ORAL ARGUMENT — 11/17/98
98-0560
FITZGERALD V. ADVANCED SPINE FIXATION

WALKER: We are here to seek an affirmative answer to the certified question from the 5th circuit, which is essentially whether a retailer who sells the same or similar product of a particular manufacturer, is entitled to statutory indemnity even though it turns out in discovery that that retailer did not sell the particular injuring product?

I am going to focus on these particular areas. First, this is a statutory right of indemnity. Second, the statutory right is broad. It does not require a determination either that the seller sold the particular injuring product, or even that the manufacturer made that particular injuring product. Third, Mr. Fitzgerald, is a seller under the statute. And this case is even more compelling because the only reason that Mr. Fitzgerald was sued was because he sold Advanced Spine products. Fourth, indemnity under these facts is consistent.

SPECTOR: He sold them in El Paso?

WALKER: Yes.

SPECTOR: But, that was not the product that was the subject of the lawsuit?

WALKER: That's right. As it turns out through discovery, in fact Mr. Fitzgerald was sued in some 30 cases across the country; 9 or 10, which were in Texas, including here in Austin. It turns out that Mr. Fitzgerald's area where he sold things was more limited. He did not actually make it to Austin, but this is what turned up in the discovery. If he had distributed across the state of Texas, for example, it would be even more conceivable that he would have sold the products that were implanted in Austin or Dallas that were the subject of these lawsuits. In 23 of these 33 lawsuits, there was a specific allegation that Advanced Spine was the manufacturer of the complaint about device. I think the other 7 were non-specific, or at least most of the other 7 were non-specific.

Indemnity under these facts is consistent with the traditional rationales for innocent retailer liability of indemnity.

HANKINSON: Well Judge Sparks didn't agree with that though. Judge Sparks says, that Texas law on indemnity requires the seller to be in the chain of distribution. Would you please explain in what way you think Judge Sparks was wrong?

WALKER: This is an issue in fact that had not been argued or briefed before Judge Sparks. This is an issue that he came up with before we had an opportunity to present him with any law. The statute is very broad. The statute changes and eliminates the need under the common law that there be any finding of liability against a manufacturer. This is a very large chain.

HANKINSON: But that's different. Judge Sparks would agree with you, I think, that the statute intended to eliminate the requirement that there be a finding of liability against the manufacturer, but he found no intent on the part of the legislature to eliminate the requirement that the seller, the retailer, be in the chain of distribution between the plaintiff and the manufacturer.

WALKER: I think that you have to read the definitions of 'seller' and the 'duty to indemnity' together to address this issue. I think Judge Sparks looked back at the old common law. For example, this court in *Humana Hospital* in a certified question case said, that you have to have a finding that the manufacturer must be a liable defendant before you can obtain indemnity. And I think that's the type of cases on which Judge Sparks was relying. None of the cases that we have found addresses this sort of situation in which you have a seller who sells the products of the manufacturer, who is sued only because he sells those products. And it just happens to turn out that he didn't sell the particular injuring product. The legislature in changing this requirement, this is one of the big changes in the statute, it completely eliminated the requirement that there be any finding of culpability by the manufacturer. The statute did not change the common law requirements for a plaintiff to recover against a manufacturer or any other distributor. The focus of this indemnity statute is as between the manufacturer and the seller.

HANKINSON: I am very confused by what you just said. I thought that Texas law did require in order for indemnity to flow from the manufacturer to the seller, that the seller actually be in the chain of distribution?

WALKER: The cases had not addressed this situation yet.

HANKINSON: We have no Texas common law on that issue?

WALKER: No. The issues certified by the 5th circuit deals with whether if you are entitled to indemnity under the statute -

HANKINSON: No, I understand that. But I am talking about before the legislature passed this particular statute that the 5th circuit has asked us to interpret, what was Texas law with respect to the issue of whether or not the seller had to be in the chain of distribution?

WALKER: The common law was that a seller had to be in a chain of distribution, but it wasn't clear - it did not specifically address whether they had to sell the particular injuring product. The law was that for a plaintiff to recover against somebody they had to establish that you had the injuring product, that you provided it or sold it, or manufactured it. The legislature did away with that requirement.

HECHT: Well isn't the only reason it ever would come up is because of some conspiracy theory like there is here?

WALKER: I don't know.

HECHT: What other theory could it arise?

WALKER: For example: If you are approaching the statute of limitations. If Mr. Fitzgerald and seller B both sell advanced spine products let's say in West Texas, or possibly in Austin, a plaintiff files a lawsuit saying: we're not sure which of you sold this particular screw. We are going to sue both of you, and we will sort it out through the discovery process. In that sort of situation, even without conspiracy or any other theories, you have a situation which Mr. Fitzgerald and seller B aren't really in a different position with respect to the manufacturer. It just turns out that seller B sells the particularly injuring device. And so, yes, he can go through the situation, sort it out in discovery. That's kind of what happened here.

HECHT: But they went further here and alleged conspiracy, right?

WALKER: Yes.

HECHT: The plaintiff persisted in their claim after it was known that this defendant did not sell the product?

WALKER: That's correct. And that is handled by the definition under the products liability action, which talks about not only traditional theories of products liability, such as, strict liability, warranty and such, but expanded to include any other theories or combinations of theories essentially. And so that would include conspiracy or whatever it may be.

HANKINSON: But in the circumstance that you talked about where you have the typical problem with product identification, and it can be sorted out, and absent a conspiracy claim, typically plaintiffs don't have the interest in pursuing someone who didn't sell the product, and typically let, even if they sued out of an abundance of caution, let that defendant out very early in the litigation?

WALKER: I guess it kind of depends on the plaintiffs and how it goes. My experience has been that doesn't always happen. And so you may still be the seller who gets dragged along for the course of litigation. You are still subject to costs and expenses as a seller even though it turns out you didn't sell the particular injuring product simply because you are in the stream of manufacturer's commerce. You sold the manufacturer's product, and the only reason that you are being sued is that you sold their product.

ENOCH: Did Ken Fitzgerald sell as part of its inventory, the product that was made

- I'm not talking about to this patient - but this patient had a particular product, did Fitzgerald sell that product on the market?

WALKER: If you're talking about if it is Model A, model A was implanted in the plaintiff. Fitzgerald sold a Model A. He may not have sold that particular one, but he sold that model.

ENOCH: Would your argument that you just simply are a seller of a product apply to Fitzgerald if he never sold a Model A? That wasn't part of the product line he carried?

WALKER: I don't know if that's the situation. That's not the certified question before the court. Here, we do have, the situation which you are selling the product of the manufacturer. There is a close relationship there.

ENOCH: Again, you're saying the product of the manufacturer. The manufacturer has a line of products and you are a distributor for that manufacturer. So when you say the 'product', you're talking about if there is a lawsuit for a defective product and I sell that defective product, then I am entitled to indemnity by the manufacturer, whether or not I can be ultimately held liable for whatever reason, either I didn't sell this particular product or the statute of limitations or some other reason, that's your point?

WALKER: I think that's correct. Even if you have a Model A1, A2, or whatever, you're selling the manufacturer's product.

ENOCH: Well you use the description of this bolt was defective and there are a number of people selling it and I didn't know which one, and we will sort out in discovery. That's the example you used. But my question is, if you divorce the seller from being in the distributive chain of the defective product, then how do you carve-out - I mean where do you carve-out this seller? Now I'm a seller and I don't sell that bolt. I sell other of this manufacturer's product, but not that bolt. Would that person be entitled to indemnification?

WALKER: I think under the statute, he would. I don't think that the statute is limiting it anywhere to selling, having to go through and find out and make sure that you sold the particular model and batch of that screw. You are in the stream of the manufacturer's commerce. The only reason that you are being sued is because you are in that stream. You are a seller of the manufacturer's products. And if during the course of discovery it turns out: well, I didn't sell this particular one. But you sold something else and the only reason, I think the focus, the inquiry here is, the only reason that you're being sued is because you're a seller of the manufacturer's product. You are in that stream of commerce. And I think this is consistent with what the testimony from Senator Parker was. And the bill analysis. Senator Parker again talks about in situations again eliminating the need that there be any liability on the manufacturer that Senator Parker said, that if in a case where the jury finds or whatever fact finder finds that the plaintiff had not met the burden of proof against the manufacturer, well it could be that the burden of proof is that the manufacturer did manufacturer the particular product. Question 1, to the jury might be: Did Advance Spine make this screw? And they answer, No. Under that sort of circumstance, then if you are a seller you're a seller of Advanced Spine, the jury finds that Advanced Spine didn't even sell the screw under the statutory indemnity you are entitled to indemnity.

This is also confirmed in the bill analysis which it indicated that this applies 1) regardless to the type of claim being made; and 2) it expands the indemnity rights sellers now have under the common law by requiring manufacturers to indemnify them "regardless of the outcome of the suit." In other words, not just settling the suit, not just finding that the product was not defective, but if you get a summary judgment saying, we're the wrong manufacturer, and therefore, seller was not in your distributive chain of the particular injuring product. Regardless, this is what the legislature said. And it's contemplated in the legislative history.

Requiring a finding somehow that the seller who seeks indemnity actually sold the injuring product, will be contrary to the explicit language of the statute, and it doesn't matter what the outcome of the suit is. In other words, if we are to accept this argument, then you would have to say: alright, even if the manufacturer got out on summary judgment because they didn't sell the product, and you are a seller of that manufacturer, you're going to have to go prove to a jury or some fact finder that the manufacturer from whom you seek indemnity made the injuring product and you are seller of the injuring product. Well that's not right. That's not what the statute says.

I think if we look at the statute as well, it's clear that Advanced Spine's argument, which is contrary to the express language of the statute, they think that the statute only expanded indemnity if 1) the manufacturer settles; and 2) they say if there's a finding of no liability against the manufacturer. As I said, that can include the fact that the manufacturer didn't even make the injuring product.

The statute also expands the types of suits. I think when we are trying to figure out what they mean by who is the seller entitled to indemnity, we look at what else they did. When they define a product's liability action to include any other theory or combination of theories this is another issue that had not been expressly addressed in common law.

I also want to point out that there was no testimony of Senator Parker or anybody on the issue, and yet, we see that in the statute. So there is something else going on that's not reflected specifically in the legislative history.

HECHT: But as a matter of policy, it's one thing to extend indemnity to a seller whose only reason for being in the suit is because he passed through a product that was defective, and it's another thing to extend indemnity to a seller who just happens to be there because the plaintiff has made a claim that has no merit.

WALKER: I think what we're talking here is consistent with the rationale for indemnity. If the rationale for indemnity is that the manufacturer is in a better position to make a determination to bring products in or out of the market, the manufacturer is in a better position to bear the costs, then having a seller who is in the distributive chain of the manufacturer and who may not be in a different position than the example I gave earlier, Seller B, then that is consistent with that rationale for applying indemnity. And so, I think what they're saying is that it doesn't matter what you call it, how you package the product's liability suit if you are a seller and you are sued because you sold the manufacturer's product, then you ought to be entitled to indemnity.

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APPELLEE

MUTH: I represent Advanced Spine, in this case the respondent. I think if the court will take a look at Judge Sparks' opinion, I think it is a well-reasoned opinion. He obviously felt and I believe he was correct in this instance, that there is a long-line of common law in the State of Texas with regard to product's liability.

OWEN: What about the hypothetical that was brought up a minute ago about the situation where the manufacturer sued and several sellers of the same product were sued and it remains to be sorted out in discovery on who actually sold the product. And then the manufacturer settles the case early on in discovery. Who if any among the various sellers are entitled to indemnity?

MUTH: Well I think if you look at the common law, which is what Ch. 82 was intended to codify, the seller who places the offending product into the stream of commerce, would be entitled to indemnity. No one else would be.

OWEN: So you would have another suit among the three sellers to sue. Then they would be trying to prove who had actually sold the product?

LAWYER: In this particular instance, in the Fitzgerald case, Mr. Fitzgerald and everyone involved in the case knew who manufactured the various devices.

OWEN: We're looking at the broader application of this statute.

LAWYER: I don't think if you look to the common law, the party that is entitled to indemnity is that entity that placed the offending product in to the stream of commerce.

OWEN: But we're looking at the statute. What happens for example in the *Lone Star Steele Mill* litigation that's been going on for years in Daingerfield. A bunch of different people have been sued, and let's say it's ultimately settled before it's determined who actually sold specific products. How will the defense costs of that litigation - are they entitled to indemnity from any of the manufacturers?

LAWYER: I don't believe so under the statute. And unfortunately, and particularly in a case like Mr. Fitzgerald, who is a small distributor, that's the cost of doing business these days. Unless you are able to prove that you were the one to actually have brought the product into commerce -

OWEN: Wasn't that one of the costs of business that the statute was designed to put back on the manufacturer as opposed to the so-called innocent seller?

LAWYER: Sure. And I think the only change in the statute is the fact that there no longer has to be a judicial determination of the culpability of the manufacturer. Under the common law, there had to be that finding. Under the new statute, which is the only change from the common law, there does not have to be a finding of culpability on the part of a manufacturer. Seller, if he can prove from the start that he was in the chain of distribution of a defective product or the offending product, he is entitled to indemnity from that first instance. He doesn't have to wait until the case is either settled or adjudicated in some other manner.

OWEN: What language in the statute itself do we infer this in the chain of distribution concept ______?

LAWYER: Basically what you have to do is look 1) at the legislative history; both Rep. ______, who sponsored the bill in the House and Sen. Parker who sponsored the bill in the Senate, both in debates indicated that the idea or the intent of Ch. 82 was to codify the common law.

OWEN: Our case law says we don't look at that sort of thing. What do we find in the statute that gives rise to the inference you are asking us to make?

LAWYER: You look at the definition of a product's liability suit. And a product's liability suit is a suit that involves a defective product. So for someone to bring a product's liability suit there has to be a chain of distribution. And in order for someone anywhere up or down that chain, they have to have been involved in distributing the offending product, not a similar product or other products that plaintiff might allege were involved. Particularly in a case like this where you are talking about conspiracy allegations, misrepresentation allegations, you have to be in the chain of distribution in order to avail yourself of -

OWEN: But let's say three different sellers sold the same defective product, the only issue is did they sell it to the plaintiff in this case, and the case is settled before that determination is made, who gets the indemnity?

LAWYER: Again, the entity that placed the offending product in to the stream of commerce. If there is more than one seller, and it's unclear until there is a determination who that seller is, then I don't think there's indemnity for anyone.

ABBOTT: Is there any legal prohibition or practical impediment against a distributor obtaining contractual indemnity from the manufacturer?

LAWYER: No, I don't think ch. 82 changes any outside agreement that a seller might have. As a matter of fact, I think it specifically speaks to that. But if you have a contractual indemnity agreement with a manufacturer, ch. 82 does not affect that relationship in anyway.

ENOCH: How do you respond to Mr. Walker's argument that - his point is if you accept Advanced Spine's position, then the seller is in the untenable position of having to prove that a defective product was in fact sold even if the manufacturer ultimately wins on the question that there was no defective product sold. That is to say, the indemnity statute does not codify the common law, because it provides for indemnity even if the manufacturer wins in its lawsuit.

LAWYER: Well I agree with that.

ENOCH: So how do you respond then to the argument that this statute says that the seller of the defective product wins - is entitled to indemnity regardless of how the case is concluded. When he says: well, okay, the manufacturer comes up and establishes no defective product was sold. Then how does the - under your argument - if I've had to have been the actual seller of the actual defective product, how could I possibly get indemnity then?

LAWYER: You still have to be in the chain. You have to have been one of the conduits that passed this product along to the ultimate plaintiff, who files the lawsuit. You have got to be in that chain. You can't be outside the chain in order to avail yourself of indemnity under ch. 82. Mr. Fitzgerald was not in the chain.

ENOCH: The manufacturer didn't sell a defective product. Maybe it wasn't the manufacturer, as the *Lone Star Steele* case demonstrates. There are a number of manufacturers of this product, and a number of distributors of the product, and maybe this is not the manufacturer that sold the particular product that they are complaining about. So they win and all the sellers down the line arguably whatever they sold would say: well I've got this statute that regardless of the outcome of the case, I am entitled to indemnity for my loss suffered as a result of this. Your point would be, there would be no indemnification under that statute?

LAWYER: That's correct. In the 24 cases in which Advanced Spine products were involved that Mr. Fitzgerald was sued, Mr. Fitzgerald didn't distribute any of those products. Therefore, under ch. 82, he's not entitled to indemnity. He wasn't in a distributive chain for those

24 offending products, the ones that the ultimate plaintiffs are claiming caused him some sort of injury. Mr. Fitzgerald wasn't in that chain; therefore, he's not entitled to indemnity. He has to be in the chain. Because I think it's clear that ch. 82 is a codification of the common law, and the common law required that in order for someone in the chain to obtain indemnity from the manufacturer, they had to have passed along the ultimate offending product that the plaintiff was claiming caused them some sort of injury. That's not the case in this situation. Mr. Fitzgerald was out of the loop.

Again, the only thing that I think ch. 82 did was make it where an innocent seller is able to get indemnity without there being a judicial determination of the culpability of the manufacturer. I think that my learned colleague is trying to read a very broad interpretation of ch. 82, which obviously the legislature did not intend.

Let me just give you an example. Mr. Fitzgerald is a seller or distributor of medical products. The product in this case was a medical construct, which is used in fusion surgeries. There are a number of different manufacturers that manufactured those products. Take for instance, if Mr. Fitzgerald had sold both Advanced Spine and Softmore(?) Banning(?) products, and one would had been implanted in the plaintiff, and the other had not. If you were sued by a plaintiff as distributing both Advanced Spine and Softmoore Banning, who would he be able to seek indemnity from? Are we going to reach out that far and say: Okay, you sell both products so you can pick which company you want to be indemnified by. Advanced Spine is a very small company, limited resources. I am not going to go to them. I am going to Softmore Banning who has deep pockets. I know they can pay my legal bills. I know that they are going to indemnify me all the way down the line. I don't think that's what the legislature intended.

SPECTOR: Well maybe both?

LAWYER: Again, I don't see it, because it does not follow the common law, because there's got to be that chain. You have to be able to follow from manufacturer all the way down to ultimate consumer. And in this case, we can't. Mr. Fitzgerald was not involved in that chain. Therefore, it's our position that under ch. 82, Mr. Fitzgerald is not entitled to indemnity, and we would ask that the court answer the certified question in the negative.

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REBUTTAL

LAWYER: Since we are interpreting a statute here, we have to look at the language of the statute. And here, Fitzgerald fits within the indemnity provisions of the language in the statute. The statute says, the manufacturer shall indemnify a seller for losses incurred in a product's liability action, not withstanding the outcome of the underlying suit, and the only exception is if the seller is not innocent. That is, his independent negligence has caused his losses.

ABBOTT: And your definition of 'seller' would be any seller of products?

LAWYER: Right. I think we have to look at the definition of seller within the Act, which defines a seller as a person who is engaged in the business of distributing or placing for commercial purpose a product in the stream of commerce. And when we look at that, 'engaged in the business of doing', if we compare that to the definition of manufacturer in the Act, it has two prongs. Manufacturer has to not only make the product. It says the manufacturer also has to place the product in the stream of commerce.

ABBOTT: Under your construct, if someone has a complaint with a product manufactured by General Motors, and they just get off base a little bit and decide to sue Sears for that, Sears would be a seller, General Motors would be a manufacturer, and if Sears prevails and says: Look, I never sold any car by GM, would Sears be able to recover from GM under this statute?

LAWYER: That could be a possible construction of the Act. Of course here, the 5th Circuit is saying: Well, we have a situation where the seller sold the same or similar product, and that's why they were hailed into court.

ABBOTT: But under the application you are offering, wouldn't that be a possibility?

LAWYER: It could be a possible construction. But I don't think the parade of horribles that may follow from that are likely. I think it's very unlikely. And that is because I don't see a real incentive for a plaintiff to add sellers to a lawsuit who have no connection with the lawsuit. I think they just gum up the works and make it more expensive. Number 2, I think the availability of sanctions for frivolous lawsuits could come into play; and in fact, a manufacturer could possibly use those availability of sanctions to recoup some of the indemnity costs that it may get. And third, I think this statute if you read it that way does provide an incentive for early on in the lawsuit for the right parties to be kept in and the ones that shouldn't be there be let out.

OWEN: How does it provide incentive to the plaintiff to let people out?

LAWYER: It's not an incentive to the plaintiffs. It's an incentive to the manufacturer to make sure the proper sellers are in the lawsuit. In fact, that's what happened in this case, the manufacturers in the multi-district litigation brought up the fact that we have sellers in this suit that shouldn't be in the suit, and the federal judge acted upon that and let out the sellers that weren't connected with the specific product.

ABBOTT: Why couldn't they seek indemnification here? Didn't you say there were certain sellers who were let out?

LAWYER: Like Mr. Fitzgerald that had sold the Model A product, but hadn't sold the specific product that was implanted in the specific plaintiffs. But I think we looked at the definition of manufacturer, which has two prongs, one of which of those is placing the product in the stream of commerce. Compare that to the definition of seller in the Act, which doesn't have that prong. It just simply says: You have to be engaged in the business of placing products in the stream of commerce. It doesn't have an actual place the product in the stream of commerce prong. Based upon that, I think that does show the legislative intent that this statute would cover Mr. Fitzgerald in this case.

And of course, we have here, Mr. Fitzgerald is the epitome of an innocent seller. He didn't sell the specific product that went into this plaintiff, but the only reason he was hauled into court was because he sold Advanced Spine products.

OWEN: Did he sell the same kind of products?

LAWYER: The same kind of products, right.