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No. 13-0961

In the Supreme Court of Texas

OCCIDENTAL CHEMICAL CORPORATION
Petitioner,

v.

JASON JENKINS,
Respondent.

On Petition for Review from the Houston First Court of Appeals
No. 01-09-01140-CV

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Occidental's petition for review contends that this case is about tort duties. But there is nothing even remotely controversial about imposing a duty on a party that created a dangerous condition—the duty the court of appeals recognized here. *See* Op. at *12, 16-20 (Tab D). This Court has recognized the duty that controls this case since *Strakos v. Gehring*, 360 S.W.2d 787, 790 (Tex. 1962), and it was reaffirmed in *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 425-26 (Tex. 2011). There, this Court reaffirmed that if a non-owner creates a dangerous condition on real property, "general negligence principles apply." *Id.* at 424. In such a case, this Court explained that the duty to rectify "what is ultimately a faulty design" should fall on the party responsible for the "faulty design." *Id*. at 426.

Occidental is the party responsible for the "faulty design." Op. at *1, 12. Thus, its negligence duty is not controversial. Occidental's problem does not arise because of the scope of its duty, but because it failed to prove its repose defenses. At trial, Occidental lost the verdict on the key issue related to the statute of repose. It secured a JNOV based on a misreading of the statute, which the court of appeals correctly reversed in a painstakingly careful opinion. Op. at *3-11. In this Court, Occidental indulges in fear-mongering about an unlimited expansion of tort duties. The Legislature dealt with that risk in the statutes of repose; Occidental's failure to prove those statutory defenses is neither important nor an injustice.

STATEMENT OF FACTS

The court of appeals' opinion correctly recounts the key facts and faithfully applies the standard of review to the record and the verdict. Op. at *1, 5-7, 8-11. Justice Harvey Brown, the opinion author, got the facts right.

The material facts are simple: For years, Occidental owned and operated a chemical plant in Bayport. *Id*. at *1. While Occidental owned the plant, it designed an "acid addition system" for purposes of adding acid to its chemical processes. *Id*. There was a dispute at trial about the origin of the design. Occidental insisted that the design was the product of a team and was created under the "supervision" of a licensed engineer, but there was evidence that the actual "design" of the system was delegated to an unlicensed engineer at Occidental. *Id*.

The jury heard evidence that the acid addition system was initially designed by Neil Ackerman, a recent college graduate who was not yet licensed as an engineer by the State of Texas (or even eligible to be licensed). *Id*. at *1, 5-6. Occidental disputed the importance of Ackerman's role, but it could not escape the evidence that Ackerman created the "conceptual design" and was primarily responsible for "shepherding" the project. *Id*.

Once the design was complete, Occidental hired third-party contractors to construct the acid addition system. *Id*. at *1, 8, 10. It is undisputed that Occidental did not do the construction work itself. *Id*.

Unfortunately, the design of the acid addition system was very dangerous. Years after it had been designed and constructed—and after Occidental had sold the plant to another company—a process engineer named Jason Jenkins was nearly blinded when the dangerous design ejected acetic acid into his face. *Id*. at *1.

At trial, Occidental argued that it was entitled to invoke two statutes of repose that protect parties who "design" and "construct" improvements to real property. But Occidental lost the verdict on the "design" question, as the jury found it had failed to prove the acid addition system was "designed" by a "licensed engineer." *Id*. at *1-2. Occidental did not even request a jury finding that it had "constructed" the acid addition system, wrongly asserting that it did not need to do so. *Id*. at *8. Although Occidental had failed to prove its repose defenses, the trial court granted a JNOV based on a misreading of the statutes. *Id*. at *1-3.

The court of appeals correctly reversed, strictly interpreting the two statutes according to their plain language and this Court's precedent. *Id*. at *3-11. Occidental amusingly criticizes the court of appeals for issuing multiple opinions, Pet. at 7-8, but that is only because Occidental filed multiple motions for rehearing. Each time, Occidental would find some new fault with the opinion, and each time, Justice Brown would conscientiously address Occidental's concern. Significantly, every member of the First Court of Appeals except for Justice Evelyn Keyes (without opinion) agreed that further review is unwarranted (Tab E).

SUPREME COURT REVIEW IS UNWARRANTED

The petition attempts to transform a statute of repose case into a duty case. The real issue here involves the statute of repose, and once that issue is understood, the duty issue disappears. This response places the issues into proper context.

I. The Statute of Repose Issues Do Not Warrant Review.

The Legislature has chosen to limit tort liability for property improvements with two statutes of repose. One statute applies to licensed professionals who design such improvements and another applies to contractors who construct them. Occidental did not prove that either statute applies. The legal system worked fine; Occidental was simply unable to prove its defenses.

The statute of repose for design protects "licensed or registered" designers, but Occidental's young designer had no license. An older supervisor was licensed, but she did not do the design work. Because Occidental failed to prove that the acid addition system was "designed by" a licensed engineer, it lost this defense. The court of appeals decided this issue properly. *See* Op. at *3-11.

The statute of repose for construction protects a person who "constructs" improvements to real property, but everyone agrees Occidental did not "construct" the acid addition system; a third-party contractor did so. Occidental did not even request a jury finding on this issue, and it did not prove the defense conclusively. The court of appeals also decided this issue properly. *See id.* at *7-11.

A. Occidental Failed to Establish the Statute of Repose for Design.

Section 16.008 of the Civil Practice and Remedies Code provides a statutory defense of repose for claims "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":

> A person must bring suit for damages for [personal injury] 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.

Tex. Civ. Prac. & Rem. Code § 16.008(a).

Because the statute of repose is an affirmative defense, Occidental bore the burden of proving that it falls within the protected class, and that the activity for which it seeks repose is a protected activity. *See*, *e.g.*, *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). Occidental failed to carry that burden because Occidental is not a "registered or licensed engineer,"[1] and the jury failed to find the acid addition system was "designed" by a "registered or licensed engineer."

[1] Occidental is not a "registered" engineering firm. 8 RR 66-68. There is a registration scheme that applies to professional engineering firms, but it does not apply to companies like Occidental that simply employ engineers in their business. Therefore, the only way Occidental could invoke the statute was to prove that the employee who did the design (whose negligence subjected Occidental to liability under principles of vicarious liability) was himself a "licensed engineer." It failed to do so.

Because the parties disagreed about the correct interpretation of this statute, the trial court submitted two questions about it. One question asked whether the acid addition system was "designed by" a licensed engineer; the other asked whether it was "designed under the supervision of" a licensed engineer. CR 2642. The first question is legally correct and controlling; the second is legally incorrect and immaterial—yet it is the focus of Occidental's petition.

In Question 8, the jury answered a question based on the statutory language. It failed to find that the acid addition system was, in fact, "designed by" any "registered or licensed engineers":

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"

CR 2642. In Question 9, the jury answered a question that Occidental contrived to suit its facts rather than the statutory text. It found the acid addition system was "designed under the supervision" of "registered or licensed engineers":

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"

Id.

The court of appeals held that Question 8, which tracked the statutory text, was the only material question; the inquiry in Question 9 about "supervision" was legally immaterial. Because there was a sufficient basis for the jury to decide that the acid addition system was not "designed by" a "registered or licensed engineer" and Occidental had not conclusively proved this essential element of its defense, the court held Occidental had failed to prove this statutory defense. Op. at *3-7. Occidental challenges this holding on two grounds, but neither has merit.

1. The court of appeals correctly held that Occidental failed to prove the elements of its statutory defense conclusively.

First, Occidental attacks the jury's failure to find the acid addition system was "designed by" a "registered or licensed engineer" on the fact-bound premise that "it was uncontroverted and conclusively demonstrated that multiple licensed Occidental engineers worked together to design the pH-balancing system at issue." Pet. at 15. Not so. The evidence was conflicting, and Jenkins won the jury verdict. Justice Brown's careful review of the trial record is correct. Op. at *5-7.

The evidence at trial revealed that the acid addition system was "designed" by Neil Ackerman, young and inexperienced engineer who did not have a license. 8 RR 11-12, 62-63, 65, 71-72, 84. He was not even eligible to apply for a license. *Id.*; 4 RR 48-49. Occidental's own witness, 8 RR 10-12, admitted Ackerman was "not a registered engineer," yet he was charged with "shepherding" the design:

Q. But you do know that Neil Ackerman was the one in charge – essentially from the start to finish in shepherding the process?

A. I do know that he shepherd [sic] the process, yes.

8 RR 65.

Other Occidental employees played a role, but on the key issue of "design," the grudging admissions from Occidental's witnesses offered the jury a clear story: "He [Ackerman] was responsible for the process, getting it done." 8 RR 84. Ackerman was the "originator" of the design, which is to say that he "managed," "coordinated," and "shepherded" the project. 4 RR 48; 5 RR 144-45.

Likewise, internal design documents named Ackerman as the "Originator" and confirmed that the design details were "Per Neil Ackerman." PX 15. Occidental's assertion that it proved its defense conclusively cannot succeed unless the courts are willing to pretend this evidence does not exist.

Occidental indulges in hyperbole, accusing the court of appeals of reaching a "truly remarkable" holding that "if a plaintiff can find one unlicensed engineer on a design team upon whom to pin blame, then the statute of repose is unavailable to a corporation like Occidental." Pet. at 17. But this criticism is utterly unjustified. Occidental cannot blame the court of appeals for its decision to assign design work to an unlicensed engineer (and its resulting inability to prove the statutory defense authorized by the Legislature). Nor can it defy the Legislature by changing the test enacted by the Legislature to suit its facts—the issue to which we turn next.

2. The court of appeals correctly held the Legislature did not grant repose for mere "supervision" of a design.

Unable to satisfy the plain language of the statute, Occidental tries to alter it. According to Occidental, the statute must protect not only a licensed engineer who "designs" an improvement to real property, but also any licensed engineer who "supervises" such a design. On this basis, Occidental says the Question 9 finding about "supervision" trumps the Question 8 answer about "design." Pet. at 16-17.

Occidental's preference is understandable, as it conveniently fits the facts. But it does *not* fit the statute, which provides no such protection for "supervision." Because the statutory language "provides the best indication of legislative intent," *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 133 (Tex. 2013), this Court often emphasizes that "[w]here text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). This text is clear and determinative; it does not protect "supervision."

The Legislature chose to grant repose only to a licensed engineer who "designs, plans, or inspects." Tex. Civ. Prac. & Rem. Code § 16.008(a). The word "supervise" does not appear in the statute. The Legislature knows how to regulate "supervision" in the profession of engineering when it wants to do so. *See*, *e.g.*, Tex. Occ. Code §§ 1001.052, 1001.304(b), 1001.405(e)(3). It did not do so here, and the omission is significant. *See PPG Indus., Inc. v. JMB/Houston Ctrs. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004). Courts should not rewrite the statute.

Indeed, the omission of "supervision" is even more important in this case than many others, because statutes of repose for "design" were passed nationwide in an effort to define the temporal limits of liability for architects and engineers. Many states passed statutes that protect "supervision."[2] But the Texas Legislature chose not to do so, and "that should end the inquiry because this Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

Occidental's petition exposes the weakness of its statutory interpretation. The petition cites two intermediate court decisions that referred to "supervision" only in their factual summaries, not their legal analysis. *See Tex. Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28 (Tex. App.—Texarkana 1991, writ denied); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). There was no dispute in those cases that those defendants fell within the protected class. Given that this is the best that Occidental can do, the court of appeals did not err by strictly applying the statute as written.

[2] *See, e.g.*, Ala. Code § 6-5-225; Ark. Code § 16-56-112; Cal Civ. Proc. 337.1; Colo. Rev. Stat. § 13-80-104; Conn. Gen. Stat. § 52-584a; 10 Del. Code § 8127; Fla. Stat. § 95.11; Ga. Code § 9-3-51; Haw. Rev. Stat. § 657-8; Idaho Code § 5-241; Ind. Code § 32-30-1-5; La. Rev. Stat. § 2772; Mass. Gen. Laws 260 § 2B; Mich. Comp. Laws § 600.5839; Miss. Code § 15-1-41; Mont. Code § 27-2-208; N.J. Stat. § 2A:14-1.1; N.M. Stat. § 37-1-27; N.D. Cent. Code § 28-01-44; Oh. Rev. Code § 2305.131; Okla. Stat. tit. 12, § 109; Pa. Cons. Stat. §5536; R.I. Gen. Laws § 9-1-29; Tenn. Code § 28-3-202; Utah Code § 78B-2-225; Va. Code § 8.01-250; Wash. Code §§ 4.16.300, 4.16.310; W.V. Code § 55-2-6a; Wisc. Stat. § 893.89; Wyo. Code § 1-3-111.

For this reason, the Question 9 inquiry about "supervision" was immaterial. Question 8 submitted the material question about "design," and Occidental lost it. The court of appeals correctly held 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." Op. at *5. "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." *Id*. at *6. Occidental cannot allow a young, unlicensed engineer to design dangerous equipment and then claim a defense tied to the licensing scheme. The court of appeals' holding was correct and it does not warrant review.

B. Occidental Failed to Establish the Statute of Repose for Construction.

The other statute of repose involved in this case appears in Section 16.009, which provides repose for claims "against a person who constructs or repairs an improvement to real property":

> 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.

Tex. Civ. Prac. & Rem. Code § 16.009(a). Occidental failed to prove it was the "person who construct[ed]" the relevant "improvement to real property."

Occidental leaves the construction statute unbriefed. Pet. at xiii, 9, 17 n.3. Ordinarily, there is nothing jurisprudentially important about an unbriefed issue—and indeed, the court of appeals' opinion on this issue is excellent. Op. at *7-11. Everyone agrees that Occidental did not "construct" the acid addition system itself; independent contractors did so. 8 RR 58-59, 71. Thus, Occidental is not entitled to repose under Section 16.009. Op. at *8.

Because it cannot satisfy the statutory language, Occidental asks this Court to extend the construction statute to property owners who pay for improvements. Pet. at xiii. But this theory of "respondeat repose" cannot be squared with the text. By its terms, the statute applies to a "person" who "constructs" an improvement. Tex. Civ. Prac. & Rem. Code § 16.009(a). "The plain language of the statute applies to those who construct or repair improvements—the statute applies to those who start with personalty and transform the personalty into an improvement." *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995); *see also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 (Tex. 2009) (Section 16.009 "only precludes suits against persons or entities in the construction industry that annex personalty to realty"). Thus, the court of appeals correctly held "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.'" Op. at *8. Section 16.009 is inapplicable.

C. Occidental's Inability to Prove Its Statutory Repose Defenses Is No Reason to Distort Common-Law Duty Rules.

Exposing the flaws in Occidental's effort to invoke the statutes of repose reveals the real reason for its no-duty argument. In essence, the no-duty argument is an attempt to counteract Occidental's inability to prove its statutory defenses. The petition repeatedly frames its no-duty theory as an essential common-law rule, the only solution to avoid making negligent equipment designers "forever liable." *See* Pet. at iv ("forever liable"), viii ("forever liable"), x ("forever liable" (twice)), xii ("forever liable"), 7 ("forever liable" (twice)), 8 ("forever liable"), 9 ("forever liable"), 11 ("forever liable"), 14 ("forever liable"). The theme is not subtle.

But this concern is the reason the Legislature enacted the statutes of repose. The Legislature struck "a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries." *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 264 (Tex. 1994). Defendants who prove they fall within a statute of repose are not "forever liable." Otherwise, the Legislature has decided they can be held liable. *See id.* at 264-65. Occidental's real gripe is not with the court of appeals, but the Legislature.

The Legislature has addressed the issue of long-term tort liability by statute, and courts should not distort the common law to extend the protection of repose beyond the intent of the Legislature. Courts should faithfully adhere to the text of the statutes of repose—which is precisely what the court of appeals did here.

II. The Common-Law Duty Issue Does Not Warrant Review.

Under general negligence principles, Occidental had a duty to act reasonably in designing the acid addition system. Occidental's assertion that it owed no duty (in other words, that it had a license to act unreasonably) is unjustified.

A. A Party That Creates a Dangerous Condition on Real Property May Be Liable for Negligence.

For over 50 years, this Court has held that liability may arise not only from control over real property that imposes a duty to "make safe" or "warn" about dangerous conditions, but also from negligent acts by non-owners or occupiers that "create" a danger. *See, e.g.*, *Strakos v. Gehring*, 360 S.W.2d 787, 790 (Tex. 1962). The *Strakos* rule is the key to this case.

To give the analysis context, it is useful to review the history of *Strakos*. Before *Strakos*, the liability of a defendant who created a hazard on real property was governed by the "accepted work doctrine." *Strakos*, 360 S.W.2d at 789. Control was the litmus test for liability. Once the defendant's work was accepted and the defendant ceded control of the property, it owed no duty to third parties. *Id*. But in 1962, as part of the modern trend that abandoned "privity" rules, *Strakos* abandoned the "accepted work doctrine" and held that parties who create hazardous conditions on real property may be liable for negligence whether or not they are in control of the property at the time of the injury. *Id.* at 790.

The *Strakos* rule is mainstream American law. It is found in Section 385 of the Restatement (Second) of Torts, and is cited frequently by this Court.[3] In 2011, this Court reaffirmed that *Strakos* abolished a no-duty rule. If a non-owner created a dangerous condition on real property, "general negligence principles apply." *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 424 (Tex. 2011). Under *Strakos*, the duty to rectify "what is ultimately a faulty design" falls on the party responsible for the "faulty design." *Id*. at 426. Here, that party is Occidental.

Occidental argues that *Strakos* does not apply to a former premises owner who created the dangerous condition itself and then sold the property. Pet. at 10. But that makes no sense, and unsurprisingly, *Strakos* and its progeny do not define the duty with reference to the actor who created the danger. *See Science Spectrum*, 941 S.W.2d at 912 (holding that "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 due care"). Occidental also argues that liability under the *Strakos* rule should end after "a substantial period of time." Pet. at 11. But this argument confirms that Occidental's real concern is not about the *creation*, but the *conclusion*, of the duty. The Legislature has dictated that conclusion by enacting the statutes of repose; Occidental simply failed to prove its defenses.

[3] *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 452 (Tex. 2006); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986).

B. Occidental's Duty Is Well-Grounded in the Common Law.

Occidental's no-duty argument ignores the fact that Occidental wore two hats. It was (i) the designer of the acid addition system and (ii) the former premises owner. The court of appeals correctly recognized these "two distinct roles." Op. at *12. Neither that court nor Jenkins denies that the familiar duty of the premises owner to "make safe" or "warn" was transferred to the new owner when the plant was sold. But that duty is not at issue.[4] Rather, Occidental is liable in its capacity as the negligent designer of the acid addition system that "created" the risk. *Id*. at *16-20. That duty arises under "general negligence principles," *Keller*, 343 S.W.3d at 424, and does not end when a party leaves the premises. *Strakos*, 360 S.W.2d at 790.

The "general negligence principles" applicable to Occidental's role as the designer of the acid addition system are well-settled under Texas law. Parties who design equipment are bound to exercise reasonable care; this duty does not change simply because the equipment is later installed as an improvement to real property, nor does it end when the property is sold.

First, Sections 395 and 398 of the RESTATEMENT (SECOND) OF TORTS impose a duty of reasonable care on parties that design and construct equipment.[5]

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[4] For this reason, Occidental's attempt to fashion a conflict with cases from other states involving only the liability of former premises owners is beside the point. Pet. at 11-13.

[5] Texas follows these rules. *See Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 327 (Tex. 1968); *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 650 (Tex. 1977); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871-72 (Tex. 1978).

Second, the rules set forth by Sections 395 and 398 apply equally to hazards created by improvements to real property—even if the party responsible for the hazard no longer controls the property. RESTATEMENT (SECOND) OF TORTS § 385. That is the whole point of the *Strakos* rule.

Applying these general negligence principles, the Restatement includes an illustration that is eerily similar to this case:

> The A Stove Company makes a gas stove under a design which places the aperture through which it is lighted in dangerous proximity to the gas outlet. As a result of this B, a cook employed by C, who has bought one of these stoves from a dealer to whom A has sold it, while attempting to light the stove is hurt by an explosion of gas. The A Stove Company is subject to liability to B.

RESTATEMENT (SECOND) OF TORTS § 398 illus. 1.

All of these "general negligence principles," *Keller*, 343 S.W.3d at 424, support the court of appeals' analysis. Op. at *11-13, 16-20. When Occidental sold the chemical plant, its duty as a premises owner was passed to the new owner, "but Occidental did owe a duty to be non-negligent in its engineering and design of the acid addition machine." *Id*. at *19. Occidental remained liable for its design of the acid addition system under the same rules as every other equipment designer. That rationale is perfectly sound. There is nothing "groundbreaking," Pet. at 9, "extraordinary," *id*. at 10, "unprecedented," *id*. at 8, 11, or "extreme," *id*. at 13, about the court of appeals' duty analysis. It is old-time religion.

CONCLUSION

As Justice Brown explained, "[t]his is an unusual case in which a former plant owner performed its own design work for an improvement to real property." Op. at *20. Such cases are rare; ordinarily the design work would be performed by a registered or licensed engineer entitled to the protection of the statute of repose. But Occidental elected to perform that role, so it must accept legal responsibility for its negligent design (and for entrusting the work to an unlicensed engineer). *Id*. There is nothing controversial about this result, which explains why eight members of the First Court of Appeals agreed it does not warrant further review (Tab E).

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Response to Petition for Review was properly forwarded to counsel of record for Petitioner in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure on the 7th day of April 2014, as follows:

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CERTIFICATE OF COMPLIANCE

1. This Response complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 4,495 words, excluding the parts of the Response exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This Response complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

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Dated: April 7, 2014