the time of the plaintiff's injury. *Jenkins*, 415 S.W.3d at 37. Nevertheless, the court ignored this settled principle (as well as the law and public policy discussed above) and the fact that Occidental is a single entity. Instead, the court created the fiction that Occidental is two separate entities -- one that formerly owned the premises and one that designed the improvement at issue. *See Jenkins*, 415 S.W.3d at 29. Based on this fiction, the court held that, although Occidental owed no duty as a former premises owner, it could be liable to Jenkins in negligence for "its engineering and design of the [pH-balancing system]." *Id.* at 38. Neither the law nor logic supports this artificial distinction.

Indeed, courts in Texas and other jurisdictions have rejected the notion that there is a distinction between a person's status as a property owner and his status as

a designer or creator of an improvement on his own property. Courts have thus declined to impose a duty on former property owners merely because they designed, engineered, or constructed an improvement on their property that allegedly causes an injury after the property has been sold.

For example, the plaintiff in *Hughston*, like Jenkins, alleged that the former property owner was negligent in connection with the design and construction of a stairway on which the plaintiff was injured three years after the property was transferred to a new owner. *Hughston*, 797 S.W.2d at 289. The Corpus Christi Court of Appeals disagreed and held that the former owner was not liable for injuries caused by dangerous conditions on the property after conveyance. *Id.* at 292. In so holding, the court noted that a plaintiff could not avoid the "obvious justice of this rule" through "[a]droit phrasing of the pleadings to encompass design defects . . . or any other theory of negligence." *Id.* at 291.

Similarly, in *Beall*, the plaintiff was injured when he ran into a cable while riding a motorbike. *Beall*, 532 S.W.2d at 363-64. He sued the former tenant of the property who had installed the cable on its property months before relinquishing possession of the property and the plaintiff's injury. *Id.* In affirming summary judgment for the former tenant, the Corpus Christi Court of Appeals held that the former tenant's liability for "constructing the horizontal cable" ceased as a matter of law at the time the tenant vacated the premises and that any cause of action the

plaintiff may have lies against the current owner of the land -- not a former owner or tenant. *Id.* at 366.[11]

The Pennsylvania Supreme Court reached the same result in *Gresik*. There, a former steel plant owner adapted and modified the plant, which resulted in steam explosions that injured the plaintiffs six years after the plant was sold. *Gresik*, 33 A.3d at 595. The court held that the former owner was not liable under a theory of negligent construction because, among other reasons, all of the alterations occurred while the owner was in possession of the property and the owner "act[ed] on his own behalf" -- not as a contractor or servant of "a *separate* possessor of the land." *Id.* at 599-600 (emphasis added).

Finally, in *Preston*, the former property owners had "designed and built a pond" in their backyard years before the property was conveyed and a toddler became immersed in the pond and suffered permanent brain damage. 720 P.2d at 476-77. The California Supreme Court rejected the idea that there is a distinction between a person's "status as [a] landowner[]" and his status as a "creator[]," "designer[]" or "builder[]" of a negligent condition. *Preston*, 720 P.2d at 481. Because the predecessor landowner's role as "creator" is merely "secondary" to his role as an owner, the court applied the general rule that former landowners could

[11] The same is true here. Jenkins sued the current owner of the plant -- *i.e.*, Equistar. (1.CR.157-68) But when the trial court severed Equistar from the suit after Equistar filed for bankruptcy (2.CR.373-74, 382-83), Jenkins focused on Occidental, the former owner.

not be liable for injuries sustained when they no longer exercised any control over the property. *Id.* at 481, 487.

Simply put, the court of appeals's effort to treat Occidental as if it were an independent contractor or third-party design professional who designed the pH-balancing system makes no sense. *See Jenkins*, 415 S.W.3d at 29-30 & n.16. Everything Occidental did to improve the property was done as the owner of the plant. Indeed, there is no evidence that Occidental designs or constructs pH-balancing systems for other plant owners. Occidental only had an interest in designing the system because it was the owner of the plant at the time and wanted to improve plant safety for its employees.

The fallacy of the court of appeals's logic in artificially segregating Occidental's role as a property owner and its role as a designer of the system (and thereby imposing a duty on Occidental) is further illustrated by the court's misplaced reliance on section 385 of the *Restatement*. *See id.* at 30. Significantly, sections 380-87 of the *Restatement* address the "Liability of Persons *Other Than a Possessor, Vendor, or Lessor*" of property:

> One *who on behalf of the possessor of land* erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

RESTATEMENT (SECOND) OF TORTS § 385 (emphasis added); *see also id.* §§ 380-87 (emphasis added).

Under its express terms, the application of section 385 is limited to a defendant who makes an alteration or improvement "on behalf of" a possessor of the land. *Id.* § 385. Section 385 thus "contemplates two distinct entities -- a possessor, and a person acting on the possessor's behalf -- and only pertains to the potential liability of the latter." *Gresik*, 33 A.3d at 599. Conversely, it does not apply when, as here, "the possessor acts on [its] own behalf." *Id.* Because Occidental never acted as "a contractor or servant of a separate possessor of the land," section 385 does not apply, and the court of appeals's dual-capacity theory of liability should be rejected. *Id.* at 599-600 & nn.6-7.

a. The existence of a duty is never presumed and is a policy-laden question.

The reasons for not imposing a duty on former property owners (like Occidental) under the circumstances here are also supported by this Court's opinion in *Allen Keller Co. v. Foreman*, 343 S.W.3d 420 (Tex. 2011). In analyzing whether an independent contractor owed a duty to the injured plaintiff, the Court recognized that duty is never presumed and is a question of law for a court. *Id.* at 425. The determination of whether a duty exists involves "broad, policy-laden questions" and is based on the balancing of a variety of factors, including the risk, foreseeability, the likelihood of injury, and the consequences of placing the burden

on the defendant. *Id.* at 424-25 & n.4. As in *Allen Keller*, these factors weigh in favor of concluding that Occidental owed no duty to Jenkins here.

To be sure, this Court has never specifically considered whether a former owner, who was allegedly negligent in designing or constructing an improvement on its property, should be subject to liability for injuries sustained on that property long after it had relinquished all ownership and control. But as previously discussed, other courts in Texas and other jurisdictions have uniformly answered that question in the negative. (*See* Parts I.A(1)-(2), above; App. tab J) And there are sound reasons why those courts have done so.[12]

To hold otherwise would discourage all property owners in Texas from improving their properties out of fear that any improvement could subject them to perpetual liability if anyone is ever injured on the property after it has been conveyed. For example:

- a small store owner may be reluctant to design and install a shelving system in his store because of the possibility that, without maintenance, the shelving system could collapse and injure someone twenty years after the store owner has retired and sold his store;
- a homeowner may forego designing and constructing an outdoor deck to avoid any potential liability if a subsequent homeowner ever slips and falls on the deck; and

[12] As previously discussed, a former owner retains no control over the conveyed premises and has no ability to (1) alter any dangerous condition, (2) enter the premises to inspect or maintain any allegedly dangerous condition, or (3) mandate proper training or safety protocols for future owners, their employees, and visitors. (*See* Parts I.A(3)-(4))

- a manufacturer may decide it is not worth the risk to improve a dangerous condition at its plant if designing or erecting such an improvement will subject the plant owner to unending liability even after selling the plant to a third person.[13]

If the court of appeals's opinion becomes the law in Texas, innovation and new technological solutions (including those that increase safety) will be stifled, the alienability of property may be inhibited, and waste (not economic growth) will be encouraged. Moreover, current property owners may be disincentivized from taking any steps to correct dangerous conditions on their property. These far-reaching consequences arising from the court of appeals's opinion will impact all Texas property owners and dictate that no duty be imposed on Occidental in this case. This Court should therefore grant Occidental's petition and clarify that a former property owner owes no duty for personal injuries that occur after selling its property.

b. *Strakos* does not apply.

The court of appeals further compounded its errors by relying, at Jenkins's insistence, on *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962), to support the imposition of liability on Occidental. *See Jenkins*, 415 S.W.3d at 30-31, 35 & n.22. In *Strakos*, this Court merely rejected the accepted-work doctrine under

[13] Alternatively, these property owners may refuse to sell their property or destroy any useful improvements before selling in an effort to avoid liability for the conduct of a future owner over whom they have no control.

which an independent contractor who created a dangerous condition on real property was relieved of any duty of care to the public after the property owner accepted the contractor's work. *Strakos*, 360 S.W.2d at 790-92. The Court did not hold that a contractor who creates any dangerous condition owes a duty of care to the general public in all the circumstances. *See id.* at 790 ("Our rejection of the 'accepted work' doctrine is not an imposition of absolute liability on contractors."). Nor has this Court or any other Texas court ever applied *Strakos* to impose liability on former property owners who design or construct improvements on their own property.

In *Allen Keller*, this Court recently confirmed the narrow holding in *Strakos*, and rejected the San Antonio Court of Appeals's attempt to use *Strakos* to impose a duty of care on a contractor any time the contractor creates a dangerous condition. *Allen Keller*, 343 S.W.3d at 424. Rather, the Court reiterated that general principles must be applied to determine whether any duty in negligence exists. *See id*. at 424-25; *see also Strakos*, 360 S.W.2d at 791; Part I.A(5)(a). Applying these principles, the Court concluded that a contractor, who had created an unreasonably dangerous condition, owed no duty to either the public or the property owner when the premises were not under the contractor's possession or control at the time of plaintiff's injury and the condition was known by the property owner. *Allen Keller*, 343 S.W.3d at 425.

For all the reasons discussed above, the Court should reject any effort to impose a duty on Occidental here, reverse the court of appeals's judgment, and render judgment that Jenkins take nothing.

B. Even assuming Jenkins was not required to assert his claim as a premises-liability action, his products-liability claim for negligent design fails as a matter of law.

Although the reasons discussed above are dispositive of this appeal, Jenkins's supposed "negligent-design" claim fails for the independent reason that there is no evidence to support the jury's products-liability finding against Occidental. The liability theory pleaded by Jenkins and submitted to the jury was for negligence in the products-liability context. (1.CR.163-65; 10.CR.2636) The trial court did not submit an ordinary (or professional) negligence claim, as the court of appeals erroneously suggested. *See Jenkins*, 415 S.W.3d at 32-33.

The court of appeals's error is evident when the jury charge is examined under the spotlight of Texas products-liability law. The Texas Civil Practice and Remedies Code defines a "products liability action" as any action against a manufacturer (or seller) for recovery of damages arising out of personal injury, allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, breach of warranty, or any other theory or combination of theories. TEX. CIV. PRAC. & REM. CODE § 82.001(2). Unlike strict liability which focuses solely on the product and whether it is

defective, negligence, in the products-liability context, requires a plaintiff to show both that (1) the product is defective and (2) the manufacturer failed to exercise ordinary care in the design, production, or sale of the product. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995); *Gonzales v. Caterpillar Tractor, Inc.*, 571 S.W.2d 867, 871 (Tex. 1978). Thus, when a negligence claim is based on a defective design, the plaintiff must establish both that there was a "design defect" (and a "safer alternative design") as a predicate to liability and negligence on the part of the manufacturer. *See* TEX. CIV. PRAC. & REM. CODE § 82.005(a); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 & n.14 (Tex. 1999); *Caterpillar*, 911 S.W.2d at 384-85.

Here, Jenkins's live petition alleged claims against Occidental for strict products liability, breach of warranty, and negligence. (1.CR.161-66) The negligence claim in Jenkins's pleadings alleged that Occidental negligently designed, manufactured, and marketed the pH-balancing system and failed to warn Jenkins about the defective nature of that system. (1.CR.164-65) In accordance with these pleadings and based on Jenkins's theory of "manufacturing liability" (9.RR.36), the question submitted to the jury tracked the products-liability law discussed above. Specifically, the instructions in Question No. 1 required Jenkins to prove:

- Occidental "fail[ed] to do that which a company engaged in the *manufacture* of like or similar equipment would have done" or "would not have done under the same or similar circumstances" (10.CR.2636, emphasis added);
- there was a "safer alternative design" (*id.*); and
- Occidental failed to use "ordinary care," which was defined as "that degree of care that would be used by a company engaged in the *manufacture* of like or similar equipment" (*id.*, emphasis added).[14]

These elements are the hallmarks of a products-liability action -- not an ordinary (or professional) negligence claim. *See Caterpillar*, 911 S.W.2d at 384-85; *Gonzales*, 571 S.W.2d at 869-71; *see also* 3 COMM. ON PATTERN JURY CHARGES, STATE BAR. OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS PJC 71.4B, 71.7 (2012). The court of appeals was thus wrong when it baldly proclaimed that "Jenkins's claim is not a strict products liability claim against a product manufacturer." *Jenkins*, 415 S.W.3d at 31.

Because the question submitted to the jury was based on a products-liability theory against a manufacturer, the sufficiency of the evidence must be measured against the question as submitted, *see Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) -- not the ordinary negligence standard espoused by the court of appeals, *see Jenkins*, 415 S.W.3d at 32-33. When that analysis is conducted, Occidental cannot

[14] Notably, the negligence standard in the charge did not ask the jury to measure Occidental's conduct against an engineer or other design professional of ordinary prudence under the same or similar circumstances. (*See id.*)

be liable for "negligent design" because there is no evidence that Occidental is a "manufacturer" of the allegedly defective product at issue -- *i.e.*, the pH-balancing system.

Under Texas law, a "manufacturer" is statutorily defined as "a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, processor, or assembler of any *product* or any component part thereof and *who places the product thereof in the stream of commerce*." TEX. CIV. PRAC. & REM. CODE § 82.001(4) (emphasis added); *see* RESTATEMENT (THIRD) OF TORTS § 1 cmt. c (2005) (a party who is not "engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff" is not subject to liability under any defective-design theory of recovery). For at least two reasons, Jenkins did not (and cannot) prove that Occidental is a manufacturer.

First, the pH-balancing system is not even a product. *See* TEX. CIV. PRAC. & REM. CODE § 82.001(4) (manufacturer must design or construct a "product"). Rather, it is an improvement to real property. Indeed, the jury specifically found that the system was an "improvement" to real property -- *i.e.*, "an addition that is attached to the property with the intent . . . that it be permanently attached." (10.CR.2642) Jenkins has never challenged this finding. As a result, it is now binding. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *Marin*

Real Estate Partners, L.P. v. Vogt, 373 S.W.3d 57, 81 (Tex. App.—San Antonio 2011, no pet.).

Second, there is also no evidence that Occidental placed the pH-balancing system (or any component thereof) into the stream of commerce, as required by Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 82.001(4); RESTATEMENT (THIRD) OF TORTS § 1 cmt. c. Occidental built the system for its own use at its plant. (8.RR.10-13, 23-24, 31, 59) It does not sell or distribute such systems to others. In fact, Jenkins stipulated that Occidental never placed the system into the stream of commerce. (7.RR.78-79) This stipulation is also fatal to any contention that Occidental is a manufacturer and can be held liable for negligently designing the system.

Simply stated, the jury was instructed to measure Occidental's conduct against the conduct of a company engaged in the manufacture of like or similar equipment. (10.CR.2636) But there is no evidence that Occidental is a "manufacturer" of an allegedly defective product. Nor is there any evidence that Occidental manufactured a pH-balancing system. Rather, it designed and constructed an improvement to its real property, as the jury found. (10.RR.2642) Thus, Occidental cannot be liable for "negligent design" by failing to do that which a company manufacturing like or similar equipment would have done.

For these reasons, the court of appeals should have affirmed the trial court's take-nothing judgment -- not recast Jenkins's claim as an "ordinary negligence" (or professional negligence) action against an architect, engineer, or other design professional. *See Jenkins*, 415 S.W.3d at 31-33. Because the court of appeals's effort to recast the claim is belied by Jenkins's own pleadings and the question the trial court actually submitted to the jury, this Court should reverse and render judgment that Jenkins take nothing from Occidental.

II. The Court of Appeals's Rejection of Texas's Statutes of Repose Turned Texas Law on Its Head and Repudiated the Legislature's Clear Intent.

For the reasons discussed above, Jenkins does not have a viable claim against Occidental. But even assuming that he did, the trial court correctly rendered a take-nothing judgment for Occidental because the statutes of repose for design and construction bar Jenkins's claim as a matter of law.

Sections 16.008 and 16.009 of the Texas Civil Practice and Remedies Code are ten-year statutes of repose. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.008, § 16.009. Section 16.008 requires a person to bring a suit against a registered or licensed engineer, "who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement . . . in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment." *Id.* § 16.008(a).

Section 16.009 likewise requires that a suit "against a person who constructs or repairs an improvement to real property" be brought not later than ten years after the substantial completion of the improvement. *Id.* § 16.009(a). This statute "provides a complete defense to a personal injury action based on [either] strict liability or negligence." *Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied); *see also Fuentes v. Cont'l Conveyor & Equip. Co.*, 63 S.W.3d 518, 520-22 (Tex. App.—Eastland 2001, pet. denied) (section 16.009 barred claim for negligence in design). The statutes of repose were enacted to "protect individuals and corporations who have no control over [a] real estate improvement and have no authority to go onto the premises to inspect the improvement for unsafe conditions." *See Hernandez v. Koch Mach. Co.*, 16 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

In rejecting the application of the statute of repose, the court of appeals held that Occidental was somehow liable under Texas common law because Occidental supposedly acted too much like an independent contractor (and not enough like an owner) in building the improvement. *Jenkins*, 415 S.W.3d at 28-31. The court then changed course and held that Occidental was not protected by the statutes of repose because Occidental acted too much like an owner (and not enough like an independent contractor) in building the improvement. *Id.* at 27. This analysis is jarringly inconsistent and wholly unsupported by Texas law.

A. Jenkins's personal-injury claim is barred by the statute of repose in TEX. CIV. PRAC. & REM. CODE § 16.009 because the evidence conclusively establishes that Occidental constructed the improvement to its real property more than ten years before Jenkins's injury.

Occidental constructed the pH-balancing system in 1992 at the time it owned the plant. (4.RR.16; 8.RR.58) The system was an improvement to real property. (10.CR.2642)[15] Jenkins filed his personal-injury claim in 2007. (1.CR.2) Jenkins's claim is thus barred by the construction statute of repose.

Under Texas law, a person "constructs" an improvement to real property for purposes of the statute of repose if he "annex[es] the personalty to the realty, thereby transforming the personalty into an 'improvement.'" *Fuentes*, 63 S.W.3d at 521; *see Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995). The court of appeals itself adopted this definition of a person who "constructs" an improvement in *Hernandez*. *Hernandez*, 16 S.W.3d at 52-53. The category of persons protected by the statute is extensive; it extinguishes the liability of any person who "furnish[es] construction or repairs to improvements." *Dallas Mkt. Ctr. Dev. Co. v. Beran & Shelmire*, 824 S.W.2d 218, 220 (Tex. App.—Dallas 1991,

[15] At trial, Jenkins took the position that the permanent, concrete-embedded pH-balancing system was not an improvement to real property, but instead was mere chattel. (8.RR.42-43) The jury disagreed, finding in Question No. 7 that the system was an improvement to real property (10.CR.2642), and the evidence amply supports that finding (*see, e.g.*, 8.RR.23-24). Because Jenkins has never challenged this finding on appeal, the jury's finding is now binding on him. *See McGalliard*, 722 S.W.2d at 696; *Marin Real Estate Partners*, 373 S.W.3d at 81.

writ denied); *see* TEX. CIV. PRAC. & REM. CODE § 16.009. The category of defendants who are not protected by the statute of repose are those who are "not connected with the construction" or installation of the improvement to real property, such as manufacturers who merely "supply a component or an entire product." *Sonnier*, 909 S.W.2d at 480; *see Fuentes*, 63 S.W.3d at 521; *Hernandez*, 16 S.W.3d at 53.

1. Occidental constructed part of the system itself.

In this case, the undisputed evidence establishes that Occidental's in-house construction and maintenance crew constructed and installed the piping for the pH-balancing system. (8.RR.31-32) This evidence is alone sufficient to support the application of section 16.009 to bar Jenkins's personal injury claim. *See* TEX. CIV. PRAC. & REM. CODE § 16.009(a). The court of appeals was thus wrong when it concluded that Occidental did not establish that it was a "direct actor" in the construction of the system. *Jenkins*, 415 S.W.3d at 25. Moreover, even if Occidental had merely hired a third-party contractor to construct the entire system at its plant, Occidental would still be entitled to the protections afforded by section 16.009 for the reasons discussed below.

2. Section 16.009 protects companies that hire third-party contractors to construct improvements on their properties.

Until the court of appeals's decision below, Texas courts had uniformly held that a company that hires a third-party contractor to construct an improvement on

its real property is protected by section 16.009 -- even though the company did not physically construct the improvement itself. In *Reames*, for example, Hawthorne-Seving designed a conveyor belt for a ceramic-tile plant in Sunnyvale. *Reames*, 949 S.W.2d at 760. Although the parties were unsure precisely who installed the conveyor belt, they agreed that Hawthorne-Seving did not physically install the improvement. *Id.* Rather, the evidence showed that Hawthorne-Seving "arranged for the construction and installation of the conveyor belt" by a third-party contractor. *Id.* The plaintiff, an employee injured while using the conveyor belt, sued Hawthorne-Seving and argued that the company was not protected by the statute of repose because it "did not actually or physically install" the improvement. *Id.* at 763.

The Dallas Court of Appeals disagreed, holding that the statute of repose protected Hawthorne-Seving even though "it did not 'hammer the nails and turn the screws.'" *Id.* Specifically, because Hawthorne-Seving "designed the conveyor belt system and arranged for its construction and installation," and because it "pa[id] the party who did the physical installation," the court concluded that Hawthorne-Seving "had a relationship with the annexation of the conveyor belt system to the realty" as necessary to invoke the statute of repose. *Id.*

The Eastland Court of Appeals reached the same result in *Fuentes*. In that case, the plaintiff sued a conveyor-belt manufacturer after he fell onto a conveyor

belt at his workplace. *Fuentes*, 63 S.W.3d at 519. Because the records did not reveal who "provided the labor to install the conveyor belt," the plaintiff asserted that the conveyor-belt manufacturer, Continental, could not rely on the statute of repose. *Id.* at 519-20. But once again, the court of appeals disagreed, holding that Continental was entitled to the protections of the statute of repose because Continental contracted to have the system installed (as well as supervised and assisted the installers) -- even though Continental was not the company that physically hammered the nails or turned the screws. *Id.* at 521-22.

Similarly, in *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), the plaintiff was injured after diving into the shallow end of a swimming pool on property developed by Fox & Jacobs. *Id.* at 920. The plaintiff argued that the construction statute of repose did not protect Fox & Jacobs because it was merely the developer of the property and did not physically install the pool. *Id.* at 921. In rejecting this contention, the court noted that Fox & Jacobs developed guidelines for the pool, designated the location of the pool, created a conceptual layout of the pool, and approved the approximate dimensions of the pool. *Id.* at 922. The company also hired the contractor who performed "the actual construction." *Id.* Thus, Fox & Jacobs was entitled to the protection of the statute of repose. *Id.*

3. Section 16.009 shields Occidental from liability for its "construction" of the pH-balancing system.

The facts of the present case dictate the same result as *Reames*, *Fuentes*, and *McCullough*. Here, in addition to using its own in-house construction and maintenance force to construct and install the piping for the system (8.RR.31-32), Occidental's in-house design team also designed the pH-balancing system, developed the specifications for the system, and procured all of the parts to construct its design (8.RR.11-13, 26-27, 31-32, 71, 148-49). Moreover, Occidental "employed" contractors who performed the "physical labor . . . to install and construct" parts of the system pursuant to Occidental's specifications. (8.RR.58-59) Although no one can remember exactly who physically installed the system, Hanneman testified that it was a construction company with which Occidental had an "alliance[]" for such purposes. (*Id.*) Occidental paid for the installation of the pH-balancing system and booked the expense as a fixed capital cost. (8.RR.26; *see* DX 10) In short, and as Jenkins conceded in his Statement of Facts in the court below, the pH-balancing system "was designed and installed in 1992 under the auspices of . . . Occidental." (*See* Br. of Appellant at 1)

Because Occidental designed the system, constructed part of it, procured the parts of the system, hired the contractors to build the system to Occidental's specifications, and paid for its installation, Occidental "construct[ed]" the pH-balancing system to the extent necessary to invoke the protections of section

16.009 under Texas law. *See* TEX. CIV. PRAC. & REM. CODE §16.009; *Fuentes*, 63 S.W.3d at 519-22 (plaintiff's "negligence in design" claim barred by the statute of repose in section 16.009); *Hernandez*, 16 S.W.3d at 52-53; *Reames*, 949 S.W.2d at 760-63 (plaintiff's claimed "negligence" in design of the conveyor belt barred by section 16.009); *McCulloch*, 696 S.W.2d at 920-23 (plaintiff's "defective design" claim barred by the statute of repose).

Further, and contrary to Jenkins's contention in the court below, there is no merit to the suggestion that Occidental somehow "waived" its ability to rely on section 16.009 by not requesting a jury finding that Occidental "constructed" the improvement. (*See* Br. of Appellant at 31) Simply put, there was no disputed fact issue to submit to the jury because Occidental's role in the construction was uncontroverted and conclusively established. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814-15 (Tex. 2005) ("[U]ncontroverted issues need not be submitted to the jury at all."); *Wright v. Vernon Compress Co.*, 296 S.W.2d 517, 523 (Tex. 1956) ("[T]he trial court is required to submit only controverted issues. No jury finding is necessary to establish undisputed facts."). Indeed, as previously noted, Jenkins conceded in the court below that the system was installed "under the auspices" of Occidental. (*See* Br. of Appellant at 1)

For these reasons, section 16.009 bars Jenkins's claim as a matter of law. Accordingly, the Court should reverse the court of appeals's judgment and render judgment that Jenkins take nothing.

B. Jenkins's personal-injury claim against Occidental is also barred by the statute of repose in TEX. CIV. PRAC. & REM. CODE § 16.008 because a licensed engineer designed, planned, or inspected the construction of an improvement to real property.

In addition to rejecting application of section 16.009, the court of appeals also erroneously concluded that Occidental is not protected by the statute of repose in TEX. CIV. PRAC. & REM. CODE § 16.008 for licensed engineers who design, plan, or inspect the construction of an improvement. *See Jenkins*, 415 S.W.3d at 20-23.

The evidence is conclusive that multiple licensed engineers employed by Occidental -- including Hanneman, Chris Tagoe, and Brent Jones -- worked together to design (and finally approve) the pH-balancing system. (8.RR.11-12, 148-49; DX 43, 44, 45) As the leader of the design team and a licensed engineer, Hanneman's role in the design was critical. For example:

- Hanneman made the decision to improve the pH-balancing process by designing a mechanical system to replace the method by which technicians added acid to the plant's products (8.RR.10-12);
- she formed "a design team" and picked its other members (Chris Tagoe, Mike Cross, Neil Ackerman, Haresh Merchant, and Brent Jones) to design a system to add the pH adjustment through a safer method (*id.*);
- she participated in and approved the design (8.RR.148);

- she provided "engineering services and oversight" on the project (8.RR.149);
- she was the "owner of the asset" (8.RR.84);
- she made changes to the design during the process and suggested revisions to the isometric portion of the system, including mandating that the system be welded and seamless to prevent leaks (8.RR.29-30; DX 9);
- she determined the system's height to ensure it would be accessible and appropriately sized for both male and female technicians (8.RR.32-33);
- she signed and approved the design drawing of the system (8.RR.29-30; DX 9); and
- she led the safety reviews of the project and the post-installation testing of the system before it was put into operation (8.RR.33-34).

Although one of the engineers on the design team, Ackerman, was not then licensed, the design process was a joint process of the complete design team -- not a solo project by Ackerman. (5.RR.145; 8.RR.11-12) As Hanneman testified, "[w]e don't do anything individually"; rather, "[w]e collaborate to come up with the best solution." (8.RR.64; *see also* 8.RR.94 ["It was a team of people that did this."]). Not surprisingly, the jury found that the improvement was designed under the supervision of a licensed engineer (10.CR.2642), and the evidence amply supports that unchallenged finding.

1. The jury's unchallenged finding that the improvement was designed under the supervision of licensed engineers is alone sufficient to support the trial court's judgment that Jenkins take nothing.

Notwithstanding the evidence described above, the court of appeals reversed the trial court's application of section 16.008 in Occidental's favor. In doing so, the court concluded that the jury's unchallenged finding that the system was designed under the supervision of one or more licensed engineers employed by Occidental was somehow "not material" because a licensed engineer's active supervisory involvement in a design project is insufficient to invoke the statute's protection. *Jenkins*, 415 S.W.3d at 20. There is no other Texas case so holding, and at least two statute-of-repose cases reach exactly the opposite conclusion (including a previous opinion from the same court of appeals). *See Tex. Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28, 30 (Tex. App.—Texarkana 1991, writ denied) (affirming summary judgment for defendant where improvement was "performed under the supervision of a Texas-registered professional engineer"); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644, 649 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (affirming summary judgment where "engineering services were performed by or under the responsible charge of engineers authorized to practice professional engineering").

The court of appeals compounded its error and departed from its own precedent when it suggested that if even one not-yet-licensed engineer assists on a

project for a company, then the statute of repose is unavailable as a matter of law to protect the employer of the licensed engineers who approved the design at issue. *Jenkins*, 415 S.W.3d at 20-21. Consequently, under the court of appeals's opinion, if a plaintiff can find just one unlicensed engineer who worked on a project, the statute of repose is unavailable to an employer who employs teams of engineers -- including licensed ones who have final supervisory and approval authority -- to develop, supervise, and approve plant-design improvements. *Id.* The court of appeals's new rule eviscerates the protections of the statute of repose and contravenes existing Texas law, as well as the language, purpose, and policy of section 16.008.

2. The evidence also conclusively establishes that a licensed engineer employed by Occidental planned or inspected the construction of the improvement.

Even if the jury's finding that licensed engineers at Occidental supervised the design of the pH-balancing system was immaterial, the trial court's take-nothing judgment is still correct because the evidence conclusively establishes that Hanneman -- a licensed engineer -- "planned" and "inspected" the improvement.

The statute of repose for licensed architects and engineers is not focused solely on "design"; it also protects those who "plan[]" or "inspect[]" improvements to real property or equipment. TEX. CIV. PRAC. & REM. CODE § 16.008(a).

Because the uncontroverted evidence conclusively shows that Hanneman planned and inspected the pH-balancing system, the statute of repose protects Occidental and bars Jenkins's claim for this reason as well. *See City of Keller*, 168 S.W.3d at 814-15 (no jury finding is necessary on "uncontroverted issues").

In particular, as the production manager of the unit, Hanneman made the decision to change the way acid was being added to the product. (8.RR.10-11) She thus decided to form "a design team" to develop a new, safer system, (8.RR.11), and she selected the members of the team (8.RR.11-12). Hanneman was in charge of the project (8.RR.32), provided oversight on the project (8.RR.149), and ultimately was "the owner" of the project (8.RR.84). She also reviewed proposed designs of the project and made changes to the designs. (*E.g.*, 8.RR.2930; DX 9) And she led the safety reviews of the project and the post-installation testing of the system before it was put into operation. (8.RR.33-34)

In short, Hanneman was ultimately in charge of the project, and the project could not have been "implemented without [her] participation and approval." (8.RR.148; *see* 8.RR.10-12, 84) Because Hanneman undisputedly "planned" and "inspected" the improvement, section 16.008 protects Occidental from liability as a matter of law.

3. Alternatively, the evidence also conclusively establishes that licensed engineers employed by Occidental designed the improvement.

Finally, the statute of repose also bars Jenkins's claim because the evidence conclusively establishes that one or more licensed engineers employed by Occidental designed the pH-balancing system. To be sure, the jury, urged by Jenkins's counsel, failed to find that the pH-balancing system was designed by a licensed engineer. (10.CR.2642) That answer aligned with Jenkins's theory -- as repeatedly urged in the court below -- that Ackerman (who was not a licensed engineer) acted alone in designing the system.

But the evidence is conclusive that the system was designed by a collaborative team that included three licensed engineers, and that Hanneman actively participated in the design process and was ultimately in charge of the project. (8.RR.10-12, 29-30, 32-33, 148-49; DX 43, 44, 45) Indeed, the evidence that Hanneman participated in the design of the pH-balancing system is undisputed. (*See, e.g.*, 8.RR.10-12, 29-30, 32-33, 148-49) Thus, the jury's answer to Question No. 8 is properly disregarded. *See City of Keller*, 168 S.W.3d at 815-16 (jury finding should be disregarded when evidence is conclusive to the contrary); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) ("When a party attacks the legal sufficiency of an adverse finding on an issue on which [it]

has the burden of proof, [it] must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.").

In holding otherwise, the court of appeals highlights Ackerman's role in the project to support its conclusion that "the jury could reasonably have concluded that the acid addition system was designed by Ackerman . . . rather than by Hanneman." *Jenkins*, 415 S.W.3d at 22. But this conclusion is based on the false premise that the system could only be (and was) designed by a single individual. Nothing supports this conclusion.

To be sure, Ackerman played a role in the design (8.RR.71) and started the modification process at Hanneman's request (8.RR.62). As one of Hanneman's subordinates on the team (8.RR.12), Hanneman designated Ackerman to be the "originator" of the project (4.RR.48; 8.RR.62), to serve as the "custodian for the paperwork" (8.RR.62-63), to circulate design changes for "approval" by Hanneman and others (5.RR.145), and to "facilitate[] getting the right people in the room at the right time" (8.RR.84).

But the evidence in no way supports the court of appeals's supposition that Ackerman acted alone in designing the pH-balancing system. In fact, Ackerman had no authority to finalize or approve the design of the system. (8.RR.149) Rather, that authority belonged to Hanneman: she was in charge of and "owned" the project, she directed Ackerman's work, she actively participated in and

approved the design, and the design could not have been completed "without [her] participation and approval." (8.RR. 10-12, 29-30, 84, 148-49) Significantly, no fact witness controverted Hanneman's central role in the design process.

Because the evidence establishes, as a matter of law, that one or more licensed engineers at Occidental designed the pH-balancing system, the plain language of the statute of repose protects Occidental from liability. *See* TEX. CIV. PRAC. & REM. CODE § 16.008. For this reason as well, the Court should reverse the court of appeals's judgment and render a take-nothing judgment in Occidental's favor.

PRAYER

For all the foregoing reasons, Occidental respectfully prays that the Court grant its petition for review, reverse the court of appeals's erroneous judgment, and render judgment that Jenkins take nothing on his claims against Occidental.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that Petitioner's Brief on the Merits contains 12,161 words (excluding the sections excepted under TEX. R. APP. P. 9.4(h)(i)(1)) and was typed in 14-point font with footnotes in 12-point font.

/s/ Rick Thompson
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing brief was served via electronic service in accordance with TEX. R. APP. P. 9.5 upon the following counsel of record for Respondent on this 5th day of September, 2014:

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Tab A

#71 ORIGINAL

CAUSE NO. 2007-73468

Jason Jenkins	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**HARRIS COUNTY, T E X A S**
	§	
Occidental Chemical	§	**295TH JUDICIAL DISTRICT**

FILED
Loren Jackson
District Clerk
JUL - 1 2009
Time: Harris County, Texas
By Deputy

CHARGE OF THE COURT

Members of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

Remember my previous instructions: Do not discuss the case with anyone else. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your mobile phone or any other electronic devices during your deliberations.

Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted by you during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely upon your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by this charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, you may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight of credible evidence admitted in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

Question No. 1

Did the negligence, if any, in Occidental Chemical's design and operating instructions for the Acid Addition System proximately cause the occurrence in question?

"Negligence" means failure to use ordinary care, that is, failing to do that which a company engaged in the manufacture of like or similar equipment would have done under the same or similar circumstances, or doing that which a company engaged in the manufacture of like or similar equipment would not have done under the same or similar circumstances.

To answer "yes" to this question, there must also have been a safer alternative design.

"Safer alternative design" means a design other than the one actually used that in reasonable probability—
(1) would have prevented or significantly reduced the risk of the occurrence in question without substantially impairing the Acid Addition System's utility and
(2) was economically and technologically feasible in 1992 by the application of existing or reasonably achievable scientific knowledge.

"Ordinary care" means that degree of care that would be used by a company engaged in the manufacture of like or similar equipment under the same or similar circumstances.

"Proximate cause" has two parts:
1. A proximate cause is a substantial factor that brings about an event and without which the event would not have occurred; and
2. A proximate cause is foreseeable. "Foreseeable" means 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.

There may be more than one proximate cause of an event.

Answer "Yes" or "No":

Answer: 12

Question No. 2

Did the negligence, if any, of Jason Jenkins proximately cause the occurrence in question?

"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.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate cause" has two parts:
1. A proximate cause is a substantial factor that brings about an event and without which the event would not have occurred; and
2. A proximate cause is foreseeable. "Foreseeable" means 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.

There may be more than one proximate cause of an event.

Answer "yes" or "no:"

Answer: 12

Question No. 3

Did the negligence, if any, of Equistar proximately cause the occurrence in question?

"Negligence" means failure to use ordinary care, that is, failing to do that which a company of ordinary prudence would have done under the same or similar circumstances, or doing that which a company of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a company of ordinary prudence under the same or similar circumstances.

"Proximate cause" has two parts:
1. A proximate cause is a substantial factor that brings about an event and without which the event would not have occurred; and
2. A proximate cause is foreseeable. "Foreseeable" means 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.

There may be more than one proximate cause of an event.

Answer "yes" or "no:"

Answer: 12

Question No. 4

Was there a defect in the marketing of the safety goggles at the time it left the possession of Sperian Protection, Inc. that was a producing cause of the injury in question?

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

"Producing cause" means a cause that was a substantial factor in bringing about the injury, and without which the injury would not have occurred. There may be more than one producing cause.

Answer "Yes" or "No"

Answer: No

If you have answered "yes" as to more than one person or entity in answer to Question No. 1, 2, 3, or 4 then answer the following question as to those persons or entities. Otherwise, do not answer the following question.

Question No. 5

Assign percentages of responsibility only to those you found caused or contributed to cause the occurrence or injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to a person or product is not necessarily measured by the number of acts, omissions, or product defects found.

For each person or entity you found caused or contributed to cause the occurrence or injury, find the percentage of responsibility attributable to each:

a.	Occidental Chemical	75 %
b.	Jason Jenkins	5 %
c.	Equistar	20 %
d.	Sperian Protection	Ø %
	Total	100 %

If you have answered "yes" to Question No. 1 and if in answer to Question No. 5 you have answered 50 percent or less as to Jason Jenkins, then answer the following question. Otherwise, do not answer the following question.

Question No. 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Jason Jenkins for his damages, if any, resulting from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

If you have found that Jason Jenkins was negligent, do not reduce the amounts in your answers, if any, because of his negligence. After you have made your answers, the judge will apply the law to determine the amount, if any, to which he is entitled.

Answer in dollars and cents for damages, if any, that were sustained in the past; and in reasonable probability will be sustained in the future for-

Element	Past	Future
a. Physical pain and mental anguish	$1 MIL	$1 MIL
b. Physical impairment	$1 MIL	$1 MIL
c. Loss of earning capacity	$163,187	$1.7 MIL
d. Medical care	$286770.40	$3.5 MIL

Question No. 7

Was the Acid Addition System an improvement to real property?

An improvement is an addition that is attached to the property with the intent by Occidental Chemical that it be permanently attached.

Answer "yes" or "no"

Answer: 12

Question No. 8

Was the Acid Addition System designed by one or more persons employed by Occidental who were registered or licensed engineers?

Answer "yes" or "no"

Answer: 12

Question No. 9

Was the Acid Addition System designed under the supervision of one or more persons employed by Occidental who were registered or licensed engineers?

Answer "yes" or "no"

Answer: 12

Presiding Juror

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
    a. Have the complete charge read aloud if it will be helpful to your deliberations.
    b. Preside over your deliberations. This means the presiding juror will manage the discussions, and see that you follow the instructions.
    c. Give written questions or comments to the bailiff who will give them to the judge.
    d. Write down the answers you agree on.
    e. Get the signatures for the verdict certificate.
    f. Notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate

1. You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you cannot have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.
2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.
   If 11 jurors agree on every answer, those 11 jurors sign the verdict.
   If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.
3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 who agree on **every** answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.

Tracy Christopher
Judge Presiding

Verdict Certificate

Check one:

____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 of us.

Signature of Presiding Juror

MICHAEL D. EDWARDS
Printed name of Presiding Juror

____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.		
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Tab B

P-2
PC
10BP
9BP

#82,183

Cause No. 2007-73468

JASON JENKINS, Plaintiff, v. SPERIAN EYE & FACE PROTECTION, INC., SPERIAN PROTECTION, INC., MINE SAFETY APPLIANCES COMPANY, LYONDELL CHEMICAL COMPANY, LYONDELL REFINING COMPANY, LLC, OCCIDENTAL CHEMICAL CORPORATION, OXYCHEM CORPORATION, and EQUISTAR CHEMICALS L.P., Defendants.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

FILED
Loren Jackson
District Clerk

SEP 24 2009
Time: 9-24-09
Harris County, Texas
By _____
Deputy

FINAL JUDGMENT

On June 18, 2009, this cause came on to be heard. Plaintiff Jason Jenkins appeared in person and by his attorneys of record and announced ready for trial. Defendant Occidental Chemical Company appeared in person and by its attorneys of record and announced ready for trial. A jury of twelve qualified jurors was duly empaneled, and the case proceeded to trial.

During trial and after the Plaintiff rested, the Court granted the Defendant's motion for directed verdict on Plaintiff's breach of warranty claims and strict liability claims but denied the remainder of the Defendant's motion. At the conclusion of the evidence, the Court submitted the case to the jury on written questions. The charge of the Court and the jury's verdict are incorporated for all purposes by reference. Because it appears to the Court that the verdict of the jury was for the Defendant Occidental Chemical Company and against Plaintiff Jason Jenkins on

the affirmative defense of the statute of repose, judgment should be rendered on the verdict for Defendant Occidental Chemical Company and against Plaintiff Jason Jenkins.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff Jason Jenkins take nothing from Defendant Occidental Chemical Company and that all costs of court are taxed against Plaintiff Jason Jenkins, for which let execution issue.

All other relief not expressly granted in this judgment is denied. This Final Judgment disposes of all parties and claims and is appealable.

SIGNED on this 6th day of Oct, 2009.

Honorable Tracy E. Christopher
Judge Presiding

Approved as to form:

Deborah G. Hankinson
Counsel for Defendant Occidental
Chemical Company

Russell Post
Counsel for Plaintiff Jason Jenkins

Approved only as to form,
not as to substance

Tab C

Opinion issued November 17, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01140-CV

JASON JENKINS, Appellant

V.

OCCIDENTAL CHEMICAL CORPORATION, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Case No. 2007-73468

O P I N I O N

Jason Jenkins was injured at the Equistar chemical plant, and the jury found that Occidental Chemical Corporation negligently designed the plant's acid addition system, awarding Jenkins damages. In two issues, Jenkins contends that the trial court erred in entering judgment in favor of Occidental on the grounds that

his claims were barred by two statutes of repose.[1] In its first issue, Occidental responds to Jenkins's two issues. In its second issue, Occidental raises three alternative grounds on which the trial court's judgment could be affirmed. We sustain Jenkins's issues and overrule Occidental's issues. We reverse the trial court's judgment and remand for entry of judgment on the jury's liability and damages findings in Jenkins's favor.

Background

Occidental owned a chemical plant in Bayport. In 1992, Occidental installed an acid addition system at the plant to regulate the acidity of a chemical compound it produced. Occidental employee Neil Ackerman developed the conceptual design for the system, shepherded the design process from start to finish, and was responsible for "getting it done." He worked in collaboration with a team of Occidental employees and under the supervision of team leader Kathryn Hanneman. Ackerman had an engineering degree but was not a licensed engineer. Hanneman and other members of the design team were licensed engineers. Occidental hired a third party engineering firm to create the detailed design drawings for the acid addition system. It also ordered some of the components of

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, 16.009 (West 2002).

the acid addition system and hired an independent contractor to install the acid addition system.

Six years later, Occidental sold the plant, with the acid addition system in place. Eight years after Occidental sold the plant, the acid addition system sprayed acetic acid at Jenkins, an operator at the plant, partially blinding him. Jenkins sued Occidental for negligently designing the acid addition system.[2] Occidental pled, as affirmative defenses, that Jenkins's claims were barred by two statutes of repose—one governing claims against registered or licensed professionals who design improvements to real property and the other governing claims against those who construct such improvements. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, 16.009 (West 2002).

After a two-week trial, the jury found in favor of Jenkins on his negligent design claim and attributed seventy-five percent of the liability to Occidental.[3] Occidental submitted questions to the jury related to its statute of repose defenses, in response to which the jury made the following findings about the acid addition system: (1) it was an improvement; (2) it was not designed by a licensed or

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2 Jenkins brought claims against other defendants as well, but Occidental was the only remaining defendant at the time of trial. Jenkins also asserted breach of warranty and strict liability claims against Occidental, but the trial court granted a directed verdict on those claims.

3 The jury assigned five percent of the liability to Jenkins and twenty percent to Equistar, the owner of the plant at the time of the injury, whom Occidental designated as a responsible third party.

registered engineer; and (3) it was designed under the supervision of a licensed or registered engineer. The trial court rendered a take-nothing verdict on the basis of Occidental's statute of repose defense.

Standard of Review

In this review, we must interpret the statutes of repose set forth in sections 16.008 and 16.009 of the Civil Practice and Remedies Code. The meaning of a statute is a question of law, which we review de novo. *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500 (Tex. 2010); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). In construing sections 16.008 and 16.009, our primary goal is to ascertain and give effect to the Legislature's intent as expressed by the words of the statute. *MCI Sales*, 329 S.W.3d at 500; *Entergy Gulf States*, 282 S.W.3d at 437. We give the words of the statute their plain and common meaning unless the statute defines the words otherwise, a different meaning is apparent from the context, or using the common meaning would lead to absurd results. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008). When the words of the statute are clear, they are determinative. *Entergy Gulf States*, 282 S.W.3d at 437.

Occidental relies on several jury findings to support its statute of repose defenses but challenges the jury's finding that the acid addition was not designed by an Occidental employee. Occidental asserts that it conclusively proved the

opposite. It further asserts that it conclusively proved alternative elements of its statute of repose defense on which it failed to request a jury finding: that the system was planned by an Occidental employee licensed in engineering and that it was inspected by an Occidental employee licensed in engineering. A statute of repose provides an affirmative defense, and Occidental bore the burden of proving all factual requisites to the application of the statutes of repose. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (holding that defendant bore burden of establishing right to summary judgment on basis of statute of repose defense); *Nexen Inc. v. Gulf Interstate Eng'g Co.*, 224 S.W.3d 412, 416 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (observing that statute of repose operates as affirmative defense on which defendant bears burden of proof); *see also* TEX. R. CIV. P. 94. Unless Occidental conclusively established each element of its defense, its failure to obtain a jury finding in its favor is fatal.[4] *See Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 805–806 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (holding that, unless an affirmative defense is established as matter of law, defendant bears burden of obtaining jury findings necessary to support defense); *Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 207 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating that, when affirmative defense was not submitted to

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[4] Occidental has not argued that it is entitled to any deemed jury findings.

jury, court reviews record to determine whether issue was disputed or whether defense was conclusively established by evidence).

Occidental's Statute of Repose Defenses

In two issues, Jenkins argues that the trial court erred in entering judgment in favor of Occidental on the basis of the statutes of repose because Occidental did not conclusively establish its entitlement to the defenses provided by these statutes of repose. The trial court's final judgment is based, in part, on the jury's findings that the acid addition system was an improvement and was designed under the supervision of an engineer. The trial court interpreted these findings as establishing Occidental's right to a take-nothing judgment on the basis of its statute of repose defenses. The trial court did not specify which statute of repose—section 16.008 or section 16.009—it relied on in reaching that conclusion. We address each in turn.

A. Introduction to sections 16.008 and 16.009 of the CPRC

Sections 16.008 and 16.009 of the Civil Practice and Remedies Code are ten-year statutes of repose. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, 16.009. Section 16.008 provides that a suit "against a registered or licensed architect, engineer, interior designer, or landscape architect . . . who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property" may not be brought more than ten years after substantial completion of the improvement or the beginning of operation of the equipment.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a). Section 16.009 provides that a suit "against a person who constructs or repairs an improvement to real property" may not be brought more than ten years after substantial completion of the improvement. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a).

Thus, sections 16.008 and 16.009 "differ in who they protect and the object of the work protected." *Sonnier v. Chisholm-Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex. 1995). Section 16.009 relates only to improvements to real property but protects a broader class of person: anyone who constructs or repairs such an improvement. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a); *see also Sonnier*, 909 S.W.2d at 479. Section 16.008 protects only registered or licensed design professionals, but applies to a broader category of work: improvements to real property and equipment attached to real property. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a); *see also Sonnier*, 909 S.W.2d at 479.

B. Section 16.008 does not bar Jenkins's claim against Occidental

In his first issue, Jenkins argues that the trial court erred in rendering judgment for Occidental under section 16.008 because (a) Occidental is not a registered engineering firm, (b) Occidental failed to prove conclusively that the acid addition system was designed by a registered or licensed engineer, and (c) Occidental's finding that the design was supervised by a registered or licensed engineer is immaterial. Occidental does not contend that it is a registered

engineering firm or that Ackerman was a registered or licensed engineer. Instead, it contends that the jury finding that the acid addition system was designed under the supervision of a licensed engineer is sufficient to establish application of the statute. Alternatively, it contends that the evidence conclusively established that the acid addition system was designed, inspected and planned by Henneman rather than Ackerman or any third party. We conclude that supervision of the design by a licensed engineer does not invoke the statute, by the statute's plain language and in light of distinctive language in its sister statute. We also conclude that Occidental did not conclusively prove that Henneman designed, inspected, and planned the acid addition system.

1. Supervision by a licensed engineer does not, alone, implicate the protections of section 16.008

By its clear and unambiguous language, section 16.008 limits its scope to claims "against a registered or licensed . . . engineer . . . who designs, plans, or inspects" the construction of an improvement to real property. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a). The jury found that the acid addition system was an improvement to real property. Section 16.008 thus applies if the acid addition system was designed, planned, or inspected by a registered or licensed engineer. The jury found that it was not. The jury's finding that the acid addition system was designed under the supervision of a registered or licensed engineer is not material

to the application of section 16.008, which makes no reference to one who supervises the design of an improvement.[5] *See id.*

Although our holding is dictated by the plain language of the statute, examining section 16.008 in the context of its sister statute buttresses our conclusion. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2005). Sections 16.008 and 16.009 were enacted for a similar purpose but have different parameters. *See Sonnier*, 909 S.W.2d at 479. The legislature chose to limit the class of persons protected by section 16.009 only with respect to the nature of their work: it applies to any person who "constructs or repairs an improvement to real property." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a). By comparison, the legislature chose to limit the class of persons protected by section 16.008 not only with respect to the nature of their work but also with respect to the nature of the persons: it expressly applies only to "registered or licensed" design professionals. *Id.* § 16.008(a). The legislature could have offered this protection to unlicensed persons performing the same work, but it chose not to do so.

Occidental relies on *Texas Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28 (Tex. App.—Texarkana 1991, writ denied) and *Sowders v. M.W.*

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[5] It is undisputed that Occidental is not a registered or licensed engineering firm. Therefore, it cannot argue that the entity itself was a "registered or licensed . . . engineer . . . who design[ed]" the acid addition system. *SEE* TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a).

Kellogg Co., 663 S.W.2d 644, 646 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), to support its contention that section 16.008 applies when an improvement is designed under the supervision of, but not by, a registered or licensed engineer. While both opinions contain factual discussions regarding supervisory work by a licensed engineer, the holdings in these cases do not support Occidental's position.

The issue in *Texas Gas* was not whether the claims against the defendant, Fluor, fell within the scope of sections 16.008 and 16.009; rather, the issue was whether the statutes applied retroactively and whether Fluor was estopped from relying on them. 828 S.W.2d at 30. Occidental relies on a statement in the opinion that the "design and construction [of an expansion to a gas processing plant] were both performed under the supervision of a Texas-registered professional engineer." But nothing in the opinion indicates that the expansion was not designed by a licensed engineer—a question that was not at issue. *See Id.* at 30–31.

Sowders also did not address the issue presented here. In *Sowders*, the plaintiffs contended that the statute of repose for architects and engineers did not apply to their claims against M.W. Kellogg, because it was a manufacturer, not a designer, of the propane unit in question. *Sowders*, 663 S.W.2d at 646. The court held that the record did not support Sowders's contention that M.W. Kellogg was merely a manufacturer, reciting affidavit testimony that M.W. Kellogg was hired to

construct and install the propane unit and that "the aforementioned engineering services were performed by or under the responsible charge of the engineers authorized to practice professional engineering in New York State." *Id.* at 649. As in *Texas Gas*, the court's reference to "supervision" relates to the construction as well as the design of the unit at issue. It does not suggest that the unit was not designed by registered or licensed engineers. *See id.*; *Tex. Gas Exploration*, 828 S.W.2d at 30–31.

We conclude that the jury's finding that a registered or licensed engineer supervised the design of the acid addition system does not establish Occidental's right to the protections of section 16.008.

2. Occidental did not conclusively establish that Henneman designed, planned, and inspected the acid addition system

Occidental asserts that it conclusively proved that Henneman, a licensed engineer and the head of Occidental's design team for the project, designed the acid addition system. The jury disagreed, and there is evidence in the record that supports the jury's finding. The evidence at trial was that Niel Ackerman, who was not a registered or licensed engineer, created the conceptual design for the acid addition system. No one employed by Occidental prepared the detailed plans; Occidental contracted out the design drafting to a third party engineering firm, HMW Design. Henneman testified that the conceptual design originated from Ackerman. She also testified that the plant modification document for the acid

addition system came from Ackerman. That document identifies Ackerman as the "originator" and includes instructions "per Neil Ackerman." According to Henneman, the task of the originator is to "start the process." Henneman also testified that Ackerman was in charge of shepherding the design process from start to finish. Ackerman testified that he coordinated everyone working on the project and was responsible for presenting the final design. This evidence is sufficient to support the jury's finding that the acid addition system was designed by Ackerman, who was not a registered or licensed engineer, rather than by Henneman.

Occidental points out that Henneman initialed the final document, but this does not, alone, conclusively establish that Henneman designed the acid addition system. Henneman also testified that she was the one who decided to replace the old system for modifying the acid and Ph-balance, that the design process was a collaborative process, and that Ackerman "did not do this all by himself." But the jury was free to disregard this testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 774–75 (Tex. 2003) ("the jury 'could believe all or any part of the testimony of any witness and disregard all or any part of the testimony of any witness.'") (quoting *Pilkington v. Kornell*, 822 S.W.2d 223, 230 (Tex. App.—Dallas 1991, writ denied)); *Benavente v. Granger*, 312 S.W.3d 745, 748 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("A jury may believe one witness and

disbelieve another, and it may resolve inconsistencies in any witness's testimony.").

Occidental alternatively asserts that it conclusively proved that Henneman planned and inspected the acid addition system. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a) (statute of repose applies to claims "against a registered or licensed . . . engineer . . . who designs, plans, or inspects" the construction of an improvement to real property). Occidental did not submit a jury question on this issue. Jenkins points out that Occidental's liability arises out of the design of the acid addition system, not the planning or inspection of the system. Assuming without deciding that Occidental could invoke section 16.008 on the basis of Henneman's planning or inspection of the acid addition system, we conclude that Occidental did not conclusively prove that Henneman planned and inspected the system.

Occidental relies on evidence regarding Henneman's role in forming the design team and as head of that team. Henneman also reviewed and commented on some of the design drawings. While this evidence demonstrates that Henneman had some involvement in the design process, it does not conclusively establish that she personally planned and inspected the construction of the acid addition system. The jury could have reasonably concluded that Henneman's role was supervisory

in nature and that Ackerman performed the actual planning and inspection of the construction.

The jury also could have reasonably concluded that the planning and inspection of the construction of the acid addition system was performed by an employee of HMW Design, the third party contractor Occidental hired to do the design drafting. For example, the design drawings reflect that they are "by" HMW employee Chet Wood, and those that are stamped "APPROVED FOR CONSTRUCTION" bear his initials on the approval signature line.[6] Henneman testified that HMW put together the drawings and material regarding "how [the acid addition system] was to actually be constructed."

The jury likewise could have reasonably concluded that Henneman planned and inspected the construction of the acid addition system. But Occidental neglected to obtain a jury finding on this issue. Occidental therefore failed to establish its statute of repose defense on this basis. *See Texaco*, 729 S.W.2d at 805–806; *Whitney Nat'l Bank*, 122 S.W.3d at 207.

We sustain Jenkins's first issue.

C. Section 16.009 does not bar Jenkins's claim against Occidental

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[6] At trial, one of the reasons espoused by the court for including in its charge a jury question on the design of the acid addition system that was specific to a registered or licensed engineer "employed by Occidental" was the possibility that the jury might conclude that the system was designed by an HMW employee.

In his second issue, Jenkins argues that the trial court erred in rendering judgment for Occidental under section 16.009 because (a) the jury's liability finding is based on negligent design rather than negligent construction, (b) Occidental admitted it did not construct the acid addition system, and (c) Occidental is not entitled to "respondeat repose" for the acts of third party contractors. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a). Occidental contends that it did "construct" the acid addition system, within the meaning of the statute, by hiring and supervising a third party contractor who constructed the system.

By its plain language, Section 16.009 applies only to claims brought against "a person who constructs or repairs an improvement to real property" in an action "arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement."[7] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a). Thus, a defendant seeking repose under Section 16.009 must prove three requisites to the statute's application:

(1) "the defendant must be the one who *constructs or repairs*";

(2) "that which the defendant constructs or repairs must be an *improvement to real property*"; and

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[7] The Code Construction Act defines "person" as including a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (West 2005).

(3) the action must "aris[e] out of a defective or unsafe condition of real property or a deficiency in the construction or repair work."

Williams v. U.S. Natural Res., Inc., 865 S.W.2d 203, 206 (Tex. App.—Waco 1993, no writ) (first and second criteria) (emphasis in original); TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (first, second, and third criteria); s*ee generally Sonnier*, 909 S.W.2d at 481–82 (generally endorsing *Williams*'s analysis).

The jury found that the acid addition system was an improvement to real property, and Jenkins does not challenge that finding in this appeal. Therefore, the second criterion is satisfied. The parties' arguments focus on whether the first criteria is satisfied. We hold that it is not and therefore do not reach the issue of whether this is an action arising out of an unsafe condition of real property or a deficiency in the construction work. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (applying to actions "arising out of a defective or unsafe condition of real property or a deficiency in the construction or repair" work), *with id.* § 16.008(a) (applying to actions "arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.")

1. Occidental did not establish that it was "a person who constructs or repairs an improvement to real property"

As discussed above, Occidental bore the burden of proof on its statute of repose defenses. *See Ryland*, 924 S.W.2d at 121; *Nexen*, 224 S.W.3d at 416. Unless an affirmative defense is established as a matter of law, the defendant also

bears the burden of obtaining the jury findings necessary to support the elements of the defense. *Texaco*, 729 S.W.2d at 805–806; *Whitney Nat'l Bank*, 122 S.W.3d at 207. Over Jenkins's objection, Occidental declined to request any jury findings with respect to its role in the construction of the acid addition system. The evidence establishes that Occidental prepared the general conceptual design of the acid addition system but hired and paid third party contractors to draft the detailed designs that specified "how it was actually to be constructed" and to actually construct the system. We therefore determine whether an owner-operator who prepares a conceptual design and hires and pays a third party to construct an improvement, without more, is "a person who constructs or repairs an improvement" within the meaning of the statute. We hold that it is not.

Section 16.009 expressly limits its application to claims against individuals or entities who "construct[] or repair[] an improvement." TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a). A person who merely constructs a product that is later annexed to real property is not a person who "constructs or repairs an improvement." *Sonnier*, 909 S.W.2d at 481 (holding statute of repose did not apply to manufacturer of tomato chopper because it had not annexed device to real property). It is the annexation that transforms the product from personalty to an improvement, and the performance of that task by a third party does not transform the product's designer and manufacturer into one who "construct[ed] . . . an

improvement." *See id.* Occidental did not build the acid addition system or annex it to real property—that work was performed by a third party contractor. For the same reason that a manufacturer whose product is later annexed to real property is not a constructor under section 16.009, the construction and installation of the acid addition system by a third party contractor does not transform Occidental into an entity that "constructs . . . an improvement to real property." TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a).

Occidental's payment for the installation is consistent with its role as the property owner-operator at the time—a role that the statute is expressly not intended to cover. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e)(2) (stating that statute does not apply to person in possession or control of real property at time of injury). The statute of repose is not intended to protect owners because they have control over the realty and have "authority to go onto the premises to inspect the improvement for unsafe conditions" and "to check for any defective alterations." *Hernandez v. Koch Mach. Co.*, 16 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). It does not convert Occidental into a constructor. Occidental did not conclusively establish that it was a "direct actor" in the construction or repair of the acid addition system. *See Petro Stopping Ctrs., Inc. v. Owens-Corning Fiberglas Corp.*, 906 S.W.2d 618, 620 (Tex. App.—El Paso 1995, no writ) ("The statute only grants repose to the direct actors in the

construction or repair of an improvement to real property."). Nor is Occidental an entity in the construction industry. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009) (noting that the statute "only precludes suits against persons or entities in the construction industry that annex personalty to realty."). Section 16.009 does not apply to a claim against a defendant "who may have performed some function in relation to an improvement to real property but who cannot be considered a constructor or repairer of the improvement." *Williams*, 865 S.W.2d at 207.

Thus, Occidental did not conclusively establish that it "construct[ed] or repair[ed] an improvement to real property," and Jenkins's claims against Occidental are not within the scope of section 16.009 according to its plain language. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.009.

2. Occidental did not perform a role equivalent to that of a general contractor

Occidental observes that statutes of repose are remedial in nature and, therefore, are given a "comprehensive and liberal construction rather than a technical construction which would defeat the purpose motivating its enactment." *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Occidental cites three cases to support its contention that the phrase "a person who constructs or repairs" should be liberally construed to include a property owner who hires a third party contractor to construct or repair

an improvement: *Fuentes v. Cont'l Conveyor & Equip. Co., Inc.*, 63 S.W.3d 518, 521–22 (Tex. App.—Eastland 2001, pet. denied); *Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 763 (Tex. App.—Dallas 1997, pet. denied); *McCulloch*, 696 S.W.2d at 922. The cases cited by Occidental extend section 16.009's protection to persons or entities that did not perform the actual construction work but were responsible for the construction work such that their alleged liability arose out of their involvement in the construction. We conclude that the reasoning of these cases is not applicable because (a) Occidental did not establish involvement in the construction work beyond preparing a concept design, purchasing some of the components parts, hiring a third party, and paying for the work—work that is consistent with Occidental's role as a property owner, a role that the statute expressly excludes from its protection—and (b) its liability does not stem from any purported involvement in the construction process.

Reames addresses the applicability of section 16.009 in a situation when a general contractor is sued for construction work performed by its subcontractor. 949 S.W.2d at 763. The court reasoned that because the general contractor "bore ultimate responsibility to [the property owner]" for construction of the conveyor belt and "was involved in the actual construction of the conveyor belt," it was entitled to protection under section 16.009. *Id.* The analysis in *Reames* expressly turns on the defendant's position as the general contractor and its responsibility to

the property owner. *Id.* (stating that the defendant's "relationship to the installation was that of a general contractor. Such a general contractor is protected under section 16.009.").

The *Fuentes* court relied on *Reames* to hold that a conveyor belt system manufacturer hired by the property owner to "supervise and assist" in the installation of its conveyor belt system was protected by section 16.009. *Fuentes*, 63 S.W.3d at 521–22 (citing *Reames*, 949 S.W.2d at 763). The *Fuentes* court reasoned that the property owner hired the manufacturer "to supervise the installation because it wanted [the manufacturer] to bear the ultimate responsibility for the proper installation" of its own equipment. *Id.* The dual role of supervising and assisting the construction amounted to constructing an improvement. *Id.* (citing *Reames*, 949 S.W.2d at 763).

The reasoning of *Reames* and *Fuentes* is not applicable here. In both cases, the defendants did not physically "hammer the nails and turn the screws," but they had "ultimate responsibility" for the construction, and their liability stemmed from their responsibility for that work. *See Reames*, 949 S.W.2d at 763; *Fuentes*, 63 S.W.3d at 521–22; *see also Jackson v. Coldspring Terrace Prop. Owners Ass'n*, 939 S.W.2d 762, 768–69 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (holding that statute of repose barred claims against successor-in-interest of licensor of entity that constructed pool because its potential liability "could only

vicariously result from [its predecessor-in-interest] 'putting out' itself as the manufacturer of a defective construction of the pool"). The same is not true here. Occidental was not the general contractor and did not serve in an equivalent capacity. *Cf. Reames*, 949 S.W.2d at 763.[8] It did not bear ultimate responsibility to the property owner for construction of the acid addition system. *Cf. Fuentes*, 63 S.W.3d at 521–22; *Reames*, 949 S.W.2d at 763. To the contrary, Occidental was the property owner to whom the third party contractor owed such responsibility. *Cf. Fuentes*, 63 S.W.3d at 521–22; *Reames*, 949 S.W.2d at 763.

In *McCulloch*, the Dallas court of appeals applied the prior version of the statute, article 5536(a), to claims brought against a community developer, Fox & Jacobs. The *McCulloch* court articulated this test for determining whether an owner is entitled to protection from the statute of repose for contractors:

> The statute was intended to apply to litigation against architects, engineers, and others involved in designing, planning or inspecting improvements to real property, as distinguished from materialmen and suppliers and from tenants and owners who possess or control the property. Thus, the critical inquiry is whether Fox & Jacobs' role in constructing the pool was more analogous to that of a builder or to an owner or supplier.

McCulloch, 696 S.W.2d at 922 (internal citations omitted).

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[8] There is some evidence that Occidental conducted a safety check on the project at some point. The timing, scope, details, or purpose of that safety check, however, are not in the record.

Unlike this case, Fox & Jacobs's role was more consistent with that of a general contractor: Fox & Jacobs not only hired contractors to create a conceptual layout and perform certain portions of the work in constructing the pool, an engineer to design the pool, and a contractor to perform the actual construction, it also supervised, inspected, and approved the construction process. *Id.* Additionally, though Fox & Jacobs was the nominal owner of the pool at the time of construction, it did not and never intended to retain possession or control over the pool after construction was completed. *Id.* Thus, Fox & Jacobs "functioned not as an owner but as a builder or supervisor." *Id.* On this basis, the court concluded: "By furnishing money, planners, engineers, and subcontractors for the construction of the pool, and by performing supervisory and inspection duties, Fox & Jacobs functioned as a 'person performing or furnishing construction . . . of . . . [an] improvement.'" *Id.* (ellipsis and bracketed materials in original).

McCulloch does not apply under these facts.[9] Occidental is not analogous to the developer in *McCulloch*. Occidental was the property owner, not a general contractor or other third party hired to manage and oversee various aspects of the

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[9] *McCulloch* was decided under the prior version of section 16.009, which expressly extended protection to persons who "furnish[]" construction or repair services. *Id.* When the Legislature recodifed the statute of repose in 1985, it changed the text of the statute from applying to "any person performing or furnishing construction or repair" to "a person who constructs or repairs," though the term "furnishing" remains in section 16.009's title. *Compare* Act of May 14, 1975, 64th Leg., R.S., ch. 269, § 1, 1975 Tex. Gen. Laws 649, 649, *with* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3254.

construction work. The "critical inquiry" under *McCullogh*—whether Occidental's role in the construction was more analogous to that of a builder or that of an owner or supplier—weighs against Occidental. *See McCullogh*, 696 S.W.2d at 922.

Additionally, Jenkins does not contend that Occidental bears any responsibility for any negligence in the construction of the acid addition system. The jury held Occidental liable for its role in the design of the acid addition system, not any purported role in construction. Section 16.009 is designed to protect against liability arising out of the construction of an improvement to real property, not out of the design of such an improvement—which is addressed in Section 16.008. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, 16.009.

We conclude that *Reames*, *Fuentes*, and *McCullogh* do not support Occidental's interpretation of section 16.009 as applying to this case. We sustain Jenkins's second issue.[10] Accordingly, we hold that the trial court erred in entering judgment in favor of Occidental on its statute of repose affirmative defense under either section 16.008 or 16.009.

Occidental's Cross-Points

In its second issue, Occidental raises three cross-points, arguing that if the trial court's judgment cannot be affirmed on the ground upon which it was

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[10] Because we have sustained Jenkins's first and second issues, we overrule Occidental's first issue.

rendered, it is nevertheless the correct outcome on these alternative grounds: (1) the only cause of action available to Jenkins is a premises liability action, (2) Jenkins cannot recover under a negligent design theory because he did not prove the elements of a products liability claim, and (3) Jenkins's claim is barred by the statute of limitations. We reject each of these alternative grounds.

A. Jenkins's claims arise out of Occidental's design of the acid addition system, not any ownership or control of the premises

Occidental contends that, because Jenkins was injured while operating an improvement to real property, his claim sounds exclusively in premises liability. Because Occidental no longer owned the premises at the time of Jenkins's injury, Occidental asserts that it cannot be held liable for its negligent design of the improvement. We do not find support for Occidental's position in the cases on which it relies. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992); *McDaniel v. Cont'l Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex. App.—Dallas 1994, writ denied); *Billmeier v. Bridal Shows, Inc.*, No. 02-08-00314-CV, 2009 WL 1176441, at *3 (Tex. App.—Fort Worth April 30, 2009, no pet.) (mem. op.).

Billmeier and *Keetch* are slip and fall cases that do not involve injuries caused by improvements to real property; they involve injuries caused by a wet spot on the floor. *Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *2. These cases distinguish between injuries arising out of an owner or operator's

contemporary negligent activity and injuries arising out of a condition of the premises, in the context of claims founded on the defendant's ownership or control of the premises. *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *3–4. These cases do not provide any basis for holding that premises liability claims are the only available claims when a previous owner negligently designs an improvement to real property. *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *3–4.

McDaniel, on the other hand, does involve an injury caused by an improvement to land. 887 S.W.2d at 171. But *McDaniel* belies, rather than supports, Occidental's position. McDaniel died when a balcony at an apartment complex collapsed on top of her. *Id.* at 169. Her heirs sued the independent contractor who remodeled and extended the balcony eight years before it collapsed, the joint venture that owned the apartment complex at the time of remodeling, and the joint venture's individual members. *Id.* In the portion of the Dallas Court of Appeals's opinion relied on by Occidental, the court held that McDaniel could only recover against the former property owners under a premises liability claim because her injury arose out of the condition of the balcony rather than concurrent negligent activity by the owners. *Id.* at 171–72. But the court of appeals affirmed the trial court's judgment against the independent contractor for his role in designing and building the remodeled balcony. *Id.* at 173–174.

Thus, the *McDaniel* opinion supports the existence of a duty on the part of a party who designed and constructed an improvement to real property, independent of any duty owed by the owner or operator of the premises on which the improvement is located. *See id.* Occidental played both roles from *McDaniel*—the role of the party who designed the faulty improvement, who was subject to liability, and the role of the former premises owner, who was not subject to liability. *See id.* But the jury's liability finding against Occidental relies on the first role and not the second. Thus, under *McDaniel*, Occidental is subject to liability for its design work.

Occidental has not cited any case holding that a former premises owner who negligently designed an improvement to land can only be held liable under a traditional premises liability theory, and we have not found any. We see no reason why the fact that Occidental's acid addition system was annexed to real property would alleviate Occidental from duties otherwise owed with respect to the safety of the system's design. *Cf.* RESTATEMENT (SECOND) OF TORTS § 385 ("One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor

makes a chattel for the use of others."). In cases where an improvement to real property was designed by a licensed engineer, section 16.008's statute of repose has been applied to place a time limit on just such liability. *E.g., Galbraith Eng'g*, 290 S.W.3d at 869 (applying statute of repose to cut-off liability of engineer who designed drainage system for home). Nor do we see any reason why Occidental's status as a former land owner would alleviate it from duties owed with respect to the negligently designed acid addition system, which continued to pose a danger after Occidental no longer owned the premises. *Cf. Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997) ("under some circumstances, one who creates a dangerous condition, even though he or she is not in control of the premises when the injury occurs, owes a duty of care"); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997) (stating that "a person who creates a dangerous condition owes" a duty of care even if the person is not in control of the premises at the time of the injury); *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962) (observing that liability of premise owner or operator for failure to warn of or make safe dangerous premises condition does not necessarily supplant liability of creator of danger).

We therefore reject Occidental's contention that Jenkins could recover against Occidental only under a premises liability cause of action.[11] We overrule the first cross-point raised in Occidental's second issue.

B. Jenkins's claim is not a strict products liability claim against a product manufacturer

Occidental next contends that, to recover for negligent design, Jenkins was required to establish the elements of a products liability claim, which Occidental identifies as requiring proof that (1) the acid addition system was a product, (2) the system was placed in the stream of commerce, and (3) Occidental was a manufacturer. Jenkins responds that these are elements of a claim for strict products liability, not his common law negligent design claim. There is no dispute that Jenkins cannot prevail on the strict products liability cause of action that he did not bring. The question is whether Texas recognizes a negligent design claim outside the bounds of a strict products liability claim against a manufacturer, and if so, whether a party bringing such a claim must prove the three elements challenged by Occidental here.

The Supreme Court of Texas has recognized that a claim for negligent design or negligent manufacturing is legally distinct from a strict products liability

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[11] Because we determine that Jenkins was not limited to a premises liability claim, we do not reach Occidental's further contention that Jenkins cannot satisfy the requirements for bringing a premises liability claim against a former owner.

claim. *See Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997) ("The [plaintiff's] negligent design and manufacturing claims are conceptually distinguishable from the strict liability claims.").[12] Occidental relies on *American Tobacco* for the proposition that a negligent design claim can only be brought against a manufacturer, quoting a portion of the Court's opinion distinguishing negligent design claims from strict products liability claims: "While strict liability focuses on the condition of the product, '[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.'" *Id.* (quoting *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995)). We do not read this quote as eliminating common law negligence claims against designers of products who are not manufacturers. The *American Tobacco* Court discussed the duties at issue in terms of a manufacturer's duties because the defendant in the case was a manufacturer. *See* 951 S.W.2d at 437.

Similar to Occidental's last argument, we note that if Occidental were correct that negligent design claims could only be asserted against product manufacturers, it would render meaningless one of the very statutes of repose upon which Occidental relied at trial: if only product manufacturers can be held liable

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[12] The Court further noted that a party cannot prevail on a negligent design claim without proving the existence of a safer alternative design. *Am. Tobacco*, 951 S.W.2d at 437. Here, the jury's finding that Occidental's negligent design caused Jenkins's injury was predicated on the existence of a safer alternative design. Occidental has not challenged this jury finding.

for design negligence, there is no need for a statute of repose that protects architects, engineers, landscape architects, and interior designers who design improvements to real property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a). This is particularly true when there is a separate statute of repose that governs product liability actions against sellers and manufacturers. *See id.* § 16.012(b) (providing a fifteen year period of repose). Additionally, chapter 150 of the Civil Practices and Remedies Code places certain procedural requirements on claims against licensed or registered architects, engineers, land surveyors, and landscape architects. *See id.* § 150.001–.003 (West 2011). Cases governed by this chapter have involved negligence claims against non-manufacturers based on the design of improvements to real property. *See, e.g.*, *Sharp Eng'g v. Luis*, 321 S.W.3d 748, 752 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (concluding section 150.002 was not satisfied with respect to carpenter's claim against engineers for negligent design of roof that carpenter fell through while performing framing work); *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, No. 03-10-00805-CV, 2011 WL 1562891, at *5 (Tex. App.—Austin Apr. 20, 2011, pet. filed) (mem. op.) (holding that section 150.002 was satisfied with respect to hotel owner's claims against former owner's architect for negligent design of foundation and drainage).

Occidental relies on *New Texas Auto Auction Services, L.P. v. Gomez De Hernandez*, for the proposition that Jenkins was required to prove that the acid addition system was a product and that Occidental placed it in the stream of commerce. *See* 249 S.W.3d 400, 402 (Tex. 2008) (holding that auctioneer who handled sale of car between seller and buyer could not be held liable for allegedly defective condition of car). But *New Texas Auto Auction* did not involve a common law negligent design claim. *See id.* Instead, it involved claims against an auctioneer for strict products liability and for negligent failure to replace the tires on a car it auctioned off. *See id.* The *New Texas Auto Auction* Court held that the auctioneer could not be held liable in strict products liability because it was not actually the seller of the vehicle. *See id.* at 404. The Court observed that the limitation of strict liability claims to products placed in the stream of commerce "arises from the justifications for strict liability itself." *Id.* at 403–04. Jenkins did not assert a strict liability claim. Occidental cites to no case that holds or otherwise indicates that the stream-of-commerce requirement has be extended to ordinary negligence actions brought against non-manufacturers.

We conclude that Jenkins asserted a claim for negligence in the design of the acid addition system, not a claim for strict products liability. The elements that Occidental asserts Jenkins has not proved are not elements of his claim. The jury found that Occidental was negligent in its design of the system—including a safer

alternative design finding—and that this negligence proximately caused Jenkins injuries. Occidental has not challenged these jury findings. Nor has Occidental asserted that it did not owe a duty to Jenkins with respect to its design of the acid addition system, except to the extent that it argues that only a property owner or operator may be held liable for injuries caused by improvements to real property—a contention we have rejected.

We overrule the second cross-point raised in Occidental's second issue.

C. Jenkins's claim was not barred by limitations

Finally, Occidental contends that the trial court's take-nothing judgment can be affirmed on the alternative ground that Jenkins's claim was barred by the statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2010). Jenkins was injured on April 21, 2006. Jenkins joined Occidental to this action on July 21, 2008, more than two years after the injury.[13] Jenkins points out that his joinder of Occidental was timely because it was less than sixty days after another defendant, Sperian, named Occidental as a responsible third party. *See id.* § 33.004(e) (repealed 2011) ("If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is

[13] Jenkins had previously sued and nonsuited Occidental.

designated as a responsible third party.").[14] Occidental argues that Jenkins should not be permitted to rely on the joinder rule for responsible third parties because Sperian's naming of Occidental as a responsible third party was the result of collusion between Sperian and Jenkins. But Occidental does not support this accusation with evidence of collusion in the record. We therefore decline to consider whether section 33.004(e) would be rendered inapplicable by conclusive behavior between litigants. *See* TEX. R. APP. P. 38.1(i) (requiring that parties support their appellate arguments with citations to the record when appropriate); *Nguyen v. Kosnoski,* 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Accordingly, we overrule the third and final cross-point raised in Occidental's second issue.

Conclusion

This is an unusual case in which a property owner performed its own design work for an improvement to real property. Section 16.008 is the statute of repose that would typically apply to a defendant in Occidental's position, but Occidental is not entitled to that defense because the jury found that it allowed an unlicensed, unregistered engineer to design the acid addition system. Occidental's efforts to

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[14] The legislature has now repealed section 33.004(e), and it will not apply to claims filed on or after September 1, 2011. Acts of May 30, 2011, 82nd Leg., R.S., ch. 203, §§ 5.02, 6.01–.02, 2011 Tex. Sess. Law Serv. ch. 203.

invoke Section 16.009 are the equivalent of trying to fit a square peg into a round hole—Occidental did not "construct[] or repair[]" the acid addition system, and we will not read this language to mean something it does not say. Occidental's alternative grounds for affirming the trial court's judgment require us to treat Jenkins's claim against Occidental as if it were based on Occidental's status as the property owner or as if it were a strict liability products claim. But these are not the claims Jenkins pled and tried.

We therefore reverse the trial court's take-nothing judgment and remand for entry of judgment in favor of Jenkins on the basis of the jury's findings on liability, proportionate responsibility, and damages.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp and Brown.

Tab D

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Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Houston (1st Dist.).
Jason **JENKINS**, Appellant
v.
OCCIDENTAL CHEMICAL CORPORATION, Appellee.

No. 01–09–01140–CV.
Feb. 14, 2013.

On Appeal from the 295th District Court, Harris County, Texas, Trial Court Case No.2007–73468.
Kurt B. Arnold, Cory Daniel Itkin, Arnold & Itkin, LLP, David M. Gunn, Russell S. Post, Stephen Douglas Pritchett, Beck, Redden & Secrest LLP, Houston, TX, for Appellant.

Barry Nathan Beck, Reagan Lee Butts, David Wayne Lauritzen, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland, TX, Deborah G. Hankinson, Hankinson LLP, Dallas, TX, Karen Kay Maston, Johnson, Trent, West & Taylor, LLP, Houston, TX, Hubert Oxford III, Benckenstein & Oxford, LLP, Beaumont, TX, for Appellee.

Panel consists of Justices JENNINGS, SHARP and BROWN.

OPINION ON REHEARING

HARVEY BROWN, Justice.

***1** Jason Jenkins brought this action against Occidental Chemical Corporation after an acid addition machine designed by Occidental sprayed acid in Jenkins's face, rendering him partially blind. The jury found for Jenkins on liability and damages, but the trial court entered judgment in Occidental's favor based on two statutes of repose.[FN1] In two issues, Jenkins argues that the trial court erred in entering judgment in favor of Occidental on the basis of the statutes of repose. In three cross-points, Occidental argues we may affirm the trial court's judgment on alternative grounds because Jenkins cannot prevail on the cause of action for which the jury found in his favor and because the statute of limitations bars Jenkins's claims. We hold that neither statute of repose applies, reject Occidental's alternative grounds for affirming the trial court's judgment, and remand the case for entry of judgment on the jury's liability and damages findings.[FN2]

FN1. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009 (West 2002).

FN2. Occidental has filed a motion for rehearing, which we deny. We vacate and withdraw our opinion and judgment of November 17, 2011, and we substitute this opinion and judgment in their place. We deny Occidental's motion for en banc reconsideration as moot. *See Brookshire Brothers, Inc. v. Smith*, 176 SW.3d 30, 33 (Tex.App.-Houston [1st Dist.] 2004, pet. denied) (op. on reh'g).

Background

Occidental owned a chemical plant in Bayport. In 1992, Occidental installed an acid addition system to regulate the acidity of a chemical compound it produced. Occidental employee Neil Ackerman developed the conceptual design for the system, shepherded the design process from start to finish, and was responsible for "getting it done." He worked in collaboration with a team of Occidental employees and under the supervision of team leader Kathryn Hanneman. While Hanneman and other members of the design team were licensed engin-

eers, Ackerman, who had an engineering degree, was not. Occidental hired a third-party engineering firm to create the detailed design drawings for the acid addition system. It also ordered some of the materials for the acid addition system and hired an independent contractor to fabricate and install the acid addition system at the plant.

Six years later, Occidental sold the plant with the acid addition system in place. Eight years thereafter, Jenkins, an operator at the plant, was partially blinded when the acid addition system sprayed acetic acid at him. Jenkins sued Occidental for negligence in designing the acid addition system.[FN3] Occidental pleaded, as affirmative defenses, that Jenkins's claim was barred by two statutes of repose—one governing claims against registered or licensed professionals who design improvements to real property and the other governing claims against those who construct such improvements. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009 (West 2002).

FN3. Jenkins brought claims against other defendants as well, but Occidental was the only remaining defendant at the time of trial. Jenkins also asserted breach of warranty and strict liability claims against Occidental, but the trial court granted a directed verdict on those claims.

After a two-week trial, the jury found in favor of Jenkins on his negligence claim, attributed seventy-five percent of the liability to Occidental, and awarded damages.[FN4] In response to the jury questions submitted by Occidental regarding its statute of repose defenses, the jury made the following findings about the acid addition system: (1) it was an improvement; (2) it was not designed by a licensed or registered engineer; and (3) it was designed under the supervision of a licensed or registered engineer. The trial court rendered a take-nothing verdict on the basis of Occidental's statute of repose defenses.

FN4. The jury assigned five percent of the liability to Jenkins and twenty percent to Equistar, the owner of the plant at the time of the injury, whom Occidental designated as a responsible third-party.

Standard of Review

***2** In this appeal, we must interpret the statutes of repose set forth in sections 16.008 and 16.009 of the Civil Practice and Remedies Code. The meaning of a statute is a question of law, which we review de novo. *MCI Sales & Serv., Inc. v. Hinton,* 329 S.W.3d 475, 500 (Tex.2010); *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex.2009). In construing sections 16.008 and 16.009, our primary goal is to ascertain and give effect to the legislature's intent as expressed by the words of the statute. *MCI Sales,* 329 S.W.3d at 500; *Entergy Gulf States,* 282 S.W .3d at 437. We give the words of the statute their plain and common meaning unless the statute defines the words otherwise, a different meaning is apparent from the context, or using the common meaning would lead to absurd results. *FKM P'ship., Ltd. v. Bd. of Regents of Univ. of Houston Sys.,* 255 S.W.3d 619, 633 (Tex.2008). When the words of the statute are clear, they are determinative. *Entergy Gulf States,* 282 S.W.3d at 437.

In moving for judgment notwithstanding the verdict, Occidental relied on several jury findings to support its statute of repose defenses but challenged the jury's finding that the acid addition system was not designed by an Occidental employee who was a licensed or registered engineer. Occidental asserted that it conclusively proved the opposite. It further asserted that it conclusively proved alternative elements of its statute of repose defense on which it failed to request a jury finding: that the system was planned by an Occidental employee licensed in engineering and that it was inspected by an Occidental employee licensed in engineering. A statute of repose provides an affirmative defense, and Occidental bore the burden of proving all factual requisites to the application of the statutes of repose. *See Ryland Group, Inc. v.*

Hood, 924 S.W.2d 120, 121 (Tex.1996) (holding that defendant bore burden of establishing right to summary judgment on basis of statute of repose defense); *Nexen Inc. v. Gulf Interstate Eng'g. Co.*, 224 S.W.3d 412, 416 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (observing that statute of repose operates as affirmative defense on which defendant bears burden of proof); *see also* TEX.R. CIV. P. 94. Unless Occidental conclusively established each element of its affirmative defense, its failure to obtain a jury finding in its favor is fatal.[FN5] *See Texaco, Inc. v. Pennzoil, Co.*, 729 S.W .2d 768, 805–06 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e .) (holding that, unless an affirmative defense is established as matter of law, defendant bears burden of obtaining jury findings necessary to support defense); *Whitney Nat'l. Bank v. Baker*, 122 S.W.3d 204, 207 (Tex.App.-Houston [1st Dist.] 2003, no pet.) (stating that, when affirmative defense was not submitted to jury, court reviews record to determine whether issue was disputed or whether defense was conclusively established by evidence).

FN5. Occidental has not argued that it is entitled to any deemed jury findings.

Occidental's Statute of Repose Defenses

***3** The trial court interpreted the jury's findings that the acid addition system was an improvement and was designed under the supervision of an engineer as establishing Occidental's right to a take-nothing judgment on the basis of its statute of repose defenses. The trial court did not specify which statute of repose-section 16 .008 or section 16.009–it relied on in reaching that conclusion. In two issues, Jenkins argues that Occidental has not established a right to rely on either statute.

A. Introduction to sections 16.008 and 16.009 of the CPRC

Sections 16.008 and 16.009 of the Civil Practice and Remedies Code are ten-year statutes of repose. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009. Section 16.008 provides that a suit "against a registered or licensed architect, engineer, interior designer, or landscape architect ... who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property" may not be brought more than ten years after substantial completion of the improvement or the beginning of operation of the equipment. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). Section 16.009 provides that a suit "against a person who constructs or repairs an improvement to real property" may not be brought more than ten years after substantial completion of the improvement. TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a).

Thus, sections 16.008 and 16.009 "differ in who they protect and the object of the work protected." *Sonnier v. Chisholm–Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex.1995). Section 16.009 relates only to improvements to real property but protects a broader class of persons: those who construct or repair such an improvement. TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a); *see also Sonnier*, 909 S.W.2d at 479. Section 16.008 protects only registered or licensed design professionals, but applies to a broader category of work: improvements to real property and equipment attached to real property. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a); *see also Sonnier*, 909 S.W.2d at 479.

B. Section 16.008 does not bar Jenkins's claim against Occidental

In his first issue, Jenkins argues that the trial court erred in rendering judgment for Occidental under section 16.008 because (1) Occidental is not a registered engineering firm, (2) Occidental failed to prove conclusively that the acid addition system was designed by a registered or licensed engineer, and (3) the jury's finding that the design was supervised by a registered or licensed engineer is immaterial. Occidental does not contend that it is a registered engineering firm or that Ackerman was a registered or licensed engineer. Instead, it contends that the jury finding that the acid addition system was designed under the supervision of a licensed engineer is sufficient to establish application of the

statute. Alternatively, it contends that the evidence conclusively established that the acid addition system was designed, inspected, and planned by Hanneman rather than Ackerman or any third-party. We conclude that supervision of the design by a licensed engineer does not invoke the statute, by the statute's plain language and in light of distinctive language in its sister statute. We also conclude that Occidental did not conclusively prove that Hanneman designed, inspected, and planned the acid addition system.

1. Supervision by a licensed engineer does not, alone, implicate the protections of section 16.008

***4** By its clear and unambiguous language, section 16.008 limits its scope to claims "against a registered or licensed ... engineer ... who designs, plans, or inspects" the construction of an improvement to real property. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). The jury found that the acid addition system was an improvement to real property. Section 16.008 thus applies to any design, planning, or inspection of the acid addition system by a registered or licensed engineer. But the jury found that the system was not designed by a registered or licensed engineer, and Occidental chose not to submit to the jury whether the system was planned or inspected by a registered or licensed engineer. Instead, Occidental asked the jury to find that the acid addition system was designed under the supervision of a registered or licensed engineer. This finding is not material to the application of section 16.008, which makes no reference to one who supervises the design of an improvement. FN6 *See id.*

> FN6. It is undisputed that Occidental is not a registered or licensed engineering firm. Therefore, it cannot argue that the entity itself was a "registered or licensed ... engineer ... who design[ed]" the acid addition system. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a).

Although our holding is dictated by the plain language of the statute, examining section 16.008 in the context of its sister statute buttresses our conclusion. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2005). Sections 16.008 and 16.009 were enacted for a similar purpose but have different parameters. *See Sonnier*, 909 S.W.2d at 479. The legislature chose to limit the class of persons protected by section 16.009 only with respect to the nature of their work: it applies to any person who "constructs or repairs an improvement to real property." *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). By comparison, the legislature chose to limit the class of persons protected by section 16.008 not only with respect to the nature of their work but also with respect to the nature of the persons: it expressly applies only to "registered or licensed" design professionals. *Id.* § 16.008(a). The legislature could have offered this protection to unlicensed persons performing the same work, but it chose not to do so.

Occidental relies on *Texas Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28 (Tex.App.-Texarkana 1991, writ denied), and *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644, 646 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.), to support its contention that section 16.008 applies when an improvement is designed under the supervision of, but not by, a registered or licensed engineer. While both opinions contain factual discussions regarding supervisory work by a licensed engineer, the holdings in these cases do not support Occidental's position.

The issue in *Texas Gas* was not whether the claims against the defendant, Fluor, fell within the scope of sections 16.008 and 16.009; rather, the issue was whether the statutes applied retroactively and whether Fluor was estopped from relying on them. 828 S.W.2d at 30. Occidental relies on a statement in the opinion that the "design and construction [of an expansion to a gas processing plant] were both performed under the supervision of a Texas-registered professional engineer." But nothing in the opinion indicates that the expansion was not designed by a licensed engineer—a question

that was not at issue. *See id.* at 3031.

***5** *Sowders* also did not address the issue presented here. In *Sowders,* the plaintiffs contended that the statute of repose for architects and engineers did not apply to their claims against M.W. Kellogg because it was a manufacturer, not a designer, of the propane unit in question. 663 S.W.2d at 646. The court held that the record did not support Sowders's contention that M.W. Kellogg was merely a manufacturer, reciting affidavit testimony that M.W. Kellogg was hired to construct and install the propane unit and that "the aforementioned engineering services were performed by or under the responsible charge of the engineers authorized to practice professional engineering in New York State." *Id.* at 649. As in *Texas Gas,* the court's reference to "supervision" relates to the construction as well as the design of the unit at issue. It does not suggest that the unit was not designed by registered or licensed engineers. *See id.; Tex. Gas Exploration,* 828 S.W.2d at 3031.

We conclude that the jury's finding that a registered or licensed engineer supervised the design of the acid addition system does not establish Occidental's right to the protections of section 16.008.

2. Occidental did not conclusively establish that Hanneman designed, planned, and inspected the acid addition system

Occidental asserts that it conclusively proved that Hanneman, a licensed engineer and the head of Occidental's design team for the project, designed the acid addition system. The jury disagreed, and there is evidence in the record that supports the jury's finding. The evidence at trial was that Neil Ackerman, who was not a registered or licensed engineer, created the conceptual design for the acid addition system. No one employed by Occidental prepared the detailed plans; Occidental contracted out the design drafting to a third-party engineering firm, HMW Design. Hanneman testified that the conceptual design originated from Ackerman. She also testified that the plant modification document for the acid addition system came from Ackerman. That document identifies Ackerman as the "originator" and includes instructions "per Neil Ackerman." According to Hanneman, the task of the originator is to "start the process." Hanneman also testified that Ackerman was in charge of shepherding the design process from start to finish. Ackerman testified that he coordinated everyone working on the project and was responsible for presenting the final design. This is some evidence from which the jury could reasonably have concluded that the acid addition system was designed by Ackerman, who was not a registered or licensed engineer, rather than by Hanneman.

Occidental points out that Hanneman initialed the final document, but this alone does not conclusively establish that Hanneman designed the acid addition system. Hanneman also testified that she was the one who decided to replace the old system for modifying the acid and Ph-balance, that the design process was collaborative, and that Ackerman "did not do this all by himself." Occidental contends that this evidence is conclusive, and therefore may not be disregarded by the jury, because "evidence of Neil Ackerman's role in the design process" does not constitute "evidence that Hanneman did not participate in the design process." We agree that the jury may not disregard relevant, undisputed evidence. *See City of Keller v. Wilson,* 168 S.W.3d 802, 81011 (Tex.2005).

***6** We disagree that Hanneman's testimony was undisputed in the relevant respect. Occidental's argument misses the point for two reasons. First, section 16.008 does not extend protection to all who participated in the design process; it protects those "registered or licensed ... engineer[s]" who "design[ ], plan[ ], or inspect[ ]" improvements to real property. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). There is *some* evidence that Ackerman personally designed, planned, and inspected the acid addition machine—not that he merely participated in a group that jointly performed these tasks—while his co-workers played other roles in the process such as task management and oversight.

Second, Occidental incorrectly implies that if any licensed engineer participated in a design project in any way, then section 16.008 bars liability against unlicensed engineers for their work. Nothing in section 16.008 supports application of the statute to design work performed by unlicensed engineers; to the contrary, the statute expressly applies only to "a registered or licensed ... engineer." *See id.* Section 16.008 does not bar suit against Occidental for design work performed by an unlicensed engineer like Ackerman, which is the basis for the jury's liability finding here.

Occidental alternatively asserts that it conclusively proved that Hanneman planned and inspected the acid addition system. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a) (statute applies to claims "against a registered or licensed ... engineer ... who designs, plans, or inspects" the construction of an improvement to real property). Occidental did not submit a jury question on this issue. Jenkins points out that Occidental's liability arises out of the design of the acid addition system, not the planning or inspection of the system. Assuming without deciding that Occidental could invoke section 16.008 on the basis of Hanneman's planning or inspection of the acid addition system, we conclude that Occidental did not conclusively prove that Hanneman planned and inspected the system.

Occidental relies on evidence regarding Hanneman's role in forming the design team and as head of that team. Hanneman also reviewed and commented on some of the design drawings. While this evidence demonstrates that Hanneman had some involvement in the design process, it does not conclusively establish that she personally planned and inspected the construction of the acid addition system. The jury could have reasonably concluded that Hanneman's role was supervisory in nature and that Ackerman performed the actual planning and inspection of the construction.

The jury also could have reasonably concluded that the planning and inspection of the construction of the acid addition system was performed by an employee of HMW Design, the third-party contractor Occidental hired to do the design drafting. For example, the design drawings reflect that they are "by" HMW employee Chet Wood, and those that are stamped "APPROVED FOR CONSTRUCTION" bear his initials on the approval signature line.[FN7] Hanneman testified that HMW put together the drawings and material regarding "how [the acid addition system] was to actually be constructed."

> FN7. At trial, one of the reasons espoused by the court for including in its charge a jury question on the design of the acid addition system that was specific to a registered or licensed engineer "employed by Occidental" was the possibility that the jury might conclude that the system was designed by an HMW employee.

***7** The jury likewise could have reasonably concluded that Hanneman planned and inspected the construction of the acid addition system. But Occidental neglected to obtain a jury finding on this issue. Occidental therefore failed to establish its statute of repose defense on this basis. *See Texaco*, 729 S.W.2d at 80506; *Whitney Nat'l. Bank*, 122 S.W.3d at 207.

We sustain Jenkins's first issue.

C. Section 16.009 does not bar Jenkins's claim against Occidental

Jenkins argues in his second issue that the trial court erred in rendering judgment for Occidental under section 16.009 because (a) the jury's liability finding is based on negligent design rather than negligent construction, (b) Occidental admitted it did not "construct" the acid addition system, and (c) Occidental is not entitled to "respondeat repose" for the acts of third-party contractors. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). Occidental contends that it "construct[ed]" the acid addition system, within the meaning of the statute, by hiring and supervising a third-party contractor that constructed the system.

By its plain language, Section 16.009 applies only to claims brought against "a person who constructs or repairs an improvement to real property" in an action "arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement." FN8 *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). Thus, a defendant seeking repose under Section 16.009 must prove three requisites to the statute's application:

> FN8. The Code Construction Act defines "person" as including a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (West 2005).

(1) "the defendant must be the one who *constructs or repairs* ";

(2) "that which the defendant constructs or repairs must be an *improvement to real property* "; and

(3) the action must "aris[e] out of a defective or unsafe condition of real property or a deficiency in the construction or repair of the improvement."

Williams v. U.S. Natural Res., Inc., 865 S.W.2d 203, 206 (Tex.App.-Waco 1993, no writ) (first and second criteria) (emphasis in original); TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a) (third criterion); *see generally Sonnier*, 909 S.W.2d at 48182 (generally endorsing *Williams's* analysis).

The jury found that the acid addition system was an improvement to real property, and Jenkins does not challenge that finding in this appeal. Therefore, the second criterion is satisfied. The parties' arguments focus on whether the first criterion is satisfied. We hold that it is not and therefore do not reach the third criterion, i.e., the issue of whether this is an action arising out of an unsafe condition of real property or a deficiency in the construction work. *Compare* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a) (applying to actions "arising out of a defective or unsafe condition of real property or a deficiency in the construction or repair" work), *with id.* § 16.008(a) (applying to actions "arising out of a defective or unsafe condition of the real property, the improvement, or the equipment").

1. Occidental did not conclusively establish that it was " a person who constructs or repairs an improvement to real property"

***8** Occidental bore the burden of proof on its statute of repose defenses. *See Ryland*, 924 S.W.2d at 121; *Nexen*, 224 S.W.3d at 416. Unless an affirmative defense is established as a matter of law, the defendant also bears the burden of obtaining the jury findings necessary to support the elements of the defense. *Texaco*, 729 S.W.2d at 80506; *Whitney Nat'l. Bank*, 122 S.W.3d at 207. Over Jenkins's objection, Occidental declined to request any jury findings with respect to its role in the construction of the acid addition system. Thus, unless Occidental conclusively established that it constructed the acid addition system, its failure to obtain a favorable jury finding is fatal. *See Texaco*, 729 S.W.2d at 805–06.

Section 16.009 expressly limits its application to claims against individuals or entities who "construct[ ] or repair[ ] an improvement." TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). A person who merely constructs a product that is later annexed to real property is not a person who "constructs or repairs an improvement." *Sonnier*, 909 S.W.2d at 481 (holding statute of repose did not apply to manufacturer of tomato chopper because it had not annexed device to real property). It is the annexation that transforms the product from personalty to an improvement, and the performance of that task by a third-party does not transform the product's designer and manufacturer into one who "construct[ed] ... an improvement." *See id.* Occidental did not build the acid addition system or an-

nex it to real property—that work was performed by a third-party contractor. For the same reason that a manufacturer whose product is later annexed to real property is not a constructor under section 16.009, the construction and installation of the acid addition system by a third-party contractor does not transform Occidental into an entity that "constructs ... an improvement to real property." TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a).

Occidental's payment for the installation does not convert Occidental into a constructor. Occidental did not conclusively establish that it was a "direct actor" in the construction or repair of the acid addition system. *See Petro Stopping Ctrs., Inc. v. Owens–Corning Fiberglas Corp.,* 906 S.W.2d 618, 620 (Tex.App.-El Paso 1995, no writ) ("The statute only grants repose to the direct actors in the construction or repair of an improvement to real property."). Nor is Occidental an entity in the construction industry. *See Galbraith Eng'g. Consultants, Inc. v. Pochucha,* 290 S.W.3d 863, 867 (Tex.2009) (noting that the statute "only precludes suits against persons or entities in the construction industry that annex personalty to realty"). Section 16.009 does not apply to a claim against a defendant "who may have performed some function in relation to an improvement to real property but who cannot be considered a constructor or repairer of the improvement." *Williams,* 865 S.W.2d at 207.

***9** Thus, Occidental did not conclusively establish that it "construct[ed] or repair[ed] an improvement to real property," and Jenkins's claim against Occidental is not within the scope of section 16.009 according to its plain language. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009.

2. Occidental did not conclusively establish that it performed a role equivalent to that of a general contractor

Occidental observes that statutes of repose are remedial in nature and, therefore, are given a "comprehensive and liberal construction rather than a technical construction which would defeat the purpose motivating its enactment." *McCulloch v. Fox & Jacobs, Inc.,* 696 S.W.2d 918, 921 (Tex.App.-Dallas 1985, writ ref'd n.r.e .). Occidental cites three cases to support its contention that the phrase "a person who constructs or repairs" should be liberally construed to include a property owner who provides the conceptual design, provides the parts, and hires a third-party contractor to construct or repair an improvement: *Fuentes v. Continental Conveyor & Equipment Co., Inc.,* 63 S.W.3d 518, 52122 (Tex.App.-Eastland 2001, pet. denied); *Reames v. Hawthorne–Seving, Inc.,* 949 S.W.2d 758, 763 (Tex.App.-Dallas 1997, pet. denied); and *McCulloch v. Fox & Jacobs, Inc.,* 696 S.W.2d 918, 922 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). The cases cited by Occidental recognize that section 16.009's protection extends to parties who, though they did not personally perform the construction work at issue, were nevertheless contractually responsible for the construction work and subject to liability in the lawsuit based on that responsibility. We conclude that the reasoning of these cases is not applicable here because (a) Occidental did not conclusively establish that it was contractually responsible for the construction work or that it acted as its own general contractor and (b) its liability does not stem from any purported involvement in, or responsibility for, the construction process.

Reames addresses the applicability of section 16.009 in a situation when a general contractor is sued for construction work performed by its subcontractor. 949 S.W.2d at 763. The court reasoned that because the general contractor "bore ultimate responsibility to [the property owner]" for construction of the conveyor belt and "was involved in the actual construction of the conveyor belt," it was entitled to protection under section 16.009. *Id.* The analysis in *Reames* expressly turns on the defendant's position as the general contractor and its responsibility to the property owner. *Id.* (stating that the defendant's "relationship to the installation was that of a general contractor. Such a general contractor is protected under section 16 .009."). Occidental did not conclusively prove that it had such a role.

The *Fuentes* court relied on *Reames* to hold that a conveyor belt system manufacturer hired by the property owner to "supervise and assist" in the installation of its conveyor belt system was protected by section 16.009. *Fuentes,* 63 S.W.3d at 521–22 (citing *Reames,* 949 S.W.2d at 763). The *Fuentes* court reasoned that the property owner hired the manufacturer "to supervise the installation because it wanted [the manufacturer] to bear the ultimate responsibility for the proper installation" of its own equipment. *Id.* The dual role of supervising and assisting the construction amounted to constructing an improvement. *Id.* (citing *Reames,* 949 S.W.2d at 763).

***10** The reasoning of *Reames* and *Fuentes* is not applicable here. In both cases, the defendants did not physically "hammer the nails and turn the screws," but they had "ultimate responsibility" for the construction, and their liability stemmed from their responsibility for that work. *See Reames,* 949 S.W.2d at 763; *Fuentes,* 63 S.W.3d at 52122; *see also Jackson v. Coldspring Terrace Prop. Owners Ass'n.,* 939 S.W.2d 762, 76869 (Tex.App.-Houston [14th Dist.] 1997, writ denied) (holding that statute of repose barred claims against successor-in-interest of licensor of entity that constructed pool because its potential liability "could only vicariously result from [its predecessor-in-interest] 'putting out' itself as the manufacturer of a defective construction of the pool"). The same is not true here. The evidence does establish that Occidental prepared the general conceptual design of the acid addition system and hired and paid third-party contractors to draft the detailed designs that specified "how it was actually to be constructed" and to actually construct the system. However, Occidental did not present evidence, or even argue below, that it acted as its own general contractor. *Cf. Reames,* 949 S.W.2d at 763.[FN9] Nor did Occidental present evidence that it bore the ultimate responsibility for actual construction of the acid addition system. *Cf. Fuentes,* 63 S.W.3d at 52122; *Reames,* 949 S.W.2d at 763.

FN9. There is some evidence that Occidental conducted a safety check on the project at some point. The timing, scope, details, or purpose of that safety check, however, are not in the record.

In *McCulloch,* the Dallas Court of Appeals applied the prior version of the statute, article 5536(a), to claims brought against a community developer, Fox & Jacobs. The *McCulloch* court articulated this test for determining whether an owner is entitled to protection from the statute of repose for contractors:

> The statute was intended to apply to litigation against architects, engineers, and others involved in designing, planning or inspecting improvements to real property, as distinguished from materialmen and suppliers and from tenants and owners who possess or control the property. Thus, the critical inquiry is whether Fox & Jacobs' role in constructing the pool was more analogous to that of a builder or to an owner or supplier.

696 S.W.2d at 922 (internal citations omitted).

Unlike this case, Fox & Jacobs's role was more consistent with that of a general contractor: Fox & Jacobs not only hired contractors to create a conceptual layout and perform certain portions of the work in constructing the pool, an engineer to design the pool, and a contractor to perform the actual construction, it also supervised, inspected, and approved the construction process. *Id.* Additionally, though Fox & Jacobs was the nominal owner of the pool at the time of construction, it did not and never intended to retain possession or control over the pool after construction was completed. *Id.* Thus, Fox & Jacobs "functioned not as an owner but as a builder or supervisor." *Id.* On this basis, the court concluded: "By furnishing money, planners, engineers, and subcontractors for the construction of the pool, and by performing supervisory and inspection duties, Fox & Jacobs functioned as a 'person performing or furnishing construction ... of ... [an] im-

provement.' " *Id.* (ellipsis and bracketed materials in original).

***11** *McCulloch* does not apply under these facts.[FN10] Occidental did not act in a role analogous to the developer in *McCulloch.* Occidental was the property owner, not a general contractor or other third-party hired to manage and oversee various aspects of the construction work.[FN11] The "critical inquiry" under *McCulloch* —whether Occidental's role in the construction was more analogous to that of a builder or that of an owner or supplier—weighs against Occidental. *See McCulloch,* 696 S.W.2d at 922.[FN12]

FN10. *McCulloch* was decided under the prior version of section 16.009, which expressly extended protection to persons who "furnish [ ]" construction or repair services. 696 S.W.2d at 922. When the legislature recodifed the statute of repose in 1985, it changed the text of the statute from applying to "any person performing or furnishing construction or repair" to "a person who constructs or repairs," though the term "furnishing" remains in section 16.009's title. *Compare* Act of May 14, 1975, 64th Leg., R.S., ch. 269, § 1, 1975 Tex. Gen. Laws 649, 649, *with* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3254.

FN11. In its motion for rehearing, Occidental states that the Court's analysis is internally inconsistent because "it holds that Occidental is liable because it acted as a contractor (rather than an owner), but that it is not protected by the statute of repose [section 16.009] because it acted as an owner (rather than a contractor)." This statement inaccurately conflates three roles into two, omitting its role as "designer" of the acid addition system. The role of designer has its own, separate statute of repose (section 16.008) and therefore is not covered under section 16.009, which covers construction professionals. It is Occidental's role as designer upon which the jury based its liability finding, and it is this role that is distinct from Occidental's role as previous owner of the premises. This role brings with it the protection of section 16.008 (rather than 16.009), but Occidental is not entitled to section 16.008's protection here because the statute only protects design work by licensed professionals and the jury found that Occidental's design work was performed by an unlicensed engineer.

FN12. We do not imply that an owner who constructs an improvement to real property may not rely on section 16.009 when it personally performs construction work or, under the line of cases cited by Occidental, when it has general-contractor-like involvement in, and responsibility for, the construction work even if another party actually performs the work. But, as *McCulloch* demonstrates, mere ownership of the premises and actions appurtenant to such ownership is not sufficient; the owner must also take on a role analogous to that of a general contractor or builder, not merely that of an owner or supplier. *McCulloch,* 696 S.W.2d at 922.

We conclude that *Reames, Fuentes,* and *McCulloch* do not support Occidental's interpretation of section 16.009 as applying to this case.[FN13] And, as noted above, we further conclude that Occidental did not conclusively establish that it actually constructed the acid addition system or acted as its own general contractor overseeing the construction. Accordingly, we hold that the trial court erred in entering judgment in favor of Occidental on its statute of repose affirmative defense under either section 16.008 or 16.009.

FN13. In its motion for rehearing, Occidental states: "To avoid applying the statute's protection to these undisputed facts, the Court reasons that (1) the statute ex-

> cludes from its protection prior owners of property who did not own, control, or possess the property at the time of the injury; and (2) the statute does not protect parties against personal-injury claims alleging negligent design." But we reach neither holding. Instead, we note that section 16.009 applies only to claims against "a person who constructs or repairs improvement to real property," and conclude that Occidental did not conclusively establish that it constructed the acid addition system. While courts have, in some cases, recognized that a general contractor or developer may rely on the statute even though it hired a subcontractor to perform the actual labor, the rationales for applying the statute in those cases are not present here.

We sustain Jenkins's second issue.

Occidental's Cross–Points

Occidental raises three cross-points, arguing that if the trial court's judgment cannot be affirmed on the ground upon which it was rendered, it is nevertheless the correct outcome on these alternative grounds: (1) the only cause of action available to Jenkins is a premises liability action for which he failed to lead, prove, or obtain a jury finding; (2) Jenkins cannot recover under a negligent design theory because he did not prove the elements of a products liability claim; and (3) Jenkins's claim is barred by the statute of limitations. We reject each of these alternative grounds.

A. Jenkins's claim arises out of Occidental's design of the acid addition system, not any ownership or control of the premises

Occidental contends that, because Jenkins was injured while operating an improvement to real property, his claim sounds exclusively in premises liability. Because Occidental no longer owned the plant at the time of Jenkins's injury, Occidental asserts that it cannot be held liable for its negligent design of the acid addition system. We do not find support for Occidental's position in the cases on which it relies. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992); *McDaniel v. Cont'l. Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex.App.Dallas 1994, writ denied) (op. on reh'g); *Billmeier v. Bridal Shows, Inc.*, No. 02–08–00314–CV, 2009 WL 1176441, at *3 (Tex.App.-Fort Worth April 30, 2009, no pet.) (mem.op.).

Billmeier and *Keetch* are slip and fall cases that do not involve injuries caused by improvements to real property; they involve injuries caused by a wet spot on the floor. *Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *2. These cases distinguish between injuries arising out of an owner or operator's contemporary negligent activity and injuries arising out of a condition of the premises, in the context of claims founded on the defendant's ownership or control of the premises.[FN14] *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *34. These cases do not provide any basis for holding that premises liability claims are the only available claims when an injury results from the negligent design of an improvement to real property by a party who neither owns nor controls the premises. *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *3–4.

> FN14. Taken out of context, *Billmeier's* articulation of the distinction between negligent activity claims and premises defect claims may be read broadly. *See Billmeier*, 2009 WL 1176441, at *3 ("When [an] alleged injury is the result of the premises' condition, the injured party can only recover under a premises defect theory."). But read in context, the *Billmeier* court addressed the distinction between the "two situations" in which an "owner or occupier may be liable for negligence"—premises defects and negligent activities—not the world of potential liability for a non-owner, non-occupier of land. *See Billmeier*, 2009 WL 1176441, at *3.

***12** *McDaniel*, on the other hand, does involve an injury caused by an improvement to land. 887 S.W.2d at 171. But *McDaniel* does not support Occidental's position. McDaniel died when a balcony at an apartment complex collapsed on top of her. *Id.* at 169. Her heirs sued the independent contractor who remodeled and extended the balcony eight years before it collapsed, the joint venture that owned the apartment complex at the time of remodeling, and the joint venture's individual members. *Id.* In the portion of the Dallas Court of Appeals's opinion relied on by Occidental, the court held that McDaniel could only recover against the former property owners under a premises liability claim because her injury arose out of the condition of the balcony rather than concurrent negligent activity by the owners. *Id.* at 171–72. But the court of appeals affirmed the trial court's judgment against the independent contractor for his role in designing and building the remodeled balcony. *Id.* at 173–74.

Here, Occidental played both roles from *McDaniel*—the role of the party who designed the faulty improvement, who was subject to liability, and the role of the former premises owner, who was not subject to liability. *See id.* But the jury's liability finding against Occidental relies on the first role and not the second. Thus, Occidental is subject to liability for its design work, as was the independent contractor in *McDaniel*.[FN15]

FN15. This Court has recently explained in another context that, when a party takes on multiple roles with respect to an event or transaction, the fact that one of those roles is one for which there is no liability (former premises owner) does not shield the party from liability arising out of the other roles (designer of a faulty acid addition system). *See Strebel v. Wimberly*, 371 S.W.3d 267, 27981 (Tex.App.Houston [1st Dist.] 2012, pet. filed) (holding that role as limited partner with no duty did not insulate party from liability for other, non-passive role in partnership, which did give rise to duty).

We see no reason why the fact that Occidental's acid addition system was annexed to real property would alleviate Occidental from duties otherwise owed with respect to the safety of the system's design. *Cf.* RESTATEMENT (SECOND) OF TORTS § 385 ("One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.").[FN16] In cases where an improvement to real property was designed by a licensed engineer, section 16.008's statute of repose has been applied to place a time limit on just such liability. *E.g.*, *Galbraith Eng'g.*, 290 S.W.3d at 869 (applying statute of repose to cut off liability of engineer who designed drainage system for home). Nor do we see any reason why Occidental's status as a former landowner would alleviate it from duties owed with respect to the negligently designed acid addition system, which continued to pose a danger after Occidental no longer owned the premises. *Cf. Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex.1997) ("[U]nder some circumstances, one who creates a dangerous condition, even though he or she is not in control of the premises when the injury occurs, owes a duty of care."); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex.1997) (stating that "a person who creates a dangerous condition owes" a duty of care even if the person is not in control of the premises at the time of the injury); *Strakos v. Gehring*, 360 S.W.2d 787, 795–96 (Tex.1962) (observing that liability of premises owner or operator for failure to warn of or make safe dangerous premises condition does not necessarily supplant liability of creator of danger).

FN16. In its motion for rehearing, Occi-

> dental asserts that this portion of the opinion "incorrectly suggests" that section 385 of the Restatement "provides that property owners are forever liable for improvements made during their ownership." We make no such suggestion. Our holding is expressly dependent on Occidental's role in the design of the acid addition system, not its role as previous owner of the plant. Put another way, we do not hold that Occidental would have owed any duty to Jenkins if it had merely owned the plant at the time of the acid addition system's design and installation.

***13** We therefore reject Occidental's contention that premises liability law bars Jenkins's claim against Occidental. We overrule Occidental's first cross-point.

B. Jenkins's claim is not a strict products liability claim against a product manufacturer

Occidental next contends that, to recover for negligent design, Jenkins was required to establish the elements of a products liability claim, which Occidental identifies as requiring proof that (1) the acid addition system was a product, (2) the system was placed in the stream of commerce, and (3) Occidental was a manufacturer. Jenkins responds that these are elements of a claim for strict products liability, not his common law negligent design claim. There is no dispute that Jenkins cannot prevail on the strict products liability cause of action that he did not bring. The question is whether Texas recognizes a negligent design claim outside the bounds of a strict products liability claim against a manufacturer, and if so, whether a party bringing such a claim must prove the three elements challenged by Occidental here.

The Supreme Court of Texas has recognized that a claim for negligent design or negligent manufacturing is legally distinct from a strict products liability claim. *See Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 437 (Tex.1997) ("The [plaintiff's] negligent design and manufacturing claims are conceptually distinguishable from the strict liability claims.").[FN17] Occidental relies on *American Tobacco* for the proposition that a negligent design claim can only be brought against a manufacturer, quoting a portion of the Court's opinion distinguishing negligent design claims from strict products liability claims: "While strict liability focuses on the condition of the product, '[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.' " *Id.* (quoting *Caterpillar, Inc. v. Shears,* 911 S.W.2d 379, 384 (Tex.1995)). We do not read this quote as eliminating common law negligence claims against designers of products who are not manufacturers. The *American Tobacco* Court discussed the duties at issue in terms of a manufacturer's duties because the defendant in the case was a manufacturer. *See id.*

> FN17. The Court further noted that a party cannot prevail on a negligent design claim without proving the existence of a safer alternative design. *Am. Tobacco,* 951 S.W.2d at 437. Here, the jury's finding that Occidental's negligent design caused Jenkins's injury was predicated on the existence of a safer alternative design. Occidental has not challenged this jury finding.

Texas courts have also recognized the general negligence duty owed by architects and engineers who perform design work but do not place their work in the stream of commerce (and thus are not subject to strict products liability).[FN18] *See Palmer v. Espey Huston & Assocs., Inc.,* 84 S.W.3d 345, 356 (Tex.App.-Corpus Christi 2002, pet. denied) ("Because the breakwater was not put in the stream of commerce, strict liability in tort does not apply. Rather, this case is about the design of a breakwater to which we apply principles of ordinary negligence."); *Hanselka v. Lummus Crest, Inc.,* 800 S.W.2d 665, 666 (Tex.App.-Corpus Christi 1990, no writ) (stating, with respect to allegedly defective design of plant's sludge disposal system, "This is not a product defect case in which, because

products have been put into the stream of commerce, strict liability applies; but rather, it is a case about design of a factory to which we apply principles of ordinary negligence.").

> FN18. A "products liability action" is statutorily defined as an action "against a manufacturer or seller," each of which is defined only to include persons who placed products or component parts in the stream of commerce. TEX. CIV. PRAC. & REM.CODE ANN. § 82.001(2), (3), (4) (West Supp.2012).

***14** We note that the legislature has enacted separate statutes of repose for strict liability claims against sellers and manufacturers and claims against design professionals who design improvements to real property. *Compare* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a) (ten-year statute of repose for design professionals), *with id.* § 16.012(b) (West 2002) (fifteen-year period of repose for manufacturers and sellers). Additionally, chapter 150 of the Civil Practice and Remedies Code places certain procedural requirements on claims against licensed or registered architects, engineers, land surveyors, and landscape architects. *See id.* §§ 150.001–003 (West 2011). Cases governed by this chapter have involved negligence claims against non-manufacturers based on the design of improvements to real property. *See, e.g., Sharp Eng'g. v.. Luis,* 321 S.W.3d 748, 752 (Tex.App.Houston [14th Dist.] 2010, no pet.) (concluding section 150.002 was not satisfied with respect to carpenter's claim against engineers for negligent design of roof that carpenter fell through while performing framing work); *Elness Swenson Graham Architects, Inc. v. RLJ II–C Austin Air, LP,* No. 03–10–00805–CV, 2011 WL 1562891, at *5 (Tex.App.-Austin Apr. 20, 2011, pet. denied) (mem.op.) (holding that section 150.002 was satisfied with respect to hotel owner's claims against former owner's architect for negligent design of foundation and drainage).

Occidental relies on *New Texas Auto Auction Services, L.P. v. Gomez De Hernandez,* for the proposition that Jenkins was required to prove that the acid addition system was a product and that Occidental placed it in the stream of commerce. *See* 249 S.W.3d 400, 402 (Tex.2008) (holding that auctioneer who handled sale of car between seller and buyer could not be held liable for allegedly defective condition of car). But *New Texas Auto Auction* did not involve a common law negligent design claim. *See id.* Instead, it involved claims against an auctioneer for strict products liability and for negligent failure to replace the tires on a car it auctioned off. *See id.* The *New Texas Auto Auction* Court held that the auctioneer had no duty to inspect or replace the tires and could not be held liable in strict products liability because it was not actually the seller of the vehicle. *See id.* at 404. The Court observed that the limitation of strict liability claims to products placed in the stream of commerce "arises from the justifications for strict liability itself." *Id.* at 403–04, 405. Jenkins did not assert a strict liability claim. Occidental cites to no case that holds or otherwise indicates that the stream-of-commerce requirement has be extended to ordinary negligence actions brought against non-manufacturers.

We conclude that Jenkins asserted a claim for negligence in the design of the acid addition system, not a claim for strict products liability. The elements that Occidental asserts Jenkins has not proved are not elements of his claim. The jury found that Occidental was negligent in its design of the system—including a safer alternative design finding—and that this negligence proximately caused Jenkins injuries. Occidental has not challenged these jury findings. Nor has Occidental asserted that it did not owe a duty to Jenkins with respect to its design of the acid addition system, except to the extent that it argues that only a property owner or operator may be held liable for injuries caused by improvements to real property—a contention we have rejected.

***15** We overrule Occidental's second cross-point.

C. The statute of limitations does not bar Jenkins's claim

Finally, Occidental contends that the trial court's take-nothing judgment can be affirmed on the alternative ground that Jenkins's claim was barred by the statute of limitations. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(a) (West Supp.2010). Jenkins was injured on April 21, 2006. Jenkins joined Occidental to this action on July 21, 2008, more than two years after the injury.[FN19] Jenkins points out that his joinder of Occidental was timely because it was less than sixty days after another defendant, Sperian, named Occidental as a responsible third-party. *See id.* § 33.004(e) (repealed 2011) ("If a person is designated under this section as a responsible third-party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third-party.").[FN20] Occidental argues that Jenkins should not be permitted to rely on the joinder rule for responsible third parties because Sperian's naming of Occidental as a responsible third-party was the result of collusion between Sperian and Jenkins. But Occidental does not support this accusation with evidence of collusion in the record. We therefore decline to consider whether section 33.004(e) would be rendered inapplicable by collusive behavior between litigants. *See* TEX.R.APP. P. 38.1(i) (requiring that parties support their appellate arguments with citations to the record when appropriate); *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex.App.-Houston [14th Dist.] 2002, no pet.).

FN19. Jenkins had previously sued and nonsuited Occidental.

FN20. The legislature has now repealed section 33.004(e), and it will not apply to claims filed on or after September 1, 2011. Acts of May 30, 2011, 82nd Leg., R.S., ch. 203, §§ 5.02, 6.01.02, 2011 Tex. Sess. Law Serv. ch. 203.

We overrule Occidental's third and final cross-point.

Occidental's Arguments on Rehearing

On rehearing, Occidental shifts its primary focus from the statutes of repose to its first alternative ground for affirming the trial court's judgment—that a premises defect claim is the exclusive negligence claim available for an injury arising out of a "condition" of property rather than concurrent negligent activity. Occidental correctly distinguishes a premises owner, operator, or controller's two types of liability: premises defect liability and negligent activity liability. But Occidental did not own, operate, or control the plant when Jenkins was injured, and its liability does not arise out of any ownership, operation, or control of the premises. Forcing injured third parties like Jenkins to frame negligent design claims as if they were premises liability claims either expands the duty to "warn or make safe" to architects, engineers, and other design professionals or it insulates them from liability to third parties injured by their negligent work. This is not and has not ever been the law in Texas.

A. Occidental's liability is neither contingent on, nor relieved by, Occidental's prior ownership of the plant

***16** In its first issue on rehearing, Occidental asserts that the Court's holding here "upends settled Texas law by permitting recovery against a former premises owner years after the property's conveyance." As discussed above, the jury held Occidental liable for its negligence in designing the acid addition machine, not based on its previous ownership or control of the plant.

We are unpersuaded by Occidental's reliance on a 1986 California case, *Preston v. Goldman*, 720 P.2d 476 (Cal.1986), to argue that former premises owners have no liability for their on-premises design work. In *Preston*, visitors to a private home sued the home's former owners after their child, left unattended, fell in a pond designed and built by the former owners. *Id.* at 477–88. *Preston* is inapplicable here for two primary reasons. First, the analys-

is in *Preston* centers on the defendants' status as private homeowners rather than professional engineers or contractors, and the *Preston* court expressly limited its holding to that scenario. *See id.* at 487 n. 10 ("Our holding here relates only to the liability of 'do-it-yourself home improvers and is not intended to affect, establish, or diminish any liability of commercial builders, contractors or renovators."). Second, the issue *in Preston* was not whether the homeowners had liability for their negligence-the jury found that the homeowners were not negligent; rather, the issue was whether a jury instruction modeled after the Restatement's "vendor" liability provision was correct. *Id.* at 478.[FN21]

FN21. We are also unpersuaded by Occidental's reliance on *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363, 36768 (Tex.App.-Houston [1st Dist.] 1994, writ denied), and *First Financial Development Corp. v. Hughston*, 797 S.W.2d 286, 291 (Tex.App.-Corpus Christi 1990, writ denied), for this proposition. In *Roberts*, we did not discuss, and the plaintiff did not raise, the issue of whether the developer was liable for negligently creating a dangerous condition. 886 S.W.2d at 366–67; Brief of Appellant at 15, *Roberts*, 886 S.W.2d 363. To the contrary, the plaintiff pleaded that the dangerous condition was "created by ... [the construction contractor] at the express request and on behalf of [the owner]," not the developer. Clerk's Record, vol. 2, at 252 (Plaintiff's Third Am. Original Pet., at 5), *Roberts*, 886 S.W.2d 363. Similarly, although the *Hughston* court stated that the plaintiff could not avoid the Restatement's limitations on a developer's vendor-liability by "[a]droit phrasing of the pleadings to encompass design defects, per se negligence, or any other theory of negligence," *Hughston*, 797 S.W.2d at 291, there is no indication of any allegation or evidence that the developer designed or otherwise created the allegedly dangerous stairwell. To the contrary, the court affirmed the portion of the judgment holding the construction contractor liable for failing to comply with several building codes with respect to the design of the stairwell. *Id.* at 293.

Moreover, other jurisdictions have faced circumstances more factually on point and have rejected arguments similar to Occidental's. These cases have imposed liability on former plant owners whose negligent design work resulted in an injury to a third-party after the sale of the plant to a new owner. *See Stone v. Untied Eng'g., a Div. of Wean, Inc.*, 475 S.E.2d 439, 443–44 (W.Va.1996) (holding former plant owner liable for its negligent design of conveyor belt); *Dorman v. Swift & Co.*, 782 P.2d 704, 706–08 (Ariz.1989) (holding former plant owner liable for negligent design of conveyor belt); *see also Carroll v. Dairy Farmers of Am., Inc.*, No. 2–04–24, 2005 WL 405719, at *6 (Ohio Ct.App. 3rd 2005) (not designated for publication) (finding fact issue as to whether former plant owner was negligent in its design, fabrication, and installation of support platform).[FN22]

FN22. Occidental relies on *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249, 1252 (Mont.1989) in its motion for rehearing. *Papp* held that the former owner of an oil separation facility who had dismantled and rebuilt the facility was not liable for its reconstruction due to the "accepted work doctrine." *See id.* at 1256–57. But Texas long ago rejected the "accepted work doctrine." *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 424 (Tex.2011) (citing *Strakos*, 360 S.W.2d at 791).

B. The distinction between negligent activity and premises defect liability governs an owner or controller's liability

In its second issue on rehearing, Occidental argues that Jenkins's injury was caused by an unreasonably dangerous premises condition and therefore

will only support a premises liability claim. Occidental invokes the distinction between premises defect liability and negligent activity liability—two distinct categories of negligence liability a premises owner or controller may have, which are governed by different liability standards. *See, e.g.*, *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 775 (Tex.2010) ("As to landowners, we have recognized negligent-activity and premises-liability theories of liability.").[FN23] But Occidental neither owned nor controlled the plant at the time of Jenkins's injury. For the reasons discussed below, we decline to impose the elements of a premises defect claim on the jury's negligent design finding. *See e.g.*, *Barzoukas v. Found. Design, Ltd.*, 363 S.W.3d 829, 838 (Tex.App.-Houston [14th Dist.] 2012, pet. filed) (op. on reh'g) (finding question of fact on negligence claim against engineering firm based on foundation design work); *Goose Creek Consol. Indep. Sch. Dist. of Chambers & Harris Cntys., Tex. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 495 (Tex.App.Texarkana 2002, pet. denied) (holding that school district could recover against plumbing subcontractor for negligent construction of pipes); *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 93 (Tex.App.-Houston [1st Dist.] 1998, pet. denied) (holding that contractor owed general negligence duty to third-party by dangerous condition contractor created on road); *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 422 (Tex.App.-Austin 1995, no writ) (reversing summary judgment on negligence claim against engineering firm for design work except as barred by economic loss rule); *McKinney v. Meador*, 695 S.W.2d 812, 814–15 (Tex.App.-Tyler 1985, writ ref'd n.r.e.) (affirming judgment against engineers and contractors based on negligent design and construction of airport runway); *Hyatt Cheek Builders–Eng'rs. Co. v. Bd. of Regents of Univ. of Tex. Sys.*, 607 S.W.2d 258, 264 (Tex.Civ.App.-Texarkana 1980, writ dism'd) (holding that general negligence question properly submitted issue of contractor's negligent installation of water pipe).

FN23. Generally, a premises owner or controller has premises defect liability if its past negligent conduct created an unreasonably dangerous condition on the premises that caused the plaintiff's injury; but if the plaintiff's injury is caused by the owner or controller's contemporaneous negligent conduct, the owner or controller has negligent activity liability. *See, e.g.*, *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 775 (Tex.2010); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 751 (Tex.1998).

1. *Wyckoffv. George C. Fuller Contracting Co.*

***17** On rehearing, Occidental relies on a recent case out of the Dallas Court of Appeals: *Wyckoff v. George C. Fuller Contracting Co.*, 357 S.W.3d 157 (Tex.App.-Dallas 2011, no pet.). In *Wyckoff*, a visitor at a home sued the homeowner and homebuilder after she fell on the home's steps. *Id.* at 164. She asserted a premises liability claim against the homeowner and a general negligence claim against the homebuilder. *Id.* The court held, however, that the injured plaintiff's claims against both defendants sounded exclusively in premises liability.[FN24] *Id.* And although the plaintiff did not contend that the homebuilder owned, occupied, or controlled the home at the time of her injury, the court held that the homebuilder owed her the same duty that the homeowner did: "the duty owed to a licensee." *Id.* The court then affirmed a summary judgment for the defendant on the ground that the plaintiff had actual knowledge of the dangerous conditions of the stairs—poor lighting, non-uniform shape, and lack of a handrail. *Id.* at 165–66.

FN24. The *Wyckoff* court cited *Keetch* and *Scroggs v. Am. Airlines, Inc.*, 150 S.W.3d 256, 263 (Tex.App.-Dallas 2004, no pet .). But both of those cases dealt with the distinction between negligent-activity and premises-defect theories of recovery against a premises owner. *See Keetch*, 845 S.W.2d at 264; *Scroggs*, 150 S.W.3d at

263. Neither addressed the duty owed by a non-owner, non-operator who was negligent in providing professional design services.

We disagree with the *Wyckoff* court's conclusion that a homebuilder, who neither owns nor controls the premises, owes the same duty the homeowner owes to licensees on the premises. To the extent the *Wyckoff* court may be read as holding that any claim for an injury not caused by contemporaneous negligent activity may only be brought as a premises defect claim, we would disagree with that holding as well. To the extent the *Wyckoff* court held that a plaintiff cannot recover for a design defect of which she had actual knowledge at the time of the injury, that holding is not implicated by the facts of this case.

2. We decline to adopt *Wyckoff's* extension of premises liability

The existence of a legal duty is a threshold requirement for negligence liability—whether sounding in general negligence or premises defect liability. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex.2006). "Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex.2000). One "special relationship" that gives rise to a duty to take action to prevent harm to others is the relationship between a premises owner or operator and those present on the premises; within this context, the law imposes a duty on the premises owner or operator to take action to make the premises reasonably safe or to warn invitees and licensees of an unreasonable danger. *See State v. Williams*, 940 S.W.2d 583, 584 (Tex.1996) (per curiam). The law imposes this same duty on a general contractor in control of the premises. *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex.1997); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex.1985).

But the Texas Supreme Court has never extended the duty to warn or make safe to defendants who did not own, occupy, or control the premises at the time of the plaintiff's injury. *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 426 (Tex.2011) (holding that engineering firm, whose work was dictated by and complied with contractual specifications, had no duty to warn of dangerous condition on premises); *Mathis*, 189 S.W.3d at 845 (holding that engineer did not owe duty to keep premises safe and did not owe any duty with respect to hole on premises engineer neither created nor agreed to make safe); *see also Martinez*, 941 S.W.2d at 911 (holding that defendant properly established that it did not owe premises liability duty because it did not own, occupy, or control premises where injury occurred but that defendant was not entitled to traditional summary judgment because it failed to address duty arising out of alleged creation of dangerous condition). In the absence of Supreme Court authority for doing so, we decline to expand premises defect liability to non-owners, non-controllers of premises.

***18** Having declined to extend premises defect liability to non-owners, non-occupiers of premises, we likewise decline to extend the premises-defect/negligent-activity dichotomy to claims against such defendants. We do so for three reasons. First, it encourages expansion of premises defect duties to parties who neither own nor control the premises, as demonstrated in *Wyckoff*, 357 S.W.3d at 163–64. Second, if the test for whether premises defect principles apply were merely whether the injury resulted from a concurrent negligent activity or a "condition of premises," without regard to the nature of the defendant or the defendant's duties, a wide variety of claims would be collapsed into premises defect claims. Third, the elements of the duty owed by an owner, occupier, or controller of premises are not necessarily compatible with the duties (if any) owed by other parties, such as design professionals.

For all of these reasons, we hold that Occidental did not owe a duty to keep the plant in a safe condition or to warn those present at the plant of

dangerous conditions on the premises, but Occidental did owe a duty to be non-negligent in its engineering and design of the acid addition machine. Because the jury held that Occidental breached the latter duty, we are not persuaded by Occidental's arguments on rehearing.

Conclusion

This is an unusual case in which a former property owner performed its own design work for an improvement to real property. Section 16.008 is the statute of repose that would typically apply to a defendant in Occidental's position, but Occidental is not entitled to that defense because the jury found that it allowed an unlicensed, unregistered engineer to design the acid addition system. Occidental's efforts to invoke Section 16.009, as an alternative to Section 16.008, are the equivalent of trying to fit a square peg into a round hole—Occidental did not "construct[ ] or repair[ ]" the acid addition system, and we will not read this language to mean something it does not say. Occidental's alternative grounds for affirming the trial court's judgment require us to treat Jenkins's claim against Occidental as if it were based on Occidental's status as the former property owner or as if it were a strict liability products claim. But these are not the claims Jenkins pleaded and tried.

We therefore reverse the trial court's take-nothing judgment and remand for entry of judgment in favor of Jenkins based on the jury's findings on liability, proportionate responsibility, and damages, as well as other matters necessary to calculate damages and interest.

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--- S.W.3d ----, 2013 WL 556388 (Tex.App.-Hous. (1 Dist.))

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Tab E

415 S.W.3d 14
(Cite as: 415 S.W.3d 14)

Court of Appeals of Texas,
Houston (1st Dist.).
Jason JENKINS, Appellant
v.
OCCIDENTAL CHEMICAL CORPORATION, Appellee.

No. 01–09–01140–CV.
July 2, 2013.
Rehearing En Banc Overruled Oct. 22, 2013.

Background: Worker at chemical plant who was sprayed in the face and partially blinded by acid addition system brought action against former owner of plant for negligently designing the system. Following jury trial in which the jury found in worker's favor, the 295th District Court, Harris County, Caroline E. Baker, J., entered take-nothing verdict based on statute of repose. Worker appealed.

Holdings: On rehearing, the Court of Appeals, Harvey Brown, J., held that:
(1) jury's finding that acid addition system was designed under supervision of a registered or licensed engineer was not sufficient to implicate statute of repose for claims against registered or licensed engineers who designed, planned, or inspected the construction of an improvement;
(2) former owner failed to conclusively establish that a licensed engineer designed, planned, and inspected the acid addition system;
(3) former owner did not “construct or repair” an improvement to real property within meaning of statute of repose for claims against persons who construct or repair an improvement;
(4) worker's action did not sound exclusively in premises liability;
(5) worker could bring a common-law negligent design claim, rather than a strict products liability claim; and
(6) former owner did not owe a duty to keep the plant in a safe condition or to warn those present at the plant of dangerous conditions on the premises.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Meaning of a statute is a question of law, which Court of Appeals reviews de novo.

[2] Statutes 361 ⚿1080

361 Statutes
361III Construction
361III(A) In General
361k1078 Language
361k1080 k. Language and intent, will, purpose, or policy. Most Cited Cases

In construing statutes, the primary goal is to ascertain and give effect to the legislature's intent as expressed by the words of the statutes.

[3] Statutes 361 ⚿1091

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 k. In general. Most Cited Cases

Statutes 361 ⚿1122

361 Statutes
361III Construction
361III(D) Particular Elements of Language
361k1122 k. Defined terms; definitional provisions. Most Cited Cases

Statutes 361 ⚿1405

361 Statutes
361IV Operation and Effect
361k1402 Construction in View of Effects, Consequences, or Results
361k1405 k. Relation to plain, literal, or clear meaning; ambiguity. Most Cited Cases

Courts give words of a statute their plain and common meaning unless statute defines words otherwise, a different meaning is apparent from the context, or using common meaning would lead to absurd results.

[4] Statutes 361 ⚿1108

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1108 k. In general. Most Cited Cases

When words of statute are clear, they are determinative of its meaning.

[5] Limitation of Actions 241 ⚿195(3)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k195 Presumptions and Burden of Proof
241k195(3) k. Burden of proof in general. Most Cited Cases

A statute of repose provides an affirmative defense, and defendant bears burden of proving all factual requisites to application of statute of repose.

[6] Limitation of Actions 241 ⚿201

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k201 k. Verdict, findings and judgment. Most Cited Cases

Unless defendant conclusively establishes each element of its defense of statutes of repose in action against persons furnishing construction or repair of improvements or against registered or licensed design professionals furnishing design, planning, or inspection for construction of improvements, its failure to obtain a jury finding on those elements in its favor is fatal. V.T.C.A., Civil Practice & Remedies Code §§ 16.008, 16.009.

[7] Negligence 272 ⚿1507.3

272 Negligence
272XVIII Actions
272XVIII(A) In General
272k1507 Time to Sue and Limitations
272k1507.3 k. Premises liability. Most Cited Cases

Jury's finding that acid addition system at chemical plant was designed under the supervision of a registered or licensed engineer was not, by itself, sufficient to implicate the protections of ten-year statute of repose governing claims against registered or licensed engineers who designed, planned, or inspected the construction of an improvement, in worker's action against former owner of the plant for personal injury caused when the acid addition system caused acid to be sprayed in worker's face; supervision of the design by a licensed engineer did not invoke the statute of repose, which made no reference to one who supervised the design of an improvement. V.T.C.A., Civil Practice & Remedies Code § 16.008.

[8] Limitation of Actions 241 ⚿197(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k197 Weight and Sufficiency

241k197(1) k. In general. Most Cited Cases

Evidence supported jury's finding that acid addition system at chemical plant was designed by a plant employee who was not a registered or licensed engineer, rather than by another employee who was a licensed engineer, thereby supporting conclusion that ten-year statute of repose for claims against licensed design professionals furnishing design, planning, or inspection for construction of improvements did not apply to worker's action against former owner of plant for personal injuries caused by acid spraying from the system, although the licensed engineer initialed final design document and testified that she decided to replace the old system; licensed engineer testified that the conceptual design originated from the other employee who was not a licensed engineer and that the other employee was in charge of shepherding the design process. V.T.C.A., Civil Practice & Remedies Code § 16.008(a).

[9] Limitation of Actions 241 ⚿197(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k197 Weight and Sufficiency
241k197(1) k. In general. Most Cited Cases

Former owner of chemical plant, which was sued by worker who was injured by acid spraying from the plant's acid addition system, failed to conclusively establish that licensed engineer planned and inspected the acid addition system at the time of its construction, and thus former owner's failure to obtain a jury finding on this issue was fatal to its affirmative defense under ten-year statute of repose for claims against licensed design professionals furnishing design, planning, or inspection for the construction of improvements, although licensed engineer was head of design team and reviewed some of the design drawings. V.T.C.A., Civil Practice & Remedies Code § 16.008(a).

[10] Limitation of Actions 241 ⚿197(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k197 Weight and Sufficiency
241k197(1) k. In general. Most Cited Cases

Former owner of chemical plant, at which acid addition system was designed by its employee and installed by a third-party contractor, did not “construct or repair” an improvement to real property, within meaning of ten-year statute of repose applicable to actions against persons who construct or repair an improvement, and thus the statute of repose did not apply to worker's personal injury action against former owner arising from alleged defect in the acid addition system. V.T.C.A., Civil Practice & Remedies Code § 16.009(a).

[11] Limitation of Actions 241 ⚿18

241 Limitation of Actions
241I Statutes of Limitation
241I(B) Limitations Applicable to Particular Actions
241k18 k. Particular forms of action. Most Cited Cases

Ten-year statute of repose for claims against persons who construct or repair an improvement to real property does not apply to a claim against a defendant who may have performed some function in relation to an improvement to real property but who cannot be considered a constructor or repairer of the improvement. V.T.C.A., Civil Practice & Remedies Code § 16.009(a).

[12] Negligence 272 1262

272 Negligence
272XVII Premises Liability
272XVII(K) Persons Liable
272k1262 k. Prior owners. Most Cited Cases

Negligence 272 1501

272 Negligence
272XVIII Actions
272XVIII(A) In General
272k1501 k. Nature and form of remedy. Most Cited Cases

Products Liability 313A 127

313A Products Liability
313AII Elements and Concepts
313Ak126 Design
313Ak127 k. In general. Most Cited Cases

Products Liability 313A 235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous machines, tools, and appliances. Most Cited Cases

Products Liability 313A 301

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak301 k. Nature and form of remedy. Most Cited Cases

Action by worker at chemical plant, who was injured when acid addition system caused acid to be sprayed in his face, against plant's former owner which designed system did not sound exclusively in premises liability; there was no reason why the fact that system was an-

nexed to real property would have alleviated former owner from duties that it otherwise owed with respect to the safety of the system's design.

[13] Negligence 272 ⚿1011

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1011 k. Ownership, custody and control. Most Cited Cases

In a premises liability claim, the injured claimant, as a general rule, must establish that the defendant possessed—that is, owned, occupied, or controlled—the premises where injury occurred.

[14] Negligence 272 ⚿1205(4)

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners or Occupiers
272k1205(4) k. Architects, designers, and planners. Most Cited Cases

Negligence 272 ⚿1205(5)

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners or Occupiers
272k1205(5) k. Engineers. Most Cited Cases

Negligence 272 ⚿1507.3

272 Negligence
272XVIII Actions
272XVIII(A) In General
272k1507 Time to Sue and Limitations
272k1507.3 k. Premises liability. Most Cited Cases

Chemical plant worker who suffered injuries when sprayed with acid from the plant's acid addition system could bring a common-law negligent design claim against the plant's former owner, which had installed the acid addition system, rather than a strict products liability claim, and thus worker was not required to establish the elements of a products liability claim; negligent design claims were not limited to actions against product manufacturers.

[15] Limitation of Actions 241 ⚿124

241 Limitation of Actions
241II Computation of Period of Limitation

241II(H) Commencement of Proceeding; Relation Back
241k124 k. Intervention or bringing in new parties. Most Cited Cases

Worker at chemical plant who was injured by acid addition system could join former owner of plant as defendant in his personal injury action after statute of limitations had otherwise expired, where another defendant named former owner of plant as a responsible third party, and former owner was joined within 60 days of the day it was named as a responsible third party. V.T.C.A., Civil Practice & Remedies Code §§ 16.003(a), 33.004(e) (Repealed).

[16] Negligence 272 ⚿1000

272 Negligence
272XVII Premises Liability
272XVII(A) In General
272k1000 k. Nature. Most Cited Cases

Generally, a premises owner or controller has premises defect liability if its past negligent conduct created an unreasonably dangerous condition on the premises that caused the plaintiff's injury; but if the plaintiff's injury is caused by the owner or controller's contemporaneous negligent conduct, the owner or controller has negligent activity liability.

[17] Negligence 272 ⚿1010

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1010 k. In general. Most Cited Cases

The existence of a legal duty is a threshold requirement for negligence liability, whether sounding in general negligence or premises defect liability.

[18] Negligence 272 ⚿210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases

Negligence 272 ⚿214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship between parties. Most Cited Cases

Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances.

[19] Negligence 272 ⚿1010

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1010 k. In general. Most Cited Cases

Negligence 272 ⚿1020

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1020 k. Duty to warn. Most Cited Cases

Negligence 272 ⚿1037(4)

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1034 Status of Entrant
272k1037 Invitees
272k1037(4) k. Care required in general. Most Cited Cases

Negligence 272 ⚿1040(3)

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1034 Status of Entrant
272k1040 Licensees
272k1040(3) k. Care required in general. Most Cited Cases

A special relationship that gives rise to a duty to take action to prevent harm to others is the relationship between a premises owner or operator and those present on the premises; within this context, the law imposes a duty on the premises owner or operator to take action to make the premises reasonably safe or to warn invitees and licensees of an unreasonable danger.

[20] Negligence 272 ⚿1205(7)

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners or Occupiers
272k1205(6) Contractors
272k1205(7) k. In general. Most Cited Cases

A general contractor in control of the premises has a duty to take action to make the premises reasonably safe or to warn invitees and licensees of an unreasonable danger.

[21] Negligence 272 ⚿1011

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1011 k. Ownership, custody and control. Most Cited Cases

Premises defect liability does not extend to non-owners, non-occupiers, and non-controllers of a premises.

[22] Negligence 272 ⚿1262

272 Negligence
272XVII Premises Liability
272XVII(K) Persons Liable
272k1262 k. Prior owners. Most Cited Cases

Products Liability 313A ⚿127

313A Products Liability
313AII Elements and Concepts
313Ak126 Design
313Ak127 k. In general. Most Cited Cases

Products Liability 313A ⚿235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous machines, tools, and appliances. Most Cited Cases

Former owner of chemical plant did not owe a duty to keep the plant in a safe condition or to warn those present at the plant of dangerous conditions on the premises, but former owner did owe a duty to be non-negligent in its engineering and design of an acid addition machine that injured a plant worker eight years after owner sold plant.

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Panel consists of Justices JENNINGS, SHARP and BROWN.

OPINION ON FURTHER REHEARING

HARVEY BROWN, Justice.

Jason Jenkins brought this action against Occidental Chemical Corporation after an acid addition machine designed by Occidental sprayed acid in Jenkins's face, rendering him partially blind. The jury found for Jenkins on liability and damages, but the trial court entered judgment in Occidental's favor based on two statutes of repose.[FN1] In two issues, Jenkins argues that the trial court erred in entering judgment in favor of Occidental on the basis of the statutes of repose. In three cross-points, Occidental argues we may affirm the trial court's judgment on alternative grounds because Jenkins cannot prevail on the cause of action for which the jury found in his favor and because the statute of limitations bars Jenkins's claims. We hold that neither statute of repose applies, reject Occidental's alternative grounds for affirming the trial court's judgment, and remand the case for entry of judgment on the jury's liability and damages findings.[FN2]

FN1. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009 (West 2002).

FN2. Occidental has filed a motion for en banc reconsideration of our February 14, 2013 opinion on rehearing. We vacate and withdraw our February 14 opinion and judgment, and we substitute this opinion and judgment in their place. We dismiss Occidental's motion for en banc reconsideration as moot. *See Brookshire Brothers, Inc. v. Smith,* 176 S.W.3d 30, 33 (Tex.App.-Houston [1st Dist.] 2004, pet. denied) (op. on reh'g).

***18 Background**

Occidental owned a chemical plant in Bayport. In 1992, Occidental installed an acid addition system to regulate the acidity of a chemical compound it produced. Occidental employee Neil Ackerman developed the conceptual design for the system, shepherded the design process from start to finish, and was responsible for "getting it done." He worked in collaboration with a team of Occidental employees and under the supervision of team leader Kathryn Hanneman. While Hanneman and other members of the design team were licensed engineers, Ackerman, who had an engineering degree, was not. Occidental hired a third-party engineering firm to create the detailed design drawings for the acid addition system. It also ordered some of the materials for the acid addition system and hired an independent contractor to fabricate and install the acid addition system at the plant.

Six years later, Occidental sold the plant with the acid addition system in place. Eight years thereafter, Jenkins, an operator at the plant, was partially blinded when the acid addition system sprayed acetic acid at him. Jenkins sued Occidental for negligence in designing the acid addition system.[FN3] Occidental pleaded, as affirmative defenses, that Jenkins's claim was barred by two statutes of repose—one governing claims against registered or licensed professionals who design improvements to real property and the other governing claims against those who construct such improvements. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009 (West 2002).

FN3. Jenkins brought claims against other defendants as well, but Occidental was the only remaining defendant at the time of trial. Jenkins also asserted breach of warranty and strict liability claims against Occidental, but the trial court granted a directed verdict on those claims.

After a two-week trial, the jury found in favor of Jenkins on his negligence claim, attributed seventy-five percent of the liability to Occidental, and awarded damages.[FN4] In response to the jury questions submitted by Occidental regarding its statute of repose defenses, the jury made the following findings about the acid addition system: (1) it was an improvement; (2) it was not designed by a licensed or registered engineer; and (3) it was designed under the supervision of a licensed or registered engineer. The trial court rendered a take-nothing verdict on the basis of Occidental's statute of repose defenses.

FN4. The jury assigned five percent of the liability to Jenkins and twenty percent to Equistar, the owner of the plant at the time of the injury, whom Occidental designated as a responsible third-party.

Standard of Review

[1][2][3][4] In this appeal, we must interpret the statutes of repose set forth in sections 16.008 and 16.009 of the Civil Practice and Remedies Code. The meaning of a statute is a question of law, which we review de novo. *MCI Sales & Serv., Inc. v. Hinton,* 329 S.W.3d 475, 500 (Tex.2010); *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex.2009). In construing sections 16.008 and 16.009, our primary goal is to ascertain and give effect to the legislature's intent as expressed by the words of the statute. *MCI Sales,* 329 S.W.3d at 500; *Entergy Gulf States,* 282 S.W.3d at 437. We give the words of the statute their plain and common meaning unless the statute defines the words otherwise, a different meaning is apparent from the context, or using the common meaning would lead to absurd results. *FKM* ****19*** *P'ship., Ltd. v. Bd. of Regents of Univ. of Houston Sys.,* 255 S.W.3d 619, 633 (Tex.2008). When the words of the statute are clear, they are determinative. *Entergy Gulf States,* 282 S.W.3d at 437.

[5][6] In moving for judgment notwithstanding the verdict, Occidental relied on several jury findings to support its statute of repose defenses but challenged the jury's finding that the acid addition system was not designed by an Occidental employee who was a licensed or registered engineer. Occidental asserted that it conclusively proved the opposite. It further asserted that it conclusively proved alternative elements of its statute of repose defense on which it failed to request a jury finding: that the system was planned by an Occidental employee licensed in engineering and that it was inspected by an Occidental employee licensed in engineering. A statute of repose provides an affirmative defense, and Occidental bore the burden of proving all factual requisites to the application of the statutes of repose. *See Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 121 (Tex.1996) (holding that defendant bore burden of establishing right to summary judgment on basis of statute of repose defense); *Nexen Inc. v. Gulf Interstate Eng'g Co.,* 224 S.W.3d 412, 416 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (observing that statute of repose operates as affirmative defense on which defendant bears burden of proof); *see also* TEX.R. CIV. P. 94. Unless Occidental conclusively established each element of its affirmative defense, its failure to obtain a jury finding in its favor is fatal.[FN5] *See Texaco, Inc. v. Pennzoil, Co.,* 729 S.W.2d 768, 805–06 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) (holding that, unless an affirmative defense is established as matter of law, defendant bears burden of obtaining jury findings necessary to support defense); *Whitney Nat'l. Bank v. Baker,* 122 S.W.3d 204, 207 (Tex.App.-Houston [1st Dist.] 2003, no pet.) (stating that, when affirmative defense was not submitted to jury, court reviews record to

determine whether issue was disputed or whether defense was conclusively established by evidence).

FN5. Occidental has not argued that it is entitled to any deemed jury findings.

Occidental's Statute of Repose Defenses

The trial court interpreted the jury's findings that the acid addition system was an improvement and was designed under the supervision of an engineer as establishing Occidental's right to a take-nothing judgment on the basis of its statute of repose defenses. The trial court did not specify which statute of repose—section 16.008 or section 16.009—it relied on in reaching that conclusion. In two issues, Jenkins argues that Occidental has not established a right to rely on either statute.

A. Introduction to sections 16.008 and 16.009 of the CPRC

Sections 16.008 and 16.009 of the Civil Practice and Remedies Code are ten-year statutes of repose. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 16.008, 16.009. Section 16.008 provides that a suit "against a registered or licensed architect, engineer, interior designer, or landscape architect ... who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property" may not be brought more than ten years after substantial completion of the improvement or the beginning of operation of the equipment. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). Section 16.009 provides that a suit "against a person who constructs or repairs an improvement to ***20** real property" may not be brought more than ten years after substantial completion of the improvement. TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a).

Thus, sections 16.008 and 16.009 "differ in who they protect and the object of the work protected." *Sonnier v. Chisholm–Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex.1995). Section 16.009 relates only to improvements to real property but protects a broader class of persons: those who construct or repair such an improvement. TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a); *see also Sonnier*, 909 S.W.2d at 479. Section 16.008 protects only registered or licensed design professionals, but applies to a broader category of work: improvements to real property and equipment attached to real property. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a); *see also Sonnier*, 909 S.W.2d at 479.

B. Section 16.008 does not bar Jenkins's claim against Occidental

In his first issue, Jenkins argues that the trial court erred in rendering judgment for Occidental under section 16.008 because (1) Occidental is not a registered engineering firm, (2) Occidental failed to prove conclusively that the acid addition system was designed by a registered or licensed engineer, and (3) the jury's finding that the design was supervised by a registered or licensed engineer is immaterial. Occidental does not contend that it is a registered engineering firm or that Ackerman was a registered or licensed engineer. Instead, it contends that the jury finding that the acid addition system was designed under the supervision of a licensed engineer is sufficient to establish application of the statute. Alternatively, it contends that the evidence conclusively established that the acid addition system was designed, inspected, and planned by Hanneman rather than Ackerman or any third-party. We conclude that supervision of the design by a licensed engineer does not invoke the statute, by the statute's

plain language and in light of distinctive language in its sister statute. We also conclude that Occidental did not conclusively prove that Hanneman designed, inspected, and planned the acid addition system.

1. Supervision by a licensed engineer does not, alone, implicate the protections of section 16.008

[7] By its clear and unambiguous language, section 16.008 limits its scope to claims "against a registered or licensed ... engineer ... who designs, plans, or inspects" the construction of an improvement to real property. TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). The jury found that the acid addition system was an improvement to real property. Section 16.008 thus applies to any design, planning, or inspection of the acid addition system by a registered or licensed engineer. But the jury found that the system was not designed by a registered or licensed engineer, and Occidental chose not to submit to the jury whether the system was planned or inspected by a registered or licensed engineer. Instead, Occidental asked the jury to find that the acid addition system was designed under the supervision of a registered or licensed engineer. This finding is not material to the application of section 16.008, which makes no reference to one who supervises the design of an improvement.[FN6] *See id.*

FN6. It is undisputed that Occidental is not a registered or licensed engineering firm. Therefore, it cannot argue that the entity itself was a "registered or licensed ... engineer ... who design[ed]" the acid addition system. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a).

Although our holding is dictated by the plain language of the statute, examining ***21** section 16.008 in the context of its sister statute buttresses our conclusion. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2005). Sections 16.008 and 16.009 were enacted for a similar purpose but have different parameters. *See Sonnier,* 909 S.W.2d at 479. The legislature chose to limit the class of persons protected by section 16.009 only with respect to the nature of their work: it applies to any person who "constructs or repairs an improvement to real property." *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). By comparison, the legislature chose to limit the class of persons protected by section 16.008 not only with respect to the nature of their work but also with respect to the nature of the persons: it expressly applies only to "registered or licensed" design professionals. *Id.* § 16.008(a). The legislature could have offered this protection to unlicensed persons performing the same work, but it chose not to do so.

Occidental relies on *Texas Gas Exploration Corp. v. Fluor Corp.,* 828 S.W.2d 28 (Tex.App.-Texarkana 1991, writ denied), and *Sowders v. M.W. Kellogg Co.,* 663 S.W.2d 644, 646 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.), to support its contention that section 16.008 applies when an improvement is designed under the supervision of, but not by, a registered or licensed engineer. While both opinions contain factual discussions regarding supervisory work by a licensed engineer, the holdings in these cases do not support Occidental's position.

The issue in *Texas Gas* was not whether the claims against the defendant, Fluor, fell within the scope of sections 16.008 and 16.009; rather, the issue was whether the statutes applied

retroactively and whether Fluor was estopped from relying on them. 828 S.W.2d at 30. Occidental relies on a statement in the opinion that the "design and construction [of an expansion to a gas processing plant] were both performed under the supervision of a Texas-registered professional engineer." But nothing in the opinion indicates that the expansion was not designed by a licensed engineer—a question that was not at issue. *See id.* at 30–31.

Sowders also did not address the issue presented here. In *Sowders*, the plaintiffs contended that the statute of repose for architects and engineers did not apply to their claims against M.W. Kellogg because it was a manufacturer, not a designer, of the propane unit in question. 663 S.W.2d at 646. The court held that the record did not support Sowders's contention that M.W. Kellogg was merely a manufacturer, reciting affidavit testimony that M.W. Kellogg was hired to construct and install the propane unit and that "the aforementioned engineering services were performed by or under the responsible charge of the engineers authorized to practice professional engineering in New York State." *Id.* at 649. As in *Texas Gas*, the court's reference to "supervision" relates to the construction as well as the design of the unit at issue. It does not suggest that the unit was not designed by registered or licensed engineers. *See id.; Tex. Gas Exploration*, 828 S.W.2d at 30–31.

We conclude that the jury's finding that a registered or licensed engineer supervised the design of the acid addition system does not establish Occidental's right to the protections of section 16.008.

2. Occidental did not conclusively establish that Hanneman designed, planned, and inspected the acid addition system

[8] Occidental asserts that it conclusively proved that Hanneman, a licensed engineer and the head of Occidental's design team for the project, designed the acid addition system. The jury disagreed, ***22** and there is evidence in the record that supports the jury's finding. The evidence at trial was that Neil Ackerman, who was not a registered or licensed engineer, created the conceptual design for the acid addition system. No one employed by Occidental prepared the detailed plans; Occidental contracted out the design drafting to a third-party engineering firm, HMW Design. Hanneman testified that the conceptual design originated from Ackerman. She also testified that the plant modification document for the acid addition system came from Ackerman. That document identifies Ackerman as the "originator" and includes instructions "per Neil Ackerman." According to Hanneman, the task of the originator is to "start the process." Hanneman also testified that Ackerman was in charge of shepherding the design process from start to finish. Ackerman testified that he coordinated everyone working on the project and was responsible for presenting the final design. This is some evidence from which the jury could reasonably have concluded that the acid addition system was designed by Ackerman, who was not a registered or licensed engineer, rather than by Hanneman.

Occidental points out that Hanneman initialed the final document, but this alone does not conclusively establish that Hanneman designed the acid addition system. Hanneman also testified that she was the one who decided to replace the old system for modifying the acid and Ph-balance, that the design process was collaborative, and that Ackerman "did not do this all by himself." Occidental contends that this evidence is conclusive, and therefore may not be disregarded by the jury, because "evidence of Neil Ackerman's role in the design process"

does not constitute "evidence that Hanneman did not participate in the design process." We agree that the jury may not disregard relevant, undisputed evidence. *See City of Keller v. Wilson,* 168 S.W.3d 802, 810–11 (Tex.2005).

We disagree that Hanneman's testimony was undisputed in the relevant respect. Occidental's argument misses the point for two reasons. First, section 16.008 does not extend protection to all who participated in the design process; it protects those "registered or licensed ... engineer[s]" who "design[ ], plan[ ], or inspect[ ]" improvements to real property. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a). There is *some* evidence that Ackerman personally designed, planned, and inspected the acid addition machine—not that he merely participated in a group that jointly performed these tasks—while his co-workers played other roles in the process such as task management and oversight. Second, Occidental incorrectly implies that if any licensed engineer participated in a design project in any way, then section 16.008 bars liability against unlicensed engineers for their work. Nothing in section 16.008 supports application of the statute to design work performed by unlicensed engineers; to the contrary, the statute expressly applies only to "a registered or licensed ... engineer." *See id.* Section 16.008 does not bar suit against Occidental for design work performed by an unlicensed engineer like Ackerman, which is the basis for the jury's liability finding here.

[9] Occidental alternatively asserts that it conclusively proved that Hanneman planned and inspected the acid addition system. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a) (statute applies to claims "against a registered or licensed ... engineer ... who designs, plans, or inspects" the construction of an improvement to real property). Occidental did not submit a jury question on this issue. Jenkins points out that Occidental's liability arises out of the design of the acid addition system, not ***23** the planning or inspection of the system. Assuming without deciding that Occidental could invoke section 16.008 on the basis of Hanneman's planning or inspection of the acid addition system, we conclude that Occidental did not conclusively prove that Hanneman planned and inspected the system.

Occidental relies on evidence regarding Hanneman's role in forming the design team and as head of that team. Hanneman also reviewed and commented on some of the design drawings. While this evidence demonstrates that Hanneman had some involvement in the design process, it does not conclusively establish that she personally planned and inspected the construction of the acid addition system. The jury could have reasonably concluded that Hanneman's role was supervisory in nature and that Ackerman performed the actual planning and inspection of the construction.

The jury also could have reasonably concluded that the planning and inspection of the construction of the acid addition system was performed by an employee of HMW Design, the third-party contractor Occidental hired to do the design drafting. For example, the design drawings reflect that they are "by" HMW employee Chet Wood, and those that are stamped "APPROVED FOR CONSTRUCTION" bear his initials on the approval signature line.[FN7] Hanneman testified that HMW put together the drawings and material regarding "how [the acid addition system] was to actually be constructed."

FN7. At trial, one of the reasons espoused by the court for including in its charge a

> jury question on the design of the acid addition system that was specific to a registered or licensed engineer "employed by Occidental" was the possibility that the jury might conclude that the system was designed by an HMW employee.

The jury likewise could have reasonably concluded that Hanneman planned and inspected the construction of the acid addition system. But Occidental neglected to obtain a jury finding on this issue. Occidental therefore failed to establish its statute of repose defense on this basis. *See Texaco,* 729 S.W.2d at 805–06; *Whitney Nat'l. Bank,* 122 S.W.3d at 207.

We sustain Jenkins's first issue.

C. Section 16.009 does not bar Jenkins's claim against Occidental

Jenkins argues in his second issue that the trial court erred in rendering judgment for Occidental under section 16.009 because (a) the jury's liability finding is based on negligent design rather than negligent construction, (b) Occidental admitted it did not "construct" the acid addition system, and (c) Occidental is not entitled to "respondeat repose" for the acts of third-party contractors. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). Occidental contends that it "construct[ed]" the acid addition system, within the meaning of the statute, by hiring and supervising a third-party contractor that constructed the system.

By its plain language, Section 16.009 applies only to claims brought against "a person who constructs or repairs an improvement to real property" in an action "arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement." [FN8] *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). Thus, a defendant seeking repose under Section 16.009 must ***24** prove three requisites to the statute's application:

> FN8. The Code Construction Act defines "person" as including a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (West 2005).

(1) "the defendant must be the one who *constructs or repairs*" ;

(2) "that which the defendant constructs or repairs must be an *improvement to real property* "; and

(3) the action must "aris[e] out of a defective or unsafe condition of real property or a deficiency in the construction or repair of the improvement."

Williams v. U.S. Natural Res., Inc., 865 S.W.2d 203, 206 (Tex.App.-Waco 1993, no writ) (first and second criteria) (emphasis in original); TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a) (third criterion); *see generally Sonnier,* 909 S.W.2d at 481–82 (generally endorsing *Williams's* analysis).

The jury found that the acid addition system was an improvement to real property, and Jenkins does not challenge that finding in this appeal. Therefore, the second criterion is satis-

fied. The parties' arguments focus on whether the first criterion is satisfied. We hold that it is not and therefore do not reach the third criterion, i.e., the issue of whether this is an action arising out of an unsafe condition of real property or a deficiency in the construction work. *Compare* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a) (applying to actions "arising out of a defective or unsafe condition of real property or a deficiency in the construction or repair" work), *with id.* § 16.008(a) (applying to actions "arising out of a defective or unsafe condition of the real property, the improvement, or the equipment").

1. Occidental did not conclusively establish that it was "a person who constructs or repairs an improvement to real property"

[10] Occidental bore the burden of proof on its statute of repose defenses. *See Ryland,* 924 S.W.2d at 121; *Nexen,* 224 S.W.3d at 416. Unless an affirmative defense is established as a matter of law, the defendant also bears the burden of obtaining the jury findings necessary to support the elements of the defense. *Texaco,* 729 S.W.2d at 805–06; *Whitney Nat'l. Bank,* 122 S.W.3d at 207. Over Jenkins's objection, Occidental declined to request any jury findings with respect to its role in the construction of the acid addition system. Thus, unless Occidental conclusively established that it constructed the acid addition system, its failure to obtain a favorable jury finding is fatal. *See Texaco,* 729 S.W.2d at 805–06.

Section 16.009 expressly limits its application to claims against individuals or entities who "construct[ ] or repair[ ] an improvement." TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a). A person who merely constructs a product that is later annexed to real property is not a person who "constructs or repairs an improvement." *Sonnier,* 909 S.W.2d at 481 (holding statute of repose did not apply to manufacturer of tomato chopper because it had not annexed device to real property). It is the annexation that transforms the product from personalty to an improvement, and the performance of that task by a third-party does not transform the product's designer and manufacturer into one who "construct[ed] ... an improvement." *See id.* Occidental did not build the acid addition system or annex it to real property—that work was performed by a third-party contractor. For the same reason that a manufacturer whose product is later annexed to real property is not a constructor under section 16.009, the construction and installation of the acid addition system by a third-party contractor does not transform Occidental into an entity that "constructs ... an improvement to real property."***25** TEX. CIV. PRAC. & REM.CODE ANN. § 16.009(a).

[11] Occidental's payment for the installation does not convert Occidental into a constructor. Occidental did not conclusively establish that it was a "direct actor" in the construction or repair of the acid addition system. *See Petro Stopping Ctrs., Inc. v. Owens–Corning Fiberglas Corp.,* 906 S.W.2d 618, 620 (Tex.App.-El Paso 1995, no writ) ("The statute only grants repose to the direct actors in the construction or repair of an improvement to real property."). Nor is Occidental an entity in the construction industry. *See Galbraith Eng'g. Consultants, Inc. v. Pochucha,* 290 S.W.3d 863, 867 (Tex.2009) (noting that the statute "only precludes suits against persons or entities in the construction industry that annex personalty to realty"). Section 16.009 does not apply to a claim against a defendant "who may have performed some function in relation to an improvement to real property but who cannot be considered a constructor or repairer of the improvement." *Williams,* 865 S.W.2d at 207.

Thus, Occidental did not conclusively establish that it "construct[ed] or repair[ed] an improvement to real property," and Jenkins's claim against Occidental is not within the scope of section 16.009 according to its plain language. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.009.

2. Occidental did not conclusively establish that it performed a role equivalent to that of a general contractor

Occidental observes that statutes of repose are remedial in nature and, therefore, are given a "comprehensive and liberal construction rather than a technical construction which would defeat the purpose motivating its enactment." *McCulloch v. Fox & Jacobs, Inc.,* 696 S.W.2d 918, 921 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). Occidental cites three cases to support its contention that the phrase "a person who constructs or repairs" should be liberally construed to include a property owner who provides the conceptual design, provides the parts, and hires a third-party contractor to construct or repair an improvement: *Fuentes v. Continental Conveyor & Equipment Co., Inc.,* 63 S.W.3d 518, 521–22 (Tex.App.-Eastland 2001, pet. denied); *Reames v. Hawthorne–Seving, Inc.,* 949 S.W.2d 758, 763 (Tex.App.-Dallas 1997, pet. denied); and *McCulloch v. Fox & Jacobs, Inc.,* 696 S.W.2d 918, 922 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). The cases cited by Occidental recognize that section 16.009's protection extends to parties who, though they did not personally perform the construction work at issue, were nevertheless contractually responsible for the construction work and subject to liability in the lawsuit based on that responsibility. We conclude that the reasoning of these cases is not applicable here because (a) Occidental did not conclusively establish that it was contractually responsible for the construction work or that it acted as its own general contractor and (b) its liability does not stem from any purported involvement in, or responsibility for, the construction process.

Reames addresses the applicability of section 16.009 in a situation when a general contractor is sued for construction work performed by its subcontractor. 949 S.W.2d at 763. The court reasoned that because the general contractor "bore ultimate responsibility to [the property owner]" for construction of the conveyor belt and "was involved in the actual construction of the conveyor belt," it was entitled to protection under section 16.009. *Id.* The analysis in *Reames* expressly turns on the defendant's position as the general contractor and its responsibility to the property owner. *Id.* (stating that the defendant's "relationship to the installation ***26** was that of a general contractor. Such a general contractor is protected under section 16.009."). Occidental did not conclusively prove that it had such a role.

The *Fuentes* court relied on *Reames* to hold that a conveyor belt system manufacturer hired by the property owner to "supervise and assist" in the installation of its conveyor belt system was protected by section 16.009. *Fuentes,* 63 S.W.3d at 521–22 (citing *Reames,* 949 S.W.2d at 763). The *Fuentes* court reasoned that the property owner hired the manufacturer "to supervise the installation because it wanted [the manufacturer] to bear the ultimate responsibility for the proper installation" of its own equipment. *Id.* The dual role of supervising and assisting the construction amounted to constructing an improvement. *Id.* (citing *Reames,* 949 S.W.2d at 763).

The reasoning of *Reames* and *Fuentes* is not applicable here. In both cases, the defendants

did not physically "hammer the nails and turn the screws," but they had "ultimate responsibility" for the construction, and their liability stemmed from their responsibility for that work. *See Reames,* 949 S.W.2d at 763; *Fuentes,* 63 S.W.3d at 521–22; *see also Jackson v. Coldspring Terrace Prop. Owners Ass'n.,* 939 S.W.2d 762, 768–69 (Tex.App.-Houston [14th Dist.] 1997, writ denied) (holding that statute of repose barred claims against successor-in-interest of licensor of entity that constructed pool because its potential liability "could only vicariously result from [its predecessor-in-interest] 'putting out' itself as the manufacturer of a defective construction of the pool"). The same is not true here. The evidence does establish that Occidental prepared the general conceptual design of the acid addition system and hired and paid third-party contractors to draft the detailed designs that specified "how it was actually to be constructed" and to actually construct the system. However, Occidental did not present evidence, or even argue below, that it acted as its own general contractor. *Cf. Reames,* 949 S.W.2d at 763.[FN9] Nor did Occidental present evidence that it bore the ultimate responsibility for actual construction of the acid addition system. *Cf. Fuentes,* 63 S.W.3d at 521–22; *Reames,* 949 S.W.2d at 763.

> FN9. There is some evidence that Occidental conducted a safety check on the project at some point; however, the timing, scope, details, and purpose of that safety check are not in the record.

In *McCulloch,* the Dallas Court of Appeals applied the prior version of the statute, article 5536(a), to claims brought against a community developer, Fox & Jacobs. The *McCulloch* court articulated this test for determining whether an owner is entitled to protection from the statute of repose for contractors:

> The statute was intended to apply to litigation against architects, engineers, and others involved in designing, planning or inspecting improvements to real property, as distinguished from materialmen and suppliers and from tenants and owners who possess or control the property. Thus, the critical inquiry is whether Fox & Jacobs' role in constructing the pool was more analogous to that of a builder or to an owner or supplier.
>
> 696 S.W.2d at 922 (internal citations omitted).

Unlike this case, Fox & Jacobs's role was more consistent with that of a general contractor: Fox & Jacobs not only hired contractors to create a conceptual layout and perform certain portions of the work in constructing the pool, an engineer to design the pool, and a contractor to perform the actual construction, it also supervised, inspected, and approved the construction process. *Id.* Additionally, though Fox & Jacobs was the nominal owner of ***27** the pool at the time of construction, it did not and never intended to retain possession or control over the pool after construction was completed. *Id.* Thus, Fox & Jacobs "functioned not as an owner but as a builder or supervisor." *Id.* On this basis, the court concluded: "By furnishing money, planners, engineers, and subcontractors for the construction of the pool, and by performing supervisory and inspection duties, Fox & Jacobs functioned as a 'person performing or furnishing construction ... of ... [an] improvement.' " *Id.* (ellipsis and bracketed materials in original).

McCulloch does not apply under these facts.[FN10] Occidental did not act in a role analog-

ous to the developer in *McCulloch.* Occidental was the property owner, not a general contractor or other third-party hired to manage and oversee various aspects of the construction work.[FN11] The "critical inquiry" under *McCulloch*—whether Occidental's role in the construction was more analogous to that of a builder or that of an owner or supplier—weighs against Occidental. *See McCulloch,* 696 S.W.2d at 922.[FN12]

FN10. *McCulloch* was decided under the prior version of section 16.009, which expressly extended protection to persons who "furnish [ ]" construction or repair services. 696 S.W.2d at 922. When the legislature recodifed the statute of repose in 1985, it changed the text of the statute from applying to "any person performing or furnishing construction or repair" to "a person who constructs or repairs," though the term "furnishing" remains in section 16.009's title. *Compare* Act of May 14, 1975, 64th Leg., R.S., ch. 269, § 1, 1975 Tex. Gen. Laws 649, 649, *with* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3254.

FN11. In its motion for rehearing, Occidental states that the Court's analysis is internally inconsistent because "it holds that Occidental is liable because it acted as a contractor (rather than an owner), but that it is not protected by the statute of repose [section 16.009] because it acted as an owner (rather than a contractor)." This statement inaccurately conflates three roles into two, omitting its role as "designer" of the acid addition system. The role of designer has its own, separate statute of repose (section 16.008) and therefore is not covered under section 16.009, which covers construction professionals. It is Occidental's role as designer upon which the jury based its liability finding, and it is this role that is distinct from Occidental's role as previous owner of the premises. This role brings with it the protection of section 16.008 (rather than 16.009), but Occidental is not entitled to section 16.008's protection here because the statute only protects design work by licensed professionals and the jury found that Occidental's design work was performed by an unlicensed engineer.

FN12. We do not imply that an owner who constructs an improvement to real property may not rely on section 16.009 when it personally performs construction work or, under the line of cases cited by Occidental, when it has general-contractor-like involvement in, and responsibility for, the construction work even if another party actually performs the work. But, as *McCulloch* demonstrates, mere ownership of the premises and actions appurtenant to such ownership is not sufficient; the owner must also take on a role analogous to that of a general contractor or builder, not merely that of an owner or supplier. *McCulloch,* 696 S.W.2d at 922.

We conclude that *Reames, Fuentes,* and *McCulloch* do not support Occidental's interpretation of section 16.009 as applying to this case.[FN13] And, as noted above, we ***28** further conclude that Occidental did not conclusively establish that it actually constructed the acid addition system or acted as its own general contractor overseeing the construction. Accordingly, we hold that the trial court erred in entering judgment in favor of Occidental on its statute of repose affirmative defense under either section 16.008 or 16.009.

FN13. In its motion for rehearing, Occidental states: "To avoid applying the statute's

> protection to these undisputed facts, the Court reasons that (1) the statute excludes from its protection prior owners of property who did not own, control, or possess the property at the time of the injury; and (2) the statute does not protect parties against personal-injury claims alleging negligent design." But we reach neither holding. Instead, we note that section 16.009 applies only to claims against "a person who constructs or repairs improvement to real property," and conclude that Occidental did not conclusively establish that it constructed the acid addition system. While courts have, in some cases, recognized that a general contractor or developer may rely on the statute even though it hired a subcontractor to perform the actual labor, the rationales for applying the statute in those cases are not present here.

We sustain Jenkins's second issue.

Occidental's Cross–Points

Occidental raises three cross-points, arguing that if the trial court's judgment cannot be affirmed on the ground upon which it was rendered, it is nevertheless the correct outcome on these alternative grounds: (1) the only cause of action available to Jenkins is a premises liability action for which he failed to lead, prove, or obtain a jury finding; (2) Jenkins cannot recover under a negligent design theory because he did not prove the elements of a products liability claim; and (3) Jenkins's claim is barred by the statute of limitations. We reject each of these alternative grounds.

A. Jenkins's claim arises out of Occidental's design of the acid addition system, not any ownership or control of the premises

[12] Occidental contends that because Jenkins was injured while operating an improvement to real property, his claim sounds exclusively in premises liability. Because Occidental no longer owned the plant at the time of Jenkins's injury, Occidental asserts that it cannot be held liable for its negligent design of the acid addition system. We do not find support for Occidental's position in the cases on which it relies. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992); *McDaniel v. Cont'l. Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex.App.-Dallas 1994, writ denied) (op. on reh'g); *Billmeier v. Bridal Shows, Inc.*, No. 02–08–00314–CV, 2009 WL 1176441, at *3 (Tex.App.-Fort Worth April 30, 2009, no pet.) (mem. op.).

[13] *Keetch* and *Billmeier* do not involve injuries caused by improvements to real property; they involve injuries caused by a slippery spot on the floor. *Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *2. These cases distinguish between injuries arising out of an owner or operator's contemporary negligent activity and injuries arising out of a premises defect. Unlike the issue presented in this appeal, the injured plaintiff's claims were against the defendant who owned or controlled the premises at the time of the accident and therefore had the ability to make safe or warn of the condition.[FN14] *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *3–4.[FN15] These cases do ***29** not address whether premises liability claims are the only available claims when an injury results from the negligent design of an improvement to real property by a party who neither owns nor controls the premises at the time of the injury. *See Keetch*, 845 S.W.2d at 264; *Billmeier*, 2009 WL 1176441, at *3–4.[FN16]

FN14. In a premises liability claim, the injured claimant, as a general rule, must establish that "the defendant possessed—that is, owned, occupied, or controlled—the premises where injury occurred." *Allen Keller Co. v. Foreman,* 343 S.W.3d 420, 426 (Tex.2011) (quoting *Wilson v. Tex. Parks and Wildlife Dept.,* 8 S.W.3d 634, 635 (Tex.1999) (per curiam)).

FN15. Taken out of context, *Billmeier's* articulation of the distinction between negligent activity claims and premises defect claims may be read broadly. *See Billmeier,* 2009 WL 1176441, at *3 ("When the alleged injury is the result of the premises's condition, the injured party can only recover under a premises defect theory.") (citing *H.E. Butt Grocery Co. v. Warner,* 845 S.W.2d 258, 259 (Tex.1992)). But read in context, the *Billmeier* court addressed the distinction between the "two situations" in which an "owner or occupier may be liable for negligence"—premises defects and negligent activities—not the world of potential liability for a non-owner, non-occupier of land. *See id.*

FN16. Occidental asserts that *Keetch* holds that a person injured by a condition of real property may only bring a premises liability claim—not a negligent activity claim—even if the defendant is alleged to have negligently created the condition. We recognize that, "[a]t some point, almost every artificial condition can be said to have been created by an activity" and that negligent activities cannot be so broadly construed as to "eliminate all distinction between premises conditions and negligent activities." *Keetch,* 845 S.W.2d at 264. However, *Keetch* concerns claims against property owners and occupiers who have the ability to make the condition safe or warn of its existence. *See Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 776 (Tex.2010) ("[P]remises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe."). The duty to make safe or warn does not apply to a former property owner. We decline to hold that a former property owner owes no duty, and we conclude that the best statement of the duty owed by a former, industrial property owner who created a dangerous condition through its own design employees is encapsulated in the general negligence principles that apply to any other design professional.

McDaniel, on the other hand, does involve an injury caused by an improvement to land. 887 S.W.2d at 171. But *McDaniel* does not support Occidental's position. McDaniel died when a balcony at an apartment complex collapsed on top of her. *Id.* at 169. Her heirs sued the independent contractor who remodeled and extended the balcony eight years before it collapsed, the joint venture that owned the apartment complex at the time of remodeling, and the joint venture's individual members. *Id.* In the portion of the Dallas Court of Appeals's opinion relied on by Occidental, the court held that McDaniel could only recover against the former property owners under a premises liability theory because her injury arose out of the condition of the balcony rather than concurrent negligent activity by the owners. *Id.* at 171–72. There was no claim that the former property owners designed or constructed the balcony, i.e., that they created the dangerous condition.[FN17] On the other hand, the jury found the independent contractor liable for his negligence in building the remodeled balcony. *Id.* at 170. The independent contractor did not appeal that finding.

FN17. There was a jury finding that the property owner was negligent in hiring and supervising the contractor. *McDaniel,* 887 S.W.2d at 170. Such a claim is not covered by *Strakos v. Gehring,* 360 S.W.2d 787, 795–96 (Tex.1962), which we discuss below.

Here, Occidental played two distinct roles—the role of the designer of the faulty improvement, who was subject to liability, and the role of the former premises owner, who was not subject to liability. But the jury's liability finding against Occidental relies on the first role and not the second role. Thus, Occidental is subject to liability only for its design work.[FN18]

FN18. This Court has recently explained in another context that, when a party takes on multiple roles with respect to an event or transaction, the fact that one of those roles is one for which there is no liability (former premises owner) does not shield the party from liability arising out of the other roles (designer of a faulty acid addition system). *See Strebel v. Wimberly,* 371 S.W.3d 267, 279–81 (Tex.App.Houston [1st Dist.] 2012, pet. filed) (holding that role as limited partner with no duty did not insulate party from liability for other, non-passive role in partnership, which did give rise to duty).

We see no reason why the fact that Occidental's acid addition system was annexed***30** to real property would alleviate Occidental from duties otherwise owed with respect to the safety of the system's design. *Cf.* RESTATEMENT (SECOND) OF TORTS § 385 ("One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.").[FN19] In cases where an improvement to real property was designed by a licensed engineer, section 16.008's statute of repose has been applied to place a time limit on just such liability. *E.g., Galbraith Eng'g.,* 290 S.W.3d at 869 (applying statute of repose to cut off liability of engineer who designed drainage system for home). Nor do we see any reason why Occidental's status as a former premises owner would alleviate it from duties owed with respect to the negligently designed acid addition system, which continued to pose a danger after Occidental no longer owned the premises. *Cf. Lefmark Mgmt. Co. v. Old,* 946 S.W.2d 52, 54 (Tex.1997) (stating that "a person who creates a dangerous condition owes" duty of care even if person is not in control of premises at time of injury); *Sci. Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 912 (Tex.1997) ("[U]nder some circumstances, one who creates a dangerous condition, even though he or she is not in control of the premises when the injury occurs, owes a duty of care."); *Strakos v. Gehring,* 360 S.W.2d 787, 795–96 (Tex.1962) (observing that liability of premises owner or operator for failure to warn of or make safe dangerous premises condition does not necessarily supplant liability of creator of danger).

FN19. According to Occidental, this portion of the opinion "incorrectly suggests" that section 385 of the Restatement "provides that property owners are forever liable for improvements made during their ownership." We make no such suggestion. Our holding is expressly dependent on Occidental's role in the design of the acid addition system, not its role as previous owner of the plant. Put another way, we do not hold that Occidental would have owed any duty to Jenkins if it had merely owned the plant at

the time of the acid addition system's design and installation.

Occidental contends that *Roberts v. Friendswood Development Co.,* 886 S.W.2d 363, 367–68 (Tex.App.-Houston [1st Dist.] 1994, writ denied), "precludes liability" against Occidental because that case holds that a former property owner is not liable for dangerous conditions created by the owner before the conveyance.[FN20] We disagree.***31** In *Roberts,* the plaintiff broke his neck diving into a lake from a pier located at a park. *Id.* at 364. Friendswood conveyed the park to Kingwood Service Association, which owned the park at the time of the accident. *Id.* at 366. The pier and boat ramp from which the plaintiff dived were on property belonging to the City of Houston. *Id.*[FN21] The Court began by observing that former owners of real property generally "are not liable for injuries caused by dangerous conditions on real property after conveyance," a proposition we reaffirm today. *Id.* at 367–68. We observed that liability for a dangerous condition on a property "arises only if the party has ownership, possession, control, *or* had itself created the dangerous condition." *Id.* at 366 (emphasis added) (citing *Davis v. Esperado Mining Co.,* 750 S.W.2d 887, 888 (Tex.App.-Houston [14th Dist.] 1988, no writ)). Because Friendswood did not own the premises at the time of the accident, any duty it owed "d[id] not stem from an ownership of the premises." *Id.* That conclusion is consistent with our holding that Occidental does not have any liability arising out of its status as a former owner. But we did not discuss the exception for the creation of a dangerous condition on property in *Roberts,* nor did we discuss—because the plaintiff-appellant's brief did not cite it—*Strakos.* 886 S.W.2d at 366–67; See Brief of Appellant in Cause No. 01–93–492–CV.[FN22] *Roberts* does not answer whether a former plant owner who uses architects in its employ to design an improvement to property should be accountable under general negligence principles for that design work.

FN20. Occidental contends that this Court held in *Roberts* that the former property owner, Friendswood, was not liable even though it "created a dangerous condition on the property before selling it." The opinion's introduction does state that the plaintiff alleged that the former property owner "created or permitted the creation of an unreasonably dangerous condition." *Id.* at 365. But the opinion discusses only one action by Friendswood that could be considered the creation of a dangerous condition: many years before the accident, when it still owned the park, Friendswood dredged the bottom of Lake Houston within fifty yards of the pier. *Id.* at 368.

To be more precise, the plaintiff's pleading stated that an uneven dangerous contour on the bottom of the lake was "created by ... [the construction contractor] at the express request and on behalf of [the owner]," not the developer. Clerk's Record, Cause 01–93–492–CV, vol. 2, at 252 (Plaintiff's Third Am. Original Pet., at 5). But the opinion discusses this allegation in connection with its analysis of whether Friendswood failed to disclose a dangerous condition—an inquiry under a different exception to the general no-duty rule, the vendor liability recognized in certain situations by section 353 of the Restatement (Second) of Torts. *See Lefmark Mgmt. Co. v. Old,* 946 S.W.2d 52, 54 (Tex.1997) (noting that *Roberts* relied on *First Fin. Dev. Corp. v. Hughston,* 797 S.W.2d 286, 290–91 (Tex.App.-Corpus Christi 1990, writ denied), which in turn relied on RESTATEMENT (SECOND) OF TORTS § 353, a provision the Texas Supreme Court has never adopted). Jenkins did not submit a jury

issue for liability under section 353. Thus, we do not discuss whether the developer had independent liability for the creation of the condition.

FN21. The Court therefore agreed with Friendswood's assertion that it "never owned" the pier and boat ramp and that they were located on land "belonging to the City of Houston." See Clerk's record, Vol. 1 at 20.

FN22. Similarly, Occidental's reliance on *First Financial Development Corp. v. Hughston,* 797 S.W.2d 286, 291 (Tex.App.-Corpus Christi 1990, writ denied), is misplaced. The plaintiff there also did not rely on *Strakos* or its progeny. Instead, the plaintiff sought to impose liability through the vendor-liability provisions in sections 352 and 353 of the Restatement. *Id.* at 290–91. Although the *Hughston* court stated that the plaintiff could not avoid the Restatement's limitations on a developer's vendor-liability by "[a]droit phrasing of the pleadings to encompass design defects, per se negligence, or any other theory of negligence," *id.* at 291, there is no indication of any allegation or evidence that the developer designed or otherwise created the allegedly dangerous stairwell. To the contrary, the court affirmed the portion of the judgment holding the construction contractor liable for failing to comply with several building codes with respect to the design of the stairwell. *Id.* at 293.

In its motion for reconsideration, Occidental contends that we have misread the factual background and allegations in *Hughston* because the opinion "plainly states that the plaintiff alleged that the developer engaged in 'various acts of negligence connected with the design, construction and maintenance of the stairway.' " We disagree. The opinion does not state that the developer engaged in these acts; it merely describes the allegations generally against the defendants as a whole, one of whom was a construction company. There is no indication in the opinion that the developer itself designed the stairs.

We therefore reject Occidental's contention that premises liability law bars Jenkins's claim against Occidental. We overrule Occidental's first cross-point.

B. Jenkins's claim is not a strict products liability claim against a product manufacturer

***32** [14] Occidental next contends that, to recover for negligent design, Jenkins was required to establish the elements of a products liability claim, which Occidental identifies as requiring proof that (1) the acid addition system was a product, (2) the system was placed in the stream of commerce, and (3) Occidental was a manufacturer. Jenkins responds that these are elements of a claim for strict products liability, not his common law negligent design claim. There is no dispute that Jenkins cannot prevail on the strict products liability cause of action that he did not bring. The question is whether Texas recognizes a negligent design claim outside the bounds of a strict products liability claim against a manufacturer, and if so, whether a party bringing such a claim must prove the three elements challenged by Occidental here.

The Supreme Court of Texas has recognized that a claim for negligent design or negligent manufacturing is legally distinct from a strict products liability claim. *See Am. Tobacco Co.,*

Inc. v. Grinnell, 951 S.W.2d 420, 437 (Tex.1997) ("The [plaintiff's] negligent design and manufacturing claims are conceptually distinguishable from the strict liability claims."). FN23 Occidental relies on *American Tobacco* for the proposition that a negligent design claim can only be brought against a manufacturer, quoting a portion of the Court's opinion distinguishing negligent design claims from strict products liability claims: "While strict liability focuses on the condition of the product, '[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.' " *Id.* (quoting *Caterpillar, Inc. v. Shears,* 911 S.W.2d 379, 384 (Tex.1995)). We do not read this quote as eliminating common law negligence claims against designers of products who are not manufacturers. The *American Tobacco* Court discussed the duties at issue in terms of a manufacturer's duties because the defendant in the case was a manufacturer. *See id.*

> FN23. The Court further noted that a party cannot prevail on a negligent design claim without proving the existence of a safer alternative design. *Am. Tobacco,* 951 S.W.2d at 437. Here, the jury's finding that Occidental's negligent design caused Jenkins's injury was predicated on the existence of a safer alternative design. Occidental has not challenged this jury finding.

Texas courts have also recognized the general negligence duty owed by architects and engineers who perform design work but do not place their work in the stream of commerce (and thus are not subject to strict products liability). FN24 *See Palmer v. Espey Huston & Assocs., Inc.,* 84 S.W.3d 345, 356 (Tex.App.-Corpus Christi 2002, pet. denied) ("Because the breakwater was not put in the stream of commerce, strict liability in tort does not apply. Rather, this case is about the design of a breakwater to which we apply principles of ordinary negligence."); *Hanselka v. Lummus Crest, Inc.,* 800 S.W.2d 665, 666 (Tex.App.-Corpus Christi 1990, no writ) (stating, with respect to allegedly defective design of plant's sludge disposal system, "This is not a product defect case in which, because products have been put into the stream of commerce, strict liability applies; but rather, it is a case about design of a factory to which we apply principles of ordinary negligence.").

> FN24. A "products liability action" is statutorily defined as an action "against a manufacturer or seller," each of which is defined only to include persons who placed products or component parts in the stream of commerce. TEX. CIV. PRAC. & REM.CODE ANN. § 82.001(2), (3), (4) (West Supp.2012).

We note that the legislature has enacted separate statutes of repose for strict liability***33** claims against sellers and manufacturers and claims against design professionals who design improvements to real property. *Compare* TEX. CIV. PRAC. & REM.CODE ANN. § 16.008(a) (ten-year statute of repose for design professionals), *with id.* § 16.012(b) (West 2002) (fifteen-year period of repose for manufacturers and sellers). Additionally, chapter 150 of the Civil Practice and Remedies Code places certain procedural requirements on claims against licensed or registered architects, engineers, land surveyors, and landscape architects. *See id.* §§ 150.001–003 (West 2011). Cases governed by this chapter have involved negligence claims against non-manufacturers based on the design of improvements to real property. *See, e.g., Sharp Eng'g. v. Luis,* 321 S.W.3d 748, 752 (Tex.App.Houston [14th Dist.] 2010, no pet.) (concluding section 150.002 was not satisfied with respect to carpenter's claim against

engineers for negligent design of roof that carpenter fell through while performing framing work); *Elness Swenson Graham Architects, Inc. v. RLJ II–C Austin Air, LP*, No. 03–10–00805–CV, 2011 WL 1562891, at *5 (Tex.App.-Austin Apr. 20, 2011, pet. denied) (mem. op.) (holding that section 150.002 was satisfied with respect to hotel owner's claims against former owner's architect for negligent design of foundation and drainage).

Occidental relies on *New Texas Auto Auction Services, L.P. v. Gomez De Hernandez*, for the proposition that Jenkins was required to prove that the acid addition system was a product and that Occidental placed it in the stream of commerce. *See* 249 S.W.3d 400, 402 (Tex.2008) (holding that auctioneer who handled sale of car between seller and buyer could not be held liable for allegedly defective condition of car). But *New Texas Auto Auction* did not involve a common law negligent design claim. *See id.* Instead, it involved claims against an auctioneer for strict products liability and for negligent failure to replace the tires on a car it auctioned off. *See id.* The *New Texas Auto Auction* Court held that the auctioneer had no duty to inspect or replace the tires and could not be held liable in strict products liability because it was not actually the seller of the vehicle. *See id.* at 404. The Court observed that the limitation of strict liability claims to products placed in the stream of commerce "arises from the justifications for strict liability itself." *Id.* at 403–04, 405. Jenkins did not assert a strict liability claim. Occidental cites to no case that holds or otherwise indicates that the stream-of-commerce requirement has be extended to ordinary negligence actions brought against non-manufacturers.

We conclude that Jenkins asserted a claim for negligence in the design of the acid addition system, not a claim for strict products liability. The elements that Occidental asserts Jenkins has not proved are not elements of his claim. The jury found that Occidental was negligent in its design of the system—including a safer alternative design finding—and that this negligence proximately caused Jenkins injuries. Occidental has not challenged these jury findings. Nor has Occidental asserted that it did not owe a duty to Jenkins with respect to its design of the acid addition system, except to the extent that it argues that only a property owner or operator may be held liable for injuries caused by improvements to real property—a contention we have rejected.

We overrule Occidental's second cross-point.

C. The statute of limitations does not bar Jenkins's claim

[15] Finally, Occidental contends that the trial court's take-nothing judgment can be affirmed on the alternative ground that Jenkins's claim was barred by the statute ***34** of limitations. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(a) (West Supp.2010). Jenkins was injured on April 21, 2006. Jenkins joined Occidental to this action on July 21, 2008, more than two years after the injury.[FN25] Jenkins points out that his joinder of Occidental was timely because it was less than sixty days after another defendant, Sperian, named Occidental as a responsible third-party. *See id.* § 33.004(e) (repealed 2011) ("If a person is designated under this section as a responsible third-party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third-party.").[FN26] Occidental argues that Jenkins should not be permitted to rely on the joinder rule for responsible third parties because Sperian's naming of Occidental as a

responsible third-party was the result of collusion between Sperian and Jenkins. But Occidental does not support this accusation with evidence of collusion in the record. We therefore decline to consider whether section 33.004(e) would be rendered inapplicable by collusive behavior between litigants. *See* TEX.R.APP. P. 38.1(i) (requiring that parties support their appellate arguments with citations to the record when appropriate); *Nguyen v. Kosnoski,* 93 S.W.3d 186, 188 (Tex.App.-Houston [14th Dist.] 2002, no pet.).

FN25. Jenkins had previously sued and nonsuited Occidental.

FN26. The legislature has now repealed section 33.004(e), and it will not apply to claims filed on or after September 1, 2011. Acts of May 30, 2011, 82nd Leg., R.S., ch. 203, §§ 5.02, 6.01–.02, 2011 Tex. Sess. Law Serv. ch. 203.

We overrule Occidental's third and final cross-point.

Occidental's Arguments on Rehearing

On rehearing, Occidental shifts its primary focus from the statutes of repose to its first alternative ground for affirming the trial court's judgment—that a premises defect claim is the exclusive negligence claim available for an injury arising out of a "condition" of property rather than concurrent negligent activity. Occidental correctly distinguishes a premises owner, operator, or controller's two types of liability: premises defect liability and negligent activity liability. But Occidental did not own, operate, or control the plant when Jenkins was injured, and its liability does not arise out of any ownership, operation, or control of the premises. Forcing injured third parties like Jenkins to frame negligent design claims as if they were premises liability claims either expands the duty to "warn or make safe" to architects, engineers, and other design professionals or it insulates them from liability to third parties injured by their negligent work. This is not and has not ever been the law in Texas.

A. Occidental's liability is neither contingent on, nor relieved by, Occidental's prior ownership of the plant

In its first issue on rehearing, Occidental asserts that the Court's holding here "upends settled Texas law by permitting recovery against a former premises owner years after the property's conveyance." As discussed above, the jury held Occidental liable based on its negligence in designing the acid addition machine, not based on its previous ownership or control of the plant.

We are unpersuaded by Occidental's reliance on a 1986 California case—*Preston v. Goldman,* 42 Cal.3d 108, 227 Cal.Rptr. ***35** 817, 720 P.2d 476 (1986)—to argue that former premises owners have no liability for their on-premises design work. In *Preston,* visitors to a private home sued the home's former owners after their child, left unattended, fell in a pond designed and built by the former owners. *Id.* at 476–77. The pond was not enclosed by a fence but was surrounded by a twelve inch wall. *Id.* at 476. The trial court ruled that the former homeowners had no liability as a matter of law under general negligence principles, but submitted a jury question under the vendor-liability provisions contained in sections 352 and 353 of the Restatement (Second) of Torts. *Id.* at 477, 479. The jury found no liability under that question. *Id.* at 477. The plaintiff appealed contending that the former owners were liable un-

der general negligence principles because they created the danger and that the vendor-liability jury issue was incorrect. *Id.*

Preston is inapplicable here for three reasons. First, the analysis in *Preston* centers on the defendants' status as private homeowners rather than professional engineers or contractors, and the *Preston* court expressly limited its holding to that scenario. *See id.* at 487 n. 10 ("Our holding here relates only to the liability of 'do-it-yourself home improvers and is not intended to affect, establish, or diminish any liability of commercial builders, contractors or renovators.").[FN27] Indeed, part of the court's rationale was that California homeowners generally would not be insured for an injury suffered after conveyance of the property. *Id.* at 483. No such analysis has been offered here. Second, unlike *Strakos*, *Preston* focused on "ownership and control as a fundamental requirement for ascribing liability," rather than the creation of a dangerous condition. *Id.* at 483. *Strakos* also rejected the accepted work doctrine, a doctrine that eliminated a defendant's liability after work was accepted because the defendant no longer controlled the property. *Strakos*, 360 S.W.2d at 790 (explaining that liability should not exist day before contractor's work is accepted and end day it is accepted and that, while one "who assumes control over a dangerous condition left by a contractor may be liable," it "does not necessarily mean that he who creates the danger should escape liability"). Third, the defect in *Preston*—the design and construction of the pool—was "a patent one as a matter of law." 227 Cal.Rptr. 817, 720 P.2d at 485.

> FN27. Our opinion also should not be read to impose liability on former home owners who, while they owned the home, created a dangerous condition through their design or construction work or their participation in design or construction work. Whether *Strakos* recognizes liability under those circumstances is not before us; we only address *Strakos's* application for a dangerous condition created by an industrial plant owner who employed design professionals and who designed the improvement using its own staff.

Moreover, other jurisdictions have faced more factually analogous circumstances and have rejected arguments similar to Occidental's. These cases have imposed liability on former plant owners whose negligent design work resulted in an injury to a third-party after the sale of the plant to a new owner. *See Stone v. United Eng'g, a Div. of Wean, Inc.*, 197 W.Va. 347, 475 S.E.2d 439, 443–44 (.1996) (holding former plant owner liable for its negligent design of conveyor belt); *Dorman v. Swift & Co.*, 162 Ariz. 228, 782 P.2d 704, 706–08 (1989) (holding former plant owner liable for negligent design of conveyor belt); *see also Carroll v. Dairy Farmers of Am., Inc.*, No. 2–04–24, 2005 WL 405719, at *6 (Ohio Ct.App. 3rd 2005) (not designated for publication) (finding fact issue as to whether former plant owner was negligent ***36** in its design, fabrication, and installation of support platform).[FN28]

> FN28. Occidental relies on *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 236 Mont. 330, 769 P.2d 1249, 1252 (1989) in its motion for rehearing. *Papp* held that the former owner of an oil separation facility who had dismantled and rebuilt the facility was not liable for its reconstruction due to the "accepted work doctrine." *See id.* at 1256–57. But Texas long ago rejected the "accepted work doctrine." *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 424 (Tex.2011) (citing *Strakos*, 360 S.W.2d at 791).

B. The distinction between negligent activity and premises defect liability governs an owner or controller's liability

[16] In its second issue on rehearing, Occidental argues that Jenkins's injury was caused by an unreasonably dangerous premises condition and therefore will only support a premises liability claim. Occidental invokes the distinction between premises defect liability and negligent activity liability—two distinct categories of negligence liability a premises owner or controller may have, which are governed by different liability standards. *See, e.g., Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 775 (Tex.2010) ("As to landowners, we have recognized negligent-activity and premises-liability theories of liability.").[FN29] But Occidental neither owned nor controlled the plant at the time of Jenkins's injury. For the reasons discussed below, we decline to impose the elements of a premises defect claim on the jury's negligent design finding. *See e.g., Barzoukas v. Found. Design, Ltd.,* 363 S.W.3d 829, 838 (Tex.App.-Houston [14th Dist.] 2012, pet. filed) (op. on reh'g) (finding question of fact on negligence claim against engineering firm based on foundation design work); *Goose Creek Consol. Indep. Sch. Dist. of Chambers & Harris Cntys., Tex. v. Jarrar's Plumbing, Inc.,* 74 S.W.3d 486, 495 (Tex.App.-Texarkana 2002, pet. denied) (holding that school district could recover against plumbing subcontractor for negligent construction of pipes); *J.D. Abrams, Inc. v. McIver,* 966 S.W.2d 87, 93 (Tex.App.-Houston [1st Dist.] 1998, pet. denied) (holding that contractor owed general negligence duty to third-party by dangerous condition contractor created on road); *Thomson v. Espey Huston & Assocs., Inc.,* 899 S.W.2d 415, 422 (Tex.App.-Austin 1995, no writ) (reversing summary judgment on negligence claim against engineering firm for design work except as barred by economic loss rule); *McKinney v. Meador,* 695 S.W.2d 812, 814–15 (Tex.App.-Tyler 1985, writ ref'd n.r.e.) (affirming judgment against engineers and contractors based on negligent design and construction of airport runway); *Hyatt Cheek Builders–Eng'rs Co. v. Bd. of Regents of Univ. of Tex. Sys.,* 607 S.W.2d 258, 264 (Tex.Civ.App.-Texarkana 1980, writ dism'd) (holding that general negligence question properly submitted issue of contractor's negligent installation of water pipe).

> FN29. Generally, a premises owner or controller has premises defect liability if its past negligent conduct created an unreasonably dangerous condition on the premises that caused the plaintiff's injury; but if the plaintiff's injury is caused by the owner or controller's contemporaneous negligent conduct, the owner or controller has negligent activity liability. *See, e.g., Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 775 (Tex.2010); *Timberwalk Apartments, Partners, Inc. v. Cain,* 972 S.W.2d 749, 751 (Tex.1998).

1. *Wyckoff v. George C. Fuller Contracting Co.*

On rehearing, Occidental relies on a recent case out of the Dallas Court of Appeals: *Wyckoff v. George C. Fuller Contracting Co.,* 357 S.W.3d 157 (Tex.App.-Dallas 2011, no pet.). In *Wyckoff* a visitor at a home sued the homeowner and homebuilder***37** after she fell on the home's steps. *Id.* at 164. She asserted a premises liability claim against the homeowner and a general negligence claim against the homebuilder. *Id.* The court held, however, that the injured plaintiff's claims against both defendants sounded exclusively in premises liability.[FN30] *Id.* And although the plaintiff did not contend that the homebuilder owned, occupied, or controlled the home at the time of her injury, the court held that the homebuilder owed her the

same duty that the homeowner did: "the duty owed to a licensee." *Id.* The court then affirmed a summary judgment for the defendant on the ground that the plaintiff had actual knowledge of the dangerous conditions of the stairs—poor lighting, non-uniform shape, and lack of a handrail. *Id.* at 165–66.

> FN30. The *Wyckoff* court cited *Keetch* and *Scroggs v. Am. Airlines, Inc.*, 150 S.W.3d 256, 263 (Tex.App.-Dallas 2004, no pet.). But both of those cases dealt with the distinction between negligent-activity and premises-defect theories of recovery against a premises owner. *See Keetch*, 845 S.W.2d at 264; *Scroggs*, 150 S.W.3d at 263. Neither addressed the duty owed by a non-owner, non-operator who was negligent in providing professional design services.

We disagree with the *Wyckoff* court's conclusion that a homebuilder, who neither owns nor controls the premises, owes the same duty the homeowner owes to licensees on the premises. To the extent the *Wyckoff* court may be read as holding that any claim for an injury not caused by contemporaneous negligent activity may only be brought as a premises defect claim, we would disagree with that holding as well. To the extent the *Wyckoff* court held that a plaintiff cannot recover for a design defect of which she had actual knowledge at the time of the injury, that holding is not implicated by the facts of this case.

2. We decline to adopt *Wyckoff's* extension of premises liability

[17][18][19][20] The existence of a legal duty is a threshold requirement for negligence liability—whether sounding in general negligence or premises defect liability. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex.2006). "Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex.2000). One "special relationship" that gives rise to a duty to take action to prevent harm to others is the relationship between a premises owner or operator and those present on the premises; within this context, the law imposes a duty on the premises owner or operator to take action to make the premises reasonably safe or to warn invitees and licensees of an unreasonable danger. *See State v. Williams*, 940 S.W.2d 583, 584 (Tex.1996) (per curiam). The law imposes this same duty on a general contractor in control of the premises. *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex.1997); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex.1985).

[21] But the Texas Supreme Court has never extended the duty to warn or make safe to defendants who did not own, occupy, or control the premises at the time of the plaintiff's injury. *See Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 426 (Tex.2011) (holding that engineering firm, whose work was dictated by and complied with contractual specifications, had no duty to warn of dangerous condition on premises); *Mathis*, 189 S.W.3d at 845 (holding that engineer did not owe duty to keep premises safe and did not owe any duty with respect to hole on premises engineer neither created nor agreed to make ***38** safe); *see also Martinez*, 941 S.W.2d at 911 (holding that defendant properly established that it did not owe premises liability duty because it did not own, occupy, or control premises where injury occurred but that defendant was not entitled to traditional summary judgment because it failed to address duty arising out of alleged creation of dangerous condition). In the absence of Supreme Court authority for doing so, we decline to expand premises defect liability to non-owners, non-

controllers of premises.

Having declined to extend premises defect liability to non-owners, non-occupiers of premises, we likewise decline to extend the premises-defect/negligent-activity dichotomy to claims against such defendants. We do so for three reasons. First, it encourages expansion of premises defect duties to parties who neither own nor control the premises, as demonstrated in *Wyckoff*, 357 S.W.3d at 163–64. Second, if the test for whether premises defect principles apply were merely whether the injury resulted from a concurrent negligent activity or a "condition of premises," without regard to the nature of the defendant or the defendant's duties, a wide variety of claims would be collapsed into premises defect claims. Third, the elements of the duty owed by an owner, occupier, or controller of premises are not necessarily compatible with the duties (if any) owed by other parties, such as design professionals.

[22] For all of these reasons, we hold that Occidental did not owe a duty to keep the plant in a safe condition or to warn those present at the plant of dangerous conditions on the premises, but Occidental did owe a duty to be non-negligent in its engineering and design of the acid addition machine. Because the jury held that Occidental breached the latter duty, we are not persuaded by Occidental's arguments on rehearing.

Motion for En Banc Reconsideration

In its April 2013 motion for *en banc* reconsideration, Occidental raises the Texas Supreme Court's holding in *In re Texas Department of Transportation*, 218 S.W.3d 74, 75 (Tex.2007), as a basis for affirming the trial court's judgment. In that case, the Court held that a plaintiff's claim against TxDOT for its negligent design decisions regarding a guardrail sounded exclusively in premises liability, not negligence. *Id.* at 77–78. The design claim against TxDOT could not proceed under general negligence principles because the design was not "an activity contemporaneous with the occurrence." *Id.* at 78. The plaintiff's claim was "based on the property itself being unsafe," which is a premises liability claim. *Id.* at 77–78. We do not read that *per curiam* opinion as limiting the scope of *Strakos*, which it did not discuss. Similarly, we do not interpret it as revising the longstanding application of general negligence principles for claims against designers and constructors of dangerous property conditions by creating the sweeping proposition that even persons who do not own, possess, or control a premises but who create a dangerous condition on it can only be sued for premises defects. Rather we interpret *Texas Department of Transportation* as another in a long-line of Texas cases that precludes a plaintiff from recasting a premises liability claim—a claim against the owner, occupier, or party in control of the premises (in that case the area adjacent to the road where the guardrail was installed)—as a negligence claim.[FN31] We are not persuaded that *Texas Department of Transportation* requires us to change our disposition of this case.

> FN31. The Attorney General's brief in that case framed the issue in those terms by quoting the plaintiffs' allegations that TxDOT " 'shared control over the bridge' " during the " 'relevant time period.' " Brief on the Merits of Texas Dep't of Transportation at 3, No. 06–0289 (July 28, 2006).

Conclusion

This is an unusual case in which a former plant owner performed its own design work for

an improvement to real property. Section 16.008 is the statute of repose that would typically apply to and limit the time for bringing a claim against a defendant in Occidental's position, but Occidental is not entitled to that defense because the jury found that it allowed an unlicensed, unregistered engineer to design the acid addition system. Occidental's efforts to invoke Section 16.009, as an alternative to Section 16.008, are the equivalent of trying to fit a square peg into a round hole—Occidental did not "construct[ ] or repair[ ]" the acid addition system, and we will not read this language to mean something it does not say. Occidental's alternative grounds for affirming the trial court's judgment require us to treat Jenkins's claim against Occidental as if it were based on Occidental's status as the former property owner or as if it were a strict liability products claim. But these are not the claims Jenkins pleaded and tried.

We therefore reverse the trial court's take-nothing judgment and remand for entry of judgment in favor of Jenkins based on the jury's findings on liability, proportionate responsibility, and damages, as well as other matters necessary to calculate damages and interest.

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Tab F

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-09-01140-CV

JASON JENKINS, Appellant

V.

OCCIDENTAL CHEMICAL CORPORATION, Appellee

Appeal from the 295th District Court of Harris County. (Tr. Ct. No. 2007-73468).

This case is an appeal from the final judgment signed by the trial court on October 6, 2009. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the trial court's judgment. Accordingly, the Court **reverses** the trial court's judgment and **remands** the case for entry of judgment in favor of appellant Jason Jenkins in accordance with the jury's findings on liability, proportionate responsibility, and damages, as well as other matters necessary to calculate damages and interest.

The Court **orders** that the appellee Occidental Chemical Corporation pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered July 2, 2013.

Panel consists of Justices Jennings, Sharp, and Brown. Opinion delivered by Justice Brown.

Tab G

Restatement (Second) of Torts
Division 2. Negligence
Chapter 13. Liability for Condition and
Use of Land
Topic 2. Liability of Vendors and Other Transferors of Land to Persons on the Land

§ 352 Dangerous Conditions Existing at Time Vendor Transfers Possession

Except as stated in § 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

Comment:

a. Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer. Still less is he liable to any third person who may come upon the land, even though such entry is in the right of the vendee.

To this rule an exception has developed as to undisclosed dangerous conditions known to the vendor, as to which see § 353.

As to the liability of the vendor for harm resulting from conditions existing at the time of transfer to persons outside of the land, see § 373.

Tab H

Effective:[See Text Amendments]

Vernon's Texas Statutes and Codes Annotated Currentness
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 16. Limitations
Subchapter A. Limitations of Personal Actions (Refs & Annos)

§ 16.008. Architects, Engineers, Interior Designers, and Landscape Architects Furnishing Design, Planning, or Inspection of Construction of Improvements

(a) A person must bring suit for damages for a claim listed in Subsection (b) against a registered or licensed architect, engineer, interior designer, or landscape architect in this state, who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.

(b) This section applies to suit for:

(1) injury, damage, or loss to real or personal property;

(2) personal injury;

(3) wrongful death;

(4) contribution; or

(5) indemnity.

(c) If the claimant presents a written claim for damages, contribution, or indemnity to the architect, engineer, interior designer, or landscape architect within the 10-year limitations period, the period is extended for two years from the day the claim is presented.

CREDIT(S)

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1997, 75th Leg., ch. 860, § 1, eff. Sept.

1, 1997.

Current through the end of the 2013 Third Called Session of the 83rd Legislature

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Effective:[See Text Amendments]

Vernon's Texas Statutes and Codes Annotated Currentness
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 16. Limitations
Subchapter A. Limitations of Personal Actions (Refs & Annos)

§ 16.009. Persons Furnishing Construction or Repair of Improvements

(a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

(b) This section applies to suit for:

(1) injury, damage, or loss to real or personal property;

(2) personal injury;

(3) wrongful death;

(4) contribution; or

(5) indemnity.

(c) If the claimant presents a written claim for damages, contribution, or indemnity to the person performing or furnishing the construction or repair work during the 10-year limitations period, the period is extended for two years from the date the claim is presented.

(d) If the damage, injury, or death occurs during the 10th year of the limitations period, the claimant may bring suit not later than two years after the day the cause of action accrues.

(e) This section does not bar an action:

(1) on a written warranty, guaranty, or other contract that expressly provides for a longer effective period;

(2) against a person in actual possession or control of the real property at the time that the damage, injury, or death occurs; or

(3) based on wilful misconduct or fraudulent concealment in connection with the performance of the construction or repair.

(f) This section does not extend or affect a period prescribed for bringing an action under any other law of this state.

CREDIT(S)

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Current through the end of the 2013 Third Called Session of the 83rd Legislature

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Tab I

States Adopting Restatement (Second) of Torts §§ 352 or 353 or Similar Rule[1]

State	Case	Application of §§ 352 or 353 or Similar Rule
Alabama	*Moore v. Prudential Residential Servs., Ltd.*, 849 So.2d 914, 923 (Ala. 2002)	"[I]n the sale of used real estate, a seller . . . generally has no duty to disclose to the purchaser any defects in the property . . . [unless the seller] has knowledge of a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer."
	Blaylock v. Cary, 709 So.2d 1128, 1130 (Ala. 1997)	"Because Alabama adheres to the *caveat emptor* rule in the sale of used residential property, a seller ordinarily has no duty to disclose to the purchaser any defects in the property."
	DeAravjo v. Walker, 589 So.2d 1292, 1293 (Ala. 1991)	"[T]he doctrine of *caveat emptor* applies with regard to the purchase of unimproved land."
	Blazier v. Cassady, 541 So.2d 472, 474 (Ala. 1989)	Absent violation of § 353, caveat emptor applies in sale of home with defective furnace.
Alaska	*Brock v. Rogers & Babler, Inc.*, 536 P.2d 778, 781-82 (Alaska 1975)	"[F]ormer possessors of land are not liable for injuries caused to others while upon the land by any dangerous condition, natural or artificial, which existed when the possession of the land was transferred. . . . One who lacks possession and control of property normally should not be held liable for injuries which he is no longer in a position to prevent."

[1]Sections 352 and 353 of the *Restatement (Second) of Torts* are referred to herein as § 352 or § 353.

State	Case	Application of §§ 352 or 353 or Similar Rule
Arizona	*Andrews ex rel. Kime v. Casagrande*, 804 P.2d 800, 803-04 (Ariz. Ct. App. 1990)	Court applied § 352 and held that former property owners owed no duty to tenants whose daughter was injured in backyard swimming pool installed by former owners. Former owners did not conceal or fail to disclose the allegedly dangerous condition and the pool was "there for everyone to see and everyone to evaluate."
	Menendez v. Paddock Pool Constr. Co., 836 P.2d 968, 978 (Ariz. Ct. App. 1991)	Former apartment complex owner was not liable under §§ 352 or 353 for injuries to plaintiff when he was thrown into pool at complex.
California	*Preston v. Goldman*, 720 P.2d 476, 480-81 (Cal. 1986)	Former property owners who designed and built pond could not be held liable for injuries sustained on property when they no longer owned or exercised any control over the property. Under §§ 352 and 353, court held that "absent a showing of fraud or deceit, the seller of realty is not liable to the purchaser or his tenants for negligence" or injuries resulting from a dangerous condition on the realty after the purchaser has taken possession of the realty.
	Lewis v. Chevron U.S.A., Inc., 119 Cal. App. 4th 690, 695-99 (Cal. Ct. App. 2004)	Former owner of real property was not liable in negligence, premises liability under §§ 352 and 353, or products liability to electrical worker who was injured when water pipe burst. Former owner had sold property eight years before plaintiff's injury, and thus had no ability to inspect the pipe, test it, to warn about it, insure against any risk caused by it, or take precautions to prevent injuries after giving up "ownership and the ability to control the property."

State	Case	Application of §§ 352 or 353 or Similar Rule
Colorado	*In re Cottonwood Canyon Land Co.*, 146 B.R. 992, 995 (Bankr. D. Colo. 1992) (emphasis in original)	"Regardless of whether [former owner] deposited the toxic substances on *its* property . . ., the fact remains that the deposit was made *by* [former owner] on its property. . . . Thus, . . . the successor-owner, cannot now assert a claim premised on such acts under a theory of . . . negligence."
Connecticut	*ABB Indus. Sys., Inc. v. Prime Tech., Inc*., 120 F.3d 351, 359-60 (2d Cir. 1997)	In action by current landowner against former owners for discharging hazardous chemicals on the land, "[t]he Connecticut Supreme Court has indicated that the doctrine of *caveat emptor* generally bars common law negligence claims."
	Connecticut Res. Recovery Auth. v. Refuse Gardens, Inc., 642 A.2d 697, 698 n.5 (Conn. 1994)	"[T]he imposition of liability for negligence on former landowners is a substantial deviation from the common law rule of *caveat emptor*. The common law rule continues to have vitality."
	Cornerstone Realty, Inc. v. Dresser Rand Co., 993 F. Supp. 107, 113 (D. Conn. 1998)	Absent allegations of facts showing danger was not discoverable on reasonable inspection, common law claims against former owners of property for contamination of the property were barred by *caveat emptor*.
	Sealy Conn., Inc. v. Litton Indus., Inc., 989 F. Supp. 120, 125 (D. Conn. 1997)	In suit for contamination of real estate, common law claims against former possessors of land were precluded by doctrine of *caveat emptor*.
	Nielsen v. Sioux Tools, Inc., 870 F. Supp. 435, 442-43 & n.12 (D. Conn. 1994)	*Caveat emptor* protected prior possessors of land from claim they improperly stored and disposed of hazardous substances on property, because plaintiff did not adequately allege harm was not discoverable by the plaintiff's reasonable inspection.

State	Case	Application of §§ 352 or 353 or Similar Rule
	Mellen v. Hartford Gas Co., 17 Conn. Supp. 489, 490 (Conn. C.P. 1952)	Court affirmed dismissal of case brought by purchasers of home against prior owner for injuries suffered from defective furnace that prior owner installed because "no case can be found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises."
Delaware	*Cropper v. Rego Distrib. Ctr., Inc.*, 461 F. Supp. 529, 535 (D. Del. 1978)	"[T]the duty of a vendor of land under § 353 extends only to those natural and artificial 'conditions' that the vendor owns, either because they are annexed to the land or because the condition is part and parcel of the land itself."
	George v. Kuschwa, No. 83C-09-008, 1986 WL 6588, at *6-8 (Del. Super. Ct. May 21, 1986), *aff'd*, 518 A.2d 983 (1986)	Absent evidence of fraudulent misrepresentation or concealment, plaintiff's suit against prior homeowner for defects in home's construction barred by *caveat emptor*.
District of Columbia	*Loughlin v. U.S.*, 209 F. Supp. 2d 165, 171 (D.D.C. 2002), *aff'd in part, vac. in part*, 393 F.3d 155 (D.C. Cir. 2004)	Court noted that District of Columbia had adopted §§ 352 and 353, and held that fact issue existed about whether university concealed or failed to disclose dangerous chemicals on land it sold to plaintiffs who suffered illnesses allegedly attributable to such chemicals.
	Caporaletti v. A-F Corp., 137 F. Supp. 14, 18 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957)	"[T]he liability of a grantor of real property for the dangerous or defective condition of the premises ceases upon the transfer of possession and control, regardless of whether the person injured is the transferee, or some third person to whom a duty of care is owed."

State	Case	Application of §§ 352 or 353 or Similar Rule
Florida	*Pertl v. Exit Info. Guide, Inc.*, 708 So.2d 956, 958 (Fla. Dist. Ct. App. 1997)	Court dismissed suit by painter who fell through deteriorated skylight against former landowner who had installed skylight because there was no evidence that former owner "exercised any control over the property on the date of the accident." Therefore, the former owner "owed no duty" to "maintain the premises in a reasonably safe condition, or to warn of the concealed peril of the deteriorated fiberglass skylight."
	Haskell Co. v. Lane Co., Ltd., 612 So.2d 669, 675 (Fla. Dist. Ct. App. 1993)	When shoppers injured by roof collapse sued prior owner of building for negligence, court dismissed claim holding "*caveat emptor* still applies to sales of commercial real property."
	Wagner v. City of Hialeah, 462 So.2d 482, 482 (Fla. Dist. Ct. App. 1984)	Court dismissed suit against shopping center's former owners and builders brought by motorcyclist for injuries allegedly resulting from negligent design of center. Court observed that property had been twice sold in eight year period, and design and construction defects were open and obvious.
Georgia	*Sosebee v. Hiott*, 278 S.E.2d 700, 702 (Ga. Ct. App. 1981)	Under rule of *caveat emptor*, absent a showing of fraud or deceit, tenant who suffered burns in apartment fire could not recover from prior owner of apartment building for negligence.
	Neal v. Baker's Liquor Store, 453 S.E.2d 816, 818 (Ga. Ct. App. 1995)	Former owner of liquor store had no duty to keep store safe, and thus customer could not recover from former owner for injuries sustained when customer was shot on liquor store's premises.
Idaho	*Boise Car & Truck Rental Co. v. WACO, Inc.*, 702 P.2d 818, 821 (Idaho 1985)	"The general rule is that the vendor of real property who parts with title, possession, and control of it is permitted to shift all responsibility for the condition of the land to the purchaser."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Barab v. Plumleigh, 853 P.2d 635, 639 (Idaho Ct. App. 1993)	Absent proof of concealment or non-disclosure satisfying § 353, "[t]he general rule is that the vendor of real property who parts with title, possession, and control of the property is permitted to shift all responsibility for the condition of the land to the purchaser."
Illinois	*Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1370 (Ill. 1988)	Under §§ 352 and 353, absent active concealment or failure to disclose dangerous condition to vendee, "a grantor or vendor of real property is not liable for personal injuries sustained by the vendee or other third persons on the premises subsequent to his transfer of possession and control."
	Century Display Mfg. Corp. v. D.R. Wager Constr. Co., 376 N.E.2d 993, 996 (Ill. 1978)	In suit against prior owner of chemical plant for damage allegedly caused by flammable chemicals stored in plant fixtures, court dismissed claim under § 352. Court noted that buyer had thoroughly inspected property and buyer and seller were sophisticated parties.
	CITGO Petroleum Corp. v. McDermott Intern., 858 N.E.2d 563, 569 (Ill. App. Ct. 2006)	Former owner's duty "was extinguished upon the transfer of possession and control of the property. In general, a grantor or vendor of real property is not liable for damages sustained by the vendee or other third person on the premises subsequent to this transfer or possession and control."
	Garrison v. Gould, Inc., 36 F.3d 588, 593 (7th Cir. 1994)	"Under Illinois law, a seller of land is generally not liable for physical harm suffered by persons on the land resulting from any dangerous condition that existed when the purchaser took possession."
Indiana	*Jackson v. Scheible*, 902 N.E.2d 807, 810 (Ind. 2009)	In wrongful death suit against vendor, court held vendor not liable because "the vendor no longer occupies or controls the condition of the property even if the vendor retains legal title as security."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Mishler v. State, 730 N.E.2d 229, 231 (Ind. Ct. App. 2000)	"When a new owner assumes control and possession, he becomes responsible for the safety of structures erected by his predecessor, absent misrepresentation by the predecessor. . . . The rule of law that a former possessor of premises is normally not liable for latent defects is appropriate because the former possessor is no longer in a position to prevent injuries."
	Great Atl. and Pac. Tea Co. v. Wilson, 408 N.E.2d 144, 147-48 (Ind. Ct. App. 1980)	Grantor of premises with dangerous condition is not liable for injuries to grantee or third persons occurring 45 days after transfer of property because "[t]he new owner, upon assuming control and possession, becomes responsible for the safety of structures erected by his predecessors."
Iowa	*Hollingsworth v. Schminky*, 553 N.W.2d 591, 599 (Iowa 1996)	"An owner who sells property loses control of the use of the property and is no longer liable for injury to others on the property."
	Statler v. Iowa Resources, Inc., 468 N.W.2d 796, 798 (Iowa 1991)	"[T]the general rule [is] that one who has transferred ownership and control is no longer held liable [because he/she] no longer has control and thus may not enter the property to cure any deficiency, and, he/she cannot control the entry of persons onto the property or provide safeguards for them."
Kansas	*Graham v. Claypool*, 978 P.2d 298, 300 (Kan. Ct. App. 1999)	Seller who conveyed property to buyer owed no legal duty to tenant who suffered injuries as a result of fire on conveyed property that occurred after buyer was in possession of property. Section 352 protected seller from liability because conditions that caused fire existed at time buyer took possession and there was no evidence that seller did not inform buyer of known dangerous conditions.

State	Case	Application of §§ 352 or 353 or Similar Rule
	Heinsohn v. Motley, 761 P.2d 796, 798-99 (Kan. Ct. App. 1988)	Under §§ 352 and 353, purchaser of cabin, who suffered carbon monoxide poisoning from stove that seller had installed, could not recover from seller for negligence. Seller did not conceal or fail to disclose dangerous condition of stove.
Kentucky	*Wilson v. Southland Optical Co.*, 774 S.W.2d 447, 448-49 (Ky. 1998)	Under §§ 352 and 353, vendors of property not liable to purchasers and purchasers' tenants for losses from fire allegedly caused by defective installation of air-conditioning unit. No evidence that, at the time of sale, vendors knew or should have known of a dangerous condition that might lead to a fire or that purchasers and tenants would not know of the condition.
	Anheuser-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at *4 (W.D. Ky. Feb. 10, 1997)	Noting that the court has adopted §§ 352 and 353 and stating that the general rule in Kentucky is that "real estate is sold in an 'as is' condition, . . . and the purchaser takes the property subject to the existing physical condition."
Louisiana	*Bayer v. Omni Hotels Mgmt. Corp.*, 995 So.2d 639, 642 (La. Ct. App. 2008)	"A former owner of property can only be held liable for defective conditions in the property if the former owner knew of the defective conditions prior to the transfer of the property and concealed those problems."
	Jones v. Briscoe, 926 So.2d 599, 602 (La. Ct. App. 2006)	Tenant could not recover from former apartment owners who built railing that collapsed. "Any duty owed to [tenant] was assumed by the [new owners] when they purchased the property, and the [former owners] relinquished any duty owed to plaintiff when they sold the property."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Kreher v. Bertucci, 814 So.2d 614, 617 (La. Ct. App. 2002)	Upon sale of property to new owner, prior owner relinquished any duty owed to tenant. New owner knew of the many defects in property, including the defect that allegedly caused tenant's injury, and no evidence showed prior owner concealed the defect.
	Raynes v. McMoran Exploration Co., Nos. 10-1730, 08-5018, 2011 WL 2181955, at *2 (E.D. La. June 3, 2011)	"In Louisiana, a former owner's duties with respect to repairing and maintaining property are assumed by a buyer upon the [buyer's] purchase of the property. A former owner of a property is liable for defective conditions in the property only 'if the former owner knew of the defective conditions prior to the transfer of the property and concealed those problems.'"
Maryland	*Council of Co-owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336, 346 (Md. Ct. App. 1986)	"[W]here the [dangerous] condition existed at the time of transfer, the vendor's duty to third parties and to the vendee will survive the sale and transfer if the vendor knew or had reason to know of the condition and of the risk involved, and failed to disclose that information to the vendee. *Restatement (Second) of Torts* §§ 352 and 353. This duty remains with the vendor only until the vendee has notice of the condition and a reasonable opportunity to take precautions against it."
	HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 351-52 (D. Md. 1993)	Court applied §§ 352 and 353 in analyzing state law claims against prior landowner for creating environmental hazard on land.
Massachusetts	*Minaya v. Massachusetts Credit Union Share Ins. Corp.*, 467 N.E.2d 874, 875 (Mass. 1984)	"A transfer of ownership of land does, in most cases, relieve the prior owner of liability for dangerous conditions existing on the land. *See Restatement (Second) of Torts* § 352 (1965)."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Jennings v. Hoban, No. 03-P-984, 2004 WL 1374437, at *1-2 (Mass. App. Ct. June 18, 2004) (unpublished)	In action against former homeowner by guest of new homeowner who slipped on debris on property, court applied §§ 352 and 353 and held that "[a] transfer of ownership in land does, in most cases, relieve the prior owner of liability for dangerous conditions existing on land."
	Creeden v. Sanieoff, 621 F. Supp. 2d 18, 20 (D. Mass. 2009)	"Massachusetts courts recognize the general principle that '[a] transfer of ownership of land does, in most cases, relieve the prior owner of liability for dangerous conditions existing on the land.'"
	Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 100 (D. Mass. 1990)	"In the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusion as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to [the vendee] or others from any defects existing at the time of transfer."
Michigan	*Christy v. Glass*, 329 N.W.2d 748, 752 (Mich. 1982)	Under common law, absent concealment or failure to disclose an existing dangerous condition, "a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser. *Caveat emptor* prevails in land sales, and the vendor . . . is not liable for any harm due to defects existing at the time of sale."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Yahrling v. Belle Lake Ass'n, 378 N.W.2d 772, 774-75 (Mich. Ct. App. 1985), *rev'd on other grounds sub nom. Wymer v. Holmes*, 412 N.W.2d 213 (Mich. 2004)	Title owner of lake property, who had transferred possession and control of property before plaintiff's injury, owed no duty to maintain property in safe condition for guests of possessor of land.
	Johnson v. Davis, 402 N.W.2d 486, 488 (Mich. Ct. App. 1987)	Alleged failure of vendors to install smoke detector in residence before sale of residence was not "concealed dangerous condition" on the property that purchaser could not discover, and thus could not form the basis of negligence liability. Court observed that "[n]egligence liability for injury due to defective premises is conditioned both upon possession and upon control of the land, since the person 'in possession is in a position of control, and normally best able to prevent any harm to others.'"
Minnesota	*Carlson v. Hampl*, 169 N.W.2d 56, 57 (Minn. 1969)	Although former owner had constructed stairway on which plaintiff fell, former owner could not be held liable for plaintiff's injuries. "The general rule is that a prior owner of real estate is not liable for injury to a purchaser or a third person caused by the condition of the premises existing at the time the purchaser took possession."
	Friberg v. Fagen, 404 N.W.2d 400, 402 (Minn. Ct. App. 1987)	Former owner of campground not liable for alleged defects in electrical wiring that resulted in plaintiff's electrocution because a former owner is "not liable for injury to a purchaser or a third person caused by the condition of the premises existing at the time the purchaser took possession."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Coppage v. City of St. Paul, Nos. C1-98-1287, C3-98-1288, 1999 WL 138719 (Minn. Ct. App. March 16, 1999) (unpublished)	"As a general rule, a prior owner of real estate is not liable to a buyer or a third person for injury caused by the condition of the property. Liability will attach, however, if the prior owner knows of or conceals an unreasonably dangerous condition and has reason to believe that the buyer will not discover the condition. Such liability ceases, however, when the buyer has a reasonable opportunity to discover the condition and to take precautions."
Mississippi	*Stonecipher v. Kornhaus*, 623 So.2d 955, 962 (Miss. 1993)	"The general rule is that a vendor of real estate is not liable to a purchaser in possession, or to any third party, [for injury] which is caused by a dangerous condition on the premises, whether natural or artificial, which existed when the purchaser took possession."
Missouri	*Combow v. Kansas City Ground Inv. Co*., 218 S.W.2d 539, 541 (Mo. 1949)	"It seems to be well settled in this state and other jurisdictions that, absent an express agreement to the contrary, a seller of real estate cannot be held liable . . . in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises."
	Ford v. Goffstein Realty Inc., 687 S.W.2d 195, 196 (Mo. Ct. App. 1984)	Court affirmed dismissal of lawsuit against former homeowner brought by parents of children who ingested lead-based paint on the property. Court observed that it is "well settled in this state and in other jurisdictions that, absent an express agreement to the contrary, the seller of real estate cannot be held liable for defective condition of the premises."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Counts v. MK-Ferguson Co., 680 F. Supp. 1343, 1348 (E.D. Mo.), *aff'd*, 862 F.2d 1338 (8th Cir. 1988)	Plaintiff's negligence claims against former owner of grain storage facility could not survive summary judgment. Former owner conveyed the facility to new owner three decades ago, and new owner was "aware of the condition and had reason to know of it." Thus, under §§ 352 and 353, the former owner could not be held liable for the defective condition.
Montana	*Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249, 1256 (Mont. 1989)	Court held that former owner-builder of oil separator facility could not be liable for wrongful death of worker caused by hydrogen sulfide exposure. Court relied on §§ 352 and 353 to support conclusion that "liability of [owner-builder] is terminated once they have relinquished ownership and control of the property."
Nevada	*Kimberlin v. Lear*, 500 P.2d 1022, 1025 (Nev. 1972)	Absent failure to disclose concealed, dangerous conditions known to him, "[a] vendor of real property who parts with title, possession and control of [the property] ceases to be either an owner or an occupier, and generally, all responsibility for the condition of the land shifts to the purchaser."
New Hampshire	*Derby v. Public Serv. Co. of N.H.*, 119 A.2d 335, 338 (N.H. 1955)	Under § 353, "[i]t is undisputed that a grantor who fails to disclose to a vendee a condition involving unreasonable risk to persons upon the land is liable for harm caused thereby to them after transfer of possession to the grantee, if the latter is unaware of the condition or the risk involved, and the vendor knows of the condition and the risk and has reason to believe that the vendee will not discover them."

State	Case	Application of §§ 352 or 353 or Similar Rule
New Jersey	*O'Connor v. Altus*, 335 A.2d 545, 549 (N.J. 1975)	Former owner-builder of apartment building could not be liable for injuries sustained by child when she ran through glass door of building nine years after former owner-builder sold building. Under § 353, "any liability for physical harm caused by a natural or artificial condition, of which the vendor has actual or constructive notice, involving unreasonable risk to persons on or off the land continues only until the vendee has had a reasonable opportunity to [take] precautions." And here, court concluded that "nine years [was] much more than a reasonable time for the vendee and his successor to have discovered and cured any such unsafe conditions [attributable to the door], of which the vendor had knowledge."
	Hut v. Antonio, 229 A.2d 823, 826 (N.J. Super. Ct. Law Div. 1967)	"[A] seller of realty is not liable for injury to a buyer in possession, or to any third party, which is caused by a dangerous condition on the premises, whether natural or artificial, which existed when the buyer took possession."
	Sarnicandro v. Lake Developers, Inc., 151 A.2d 48, 50 (N.J. Super. Ct. App. Div. 1959)	"The general rule is that, once the vendee has taken possession, the vendor of real estate is not subject to liability for bodily harm caused to the vendee or others while upon the premises by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession."
New Mexico	*Livingston v. Begay*, 652 P.2d 734, 736 (N.M. 1982)	Under § 352, "'[t]he vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer. Still less is he liable to any third person who may come upon the land, even though such entry is in the right of the vendee.'"

State	Case	Application of §§ 352 or 353 or Similar Rule
New York	*Pharm v. Lituchy*, 27 N.E.2d 811, 811-12 (N.Y. 1940)	"At common law it is the general rule that an owner of land ceases to be liable in negligence for its condition when the premises pass out of his control before injury results."
	New York Tel. Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172, 174 (N.Y. App. Div. 1984)	"The owner of land ceases to be liable in negligence for its dangerous condition when the ownership of the premises or possession and control pass to another before the injury is sustained."
	Conneely v. Herzog, 822 N.Y.S.2d 662, 663 (N.Y. App. Div. 2006)	"The landowner's liability for the condition of real estate generally ceases when possession and control is transferred."
	Young v. Hanson, 579 N.Y.S.2d 221, 222 (N.Y. App. Div. 1992)	"Generally, a landowner's liability for the condition of real property ceases when possession and control thereof is transferred."
North Carolina	*Sink v. Andrews*, 344 S.E.2d 831, 834 (N.C. Ct. App. 1986)	"As a general rule, in the absence of an express or implied warranty, or a fraudulent concealment or misrepresentation, a vendor of real property is not liable for damage or harm to a purchaser or others from defects existing at the time of the sale."
	Feibus & Co. v. Godley Const. Co., 260 S.E.2d 665, 670 (N.C. Ct. App. 1979), *rev'd on other grounds*, 271 S.E.2d 385 (N.C. 1980)	Under § 352, vendors were not liable "for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession."

State	Case	Application of §§ 352 or 353 or Similar Rule
North Dakota	*Stanley v. Turtle Mountain Gas & Oil, Inc.*, 567 N.W.2d 345, 348 (N.D. 1997)	Firefighters who were injured while fighting fire at an oilfield tank battery could not maintain negligence action against former owner-operators of tank battery. Former owner-operators neither concealed nor failed to disclose any unreasonably dangerous conditions. Thus, former owner-operators owed no duty of care to firefighters under §§ 352 or 353 because they no longer had control of the property, they could not enter the property to cure any deficiencies, and they could not control the entry of persons onto the property or provide safeguards for them.
Ohio	*Baraby v. Swords*, 851 N.E.2d 559, 571-72 (Ohio Ct. App. 1993)	Former owner of apartment building owed no duty to tenants killed in building fire and could not be held liable in negligence after conveying building to new owner.
	Paxton v. Birk, 24 Ohio Law Abs., No. 1379, 1937 WL 2291, at *475 (Ohio Ct. App. March 20, 1937)	Former owners of real estate were not liable for plaintiff's injuries resulting from disrepair of building on real estate after the real estate had been conveyed to new owner and new owner had taken possession of it.
Oklahoma	*Scott v. Archon Group, L.P.*, 191 P.3d 1207, 1213 (Okla. 2008)	Former owner of building owed no duty to truck driver who was injured when his truck struck beam in garage of building. Court recognized that "possession and control of real property is the fundamental requirement for ascribing liability for injury suffered thereon, and that once an owner parts with possession and control of the premises, the responsibility and liability, if any, for injury suffered on the property falls on the new owner."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Shipley v. Bankers Life and Cas. Co., 377 P.2d 571, 573 (Okla. 1963)	Former owner of apartment hotel was not responsible for injuries sustained by tenant in defective elevator six years after hotel was sold to new owner. Former owner relinquished all "possession, management and control of the property and the elevator" at the time of sale and was under no duty to maintain the property or the elevator after the sale.
	King v. Lunsford, 852 P.2d 821, 823 (Okla. Civ. App. 1993)	"When [former owner] surrendered possession and control of the premises to [new owner] under this contract for deed, [former owner's] responsibility (as an owner) for any injury occurring on the premises ceased."
Oregon	*Higgenbottom v. Noreen*, 586 F.2d 719, 720-22 (9th Cir. 1978) (applying Oregon law).	Under Oregon law, in an action brought against former homeowner to recover for damages suffered in a home fire, trial court properly instructed the jury that former owners are not responsible to purchasers for the condition of premises or any damages sustained thereon after change of possession.
Pennsylvania	*Gresik v. PA Partners, LP*, 33 A.3d 594, 596 n.3, 599-600 & n. 8 (Pa. 2011)	Court declined to hold former owner of steel mill liable for its alterations to the mill's furnaces that resulted in deadly explosion six years after the sale of the property. Court observed that imposing liability for injuries occurring in the post-sale timeframe would violate § 352, which provides that "a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land [by any dangerous condition] after the vendee has taken possession [of the land]."

State	Case	Application of §§ 352 or 353 or Similar Rule
	Palmore v. Morris, 37 A. 995, 998-99 (Pa. 1897)	Grantor who sells grantee land on which there is a defective structure, and surrenders possession of it to the grantee, is not liable to a third party who is injured due to the defect because the duty to repair the structure is assumed by the grantee from the time the land is conveyed.
	Welz v. Wong, 605 A.2d 368, 370 (Pa. Super. Ct. 1992)	"[A] vendor will be found liable as to a dangerous condition only if the vendee does not know of, or have reason to know of, the condition or the risk involved and if the vendor has reason to believe that the vendee will not discover the condition or realize the risk. *See Restatement of Torts (Second)* § 353."
South Carolina	*Smith v. Breedlove*, 661 S.E.2d 67, 72-73 (S.C. 2008)	Even though prior homeowner acted as general contractor in construction of his home, he owed no duty of care to any future purchasers who complained home had been negligently constructed.
	Pruitt v. Morrow, 342 S.E.2d 400, 401 (S.C. 1986), quoting *Lawson v. Citizens & S. Nat'l Bank*, 193 S.E.2d 124, 128 (S.C. 1972)	Under § 353, "[w]here material facts are accessible to the vendor [of land] only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts and make them known to the purchaser."
Tennessee	*Belote v. Memphis Dev. Co.*, 346 S.W.2d 441, 443-44 (Tenn. 1961)	As a general rule, once vendee has taken possession of realty, vendor is not subject to liability for harm caused to vendee or others on premises by any dangerous condition at the time vendee took possession.

State	Case	Application of §§ 352 or 353 or Similar Rule
	Smith v. Tucker, 270 S.W. 66 (Tenn. 1925)	Vendor of home was not liable in negligence for death that occurred when defectively-constructed mantle fell on child. Under *caveat emptor*, vendor could not be held liable in damages to vendee, or the third persons, for personal injuries arising from defects in the premises when there was no evidence that vendor sold new owner the house with actual knowledge of its dangerous condition.
Texas	*Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 367-68 (Tex. App.—Houston [1st Dist.] 1994, writ denied).	Former owner of pier was not liable for injuries suffered by plaintiff while diving from pier. Former owner had transferred ownership of pier before accident, there was no evidence that former owner had failed to disclose or actively concealed dangerous condition, and new owner had opportunity to discovery dangerous condition. Thus, former owner owed no legal duty to plaintiff.
	First Fin. Dev. Corp. v. Hughston, 797 S.W.2d 286, 289-92 (Tex. App.— Corpus Christi 1990, writ denied)	Former property owner not liable for plaintiff's injuries resulting from negligently designed and constructed stairway when plaintiff was injured three years after the property was transferred to a new owner. Court observed that a former owner of real property is "generally not liable for injuries caused on real property after conveyance."
	Beall v. Lo-Vaca Gathering Co., 532 S.W.2d 362, 365-66 (Tex. App.—Corpus Christi, 1975, writ ref'd n.r.e.)	Relying on §§ 352 and 353, court held that former tenant's liability for constructing horizontal cable that injured plaintiff ceased, as a matter of law, at the time the tenant vacated the premises. Thus, any cause of action the plaintiff has lies against the current owner of the land – not the former tenant.

State	Case	Application of §§ 352 or 353 or Similar Rule
Utah	*Loveland v. Orem City Corp.*, 746 P.2d 763, 766 (Utah 1987)	Land developer owed no duty to disclose canal bordering property and was not liable for drowning of child under §§ 352 and 353. Intermediate owner knew of canal and its potential hazard, and developer had "no right to control, supervise or otherwise enter upon property" after new owner took possession of it.
Washington	*DiPangrazio v. Salamsonsen*, 393 P.2d 936, 938 (Wash. 1964)	Adopting §§ 352 and 353 and holding that prior owner was not liable for injuries sustained by guest of new owner when "there is nothing in the record to establish that [former owner] knew of a dangerous condition."
	Dilley v. S&R Holdings, LLC, 154 P.3d 955, 957 (Wash. Ct. App. 2007)	"[G]enerally, a land seller owes no duty to people injured on the premises after the buyer takes possession, even for injuries caused by conditions existing at the time of sale."
	Bailey v. Gammell, 661 P.2d 612, 613-14 (Wash. Ct. App. 1983)	Former homeowner owed no duty to plaintiff for injuries cause by defective stairway. Plaintiff "failed to establish a duty on the part of the [former owner] under section 353" when there was no evidence that the former owner had "actual knowledge of the unusual steepness of the stairs or poor visibility" or that plaintiff would not "discover the condition or realize the risk."
West Virginia	*Conley v. Stollings*, 679 S.E.2d 594, 598-99 (W.V. 2009)	Former property owner owed no duty of care to plaintiff who was killed when his ATV ran into unmarked cable stretched across road because former owner "did not own, possess or control the subject property at the time of the accident."

State	Case	Application of §§ 352 or 353 or Similar Rule
Wisconsin	*Moore v. Brown*, 486 N.W.2d 584, 585 (Wis. Ct. App. 1992)	"[A]bsent any contractual obligations to the contrary, a purchaser has no cause of action against a private homeowner-seller for the homeowner-seller's negligent construction or repair of his home."
Wyoming	*Goodrich v. Seamands*, 870 P.2d 1061, 1064-65 (Wyo. 1994)	Former bar owner who installed ceiling fan was not liable to plaintiff for injuries caused by fan because plaintiff failed to establish prerequisites to liability under § 353 -- *i.e.*, that former owner knew or had reason to know of dangerous condition of the fan.
	Dubray v. Howshar, 884 P.2d 23, 27 (Wyo. 1994)	Under § 353, vendors of bar owed no duty to injured bar patron for injuries cause in barroom shooting. Vendors were no longer in possession of the bar, they had "no control over the day to day management of [the bar]," and the new owner "had reason to know or knew of the allegedly dangerous condition -- careless operation of a liquor establishment."
	Holland v. Weyher/Livsey Constructors, Inc., 651 F. Supp. 409, 412-13 (D. Wyo. 1987)	Prior landowner not liable for injuries to child caused by smoldering slag heap because former landowner did not control land at the time of accident.