IN THE SUPREME COURT OF TEXAS

NO. 06-0322

OWENS & MINOR, INC. AND OWENS & MINOR MEDICAL, INC., APPELLANTS,

v.

ANSELL HEALTHCARE PRODUCTS, INC. AND BECTON, DICKINSON AND COMPANY, APPELLEES

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued October 19, 2006

JUSTICE O'NEILL, joined by JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT, dissenting.

A manufacturer of a product alleged in a pleading to be defective is required to indemnify and hold harmless an innocent seller against loss arising out of a products liability action, regardless of how the action is concluded. TEX. CIV. PRAC. & REM. CODE § 82.002. We have said that the manufacturer's indemnity duty is invoked not by proof but by the plaintiff's pleadings, *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 252 (Tex. 2006); *see Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999), and that it encompasses all allegations against the seller that relate to a plaintiff's injury, *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89 (Tex. 2001). Section 82.002's clear purpose is to expand the common law indemnity rights of innocent sellers like the one here, who merely passed along sealed packages from the

factory. Yet the Court restricts the statutory indemnity obligation to defense costs the seller can link to a particular manufacturer's product. That is an impossible burden in this case, as the underlying action was nonsuited without a determination of whose product, if any, actually caused injury. As a result, the innocent seller's inability to attribute costs to a particular manufacturer leaves it without recompense, defeating the very protection the statute was meant to confer. The statutory text and our interpretive caselaw demonstrate that the Legislature intended a far broader protection for innocent product suppliers than that which the Court affords today. In my view, the statute obligated the manufacturers here to indemnify or defend the innocent seller against all claims the plaintiff alleged, for which they could then seek contribution from the remaining manufacturers. Because the Court holds otherwise, I respectfully dissent.

I. Background

Kathy Burden, a dental hygienist, filed a products liability action alleging that she developed a latex allergy from defective latex gloves. The respondents here were among the more than thirty defendants named in Burden's suit. Owens & Minor, Inc. and Owens & Minor Medical, Inc. (collectively "Owens & Minor") were sued as distributors of latex gloves, and Ansell Healthcare Products, Inc. and Becton Dickinson & Co. were sued as manufacturers. Owens & Minor sent letters to several of the defendant manufacturers, including Ansell and Becton, requesting that they indemnify Owens & Minor for all litigation expenses as required under Texas Civil Practice and Remedies Code section 82.002. When Ansell responded by offering to defend claims related only to its own products, Owens & Minor refused the offer. Becton did not respond to Owens & Minor's letter, relying on its position in earlier latex-glove litigation that in future proceedings it would only

agree to defend Owens & Minor for claims related to its own products. Owens & Minor thus retained its own counsel to defend the products liability suit.

The case was removed to federal court and consolidated as part of multidistrict latex-glove litigation in Pennsylvania. Owens & Minor brought cross-claims for indemnity against several of the manufacturers, including Ansell and Becton. The plaintiff, unable to show that Owens & Minor sold any of the injury-causing latex gloves, nonsuited her claims against Owens & Minor. She subsequently dismissed her case against all the remaining defendants for the same or similar reasons. Thus, the products liability suit ended without a finding that any party was negligent or that any particular product caused the plaintiff's injuries. Owens & Minor settled its indemnity suit against all solvent manufacturers except Ansell and Becton. The federal district court granted summary judgment in Ansell's and Becton's favor, reasoning that they had satisfied section 82.002 by offering to defend their own products. *Burden v. Johnson & Johnson Med., Inc.*, 332 F. Supp. 2d 1023, 1029 (S.D. Tex. 2004). Owens appealed to the Fifth Circuit, which certified the question to us.

II. Common Law Indemnity and Section 82.002

Under Texas law, sellers of defective products may be held strictly liable for resulting injuries. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334–35 (Tex. 1998) (citing *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788–89 (Tex. 1967)). Sellers are therefore often named as defendants in products liability suits regardless of any allegation of wrongdoing. As a result, undisputedly innocent sellers frequently must dedicate tremendous resources to defending allegedly defective products they did not manufacture or alter but merely passed on to consumers. *See* Jeffrey Nolan Diamant, Comment, *Texas Senate Bill 4: Product Liability Legislation Analyzed*, 31 HOUS. L. REV. 921, 930 (1994).

Under the common law, sellers were only entitled to indemnification from the manufacturer for damages if the manufacturer was found to be liable. *See Humana Hosp. Corp. v. Am. Med. Sys., Inc.*, 785 S.W.2d 144, 145 (Tex. 1990). Indemnification for other litigation expenses was unavailable altogether. *See Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988). Thus, when neither the seller nor the manufacturer was found liable, the seller bore the heavy cost of its defense of the product. In addition to the requirement that the manufacturer be found liable, a seller's liability must only have been vicarious, *B & B Auto Supply, Sand Pit & Trucking Co. v. Cent. Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980), that is, the seller must not have been independently liable based on its own conduct, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984), and the seller must have been in the chain of distribution, *id.*

In 1993, the Legislature sought to remedy the unfairness to innocent product sellers by enacting section 82.002 of the Texas Civil Practice and Remedies Code. This statute completely changed the common law manufacturer-seller indemnification scheme by shifting the burden of the seller's litigation costs onto the manufacturer. *See* TEX. CIV. PRAC. & REM. CODE § 82.002. Now, when neither the seller nor the manufacturer is found liable, the manufacturer must "indemnify and hold harmless" the seller for all of its litigation expenses, including attorney's fees. *Id.* § 82.002(a), (b). As under the common law, the statute explicitly provides that the seller loses its right to indemnification if it is found independently liable. *Id.* § 82.002(a). However, unlike the common law, the statute requires that the manufacturer indemnify the seller for all litigation expenses "without regard to the manner in which the action is concluded." *Id.* § 82.002(e)(1). We recognized in *Fitzgerald* that section 82.002 is intended to protect both sellers and product manufacturers,

"[f]irst, [by] ensur[ing] that the relatively small seller need not fear litigation involving problems that are really not in its control," and "[s]econd, [by] establish[ing] uniform rules of liability so that manufacturers could make informed business decisions and plaintiffs could understand their rights." *Fitzgerald*, 996 S.W.2d at 868–69. In easing the requirements for indemnification, the Legislature "gave preference to sellers with no independent liability." *Id.* at 869.

III. Interpreting Section 82.002

In construing a statute, our objective is to determine and give effect to the Legislature's intent. *See Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). We first look to the statute's language. TEX GOV'T CODE § 311.011(a); *Allen*, 15 S.W.3d at 527. Indeed, we consider it "a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent." *Fitzgerald*, 996 S.W.2d at 866. If the statute's language is unambiguous, its plain meaning will prevail. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Section 82.002, in its entirety, provides:

> (a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.
>
> (b) For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.
>
> (c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.
>
> (d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.
>
> (e) The duty to indemnify under this section:

> (1) applies without regard to the manner in which the action is concluded; and
>
> (2) is in addition to any duty to indemnify established by law, contract, or otherwise.
>
> (f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.
>
> (g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

TEX. CIV. PRAC. & REM. CODE § 82.002.

Section 82.001 defines the term "products liability action" as "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." *Id.* § 82.001(2). The term "seller" is defined as "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof." *Id.* § 82.001(3). The statute broadly defines a "manufacturer" as "a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce." *Id.* § 82.001(4).

The statute's import is straightforward and unmistakable: unless the seller is found to be negligent, the manufacturer must "indemnify and hold harmless" the seller for any reasonable

expenses resulting from products liability litigation "without regard to the manner in which the action is concluded." *Id.* § 82.002(a), (e)(1). The extent of the indemnity — sellers are to be indemnified regardless of the outcome of the underlying lawsuit — indicates how broadly the Legislature intended it to apply. *Id.* § 82.002(e), (g). The Court's conclusion that a manufacturer must only indemnify a seller for that portion of its defense costs related to the manufacturer's particular product contravenes the statute's language and creates an exception to the indemnity obligation that does not exist in the text.

The Court's holding also undermines the law's fundamental purpose, leaving many innocent sellers exposed to damages and expenses incurred in defending a product without recourse. *See id.* § 82.002(a). Under the Court's construct, a seller *might* enjoy complete indemnity if every manufacturer named in the suit agreed to defend or indemnify for the defense of its own product. But many products liability actions, like the one here, involve multiple manufacturers, and the litigation is often resolved without a determination of whose product reached the plaintiff or caused the injury. After today, the innocent seller in such a situation who is unable to attribute its costs to a particular manufacturer must shoulder the burden of the cost of defending the manufacturer's products, contrary to the statute's purpose.

The Court posits that if the Legislature had intended manufacturers to bear the burden of determining how the seller's litigation costs should be distributed among the manufacturers, the Legislature would have provided that manufacturers, as well as sellers, be indemnified for litigation expenses incurred in seeking contribution. ___ S.W.3d at ___, n.4. However, indemnification, which is the right provided to the seller in section 82.002, and contribution, which may be available to the manufacturers, are two distinct concepts with varying purposes; indemnity operates to

completely shift the burden of loss from one, usually innocent, party to another, while contribution involves apportionment of a burden among a class of liable parties. *See* 6 Texas Torts & Remedies, Contribution & Indemnity § 102.01 (MB) (2007). Here, the Legislature intended that the innocent seller be held completely harmless for any loss and therefore provided the seller with indemnity and compensation for expenses securing that indemnity. TEX. CIV. PRAC. & REM. CODE § 82.002(a), (g). In contrast, the Legislature deliberately burdened the manufacturers with the expense of litigation and made no distinction between different manufacturers' levels of liability. Under the statutory scheme, the manufacturers are collectively, not individually, responsible for the seller's losses. Contribution, the only avenue available to the manufacturers against each other, is fundamentally about sharing the burden, not shifting the burden. Thus, it is logical that the Legislature chose to award litigation expenses in the case of indemnity, but not for contribution.

The Court bases its conclusion that a manufacturer's indemnity obligation extends only to its own products on section 82.001(4), which defines a "manufacturer" as "a person who is a [maker] of any product or any component part thereof and *who places the product or any component part thereof in the stream of commerce.*" *Id.* § 82.001(4) (emphasis added). Under the Court's construct, if the plaintiff in the underlying claim, or the seller in the indemnity action, is unable to show that a particular manufacturer's product reached the plaintiff and could have caused the alleged injury, that manufacturer has no indemnity obligation under the statute. The Court's construction, however, requires that we read the same phrase in the same section differently than we have with respect to sellers. Subsection 82.001(3) defines a "seller" as "a person who is engaged in the business of distributing or otherwise *placing, for any commercial purpose, in the stream of commerce* for use or consumption *a product* or any component part thereof." *Id.* § 82.001(3) (emphasis added). In

Fitzgerald, we held that a seller who did not place the particular product alleged to have injured the plaintiff in the stream of commerce was nonetheless a "seller" for purposes of section 82.002 and was thus entitled to indemnification from the manufacturer. 996 S.W.2d at 867. We reasoned that nothing in the statutory text required proof that the seller was in the distribution chain of the particular product that caused an injury. *Id.* Given that the statute uses the same phrase — "plac[es] [the] product" "in the stream of commerce" — to define both manufacturers and sellers, *Fitzgerald* would appear to preclude a chain-of-distribution requirement for holding manufacturers to their statutory indemnity obligation. TEX. CIV. PRAC. & REM. CODE § 82.001(3), (4).

Further, our holding in *Fitzgerald* undermines the Court's reliance on common law principles instead of the statutory language to require a nexus between the manufacturer and the product. In *Fitzgerald*, we considered whether the Legislature intended section 82.002 to supplant *all* common law indemnification requirements, including the chain-of-distribution requirement, or only the requirement that the manufacturer be found liable. In holding that a seller need not be in the distribution chain for indemnity to apply, we recognized the dramatic changes the statute effected and the diminished import of the common law in this context:

> Even if the common law were clear on this issue, the manufacturer's claim that the Legislature intended to adopt the common law is not supported by the statute's legislative history and is contradicted by the statute itself. The Legislature must have been aware it was creating a new duty, not codifying existing law, because the statute says that the duty to indemnify under this section "is in addition to any duty to indemnify established by law, contract, or otherwise." *Thus, the state of the common law sheds little light on what the Legislature intended when it . . . required manufacturers to indemnify sellers in section 82.002(a).*

Fitzgerald, 996 S.W.2d at 868 (emphasis added). Nevertheless, the Court invokes the common law to conclude that the statute requires a nexus between the manufacturer and the product the seller is

forced to defend, reasoning that since common law indemnity is intended to hold harmless a party exposed to liability due to the wrongdoing of another, the statute too requires indemnity only if a manufacturer "was or would have been liable" in the underlying products liability action. ___ S.W.3d. at ___. In reaching this conclusion, the Court disregards our interpretation of the statutory scheme in *Fitzgerald* and the text of the statute itself, which entitles the seller to indemnity "without regard" to the outcome of the suit. TEX. CIV. PRAC. & REM. CODE § 82.002(e)(1). I agree with the federal district court that "[t]he law requires that manufacturers pay regardless of how an action is concluded; that includes actions that are resolved before discovery can show a chain of distribution," and that "[m]aking Owens prove that the manufacturers were in the chain of distribution would force the parties to litigate issues that are unnecessary under the statute." *Burden*, 332 F. Supp. 2d at 1028; *see also Ansell Healthcare Prods., Inc. v. Owens & Minor, Inc.*, 189 S.W.3d 889, 895 (Tex. App.—Texarkana 2006, pet. filed).

The Court erroneously concludes that this case is indistinguishable from *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, in which we held that the manufacturer of a component part not alleged to be defective in the plaintiff's pleadings did not owe a duty to indemnify the distributor of the finished product. 199 S.W.3d at 257. In so holding, we relied on section 82.002(f)'s requirement that a seller give notice to a manufacturer of "a product claimed in a petition or complaint to be defective." TEX. CIV. PRAC. & REM. CODE § 82.002(f). Based on the statute's language, we held that the key factor in deciding a manufacturer's duty to indemnify the seller was whether the plaintiff's pleadings claimed that the manufacturer's product was defective. *Hudiburg*, 199 S.W.3d at 257. *Seelin Medical, Inc. v. Invacare Corp.* demonstrates how one court of appeals has followed *Hudiburg*. 203 S.W.3d 867 (Tex. App.—Eastland 2006, pet. denied). In *Seelin*, the plaintiff's

original petition contained allegations that a component part of a product that was manufactured by Invacare was defective. The plaintiff later amended his petition to exclude claims regarding Invacare's product. *Id.* at 868. Following *Hudiburg*, the court of appeals held that Invacare must indemnify the seller for defense costs incurred for the period of time during which the live petition contained allegations against Invacare's product, but not for expenses incurred after the petition was amended. *Id.* at 871–72. While a manufacturer need not be a named defendant to trigger the indemnity obligation, a manufacturer is not obligated to indemnify a seller "for defending unproved claims that were never made" or, as in *Seelin*, were no longer present. *Hudiburg*, 199 S.W.3d at 257. I agree with the *Seelin* court that the statute limits the scope of a manufacturer's indemnity liability to expenses incurred by the seller during the period of time the manufacturer's product is implicated by the plaintiff's live pleadings; any additional liability would violate the principal we established in *Hudiburg*. *Id.*

Here, the Court asserts "[t]here is no substantive difference between the position of the component-part manufacturer in *Hudiburg* and the position of Ansell and Becton in this case." ___ S.W.3d at ___. To the contrary, unlike the component-part manufacturer in *Hudiburg*, Ansell and Becton were named as defendants in the underlying suit and their products were specifically alleged to be defective. This case fits squarely within the scope of liability we described in *Hudiburg* and that was applied in *Seelin*: "the claimant's pleadings fairly allege[d] a defect in" Ansell's and Becton's products. *Hudiburg*, 199 S.W.3d at 257. In other words, Ansell and Becton are responsible for costs incurred by Owens & Minor only to the extent that their products are implicated by the plaintiff's pleadings; if Burden had dropped her claims against their products, Ansell and

Becton would not be liable for any costs incurred by Owens & Minor after that point because, like the manufacturer in *Seelin*, there would no longer be a live claim against them.

Finally, our holding in *Meritor Automotive, Inc. v. Ruan Leasing Co.* supports the conclusion that a manufacturer must indemnify the seller for its defense of all allegations made against the seller, even if those allegations are not linked to a manufacturer's particular product. 44 S.W.3d at 89. In *Meritor*, we were asked whether a manufacturer must indemnify a seller for the seller's defense of an unsuccessful negligence claim against the seller. *Id.* at 87. Again relying on the statute's plain language, we held that a manufacturer must indemnify a seller for *all* claims in the products liability suit, including those alleging independent wrongdoing on the seller's part. *Id.* at 90. We reasoned that, since section 82.002(a) states that a "manufacturer shall indemnify and hold harmless [a seller] against loss arising out of a products liability action," and section 82.001(2) defines "products liability action" as "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product," the manufacturer's duty to indemnify extended to "*all* direct allegations against the seller that relate to plaintiff's injury as part of the 'products liability action,' and that we exclude *only* those losses proven to have been 'caused by' the seller." *Id.* at 90 (emphasis added).

Our decision in *Meritor* illustrates the breadth of the indemnity the Legislature afforded sellers under section 82.002. In holding that manufacturers must indemnify sellers who successfully defend claims based on the seller's own negligence, we recognized that the indemnity obligation manufacturers bear extends even to claims unrelated to any wrongdoing by the manufacturer. The plain language of the statute and our prior cases compel the conclusion that section 82.002 requires

a manufacturer to indemnify a seller for its entire defense unless the seller is found to be independently liable.

IV. Policy

The Court asserts various policy considerations to support its interpretation of the statute. Construing the statute to require manufacturers to indemnify or defend all claims against a seller in a products liability action, the Court posits, would lead to absurd results, as it would place one manufacturer in the untenable position of having to defend another manufacturer's products. This might be impossible, the Court says, because the defense must be intimately familiar with the particular product in order to defend it, and a manufacturer might be forced to turn over proprietary information to a competitor in the course of the defense.

First, the statute does not require that the manufacturer defend claims against the seller. The statute only uses the words "indemnify and hold harmless." TEX. CIV. PRAC. & REM. CODE § 82.002(a). While we have recognized that defending the seller fulfills the indemnity obligation, a manufacturer that considers the defense of another manufacturer's product problematic yet necessary to the seller's defense could presumably implead the culpable manufacturer. If joinder is not an option, the manufacturer could choose to defend only its own product and indemnify the seller for the rest, for which it would be entitled to seek contribution. Better yet, the manufacturers could all agree to cooperate in the seller's defense, which the statutory scheme as I interpret it would seem to encourage. The federal district court's analysis on this point is persuasive:

> Consider this hypothetical: A consumer sues seven drug stores knowing he bought from four or fewer and not knowing which of the defendants supplied him. He took a prescription drug manufactured by two companies, and the claim is product defect. In this case, the statute works to oblige the makers to defend and to pay the sellers' modest costs, with the modesty of the costs depending on cooperation among the

> parties and judicial management. The gross costs will be much less if the makers step in the action promptly since no liability could independently attach to the sellers.

Burden, 332 F. Supp. 2d at 1028.

Further, the concerns the Court voices about a manufacturer having to defend another manufacturer's product are surely magnified for a seller who is forced to defend multiple manufacturers' products in a products liability action. As the court of appeals in *Ansell Healthcare* recognized:

> The distributor is likewise in a poor position to attempt to defend the product manufactured by another. . . . The Legislature has elected to favor the innocent distributor over the manufacturers of allegedly defective products. The Texas Supreme Court has analyzed the statute in a light favorable to the innocent seller. Here, such an application results in requiring each manufacturer of an allegedly defective product sold by an innocent distributor to assume a full defense of the distributor or indemnify it from losses incurred.

189 S.W.3d at 895.

The Court bases an additional policy point upon a 1968 Utah case about right-of-way, positing that when there are two innocent parties one party should not be entitled to pass on its litigation expenses to the other. ___ S.W.3d. at ___ (citing *Bettilyon Constr. Co. v. State Rd. Comm'n*, 437 P.2d 449, 449–50 (Utah 1968)). However, by enacting section 82.002, the Legislature made the policy decision in products liability suits to require even innocent manufacturers to indemnify innocent sellers for their litigation costs. The role of this Court "is not to second-guess the policy choices that inform our statutes . . . ; rather, our task is to interpret these statutes in a manner that effectuates the Legislature's intent." *McIntyre*, 109 S.W.3d at 748. Here, the statute's text indicates the Legislature's intent to "hold harmless a seller" "without regard to the manner in which the action is concluded." TEX. CIV. PRAC. & REM. CODE § 82.002(a), (e)(1). Requiring the

seller to establish that a manufacturer was in the chain of distribution imposes a requirement that does not exist in the statute and contravenes the Legislature's indemnity scheme.

V. Conclusion

I would hold that section 82.002 obligated Ansell and Becton to indemnify Owens & Minor against all claims that Burden alleged, not just those related to their own products. Because the Court holds otherwise, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: March 28, 2008