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SUPREME COURT OF TEXAS
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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
Court of Appeals No. 01-09-01140-CV

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the case	Jason Jenkins sued Occidental Chemical Corporation for serious injuries he suffered when a negligently designed Acid Addition System ejected acid into his face.
Trial court	Hon. Tracy E. Christopher 295th District Court, Harris County
Trial court disposition	The jury found that Occidental negligently designed the Acid Addition System, that Jenkins was also negligent, and that Occidental was 75% responsible. CR2636-42 (Tab A).[1] The trial court granted JNOV on the basis of the statute of repose. CR2829-30 (Tab B).
Court of Appeals	First Court of Appeals (Brown, J., joined by Jennings and Sharp, JJ).
Disposition on appeal	The court of appeals reversed the JNOV, rejected Occidental's no-duty argument, and rendered judgment for Jenkins. Occidental filed three motions for rehearing. Each time, the court of appeals carefully reviewed and rejected Occidental's arguments. The court of appeals' final opinion is reported at 415 S.W.3d 14 (Tab E).

[1] Citations to these appendices refer to the Appendix to Petitioner's Brief on the Merits.

ISSUES PRESENTED

1. Whether a designer of industrial equipment that would otherwise owe a duty of reasonable care under traditional negligence law can escape liability because it once owned the property on which the equipment was installed and it sold the property after installation.

2. Whether statutes of repose protect a designer of industrial equipment who (a) did not "construct" an improvement to real property itself, but paid independent contractors to perform the work, and (b) entrusted the design work to an employee who was not a "licensed engineer" at the time.

INTRODUCTION

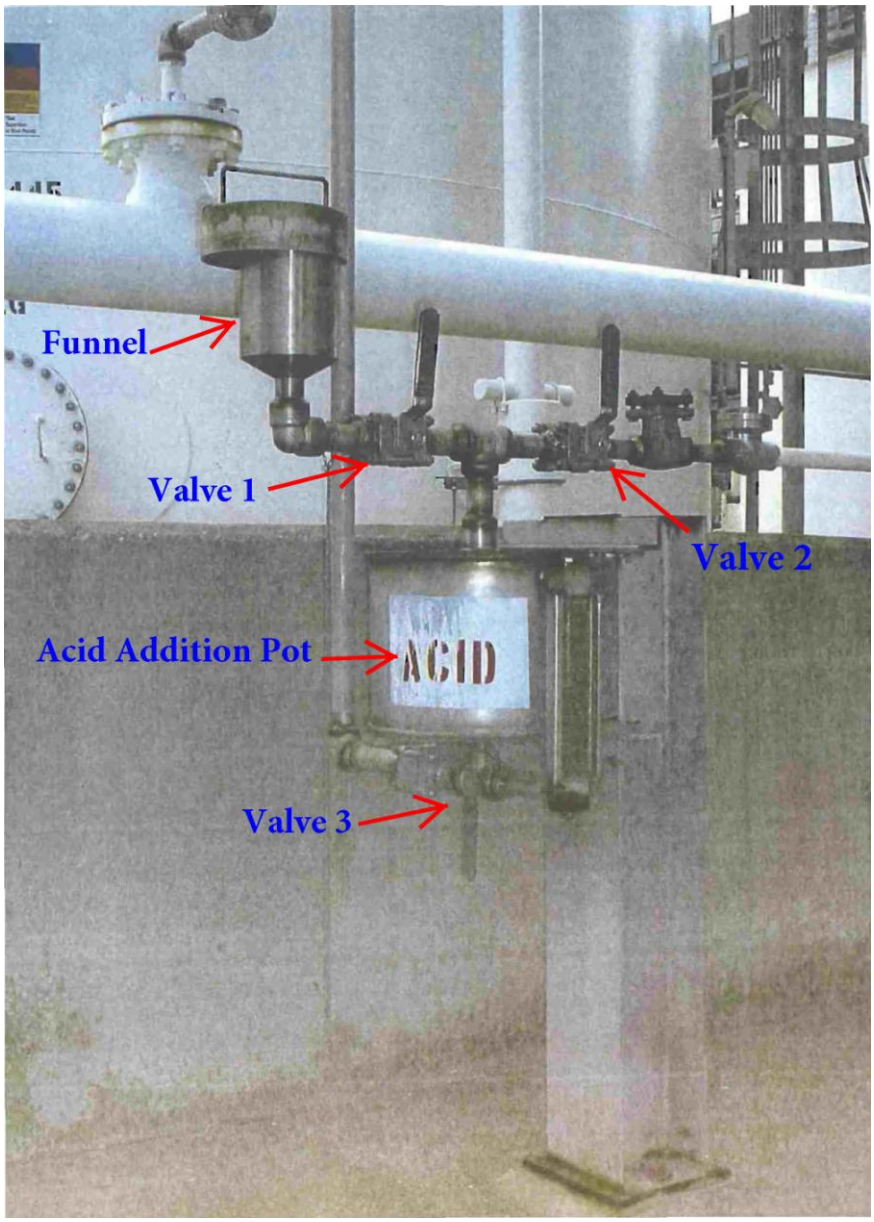
Jason Jenkins was a technician at a chemical plant who suffered horrific injuries when acid was ejected into his face under high pressure. RR5:253-54. The equipment that caused Jenkins' injury, known as an Acid Addition System, was designed by a young Occidental engineer who was not yet licensed. At trial, everyone agreed that the design was negligent. PX2. The designer admitted that safeguards "should have been" implemented. RR4:110-12; 5:167-68.

Occidental now asserts that the court of appeals' ruling "breaks new ground" and makes former premises owners liable "forever." But its hyperbole is a bluff. There is nothing novel about imposing a negligence duty on a party that designs industrial equipment. 415 S.W.3d at 28-31. And for over 50 years, this Court has held that when a non-owner creates a dangerous condition on real property, "general negligence principles apply." *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 424 (Tex. 2011) (citing *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962)).

Under "general negligence principles," the court of appeals' duty analysis is neither novel nor dangerous. In many cases, statutes of repose limit such duties. But here, Occidental cannot invoke the statutes of repose, as the court of appeals explained in a painstakingly careful opinion. 415 S.W.3d at 19-28. In this Court, Occidental indulges in fear-mongering about an unlimited expansion of tort duties. But the Legislature balanced that risk in the statutes of repose.

STATEMENT OF FACTS

This is the Acid Addition System that Occidental negligently designed.



PX45; CR2636. Occidental employee Neil Ackerman designed the System. Although he had an engineering degree, Ackerman was not a licensed engineer. RR4:48-49, 64; 5:144-45; CR2642; *see also* p. 52, *infra*.

The Engineering Challenge

The Acid Addition System was designed for a chemical plant in Bayport that produces a chemical compound called triethylene glycol ("TEG"). RR4:13-14. TEG has a variety of industrial uses. RR4:14-15. To satisfy customer demands, TEG must be maintained at a certain acidity level. RR4:16.

The TEG was produced in a tank known as a C-TEG tank. RR4:49; 5:19. Originally, the C-TEG tank lacked a safe way to regulate acidity in the tank, RR8:10-11, so Occidental conceived of the Acid Addition System as a better way to add acetic acid to the tank. RR4:17; 8:11-12.

Acetic acid acts as "a starting material for many other chemicals." RR4:30. The Bayport plant used "essentially pure [acetic] acid. It was at least 99.8% pure." *Id*. This concentration is "extremely corrosive," and is "very damaging if you get it in the eyes." *Id*. Ackerman knew acetic acid was dangerous. RR5:147, 159-61.

Because of "the hazards associated with the chemicals in a chemical plant," RR4:92, the Occupational Safety and Health Administration (OSHA) promulgated a Process Safety Management Regulation to protect employees from chemicals. *Id*. At the time the Acid Addition System was designed, that regulation required (1) a safe operational design; (2) a hazard analysis; (3) clear operating instructions; and (4) personal protective equipment. RR4:92-93; 5:126, 147, 160, 168.

Ackerman's Design Solution

The Acid Addition System has several elements. The "Funnel" is connected to a pressure vessel, which is called the "Acid Addition" or "Calibration" Pot. These elements are connected by an acid inlet valve ("Valve 1"). *See* RR4:18-19. The Acid Addition Pot also has a nitrogen inlet valve ("Valve 2") that is connected to a highly pressurized nitrogen system. Finally, it has an outlet valve ("Valve 3") that is plumbed to the C-TEG tank. *See* RR 4:19. These components are designed to "push the acid" through a series of pipelines into the C-TEG tank. RR4:18-20. Here is how the system was supposed to work:

First, the cover on the Funnel would be removed and acid would be added. RR4:18-19. The top of the Funnel is 51 inches high—just at or below the level of the face of a process technician standing in front of it. PX2; RR5:104-05, 119. Under normal circumstances, the acid would flow naturally to Valve 1. RR4:19.

Second, Valve 1 would be opened, relying on gravity to draw the acid into the Acid Addition Pot. Then Valve 1 would be closed. RR 4:19.

Third, the Acid Addition Pot would be pressurized by opening Valve 2, which was connected to a pressurized nitrogen system. RR4:19. The nitrogen was under 140-psi of pressure, about "six times the pressure you have in your car tires." RR4:19; *see also* RR4:37; 5:118 (same). "It is a lot of pressure." RR4:19.

Finally, once the acid had drained into the Acid Addition Pot and the system had been fully pressurized, Valve 3 would be opened to inject the pressurized acid into the C-TEG tank. RR4:19-20. At this point, if everything worked as planned, "the pressure in the pot is going to push the liquid in the pot" into the C-TEG tank. RR4:20. This solution was intended to provide a chemical addition system in which an operator would add acetic acid through the Funnel, apply high-pressure nitrogen, and push the acetic acid into the C-TEG tank. RR4:54-55; 5:148.

As long as the acid flowed in the intended direction, *i.e.*, to the C-TEG tank, the Acid Addition System would perform its function without danger. But if the 99.8% acid were allowed to flow backwards under pressure up through the Funnel, operators in front of the Funnel would be in severe harm's way. "[Y]ou could vent pressure back up through the line going to the funnel and there would be residual material within that line or within the product." RR4:55.

Occidental was aware of this risk at the time of the design. As Ackerman, the designer of the system, explained it: "[I]f there's nitrogen flowing and if you add acetic acid, it would [blow] the acetic acid out the funnel, I would presume." RR5:156; 4:78. This risk "should have been considered." *Id.*; 5:149-50, 156-59 (Ackerman knew); RR4:106-08 (Occidental knew). "If you had pressure on the system and you opened it up," Ackerman conceded, "you could have acetic acid come back if you were pouring it in with pressure on the system." RR5:157.

Ackerman's Dangerous Design

Ackerman's design included no safeguards to stop highly pressurized acid from projecting out of the Funnel into an operator's face. Experienced, licensed engineers would have employed a series of critical, effective safeguards. RR5:165-68. Ackerman's design omitted such safeguards, which is why acid blinded Jenkins. The flaws in Ackerman's design prompted a seasoned expert to condemn it as "inherently unsafe" and a "deficient design." RR4:34.

First, Ackerman designed the system to vent any residual pressure through the Funnel, where the acetic acid was added. RR4:35. To relieve pressure that had built up in the system before adding more acetic acid, the operator had to "vent the nitrogen, or whatever vapors are in that pot, right up though this funnel." RR4:36. That design was dangerous because "the operator, while he's operating [Valve 1], could be standing right over this funnel." *Id.* Pressurized acid left in the system—at 6X the pressure of an automobile tire—could be ejected directly up through the Funnel into the operator's eyes, nose, and mouth. RR4:36-37, 78; 5:29, 118.

The American Society of Mechanical Engineers adopted industry standards requiring that "pressure be vented to a safe location" in such a chemical system. RR4:93-94, 98. Ackerman's design did not do so—a major flaw. RR4:34, 5:32; *see also* PX2 (summarizing flaws in design).

The need for a safer alternative is obvious not only to experts, but even to non-engineers who can recognize, intuitively, the dangerous propensities of acid. It would be far better to have designed the Acid Addition System "so you could de-pressure it to a safe location independently of the line where you are feeding the [acetic] acid in." RR4:45. The system should have been designed to vent it to a safe location, far away from the operator. RR4:90; RR5:29, 124-25. Residual acid could then safely drain into the pot itself, rather than exploding into the face of an unsuspecting worker. RR4:91. This simple solution could have been installed quickly and inexpensively. RR4:110-11; 5:159.

Second, Ackerman's design required an operator to open the acid inlet valve (Valve 1) to determine if the Calibration Pot was pressurized. RR4:37-38; PX144. A pressure gauge could have been added "so that you would know if there was any pressure in it and how much pressure there was." RR4:37; *see also* RR4:45 (same). Adding such a pressure gauge would have been "cheap and easy." RR4:39, 90, 110. But because there was no gauge, there was no way to know there was pressure in the system. RR4:90, 106-07; 5:121-22.

Ackerman admitted he should have considered all these issues back in 1992, when he designed the system. RR4:108-10; RR5:136, 156-64. And he conceded that both solutions "should have been implemented." RR4:110-12; 5:167-68.

But these design problems escaped notice because "Ackerman said that he couldn't recall [Occidental] performing a hazards analysis" on its eventual design. RR4:59. Occidental also did not consult safety professionals. RR4:81; 5:151-52. In short, Occidental skipped the checks and balances essential to a safe design. RR4:42-47, 63-64. When that occurs, "[t]here's a very good chance that hazards are going to be overlooked and you are not going to have sufficient safeguards to protect against those hazards." RR4:59. And that is precisely what happened.

The "Incomplete" and "Confusing" Operating Instructions

The Acid Addition System included operating instructions. PX16; RR4:20. Operators must follow these operating instructions, RR4:20-23, so "[t]hey need to be clear and accurate as to the steps that need to be done." RR4:67. But these instructions were "incomplete" and "confusing." RR4:39.[2] Falling intolerably short of OSHA regulations, they did not explain how to vent the system safely. RR5:27-30, 121-23. Instead, the operating instructions directed the operator to "[i]nsure addition pot is de-pressured before adding acid by opening the valve [Valve 1] between the funnel and the pot." RR4:72. In short, the instructions told Jenkins to open the very valve that would explode pressurized acid up through the Funnel into his face. RR4:72-73; 5:27-30, 122-23.

[2] Occidental prepared the operating instructions, which were revised by the subsequent operator. RR4:65. The differences are immaterial. *See* RR4:69-73; *compare* PX16 (Occidental version) *with* PX21 (Equistar version). "They are substantially the same." RR4:73; *accord* 5:121.

The "Loaded Gun" Goes Off

Given its design flaws, the Acid Addition System was "a loaded gun waiting to go off." RR4:98. It was just a matter of time: "[I]t's not uncommon for plants to operate for a number of years, decades even, before they have an incident. So in these cases there were latent hazards present, things that were just waiting to happen, for the right circumstances to come along." RR4:113. When it happened, the man staring down the barrel was Jason Jenkins.

Jenkins was an experienced instrument technician in the chemical industry. RR5:227-28. After a decade he rose to the job of process technician, where he became responsible for "[t]he making of the physical properties of the chemicals." RR5:231. He underwent "vigorous training" for seven months, which included a "rigorous testing program," safety training, and task-based training. RR5:231-37.

On the morning of the accident, Jenkins was ordered to add acetic acid to the C-TEG tank. RR4:82; 5:241. Jenkins had not yet performed this particular task, but he had observed it. RR5:241-43. He reviewed the operating instructions and donned personal protective equipment. *Id*. He then brought acetic acid from the laboratory to the Acid Addition System, where he followed the operating instructions to the letter. RR4:83; 5:243-47. After adding acetic acid to the system, he closed the valves and continued his work. RR4:84; 5:247. Later that same day, he was instructed to repeat the operation. *Id*.

Jenkins re-read the instructions and he followed the "[s]ame exact process." RR5:248. "On a job that you do that is not routine, you're better off reading through it every time you do the job." *Id.*

Jenkins took the lid off the Funnel, RR4:85; 5:250, which was located just below the level of his face. PX2; RR5:119. He looked down into the Funnel and "saw some residual acid in the funnel." RR5:250; 4:85. But he had "no indication at all that it [was] under pressure." RR5:250. He relied on the operating instructions to guide his next steps. RR5:251-52.

Jenkins "opened the valve between the acid addition pot and the funnel [Valve 1]." RR 5:253. But there was residual pressure in the Acid Addition Pot. RR4:85. As such, "when [Valve 1] was opened to drain that material into the pot, the pressure in the pot blew that [acetic] acid back up into Mr. Jenkins' face." RR4:36; *see also* RR4:85 ("And it blew that acid back up at him.").

The projected acid emerged with such force that Jenkins's face shield and protective goggles were no match; they were not designed to stop a blast of acid shooting upwards at high pressure. RR4:26-27, 85-86; 5:118, 120, 248-50, 253-54. Jenkins was "instantly blinded." RR4:86.

> I remember everything just instantly went blank. Everything—my sight, just white. I couldn't—all my sense of smell—the only thing that I could smell was acid. It went up my nose. You know, it got in my eyes. All I remember was just seeing white.

RR5:254.

> I was scared. I didn't know what just happened. It was just so fast, so quick. It—it—I mean, I knew something pretty severe had just happened; but I didn't know what the severity of it was, until maybe a couple of seconds later, whenever I tried to open my eyes and all I could see was white.

Id. And the pain was excruciating:

> Try to imagine what it is like to—I don't know. Take a thousand needles and stick it in your eye, in both eyes. It was a lot of pain. Very, very, painful. Something that it would be very difficult for anybody to make it through. You had to be—it was the worst pain I had ever felt in my life.

Id.

Jenkins later learned "the stem cells in my eyes had been almost 100 percent burned away in one eye and quite a bit in the other." RR6:95. His eye specialist informed him that "this is one of the worst acid burns he had seen in 25 years." RR6:97; *see also* RR6:214 (same). By trial, he had endured nine eye surgeries and stem cell implants, with mixed success. RR6:98-116; 7:17.

Jenkins lost his sight. RR6:34-36. After extensive medical treatment and numerous surgical procedures, he regained partial sight—but his vision is erratic, and he is permanently disabled. RR6:12-37, 40-62, 119-24. He has suffered "significant depression" and PTSD. RR6:37-38; 7:17-18. He will need ongoing medical care—including as many as ten more transplants—for the rest of his life. RR6:60-68; *see also* RR7:19-35 (life-care plan). This injury was catastrophic.

The $5,000 Fix

A root cause analysis in the aftermath of this accident called the design flaws in the Acid Addition System the "primary cause" of Jenkins' accident. PX 2; RR4:95; 5:161-64. Confronted with those findings, Ackerman admitted that a different design "should have been implemented." RR4:110-12; 5:167-68.

After this accident, the Acid Addition System was redesigned to include both a pressure gauge and a safe way to de-pressurize the system to a safe location (far away from the operator). RR4:97-98; 5:161-67; PX12; *see also* RR5:10-15 (discussing other changes). The redesign cost only $5,000. RR5:161-62.

SUMMARY OF ARGUMENT

The court of appeals carefully—and correctly—resolved this case in a series of painstakingly thorough opinions by Justice Harvey Brown. The history is telling: Occidental criticizes the court of appeals for its multiple opinions, Occ. Br. at 9-10, but they exist because Occidental filed multiple motions for rehearing. Each time, Occidental found some new fault with the opinion, and each time, the court conscientiously addressed Occidental's concern.

In this case, "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. . . . Occidental is subject to liability only for its design work." 415 S.W.3d at 29. This analysis is correct.

The court of appeals held that Occidental owed a duty to use reasonable care in designing the Acid Addition System, and that duty survived the sale of the plant. Occidental repeatedly argues that this case is governed by premises liability law. But it is not. As a non-owner or occupier of the property at issue at the time of Jenkins' injury, Occidental has no liability in its role as a premises owner. Rather, Occidental's liability stems from its role as designer of the Acid Addition System. The fact that Occidental is not liable as a former premises owner does not grant it immunity for its negligent equipment design. 415 S.W.3d at 39. Its negligence duty arose under "general negligence principles," *Keller*, 343 S.W.3d at 424, and did not evaporate when Occidental sold the premises. *Strakos*, 360 S.W.2d at 790.

If Occidental had not performed its own design work, it would not be liable. "This is an unusual case in which a former plant owner performed its own design work for an improvement to real property." 415 S.W.3d at 39. Such cases are rare; ordinarily, a registered or licensed engineer, entitled to the protection of the statute of repose, performs the design work. But Occidental elected to perform that role—without using a licensed engineer—so it must accept the consequences.

Occidental did not prove it was protected by either of the statutes of repose it has invoked. The court of appeals correctly enforced both statutes according to their plain language. The Legislature set the bar, and Occidental did not meet it. Occidental cannot change the facts, and this Court should not change the law.

ARGUMENT

One question in this case is beyond dispute: Occidental acted negligently. The Acid Addition System was designed negligently; indeed, it failed OSHA requirements and industry standards. *See* PX2. The designer himself conceded that a different design "should have been implemented." RR4:110-12; 5:167-68. Nor is there a dispute that Jenkins was seriously injured as a result of these flaws. Thus, the issues are confined to (1) whether Occidental owed any duty to the predictable victim of its serious design flaws, and (2) whether it can avoid responsibility in the safe harbor of an inapplicable statute of repose.

I. The court of appeals correctly held Occidental liable for its negligent design of the Acid Addition System.

Occidental occupied "two distinct roles." 415 S.W.3d at 29. It designed the Acid Addition System and formerly owned the plant. As Justice Brown explained, that fact makes this an "unusual case." *Id*. at 39. The duty not to create a danger is distinct from the duty of a premises owner to make safe or warn about dangerous conditions on the premises. For this reason, the court of appeals' decision upholding liability for the negligent design neither "broke new ground" nor made former owners "forever liable." Occ. Br. at 11. Occidental (and its amici) are just substituting slogans for serious legal analysis. The court of appeals' duty analysis is correct and consistent with the law in other jurisdictions.

A. The duty to exercise reasonable care in designing equipment is mainstream tort law.

Occidental's no-duty argument is far more novel than the notion that a designer's mistake that predictably injures an unwitting victim must be redressable. If the Acid Addition System had been designed by a third party engineering firm (like KBR, for example) or an engineer employed by another chemical company, the duty analysis would be elemental. That firm or engineer would unquestionably have to answer for negligence. This Court recently noted, in a different context, that the rules governing negligence actions against professionals like engineers are "deeply developed and their application uniform and well-settled." *LAN/STV v. Martin K. Eby Const. Co.*, 435 S.W.3d 234, 244 (Tex. 2014) (citing in footnote statutes affecting professional negligence claims against engineers); *see also Trinity River Auth. v. URS Consultants, Inc.* 889 S.W.2d 259, 262 (Tex. 1994) (noting that the common-law cause of action to recover for damages "resulting from negligent design or construction" is well-settled).

Indeed, professional negligence claims are so familiar that the Legislature requires a certificate of merit from a "licensed professional engineer" before suit can be brought against an engineer. Tex. Civ. Prac. & Rem. Code § 150.002(a); *see generally Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556 (Tex. 2014); *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384 (Tex. 2014). This legislative regulation underscores the existence of the design duty.

Likewise, there is no question that a manufacturer who designs industrial equipment that is installed on real property can be liable for a negligent design. This Court adopted that rule in *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 327 (Tex. 1968), upholding a negligence finding against "the Otis Elevator Company, which manufactured and allegedly designed" an escalator and its adjacent housing, even though the escalator subsequently had been installed on the premises of the "the R. E. Cox department store in Waco." *Id*. at 326. The premises owner was not found negligent, but this Court upheld the negligent-design liability of the escalator designer. *Id*. at 327-28.

Therefore, a third-party engineering firm (or engineer) could be held liable for negligently designing the Acid Addition System. Indeed, that is the lesson of *Allen Keller Co. v. Foreman*, 343 S.W.3d 420 (Tex. 2011), where this Court refused to impose liability on a contractor that built a project according to the engineer's specifications in large part because legal responsibility for the design rested with the designer. *Id*. at 426.

It would be an odd twist in the law if a company could evade liability by using its own engineer to create a faulty design, rather than outside engineers who must answer for their transgressions. In either scenario, the duty analysis must be the same.

Nor does it make any difference that Occidental occupied two distinct roles, one as equipment designer and the other as premises owner. Because it no longer owed a duty as the premises owner, Occidental wants to evade responsibility for causing harm based on an incompetent design. But its theory is contrary to basic tort principles.

1. The negligent-design theory is fundamental tort law.

There is no "policy-laden question" affecting Occidental's duty to design the system so that it does not cause catastrophic injury to the operators Occidental knew would engage it. Occ. Br. at 26. The basic principles are well-settled under Texas law: A company that designs equipment must use 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.

The basic rule governing negligence in this context is stated by Section 395 of the Restatement (Second) of Torts:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Restatement (Second) of Torts § 395 (App. 1). This Court adopted Section 395 in *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 327 (Tex. 1968).

This Court has also adopted Section 398, which is "a special application of the rule in Section 395" for design cases. *Id.* It provides:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Restatement (Second) of Torts § 398 (App. 2).

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.

If a third party had designed and manufactured the Acid Addition System, therefore, it would owe an unquestionable duty. Just as the designer of the escalator in *Otis* "had a duty to that class of persons [using the escalator] to exercise reasonable care in the design of the escalator," *Otis*, 436 S.W.2d at 328, and the designer of the stove had a duty to the cook in the Restatement illustration, the designer of the Acid Addition System had a duty to its foreseeable users—process technicians like Jason Jenkins.

2. The fact that equipment is affixed to real property does not alter this duty or absolve the negligent designer of liability.

Sections 395 and 398 apply equally to hazards created by improvements to real property—and that is true even if the parties responsible for the danger are not in possession of the 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) (App. 3). By emphasizing that liability for hazards associated with improvements to real property is determined "under the same rules" as those governing liability for the manufacture of chattels, Section 385 incorporates the liability standards of Section 395 and 398. *Id*. at cmt. a. This rule applies to one who is "acting as the possessor's servant." *Id*. at cmt. b; *see also* Restatement (Second) of Torts § 383 cmt. a.

This liability is imposed upon a party that creates a hazardous improvement "as the erector or creator of the structure or condition, and *not* as a person entitled to be upon the land," so "the liability is *not* subject to the same limitations as is that of the possessor of land or chattels." Restatement (Second) of Torts § 385 cmt. d (emphasis added). Therefore, the liability of a party that creates a danger on real property is *not* subject to the special rules of premises liability.

The Restatement contrasts the duty owed by the person who creates the danger with the separate and distinct duty owed by the current premises owner, who "is under a duty toward the person injured to discover the defect and make the structure or condition safe or warn such person of the existence of the danger." *Id.* at cmt. c. Section 385 cross-references another of the sections related to chattels for this purpose, Section 396. *Id.* ("*see* § 396"). Section 396 rejects the no-duty argument in black-letter law:

> A manufacturer of a chattel is subject to liability under the rules stated in §§ 394 and 395 [the relevant section here] although the dangerous character or condition of the chattel is discoverable by an inspection which the seller or any other person is under a duty to the person injured to make.

Restatement (Second) of Torts § 396 (App. 4). Thus, the fact that a current premises owner also owes a separate duty to "make safe" or "warn" about a dangerous condition does *not* absolve the creator of the danger from all liability. The owner's liability is *in addition to*, and not *in the alternative to*, the liability of the party that created the dangerous condition in the first place:

> The fact that the inspection, if made, would have disclosed the dangerous character of the chattel and enabled him who owed the duty to correct the defect or give a warning or instructions which would have made it possible to use it safely, subjects the one who fails to perform the duty to liability for physical harm resulting to those to whom the duty is owed. *It does not, however, relieve from liability the manufacturer to whose negligence the dangerous condition is due*.

Id. cmt. b (emphasis added). These principles foreclose Occidental's argument. Occidental is urging this Court to part company with mainstream tort law.

3. Texas follows these general principles of negligence law for one who creates a danger on real property.

This Court adheres to these black-letter principles. For over half a century, this Court has held that negligence liability may be imposed on parties who create hazardous conditions on real property *whether or not they are in control* of the property at the time of the injury. *See Strakos v. Gehring*, 360 S.W.2d 787, 790 (Tex. 1962). The *Strakos* principle, which is the same rule set forth in Section 385, is the key to this case. *See id*. at 792-93 (citing Section 385 in support).

Before *Strakos*, the liability of one 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* jettisoned the "accepted work doctrine" and held that parties who create hazardous conditions on real property are liable for negligence whether or not they are in control of the property at the time of the injury. "The fact that one who assumes control over a dangerous condition left by a contractor may be liable for injuries resulting therefrom does not necessarily mean that he who creates the danger should escape liability." *Id*. at 790. The *Strakos* principle is the same rule set forth in Section 385 of the Restatement, and it controls this case.

Since *Strakos*, this Court has held repeatedly that one may be liable if he creates a dangerous condition on real property, even absent control of the premises at the time of injury. *See, e.g., In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005) ("[A] contractor performing repairs has an independent duty under Texas tort law not to injure bystanders by its activities, or by premises conditions it leaves behind."); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997) (person who creates a danger owes a duty even if not in control of premises at time of injury); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997) (noting 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"); *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986) ("[A] private person who has created the dangerous condition may be liable even though not in control of the premises at the time of injury.").

Though this Court has not decided the precise issue presented in this case—whether liability for negligently creating a dangerous condition on real property reaches *former owners* of the property—the well-accepted rule that liability may arise from negligent acts by non-owners or occupiers should not be suspended simply because the negligent actor once owned the property. A "former" owner is a "non" owner; consequently, the same principles apply to both. Holding former owners liable for negligent design of improvements is consistent with Texas law.

In 2011, this Court reaffirmed that *Strakos* had abolished the no-duty rule. *Allen Keller Co.*, 343 S.W.3d at 424 ("It is true that in *Strakos,* we rejected the accepted-work doctrine."). The Court explained that *Strakos* "did not recognize the existence of a duty in all circumstances," *id*., but when a non-owner creates a dangerous condition on real property, "general negligence principles apply." *Id.* The Court's application of those "general negligence principles" is illuminating. *Allen Keller* involved a claim against a contractor that had built an improvement to real estate in "absolute compliance" with an engineer's specifications. *Id*. at 425. The plaintiff argued that the contractor should be liable for a dangerous condition, but citing an amicus brief filed by the Associated General Contractors of Texas, this Court decided it was better to "rely on the expertise of engineers who design and prepare construction plans and specifications." *Id*. at 426. Under that logic, the negligence duty falls on the designer—here, Occidental.

Thus, "general negligence principles" support the court of appeals' analysis. 415 S.W.3d at 28-31, 34-39. When Occidental sold the chemical plant, its duty as a premises owner expired, "but Occidental did owe a duty to be non-negligent in its engineering and design of the acid addition machine." *Id*. at 38. Thus, Occidental is liable for its negligent design of the Acid Addition System. *Id*.

This rationale is valid under Texas law, and it is consistent with decisions in other jurisdictions that follow or apply the same norms. *See* pp. 29-34, *infra*.

B. Occidental's effort to recharacterize this negligent-design case as a premises liability case is unsound.

1. Negligent-design cases are not subject to the special rules of premises liability law.

Occidental tries to shoehorn the negligent design of industrial equipment into the premises liability categories adopted for cases like *Keetch v. Kroger Co*., 845 S.W.2d 262 (Tex. 1992). Based on that premise, Occidental accuses Jenkins of blurring the line between a "negligent activity" and a "premises defect" claim. Occ. Br. at 11-14. But Occidental, not Jenkins, is blurring lines.

Occidental is relying on a distinction that applies to premises-liability cases brought against "the owner/operator" of the premises. *Keetch*, 845 S.W.2d at 264. That distinction was recognized by this Court to emphasize certain unique features of the duties owed by "possessors of land" under Section 343 of the Restatement. *See, e.g., Corbin v. Safeway Stores, Inc*., 648 S.W.2d 292, 295 (Tex. 1983); Restatement (Second) of Torts § 343; *id*. § 328E (defining "possessor of land"). But as noted above, the duty owed by a party that creates a dangerous condition on real property but lacks control of the property (or later cedes control) "*is not subject to the same limitations as is that of the possessor of land or chattels*." Restatement (Second) of Torts § 385 cmt. d (emphasis added). The Restatement itself forecloses Occidental's effort to blur the lines between "negligent design" and "premises liability." *See* pp. 19-20, *supra*.

The distinction between "dangerous conditions" and "negligent activities," which often arises in premises-liability cases, is also meaningless in this context. That distinction can only be applied to claims against the current premises owner. The premises owner owes a duty to "make safe" or "warn" because the premises are under its control. *See, e.g.*, *In re Texas Dept. of Transp.*, 218 S.W.3d 74, 75 (Tex. 2007); *see also* 415 S.W.3d at 36-38 & n.31 (discussing the control element). Obviously, it would make no sense to apply that distinction to a party that created a danger in the *past* and lacks any control of the premises *now* (like Occidental here). The very point of the *Strakos* rule is to preserve negligence liability in such a case. Because Occidental is not liable as a premises owner, the court of appeals correctly held that premises-liability rules are inapposite. 415 S.W.3d at 28-31, 34-39.

Occidental claims that the opinion below will lead to perverse incentives. Occ. Br. at 26-28. That is false. Rather than expand liability, the court of appeals has drawn a principled line that narrows the potential tort liability of a non-owner. 415 S.W.3d at 38. Justice Brown explained that his ruling does not impose a duty to "make safe" or "warn" on a non-owner, "but Occidental did owe a duty to be non-negligent in its engineering and design of the acid addition machine." *Id.* That narrow rule visits liability only on the party guilty of fault—the admittedly negligent designer of a system whose operator, following the designer's own operating instructions, became its victim.

This distinction between negligent design and premises liability is well worn in the law. Courts throughout the country have recognized a cause of action for "negligent design," as distinguished from a claim based on "premises liability." For example, the First Circuit has explained the distinction between these two fundamentally different claims:

> Negligent design cases involve a claim that the property was unsafe from its very conception: the risks to patrons stem from the layout of or the nature of improvements on the property. . . . In such cases, the property encountered by the plaintiff existed in the state intended by its owner; it was not in disrepair or altered by some external force or action. Therefore, the alleged defect, or negligence, is inherent in the property's design . . . .

Vazquez-Filippetti v. Banco Popular, 504 F.3d 43, 50-51 (1st Cir. 2007). "It is illogical—and incorrect—to view . . . allegations [concerning design decisions] as stating a claim based on premises liability, which would address the failure to remedy conditions that the property owner neither intended nor desired." *Id*. at 51. This distinction is amply supported by decisions across the United States.[3]

[3] *See, e.g., Perdue v. Greater Lafayette Health Servs., Inc*., 951 N.E.2d 235, 240-41 (Ind. Ct. App. 2011); *Claybaugh v. Condado Plaza Hotel and Casino*, No. 08-1667, 2010 WL 3212464, at *1-2 (D. P.R. Aug. 11, 2010); *Nider v. Republic Parking, Inc*., 169 P.3d 738, 744 n. 7 (Okla. Ct. App. 2007); *Marshall v. Burger King Corp*., 856 N.E.2d 1048, 1055 (Ill. 2006); *Auito v. Clarkston Creek Golf Club, Inc.*, No. 240621, 2004 WL 1254193, at *3-4 (Mich. Ct. App. June 8, 2004); *Smedsrud v. Powell*, 61 P.3d 891, 900 (Okla. 2002); *Buonanno v. Colmar Belting Co., Inc*., 736 A.2d 86, 88 (R.I. 1999); *Rivera v. King*, 765 P.2d 1187, 1194 (N.M. Ct. App. 1988); *see also Ferrell v. McDonald's Corp*., No. 05-01-00838-CV, 2002 WL 1895346, at *3-4 (Tex. App.—Dallas Aug. 19, 2002, pet. denied).

2. Occidental incorrectly claims the court of appeals' decision departs from the "overwhelming majority of states."

Despite the well-settled distinction between negligent-design claims and premises-liability claims, Occidental argues that these two distinct claims should be collapsed into one when the defendant is a *former*, rather than *present,* owner.

A former owner generally is not liable for injuries accruing after conveyance of the property under a premises-liability theory—a plaintiff must establish that the defendant owned, occupied, or controlled the premises at the time of the injury before liability may be imposed. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002). But it makes no sense to say that a defendant who would otherwise be liable for the *distinct* claim of negligent design of improvements or equipment installed on the premises can be exonerated from liability by selling the premises. That conclusion is incompatible with the *Strakos* rule. *See* pp. 21-23, *supra*.

In addition, imposing liability for a negligent design of equipment installed on real property by a former owner conforms with the law in other jurisdictions. Occidental claims the decision below is contrary to "the overwhelming majority of states and other recognized legal authorities." Occ. Br. at 16. In doing so, Occidental relies on Section 352 of the Restatement, which recognizes 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. *Id*. But Section 352 does not control this case.

Jenkins has no quarrel with Section 352 as a general proposition. But as noted above, Occidental's liability is not founded on its status as a premises owner. *See Jenkins*, 415 S.W.3d at 38 ("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."). Rather, Occidental's liability is based on the *other* hat it wore—that of negligent designer.

For this reason, Occidental's attempt to fashion a conflict with cases from other states involving the liability of former premises owners is beside the point. Occ. Br. at Tab I. The cited cases do not involve former owners who created a dangerous condition by negligently designing equipment, so they are irrelevant. On that precise question, the national authorities support Jenkins' position.

That a party can wear two hats—one of former premises owner and another of negligent designer—is not an earth-shattering concept. Occidental ignores the authorities from other jurisdictions that have recognized this dichotomy and imposed liability for one role but not the other, including the cases cited by the court of appeals. Instead, Occidental cites a total of six cases to support its position that even when a former landowner negligently designed the improvement that later caused the plaintiff's injury, the former owner cannot be held liable as a matter of law. Occ. Br. at 17-18. Each of those cases is materially distinguishable except one, and the one outlier is unpersuasive.

- ***Occidental ignores authorities from other jurisdictions that defeat its position.***

Other jurisdictions that apply tort principles consonant with those in Texas have held that, despite the general rule that a property owner's liability ends when it ceases to own or occupy the property, a former owner may be held liable for injuries sustained due to a danger it created on the property—even though it could not be held liable under a premises-liability theory. In other words, the fact that the negligent actor once owned the property on which the injury occurred does not foreclose liability for creation of a dangerous condition. The court of appeals itself pointed out three of these cases, 415 S.W.3d at 35-36, yet Occidental failed to address any of them. Jenkins will discuss them here.

- ***Occidental ignores three cases cited by the court of appeals.***

In *Dorman v. Swift & Co*., 782 P.2d 704, 706-08 (Arizona 1989) (en banc), the Arizona Supreme Court addressed a negligent-design case strikingly similar to the one here. The court considered whether Section 352 of the Restatement barred an injured plaintiff's claim for personal injuries against a former plant owner for negligent design of a conveyor belt. The former owner had designed, constructed, and installed the conveyor belt. The court held that it was a "mere fortuity" that the maker of the product at issue—the conveyor belt—was also the vendor of the real property, so Section 352 was inapplicable. *Id*. at 708. That rationale is equally applicable here.

In *Stone v. United Engineering, a Division of Wean, Inc.*, 475 S.E.2d 439 (W.Va. 1996), the West Virginia Supreme Court observed that it had not adopted Section 352. The court also recognized, however, that other jurisdictions had recognized exceptions to Section 352's "rather hard-line rule of nonliability," including instances in which "a condition . . . poses an unreasonable risk of harm to others." *Id*. at 451. The court noted that when a former owner has created a dangerous condition, he remains subject to any liability he would have incurred had he remained in possession for injuries to others caused by such a condition. *Id*. The exceptions to Section 352 evolved "because a vendor's responsibility to others is regarded to be of such social importance that he is not permitted in every situation to shift such responsibility automatically upon the sale." *Id*. at 452.

In *Carroll v. Dairy Farmers of Am., Inc*., No. 2-04-24, 2005 WL 405719 (Ohio Ct. App. 2005), the court held that fact issues precluded summary judgment because there was evidence that the former owner negligently designed, fabricated, and installed a support platform from which plaintiff fell. *Id*. at *6-7.

Each of these cases supports the court of appeals' holding that Occidental is liable for its negligent design of the Acid Addition System even though it sold the property prior to Jenkins' injury. Occidental ignores these cases. This Court should not.

- **Other out-of-state authorities that Occidental ignores support Jenkins' position.**

Multiple authorities from other jurisdictions that Occidental ignores support the court of appeals' holding.

- *Scheffield v. Vestal Pkwy. Plaza, LLC*, 958 N.Y.S.2d 232, 234 (N.Y. App. Div. 2013) ("It is well settled that a prior owner of premises may not be held liable for a dangerous condition on the land . . . However, a prior owner who affirmatively created the alleged dangerous condition will not be absolved from liability.");
- *Smith v. Andre*, 843 N.Y.S.2d 209, 211 (N.Y. App. Div. 2007) (defendants held no interest in property and thus were not subject to liability when it was "undisputed that the accident was the result of a transient condition, not some hazard created by appellants when they owned the building");
- *Haynes v. Estate of Goldman*, 847 N.Y.S.2d 902, *15 (N.Y. Sup. Ct. 2007) ("A prior owner of real property will also be held liable for affirmative acts of negligence in the design and construction of appurtenances upon real property.");
- *Thompson v. Higginbotham*, 187 S.W.3d 3, 7 (Mo. Ct. App. 2006) (if status of defendants who built and formerly owned apartment building did not give rise to liability other than as designers and builders, plaintiff's claim would be subject to statute of repose);

- *CITGO Petroleum Corp. v. McDermott Int'l, Inc*., 858 N.E.2d 563, 569 (Ill. App. Ct. 2006) (third-party claims against former owner for negligent installation of pipes in construction of refinery barred by statute of repose, while any claims for "negligent inspection, maintenance and operation" of property would be barred because former owner did not possess or control property at time of accident);
- *Coyne v. Talleyrand Partners, L.P.*, 802 N.Y.S.2d 513, 515-16 (N.Y. App. Div. 2005) (former owners not liable where they did not own premises on date of accident and record was "devoid of evidence establishing that the accumulation of water or ice on the landing was a recurring condition due to a defect in the design or construction of the premises");
- *Matthews v. Tobias*, 688 N.Y.S.2d 677, 678 (N.Y. App. Div. 1999) (former owner not liable when there was no evidence it "either created a dangerous condition or concealed it");
- *Learson v. Bussey*, 691 So.2d 1301, 1303 (La. Ct. App. 1997) ("[D]espite defendants[']arguments to the contrary, where a defective thing is involved, not only can its owner be responsible for damages, but also the party who actually created the risk whether or not he is the owner.");

- *Marrero v. Marsico*, 639 N.YS.2d 183, 184 (N.Y. App. Div. 1996) (defendant's liability "for the creation of the dangerous condition during its construction work is not dependent upon its status as the owner of the property . . . therefore, [its] conveyance of the property cannot relieve it of its independent liability for creating the dangerous condition during the construction work");
- *B.H. Stephens v. St. Regis Pulp & Paper Co.*, 863 F. Supp. 341, 345-46 (S.D. Miss. 1994) (that vendor of land is not liable for dangerous conditions on property once sold did not preclude liability for negligent construction of structure by former owner);
- *Magee v. Blue Ridge Prof'l Bldg. Co., Inc*., 821 S.W.2d 839, 842-43 (Mo. 1991) (en banc) (former owner sued for negligence as designer and builder of stairs entitled to judgment based on statute of repose);
- *Merrick v. Murphy*, 371 N.Y.S.2d 97, 100 (N.Y. Sup. Ct. 1975) ("There is a distinction, however, between mere negligent maintenance of property and affirmative acts of negligence in the actual creation of a nuisance or dangerous condition. . . . In the latter instance, ownership or possession of the property upon which the condition is found, is not necessarily a prerequisite to responsibility for injury or damage which results therefrom.").

The authorities cited by the court of appeals, as well as the additional authorities cited above, establish that a former owner may be held liable for creating a dangerous condition when it has negligently designed equipment that injures its intended user. This is true *despite* the existence of the rule stated in Section 352 (or a similar common-law rule) that a former property owner generally is not subject to liability for physical harm caused by a dangerous condition once the subsequent owner has taken possession of the property. In fact, in each of the cases cited above, the relevant state law recognized that liability may be based on the creation of a dangerous condition, despite the fact that the state also recognized Section 352 or a similar rule. *See* Occ. Br. at Tab I.

- **All but one of the out-of-state authorities upon which Occidental relies are distinguishable.**

All but one of the out-of-state cases that Occidental cites in support of its position are distinguishable.

- *Papp v. Rocky Mtn. Oil & Minerals, Inc*., 769 P.2d 1249, 1252, 1257 (Mont. 1989) (former owner who had dismantled and rebuilt a facility was not liable for injuries resulting from its reconstruction "for reasons similar to the accepted 'work rule doctrine,'" which this Court rejected in *Strakos*).
- *Conley v. Stollings*, 679 S.E.2d 594, 597, 599 & n.8 (W. Va. 2009) (plaintiffs could not recover against former owners under premises-liability principles because they did not own or control the land at the time of the

incident but the court specifically noted that the plaintiff did not argue the former owners could have been liable on the theory that a condition on the property imposed an unreasonable risk of harm);

- *Century Display Mfg. Corp. v. D.R. Wager Constr. Co., Inc.*, 376 N.E.2d 993, 997-98 (Ill. 1978) (mere presence of residue of combustible materials sealed in pipes or tanks did not constitute unreasonable risk where vendee agreed to take property "as is" and had reasonable opportunity to discover the dangerous condition; case did not discuss negligent design claims);
- *Carlson v. Hampl*, 169 N.W.2d 56, 57 (Minn. 1969) (former homeowner not liable for constructing stairway under general premises-liability principles, and new owner knew or should have known of the condition; no other theory was asserted by the plaintiff or explored by the court).

Occidental also relies upon *Preston v. Goldman*, 720 P.2d 476 (Cal. 1986). The court of appeals distinguished that case on the grounds that (1) the analysis in *Preston* centered on the defendants' status as private homeowners rather than professional engineers or contractors, and the court expressly limited its holding to that scenario; (2) the court focused on "ownership" and "control" as the grounds for liability rather than the creation of a dangerous condition; and (3) the defect—the design and construction of a swimming pool—was patent as a matter of law. 415 S.W.3d at 35.

That distinction was sound. A California court of appeals has characterized *Preston*'s "specific holding" as "affirm[ing] the general rule of nonliability" where "the defendant is a do-it-yourself homeowner and the dangerous condition is patent . . ." *Whitney v. Raab*, No. B158636, 2003 WL 21214143, *6 (Cal. Ct. App. 2003) (unpublished). Those narrow circumstances are not present here.

Moreover, that California decision diverges materially from the Texas rule. The *Preston* court summarized three approaches that have arisen to govern those who create hazardous conditions, including the rule this Court adopted in *Strakos*. 720 P.2d at 479-80. Under that rule as applied to former owners, "the 'mere transfer of title' should not be enough to shift responsibility, especially when the dangers were created by the vendor's affirmative negligence." *Id.* at 480. Instead, *Preston* held "primary importance in ascribing liability here must be placed upon ownership and control of property." *Id.* a 488. Because California does not follow the *Strakos* rule, *Preston* is immaterial to this Texas case.

- **The Texas cases cited by Occidental also are distinguishable.**

Occidental cites *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 367-68 (Tex. App.—Houston [1st Dist.] 1994, writ denied) for the proposition that under Texas law, a former property owner is not liable for injuries caused on real property after conveyance. Occidental Br. at 15. Both Jenkins and the court of appeals agree with that statement, as a general matter. *Jenkins*, 415 S.W.3d at 30.

But the *Roberts* court did not address the "creation of a dangerous condition" exception to the general no-liability rule for non-owners—the matter at issue here. *Jenkins*, 415 S.W.3d at 30-31 (distinguishing *Roberts*). *Roberts* actually supports Jenkins' view that a former premises owner can be held liable if, as here, it created the dangerous condition. *See Roberts*, 886 S.W.2d at 366 ("liability for a defective condition on property arises only if the party has ownership, possession, control, *or had itself created the dangerous condition*") (emphasis added).

Occidental cites *First Fin. Dev. Corp. v. Hughston*, 797 S.W.2d 286, 291 (Tex. App.—Corpus Christi 1990, writ denied) and *Beall v. Lo-Vaca Gath. Co*., 532 S.W.2d 362, 364-66 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) for the proposition that former owners are not liable for injuries on the property after conveyance even if "the former property owner was involved in creating or designing the allegedly dangerous condition." Occ. Br. at 16. But in those cases, the former owners had not designed the equipment to be affixed to the real estate, and both holdings turned on the fact that the transferee had been put on notice of the danger. *See Hughston*, 797 S.W.2d at 290-92; *Beall*, 532 S.W.2d at 365-66. Neither of those can be said here. Indeed, in *First Financial*, the party that designed the improvement was held liable even though it lacked control of the premises at the time of the injury. *See First Fin*., 797 S.W.3d at 293. In sum, Occidental's cases are neither on point nor controlling.

- **Occidental has found only one decision in the country that supports it, and the court there reached the wrong result because it received inadequate briefing.**

Decisions by courts throughout the country support the court of appeals' conclusion that Occidental occupied "two distinct roles" here: (i) designer of the Acid Addition System and (ii) former premises owner. 415 S.W.3d at 29. In these dual capacities, Occidental's duty in the capacity of *premises owner* to "make safe" or "warn" was transferred to the new owner when the plant was sold. By contrast, Occidental's liability in its capacity as *negligent designer* was not terminated when it sold the property. Under this dual-capacity analysis, Occidental can be liable in its capacity as the *negligent designer* of the Acid Addition System that "created" the risk, even though it no longer occupies the distinct capacity of *premises owner*. 415 S.W.3d at 28-31, 34-39.

Although the court of appeals' dual-capacity analysis lies squarely in the jurisprudential mainstream in jurisdictions which, like Texas, have abandoned the "accepted work" doctrine, Occidental has identified one outlier decision that goes against that mainstream: *Gresik v. PA Partners, L.P.*, 33 A.3d 594, 599 (Pa. 2011). This Court should decline to follow *Gresik* not only because it represents a distinct minority position, but also because it was the product of inadequate briefing.

In *Gresik*, the defendant, PA Partners, had owned and operated a steel plant. *Id*. at 595. While it still owned and possessed the premises, PA Partners modified the plant in ways that rendered it unreasonably dangerous. *Id.* PA Partners subsequently sold the plant. *Id.* The plaintiffs, who suffered injuries in a plant accident after the sale, argued that PA Partners could be held liable for pre-existing "negligent construction" even after it conveyed the property. *Id*. at 596.

But plaintiffs did not develop in their briefing the dual-capacity argument that guided the court of appeals' analysis here: "PA Partners . . . argues at some length that [plaintiffs'] contention that it acted in a 'dual capacity' as a vendor and contractor is unsupportable under the present circumstances. *[Plaintiffs] did not articulate any such theory in their brief*, although they did raise the dual-capacity doctrine at oral argument, suggesting that PA Partners acted in a dual capacity as possessor and contractor." *Id.* at 599 n.6 (emphasis added).

Without the benefit of briefing by plaintiffs on the "dual capacity" argument, the *Gresik* court rejected it. *Id.* The lack of such briefing explains why that decision does not grapple with any of the decisions throughout the country that have adopted the dual-capacity approach. More particularly, the *Gresik* court did not even mention *Dorman*, *Stone*, or *Carroll*—the three out-of-state decisions relied upon by the court of appeals in this case. *See* 415 S.W.3d at 35-36 (discussed *supra* at 29-31).

If the *Gresik* court had been informed of those decisions, it might well have embraced them because they each employ a solid analysis firmly grounded on the dual-capacity approach. *See, e.g.*, *Dorman*, 782 P.2d at 706-08 (explaining that "[p]laintiff's claim against Swift for negligence based on the construction and design of the inclined conveyor is not barred merely because of the fortuitous circumstance that Swift was both [i] the manufacturer of the product and [ii] the vendor of realty upon which the product was located").

Significantly, *Gresik* has never been cited with approval by any court outside of Pennsylvania. This Court should decline to be the first to do so.

The law should remain as expressed in the court of appeals' opinion below and as recently summed up by another Texas appellate court:

> [A] person who formerly owned or controlled property and created a dangerous condition *is not insulated from liability* when it sells or departs from the property and leaves that condition behind.

E.I. DuPont de Nemours & Co. v. Roye, No. 14-12-740-CV, 2014 WL 3908058, *6 (Tex. App.—Houston [14th Dist.] Aug. 12, 2014, no pet. h.) (emphasis added).[4] This principle comports with Texas law regarding liability for the creation of a dangerous condition on real property as well as general negligence principles.

[4] The *DuPont* court distinguished the case before it, holding that this "principle" did not apply because "DuPont still owns the property and can be sued on a premises liability theory." *Id.* Obviously, the implication was that, in a case like this one, the former owner can be sued for creating the dangerous condition. *Id.* (citing *Jenkins* with approval).

3. The Legislature's decision to enact a statute of repose without exempting property owners signals legislative acceptance of the negligent-design duty.

Occidental alternatively argues that it is entitled to judgment in this case based on two statutes of repose. Occidental Br. at 35-50. But those very statutes further demonstrate why Occidental is wrong in arguing that a former owner who negligently designs a structure on real property is not liable after a conveyance. Under the design statute of repose, claims related to conditions of improvements to real property must be brought within 10 years of the improvement's completion. Tex. Civ. Prac. & Rem. Code § 16.008. Thus, one who designs an improvement to real property *is subject to* liability for up to 10 years. Under Occidental's theory, any licensed engineer hired to design the Acid Addition System would be subject to liability for 10 years, but an engineer in Occidental's employ would not—rather, the engineer and his employer (Occidental) would enjoy a complete bar to liability. No exception was made by the Legislature for registered or licensed engineers *employed by the property owner*. This Court should not create one.

Occidental's argument would render the statutes of repose meaningless when design or construction is performed by an owner who later sells the property. Because former owners are not excluded from the plain language of the statutes, that is an impermissible result. *See Stephens*, 863 F. Supp. at 346. Consequently, the very existence of the statutes of repose confirms the existence of a duty.

C. Occidental's effort to recharacterize this negligent-design case as a strict-products-liability case is equally unsound.

Finally, Occidental suggests that Jenkins cannot recover for negligent design because he should be required to meet the test for a strict-products-liability claim (which he cannot do because the Acid Addition System was never placed into the stream of commerce). Occ. Br. at 30-34. Occidental has the analysis backwards. This is a common-law negligence case, not a strict-liability case of a design defect. The two liability theories are different. *See Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978) ("Strict liability looks at the product itself and determines if it is defective. Negligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.").

The "stream of commerce" element is mandatory for a strict-liability claim, but not for a negligence claim. Because the Acid Addition System was never in the stream of commerce, Occidental is neither a "manufacturer" nor a "seller" under Chapter 82. *See* Tex. Civ. Prac. & Rem. Code § 82.001(4) (definition of "seller" and "manufacturer" requires "product" in "stream of commerce"). Thus, this case is not a "products liability action" under that statute. *See id.* § 82.001(2) ("products liability action" is any action against a "manufacturer" or "seller"). This fact means that Chapter 82 does not apply to this case. Occidental's effort to shoehorn the case into Chapter 82 simply because the word "manufacturer" appeared in the jury charge is without merit. This is not a products-liability case.

But that does not mean Jenkins lacks a common-law negligent-design claim. Placement of a product in the stream of commerce is the necessary prerequisite for a strict-products-liability claim. *See, e.g.*, Restatement (Second) of Torts § 402A; *New Tex. Auto Auction Servs. v. Gomez De Hernandez*, 249 S.W.3d 400, 403-04 (Tex. 2008) (explaining the "stream of commerce" element and the public policy underlying strict liability); *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984) (noting that for strict-liability claims, as opposed to negligence claims, "liability is established by proving that a product was placed in the stream of commerce containing a defect which was a producing cause of the event made the basis of suit"). But it is not an essential element of a negligent-design claim. Occidental's cases do not hold otherwise. *See* Occ. Br. at 31-32 (citing cases).[5] Chapter 82 "was not intended to replace section 402A or the common law except in limited circumstances." *New Texas*, 249 S.W.3d at 405. This is not such a case.

It would be an odd legal system in which a party can negligently design dangerous equipment but be immune from all liability simply because it never placed its creation into the stream of commerce. Happily, that is not the law. Negligence in designing equipment that is not placed in the stream of commerce remains actionable under the common-law rules adopted in *Otis Elevator*.

[5] This Court holds that a negligent-design claim includes the "safer alternative design" element of strict liability law. *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997). Jenkins anticipated that requirement and secured a jury finding on that element. CR2636.

II. The court of appeals correctly enforced the plain language of the statutes of repose.

Occidental insists that absolving it of all tort liability is the only way to avoid making former landowners "forever liable." This theme appears throughout Occidental's brief, and it is echoed loudly by amici. The warning is not subtle—but it is exaggerated and unnecessary.

The Legislature enacted statutes of repose in response to this very concern. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 (Tex. 2009) (explaining that "the stated purpose of this statute of repose was to eliminate 'unlimited time liability' against engineers or architects"). These statutes of repose are intended to strike "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 their liability is not limited. *Id.* at 264-65. Occidental's secondary arguments—its attempts to invoke two statutes of repose—expose the real issue in this case: Occidental simply failed to prove its defenses.

The Legislature has addressed the issue of long-term tort liability by statute. This Court should faithfully adhere to the plain language of the statutes of repose, as the court of appeals did, and leave further policy debates to the Legislature. Occidental's inability to prove its defenses is neither important nor an injustice.

A. The court of appeals correctly held the construction statute (Section 16.009) does not apply here.

Occidental opens its argument on the statute of repose with Section 16.009, which provides a defense for claims "against a person who constructs or repairs an improvement to real property." Tex. Civ. Prac. & Rem. Code § 16.009(a).

The court of appeals' opinion on this issue is rock-solid and firmly rooted in the statutory text. 415 S.W.3d at 23-28. Occidental itself did not construct the Acid Addition System; independent contractors did so. RR8:58-59, 71. If there had been a fault in the *construction*—as opposed to the *design*—of the system, those independent contractors would have been protected by Section 16.009. Because that is not this case, this statute is no defense.

1. The court of appeals correctly followed this Court's precedent that Section 16.009 protects only parties that annex personal property to real property.

Section 16.009 applies only 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, 867 (Tex. 2009) (Section 16.009 "only precludes suits against persons or entities in the construction industry that annex personalty to realty").

The question presented in *Sonnier* was whether the statute of repose for those who "construct" an "improvement" extends to a manufacturer of equipment that is later annexed to real property. That question had divided the Texas courts. *See Sonnier*, 909 S.W.2d at 477-82. The Court took a narrow view of the statute, holding that it protects only builders that attach personal property to real property in a manner that "constructs" an "improvement." *See id.* at 482-83. It applies "only to preclude suits against those in the construction industry that annex personalty to realty." *Id.* at 479. In *Galbraith*, the Court reaffirmed that reading of Section 16.009. *See Galbraith*, 290 S.W.3d at 868. That narrow interpretation of Section 16.009 is a complete answer to this case, because Occidental did not annex the Acid Addition System to the real property to "construct" an "improvement."

Under this reading, Section 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. The statute simply has no application to the design claim in this case.

Moreover, Occidental itself did not "construct" the Acid Addition System. At trial, Occidental's witnesses admitted that "construction" of the "improvement" (*i.e.*, attachment of the equipment to the real estate) was done by contractors. RR8:58-59, 71. Because Occidental did not attach the Acid Addition System to the plant, transforming it into an "improvement," *Sonnier*, 909 S.W.2d at 482-83, Occidental is not protected by Section 16.009.

2. Occidental's current claim that it "constructed part of the system itself" was neither preserved nor proved.

Occidental now argues that its own employees constructed "piping" for the Acid Addition System. Occ. Br. at 38. But under *Sonnier*, that is not the question. Section 16.009 applies only to those who attach the equipment to the real property, transforming it into an "improvement." At most, there was conflicting evidence. *Compare* RR8:31-32 *with* 8:58-59, 71. But Occidental bore the burden of proof, and Jenkins objected that the essential fact was not proved conclusively. RR9:50. By failing to request a finding on the issue, Occidental waived its current argument (which it has never even raised until now). *See* Tex. R. Civ. P. 279; *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

3. Section 16.009 does not provide repose for property owners who hire contractors to do construction work.

Because it cannot satisfy the statutory text and the interpretation given to this statute in *Sonnier* and *Galbraith*, Occidental asks this Court to extend the statute to property owners who merely pay for improvements. Occ. Br. at 38-42. But this theory of "respondeat repose" cannot be squared with the statutory text. Faithfully following *Sonnier* and *Galbraith*, the court of appeals correctly held that "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.'" 415 S.W.3d at 24-25.

Occidental's theory cannot coexist with the "plain and common meaning of the statute's words." *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Section 16.009 applies only to claims against "a person who constructs or repairs an improvement to real property." Tex. Civ. Prac. & Rem. Code § 16.009. Nothing in the statutory language extends protection to landowners that "contract" for such construction or repairs by third parties, and the Court "cannot interpret the statute to require otherwise without rewriting it." *In re J.P.*, 136 S.W.3d 629, 631 (Tex. 2004). Occidental's effort to read Section 16.009 more broadly than its text reflects the same blurring of lines that *Sonnier* and *Galbraith* rejected.

Occidental cites a series of lower-court decisions in support of its argument, but they cannot bear the necessary weight. Those decisions were grounded in a prior version of the statute that applied more broadly than the current statute. Rather than being limited to parties who "construct" or "repair" an improvement, the prior version of this law applied to any action "against any person performing *or furnishing* construction . . . of any such improvement." *See McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (quoting article 5536a § 2) (emphasis changed). The old concept of "furnishing" construction might be read to include contracting with a third-party contractor—but Section 16.009 no longer protects persons that "furnish" construction. Thus, Occidental's authorities grounded in the older statute are no longer good law.

Second, even under the old statute, courts only granted repose to defendants that acted as general contractors in managing the work—not to mere landowners. In *Reames v. Hawthorne-Seving, Inc*., 949 S.W.2d 758 (Tex. App.—Dallas 1997, pet. denied), for example, the defendant was retained by the property owner as a general contractor. The defendant prepared a design and hired a subcontractor to construct it. The court of appeals held that the general contractor was entitled to repose even if it did not "hammer the nails and turn the screws." *Id.* at 763; *accord Fuentes v. Continental Conveyor & Equip. Co.*, 63 S.W.3d 518, 521 (Tex. App.—Eastland 2001, pet. denied). Here, Occidental was not the general contractor.

Similarly, in *McCulloch*, the defendant acted as the general contractor. Although the defendant owned the property, it was a real estate developer and it "never intended to maintain possession or control" of the property. Consequently, that defendant acted "not as an owner but as a builder or supervisor." *McCulloch*, 696 S.W.2d at 922. Here, Occidental acted solely as the property owner—it did not act as the general contractor. Unlike a general contractor, it did not accept "ultimate responsibility for the proper installation" of the Acid Addition System. *Fuentes*, 63 S.W.3d at 521-22. It contracted that duty to third-party contractors.

For these reasons, Occidental is not entitled to repose under Section 16.009. Nor is it entitled to repose under Section 16.008, the "architects and engineers" act, which was once its lead argument but is now buried in last place.

B. The court of appeals correctly held the architects and engineers statute (Section 16.008) does not apply here.

Section 16.008, the "architects and engineers" statute of repose, provides a defense 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." Tex. Civ. Prac. & Rem. Code § 16.008(a).[6]

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. CR2642. The first question is correct and controlling; the second is incorrect and immaterial.

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" no

CR 2642.

[6] Occidental is not a "registered" engineering firm. RR8:66-68. There is a registration scheme for professional engineering firms, *see* Tex. Occ. Code § 1001.405, but it does not apply to companies like Occidental that simply employ engineers in their business. Thus, the only way Occidental could invoke the statute of repose was to prove that the employee who did the design (whose negligence subjected Occidental to vicarious liability) was a "licensed engineer."

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 decided 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 find 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 that Occidental had not proved its defense. 415 S.W.3d at 20-23. Occidental challenges this holding on three grounds, but none has merit.

1. Occidental failed to prove the Acid Addition System was "designed" by a registered or licensed engineer and the court of appeals correctly held the evidence is inconclusive.

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 conclusively proved the essential element of "design." Occ. Br. at 48-50. Not so. The evidence was conflicting, and Jenkins won the jury verdict on this issue. Justice Brown's careful review of the record is correct. 415 S.W.3d at 24-25.

The evidence at trial revealed that the Acid Addition System was "designed" by Neil Ackerman, a young and inexperienced engineer who lacked a license. RR5:144-45; 8:62-63, 65, 71-72, 84. He was not yet eligible to apply for a license. RR4:48-49. Occidental's own witness, RR8:9-12, admitted that Ackerman was "not a registered engineer," yet he was the "driver" who "shepherded" the design:

> Q. But you do know that Neil Ackerman was the one in charge . . . essentially from start to finish in shepherding the process?
>
> A. I do know that he shepherd [sic] the process, yes.

RR8:62-63, 65. Other employees played a role, but on the key issue of "design," the grudging admissions from Occidental's witnesses offered the jury a clear story: Ackerman created the "conceptual design" and was "responsible for the process." RR8:71-72, 84. Ackerman was the "originator" of the design, which is to say he "managed," "coordinated," and "shepherded" the project. RR4:48; RR5:144-45.

Likewise, internal design documents named Ackerman as the "Originator" and indicated that details were "Per Neil Ackerman." PX15; RR5:144-45; 8:62. Occidental's assertion that it proved its defense conclusively ignores this evidence, and relies on the self-serving testimony of its own witnesses. Occ. Br. at 48-50. That will not do, because Occidental's proof does not prove the "vital facts" of its defense as a matter of law. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814-17 (Tex. 2005); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

The testimony of an interested witness almost never meets this strict test, since a jury may discredit it. "Testimony by an interested witness may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it." *Lofton v. Texas Brine Corp*., 777 S.W.2d 384, 386 (Tex. 1989); *accord In re Jane Doe 4*, 19 S.W.3d 322, 325 (Tex. 2000). That rule is decisive, since Occidental's defense rested on the testimony of its own interested witnesses. As noted above, their testimony was discredited and contradicted—not conclusive.

This Court has long followed "[t]he general rule" that "evidence given by an interested witness, even though uncontradicted, presents an issue to be determined by the trier of fact." *Gevinson v. Manhattan Const. Co*., 449 S.W.2d 458, 467 (Tex. 1969). The exception set forth above is rarely satisfied—and never when the witness is impeached via cross-examination. RR8:53-142, 150-58. In this context, "the jury was free to disregard [Occidental's proferred] testimony as not credible." *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007).

Occidental indulges in hyperbole, accusing the court of appeals of holding that "if a plaintiff can find one unlicensed engineer who worked on a project, the statute of repose is unavailable to an employer who employs teams of engineers." Occ. Br. at 46. But Occidental cannot blame the court of appeals for Occidental's own decision to assign dangerous design work to an unlicensed engineer.

In fact, it is Occidental's attempt to invoke repose that proves too much. The "practice of engineering" is highly regulated. Tex. Occ. Code § 1001.003. The Legislature prohibits anyone from engaging in the "practice of engineering" unless that individual "holds a license" issued by the State. *Id*. at § 1001.301(a). The right to use a seal with the designation "Licensed Professional Engineer" or "Registered Professional Engineer" is limited to licensees. *Id*. at § 1001.401(a); *see also id*. at § 1001.301(b)(3)-(4) (unless an individual holds a license he or she cannot claim to be a "licensed engineer" or a "registered engineer").

A person must satisfy demanding criteria to secure an engineering license—including education, a rigorous exam, and the "active practice of engineering" for at least four years. *Id*. at § 1001.302; *see also* 22 TEX. ADMIN. CODE §§ 133.21-99 (licensing requirements). Ackerman was not licensed, and in 1992, he did not even meet the requirements. *See* p. 52, *supra*. Occidental's failure to prove its defense is a consequence of its own decision to ignore the State's licensing scheme.

The licensing requirement embedded in the statute of repose is no accident. The predecessor to Section 16.008 was enacted in 1969, in response to the growth of professional liability claims after the "accepted work" doctrine was abandoned. That statute was enacted to protect licensed professionals.[7]

[7] For a history of this development, in Texas and nationally, *see* Susan C. Randall, *Due Process Challenges to the Statutes of Repose*, 40 S.W. L. J. 997, 999-1000 (1986); David E. Colmenero, *Manufacturers May Claim Repose under Section 16.009 Only if They Install Their Products onto Real Property*, 27 Tex. Tech. L. Rev. 1595, 1596-97 (1996).

From the very beginning, the Legislature placed a condition on this defense: To be protected, the architect or engineer who was responsible for the design work had to be licensed. *See* Act of May 27, 1969, 61st Leg., R.S., ch. 418, § 2, 1969 Tex. Gen. Laws 1379, 1379 (repealed). Today, it is still limited to claims against "a registered or licensed . . . engineer." Tex. Civ. Prac. & Rem. Code § 16.008. The Legislature mandated that the protection of this statute of repose is restricted to professionals who are "registered or licensed." Its judgment should be enforced.

2. The court of appeals correctly disregarded the finding of "supervision" by a registered or licensed engineer, which is immaterial under the plain language of the statute.

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, but also the "supervision" of such a design. Therefore, Occidental argues that the Question 9 finding about "supervision" should trump the Question 8 answer about "design." Occ. Br. at 45-46. Occidental is mistaken.

By its terms, Section 16.008 provides no 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 (exempting from license requirements an employee whose assignment "does not include responsible charge of design or supervision"); *id*. at § 1001.304(b) (license examination should consider applicant's ability to "design and supervise engineering works"); *id*. at § 1001.405(e)(3) (business entity may call itself an engineering firm only if it is registered and its work is either "personally performed by an engineer or directly supervised by an engineer"). Indeed, the regulations implementing the Texas Engineering Practice Act define "direct supervision" for certain purposes. *See* 22 TEX. ADMIN. CODE § 131.81(10). But the term "supervision" does *not* appear in Section 16.008.

As this Court has explained before, "[a] statute's silence can be significant." *PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79, 84 (Tex. 2004). Courts adhere to the plain language chosen by the Legislature because "the words it chooses should be the surest guide to legislative intent." *Fitzgerald v. Advanced Spine Fix. Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). "[W]hen we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be." *Id*.

Indeed, the omission of "supervision" is especially compelling in this case, because statutes of repose for "design" have been enacted all across the country. At least 30 states afford repose to "supervision."[8] The Texas Legislature could have made the same choice, but it did not do so. The omitted term "supervision" should not be read into Section 16.008 "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." *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

As authority for its contention that Section 16.008 protects "supervision," Occidental has cited *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.). But in fact, neither case held that "supervision" is covered by this statute of repose; indeed, neither case even considered the question. Occidental has simply cherry-picked snippets from the factual recitations. *See Texas Gas*, 828 S.W.2d at 30; *Sowders*, 663 S.W.2d at 649. This approach is not sound legal analysis.

[8] *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.

Moreover, the defendants in both cases were professional engineering firms. *See Texas Gas*, 828 S.W.2d at 30; *Sowders*, 663 S.W.2d at 649. For many years, Texas courts have held that a suit against a professional engineering firm is a suit against a registered or licensed engineer. *See*, *e.g.*, *Brown v. M.W. Kellogg Co*., 743 F.2d 265, 268 (5th Cir. 1984); *Hill v. Forrest & Cotton,* 555 S.W.2d 145, 149 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). Thus, there was no dispute in those cases that the defendants were protected by the act. But as explained above, a specific statute now regulates "registration" of professional engineering firms, and Occidental is not registered (because it is not an engineering firm). Therefore, this case does not fall within the line of cases represented by *Texas Gas* and *Fluor* (to the extent those cases even reflect a legal rule, instead of a factual summary without any bearing on the legal analysis).

Instead, this case falls within a line of cases holding that property owners who contract for engineering services are not protected by the statute of repose, even if they "supervise" the work. For example, in *McCullough v. Fox & Jacobs*, 696 S.W.2d 918, 920 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), a property owner claimed repose under article 5536a § 1 (the predecessor to current Section 16.008), arguing that its supervision of a construction project entitled it to the benefit of the statute of repose. *Id.* at 920-21. The court disagreed. *Id.* at 921-22.

Under this line of cases, Section 16.008 does not cover property owners who contract for engineering services or perform their own engineering work. *Id*.; *Smither v. Tex. Util. Elec. Co.*, 824 S.W.2d 693, 697 (Tex. App.—El Paso 1992, writ dism'd); *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 244-45 (Tex. App.—Texarkana 1992, writ denied). In short, Occidental's "supervision" theory is not supported by prior precedent or the plain language of Section 16.008.

For these reasons, the Question 9 issue about "supervision" was immaterial. Question 8 submitted the material question about "design," and Occidental lost it. The court of appeals correctly held "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." 415 S.W.3d at 21. Occidental cannot allow an unlicensed engineer to design dangerous equipment and then claim a defense tied to the licensing scheme.

3. Occidental's claim that a licensed engineer "planned or inspected" the Acid Addition System is immaterial.

Last, Occidental argues it is entitled to repose because a licensed engineer "planned" and "inspected" the Acid Addition System. Occ. Br. at 46-48. However, Occidental turns Section 16.008 inside out. The statute offers a defense to a "registered or licensed . . . engineer" who "designs, plans, or inspects." Thus, if Jenkins had alleged negligence by a licensed engineer in planning or inspection, Occidental would have had a valid defense. But that is not the case here.

Instead, Jenkins sued because the "design" was negligent—and as noted, Occidental failed to prove that the "design" was performed by a licensed engineer. The fact that licensed engineers performed other tasks is entirely beside the point, and notably, Occidental cites no legal authority for its argument.

Occidental's theory assumes that "designing," "planning," and "inspecting" are interchangeable, but that is not the law. This Court holds that statutes should be construed to "give effect to every provision and ensure that no provision is rendered meaningless or superfluous." *Leordeanu v. American Protection Ins. Co*., 330 S.W.3d 239, 248 n.35 (Tex. 2010). The "planning and inspection" theory would nullify these distinct statutory terms in a case based on a negligent "design."

In any event, Occidental did not conclusively prove that a licensed engineer "planned" or "inspected" the Acid Addition System. This theory is founded on testimony from an Occidental witness who was cross-examined and impeached. RR8:53-142, 150-58. The jury was free to disbelieve her.

For both reasons, Justice Brown correctly rejected this argument because "Occidental's liability arises out of the design of the Acid Addition System" and Occidental failed to establish "planning" or "inspection" by licensed engineers. 415 S.W.3d at 22-23.

CONCLUSION

The petition should be denied, or the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Respondents' Brief on the Merits was properly forwarded to counsel of record for Respondent in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by e-file and/or email, on this 26th day of November 2014, addressed as follows:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 14,820 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This brief 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.

Dated: November 26, 2014.

/s/ Russell S. Post
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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 Court of Appeals No. 01-09-01140-CV

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

TAB

Tab 1

Restatement (Second) of Torts § 395

Restatement (Second) of Torts § 395 (1965)

Restatement of the Law - Torts

Database updated October 2014
Restatement (Second) of Torts

Division 2. Negligence

Chapter 14. Liability of Persons Supplying Chattels for the Use of Others

Topic 3. Manufacturers of Chattels

§ 395 Negligent Manufacture of Chattel Dangerous Unless Carefully Made

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Comment:

a. *History.* The original common law rule was contrary to that stated in this Section. The case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng.Rep. 402 (1842), in which a seller who contracted with the buyer to keep a stagecoach in repair after the sale was held not to be liable to a passenger injured when he failed to do so, was for a long time misconstrued to mean that the original seller of a chattel could not be liable, in tort or in contract, to one other than his immediate buyer. To this rule various exceptions developed, the first of which involved the rule stated in §§ 388, 390, and 394, that a manufacturer who knew that the chattel was dangerous for its expected use and failed to disclose the danger became liable to a third person injured by the defect.

The most important of these exceptions, however, made the seller liable to a third person for negligence in the manufacture or sale of an article classified as "inherently" or "imminently" dangerous to human safety. By degrees this category was redefined to include articles "intended to preserve, destroy, or affect human life or health." For more than half a century, however, the category remained vague and imperfectly defined. It was held to include food, drugs, firearms, and explosives, but there was much rather pointless dispute in the decisions as to other articles, and as to whether, for example, such a product as chewing tobacco was to be classified as a food.

In 1916 the leading modern case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas. 1916C, 440, 13 N.C.C.A. 1029 (1916), discarded the general rule of non-liability, by holding that "inherently dangerous" articles included any article which would be dangerous to human safety if negligently made. After the passage of more than forty years, this decision is now all but universally accepted by the American courts. Although some decisions continue to speak the language of "inherent danger," it has very largely been superseded by a recognition that what is involved is merely the ordinary duty of reasonable care imposed upon the manufacturer, as to any product which he can reasonably expect to be dangerous if he is negligent in its manufacture or sale.

b. This Section states the rule thus generally adopted. The justification for it rests upon the responsibility assumed by the manufacturer toward the consuming public, which arises, not out of contract, but out of the relation resulting from the purchase of the product by the consumer; upon the foreseeability of harm if proper care is not used; upon the representation of safety implied in the act of putting the product on the market; and upon the economic benefit derived by the manufacturer from the sale and subsequent use of the chattel.

c. Not necessary that chattel be intended to affect, preserve, or destroy human life. In order that the manufacturer of a chattel shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do if it is imperfect.

d. Not necessary that chattel be inherently dangerous. In order that the manufacturer shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel be "inherently dangerous," in the sense of involving any degree of risk of harm to those who use it even if it is properly made. It is enough that the chattel, if not carefully made, will involve such a risk of harm. It is not necessary that the risk be a great one, or that it be a risk of death or serious bodily harm. A risk of harm to property, as in the case of defective animal food, is enough. All that is necessary is that the risk be an unreasonable one, as stated in § 291. The inherent danger, or the high degree of danger, is merely a factor to be considered, as in other negligence cases, as bearing upon the extent of the precautions required.

Illustration:
Illustration:

1. A manufacturers a mattress. Through the carelessness of one of A's employees a spring inside of the mattress is not properly tied down. A sells the mattress to B, a dealer, who resells it to C. C sleeps on the mattress, and is wounded in the back by the sharp point of the spring. The wound becomes infected, and C suffers serious illness. A is subject to liability to C.

e. When inspections and tests necessary. As heretofore pointed out (§ 298, Comment *b*), the precaution necessary to comply with the standard of reasonable care varies with the danger involved. Consequently the character of harm likely to result from the failure to exercise care in manufacture affects the question as to what is reasonable care. It is reasonable to require those who make or assemble automobiles to subject the raw material, or parts, procured from even reputable manufacturers, to inspections and tests which it would be obviously unreasonable to require of a product which, although defective, is unlikely to cause more than some comparatively slight, though still substantial, harm to those who use it. A garment maker is not required to subject the finished garment to anything like so minute an inspection for the purpose of discovering whether a basting needle has not been left in a seam as is required of the maker of an automobile or of high speed machinery or of electrical devices, in which the slightest inaccuracy may involve danger of death.

f. Particulars which require care. A manufacturer is required to exercise reasonable care in manufacturing any article which, if carelessly manufactured, is likely to cause harm to those who use it in the manner for which it is manufactured. The particulars in which reasonable care is usually necessary for protection of those whose safety depends upon the character of chattels are (1) the adoption of a formula or plan which, if properly followed, will produce an article safe for the use for which it is sold, (2) the selection of material and parts to be incorporated in the finished article, (3) the fabrication of the article by every member of the operative staff no matter how high or low his position, (4) the making of such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article, and (5) the packing of the article so as to be safe for those who must be expected to unpack it.

Illustrations:
Illustrations:

2. The A Motor Company incorporates in its car wheels manufactured by the B Wheel Company. These wheels are constructed of defective material, as an inspection made by the A Company before putting them on its car would disclose. The car is sold to C through the D Company, an independent distributor. While C is driving the car the defective wheel collapses and the car swerves and collides with that of E, causing harm to C and E, and also to F and G, who are guests in the cars of C and E respectively. The A Motor Company is subject to liability to C, E, F, and G.

g. The exercise of reasonable care in selecting raw material and parts to be incorporated in the finished article usually requires something more than a mere inspection of the material and parts. A manufacturer should have sufficient technical knowledge to select such a type of material that its use will secure a safe finished product. So too, a manufacturer who incorporates a part made by another manufacturer into his finished product should exercise reasonable care to ascertain not only the material out of which the part is made but also the plan under which it is made. He must have sufficient technical knowledge to form a reasonably accurate judgment as to whether a part made under such a plan and of such material is or is

not such as to secure a safe finished product. The part is of his own selection, and it is reasonable for the users of the product to rely not only upon a careful inspection but also sufficient technical knowledge to make a careful inspection valuable in securing an article safe for use. In all of these particulars the amount of care which the manufacturer must exercise is proportionate to the extent of the risk involved in using the article if manufactured without the exercise of these precautions. Where, as in the case of an automobile or high speed machinery or high voltage electrical devices, there is danger of serious bodily harm or death unless the article is substantially perfect, it is reasonable to require the manufacturer to exercise almost meticulous precautions in all of these particulars in order to secure substantial perfection. On the other hand, it would be ridiculous to demand equal care of the manufacturer of an article which, no matter how imperfect, is unlikely to do more than some comparatively trivial harm to those who use it.

h. Persons protected. The words "those who use the chattel" include not only the vendee but also all persons whose right or privilege to use the article is derived from him, unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use. Unless the article is made to special order for the peculiar use of a particular person, the manufacturer must realize the chance that it may be sold. This becomes a substantial certainty where the article is sold to a jobber, wholesaler, or retailer. So too, many articles are obviously made for the use of several persons or are sold under conditions which make it certain that they will be used by persons other than the purchaser. Thus the manufacturer of a seven-seated automobile which is obviously intended to carry persons other than the purchaser and his chauffeur should recognize it as likely to be used by any persons whom, as members of his family, guests, or pedestrians picked up on the road, the purchaser chooses to receive in his car. A threshing machine sold to the owner of a large farm is obviously intended for the use of his employees.

The words "those who use the chattel" include, therefore, all persons whom the vendee or his subvendee or donee permits to use the article irrespective of whether they do so as his servants, as passengers for hire or otherwise, to serve his business purposes, or as licensees permitted to use a car purely for their own benefit. They also include any person to whom the vendee sells or gives the chattel, or to whom such subvendee or donee sells or gives the chattel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its use. Thus they include a person to whom an improperly prepared drug is hypodermically administered by a physician who has bought it from a drugstore which has purchased it from a wholesaler or jobber.

i. Persons endangered by use. The words "those whom he should expect to be endangered by its probable use" may likewise include a large group of persons who have no connection with the ownership or use of the chattel itself. Thus the manufacturer of an automobile, intended to be driven on the public highway, should reasonably expect that, if the automobile is dangerously defective, harm will result to any person on the highway, including pedestrians and drivers of other vehicles and their passengers and guests; and he should also expect danger to those upon land immediately abutting on the highway. Likewise the manufacturer of a cable to be used in the transmission of high voltage electric current should reasonably anticipate that if its insulation is defective its use may endanger even persons miles away from the cable itself.

j. Unforeseeable use or manner of use. The liability stated in this Section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate. In the absence of special reason to expect otherwise, the maker is entitled to assume that his product will be put to a normal use, for which the product is intended or appropriate; and he is not subject to liability when it is safe for all such uses, and harm results only because it is mishandled in a way which he has no reason to expect, or is used in some unusual and unforeseeable manner. Thus a shoemaker is not liable to an obstinate lady who suffers harm because she insists on wearing a size too small for her, and the manufacturer of a bottle of cleaning fluid is not liable when the purchaser splashes it into his eye.

Illustration:
Illustration:

3. A manufactures and sells to a dealer an automobile tire, which is in all respects safe for normal automobile driving. B, an automobile racer, buys the tire from the dealer and installs it on his racing car. In the course of the race the tire blows out because of the excessive speed, and B is injured. A is not liable to B.

k. Foreseeable uses and risks. The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily intended. The maker of a chair, for example, may reasonably expect that some one will stand on it; and the maker of an inflammable cocktail robe may expect that it will be worn in the kitchen in close proximity to a fire. Likewise the manufacturer may know, or may be under a duty to discover, that some possible users of the product are especially susceptible to harm from it, if it contains an ingredient to which any substantial percentage of the population are

allergic or otherwise sensitive, and he fails to take reasonable precautions, by giving warning or otherwise, against harm to such persons.

l. The fact that the article is leased, given, or loaned to the user rather than sold or leased does not affect the liability of the manufacturer for his negligence in making the article.

m. Manufacturer of raw material or parts of article to be assembled by third person. It is not necessary that the manufacturer should expect his product to be used in the form in which it is delivered to his immediate buyer. A manufacturer of parts to be incorporated in the product of his buyer or others is subject to liability under the rule stated in this Section, if they are so negligently made as to render the products in which they are incorporated unreasonably dangerous for use. So too, a manufacturer of raw material made and sold to be used in the fabrication of particular articles which will be dangerous for use unless the material is carefully made, is subject to liability if he fails to exercise reasonable care in its manufacture. As to the effect to be given to the fact that the defect could have been discovered before the part or material was incorporated in the finished article, see § 396.

Illustration:
Illustration:
4. Under the facts stated in Illustration 2, the B Wheel Company is subject to liability to C, E, F, and G.

n. The rule stated in this Section applies where the only harm which results from the manufacturer's failure to exercise reasonable care is to the manufactured chattel itself.

Illustration:
Illustration:
5. A manufactures and sells to a dealer an automobile, which is purchased from the dealer by B. Because of A's failure to exercise reasonable care in manufacture the car has a defective steering gear. While B is driving the steering gear gives way, and the car goes into the ditch and is damaged. B is not injured, and there is no other damage of any kind. A is subject to liability to B for the damage to the automobile.

Tab 2

Restatement (Second) of Torts § 398

Restatement (Second) of Torts § 398 (1965)

Restatement of the Law - Torts

Database updated October 2014
Restatement (Second) of Torts

Division 2. Negligence

Chapter 14. Liability of Persons Supplying Chattels for the Use of Others

Topic 3. Manufacturers of Chattels

§ 398 Chattel Made Under Dangerous Plan or Design

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Comment:

a. The rule stated in this Section, like that stated in § 397, is a special application of the rule stated in § 395.

b. *When dangerous plan or design known to user.* If the dangerous character of the plan or design is known to the user of the chattel, he may be in contributory fault if the risk involved in using it is unreasonably great or if he fails to take those special precautions which the known dangerous character of the chattel requires.

Illustration:
Illustration:

1. 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.

Tab 3

Restatement (Second) of Torts § 385

Restatement (Second) of Torts § 385 (1965)

Restatement of the Law - Torts

Database updated October 2014
Restatement (Second) of Torts

Division 2. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 8. Liability of Persons Other Than a Possessor, Vendor, or Lessor

§ 385 Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted

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.

Comment:

a. The rules determining the liability as one who as manufacturer or independent contractor makes a chattel for the use of others, are stated in §§ 394- 398, and §§ 403 and 404.

b. The words "on behalf of the possessor" are defined in § 383, Comment a. This Section applies to any person who on behalf of the possessor of land erects thereon a structure or creates any other artificial condition, irrespective of whether in so doing he is acting as the possessor's servant or as an independent contractor, and whether he does the work for reward or gratuitously.

c. A manufacturer of a chattel who puts it upon the market knowing it to be dangerous and having no reason to expect that those who use it will realize its actual condition is liable for physical harm caused by its use (see § 394). As the liability of a servant or an independent contractor who erects a structure upon land or otherwise changes its physical condition is determined by the same rules as those which determine the liability of a manufacturer of a chattel, it follows that such a servant or contractor who turns over the land with knowledge that his work has made it dangerous in a manner unlikely to be discovered by the possessor is subject to liability both to the possessor, and to those who come upon the land with the consent of the possessor or who are likely to be in its vicinity.

As to the effect of the employer's knowledge of the dangerous character of the structure or condition when he accepts it from the servant or contractor, see § 388, Comment *n*.

As is stated in § 395, a manufacturer of a chattel who, by failing to exercise reasonable care in its manufacture, puts upon the market a dangerously defective article, is subject to liability for bodily harm caused to persons who may be expected to use it with the consent of his vendee or to be in the vicinity of its probable use. So too, a servant or contractor who turns over the land to his employer in a condition made dangerous by his failure to exercise reasonable care, is liable for harm caused by it, after his employer has accepted the work, not only to his employer but to all persons whom he should expect to be upon the land with the consent of his employer or to be in its vicinity.

As to the effect upon the servant's or contractor's liability of the fact that the employer, as the possessor of the land, is under a duty toward the person injured to discover the defect and make the structure or condition safe or warn such person of the existence of the danger, see § 396.

d. When work accepted by possessor. The liability stated in this Section is imposed upon the servant or contractor as the erector or creator of the structure or condition, and not as a person entitled to be upon the land for the purpose of doing work with the consent of and on behalf of the possessor. When the work is completed and accepted by the possessor, the servant's or contractor's connection with the land ceases, just as a repairman loses possession of a chattel which is entrusted to him for repair when he returns it to its owner. In both cases, the liability is not subject to the same limitations as is that of the possessor of land or chattels. While in both cases it extends only to persons who are lawfully using or sharing in the use of the land or chattel with the consent of its possessor, neither a negligent servant or contractor, nor a negligent manufacturer or repairman is relieved from liability by the fact that he does not know of the dangerous condition of the land or chattel and that the person injured is a licensee and not one who enters the land or uses the chattel as an invitee of its lawful possessor. In this particular, the liability of a servant or contractor for bodily harm done after the work has been turned over to the possessor of the land for whom it is done, differs from that of a servant or contractor for harm done while he is still upon the land and in charge of the work of erecting a structure or otherwise changing the physical condition of the land. (See § 384.)

Tab 4

Restatement (Second) of Torts § 396

Restatement (Second) of Torts § 396 (1965)

Restatement of the Law - Torts

Database updated October 2014
Restatement (Second) of Torts

Division 2. Negligence

Chapter 14. Liability of Persons Supplying Chattels for the Use of Others

Topic 3. Manufacturers of Chattels

§ 396 Effect of Third Person's Duty to Inspect

A manufacturer of a chattel is subject to liability under the rules stated in §§ 394 and 395 although the dangerous character or condition of the chattel is discoverable by an inspection which the seller or any other person is under a duty to the person injured to make.

Comment:

a. The rule stated in this Section is closely analogous to that stated in § 393, and the Comments under that Section therefore are applicable to this Section.

b. A chattel often passes through a number of hands before it reaches the person whose use of it causes bodily harm to himself or others. The buyer from the manufacturer, or any other person in the line of transmission to the ultimate user of the chattel, may have an opportunity, and be under a duty, to inspect the chattel before turning it over for use or transferring it to a third person whom he should expect so to turn it over to others. The duty of inspection may be owed only to the person to whom the chattel is transferred, but it is more usually owed to all those who should be expected to use the chattel with the consent of, or through its transfer from, the transferee and to persons likely to be in the vicinity of its probable use. The fact that the inspection, if made, would have disclosed the dangerous character of the chattel and enabled him who owed the duty to correct the defect or give a warning or instructions which would have made it possible to use it safely, subjects the one who fails to perform the duty to liability for physical harm resulting to those to whom the duty is owed. It does not, however, relieve from liability the manufacturer to whose negligence the dangerous condition is due.

Illustrations:
Illustrations:

1. The A Motor Company sells to B a car, the steering gear of which is so negligently constructed as to make the car unsafe to drive. B makes a business of renting cars to be driven by the renter on short trips. The defect is discoverable by an inspection which B is under a duty to make (see § 408), but not by any inspection required of a person to whom cars are so rented. B rents the car to C without inspecting it. While C is carefully driving the car he collides with the car of D. The collision is due to the bad condition of the steering gear. C, D, and E, a guest in C's car, are hurt. C, D, and E can recover against either the A Motor Company or B.
2. The A Electric Company sells and ships a machine to the B Company, so packed as to be dangerous to those that unpack it. In consequence C, an employee of the B Company, is hurt while unpacking the machine. The A Company is subject to liability to C, even though his employer, the B Company, was also negligent toward him in failing to inspect the machine and container before turning it over to C for unpacking.
3. The A Manufacturing Company sells to B a threshing machine, and at B's order ships it to his farm, where B's foreman, without inspecting it, orders C and D, employed on B's farm, to operate it. The platform over the moving machinery is so badly constructed that it collapses under the weight of C and D, and they are hurt by the moving machinery. Had the foreman made a careful inspection of the machine, he could have discovered the bad condition of the platform. The A Company and B are subject to liability to C and D.

c. The situations to which the rule stated in this Section is most usually applicable are those in which a buyer of a defectively manufactured chattel, or one who derives possession of it from the buyer, turns over the chattel to his employees or others for use for his business purposes or permits others to share in its use for such purposes, or where the buyer of such a chattel leases it for immediate use (see §§ 392 and 408, which state that persons so supplying chattels are under a duty to inspect them before turning them over foo use). The rule stated in this Section is also applicable where the manufacturer of raw material or of a part, such as an automobile wheel, sells it to another manufacturer who is under a duty to inspect it, before incorporating it in his product (see § 395, Comment *f*).