

No. 04-0610

IN THE SUPREME COURT
OF TEXAS

DANIEL TORRES, WILLIAM BOURLAND AND DAVID NATIVIDAD,

Petitioners,

v.

THE COASTAL CORPORATION,

Respondent.

On Petition for Review from the
Thirteenth Court of Appeals

PETITIONERS' REPLY BRIEF ON THE MERITS

Mikal C. Watts
State Bar No. 20981820
WATTS LAW FIRM, L.L.P.
555 North Carancahua, Suite 1400
Corpus Christi, Texas 78478-0801

Thomas H. Crofts, Jr.
State Bar No. 05099200
Sharon E. Callaway
State Bar No. 05900200
Jacqueline M. Stroh
State Bar No. 00791747
CROFTS & CALLAWAY, P.C.
112 East Pecan Street, Suite 800
San Antonio, Texas 78205-1578

Richard P. Hogan, Jr.
State Bar No. 09802010
Jennifer Bruch Hogan
State Bar No. 03239100
HOGAN & HOGAN, L.L.P.
4200 Bank of America Center
700 Louisiana Street
Houston, Texas 77002

William Powers, Jr.
State Bar No. 16218850
727 East Dean Keeton Street
Austin, Texas 78705

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	iii
REPLY TO STATEMENT OF FACTS	1
REPLY ARGUMENT	6
I. Coastal Does Not Address the Important Issues Raised By the Plaintiffs	6
II. Coastal’s Attacks on Duty Are Without Merit	7
A. On appeal, Coastal attempts to recharacterize the plaintiffs’ case in a way never pleaded or pursued by the Plaintiffs below	8
1. This is not a premises liability case	8
2. This is not a case of vicarious liability	10
3. This is not a case of attenuated causation	10
B. Coastal’s proposed no-duty rules are pernicious	13
III. The Trial Court Properly Admitted Puchinsky’s Testimony	15
A. Puschinsky’s expert opinion testimony rests on a solid foundation	15
B. No legal basis exists for striking Puschinsky’s testimony	18
C. The admission of Puschinsky’s testimony did not lead to rendition of an improper verdict	19
IV. The Judgment Properly Awards Prejudgment Interest on Future Damages	20
PRAYER	21
CERTIFICATE OF SERVICE	23

INDEX OF AUTHORITIES

	Page(s)
Cases	
<i>Biggers v. Continental Bus. System Inc.</i> , 157 Tex. 351, 298 S.W.2d 79 (1957)	12
<i>Bradford v. Vento</i> , 48 S.W.3d 749 (Tex. 2001)	1
<i>C & H Nationwide, Inc. v. Thompson</i> , 903 S.W.2d 315 (Tex. 1994)	20, 21
<i>City of Fort Worth v. Zimlich</i> , 29 S.W.3d 62 (Tex.2000)	1
<i>Clark v. Waggoner</i> , 452 S.W.2d 437 (Tex. 1970)	12
<i>Coastal Corp. v. Torres</i> , 133 S.W.3d 776, 778 (Tex. App.— Corpus Christi 2004, pet. filed)	2
<i>Enloe v. Barfield</i> , 422 S.W.2d 905 (Tex. 1967)	12
<i>Exxon Corp. v. Tidwell</i> , 867 S.W.2d 19 (Tex. 1993)	13, 15
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 7813 (Tex. 1998)	18
<i>Golden Spread Council, Inc. v. Akins</i> , 926 S.W.2d 287 (Tex. 1996)	10
<i>Greater Houston Transport Co. v. Phillips</i> , 801 S.W.2d 523 (Tex. 1990)	11, 12
<i>Humble Oil & Refining Co. v. Martin</i> , 148 Tex. 175, 222 S.W.2d 995 (1949)	13, 15

<i>Keetch v. Kroger</i> , 845 S.W.2d 262 (Tex. 1992)	11
<i>Lear Siegler Inc. v. Perez</i> , 819 S.W.2d 470 (Tex. 1991)	11
<i>Lenz v. Lenz</i> , 79 S.W.3d 10 (Tex. 2002)	1
<i>Palsgraf v. Long Island R.R. Co.</i> , 248 N.Y. 339, 162 N.E. 99 (1928)	11
<i>Phan Son Vau v. Pea</i> , 990 S.W.2d 751 (Tex. 1999)	11, 12
<i>Read v. Scott Fetzer Co.</i> , 990 S.W.2d 732 (Tex. 1998)	12, 13, 14, 15
<i>Redinger v. Living, Inc.</i> , 689 S.W.2d 415 (Tex. 1985)	13, 15
<i>Timberwalk Apts. Partners Inc. v. Cain</i> , 972 S.W.2d 749 (Tex. 1998)	11
<i>Union Pump Co. v. Allbritton</i> , 898 S.W.2d 773 (Tex. 1995)	11
<i>Walker v. Harris</i> , 924 S.W.2d 375 (Tex. 1996)	1
<i>Weirich v. Weirich</i> , 833 S.W.2d 942, 945 (Tex.1992)	1
Rules and Statutes	
TEX. FIN. CODE § 301.002(a)	20
TEX. REV. CIV. STAT. art. 5069-1.01	20
TEX. R. EVID. 702	16

Miscellaneous

Act of September 1, 2003, 78th Leg., R.S., ch. 204, § 6.04 21

W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS
§ 53, at 356 (5th ed. 1984) 7

WILLIAM POWERS, JR.,
Judge and Jury in the Texas Supreme Court,
75 Tex. L. Rev. 1699 (1997) 14

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM
(BASIC PRINCIPLES) § 7 (Appendix, Tentative Draft No. 4, 2004) 7

DAVID ROBERTSON, WILLIAM POWERS, JR., DAVID ANDERSON
& OLIN G. WELBORN III, CASES AND MATERIALS ON TORTS 184
(West ed. 1998) 14

REPLY TO STATEMENT OF FACTS

This Court has repeatedly reviewed legal sufficiency points and matter-of-law arguments “in a light that tends to support the jury’s verdict.” *See Lenz v. Lenz*, 79 S.W.3d 10, 17 (Tex. 2002). Thus, the Court is to examine “the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary.” *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex.1992). In addition, because Coastal did not object to the jury charge’s instruction on liability, the Court’s job is to review the sufficiency of the evidence in light of the charge submitted. *See Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 68 (Tex.2000).

Accordingly, whether Coastal’s assertion is true that “[t]he facts in this record do not support petitioners’ theory [about corporate control over expenditures]” *see* Resp. Br. on the Merits at 5, must be determined (1) in the light most favorable to the verdict, (2) in light of the charge as submitted, (3) while disregarding all evidence and inferences to the contrary. This record easily supports the jury’s verdict.

The Court can decide whether there is evidence to support the jury’s answer to the liability instruction quoted in the court of appeals’ opinion:

In order to find negligence on the part of The Coastal Corporation, you must find all of the following: (1) The Coastal Corporation had the right to control the budget and/or expenditures of Coastal Refining & Marketing, Inc.; (2) The Coastal Corporation exercised that right of control through a person who was acting as a director, officer, employee or agent of The Coastal Corporation; and (3) The Coastal Corporation's exercise of that control amounted to negligence.

Coastal Corp. v. Torres, 133 S.W.3d 776, 778 (Tex. App.— Corpus Christi 2004, pet. filed). The plaintiffs did not request this extensive instruction—Coastal did.¹ And as the sponsor of the instruction on which liability “depends,” Coastal is bound by it.

This instruction required proof of three elements, and the record provides ample proof of all three elements. *See* Pets’ Br. on the Merits at 1-4. Notwithstanding the case and evidence put on by Coastal at trial, there is support in the record for these elements.

First, as the charge discussed, Coastal had the right to control the budget and/or the expenditures of the Corpus Christi refinery. *Id.* at 1-2. The repairs or maintenance that would have prevented the explosion required approval by Coastal. 9 RR 44; 46-48. Similarly, since a turnaround² requested before the explosion was slated to cost \$1.3 million, 10 RR 136, the order authorizing the turnaround would had to have come from the Coastal Corporation Board of Directors. 10 RR 177.

Second, Coastal exercised that right of control through a person who was acting as a director, officer, employee or agent of Coastal. The VP of Coastal Corporation, John Lipinski, exercised specific control over its budgets, its capital projects, and shut-downs for maintenance, turnarounds, and its expenditure of funds. *See* Pets’ Br. on the Merits

¹The charge ultimately submitted included three paragraphs of instructions requested by Coastal’s counsel and agreed to by Plaintiffs’ trial counsel. *See* 10 RR 196-97. As plaintiffs’ trial counsel pointed out during the charge conference, the parties essentially had agreed on a liability instruction. *See* 9 RR 112. Then, after the agreement, it was dictated into the record—without alteration or dispute. *See generally* 9 RR 112-116. This instruction is traceable to Coastal’s proposed instructions concerning Coastal’s right to control the budget, and the exercise of that control. *See* 9 RR 54.

²The process of cleaning, maintenance, and replacing damaged items in a refinery is called a turnaround. 5 RR 64.

at 3, 5. Coastal policies also limited the authority of plant-based personnel to approve necessary safety expenditures. Even though he was vice-president of the subsidiary and plant manager, Ralph Coker had no authority to write a company check to order even a pizza, 9 RR 36, and had no authority to approve maintenance expenditures exceeding \$50,000. 9 RR 44. This limitation played a critical role in the events leading up to this explosion. In order to replace the prefract overhead receiver and the prefract overhead condenser, it would cost more than \$50,000, 9 RR 47-48. At that level, approval was required from John Lipinski. 9 RR 44; 46; 47.

Although Lipinski was vice-president of Coastal, his budgetary authority stopped at \$300,000. 10 RR 31. While he was able to approve pre-turnaround, on-stream inspections of the piping, 10 RR 122-123, he would not have the authority to approve pre-turnaround, on-stream inspections of vessels costing more than twice that. Instead, that approval would have to come from the senior VP of Refining of the Coastal Corporation, 10 RR 48, who had authority up to \$1,000,000. 10 RR 176. Yet because the turnaround scheduled for this unit was slated to cost \$1.3 million, 10 RR 136, the order authorizing the turnaround would have to come from the Board of Directors, headed by Coastal Chairman, David Arlidge. 10 RR 177.

Third, Coastal's exercise of that control amounted to negligence. Coastal exercised its control over money in such a way that (1) the plant had a grossly inadequate inspection department, and (2) it delayed the previously-scheduled turnaround, all so that millions of dollars of unused maintenance funds could be diverted to profit for Coastal. *See* Pets' Br.

on the Merits at 3-5. This unit had been scheduled for a turnaround in May 1999, because the last one happened in 1995. 5 RR 65. However, as of May 13, 1999, the superintendent of maintenance knew of no plans for a turnaround of this area of the plant. 5 RR 139, 155-56. Despite learning of corrosion as early as 1996, Coastal did not authorize funds for the May 1999 turnaround before the explosion happened on May 13, 1999. 5 RR 123, 138, 147, 156-58; 7 RR 182; 8 RR 58; 9 RR 20; 10 RR 173-77. The evidence supports the charge's liability standard and the jury's verdict under that standard.

It is no answer to this record for Coastal to pull snippets from the trial, put them in bullet points, *see* Resp. Br. on the Merits at 3-5, to persuade the Court as if it were the thirteenth juror. The question is not whether Coastal can find parts of the record that would support its view of the evidence. Given the standard of review, there is ample evidence to support the jury's liability findings under the standard of review and the charge that was given.

In answer to the bullet points in Coastal's Merits:

- "Coastal Corp" is the title on the 1999 annual budget of the subsidiary (PX 119, 10 RR 149, 155)
- John Lipinski has "budget criteria" on maintenance projects at the refinery (10 RR 163-64)
- The plant manager said that "on numerous occasions" the budget came back from Houston with reductions in (1) the total budget, or (2) specific sub-parts (9 RR 41)
- Although a budget was a spending item "approved in principle," (PX 113), an AFE was "approval in fact," (10 RR 105-06) and those pages had to be sent on "inter-corporate" correspondence (PX 112, 113, 114, 117, 122; 10 RR 106-07)

- One example of this is PX 113, an AFE through which funds were sought by the plant manager from Coastal on a form that says “Coastal Corporation - Authorization for Expenditure of Funds.” (10 RR 72-73)
- A turnaround cannot occur until the AFE is approved by John Lipinski (5 RR 140-41)
- Other “intercorporate correspondence” was sent (PX 124), referencing “controllable budgets.” *Id.*
- John Lipinski got staffing reports to see where expenditures were against the budget (10 RR 167); if the overtime staffing budget was exceeded by even 10 percent, explanations were required (10 RR 167-68)
- Orders went out that “contract labor . . . must be seriously challenged” (PX 124) in a plant with too few inspectors under Noe Gonzalez’s control, who said “[d]efinitely there wasn’t enough money, obviously,” (4 RR 171-72), and in an industry where the standard was to have 10 full time and 30 contractors in the maintenance/inspection department (7 RR 120-21).

There is no getting around the ultimate directive given by the parent to the subsidiary: “We don’t want the maintenance budgets to be necessarily the same as last year. We should be at a point where we don’t need to spend as much.” PX 124; 10 RR 168-69. Three horribly burned refinery workers would disagree with that control, exercised in this case to the point that a necessary turnaround was not funded. The liability facts support the jury’s verdict, and once that is decided, this Court’s role in reviewing the facts is concluded.

REPLY ARGUMENT

I. Coastal Does Not Address the Important Issues Raised By the Plaintiffs.

Coastal's response ignores the critical duty arguments we have raised. Rather than respond, the Respondent retreats to the comfortable old bromides that Plaintiffs are trying to expand tort duty principles. Therefore, Coastal recasts this case as one where a respected Plaintiffs' lawyer simply missed out in pleading and proving a premises case. If that attack on the verdict misses, then Coastal argues that Texas law does not recognize "a duty to budget with reasonable care." *See* Resp. Br. on the Merits at 17.

Whatever else Coastal says, this is not an exercise in choosing proper causes of action or pleading and proving them correctly. The question is simple and direct under the new Restatement: did Coastal's own affirmative conduct create a risk of physical harm? Texas law does not subdivide negligence into discrete classifications such as "negligent budgeting," anymore than it characterizes as separate torts "negligent driving," "negligent stopping," or "negligent lookout"—it's all just negligence.

These important duty issues affect many other cases—yet even Coastal will not take on the issue of whether the American Law Institute got it right in the new draft Restatement. If this is truly a *restatement* of law, then Texas would lie outside the mainstream if it repudiates the Restatement view of tort duty. Under the prevailing view of the ALI and the Restatement, duty arises when an actor's conduct creates a risk of physical harm. Does Texas adhere to this duty in tort cases or not? This Court should grant review to resolve the important duty principles that exist in this case.

II. Coastal's Attacks on Duty Are Without Merit.

Generally, a person who engages in an affirmative activity has a duty to use reasonable care. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984). And, as we have argued in the petition and in our opening merits briefs, the new Restatement of Torts does not change the general principle that reasonable care should be used when one's own conduct creates a risk of harm to another. Contrary to the lower court's analysis, the general rule—the starting point for any duty analysis—is that every person owes a duty to use reasonable care when his conduct creates a risk of harm to another. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 (Appendix, Tentative Draft No. 4, 2004)³.

This case presents a question whether to create a new *categorical* no-duty rule. The question is not, as Coastal suggests, whether any “Texas court has recognized a duty to budget with reasonable care.” Resp. Br. on the Merits at 17. To sustain the jury's verdict, the Court would need only to hold that Coastal failed to exercise ordinary care and take reasonable precautions in the face of known risks. Coastal's liability rests on the

³ Contrary to the Respondent's Merits Brief, this argument was raised in the court of appeals—repeatedly. First, the Plaintiffs argued that the duty of care in one's own affirmative conduct was established law in Texas and in the commentaries. *See* Appellee's Br. at 10, 13, 16-18. Second, and only once the new Restatement Draft was approved, the Plaintiffs cited it by name in their motion for rehearing. *See* Appellee's Motion for Rehearing at 1. The Tentative Draft was not even presented for adoption to the ALI until the annual meeting held in May 2004. *See* appdx. to PFR. The court of appeals opinion was handed down on March 25, 2004. Thus, although the principles that Plaintiffs rely upon were argued to the lower court, the authority cited for those propositions had not been presented to—or adopted by—the ALI until after the court of appeals rendered its judgment. Plaintiffs promptly cited the new Restatement as authority for their arguments in the motion for rehearing. It is simply false that section 7 of the new Restatement is being raised now “for the first time in this lengthy litigation.” *See* Resp. Br. on the Merits at 12-13.

basic premise that it has responsibility for its own acts. This duty is nothing “new.” Coastal’s tort duty flows from the mainstream rule that a party must use reasonable care in its affirmative conduct. When its actions create the risk of an explosion in a refinery, Coastal is charged with the duty to use ordinary care to reduce the risks posed by its conduct.

Coastal never tries to justify its conduct. Instead, Coastal argues that this can *only* be a premises liability case, and that it had no control over the place where the explosion happened. Then, Coastal says its alleged duty is “unrecognized” and “unprecedented.” But Coastal’s own actions make it liable. Coastal cannot erect a no-duty rule that would make sense either for itself or for others who would latch onto it in later cases. No reason exists to embrace any of these novel no-duty rules.

A. On appeal, Coastal attempts to recharacterize the plaintiffs’ case in a way never pleaded or pursued by the Plaintiffs below.

First, Coastal says this can only be a premises case. Next, it suggests that a parent company is being held responsible for its subsidiary’s conduct. Last, it argues that this is a case of attenuated causation—an argument that fails to appreciate the difference between the duty and causation elements of a tort claim. All these challenges fail.

1. This is not a premises liability case.

The Plaintiffs’ petition never once pleaded, and their lawyer never pursued a premises liability theory. Now, presumably because the explosion happened on land, Coastal attempts to pigeonhole this as a case of premises liability. It is not.

First, the plaintiffs were hurt by an explosion during the active refining operation of transforming one hazardous hydrocarbon into another usable and sellable fuel. 10 RR 132. The process causing this explosion was an *activity* of refining naphtha at 118-120 degrees and at 100-110 pounds per square inch of pressure. 7 RR 160-61. That process is not a passive dangerous condition. Pressure inside the vessel amounts to nothing unless the affirmative refining activity of pressurizing and heating “naphtha” goes on inside the vessel. The activity of refining naphtha is not a condition of real property.

Second, this is not a case about the landowner-occupier’s conduct at all. It is about safety funding and safety dollars being siphoned out of the lucrative Corpus Christi plant and transformed into Houston profit dollars for the parent corporation, Coastal. Coastal put workers’ lives at risk by making them work around a horribly under-maintained petrochemical plant. Coastal authorized no money to do a needed turnaround on time. 10 RR 175-76. It permitted spending no funds to provide adequate staffing and inspections. 4 RR 159-60, 177-74, 7 RR 170-76, 120-25. And despite having funded a pre-turnaround safety study, PX 126, 10 RR 122-23, Coastal’s VP Lipinski never followed-up to see if the refinery had done the study or corrected the corrosion.

Coastal for the first time on appeal attempts to re-cast this case as one involving a premises defect. Yet, the plaintiffs never pleaded a premises defect case, CR 11-16, and always pursued Coastal for its own negligent control of the budget and expenditures of the Corpus Christi plant. Coastal’s own lawyer understood the case:

The burden of proof, as Mr. Sico correctly told you, is placed upon Mr. Watts and Mr. Sico to prove to you that the Coastal Corporation did something. And I heard what he said was they were going to prove to you that the Coastal Corporation, the defendant in this case, controlled the budget and approved the budget for the Coastal Refining & Marketing plant out here.

4 RR 38. This is not a premises case; it is about Coastal's affirmative conduct.

2. This is not a case of vicarious liability.

Coastal next portrays itself as a distant parent, lacking liability for its subsidiary's premises or conduct. But the jury did not find Coastal liable vicariously or even as a parent company. The plaintiffs proved, and the jury found, that Coastal was liable for its *own* conduct in creating a corporate management and expense-approval structure without adequate safeguards to find or remedy dangers. Coastal's subsidiary, CR&M, lacked approval to spend dollars on safety at the Corpus Christi plant.

Consequently, Coastal's reliance on its status as a parent is misplaced. Its liability is premised on primary liability—its own conduct—as opposed to vicarious liability for something done by its subsidiary. *See Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) (differentiating between BSA's primary and its vicarious liability). Coastal must answer for itself, rather than hiding behind a labyrinthian corporate structure it created for itself and its assets.

3. This is not a case of attenuated causation.

Last, Coastal tries to limit the plaintiffs' claims to a "fact-specific duty to exercise ordinary care that arises when a defendant has retained or exercised control over operational activities." *See* Resp. Br. on the Merits at 21-22. Coastal's answer for that

traditional tort duty is to say the plaintiffs were not hurt by *its* conduct, which was “too attenuated.” Coastal also asserts that the plaintiffs “theory attempts to *create* a duty” in cases of attenuated causation. The answer to these arguments is easy—if causation is the issue, the Court has had no trouble limiting recovery in cases of remote legal causes. *See Phan Son Vau v. Pena*, 990 S.W.2d 751, 755 (Tex. 1999). But rather than use causation principles to cut off duty, the better analysis is as old as *Palsgraf*.

These plaintiffs are unlike the third-party, not a passenger of the cab, who was shot by the taxi driver in *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990). Refinery workers are unlike shoppers at a Kroger store who slip on a grape or apartment visitors who are attacked by criminals in the premises liability cases cited by Coastal. *See Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992); *Timberwalk Apts. Partners Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998). Nor were these workers injured by entirely fortuitous, random events like the contract worker in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995), or the highway traveler in *Lear Siegler Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991), two other cases cited by Coastal. *See* Resp. Br. on the Merits at 21-22. These plaintiffs worked at the very place where Coastal’s expenditure-control policy had an impact.

To uphold liability here, the court need only make a routine application of the rule in *Palsgraf*, that a defendant’s duty extends to the foreseeable plaintiffs. *See Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Those principles are commonly applied in Texas cases. All that a plaintiff must show is that the danger created by the defendant’s conduct was of the type that should reasonably be anticipated from its

conduct. *Phan Son Vau v. Pena*, 990 S.W.2d 751, 755 (Tex. 1999); *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970). When a defendant can foresee that the event in question, or some similar event would occur, causation is established. *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1998); *Clark*, 452 S.W.2d at 440. The rule does not require that the actor anticipate just how an injury will grow out of the dangerous situation. *Id.*; *Enloe v. Barfield*, 422 S.W.2d 905, 908 (Tex. 1967); *Biggers v. Continental Bus. Systems*, 157 Tex. 351, 369, 298 S.W.2d 79, 82 (1957) (“it is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued.”).

Here, it is undisputed that the refinery workers were foreseeable victims. Owners of refineries in general are aware of the risks. 7 RR 124. Coastal’s Lipinski knew the prefractionator held hazardous hydrocarbons under pressure and at extreme heat, 10 RR 146, knew that fouling and corrosion were a normal part of refining, 10 RR 140, knew that one should build metal thickness into a pressure vessel, because there is corrosion which does wear away at the metal, 10 RR 140, knew that if corrosion ate away at that metal, there would be an explosion, 10 RR 143-45, knew that with an explosion, hazardous hydrocarbons would be released, 10 RR 144, and knew that if there was a fire, someone could get hurt. 10 RR 145. Additionally, as Coastal’s VP of Refining, Lipinski knew that the vessel had experienced severe corrosion and fouling, 10 RR 140-41, yet he never released the funds needed to repair the vessel during a turnaround. 10 RR 175-76. Foreseeability is “the foremost and dominant” consideration to determine duty. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d at 525. Foreseeability is conclusive.

B. Coastal's proposed no-duty rules are pernicious.

Coastal proposes no-duty rules to absolve its actions. First, it says only premises owners and occupiers can be liable for creating a defective condition in a tank. Second, it argues that parent companies are always insulated from liability for any premises defect or for conduct relating to a subsidiary's plant.

Both no-duty rules would be pernicious. If it were true that only a premises owner/occupier could respond in damages for a danger at its plant, any number of plants would become more dangerous. Product suppliers could always attribute a danger to a premises condition; engineers and architects could blame everything on the landowner; and outside contractors would pay less attention to working safely. The premises owner cannot answer for all dangers created by others.

Likewise, it is not true that parent companies are relieved of responsibility for their actions, simply because they are the corporate parent. Companies can be responsible for exercising control irresponsibly. When a "strict system of financial control and supervision" is put in place by an oil company, placing little discretion in a subsidiary, that control creates liability. *Humble Oil & Refining Co. v. Martin*, 148 Tex. 175, 178, 222 S.W.2d 995, 998 (1949). If the parent keeps some control over approval of expenditures, that control must be exercised responsibly, with reasonable care. This rule is the categorical one embraced by *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1998); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 22 (Tex. 1993); and *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). When Coastal's own conduct own conduct in creating

that management scheme, and in withholding funds for inspectors and safety maintenance, creates a risk of physical harm to others, liability should follow.

Because they are poor policy and no cases uphold them, Coastal's no-duty rules should be rejected. Coastal's proposed rules are manufactured just to fit this case. Its position is "a restricted railroad ticket, good for this day and train only." *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 738 (Tex. 1998) (Hecht, J., dissenting). Coastal's no-duty rules are not, as they must be, capable of broad and categorical application. *See* DAVID ROBERTSON, WILLIAM POWERS, JR., DAVID ANDERSON & OLIN G. WELBORN III, *CASES AND MATERIALS ON TORTS* 184 (West ed. 1998) (A duty rule should be "a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problems to dismiss the complaint or award summary judgment for the defendant on the basis of the rule."); WILLIAM POWERS, JR., *Judge and Jury in the Texas Supreme Court*, 75 *Tex. L. Rev.* 1699, 1715 (1997) ("[D]uty rules should, at a minimum, be sufficiently broad and categorical"). As they have been proposed, Coastal's no-duty rules exist only for this case; if applied more broadly, they would disrupt mainstream tort-law principles.

Given the fact that Coastal acknowledges these Plaintiffs to be blameless, 4 RR 127-28, and that Lipinski admits that human error on the defendant's side caused this explosion, 10 RR 127, Coastal hardly possesses the clean hands it should possess when seeking a one-time exemption from hornbook principles of tort duty for one's own affirmative acts.

The only categorical and principled rule of general application is the rule of ordinary care. As the Plaintiffs argued below, this duty of care requires a defendant to use reasonableness as its guide in exercising control over others—but only if that control is retained. Thus, Coastal must choose to keep control or give it up. Either Coastal can set up a district and separate subsidiary *or* Coastal can keep control. If it keeps some control over approval of expenditures, that control must be exercised responsibly, with reasonable care. This rule is the categorical one embraced by *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1998); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 22 (Tex. 1993); and *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). The rule has existed in Texas for decades. *Humble Oil & Refining Co. v. Martin*, 148 Tex. 175, 178, 222 S.W.2d 995, 998 (1949). It applies here to Coastal. The court of appeals’ judgment is erroneous and should be reversed; the trial court’s judgment should be affirmed.

In two points reserved for assertion by Coastal in the event this Court upholds liability, Coastal asks this Court to address whether the trial court correctly allowed the admission of Bob Puschinsky’s testimony and whether the trial court correctly awarded prejudgment interest on future damages.

III. The Trial Court Properly Admitted Puschinsky’s Testimony.

A. Puschinsky’s expert opinion testimony rests on a solid foundation.

Coastal argues that Puschinsky’s testimony follows the plaintiffs’ legal theory of the case. *See* Resp. Br. on the Merits at 25. However, because the overarching purpose of an expert’s testimony is to establish material facts in issue, this ground for a “no evidence”

argument is both nonsensical and without authority. *See* TEX. R. EVID. 702. What else was he supposed to say, but that Coastal was negligent?

Coastal's next "no evidence" argument is that an expert's bare opinion will not suffice; rather, it must have some foundational basis— which it argues is wholly lacking. To the contrary, the record soundly defeats this "lack of foundation" argument.

Coastal is correct that Puschinsky's primary opinion was that more stringent and frequent inspections of the HDS prefractionator overhead receiver during 1997-99 would have prevented the explosion. 7 RR 112-13. In addition, Puschinsky offered the opinions that: Coastal's failure to allocate funding for inspections or to increase the number of inspectors was not an exercise of ordinary care or what a reasonably prudent company should do; and such failure to provide funding for an adequate inspection department created an extreme degree of risk of explosion, of which Coastal was aware. 7 RR 121-23, 125. However, in describing Puschinsky's opinion, Coastal conveniently omits the foundation:

the 1997-98 inspection readings unquestionably demonstrate that the vessel was in serious trouble in that Tmin readings showed that the vessel walls were thinning from corrosion at a high rate and by 1998 would not be safe to operate. 7 RR 115, 117-18.

in general the inspections during the year prior to the explosion were not detailed nor frequent enough; rather, should have occurred each six months. 7 RR 117-18.

specifically, the 1998 inspection was inadequate because there were not enough readings taken at enough points on the vessel; the inside walls were not felt for irregularities and corrosion; no detailed ultrasonic inspection of the outside of the vessel; no detailed ultrasonic inspection or internal strapping inspection. 7 RR 115-16.

2 permanent inspectors and 2 contract inspectors was inadequate staffing.
7 RR 117.

the only explanation for failure to provide additional inspectors upon the chief inspector's request was that there was a budgetary or funding block.
7 RR 118.

Puschinsky's opinion was based on (1) the testimony of Noe Gonzalez, Coastal's chief inspector, 7 RR 116; (2) Puschinsky's engineering experience, participation in discussions with oil refineries in the area, and general knowledge of refinery maintenance programs, including inspection staffing, 7 RR 119, 122; and (3) a review of the documentation in the inspection file. 7 RR 116.

This foundation is hardly a "bare assertion of opinion;" nor is it based on assumptions not proven. Each of the statements by Gonzalez upon which Puschinsky relies was introduced into evidence at trial by way of the Gonzalez deposition. Gonzalez further supports Puschinsky's opinion that there should have been a prudent review of the prefractionator after March 1998, because an inspection would have caught and corrected the problem. 4 RR 133,137,139-41. Gonzalez also agrees that in a highly corrosive environment, frequent inspections are critical for safety and therefore must be done. 4 RR 137,141-42,164-65. However, as Gonzalez and other CRM employees testified, there were no inspections done on the prefractionator between March 1998 and the May 1999 explosion. 4 RR 165-69. Gonzalez also agrees that lack of funding made the difference in the degree and frequency of inspections and thus between safety and a tragic fire that everyone knew was a high possibility. 4 RR 129-30,164-65,173-74.

B. No legal basis exists for striking Puschinsky's testimony.

Although Coastal's objection to Puschinsky's testimony at trial was centered on a *Daubert* challenge, CR17; 7RR92-104, its appellate argument abandons that framework. As demonstrated above, there is no analytical gap between the facts and undisputed cause of the May 1999 explosion and the opinion that lack of funding for sufficient inspections and inspection department staffing caused the extreme thinness of the prefractionator walls to go unremedied. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 7813 (Tex. 1998).

Coastal's final attack on Puschinsky's opinion is what it terms his conclusory testimony, which should have been excluded at trial. *See* Resp. Br on the Merits at 26. Yet these are just recycled arguments about his allegedly invalid foundation for giving opinions at all—which Coastal's brief candidly admits. It says that the objections to Puschinsky's testimony should have been sustained “for much the same reasons that Puschinsky's testimony amounted to no evidence, *as discussed immediately above.*” *Id.* at 28 (emphasis added). None of these arguments are viable, because Puschinsky was qualified to and did opine about matters that were based on a reliable foundation.

Puschinsky was not offering an expert opinion on parents and subsidiaries or on Lipinski's control over funding. He was reciting facts as testified to by Gonzalez, which formed part of the foundation for his opinion. Gonzalez's statements were in evidence; therefore, there is no legal ground for striking either Puschinsky's entire testimony or two sentences out of twenty pages of testimony. 7 RR 118,125-26. In any event, even if there

were some legal ground for striking these statements, their removal does not affect the evidentiary weight of Puschinsky's opinion that lack of funding adequate inspections led to May 1999 explosion of the prefractionator overhead receiver. Coastal's "no evidence" and factual sufficiency challenges to Puschinsky fail.

C. The admission of Puschinsky's testimony did not lead to rendition of an improper verdict.

In addition, Coastal wholly failed to meet its burden under Rule 44.1(a)(1). *Harmful* error is defined as error that "probably caused the rendition of an improper judgment." Knowing its burden, Coastal uses six lines of its brief discussing why Puschinsky's testimony allegedly "probably caused the rendition of an improper judgment." *See* Resp. Br. on the Merits at 29.

In the six lines of argument it did provide, Coastal offered only two sentences of analysis: (1) "He was the only witness who testified that Coastal Corp. was negligent, and grossly negligent"; and (2) "[h]is inflammatory testimony about Coastal Corp.'s failure to fund inspections was no doubt responsible, at least in part, for the jury's excessive award of \$122.5 million in actual damages." *Id.*

These arguments are hollow. First, in a reporter's record comprised of thirteen volumes and 1603 pages, Puschinsky's testimony comprised only 20 pages, *see* 7 RR 106-26. Second, Puschinsky was only one of 35 witnesses, and his videotaped deposition was only one of 21 videotapes. Third, Puschinsky's opinion that Coastal was "grossly negligent" cannot have "probably caused the rendition of an improper judgment," since the jury answered "No" to that question. *See* CR 49. Fourth, Puschinsky's opinion on

negligence was largely cumulative of testimony previously given by the plant's inspection manager, Noe Gonzalez, 4 RR 174-75; 7 RR 121-22, of evidence detailing the paltry amount of money Coastal spent on maintenance as compared to other refineries. 4 RR 145-47; 172; 173-74. Because Coastal makes no complaint about that evidence previously heard by the jury, Coastal cannot meet its burden to show harmful error.

IV. The Judgment Properly Awards Prejudgment Interest on Future Damages.

This Court, in *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324-28 (Tex. 1994), held that prejudgment interest is recoverable on future damages in personal injury cases. As a result, the trial court awarded prejudgment interest on the jury's verdict awarded in the judgment. Coastal recognizes *C & H*'s status as binding precedent, just as the trial court did. However, Coastal—relying on an alleged amendment to the Texas Finance Code redefining “interest”—argues that the judgment in this case should be modified. Since *C & H*, however, there has been no amendment of the definition of “interest” so as to warrant a change in the judgment.

Instead, the definition of “interest” in effect at the time the lower appellate briefing was filed—and even today—is identical to the definition contained in the statute as it was interpreted by this Court in *C & H*. *Cf.* TEX. REV. CEV. STAT. art. 5069-1.01(a) (Vernon 1987) with TEX. FIN. CODE § 301.002(a)(4) (Vernon Supp. 2001). Unbelievably, Coastal repeats this tired and inaccurate point. Nor can Coastal successfully assert that the recently-enacted limit on awarding prejudgment interest on future damages governs this case. The Act expressly provides that it applies only to judgments that were signed or

subject to appeal on or after the Act's effective date of September 1, 2003. Act of September 1, 2003, 78th Leg., R.S., ch. 204, § 6.04. The judgment in this case was signed on October 17, 2000. CR 446.

Coastal's constitutional argument is likewise doomed because it, too, was rejected in *C & H*. *C & H*, 903 S.W.2d at 326-27. Moreover, Coastal never explains how the award of prejudgment interest is unconstitutional, nor does it even bother to identify the constitutional provisions that such an award supposedly violates. Coastal doesn't ask this Court to reconsider its analysis in *C & H* or set forth its own analysis why *C & H* should have been decided differently. All Coastal does is ask that the judgment be modified on the basis of an erroneous point regarding statutory language and a vague claim of unconstitutionality contained in a single sentence of its brief. This point should be rejected, and the trial court's judgment should be affirmed.

PRAYER

This Court should grant the petition, reverse the court of appeals judgment, and affirm the trial court's judgment. The plaintiffs pray for all relief to which they are entitled.

Respectfully submitted,

HOGAN & HOGAN, L.L.P.

Mikal C. Watts
State Bar No. 20981820
WATTS LAW FIRM, L.L.P.
555 North Carancahua, Suite 1400
Corpus Christi, Texas 78478-0801
Telephone: (361) 887-0500
Facsimile: (361) 887-0055

Thomas H. Crofts, Jr.
State Bar No. 05099200
Sharon E. Callaway
State Bar No. 05900200
Jacqueline M. Stroh
State Bar No. 00791747
CROFTS & CALLAWAY, P.C.
112 East Pecan Street, Suite 800
San Antonio, Texas 78205-1517
Telephone: (210) 299-0270
Facsimile: (210) 225-7110

Richard P. Hogan, Jr.
State Bar No. 09802010
Jennifer Bruch Hogan
State Bar No. 03239100
4200 Bank of America Center
700 Louisiana Street
Houston, Texas 77002-2793
Telephone: (713) 222-8800
Facsimile: (713) 222-8810

William Powers, Jr.
State Bar No. 16218850
727 East Dean Keeton Street
Austin, Texas 78705
Telephone: (512) 232-1120
Facsimile: (512) 471-6987

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.

Coastal is represented on appeal by:

Reagan W. Simpson
KING & SPALDING, L.L.P.
1100 Louisiana, Suite 4000
Houston, Texas 77002
Via Certified Mail Return Receipt Request
No. 7003 1680 0006 8784 4990

Darrell Barger
HARTLINE, DACUS, BARGER, DREYER & KERN, L.L.P.
800 North Shoreline Blvd.
North Tower, Suite 2000
Corpus Christi, Texas 78401-3700
Via Certified Mail Return Receipt Request
No. 7003 1680 0006 8784 2590

Mike Hatchell
LOCKE LIDDELL & SAPP LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
Via Certified Mail Return Receipt Request
No. 7003 1680 0006 8784 2965

Russell H. McMains
State Bar No. 13782000
LAW OFFICES OF RUSSELL H. MCMAINS
P. O. Box 2846
Corpus Christi, TX 78403
Via Certified Mail Return Receipt Request
No. 7003 1680 8784 4891

Richard P. Hogan, Jr.

DATE: April 29, 2005