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 REPLY BRIEF ON THE MERITS

Barry N. Beck
State Bar No. 0200400
bbeck@cbtd.com
David W. Lauritzen
State Bar No. 00796934
dlauritzen@cbtd.com
Rick G. Strange
State Bar No. 19355700
rstrange@cbtd.com
Cotton Bledsoe Tighe & Dawson, P.C.
500 West Illinois, Suite 300
Midland, Texas 79701
432.685.8553
432.684.3124 (fax)

Deborah G. Hankinson
State Bar No. 00000020
dhankinson@hankinsonlaw.com
Joseph B. Morris
State Bar No. 14489700
jmorris@hankinsonlaw.com
Rick Thompson
State Bar No. 00788537
rthompson@hankinsonlaw.com
Hankinson LLP
750 N. St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

Counsel for Petitioner
Occidental Chemical Corporation

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Jason Jenkins was injured by an allegedly dangerous condition -- not by a contemporaneous negligent activity -- while working on the premises of his employer, Equistar. As a result, Jenkins's claim was for premises liability -- not negligence. Jenkins, however, did not plead (or prove) a premises liability action. (*See* 1.CR.157-68) He did not ask the trial court to submit a premises liability issue to the jury. (*See* 9.RR.33-58) And he stipulated that he did not seek recovery for premises liability. (10.RR.50-53)

Instead, Jenkins pleaded products liability claims against Occidental, the former plant owner, for (1) strict liability, (2) negligent design, manufacturing, and marketing, and (3) breach of the implied warranty of merchantability. (1.CR.5-9, 161-66) And the only liability theory Jenkins submitted to the jury and prevailed upon was for negligent design in the products liability context. (10.CR.2636) Occidental, however, designed and constructed an improvement (*i.e.*, the pH-balancing system) to its own real property for its own use. Because, as Jenkins admits (Br. at 42), Occidental was not a manufacturer of a product that was placed in the stream of commerce, Jenkins's products liability claim for negligent design necessarily fails.

Nonetheless, Jenkins now engages in an after-the-fact effort to salvage his unviable products liability claim by recasting it as an ordinary negligence action

governed by general negligence principles. Jenkins's effort finds no support in his pleadings, the jury question, or Texas law. The court of appeals erred in reversing the trial court's judgment that Jenkins take nothing and remanding the case for entry of judgment in Jenkins's favor.

REPLY TO STATEMENT OF FACTS

In its initial brief, Occidental provided a statement of facts that fairly presents the issues. (*See* Occidental Br. at 1-10) Notably, Jenkins does not specifically contradict or challenge those facts. Instead, he presents a "Statement of Facts" that contains numerous misstatements of the record. (*See* Br. at 1-12) For example:

- Jenkins asserts that "[a]t trial, everyone agreed that the design [of the pH-balancing system] was negligent." (Br. at 1, citing PX 2) But the only evidence on which Jenkins relies is an incident report prepared by Equistar (PX 2) -- a company that was subject to liability because it was the plant owner and Jenkins's employer at the time of the accident.

- Jenkins claims that Neil Ackerman conceded that safeguards "should have been" implemented. (Br. at 1, 7) But in so claiming, Jenkins relies on his *own* expert -- not Ackerman. (*Id.*, citing 4.RR.110-12) And Ackerman actually testified that (1) the system would not have been used if it were not deemed safe, (2) a pressure indicator was not necessary, and (3) the system already had a means to vent the pressure. (5.RR.162-65, 167)

- Jenkins cites no evidence whatsoever when he erroneously asserts that the design "included no safeguards to stop highly pressurized acid from projecting out of the Funnel" and Occidental "omitted such safeguards." (Br. at 6)

- Relying solely on the testimony of two persons who lack personal knowledge regarding whether Occidental conducted a safety audit, Jenkins contends Occidental did not consult safety professionals in connection with

the design of the system. (Br. at 8, citing 4.RR.81; 5.RR.151-52) Jenkins, however, ignores the uncontroverted testimony of Kathryn Hanneman that a safety review and audit were performed before the system became operational. (8.RR.33-34, 112)

Occidental will address other germane misstatements in the Argument below.

ARGUMENT

I. As a Former Owner of Real Property in Texas, Occidental Cannot Be Held Liable in "Negligence" for Improvements It Created While It Owned the Property.

Jenkins repeatedly concedes that, as a former property owner, Occidental owes no duty and is not subject to liability for the allegedly dangerous condition that injured Jenkins eight years after Occidental sold and relinquished control over the property. (Br. at 17, 23, 25, 27) That should be the end of the inquiry. Nonetheless, Jenkins tries to pretend that Occidental is not a former property owner but rather a third-party designer that can be held liable in ordinary (or professional) negligence for designing the pH-balancing system and creating an allegedly dangerous condition on the premises. Neither Texas law nor the authorities on which Jenkins relies support the imposition of liability on Occidental here. The court of appeals erred in concluding otherwise.

A. Former property owners owe no duty and are not subject to liability for allegedly dangerous conditions on the property after conveyance.

The starting and ultimately ending point for this appeal is section 352 of the *Restatement* (*Second*) *of Torts*. Under that section, 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 . . . which existed at the time that the vendee took possession." RESTATEMENT (SECOND) OF TORTS § 352 (1965). Occidental was a vendor of land. (5.RR.96; 8.RR.156); *see Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997) ("vendor" refers to "former owner of land"). In 2006, an allegedly dangerous condition on the land (*i.e.*, the pH-balancing system) caused physical harm to Jenkins. (5.RR.240-41, 253-55) And that condition existed in 1998 when Jenkins's employer, Equistar, purchased and took possession of the property. (8.RR.9)[1] As a result, Occidental is not liable for Jenkins's personal injuries. *See* RESTATEMENT (SECOND) OF TORTS § 352; *see also* Occidental Br. at 14-16.

Contrary to the false premise underlying Jenkins's entire argument, a former property owner's liability does not turn on whether the owner itself negligently designed or created a dangerous condition. Rather, section 352 eliminates the liability of the former owner for "*any* dangerous condition" that existed at the time of sale -- regardless of whether the vendor created that condition. *Id.* (emphasis added).

[1] Jenkins sued Equistar, the current premises owner. (1.CR.157-68) But he later moved to sever Equistar from this suit. (2.CR.373-74, 382-83)

1. Occidental is not a manufacturer of a product or chattel.

Jenkins cannot avoid this result by relying upon RESTATEMENT (SECOND) OF TORTS §§ 395, 396, and 398 and *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968), to contend that "a manufacturer who designs industrial equipment . . . can be liable [in ordinary negligence] for negligent design." (*See* Br. at 16-18, 20) Sections 395, 396, and 398 of the *Restatement* govern the liability of "a manufacturer of chattel" who designs, manufactures, and "puts goods out on the market." RESTATEMENT (SECOND) OF TORTS §§ 395, 396, 398; *see also id.* § 394 cmt. a. And in *Otis Elevator*, this Court merely recognized that the "manufacturer of a chattel" owed a duty of care in "the manufacture and design of [its] products" under sections 395 and 398. *Otis Elevator*, 436 S.W.2d at 327.

But neither *Otis Elevator* nor sections 395, 396, and 398 apply here because Occidental is *not* a manufacturer of a chattel that harmed Jenkins. Indeed, Jenkins admits that Occidental is not a "manufacturer." (Br. at 42) He stipulated that Occidental never placed the pH-balancing system into the stream of commerce. (7.RR.78-79) And although he took the position at trial that the pH-balancing system was chattel (8.RR.42-43), the jury disagreed, and he has never challenged the jury's now binding finding that the system was a permanently attached "improvement" to real property (10.CR.2642). *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986) (unchallenged fact finding is binding on appeal).

For these reasons, the illustration from the *Restatement* that Jenkins quotes at length is not "eerily similar" to this case. (Br. at 18) In stark contrast to Occidental, which designed and constructed an improvement to its own property for its own use, the A Stove Company in the illustration manufactured a gas stove (*i.e.*, a chattel) and sold it to a dealer, thereby placing it into the stream of commerce. *See* RESTATEMENT (SECOND) OF TORTS § 398 illus. 1. As a result, the A Stove Company was subject to products liability under section 398 to a cook who was injured using the stove. *Id.* This same rule does not apply to a property owner (like Occidental) who constructs an improvement on its own property for its own use and then sells the property. And tellingly, Jenkins cites no case so holding.

2. Occidental was the possessor of the property, and it created the condition on its own behalf -- not on behalf of another possessor.

Jenkins's next contention -- that sections 395 and 398 "apply equally to hazards created by improvements to real property" by parties who are not in possession of the property (Br. at 19) -- is also misguided. In so arguing, Jenkins relies on section 385 of the *Restatement*. But that section does not apply to a party (like Occidental) who created the condition on its own property while it was the possessor and owner of that property.

Rather, section 385 addresses the "Liability of Persons *Other Than a Possessor, Vendor, or Lessor*," and thus recognizes a distinction between a possessor and a person acting on the possessor's behalf. *See* RESTATEMENT (SECOND) OF TORTS §§ 380-87 (emphasis added). Significantly, it applies solely to third persons who create a condition "*on behalf of the possessor of land*." *Id.* § 385 (emphasis added). It does not apply when, as here, "the possessor acts on [its] own behalf." *Gresik v. PA Partners, L.P.*, 33 A.3d 594, 599 (Pa. 2011).

Because Jenkins did not bring suit against a person who created the condition "on behalf of the possessor of land," section 385 is immaterial. Indeed, Jenkins did not sue the third-party contractor that performed the physical labor to install some of the pH-balancing system. (*See* 1.CR.2-11, 157-68) Rather, Jenkins sued the former possessor (*i.e.*, Occidental) who created the condition for its own behalf on its own property. (1.CR.157-68)

3. *Strakos* does not control this case.

For similar reasons, Jenkins is also wrong when he contends that *Strakos v. Gehring*, 360 S.W.2d 787 (1962), "controls" and is "the key" to this case. (Br. at 21) To begin with, Jenkins acknowledges that "[t]he *Strakos* principle is the same rule set forth in Section 385 of the Restatement." (*Id.*) But as discussed above, section 385 does not apply here.

Indeed, *Strakos*, like section 385, involved a claim against a third-party independent contractor who created a dangerous condition (a hole) while performing road work on behalf of the property owner (Harris County). *See Strakos*, 360 S.W.2d at 788-89. Under that scenario, this Court merely rejected the accepted-work doctrine under which an independent contractor who created a dangerous condition on real property was automatically relieved of any duty of care to the public after the property owner accepted the contractor's work. *Id.* at 790-92.

Moreover, the *Strakos* Court did not even hold that a contractor who creates a dangerous condition owes a duty of care to the general public in all circumstances. *See Strakos*, 360 S.W.2d at 790 ("Our rejection of the 'accepted work' doctrine is not an imposition of absolute liability on contractors."). And more recently, in *Allen Keller Co. v. Foreman*, 343 S.W.3d 420 (Tex. 2011), this Court confirmed the limited holding in *Strakos* and made clear that a contractor does not necessarily owe a duty of care any time it creates a dangerous condition. *Id.* at 424-25.

More importantly, no Texas court has ever applied *Strakos* to impose liability on *former property owners* who designed or constructed improvements (or allegedly created dangerous conditions) on their own property but are no longer in control of the property at the time of injury. And none of the cases cited by

Jenkins hold otherwise. (*See* Br. at 22) Indeed, those cases involve duties owed by third parties -- not former property owners like Occidental. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005) (duty of contractor performing repairs); *Lefmark Mgmt.*, 946 S.W.2d at 52-55 (duty of former property manager); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997) (duty of adjacent tenant); *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986) (duty of fire marshal).[2]

Because *Strakos* and its progeny only apply to *non-owners* who create a dangerous condition, it has no application here. And notwithstanding Jenkins's assertions, Occidental is not "a 'non' owner." (Br. at 22) Rather, it is a former owner of the property, and it was the owner of the property at the time the allegedly dangerous condition was created. The court of appeals thus erred in relying on *Strakos* to impose liability on Occidental. *See Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 35 n.27 (Tex. App.—Houston [1st Dist.] 2013, pet. filed).

[2] Although Jenkins stated that he did not seek to recover on a premises-liability claim (10.RR.50-53), the cases on which he now relies involve premises-liability claims. *See, e.g.*, *Lefmark Mgmt.*, 946 S.W.2d at 52 ("In this premises liability case . . . ."); *Science Spectrum*, 941 S.W.2d at 910 (same); *Page*, 701 S.W.2d at 834 (independent contractor "put in control of premises by the owner" is "under the same duty as the owner to keep the premises" in a safe condition).

B. Jenkins was required to bring his so-called "negligent design" claim as a premises-liability action.

Because Jenkins was injured by a condition of the property -- not by some contemporaneous negligent activity by Occidental -- he would be required to assert a premises-liability action against Occidental if Occidental had never sold the property. *See H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 259 (Tex. 1992); *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992).[3] It simply cannot be the case that Occidental is now *worse* off by owing a perpetual duty in ordinary negligence that it did not owe the day before selling its property. Nonetheless, Jenkins now asserts that Occidental's "duty as a premises owner expired" when Occidental sold the plant (Br. at 23), and a *new* cause of action (with a lesser burden of proof) for ordinary negligence supposedly sprang to life.

The imposition of any such rule would not "narrow[] the potential tort liability" of a former landowner. (Br. at 25) Rather, it would *expand* potential liability on a never-ending basis to any property owner who designs or constructs an improvement to its property. Indeed, contrary to Jenkins's bald assertion (Br. at 13) and the court of appeals's opinion, there is nothing "unusual" or "rare" about a

[3] Jenkins cannot circumvent the requirements of premises-liability law by alleging that Occidental negligently "engineer[ed] and design[ed]" the pH-balancing system. (Br. at 25); *see In re Tex. Dep't of Transp.*, 218 S.W.3d 74, 78 (Tex. 2007) (non-owner defendant's alleged negligence in "designing" roadway is not a contemporaneous activity and is properly pled only as a premises-liability action).

property owner who designs, constructs, or creates an improvement on its property. *See Jenkins*, 415 S.W.3d at 39.

In fact, homeowners, ranchers, farmers, and business owners routinely undertake their own improvement projects. And they commonly do so without hiring a licensed engineer to design (or an outside contractor to construct) the improvement. If allowed to stand, the court of appeals's opinion will impact all Texas property owners because of the threat they could face liability countless years after selling their property if someone is ever injured on the premises. And current premises owners will have far less incentive to remedy or warn of dangerous conditions if they can simply pass liability to a former owner for negligently designing the condition years earlier.

1. Under Texas law, there is no distinct claim against former property owners for negligent design of improvements.

Jenkins concedes that, under section 352 of the Restatement, "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." (Br. at 27) Nonetheless, based on the fiction that Occidental had "two distinct roles" and wore "two hats," Jenkins takes the position that section 352 does not control here because Occidental's liability is supposedly based on its role as a "negligent designer" -- not on its status as a premises owner. (*Id.* at 12, 14, 27-28) Nothing supports this artificial distinction or Jenkins's misguided efforts to rely on

authorities from other jurisdictions to pretend that Occidental is two separate entities.

a. Jenkins's reliance on cases from other jurisdictions is misplaced.

Instead of addressing the relevant sections of the *Restatement*, Texas law, or factually similar cases from other jurisdictions, Jenkins cherry picks three opinions from other states in an effort to create the illusion that "a former owner may be held liable for injuries sustained due to a danger it created on the property." (Br. at 29-30) That is not the law in Texas. And in any event, the cases on which Jenkins relies are easily distinguishable.

For example, in *Dorman v. Swift & Co.*, 782 P.2d 704 (Ariz. 1989), the Arizona Supreme Court merely considered whether section 352 of the *Restatement* "bars a personal injury negligence action against the *maker of a product*." *Id.* at 705 (emphasis added). Ultimately, the court declined to adopt section 352 in Arizona. *Id.* at 707. Instead, it held that, even if section 352 were to apply, it "cannot operate to insulate the maker of a product from its negligence where the product is wholly unrelated to the use and enjoyment of the land." *Id.*

In stark contrast to the defendant in *Dorman*, Occidental is not "the maker of a product," and the pH-balancing system was permanently attached to the land. In any event, Arizona courts have consistently applied section 352 after *Dorman* and declined to impose liability on former property owners even when they designed

the dangerous condition that injured the plaintiff. *See Menendez v. Paddock Pool Constr. Co.*, 836 P.2d 968, 977-80 (Ariz. Ct. App. 1992); *Andrews v. Casagrande*, 804 P.2d 800, 802-04 (Ariz. Ct. App. 1990).

Jenkins's reliance on *Stone v. United Engineering*, 475 S.E.2d 439 (W. Va. 1996), fares no better. There, the court simply recognized that two limited exceptions have emerged to section 352 under which a former landowner may be liable for injuries sustained after selling the property: (1) under section 353 when a vendor of property "conceals or fails to disclose" to the vendee any condition which involves unreasonable risk to persons on the land, and (2) "where the vendee of real property has knowledge of the dangerous condition at the time of conveyance but sufficient time has not elapsed at the time of an accident to allow the vendee to remedy the defect." *Id.* at 451-52.

Here, Jenkins never alleged (or proved) that Occidental concealed or failed to disclose any dangerous condition. And given that Equistar was in possession of the property for eight years before Jenkins's injury, it had more than a "reasonable time to discover and remedy" any hazardous condition. *Id.* at 452; *see also Century Display Mfg. Corp. v. D.R. Wager Constr. Co.*, 376 N.E.2d 993, 997-98 (Ill. 1978) (2.5 months was reasonable time for buyer to discover and take precautions against danger posed by combustible liquids at plant); *Coppage v. City of St. Paul*, No. C1-98-1287, 1999 WL 138719, at *5 (Minn. Ct. App. 1999) (seven

months was more than reasonable time for purchaser to discover and remedy undisclosed hazard). Moreover, after *Stone*, the West Virginia Supreme Court recognized that former landowners who create dangerous conditions on their property owe no duty to a plaintiff injured on the property when the former owner did not "own, possess, or control" the property at the time of the accident. *Conley v. Stollings*, 679 S.E.2d 594, 598-99 (W. Va. 2009).

Similarly, the court's unpublished opinion in *Carroll v. Dairy Farmers of America, Inc.*, No. 2-04-24, 2005 WL 405719 (Ohio Ct. App. Feb. 22, 2005), proves nothing. There, the court never addressed section 352 or whether a former property owner can be liable in ordinary negligence for negligent design. Instead, the court simply reversed a summary judgment in favor of a former plant owner because material fact issues existed concerning whether the owner was responsible for the design, modification, or installation of a platform from which the plaintiff fell. *Id.* at *1-2, 4-7.

The other out-of-state authorities Jenkins cites likewise do not support the imposition of liability on Occidental. (*See* Br. at 31-34) Although Jenkins tries to create the appearance that "multiple" jurisdictions recognize that a former owner may be held liable for creating a dangerous condition when it has negligently designed equipment, seven of the twelve cases cited by Jenkins are lower court decisions from a single jurisdiction (New York). (*Id.*) Further, the cases on which

Jenkins relies (*e.g.*, *Smith*, *Coyne*, and *Matthews*) are premises-liability cases -- not ordinary negligence cases. (*Id.*) And none of them ultimately hold the former property owner liable for injuries sustained after relinquishing control over the property.

Jenkins further misses the point when he argues that "[c]ourts throughout the country have recognized a cause of action for 'negligent design,' as distinguished from a claim based on 'premises liability.'" (Br. at 26) Simply put, Jenkins did not assert an ordinary negligence claim for "negligent design." Moreover, none of the out-of-jurisdiction cases Jenkins cites involves "negligent design" claims against a former owner. (*Id.* at 26 & n.3) And the one Texas case that Jenkins cites -- *Ferrell v. McDonald's Corp.*, No. 05-01-00838-CV, 2002 WL 1895346 (Tex. App.—Dallas Aug. 19, 2002, pet. denied) (not designated for publication) -- involved a non-viable products liability action for negligent design and strict liability against a current restaurant owner (not an ordinary negligence claim). *See id.* at *3 (affirming summary judgment for restaurant owner on products liability action for negligent design because the owner did not "participate in the sale, distribution, design, manufacture or marketing" of the allegedly defective product).

b. Jenkins's efforts to distinguish authorities from other jurisdictions are unavailing.

Equally meritless are Jenkins's efforts to distinguish authorities from other jurisdictions cited in Occidental's opening brief. (Br. at 34-36, 38-40) A close

reading of those cases reveals that they are factually similar and address the precise legal issue presented here -- namely, whether former owners, allegedly negligent in designing or constructing an improvement on their property, should be subject to liability for injuries sustained on that property long after relinquishing ownership and control. And each of those cases held the former property owner was not liable even though it created the dangerous condition at issue. *See Gresik*, 33 A.3d at 599-600; *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249, 1256-57 (Mont. 1989); *Preston v. Goldman*, 720 P.2d 476, 481, 487 (Cal. 1986); *see also* Occidental Br. at 16-19.

c. Jenkins cites no Texas cases supporting his position, and his efforts to distinguish the Texas cases cited by Occidental are futile.

Notably, Jenkins cites no Texas case in which a former property owner is held liable to a plaintiff in ordinary negligence (or any other theory) for designing an improvement (or condition) on its property that subsequently injures a plaintiff. And his efforts to distinguish the three Texas cases Occidental cites are unavailing. (*See* Br. at 36-37)

For example, Jenkins now argues that (1) the court in *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1994, writ denied), did not address the so-called "'creation of a dangerous condition' exception to the general no-liability rule for non-owners," and

(2) *Roberts* supports the view that a former premises owner can be liable if it created the dangerous condition. (Br. at 37) But the plaintiff in *Roberts* specifically alleged that the former owner "created or permitted the creation of an unreasonably dangerous condition." *Roberts*, 886 S.W.2d at 365. Nonetheless, the court held the former owner was not liable for injuries caused by the dangerous condition after conveyance because the one exception to a vendor's non-liability -- when the vendor does not disclose or actively conceals the existence of the condition and the vendee has not discovered the condition or had a reasonable opportunity to take precautions -- did not apply. *Id.* at 367-68. The same is also true here.

Similarly, Jenkins now asserts the former owners in *Beall v. Lo-Vaca Gathering Co.*, 532 S.W.2d 362 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.), had not "designed the equipment to be affixed to the real estate." (Br. at 37) But the former owner in *Beall* was solely responsible for creating the dangerous condition because, while in possession of the property, it "strung a wire or cable" between two utility poles to deter traffic, and the plaintiff was subsequently injured when he struck that cable while riding a motorcycle. *Beall*, 532 S.W.2d at 364.

Jenkins also argues that the holdings in *Beall* and *First Financial Development Corp. v. Hughston*, 797 S.W.2d 286 (Tex. App.—Corpus Christi

1990, writ denied), turn on the fact that "the transferee had been put on notice of the danger." (Br. at 37) Those cases, however, are addressing section 353 of the *Restatement*, which imposes liability on a vendor in a premises-liability action only when the vendor actively conceals or fails to disclose a dangerous condition of which it is aware. *See First Fin.*, 797 S.W.2d at 290; *Beall*, 532 S.W.2d at 365. But here, Jenkins does not assert a premises-liability action -- let alone rely on the section 353 exception. And in any event, the transferee in this case (*i.e.*, Equistar) was on notice of the potentially dangerous nature of the pH-balancing system because (1) Occidental provided Equistar with all plant records, including those related to the system (3.RR.148; 8.RR.143-44), (2) the system is conspicuously labeled with the term "ACID" (Br. at 2; *see* PX 45), and (3) Equistar required its employees to wear protective gear when working with the system (4.RR.24-29; 5.RR.235).

Jenkins's final contention -- that "the party that designed the improvement [in *First Financial*] was held liable even though it lacked control of the premises at the time of injury" -- simply proves Occidental's point. In that case, the court held that the transferor of the property was not liable for injuries after conveyance. *First Fin.*, 797 S.W.2d at 292-93. And the one party held liable (Williams Construction Company) was a third-party contractor that "built the stairway where the accident occurred" -- not the former owner. *Id.* Jenkins, however, did not sue

a third-party contractor. And to avoid the statute of repose, it takes the position that Occidental did not construct the system. (*See* Br. at 46)

2. The statutes of repose do not signal legislative acceptance of a negligent-design duty.

Jenkins further confuses the issue when he contends that the statutes of repose supposedly "confirm[] the existence of a duty" on former property owners. (Br. at 41) The statutes of repose, however, merely bar actions against persons who design or construct an improvement after a specified period of time. They have nothing whatsoever to do with the threshold issue of whether those persons owe a duty. Thus, the Texas Legislature's decision to enact a statute of repose without specifically exempting "property owners" proves nothing -- *i.e.*, it neither supports nor negates the existence of a perpetual duty on former owners who design or construct their own improvements. It does not signal acceptance of Jenkins's "negligent-design" theory. (*Id.*)

C. Jenkins does not have a viable products liability claim.

1. Jenkins pleaded and attempted to prove a products liability claim -- not an ordinary negligence claim.

In a misguided effort to now recast his lawsuit as a "common-law negligence case" governed by general negligence principles (Br. at 42), Jenkins ignores his own pleadings and the liability question submitted to the jury. To begin with, Jenkins did not plead a "common-law negligence claim." Rather, Jenkins alleged products liability claims against Occidental for (1) strict liability,

(2) negligent design, manufacturing, and marketing, and (3) breach of the implied warranty of merchantability. (1.CR.160-65); *see* TEX. CIV. PRAC. & REM. CODE § 82.001(2) ("products liability action" includes claims arising out of personal injury, allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, or breach of warranty).

Moreover, the trial court did not submit an ordinary negligence issue to the jury. And tellingly, Jenkins never recites or specifically addresses the relevant jury question in his brief. Nor can he, because the only liability theory submitted to the jury was for negligent design in the products liability context. (10.CR.2636) Indeed, unlike a common-law negligence claim, Question No. 1 required Jenkins to establish that (1) Occidental's design of a supposed product (*i.e.*, the Acid Addition System) was negligent, (2) a "safer alternative design" existed, and (3) Occidental's conduct fell below the care that would be exercised by "a company engaged in the manufacture of like or similar equipment." (*Id.*)

Critically, these elements are the hallmarks of a products-liability action for negligent design against a manufacturer who places its products into the stream of commerce -- not an ordinary negligence claim. *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997) (negligent design claims are "predicated on the existence of a safer alternative design for the product" and look at "the acts of the manufacturer [to] determine if it exercised ordinary care in design"); *compare*

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS PJC 71.7 (2012) (negligent design, manufacturing, or marketing in products cases) *with* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE PJC 2.1, 4.1 (ordinary negligence) (2012).

Occidental, however, cannot be liable for "negligent design" because, as discussed above in Part I.A.1, it is not a "manufacturer" (Br. at 42); it never placed the pH-balancing system into the stream of commerce (7.RR.78-79); and the jury found the system is an improvement to real property -- not a product or chattel (10.CR.2642). Because Jenkins's and the court of appeals's effort to recast Jenkins's claim after the fact is belied by Jenkins's own pleadings and the jury question at issue, the Court should reverse and render judgment that Jenkins take nothing from Occidental.

2. Occidental is not recharacterizing Jenkins's action as a strict products liability case.

Rather than address these dispositive issues, Jenkins engages in revisionist history by arguing that "[t]his is not a products-liability case" and then accusing Occidental of recharacterizing his "negligent-design case" as a "strict-products-liability case." (Br. at 42) Nothing supports Jenkins's rhetoric. As discussed above, a claim for negligent design is, by definition, a products liability action. And contrary to Jenkins's assertion, Occidental has never

characterized Jenkins's claim as a strict-products-liability claim. Rather, it correctly observed that Jenkins asserted (and submitted) a products-liability claim for negligent design. (*See* Occidental Br. at 30-35)

Jenkins is also wrong when he notes that "[p]lacement of a product in the stream of commerce" is a "necessary prerequisite" for strict-products liability, but then argues it is "not an essential element of a negligent-design claim." (Br. at 43) In fact, a products-liability claim for negligent-design requires proof of all the elements of a strict-products liability claim (including the placement of a product in the stream of commerce), as well as evidence the manufacturer did not exercise ordinary care in the design of the product. *See, e.g.*, *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978); *Zavala v. Burlington N. Santa Fe Corp.*, 355 S.W.3d 359, 365-66 (Tex. App.—El Paso 2011, no pet.); *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 476 (Tex. App.—Dallas 2011), *rev'd on other grounds*, 432 S.W.3d 865 (Tex. 2014).

II. The Statutes of Repose Bar Jenkins's Claim.

Even assuming Occidental was liable for Jenkins's injuries, Jenkins's claim is nevertheless barred by the statutes of repose in TEX. CIV. PRAC. & REM. CODE §§ 16.008 and 16.009.

A. Jenkins's claim is barred by TEX. CIV. PRAC. & REM. CODE § 16.009.

Section 16.009 applies to "a person who constructs or repairs an improvement to real property." TEX. CIV. PRAC. & REM. CODE § 16.009. Because Occidental constructed an improvement to its real property and Jenkins did not bring suit within ten years after the completion of the improvement, section 16.009 provides a "complete defense" to Jenkins's personal injury action. *Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied).

1. Occidental constructed part of the system itself.

Jenkins acknowledges that section 16.009 precludes suits against those that "annex" or "attach" equipment to real property, transforming it into an improvement. (Br. at 46-47) Here, the evidence conclusively establishes that Occidental's in-house construction and maintenance crew constructed and installed the piping for the pH-balancing system. (8.RR.31-32)

Instead of addressing this dispositive evidence, Jenkins mischaracterizes the testimony by first claiming that the construction was "done by contractors" (Br. at 46, citing 8.RR.58-59, 71) and then arguing that, "[a]t most, there was conflicting evidence" (Br. at 47, *comparing* 8.RR.31-32 *with* 8.RR.58-59, 71). The record does not support Jenkins's assertions.

To be sure, contractors were involved in the construction of the system. But there was no conflict in the evidence or need for Occidental to "request a finding on the issue." (Br. at 47) Rather, the undisputed evidence shows that contractors constructed and attached the "acid addition pot" (8.RR.58-59, 71), and Occidental constructed and installed the piping for the system (8.RR.31-32). And under Texas law, section 16.009 applies to all persons who construct any part of an improvement. *See Gordon v. W. Steel Co.*, 950 S.W.2d 743, 748 (Tex. App.—Corpus Christi 1997, writ denied). Because the piping (like the pot) is an improvement attached to real property (*see* PX 45), the statute of repose bars Jenkins's claim against Occidental for this reason alone.

Nothing in *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475 (Tex. 1995), cited by Jenkins, compels a different result. There, the Court held that section 16.009 does not grant "repose to manufacturers in products liability suits" who "merely manufacture[] a product that another party move[s] and attache[s] to the realty." *Id.* at 479. But as previously discussed, Occidental does not manufacture pH-balancing systems (or piping for such systems). Because Occidental itself attached and "annex[ed]" part of the system to the realty (Br. at 46), and thereby

constructed an improvement, the court of appeals erred in holding that section 16.009 does not bar Jenkins's claim. *See Jenkins*, 415 S.W.3d at 23-28.[4]

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

Even if Occidental had not constructed part of the improvement itself, section 16.009 would still shield Occidental from liability because it hired the contractor to attach the acid addition pot to the system. *See, e.g.*, *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 922 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (defendant who approved design of pool was entitled to protection of 16.009 even though it "hired a contractor to perform the actual construction"). In arguing otherwise, Jenkins erroneously implies that the cases cited by Occidental were based on a previous (and supposedly "broad[er]") version of section 16.009 that applied to any action against "any person performing or furnishing construction" of an improvement. (Br. at 48) But other than Jenkins's unsupported speculation that "[t]he old concept of 'furnishing' construction might be read to include contracting with a third-party contractor" (*id.*), Jenkins provides no justification for his suggestion that only the previous version of the statute would protect Occidental.

[4] Jenkins is also wrong when he contends "[s]ection 16.009 is inapplicable to a design claim that has nothing to do with the way in which equipment has been attached to real property." (Br. at 46) Section 16.009 does not turn on whether a plaintiff complains about the manner in which equipment is attached to real property. Rather, it applies to any personal injury claim "arising out of a defective or unsafe condition on the real property," and it protects any "person who constructs or repairs an improvement." TEX. CIV. PRAC. & REM. CODE § 16.009.

Indeed, section 16.009 is currently titled "Persons Furnishing Construction or Repairs of Improvements." TEX. CIV. PRAC. & REM. CODE § 16.009.

More importantly, Jenkins ignores that Occidental cites two cases -- *Reames* and *Fuentes v. Continental Conveyor & Equipment Co.*, 63 S.W.3d 518 (Tex. App.—Eastland 2001, pet. denied) -- that are based on the current version of section 16.009. And both of those cases hold that parties who contract to have an improvement physically installed have "a relationship with the annexation of the [improvement] to the realty" as necessary to invoke the statute of repose. *Reames*, 949 S.W.2d at 763; *see Fuentes*, 63 S.W.3d at 521-22.

Jenkins's final contention -- that "Occidental acted solely as the property owner" and the statute of repose only protects "general contractors," not mere landowners (Br. at 49) -- is particularly disingenuous. Indeed, in an effort to impose liability on Occidental, Jenkins devotes the majority of his brief to treating Occidental as if it were a third-party contractor or manufacturer -- not a property owner -- who designed, manufactured, and created the pH-balancing system. (*See* Br. at 14-43) Yet, in the very next breath, Jenkins inconsistently contends that Occidental acted "solely as the property owner." (Br. at 49) Jenkins cannot have it both ways. To the extent Occidental could ever be liable for injuries caused by an

improvement to its formerly owned real property constructed years before selling the property, section 16.009 extinguished that liability as a matter of law.[5]

B. Jenkins's claim is also barred by TEX. CIV. PRAC. & REM. CODE § 16.008.

1. The evidence conclusively establishes that a licensed Occidental engineer planned or inspected the construction of the improvement.

Section 16.008 protects licensed engineers who "plan[]" or "inspect[]" improvements to real property or equipment attached to real property. TEX. CIV. PRAC. & REM. CODE § 16.008(a). As extensively set forth in Occidental's opening brief, the evidence conclusively establishes that Hanneman is a licensed engineer who, among other tasks, "planned" and "inspected" an improvement to real property. (*See* Occidental Br. at 47; *see, e.g.*, 8.RR.10-12, 32-34, 84, 148)

Jenkins does not address this uncontroverted testimony. Instead, he cites the entire 97-page cross-examination of Hanneman and baldly asserts the evidence was not conclusive because Hanneman was "cross-examined and impeached." (Br. at 60, citing 8.RR.53-142, 150-58) Hanneman, however, was not impeached (or cross-examined) about her planning and inspection of the system. (*See* 8.RR.53-142, 150-58) And notably, Jenkins does not identify any specific

[5] In any event, the undisputed evidence shows that Occidental also acted as a general contractor by supervising the construction of parts of the pH-balancing system. (8.RR.145-46, 149)

testimony showing otherwise. Nor does Jenkins identify any conflicting evidence on this issue. There is none.

Jenkins's remaining contention -- that the planning or inspection of the system by a licensed engineer is supposedly "immaterial" because Jenkins did not allege any negligence in "planning" or "inspecting" the system (Br. at 59-60) -- is equally meritless. Simply stated, the application of section 16.008 does not turn on the particular theory of negligence alleged by a plaintiff. Rather, section 16.008 applies in "an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment." TEX. CIV. PRAC. & REM. CODE § 16.008(a). And it requires a person to bring a suit against a licensed engineer, "who designs, plans, *or* inspects the construction of an improvement to real property . . ., not later than 10 years after the substantial completion of the improvement." *Id.* (emphasis added).[6] Because Jenkins failed to do so here, his claim is barred for this reason alone.

2. The jury's unchallenged finding that the improvement was designed under the supervision of licensed engineers is alone sufficient to invoke the protection of section 16.008.

Jenkins does not and cannot dispute that the improvement was designed under the supervision of one or more licensed Occidental engineers. Instead, he

[6] By reading the term "or" out of section 16.009 and implying additional terms that nowhere exist, it is Jenkins -- not Occidental -- that fails to "give effect to every provision [of the statute] and ensure that no provision is rendered meaningless or superfluous." (Br. at 60)

first argues that the jury's finding is "immaterial" and that *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 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), do not apply because (1) neither case supposedly considered the question of "supervision" and (2) both cases allegedly involved professional engineering firms. (Br. at 55-58) Jenkins is wrong on both accounts.

In *Fluor*, the court specifically identified the fact that the design was "performed under the supervision of a Texas-registered professional engineer" as an "essential fact[]" in holding that the statute of repose applied. *Fluor*, 828 S.W.2d at 30; *see Sowders*, 663 S.W.2d at 649 (affirming summary judgment for defendant because "the engineering services were performed by or under the responsible charge of engineers authorized to practice professional engineering"). And contrary to Jenkins's assertion, neither case identifies the defendant as a "professional engineering firm[]." (Br. at 58)

Jenkins raises a false issue when he next contends that "property owners who contract for engineering services are not protected" by section 16.008. (Br. at 58-59) Unlike the inapposite cases on which Jenkins relies, Occidental did not contract for engineering services by a third party. *See Smither v. Tex. Utils. Elec. Co.*, 824 S.W.2d 693, 697 (Tex. App.—El Paso 1992, writ dism'd) (defendant was not entitled to protection of section 16.008 when the summary judgment proof

established that Ebasco Services -- not defendant -- was "the engineering company responsible for the design of the weir and canal"); *McCulloch*, 696 S.W.2d at 921 (defendant contracted with professional engineer to design pool).[7] Rather, Occidental's own engineers designed the improvement themselves. (5.RR.145; 8.RR.10-12, 29-30, 32-33, 145-46, 148-49) And they did so under the supervision of a licensed engineer. (10.CR.2642)

Moreover, Jenkins cannot invoke *McCulloch* to support his contention that section 16.008 does not protect property owners even if they supervise the engineering work. The defendant in *McCulloch* invoked the statute of repose for construction -- not engineering -- based on its assertion that, "as supervisor of the project, it was sufficiently involved in the construction process to merit the protection of the statute." *McCulloch*, 696 S.W.2d at 921. And the court, in recognition that the statute is to be given "the most comprehensive and liberal construction possible," agreed that section 16.009 applied even though the defendant "hired a contractor to perform the actual construction." *Id.* at 921-22.

[7] Likewise, in *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239 (Tex. App.—Texarkana 1992, writ denied), the court recognized that "[a] firm need not provide engineering services exclusively to be protected by Section 16.008." *Id.* at 243. Nevertheless, the court held that summary judgment was inappropriate because material fact issues existed regarding whether the defendant acted as an engineer. *Id.* at 243-44.

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

Notwithstanding the jury's failure to find the improvement was designed by a licensed engineer, the record does not support the myth that a single individual (Neil Ackerman) designed the pH-balancing system. In fact, it conclusively establishes that a team of Occidental engineers, led by a licensed engineer, designed the system. (*See* Occidental Br. at 43-44, 47)[8]

Jenkins cannot avoid this result by baldly asserting that "[t]he evidence was conflicting" and then creating a misleading impression by cherry-picking testimony that Ackerman "shepherded" the process and served as the so-called "Originator." (*See* Br. at 51-52) There is no conflict. Indeed, the very testimony Jenkins cites from Ackerman and Hanneman is consistent and conclusively establishes:

- Ackerman did not initiate any design changes or have any authority to finalize or approve the design;
- the design was not decided "unilaterally" and was instead a "team approach"; and
- as the employee who "shepherded" the process and served as the "Originator," Ackerman merely "circulat[ed]" the paperwork for

[8] Jenkins acknowledges that section 16.008 offers protection if the "engineer who was responsible for the design work [was] licensed." (Br. at 55) Occidental agrees, and that is another reason why section 16.008 applies here. Indeed, as extensively discussed in Occidental's opening brief, Hanneman is a licensed engineer, and she actively participated in the design of the system; she was ultimately in charge of and responsible for the project; and the jury found the system was designed under her supervision. (*See* Occidental Br. at 43-44, 48-50; 10.CR.2642)

> approval, "coordinated" the various groups to make sure "everyone [was] doing their part," and "facilitated getting the right people in the room at the right time."

(5.RR.144-45; 8.RR.62-65, 83-84, 149)[9]

For these reasons, the court of appeals erred in concluding that section 16.008 does not apply here.

CONCLUSION

Accordingly, the Court should reverse the court of appeals's judgment and render judgment that Jenkins take nothing against Occidental.

[9] Ironically, and in sharp contrast to Jenkins's current position, Jenkins's counsel conceded during Hanneman's cross-examination that he was "not suggesting" that Ackerman did the design "all by himself." (8.RR.71)

Respectfully submitted,

/s/ Deborah G. Hankinson

DEBORAH G. HANKINSON
State Bar No. 00000020
dhankinson@hankinsonlaw.com
JOSEPH B. MORRIS
State Bar No. 14489700
jmorris@hankinsonlaw.com
RICK THOMPSON
State Bar No. 00788537
rthompson@hankinsonlaw.com
HANKINSON LLP
750 N. St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

BARRY N. BECK
State Bar No. 02004000
bbeck@cbtd.com
DAVID W. LAURITZEN
State Bar No. 00796934
dlauritzen@cbtd.com
RICK STRANGE
State Bar No. 19355700
rstrange@cbtd.com
COTTON BLEDSOE TIGHE & DAWSON, P.C.
P.O. Box 2776
500 West Illinois, Suite 300
Midland, Texas 79702-2776
432.685.8553
432.684.3124 (fax)

Counsel for Petitioner
Occidental Chemical Corporation

CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that Petitioner's Reply Brief on the Merits contains 7,483 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
Rick Thompson

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 10th day of February, 2015:

Russell S. Post, Esq.
rpost@brsfirm.com
David M. Gunn
dgunn@brsfirm.com
Erin H. Huber
ehuber@beckredden.com
Chad Flores
cflores@beckredden.com
Beck Redden LLP
1221 McKinney Street, Suite 4500
Houston, Texas 77010-2010

Wallace B. Jefferson
wjefferson@adjtlaw.com
Douglas W. Alexander
dalexander@adjtlaw.com
Alexander Dubose Jefferson & Townsend LLP
515 Congress Ave., Suite 2350
Austin, Texas 78701

/s/ Rick Thompson
Rick Thompson