

Construction Law Practice Tip: Selling Plant Owner Sheds Liability

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The owner of a chemical plant designed and built equipment that, 14 years later, injured an employee of the subsequent plant owner. *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 642 (Tex. 2016).¹ The Texas Supreme Court held that the employee could not assert an ordinary negligence claim against the first owner because of the injury-causing equipment.

In 1992, Occidental designed and built an acid-addition system for use in its Bayport chemical plant. Occidental sold the plant six years later. In 2006, the system sprayed acid and partially blinded Jenkins, who was servicing the system for his first time. Jenkins sued Occidental. The jury found that Occidental's negligent system design and operating instructions proximately caused Jenkins's injury, and it calculated his damages. The trial court nonetheless entered a take-nothing judgment based on Occidental's repose defense. Jenkins appealed. The court of appeals rejected Occidental's repose defense² and held that Jenkins's negligent design claim against Occidental based on its acid-addition system survived the plant's sale. The Texas Supreme Court accepted Occidental's petition for review.

A person in control of premises owes a duty to use reasonable care to keep the premises in a safe condition, and to warn invitees of concealed hazards that the person knows or should know about. Invitees, in turn, can assert two types of negligence claims following an injury: a claim in ordinary negligence arising from a contemporaneous activity or instrumentality, and a premises liability claim.³ The latter typically arises from a pre-existing condition of the premises. A duty rooted in premises liability "runs with the ownership or control of the property and upon a sale ordinarily passes to the new owner."⁴ In *Jenkins*, the court of appeals held that Occidental retained ordinary negligence liability for its allegedly defective design work even after it sold the plant. The court of appeals reasoned that

a property owner who creates a dangerous condition on its property has both a premises-liability duty to make safe or warn about the dangerous condition and a distinct ordinary-negligence duty not to create the dangerous condition in the first place.⁵

Under the court of appeals' analysis, Occidental held dual roles as both property owner and equipment designer. The plant's sale ended Occidental's premises duty as to its first role, but not its ordinary negligence duty as to the second.

The Supreme Court squarely rejected the appellate court's dual-role analysis, which it found was unsupported by Texas case law and largely rejected in other jurisdictions.⁶ The Court held

instead that premises-liability principles apply to a property owner who creates a dangerous condition on its property, and that the claim of a person injured by the condition remains a premises-liability claim as to the owner-creator, regardless of how the injured party chooses to plead it.⁷

Jenkins's claim against Occidental for his injury caused by the allegedly dangerous acid-addition system remained a premises liability claim. Because Occidental sold the Bayport plant and retained no control over its operations, Occidental no longer owed Jenkins a premises-based duty of care. This duty had passed on to the buyer.⁸ The Supreme Court reversed the court of appeals and rendered judgment that Jenkins take nothing.

¹See also, *Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 17 (Tex. App.—Houston [1st Dist.] 2013) (“*Jenkins*”).

²For reasons that are not germane to this article. Moreover, the Supreme Court did not decide the repose issue.

³*Occidental*, 478 S.W.3d at 644.

⁴*Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 351–54 (1965)).

⁵*Id.* at 645.

⁶*Id.* at 647–48.

⁷*Id.* at 648.

⁸Of course exceptions may apply when the seller “actively conceals or fails to disclose” a known dangerous condition. *Id.* n.7 (citing RESTATEMENT (SECOND) OF TORTS § 353 (1965)).