ORAL ARGUMENT – 9/30/04
03-0987
RAWSON-KOENIG INC V. HUDIBURG CHEVROLET INC.

MCCORQUODALE: The principal issue in this case is whether there is any right on the part of Hudiburg to statutory indemnity when the pleadings that were filed against Hudiburg in the Anderson lawsuit did not specifically allege defect in the service body that was manufactured by Rawson-Koenig.

HECHT: What if they had?

MCCORQUODALE: Under ch. 82 it would probably have a product's liability action alleged. If the petition said that the service body manufactured and distributed by Rawson-Koenig had a defect in it and the defect was a producing cause of the plaintiff's injuries and damages, then that would seem to fit the definition under ch. 82, which seems to be pleadings driven.

HECHT: And then take me through that. Even if the defendants win that case Rawson-Koenig would be liable to Hudiburg Chevrolet for indemnity.

MCCORQUODALE: That certainly seems to be the structure of ch 82 as it was originally envisioned, that it didn't matter how that lawsuit would be resolved. If you try the lawsuit and you succeeded on the merits and it was a complete defense verdict you would owe indemnity. If there was a defect found you would owe indemnity. That if Hudiburg settled that under ch 82 as Rawson-Koenig, you could not litigate the issue of whether there was anything wrong with their product. And certainly, I think most people thought that was the key feature of ch. 82 and how different from common law indemnity is that it relieved the seller of the obligation of proving in the indemnity lawsuit that there was defect in fact in the component part or in the products supplied to it by the manufacturer.

Bostrom kind of comes out of the blue and says that Bostrom was both a common law indemnity claim and a statutory indemnity claim. And then winds up holding that both claims lose because there is no evidence of a defect in the component part itself. And that written into ch. 82 changes certainly the way we saw the case as it progressed through the lower courts and the CA.

OWEN: Bostrom was a little bit different because it the plaintiff in that case, the injured party, did not sue the component part manufacturer and did not allege that that seat in and of itself was defective.

MCCORQUODALE: Which is what we have here with Rawson-Koenig. We were not named by the plaintiffs...

OWEN: I'm just saying your case aside. We were careful to say in that case, there were no allegations against the component part manufacturer and there was no evidence at all that the component part manufacturer had a product defect. What happens in a case where everybody is ultimately proved at the end of the trial innocent? Is there indemnity up and down the line or not?

MCCORQUODALE: The answer appears to be from the viewpoint of the seller that there is indemnity. That the fact that there is no defect in your product, the fact that you have done nothing wrong, ch. 82 on its face does not appear to make that a defense.

HECHT: The problem with this obviously is component part manufacturers. For example, the plaintiff in this case could have alleged that there was something wrong with the muffler as well as everything else, or with the exhaust manifold, or with the bolts that attaches the motor to the frame. And if the plaintiff had done that, then under the theory that you just espoused, which is a reasonable interpretation of the statute, all of those people would be liable for indemnity to whoever the ultimate seller was. Doesn't it follow that that would be the case?

MCCORQUODALE: That is what follows.

HECHT: That doesn't seem reasonable.

MCCORQUODALE: No. In fact we had argued and were successful in the TC that that was one of the reasons the statute was unconstitutional. The CA said no you are premature on that argument. First you have to be found liable under the statute before you can raise your constitutional argument. And we elected not to bring that up here on this round thinking it will go back to the lower court and have our trial and if we are found liable, then we will go to the same judge and say you found that unconstitutional on that ground before. Do it again. Overturn whatever the result was at the trial and let's go back to the CA and say that this time we are not premature in that challenge.

It imposes this huge problem of you transfer these enormous liabilities to - for example component part manufacturers. You've got gaps in the statute like what determines whether it's a product liability action and which petition. Now we've proceeded down the road where you will see in the record that we've used the third amended petition from the Anderson suit, which was a live pleading at the time of trial. What do you do with a plaintiff that files for example an original petition and says the Koenig service body obviously had a defect in it and it was producing cause of the damages. Does four months of discovery and says well I was completely wrong and files an amended petition and doesn't say anything about the Koenig service body. And then you go off with Hudiburg and you settle.

Certainly if Hudiburg you would have an argument well that's a products liability action because at one time there was an allegation in the lawsuit, there was a defect in the component part.

BRISTER: But the concept of indemnity is the person that made the defective or allegedly

defective component bares the cost for defending it.

MCC: That's certainly the concept of ch 82, is that you transfer that cost even for non-defective products.

BRISTER: And that it ought to be the plaintiff rather than the defendant that picks out the defective component. So if the plaintiff says it's the Firestone tires that caused the flip-over, the defendant can't try the case, win, and then sue the sun visor manufacturer and say you indemnify me for my costs.

MCC: If the component part is in fact identified that is correct. And there's nothing unusual about that, because all the time in indemnity cases, you see that the question of indemnity turns on what was the nature of the liability that was alleged against the indemnity.

OWEN: If you are a car dealer why wouldn't you encourage the plaintiff to sue quite a number of component parts manufacturers along with the car manufacturers so that you are going to get indemnity no matter what?

MCC: Yes. That's one of the perhaps unintended consequences. Another unintended consequence in the statute is the various ____ plaintiff who goes to the component manufacturer like Koenig and says I have not alleged there was a defect in your product. Give me money and settle with me or else I'm going to allege there was a defect in your product, that I am going to trigger the ch. 82 rights for the dealer. There are certainly ways that you can manipulate the statute if you wanted to.

HECHT: Kind of do a bidding.

MCC: Yes. And that is the product of the inability to defend yourself by saying there is nothing wrong with my product, like you could in the common law indemnity action. What the statute does not do, which is what Hudiburg argues for, is where you have an allegation that says the vehicle is defective. That is to be considered an allegation that each and every component part in the vehicle was defective, and that that triggers some right of indemnity against all the component part suppliers for the entire vehicle.

HECHT: Follow that along. How much is enough? If they say, well it's defective because the bed separated from the chassis and that fuel tank leaked and that's what caused the fire. Even if you don't say, and not only that, but GM made the chassis and Koenig made the bed.

MCC: I think you can probably say that you do not have to list the name of the manufacturer of the particular component part if you have sufficient information in the pleadings from which you can clearly identify the component part and you can look to, I would think at that point, perhaps some extrinsic evidence of who was the manufacturer. If the suit is against Target and it says I bought this red basketball and it blew up and it injured me, and Target knows that it only

bought red basketballs from one particular manufacturer, and that manufacturer is not named, you could look at extrinsic evidence, because you have enough information from the pleading alleging a defect in the product that you could go identify a manufacturer. And the component part really wouldn't be much different from that. Here the allegation that you may have is an allegation with regard to the fuel system. And then the question is, can you go beyond that pleading? can you look at extrinsic evidence and argue about whose component part is the fuel system? is it a part of the chassis? or they GM supplied parts? should it properly be considered part of Koenig's product? is it something that really comes from the final stage of assembler, B&M which actually supplies one last third party part from somebody that's not ever been a party to any of the litigation? And there you get into this tension of what the court has said before that you are trying to determine is it a product liability action that triggers the duty to indemnify from the pleadings themselves, or how far can you go behind the pleadings where you have to have at times some information to fill in the gap as to who the manufacturer is.

WAINWRIGHT: The service body, is that the bed of the truck?

MCC: The service body is the built up part that goes onto the flat chassis on the back. It's sold as a - what's called a knock down unit, which is a bunch of flat sheet-metal of the shift with installation instructions to a company, a final stage assembler like B&M, which receives the chassis when you've got the cab and just the flat chassis and then it's effectively would be like a pickup bed. Only it's a much larger structure that contains a number of storage compartments on it. That's what the service bed is.

WAINWRIGHT: Is there any contention in our court that the service body itself was defective?

MCC: We don't believe that there is any contention that the service body itself was defective.

WAINWRIGHT: What do you mean by we don't believe there is? Has it been asserted or not?

MCC: Yes. It's been asserted. Clearly we say that there is nothing in the Anderson pleading that says that there was a defect in the service body that was manufactured by Koenig.

WAINWRIGHT: So the whole argument is about how it was attached, how it was put together, that and the fuel system as well?

MCC: Yes. And that fuel system part is part of the installation of how it's put together. And one of the distinctions that we make is that when we get to the part of the argument that addresses independent liability of the seller, that that independent liability in a case like this where you've got a seller who causes a _____ assembler to be made from a group of component parts, that that can include the defects that arise, if any, from the final assembly are solely the province of the seller who has had that final assembly made

What you can't do is take a series of nondefective component parts as a seller, cause this assembly to be made, and then when there is a defect in the assembly as alleged in this case turn around and say well I am going to pass that liability on under ch. 82 to all of the suppliers of the nondefective component parts. That's just not the way that it works.

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GM

DWYER: I would like to address two issues. The first being the language of the statute, in fact the issues would be the subject of the past 10 minutes. I will present a slightly different view of the application of the statute that I think addresses many of the questions that have been asked by the panel, although perhaps it may provoke different types of questions, the interpretation I have. The second issue, some of the evidentiary issues that are presented with respect to GM's summary judgment motion.

Both sides have parsed the language of the statute in some detail. Both allege that at least the plain meaning of the statute supports their position. In the case of Hudiburg, that interpretation is that a seller can always seek indemnity from every manufacturer, including a component manufacturer. I think that interpretation is clearly false. In fact I think this court's decision in Bostrom in June undermines that interpretation.

The second is, Hudiburg alleges they are an innocent seller so long as they did not commit the act that gives rise to the loss. In other words, they disclaim responsibility for the acts of any third party that they introduce under the transaction. In contrast, what we say is that the statute actually says a manufacturer. It doesn't say all manufacturers. Second, the statute presupposes that the seller seeking indemnity is an innocent seller. We say an innocent seller as to the manufacturer from whom they seek indemnity.

So if there is an act by a third party for whom that seller is responsible, in this case the installation by B&M that we say Hudiburg is liable for, and that is independent of any liability the seller would have derivative of the manufacturer from whom they seek indemnity. In this case that liability would clearly be unrelated and nonderivative to any liability GM would have, then in that case the exclusion applies.

This interpretation is consistent, not only with the statute but also the common law that underlies the statute. If you look at all the old common law cases, they are always talking about indemnity being in the concept of a derivative type liability.

HECHT: But GM could - if its product - if the chassis had been defective could be liable for indemnity.

DWYER: Understood.

HECHT: And if the plaintiff says that it is, the plaintiff loses. And the statute says that doesn't matter. As long as the plaintiff says GM's chassis was the problem, then it seems to trigger.

DWYER: I would agree with that.

HECHT: If you have those allegations and that situation in this case, then how does GM escape indemnity?

DWYER: But that's not the case we have here. The way this case is presented is that what we're talking about is the liability with respect to the service bed installation and the detachment of a service bed. All allegations with respect to the fuel tank itself were settled by GM independently. So when this case is presented to this court, what we're talking about is a summary judgment for GM and Rawson-Koenig could produce evidence that the installation of the service bed in fact was negligent, that it caused the losses. That's the loss we're here about. That's the loss we say excludes Hudiburg from the operation of ch. 82's indemnity provision.

Now assuming that's true, and we've established that, Hudiburg still takes the position that they can still seek indemnity from GM even for that liability that is unrelated to the GM chassis simply because GM is in the stream of manufacturers that ultimately produced a part that went into the complete installation.

HECHT: If instead of the way we have this case if the allegation is that the chassis manufacturer and the bed manufacturer were both responsible, as well as Hudiburg, and everybody is sued, and everybody settles on the same day, or even if it goes to trial and the defendants all win. Then wouldn't GM still be liable for indemnity?

DWYER: Hence comes my interpretation of the statute. I believe the only way you can interpret this statute in a way that makes sense and accomplishes the objectives that an innocent seller seeking indemnity from his manufacturer is to assume that there really is only one manufacturer for every potential seller from whom indemnity can be sought. And that potential manufacturer is in fact the manufacturer of the product that seller sold. Because it is only as to that product that the seller can claim to be the innocent seller.

HECHT: The assembler.

DWYER: Correct. B&M is the manufacturer under the state from whom Hudiburg would have indemnity. And we don't contest that. The real issue in this case is what happens when that manufacturer is insolvent? What happens when the person from whom the seller is entitled to seek indemnity under the statute isn't in a position to give that indemnity. Does that seller then get to go upstream?

OWEN: That seems to rule out the component parts piece of it, because you can have

a manufacturer and a component part.

DWYER: But the reason the component parts is included in the definition of manufacturer is you also have component parts sellers. Those sellers haven't sold assembled products. Those sellers themselves can be liable for liability that attaches under product liability law for a component defect. Those person have to have somebody to look to for indemnity. We take the position that the person they look to under the statute and hence the reason it is included in the definition is the component part manufacturer.

WAINWRIGHT: But you contend that Hudiburg is not an innocent seller. I assume because they picked B&M and they selected also the part in the absence of the buyer's...

DWYER: As to GM. Yes, we would agree. As to B&M, then I think Hudiburg would still be an innocent seller because they would be able to in fact pass off that liability. Theirs is completely derivative of the assemblers. They would be the person secondarily liable from the position of the primary liable party, which again is B&M. And then it would flow with all the case law, and it would be much like this court said in Bonniwell when it talked about preserving the innocent retailer exclusion. When it got rid of the other elements of common law liability to the undermining basis for indemnity is the concept that unjust enrichment and that the party that gets indemnity essentially is passing off the liability that has attached to it to the party ultimately responsible for that liability.

OWEN: Let's say there's a crash award in this case. The plaintiff sues the local GM dealer and also sues the designer of the fuel system, and the component part _____. At trial there is no liability. The jury finds no defect. Who has to indemnify whom for defense costs?

DWYER: In the context of the dealer, I assume you mean the Chevrolet dealer for example, then Chevrolet would have that claim against GM, their seller.

OWEN: What about the parts manufacturer?

DWYER: The parts manufacturer I don't think would have a claim of indemnity against anybody.

OWEN: Would the local dealership have a claim for indemnity for its defense costs against the component parts manufacturer?

DWYER: I actually believe the way the statute should be interpreted that eliminates these problems that have been raised here, the answer is no. Their indemnity right would be against their manufacturer.

OWEN: What if the manufacturer is bankrupt, but the component parts manufacturer isn't?

DWYER: I think that's the risk that the sellers take. They are the ones who deal with their manufacturers. Somebody has to take the risk of an insolvency there. The only way to make that work is to make it the person you deal with. And in the case of the statute you are intending to shift liability from the manufacturer to the innocent retailer who sells his products. If that person goes bankrupt, then I think that risk is out there on the seller.

OWEN: Does GM get indemnity from the component part manufacturer?

DWYER: Yes.

OWEN: Where they are all innocent?.

DWYER: No. I'm sorry. I'm assuming it would be in fact a defective component part.

OWEN: It's alleged to be but the jury says no it's not.

DWYER: In the case of a nondefective part, no. GM simply as part of doing business has to shoulder the cost of its dealers who are innocent of some claim that's asserted against them simply because they sold a GM product.

OWEN: But the component part manufacturer is defined as a seller too. Do they get indemnity from GM?

DWYER: Then I think you are in the case like Bostrom. You could have a case where a manufacturer could in fact have indemnity against his component part manufacturer in a case like that. Because I think that's what Bostrom says if in fact that component part manufacturer did manufacture something defective and the allegation was there.

OWEN: It was not defective. In my example the plaintiff sues the dealership, GM and the component parts manufacturer. The jury says there is no defect up and down the line.

DWYER: Then would GM have indemnity against the component parts manufacturer?

OWEN: Or vice versa. Does a component parts manufacturer have indemnity against GM because component part manufacturer is both a seller and a manufacturer under the statute.

DWYER: I guess that's right. In that case, I guess they would.

OWEN: Who gets indemnity from whom in that...

DWYER: In that case, I guess under the statute you could argue that they too are a seller - I don't know. I haven't thought through that example. It so rarely comes up.

WAINWRIGHT: Let me test your assertion that Hudiburg is not innocent as to GM in this case, but is as to B&M. The reason Hudiburg is not innocent as to GM is it picked a manufacturer that caused problems. They put the parts together negligent, allegedly. If that's the reason why Hudiburg was not innocent as to GM, why would that change when you look at Hudiburg vis a vis B&M? It still picked a negligent components, the person who put the components together.

DWYER: The innocence as to B&M isn't excluded so much because they picked the person. It is simply because as to GM, Hudiburg is not a mere conduit. They took our product, they offered it, they did something to it. Whether they selected them, somebody else volunteered, whether they did a good job of picking the right person, whether they failed to inspect it, all of those are factors. But the real answer comes once we send them a part and they go do anything with it, they are no longer simply a conduct for our part, which is a way it's expressed in many of the cases: a mere conduct, an innocent retailer. In the case of B&M, they are in fact a mere conduit. B&M under the law is the final assembler, the final manufacturer of that vehicle. Hudiburg sells that vehicle.

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RESPONDENT

WAINWRIGHT: Are there allegations that the service body itself was defective, or is it just what was done to it and the fuel system were defectively done?

FRASIER: We believe the Anderson petition alleges that the vehicle when sold that included an attached service bed was defective.

WAINWRIGHT: That the truck was defective?

FRASIER: That the vehicle when sold was defective. And paragraph 12 goes into great detail in the petition to talk about the service bed at all times, when it was sold, when the crash occurred, and every time in-between had on it or was attached to the truck. So there was a long allegation. It's on page 4 of the petition. It goes through a long detail that the service bed was attached and they claimed that Hudiburg was responsible for it being there, but its' very detailed about how it was on there.

WAINWRIGHT: That's kind of a tactical answer. The truck was defective. Was the service bed alleged itself, the part to be defective? And your answer is that the truck was alleged to be defective and the service bed was attached to the truck.

FRASIER: There is no allegation in the Anderson petition that says "the service bed was defective." That is not in the petition. What we are arguing that's on page 334 of the record, and they go into detail, is that the service bed is addressed. It is mentioned. The context of the petition that there was a fire. And the record shows that the fuel system was an integral part of the service bed, that the vehicle when sold - and they go into detail in the petition of what is involved here. This cab chassis that GM brings to Hudiburg has to have a bed on it before it can be driven off by a

consumer. It cannot be licensed unless there is a component part put on. It is made with the intention that there would be an assembly of a component part on it. That's the difference.

WAINWRIGHT: If it is the case that there is no allegation or proof that the service body itself was defective, why doesn't Bostrom ____ in this case as to GM?

FRASIER: Bostrom was talking about if there was no proof of a component part being defective. Here we are talking about ch. 82 indemnity between co-defendant as between manufacturers. We believe that Bostrom was relying upon cases dealing with the product manufacturer's liability to the consumer. Here, ch. 82 as this court held in Fitzgerald creates new duties, and favors the seller. What has to be in the petition is an allegation that the product was defective.

OWEN: Did you give notice to them while the Anderson suit was pending?

FRASIER: Yes. We brought them in as a third party defendant in the underlying Anderson case. We gave them notice. We looked at the petition that although it didn't have the magic words "service bed was defective" it said that the cab chassis came Hudiburg. It was assembled with a service bed at all material times throughout the entire process. It goes to great length to make that point. Then it says the vehicle when sold, which had an attached service bed, was defective. The definition of a manufacturer includes component part manufacturers. So the vehicle when sold was defective includes the component parts. It has to. A vehicle has component parts. And the allegations in the petition, and we think the CA's rule is a reasonable rule, reasonably construed the petition.

As counsel mentioned. It may not even identify the manufacturer. It may just identify the product. And that's what CH. 82 is all about. The product is alleged to be defective. It doesn't have to go to name each component part manufacturer. But a seller, like Hudiburg, who was required by law to have this assembled - it doesn't have the means to do so itself, the evidence shows that it doesn't have the expertise. It sends it out. And by the way there is no evidence that Hudiburg was negligent in selecting B&M. There is no evidence of that. There is no negligent hiring or retention proof in the case.

HECHT: If this pleading gets you there, then why can't you sue the manufacturer of the muffler if it's somebody other than GM, or the bolts that surely the bolts were made by somebody else, or anybody who made a piece that was incorporated in to the vehicle _____.

DWYER: That's where the reasonably construed test takes care of that. On one hand we have Rawson-Koenig's extreme view that you have to identify literally every part manufacturer and that it was defective. We don't think that's the test because that puts the seller at the whim of the drafter of the _____ petition. On the other hand, the statute says manufacturers include component part manufacturers. So if the _____ product is alleged to be defective, that could conceivably by definition of the statute could include everybody. The CA is a reasonably limiting rule that we

believe the court should affirm or adopt because it allows the seller who is in the real world who assembled this or had it assembled knows that when the allegations are a fire, it's turned on its side upon a collision, ought to be able to look at a petition and reasonably construe it to see which manufacturer is named or which product is named.

The statute nowhere say that it's up to one manufacturer. This court has used a phrase manufacturers in its decisions in Fitzgerald acknowledging the reality as does the statute that you have more than one manufacturer. The idea is to protect innocent sellers. On this record there was no evidence that Hudiburg was not innocent.

HECHT: Surely you are not any more innocent than GM. All they did was sell a chassis.

DWYER: Well they sold a chassis that had to be assembled before it could be actually sold to the consumer. There is an allegation in the petition, which we were named as a defendant, that GM had a defective product. They don't have to prove they are innocent. It's not the manufacturers innocence. That doesn't have to be proved here. With all due respect to the Bostrom decision, ch. 82 focuses on an innocent seller being indemnified from the manufacturer. As this court stated in Fitzgerald, the legislature decided to favor sellers. It wants to protect both but it favors sellers. The innocent seller.

HECHT: But the idea seems to be that in a very simple situation where you have strict liability, everybody in the chain is liable. Consumer - we are going to protect the consumer, he can sue anybody. It seems like it's a perfect rational decision to say that fellow ought to get his costs back, expenses of litigation back from the guy who made the product in the first place since as between the two of them that seems fair. It gets more complicated when the person upstream is only making a little part of the ultimate product. And that was the problem in Bostrom. Some allegation that the seat that was included in the vehicle was defective. How does your view of this work when you have this whole - even if you have a reasonable view that the CA has, how are we going to tell who in this universe of part manufacturers should indemnify the downstream person.

DWYER: The CA's test is a limiting test that limits the universe or locust of manufacturers to avoid the proverbial sparkplug, hubcap manufacturer. And so the CA is saying you've got to give a seller some latitude if you can't have a specific allegation from the context of this petition.

HECHT: But if the plaintiff had actually sued that person or named them...

DWYER: Named the bed.

HECHT: Or the sparkplug manufacturer.

DWYER: According to the statute and as this court has stated in Fitzgerald that you look

at the pleading and that if it's alleged a part is defective, then you give that manufacturer notice and there you go. If the seller is innocent there has to be a finding. There was no finding that the seller is independently liable. And there is nothing in this record at this stage, there is no record, no evidence of that of Hudiburg, then the statute which is aimed to protect innocent sellers allows the seller to seek indemnity from that manufacturer. And if they happen to allege in the petition whatever manufacturer it is, whether it makes sense they were involved or not, this court - if you look at the pleadings and that's what we have to go on, then that would be the case.

JEFFERSON: What if a court finds that the manufacturer was named without any basis in law or fact. If it was a completely frivolous pleading, then the indemnity obligation still arises?

DWYER: Yes. Because I think that may be a different issue. But vis a vis the innocent seller who is being sued and is defending itself, when it gives notice to that manufacturer, manufacture your product is alleged to be defective in this lawsuit, then the manufacturer has a decision to make: does it let the seller go and defend itself, or does it come in and defend like it should. This is what it is about. The manufacturer is in the case early to defend. And if they want to ride it out and say my product wasn't implicated. Well they may prove that later, but as far as the claim for indemnity that Hudiburg has it's irrelevant. They have to indemnity Hudiburg for its costs in defending the suit, its litigation costs, attorney's fees, and how if it settles. That's what the statute is there for and that is to encourage manufacturers to come in and defend these innocent sellers. That's the whole purpose. So under that scenario, if it proves later to be frivolous and you have a rule 13 violation in the pleading, as far as an innocent Hudiburg's concern you still get indemnity.

OWEN: Do you contend you did not modify or alter the product?

DWYER: We did not modify the product.

OWEN: You paid somebody else to.

DWYER: We sent it out to B&M, an independent contractor who was a licensed Koenig bed dealer to detach...

OWEN: That's between you and the buyer of the vehicle. You altered or modified the product.

DWYER: The product had to be - the product had to have a service bed. Yes.

OWEN: Doesn't it seem reasonable under the statute though that you did, your client, altered or modified the product?

DWYER: Our position is is that the statute requires that the seller commit an act. B&M was the independent contractor. Yes, we chose them...

OWEN: Let's say that your - I have a lot and I hire you as a homebuilder to go build a house for me. And you hire a subcontractor who does something bad, and it's defective in my home. You are still liable. You can't say to me an independent contractor did it. I am sorry. It's not my problem. As between use you are liable. You are independently liable because you are the general contractor.

DWYER: I would be strictly liable in a products liability sense. Yes.

OWEN: Well you are also liable under common law warranties aren't you?

DWYER: You would have to go and approve - there are a couple of CA cases where the court has cited whether someone who employs a subcontractor and knows that that subcontractor is wholly competent...

OWEN: So I buy a home from you and it's defective. I don't see how you can say as between me, the buyer, that you are not liable for it.

DWYER: The liability between the general contractor and the consumer, you the buyer. Yes. Under that hypothetical there will be liability. Here we are dealing with the indemnity between the seller and the manufacturer, not liability to the consumer. And that's the difference. Ch. 82 is between the seller and manufacturer, and whether or not there was liability to the consumer.

OWEN: As between the buyer of the vehicle, Hudiburg and B&M and then GM over here, you are independently liable to that buyer regardless of what GM did or didn't do.

DWYER: For purposes of this statute, the independent liability would have to be an act by Hudiburg. And we don't believe that being vicariously liable for the conduct of an independent contractor is what the statute means by independent liability. The new .003 section that's not part of this case because it's not retroactive, talks about a nonmanufacturer seller is completely innocent, can walk away in summary judgment unless there is proof that there are certain things happening.

OWEN: But you were a manufacturer. The fact that you hired somebody else to do it doesn't mean that you are not a manufacturer. It seems to me GM could subcontract out all of it's vehicle constructing to independent contractors, but it's still liable of manufacturing it.

DWYER: As a manufacturer it is. But we are not a manufacturer. If you get a product that is designed by GM to be assembled at some point in time before it is purchased, and dealerships are not capable or qualified to do the assembly work, and GM knows that, and we send it out as is anticipated, and that assembler, that independent assembler does a bad job or is negligent and somehow that causes, that does not mean that that is an independent act of negligence for which we are prohibited from seeking indemnity. That's not the way the statute reads. There is no evidence that we knew that B&M was incompetent.

HECHT: And if there had been, then what?

DWYER: If there was evidence that we chose an incompetent independent contractor, that we knew or should have known that they were incompetent because of prior happenstance of prior occurrences, then there is some CA case law in Texas that says that we would owe a third party a duty to select a competent subcontractor or independent contractor. If that were the case. That hasn't been briefed. It's not before the court. But under that hypothetical there could be independent liability. In this case though, there was no evidence that B&M wasn't incompetent. In fact, Mr. Rawson of Rawson-Koenig said that B&M, he was comfortable with their capabilities. They were an authorized Koenig bed dealer, and that's who we send it to. Not some fly by night store down the road. And so we complied with what was going to have to happen from the GM's cab chassis. We had to do that.

The seller, like Hudiburg, has to be protected. And that's what ch. 82 was all about. It sued, unless there was a finding that we were negligent somehow in picking B&M perhaps or some other independent act of negligence, then we don't get indemnity. Otherwise, we are protected, we are favored under ch. 82 and we get our indemnity from the manufacturer. The product was alleged in this petition to be defective. It goes out of its way to describe a service bed. The service bed is integrated and connected with a fuel system in ways that the tires, the spark plugs, and hubcaps are not. That is in this record.

HECHT: Do you think the same result would obtain under the common law?

DWYER: Under the common law the duties under ch. 82 are different. Under the common law we would have to prove the defect. Under the common law if the seller has culpability, then, yes it does not get indemnity under the common law. So in that instance it would be the same.

So the Anderson petition is sufficient. It alleges that the completed product was defective. And we gave notice very soon in that lawsuit to Rawson-Koenig to come in - we brought them in. And they didn't participate in the underlying settlement, but they were brought in. So we followed the statute. There was no proof that we are not innocent. We had to have it assembled. That's the way it was given to us. And we disagree with the contention that you only look at one manufacturer. The statute does not limit that. It realizes the real world that there are more than one manufacturer to any product these days.

On this record, there is no evidence that the petitioners conclusively proved that B&M's conduct was a proximate cause of this crash. On that record, therefore, the claim that we are not innocent goes away. The claim that we had a duty to inspect goes away. And we are left with GM's constitutional arguments and then the Anderson petition issue which we of course are arguing today. On this record, they did not get there. The court recently issued the Cedars Hospital v. Mason case going into the central factor test and what has to be proven. This record does not get there. It's conclusory at best. There was no evidence that this tragic accident on the interstate highway at speeds exceeding 50 mph would have happened any differently had that bed been

attached in a different way. They are not able to say that. That the fire would not have occurred but for, that the injuries would have been lessened but for. There is no evidence in this record on that.

WAINWRIGHT: There is however some expert testimony that these matters, the installation of the service body onto the chassis contributed to the injuries. Isn't there?

DWYER: Yes.

WAINWRIGHT: Exacerbated the fire, contributed to worsening the injuries suffered by the plaintiffs. There is some evidence of it contributing to the injuries though isn't there?

DWYER: As to our case failure to provide a safe method of attaching the bed was a contributing cause of the hose tearing off, which in turn contributed to the fire. There is one statement - well that's really all they go to. It's causally related. And causally related is not but for causation. It's conclusory. But even though there is a fact issue that there was a connection, we have Mike James affidavit that B&M's attachment held up in the impact better than RK's plant method of attachment. So even then there's a fact issue as we argue in our briefs on causation. We don't think they get there because it's conclusory. A contributing cause or causally related that's too amorphous and this court has held like in Mason you've got to be more direct. But there's a fact issue in any event.

WAINWRIGHT: Contributing cause establishes but for causation.

DWYER: Just but for.

WAINWRIGHT: But not a substantial factor?

DWYER: Substantial factor and but for as this court held in Mason are kind of the same thing or related to...

WAINWRIGHT: But for is a substantial factor. You're saying contributed to only establishes but for but not substantial factor?

DWYER: It's conclusory I think on both.

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...on this record. And so if there is no evidence that they conclusively proved a connection between what B&M did, then whether or not their conduct is imputed to us, that somehow we are responsible under the hypothetical of the seller, the subcontract is the builder, the court need not go there. But in any event we believe that ch. 82 as this court held in Fitzgerald creates a new duty on manufacturers. It's different than the common law. And based upon this record, this petition, we gave notice to the manufacturers the two main parts, we're not talking about

some small part. We're talking about the service bed and the cab chassis. You have to have those two parts. That's what makes this truck. You have to have a bed on this truck for it to be purchased and driven by a consumer. And we...

HECHT: If it was a van that sometimes people fix up differently would that be different?

DWYER: If it was a van?

HECHT: Part of the problem with GM is that they are anticipating that something else is going to have to be done to this chassis. But if they didn't, if the vehicle was something that could be modified, was frequently modified, but they didn't anticipate that it had to be modified would that make a difference with respect to GM?

DWYER: No. Because if the petition still alleges that the van was defective when sold, barring any finding of liability on Hudiburg, we would still have the right to seek indemnity under the statute against GM under they hypothetical.