TADC PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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I. Summary

1. The statutory presumption of non-liability under Texas Civil Practice & Remedies Code Section 82.008 (which creates a rebuttable presumption of non-liability if the design complies with mandatory federal safety standards) applies based on the product risk, not the specific product defect alleged by the plaintiff. *Hamid v. Lexus*, No. 01-10-00163-CV, 2011 WL 7074213 (Tex. App.—Houston [1st Dist.] Dec. 22, 2011, no pet.).

2. When an expert fails to support his opinion that a safer alternative design would have prevented an accident involving a delaminating tire and fails to address the actual conditions of the accident, such testimony is legally insufficient. *Ford Motor Co. v. Wiles*, 353 S.W.3d 198 (Tex. App.—Dallas 2011, no pet.).

3. Where Texas and Wisconsin law differ on the contribution and indemnity provisions for an innocent retailer, an indemnity claim with a strong connection to Wisconsin should follow Wisconsin law. *Engine Components, Inc. v. A.E.R.O. Aviation Co.*, No. 04-10-00812-CV, 2012 WL 666648 (Tex. App.—San Antonio Feb. 29, 2012, pet. filed).

4. Where a plaintiff is injured by an unidentified product, the plaintiff is not precluded from recovering simply because the product cannot be identified but must present evidence that all models of the product possessed the alleged manufacturing or design defect. *Zavala v. Burlington N. Santa Fe Corp.*, 355 S.W.3d 359 (Tex. App.—El Paso 2011, no pet.).

5. A jury's finding that an acid addition system was designed under the supervision of a licensed engineer was not sufficient to implicate either statute of repose under Section 16.008 or Section 16.009 of the Texas Civil Practice & Remedies Code. *Jenkins v. Occidental Chem. Corp.*, No. 01-09-01140-CV, 2011 WL 6046527 (Tex. App.—Houston [1st Dist.] Nov. 17, 2011, no pet.).

6. When the injury alleged by the plaintiff is the result of the condition of the premises, and the injured party was not injured by or as a contemporaneous result of a negligent activity itself rather than a condition created by the activity, the plaintiff's claim resounds in premises liability and the plaintiff cannot convert her claim into a products liability claim. *Wyckoff v. George C. Fuller Contracting Co.*, 357 S.W.3d 157 (Tex. App.—Dallas, no pet.).

II. Discussion

1. *Hamid v. Lexus*, No. 01-10-00163-CV, 2011 WL 7074213 (Tex. App.—Houston [1st Dist.] Dec. 22, 2011, no pet.).

In *Hamid*, the Houston Court of Appeals concluded that the applicability of the Federal Motor Vehicle Safety Standards is based on the relevant product risk, not the specific product defect alleged by the plaintiff. Thus, the court affirmed the trial court's application of the rebuttable presumption of non-liability and take-nothing judgment against the plaintiffs.

The Hamids sued Lexus and Toyota after their daughter died when she lost control of the Lexus she was driving. Megan Hamid steered violently to avoid an abandoned vehicle on the shoulder of the interstate and failed to apply her brakes. Megan's vehicle hit the barrier dividing the interstate and rolled several times. Megan was severely injured and died the next day.

The Hamids alleged that the vehicle was defectively designed because it was manufactured and sold without Vehicle Stability Control, a safety technology that helps drivers maintain or regain control of their vehicle during emergency steering maneuvers. The Hamids further alleged that the absence of the device rendered the vehicle defective and was a producing cause of Megan's death.

Lexus and Toyota denied the allegations, asserting that because the vehicle complied with various safety standards applicable to the vehicle at the time, they were entitled to a jury instruction on the statutory "presumption of safety" under Texas Civil Practice & Remedies Code Section 82.008.

The trial court included a question in the charge on the statutory presumption of non-liability under Section 82.008. The Hamids objected on the basis that the defendants were not entitled to the presumption because there were no Federal Motor Vehicle Safety Standards that applied to the Vehicle Stability Control. The trial court overruled the Hamids objection, and the jury found that no design defect existed in the vehicle at the time it left the possession of Lexus or Toyota. The trial court entered a take-nothing judgment against the Hamids and the Hamids appealed. The court of appeals considered two issues on appeal: (1) Whether the Hamids had properly preserved the alleged charge error; and (2) Whether the defendants were entitled to a rebuttable presumption instruction.

First, the court explained that to preserve charge error for review, a party must point out distinctly the objectionable matter and the grounds of the objection. "On appeal, the charge error complained of must comport with the objections made at the charge conference." The court examined the Hamids' three arguments for reversal of the trial court's judgment: (1) that the statutory presumption did not apply when no federal safety standard or regulations existed that related to the defect that had been alleged by the plaintiff; (2) that the federal safety standards relied upon by Toyota did not govern the product risk—the loss of vehicle control due to rear-wheel spinout caused by the lack of Vehicle Stability Control; and (3) that the legislative history and existing legal precedent revealed that the rebuttable presumption was never intended to be submitted as a jury instruction. The court clarified that at best the Hamids' charge objection preserved only the first of these three arguments.

The Hamids objection was focused on the Vehicle Stability Control itself, rather than the admitted standards. So the court found that the Hamids first argument was properly preserved because it addressed the lack of a particular safety device and resulting defect. Whereas the court found that the Hamids failed to preserve their second challenge to the jury charge because the second argument addressed the lack of relevance of the federal standards. Moreover, the court explained that during trial Toyota demonstrated that the vehicle complied with two applicable Federal Motor Vehicle Safety Standards. Neither at trial nor during the charge conference did the Hamids notify the trial court that Toyota had not satisfied its burden to demonstrate that these standards were relevant, governing the product risk in question. The court further held that the Hamids waived their third argument because they previously made no contention about legislative history or case law on the use of presumption instructions.

The court then turned to the second issue. The Hamids argued that Toyota was not entitled to a rebuttable presumption instruction because the legislative intent of Section 82.008 demonstrated that the presumption only applied when there was a standard that related specifically to a defect that had been alleged by a plaintiff. At trial, Toyota had offered safety standards that related to the vehicle's brake system, not the Vehicle Stability Control system. The court rejected the Hamids' argument and held that based on the plain and unambiguous language of the statute, the applicability of the presumption is based on the relevant product risk, not the particular alternative design alleged by the plaintiff. The court cited the 5th Circuit's opinion in *Wright v. Ford Motor Co.* stating, "the statute clearly addresses risk, not the particular safety device the plaintiff's alleged should be utilized." The court further concluded that the legislature's focus on "risk" in Chapter 82 supported its conclusion.

On appeal, the Hamids argued for a narrow definition of the risk: "the failure to maintain the vehicle control during emergency maneuvers due to rear-wheel spinout, which was caused by the lack of a Vehicle Stability Control system." Whereas Toyota argued for a broad definition of

the risk: "the loss of the vehicle control causing a crash," contending that two Federal Motor Vehicle Safety Standards relating to brake systems applied. The court distinguished that although the parties disagreed regarding the nature of the risk, the Hamids failed to make this argument during the charge conference.

Thus, the court rejected the Hamids' assertion that the statutory presumption of non-liability did not apply when there was not a federal safety standard or regulation that related to the specific product defect alleged by the plaintiff. Further, the court also held that the Hamids' other challenges were waived because they were not preserved. The Houston Court of Appeals affirmed the trial court's take nothing judgment.

Hamid is useful to defense attorneys because it enlarges the application of the statutory presumption of non-liability. Rather than requiring that the statue address a specific safety device or lack thereof that caused the plaintiff's injury, the court's holding broadens the rebuttable presumption instruction's application to the relevant product risk. Defense practitioners should use this to their advantage by arguing for the application of more broad Federal Motor Vehicle Safety Standards to obtain the presumption.

2. *Ford Motor Co. v. Wiles*, 353 S.W.3d 198 (Tex. App.—Dallas 2011, no pet.).

In *Ford Motor Company*, the Dallas Court of Appeals held that the opinion of the plaintiffs' expert was bare, baseless, and could not support the judgment. Accordingly, the court held that the expert's testimony was legally insufficient evidence of safer alternative design and reversed the trial court's judgment on the jury verdict for the plaintiffs.

In this design defect case, the Wiles' Ford Explorer vehicle lost tread on a tire and rolled over, killing Diane Wiles. The Wiles family was returning from a vacation when they noticed an unusual vibration in their vehicle. The family checked the tires but they did not find anything wrong. Later, the tread on the vehicle's left rear tire separated and the vehicle swerved to the left. The driver attempted to steer the vehicle to the right and off of the road into the grass to stop it, but the vehicle kept turning right and rolled over. When the tread of the left tire detached, the wheel rim gouged a line through the road surface. While the vehicle was rolling, Diane Wiles was ejected from the vehicle.

The Wiles sued Ford Motor Company, Michelin North America, and Procare Automotive Solution, LLC. The jury found that the tire was not defective and that Michelin and Procare were not responsible for the accident. The jury also found there was a design defect in the handling of the vehicle, that Jim and Diane Wiles were negligent, and divided responsibility equally between Jim, Diane, and Ford. Based on the jury's verdict, the trial court rendered judgment for the Wiles for actual damages of $7,370,197.16 plus interest.

On appeal, Ford asserted that the trial court erred in determining the evidence was legally sufficient to support the jury's verdict that the accident was caused by a design defect in the vehicle and that the plaintiffs' suggested alternative design would have prevented the accident. The Wiles' theory was that the accident was caused by the defective design of the handling of the vehicle, which caused it to go out of control and roll when the tire delaminated. The Wiles' expert testified the problem was caused by tramp in the rear axle of the vehicle skating back and forth, making the vehicle un-steerable.

The court explained that Tramp occurs when there is a solid axle between the wheels and one wheel bounces repeatedly, reducing traction and causing the vehicle to skate back and forth. The Wiles' expert supported his view that tramp and skate occur during tire delamination with video recordings and data tests of vehicles driven at different speeds with tires that delaminated.

The Wiles' expert further testified that Ford was aware that the vehicle had greater problems with tramp and skate than sport utility vehicles of other manufacturers, and in certain markets, Ford changed the type and placement of the shock absorbers. The Wiles' expert concluded that an alternative shock absorber arrangement would have undoubtedly prevented the driver from losing control of the vehicle, the accident would not have occurred, and Diane Wiles would not have died.

Ford maintained on appeal that the testimony of the Wiles' expert constituted no evidence because his theory had no basis and

was founded solely on his conclusive opinion. The court cited the Texas Supreme Court in stating, "a claim will not stand or fall in the mere *ipse dixit* of a credentialed witness." The court explained that the Wiles' expert presented no basis for his testimony that the alternative shock absorber arrangement would have prevented an accident involving a delaminating tire. Further, the expert's testimony about the benefits of the alternative shock absorber arrangement failed to address the actual conditions of the accident. Specifically, the court found that the expert's testimony failed to explain how stiffer shock absorbers placed closer to the wheels would have prevented the rollover when the rear tire went flat and the wheel rim dug into the road surface.

The court concluded that the Wileses failed to present legally sufficient evidence of a safer alternative design. Thus, the Dallas Court of Appeals reversed the trial court's judgment and rendered judgment that the Wileses take nothing for their claims against Ford.

Ford Motor Company serves as a reminder to defense practitioners that plaintiff's experts opining on safer alternative designs may not divorce the actual conditions and facts from their conclusion. Defense practitioners may utilize *Ford Motor Company* to disqualify such expert opinions.

3. *Engine Components, Inc. v. A.E.R.O. Aviation Co.*, No. 04-10-00812-CV, 2012 WL 666648 (Tex. App.—San Antonio Feb. 29, 2012, pet. filed).

The issue in *Engine Components*, was whether to apply Texas law or Wisconsin law to an indemnity claim. The San Antonio Court of appeals reversed the trial court's finding that Texas law applied to the indemnity claim, where a strong connection between the indemnity claim and Wisconsin existed.

A.E.R.O. called ECI and requested it work on the core cylinder assembly for an airplane. ECI completed the requested work and sent the cylinder stud assembly back to A.E.R.O., who added parts to make it airworthy and then sold and shipped it to Cacic Aviation, who installed it on the plane. The Cessna aircraft in which the assembly was installed crashed and killed three occupants, all of whom were Wisconsin residents.

A.E.R.O. and ECI were sued in Wisconsin in a product liability action. While the suit was pending, A.E.R.O. tendered its defense to ECI under Section 82.002 of the Texas Civil Practice & Remedies Code. When ECI did not accept the tender, A.E.R.O. filed suit in Texas, where ECI had its principle place of business. Later, both A.E.R.O. and ECI settled with the plaintiffs in the Wisconsin suit.

ECI filed a motion for summary judgment in the Texas suit asserting, based on choice of law principles, that Wisconsin law applied and that there was no right to indemnity. The trial court denied the motion and held that Texas law would apply. On appeal, ECI argued that the trial court erred in applying Texas products liability law and that Wisconsin law should have been applied to A.E.R.O.'s indemnity claim.

The court explained that first it must decide whether the applicable laws from Texas and Wisconsin differ. The court further explained that if it determined that the laws differed, the court must then determine the appropriate law to apply. However, the Texas Supreme Court has held that "there may not be a conflict when only one forum has an interest at stake."

The court first addressed Wisconsin law, finding that Wisconsin adopted the rule of strict liability and had not enacted any statutes that modified the imposition of liability on an innocent retailer. "There is no Wisconsin statute requiring a manufacturer to indemnify an innocent retailer and the Wisconsin Supreme Court specifically declined to adopt such a requirement." Thus, the court found that Wisconsin clearly rejected a total shifting of responsibility and opted for only contribution. "An innocent retailer is entitled only to the defense of contributory negligence under Wisconsin's comparative fault scheme."

Next the court addressed Texas law, finding that in Texas, with some exceptions, Chapter 82 of the Texas Civil Practice & Remedies Code obligates manufacturers to indemnify innocent sellers from product liability actions arising out of their products. Accordingly, the court held that the difference between Texas and Wisconsin law was clear—Texas allows an innocent retailer indemnity, whereas Wisconsin follows strict liability and holds sellers and manufacturers who

placed defective products into the stream of commerce equally liable.

The court determined that a strong connection between the indemnity claim and Wisconsin existed. The defective product was placed into the stream of commerce in Wisconsin. The product was sold to an aviation repair facility in Wisconsin to be placed on an aircraft in Wisconsin. Further, Wisconsin was the jurisdiction where the underlying product suit was filed. Thus, a true conflict between Wisconsin and Texas law regarding indemnity in the products liability context existed.

The court then addressed the appropriate law to apply. "Texas courts use the Restatement (Second) of Conflict of Laws 'most significant relationship' test to decide choice of law issues." The court explained that it must consider which state's law had the most significant relationship to the particular substantive issue to be resolved. The court considered the following factors: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties was centered.

The court explained that the first two factors pointed to Wisconsin—the injury occurred in Wisconsin, the indemnity claim arose in Wisconsin, and the product was placed into the stream of commerce in Wisconsin. The court found that the last two factors were mixed because the companies were located in Texas, Illinois, and Delaware. And ECI performed the work in Texas but A.E.R.O. sold the product to a company in Wisconsin. Yet the court ultimately held that the policy considerations favored the application of Wisconsin law to resolve the indemnity issue.

The court held that because Wisconsin opted for a comparative fault scheme rather than a total shift of liability that A.E.R.O. had no claim for contribution. Thus, the San Antonio Court of appeals reversed the trial court, finding that the trial court erred in applying Texas law because there is no right of indemnity under Wisconsin law.

Defense practitioners could utilize *Engine Components* to their advantage if an indemnity claim alleged against their client has a strong connection to a state that fails to modify the imposition of liability on an innocent retailer.

4. *Zavala v. Burlington N. Santa Fe Corp.*, 355 S.W.3d 359 (Tex. App.—El Paso 2011, no pet.).

In *Zavala*, where the plaintiff was injured by an unidentified hopper car door, the El Paso Court of Appeals affirmed the trial court's grant of summary judgment to the railroad company on all claims. The court held that the plaintiff was not precluded from recovering simply because he could not identify the hopper car that injured him but that he failed to present evidence that railroad cars of the same model deviated from specifications making them unreasonable or that railroad cars of the same model were designed defectively.

Jesus Zavala worked for Ranstad North America, L.P., an employment agency that assigned employees to various other agencies. Zavala was assigned to Commodity Specialists Company, LLC. Zavala's duties included loading and unloading Burlington Northern Santa Fe hopper cars. The hopper cars were designed such that as granular material was loaded it was funneled to a rectangular section at the bottom of the car and then unloaded from the bottom through a door at the end of a chute. The door in the chute was opened and closed by rotating the chute door-opening mechanism. One method to opening the door was to insert a metal rod into a hole in the opening mechanism and pushing or pulling the bar, causing the opening mechanism to rotate and the door to slide open.

While attempting to open the door, Zavala sustained an injury. Zavala alleged that he properly inserted the bar into the opening mechanism but was unable to open the door on his own so he asked for help. Zavala alleged that the mechanism ultimately gave way when three men exerted pressure on the rod, but Zavala injured his right wrist in the process.

Zavala could not identify the exact car which injured him or pinpoint any specific defect on the car. Zavala did not see the hopper car again but identified the opening mechanism on a BNSF model 450 car as "the same or substantially similar hopper loading mechanism [he] was injured on." Zavala worked from 3:00 p.m. until 11:00 p.m. on the date of the

injury, and the incident occurred at 4:30 p.m. According to the BNSF spotting record, no model 450 cars were on site at any time during Zavala's shift.

Zavala filed suit against BNSF alleging strict products liability, premises liability, and negligence for personal injuries sustained while attempting to open the hopper car door. BNSF filed a motion for summary judgment asserting it was entitled to judgment as a matter of law as to all of Zavala's claims. The trial court granted BNSF's motion in its entirety. Zavala appealed, bringing three issues for review: (1) the trial court erred generally in granting summary judgment; (2) the trial court erred in granting summary judgment on his strict products liability claims; and (3) the trial court erred in granting summary judgment on his negligence and premises liability claims.

Generally, Zavala alleged that BNSF was negligent because the hopper car did not work safely for the foreseeable uses, that BNSF knew of these problems before placing the hopper car into the stream of commerce, and that such acts proximately caused Zavala's injuries. Zavala relied only on the doctrine of res ipsa loquitor. The court explained that where the plaintiff alleged no negligence other than conduct relating to whether the product was unreasonably dangerous when sold, the negligence theories were "encompassed and subsumed into the defective product theories." Thus, the court held that Zavala's right to recover stood on the outcome of his products lability claims.

As to the premises liability claim, the court stated that "a railroad has a duty to use reasonable care to furnish a car that is reasonably safe and free from any dangerous condition of which it either knew or, through the exercise of reasonable care should have known." The court explained that the occupier of premises has no duty to warn a business invitee of dangerous conditions that are "obvious, reasonably apparent, or well known to the person injured."

The court acknowledged that Zavala failed to present evidence creating a fact issue as to the existence of a defect or a dangerous condition which was not known or obvious. Thus, the court held that BNSF met its burden of proof for summary judgment on the premises liability claim and the trial court did not err in awarding such relief.

The court next turned to Zavala's strict liability claims. Zavala maintained that BNSF was liable as a seller. BNSF argued that Zavala failed to meet his burden of proof of showing that BNSF placed the product into the stream of commerce because Zavala failed to show that BNSF supplied the product which allegedly injured Zavala. Zavala conceded that he could not identify the hopper car which caused his injury, but contended that there was no need for him to identify the exact hopper car so long as he could identify the type of hopper car opening mechanism which malfunctioned at the time of the injury. The court found that since Zavala could not identify the specific car which caused his injuries, then he must show more than a scintilla of evidence that all BNSF model 450 cars possessed a manufacturing defect. Zavala failed to present any evidence that all model 450 cars deviated for the specifications or planned output in a manner that rendered the cars unreasonably dangerous. Thus, the court held that the trial court did not err in granting summary judgment on Zavala's manufacturing defect claim.

For his design defect claim, Zavala identified the defective product as the chute door opening mechanism on the hopper car. The court began by stating that "a plaintiff is not required to show by direct proof how the product became defective or to identify a specific engineering or structural defect." The court explained that although a malfunction may be shown by testimony of the user about the circumstances surrounding the event in question, the inference of defect may not be drawn from the mere fact of a product-related accident. The court further explained that Zavala could support his claim with circumstantial evidence.

Yet the court identified that for circumstantial evidence to support an inference that a product was defective: (1) it must do more than raise the possibility that the injury could have resulted from the defect; (2) it must provide a reasonable basis for concluding that the injury would not ordinarily have occurred absent a defect; (3) it must do more than raise the possibility that the defective condition could have existed at that time; (4) it must provide a reasonable basis for concluding that the defective condition did not arise subsequent to the manufacturer's exercise of control over the

product; and (5) it need not disprove all other possible causes for the injury.

Zavala relied upon the deposition testimony of the men who assisted him in opening the door as evidence that the hopper car door malfunctioned at the time of injury. Zavala also relied on his expert's testimony based on the examination of the model 450 car. BNSF argued that without identifying the specific hopper car or any specific defect on the car, Zavala's speculation that the door was defective raised no fact question.

The court found that "[g]lobal assertions that all model 450 doors were defective because they were hard to open does not create more than a mere suspicion of a defect." The court held that Zavala failed to present sufficient evidence to create a genuine issue of material fact as to the existence of a design defect which rendered all model 450 cars unreasonably dangerous.

As to Zavala's marketing defect claim, both Zavala and the other employees testified that the hard-to-open doors were a common occurrence and they often assisted each other in applying force to open the doors. Zavala further testified that his supervisor instructed him on how to open the door at the time of the injury. The court found that BNSF established that Zavala had actual knowledge of the dangers posed by the doors, and Zavala failed to present any evidence sufficient to create a fact issue as to the necessity of warnings or instructions. Thus, the court held that BNSF had no duty to warn of the open and obvious risk of which the plaintiff was aware. The El Paso Court of Appeals affirmed the trial court's grant of summary judgment to the railroad company on all claims against Zavala.

Zavala reminds defense practitioners that the burden on plaintiffs injured by a product that cannot be identified is higher. The holding in *Zavala* should help defense practitioners argue that when a product cannot be identified that the plaintiff must show that all models of the product possessed a manufacturing or design defect.

5. *Jenkins v. Occidental Chem. Corp.*, No. 01-09-01140-CV, 2011 WL 6046527 (Tex. App.—Houston [1st Dist.] Nov. 17, 2011, no pet.).

In *Jenkins*, the trial court entered a take-nothing judgment based on the statute of repose against the plaintiff who brought an action against the former owner of a chemical plant when the plaintiff was sprayed in the face and partially blinded by an acid addition system. The Houston Court of Appeals reversed and remanded, holding that neither Section 16.008 nor Section 16.009 of the Texas Civil Practice & Remedies Code barred the plaintiffs claims against Occidental.

Occidental owned a chemical plant. Occidental installed an acid addition system at the plant to regulate the acidity of a chemical compound it produced. An Occidental employee developed the conceptual design for the system, shepherding the design process from start to finish. The employee was not a licensed engineer, but the supervisor or team leader was a licensed engineer. Occidental hired a third party engineering firm to create the detailed drawing for the system and hired an independent contractor to install the acid addition system. Eight years after Occidental sold the plant, the system sprayed acetic acid at Jason Jenkins, an operator at the plant.

Jenkins sued Occidental for negligently designing the acid addition system. Occidental plead as affirmative defenses that Jenkins' claims were barred by two statues of repose—one governing claims against registered or licensed professionals who design improvements to real property and the other governing claims against those who construct such improvements.

The jury found in favor of Jenkins on the negligent design claim, and answered specific questions that Occidental submitted on the statute of repose. The jury found that the acid addition system was not designed by a licensed engineer, but that it was designed under the supervision of a licensed engineer. The trial court rendered a take nothing judgment on the basis of Occidental's statute of repose.

The court began with an explanation of the statutes. Sections 16.008 and 16.009 "differ in who they protect and the object of the work protected." The court explained that Section 16.009 relates to (1) improvements only to real property, but (2) protects a broader class than 16.009 (anyone who constructs or repairs such an improvement), whereas Section 16.008 protects (1) only licensed professionals, but (2) relates to a broader category of work

(improvements to real property and equipment attached).

Jenkins first argued that the trial court erred in rendering judgment for Occidental under Section 16.008 because: (1) Occidental was not a registered engineering firm; (2) Occidental failed to conclusively prove that the system was designed by a licensed engineer; and (3) the jury's finding that the design was supervised by a licensed engineer was immaterial. Occidental contended that the jury finding that the system was designed under a licensed engineer was sufficient to establish application of the statute of repose.

The court concluded that supervision of the design by a licensed engineer did not invoke the statute by the statute's plain language and in light of distinctive language in its sister statute. Thus, the jury's finding that the acid addition system was designed under the supervision of a licensed engineer was not material to the application of Section 16.008.

The court further held that Occidental failed to conclusively prove that the supervisor designed, inspected, and planned the acid addition system. The supervisor testified that the conceptual design originated from the unlicensed employee and that he was in charge of shepherding the design process from start to finish.

Next, Jenkins argued that the trial court erred in rendering judgment for Occidental under Section 16.009 because: (1) the jury's liability findings were based on negligent design rather than negligent construction; (2) Occidental admitted it did not construct the acid addition system; and (3) Occidental was not entitled to respondent repose for the acts of third party contractors. Occidental contended that it did construct the system within the meaning of the statue, by hiring and supervising a third party contractor.

The court held that Occidental failed to establish that it was a "person" who constructed or repaired an improvement to real property under Section 16.009. The court further held that an owner-operator who prepared a conceptual design and hired and paid a third party to construct an improvement was not covered by the statute of repose. Occidental did not build the acid addition system or annex it to real property—that work was performed by a third party contractor. Further, the jury held Occidental liable for its role in the design of the acid addition system not any purported role in construction.

The court next addressed Occidental's cross-points raised on appeal: (1) that because Jenkins was injured while operating an improvement to real property and that his claim sounded exclusively in premises liability; (2) that to recover for negligent design Jenkins was required to establish the elements of a products liability claim; and (3) that the statute of limitations barred Jenkins claims.

The court rejected Occidental's first cross-point, finding that no reason existed to alleviate Occidental from duties otherwise owed with respect to the safety of the system's design. As to the second point, the court explained that the Supreme Court of Texas has recognized that a claim for negligent design or negligent manufacturing is legally distinct from a strict products liability claim. Jenkins did not assert a strict liability claim. Thus, the court overruled Occidental's second cross-point. Finally, the court responded to Occidental's third point that although Jenkins joined Occidental to the action more than two years after the injury, the joinder was timely because it was less than sixty days after another defendant named Occidental as a responsible third party under Texas Civil Practice & Remedies Code Section 33.004. Occidental argued that the joiner was a result of collusion between the parties, but the court found that Occidental offered no support for this accusation. Thus, the Houston Court of Appeals reversed the trial court's take-nothing judgment and remanded for entry of judgment in favor of Jenkins on the basis of the jury's findings on liability.

Occidental may assist defense attorneys in structuring questions to be included in the charge when defenses under Sections 16.008 and 16.009 of the Texas Civil Practice & Remedies Code may be available. Defense attorneys should focus on the court's distinction between the class of parties and objects that Sections 16.008 and 16.009 protect before framing their argument.

6. *Wyckoff v. George C. Fuller Contracting Co.*, 357 S.W.3d 157 (Tex. App.—Dallas, no pet.).

The Dallas Court of Appeals affirmed the trial court's take-noting judgment in favor of the owner and the contractor against a party guest who fell on the stairway leading to a wine cellar. The plaintiff claimed she was injured by a defect in the design of the stairway that made it unreasonably dangerous, but the plaintiff did not assert that she was injured as a contemporaneous result of activity by the contractor at the house, precluding claims against the contractor for products liability.

Virginia Wyckoff attended a party at Jayne West's house during which West gave Wyckoff a tour of the house. Wyckoff was injured after falling on the steps leading to the wine cellar. Wyckoff sued both West and George C. Fuller Contracting Company, the contractor that built the house and sold it to West. Wyckoff asserted that the stairway was defectively designed and constructed by Fuller Contracting because: (1) the lighting to the stairway was insufficient, and (2) the stairway did not comply with applicable building codes because it did not have hand or guard rails and, toward the bottom of the stairway was completely open on one side.

Fuller Contracting filed a combined traditional and no-evidence motion for summary judgment, arguing that: (1) Wyckoff could recover only on premises liability, not for products liability, (2) it did not owe a duty to Wyckoff, and (3) there was no evidence that the stairs constituted a dangerous condition.

As summary judgment evidence, Fuller Contracting attached the affidavit of George Fuller, stating that Fuller Contracting did not own, possess, or occupy the house, was not engaged in work at the house, and did not have control of the premises. Fuller Contracting also attached excerpts from Wyckoff's deposition in which she stated that she could see the stairway was not well lit, she felt there was enough light to go down the stairway, she was uncomfortable going down the stairway, and she had only a brick wall to hold on to.

In her response, Wyckoff asserted that the person who created the dangerous condition owes a duty to protect third persons against the condition, and because Fuller Contracting built the house it was responsible for ensuring the premises met all applicable building codes and safety standards. Wyckoff attached the affidavit of Jim W. Sealy, an architect who stated that the stairway was a violation of applicable building codes and such deficiencies were the proximate cause of Wyckoff's fall.

The trial court granted Fuller Contracting's, as well as West's, motions for summary judgment without stating the basis for doing so. Wyckoff argued on appeal that she was not limited to a premises liability claim against Fuller Contracting, contending that she may assert negligence, negligence per se, premises liability, and products liability claims against Fuller Contracting for creating the dangerous condition.

The court began by explaining that "[w]hen the alleged injury is the result of the condition of the premises, the injured party can recover only under a premises liability theory." The court distinguished that when the alleged injury is the result of a negligent activity, the injured party must have been injured by or as a contemporaneous result of the activity itself rather than a condition created by the activity. The court explained that because Wyckoff contended that she was injured by the defects in the design of the stairway that made it unreasonably dangerous, she cannot convert her claim, which does not assert she was injured as a contemporaneous result of any activity by Fuller Contracting, into a products liability claim. Thus, the court held that based on the pleadings and the manner in which the case was presented to the trial court, Wyckoff's claim against Fuller Contracting was a premises liability claim.

Next, the court designated that Wyckoff was a social guest and was classified as a licensee. "One of the elements a licensee must prove to establish liability for a premises defect, is that he did not actually know about the alleged dangerous condition." Wyckoff testified that she was aware of the poor lighting and lack of a handrail. Accordingly, Wyckoff perceived and had actual knowledge of the allegedly dangerous conditions about which she complained. Therefore, the court held as a matter of law that neither Fuller Contracting, nor West, owed a duty to Wyckoff, affirming the trial court's grant of summary judgment.

Wyckoff serves defense practitioners in that it refuses to allow plaintiffs to maintain products liability claims, in addition to premises liability claims, in cases where the injury is a result of the condition of the premises.