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 BRISTER, concurring.

The two opinions here appear to be ships passing in the night — each assuming the other means something it does not actually say. I write separately to indicate what I believe is common ground.

First, the dissent is correct that statutory indemnity is triggered by a plaintiff's pleadings, not actual proof. We recently said as much in a unanimous opinion,[1] and the Court says so explicitly again today.[2] Thus, a retailer is not required to *prove* that a defendant's product caused the plaintiff's

[1] *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 256 (Tex. 2006) ("The duty to indemnify is triggered by the injured claimant's pleadings.").

[2] ___ S.W.3d at ___ ("[T]he pleadings must properly allege that the named defendant is a manufacturer of the product under the statutory definition to establish a nexus between the defendant manufacturer and the product, and thus trigger the protection of the statute.").

injury (and thus its own defense costs), only that a plaintiff's *allegation* about the defendant's product did so. It is unclear why the dissent thinks this is an "impossible burden."

Second, I agree with the Court that a manufacturer's statutory duty of indemnity is limited to its own products. A nexus between the plaintiff's pleadings and the defendant's product is required not due to common law, but to common sense. Nothing in the statute suggests a retailer can get indemnity from A and B for costs incurred in defending products made by X, Y, and Z; as we recently noted in *Hudiburg*, a truck seller cannot claim indemnity from a hubcap manufacturer if nothing in the pleadings suggests the hubcaps were defective. Only one conclusion can follow from this: defendants defend their own products, not somebody else's. If the dissent truly believes that no nexus is necessary, nothing would prevent the retailer here from suing General Motors or Gucci for indemnity. Of course, the plaintiff never alleged Gucci made the latex gloves she used, but a plaintiff's pleadings need not name a particular manufacturer for indemnity to follow.[3]

Burden's pleadings here were industry-wide and very general, but they cannot be fairly read to allege that Ansell or Becton made any latex gloves except their own. Making them provide indemnity for other gloves would make them indemnify a claim the plaintiff never made. That is beyond what the statute requires.[4]

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[3] *Hudiburg Chevrolet*, 199 S.W.3d at 257 ("[W]e do not agree with Rawson-Koenig that a claimant's pleadings must actually name a manufacturer to invoke a right of indemnity under section 82.002.").

[4] *See id*. ("It is one thing to give a seller indemnity for defending unproved claims that a product is defective; it would be quite another to give a seller indemnity for defending unproved claims that were never even made.").

The retailer here admits as much in its brief, conceding that if Burden dropped her claims against Ansell and Becton, then they would have no duty to defend Owens & Minor any longer.[5] The same would be true when a manufacturer is dismissed on special exceptions or summary judgment — if the plaintiff no longer has a pending claim against a product, its manufacturer cannot be liable for any further indemnity.

We did not hold in *Meritor* that manufacturers must indemnify retailers regardless of the circumstances or the pleadings.[6] Although we held manufacturers must cover defense costs relating to a retailer's own negligence, that was because statutory indemnity covers "loss *arising* out of a products liability action" and excludes only "loss *caused* by the seller's negligence."[7] A claim based on a retailer's independent culpability *arises* in a plaintiff's pleadings but does not *cause* loss until there is a judgment to that effect.[8] By contrast, no claim that Ansell and Becton made gloves for other manufacturers ever arose in this case.

The dissent is also correct that the statute gives innocent retailers broad protection, and the Court's opinion could spell out more clearly why that will still be the case. As we recently noted in *Tony Gullo Motors v. Chapa*, when a case involves multiple claims, "many if not most legal fees in such cases cannot and need not be precisely allocated to one claim or the other":

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[5] "Had plaintiff Burden amended her Petition to delete product claims against Ansell or [Becton], then [they] would have no duty to defend Owens & Minor."

[6] *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86 (Tex. 2001).

[7] TEX. CIV. PRAC. & REM. CODE § 82.002(a) (emphasis added).

[8] *Meritor Auto.*, 44 S.W.3d at 91.

> Many of the services involved in preparing [one] claim for trial must still be incurred if [other] claims are appended to it; adding the latter claims does not render the former services unrecoverable. Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, voir dire of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.[9]

Here, no one disputes that if Burden had alleged injuries solely from Ansell's gloves, it would have been responsible for 100 per cent indemnity. Nothing in the statute suggests this responsibility dropped to 50 per cent when Burden added another manufacturer; Ansell still had to pay for sending and responding to standard disclosures, producing documents, deposing the plaintiff, and attending MDL hearings in Pennsylvania. In most toxic tort cases, the costs incurred *solely* because of an added defendant are marginal, and it is those alone that Ansell would not have to pay.

Thus, I disagree with the dissent that the Court's opinion places "an impossible burden" on innocent retailers; they are still entitled to every dime incurred as if the manufacturer from whom they seek indemnity had been the only one sued — which in most cases will be most of the dimes. If several manufacturers have become insolvent (as appears to be the case here), an innocent retailer is not required to squeeze indemnity from those turnips; rational litigants rarely spend much money pursuing penniless defendants, so an innocent retailer can still recover almost all its costs from the manufacturers the plaintiff actually pursues. And as Burden's pleadings against Ansell and Becton remained viable until she nonsuited her case, their duty to indemnify continued until that date.

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[9] 212 S.W.3d 299, 313 (Tex. 2006).

I disagree with Becton's argument that the statute requires an innocent retailer to pursue indemnity from each and every manufacturer, rather than picking one or a few. The statute says nothing about how many manufacturers a retailer must sue for indemnity, or about limiting indemnity pro rata. When legal work has to be done whether there are 1 or 100 defendants, the one manufacturer from whom they are sought can hardly claim most of the work was not reasonable, necessary, and due under the indemnity statute. I share Becton's concern that an innocent retailer might arbitrarily saddle a disfavored manufacturer with all indemnity costs, and that the dissent may (or may not) be mistaken in assuming one manufacturer can get contribution from others. But today's decision provides a disincentive to such favoritism: if a retailer seeks indemnity from *less than all* manufacturers, it will be entitled to *less than all* its costs.

In closing, I would also mention that none of this is how the statute was intended to work. The whole idea was that innocent retailers would not be sued *at all* in products cases, as the Legislature made clear in its 2003 amendments.[10] That goal is not advanced by encouraging manufacturers to refuse indemnity except for some pro rata part of the case (as the dissent fears), or to hire duplicative attorneys for the retailer (as the dissent advocates). As we have said many times in other mass-tort contexts, the best plan is to decide early on which defendants are really involved, and discharge those that are not. As I believe the Court's opinion today moves in that direction, I join in it.

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[10] *See* TEX. CIV. PRAC. & REM. CODE § 82.003; Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 5.02, 2003 Tex. Gen. Laws 847, 860 (eff. Sept. 1, 2003).

Scott Brister
Justice

OPINION DELIVERED: March 28, 2008