

# IN THE SUPREME COURT OF TEXAS

=====  
No. 98-0560  
=====

KEN FITZGERALD, D/B/A PERFORMANCE ORTHOPAEDICS, APPELLANT

v.

ADVANCED SPINE FIXATION SYSTEMS, INC., APPELLEE

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

**Argued on November 17, 1998**

JUSTICE GONZALES delivered the opinion of the Court, joined by: JUSTICE HECHT, JUSTICE ENOCH, JUSTICE ABBOTT, and JUSTICE O'NEILL.

JUSTICE OWEN dissented, joined by: CHIEF JUSTICE PHILLIPS, JUSTICE BAKER, and JUSTICE HANKINSON.

This case comes to us by certified question from the United States Court of Appeals for the Fifth Circuit.<sup>1</sup> Section 82.002 of the Texas Civil Practice and Remedies Code gives an innocent seller the right to seek indemnity from the manufacturer of an allegedly defective product for products litigation costs, such as attorney fees.<sup>2</sup> Ken Fitzgerald seeks indemnity under the statute. Fitzgerald was dismissed from a products-liability suit because, while he sold the allegedly defective product, he did not sell the ones that purportedly injured the plaintiffs. Fitzgerald then sued the manufacturer to indemnify him for his litigation costs. The Fifth Circuit asks:

Whether the Texas Products Liability Act of 1993, Tex. Civ. Pract. & Rem. Code Ann. § 82.002, requires a manufacturer of an injuring product to indemnify a retailer

---

<sup>1</sup> 143 F.3d 935.

<sup>2</sup> See TEX. CIV. PRAC. & REM. CODE § 82.002(a), (b).

that was forced to defend itself in products liability litigation even though the retailer, who sold products of the same or similar type involved in the suit, did not sell the particular product claimed to have harmed the underlying plaintiff.<sup>3</sup>

We answer, “Yes.”

The controlling facts are few and straightforward. Advanced Spine Fixation Systems manufactures a product called a spinal fixation device. Fitzgerald sold the device in three counties in Texas and New Mexico. Plaintiffs sued the manufacturer and a number of sellers of the device, including Fitzgerald, in multi-district litigation consolidated in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs asserted various products liability theories as well as conspiracy, concert of action, and enterprise liability. The district court dismissed the claims against Fitzgerald because he did not sell the particular devices implanted in the plaintiffs.

Fitzgerald sought indemnity from Advanced Spine Fixation Systems under section 82.002(a) of the Texas Civil Practice & Remedies Code, for about \$21,000 plus the fees and costs necessary to enforce his indemnity rights. The U.S. District Court in Texas granted a take-nothing summary judgment against Fitzgerald, and on appeal the Fifth Circuit certified the question.

The manufacturer argues that the Legislature intended to deny indemnification to sellers who are not in the chain of distribution from the manufacturer to the injured plaintiff. It contends that prior case law and legislative history demonstrate that the Legislature’s purpose was to codify some aspects of our decisions and overrule others, resulting in indemnity only for those sellers in the chain of marketing or distribution of the defective product from the manufacturer to the injured plaintiff. We disagree. Case law does not directly address indemnification for sellers outside the chain of distribution, and we find nothing in the legislative history to cast doubt on the otherwise plain words of the statute.

---

<sup>3</sup> 143 F.3d at 936.

When interpreting statutes we try to give effect to legislative intent.<sup>4</sup> “Legislative intent remains the polestar of statutory construction.”<sup>5</sup> However, it is cardinal law in Texas that a court construes a statute, “first, by looking to the plain and common meaning of the statute’s words.”<sup>6</sup> If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision’s words and terms.<sup>7</sup> Further, if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity. As our Court said long ago:

When the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law.<sup>8</sup>

The United States Supreme Court has also stated that a court should not apply rules of construction to unambiguous language barring exceptional circumstances.<sup>9</sup>

There are sound reasons we begin with the plain language of a statute before resorting to rules of construction. For one, it is 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. Also, ordinary citizens should be able to rely on the plain language of a statute to mean what it says.<sup>10</sup> Moreover,

---

<sup>4</sup> See *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993).

<sup>5</sup> *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995).

<sup>6</sup> *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484 (Tex. 1998).

<sup>7</sup> See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985); *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983); see also *Fenet v. McCuiston*, 147 S.W. 867, 869 (Tex. 1912)(holding that we adopt the construction that avoids absurd results).

<sup>8</sup> *Dodson v. Bunton*, 17 S.W. 507, 508 (Tex. 1891).

<sup>9</sup> See *Burlington N. R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (holding “Unless exceptional circumstances dictate otherwise, ‘[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete’,” quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

<sup>10</sup> See *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944).

when we stray from the plain language of a statute, we risk encroaching on the Legislature’s function to decide what the law should be.

Thus, our analysis begins with the Legislature’s words. We may consider textual aids to construction for the insight they may shed on how the Legislature intended that their words be interpreted.<sup>11</sup> In doing so, we look at the entire act, and not a single section in isolation.<sup>12</sup> The 73<sup>rd</sup> Legislature enacted section 82.002 when it added chapter 82 to the Texas Civil Practice and Remedies Code.<sup>13</sup> In addition to indemnity, Chapter 82 addresses such disparate products liability issues as the standards for liability for inherently unsafe products, design defects, and firearms and ammunition.<sup>14</sup>

The critical provision is section 82.002 (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.<sup>15</sup>

Other subsections illuminate the duty created by section 82.002(a). A “loss” is not just liability for damages, but includes court costs and reasonable attorney fees.<sup>16</sup> The duty to indemnify does not require a judgment against a seller because it “applies without regard to the manner in which the action is concluded.”<sup>17</sup> The duty is a new, distinct statutory duty, because it “is in addition to any

---

<sup>11</sup> See *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991).

<sup>12</sup> See *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998).

<sup>13</sup> Act of February 24, 1993, 73<sup>rd</sup> Leg., R.S., ch. 5, 1993 Tex. Gen. Laws 4564.

<sup>14</sup> See TEX. CIV. PRAC. & REM. CODE §§ 82.002 - 82.006.

<sup>15</sup> TEX. CIV. PRAC. & REM. CODE § 82.002(a).

<sup>16</sup> See *id.* § 82.002(b).

<sup>17</sup> *Id.* § 82.002(e)(1).

duty to indemnify established by law, contract, or otherwise.”<sup>18</sup> Finally, we may conclude that the duty is imposed only on “the manufacturer of a product claimed in a petition or complaint to be defective,” because of the notice provision in subsection 82.002 (f).<sup>19</sup>

On its face, the statute requires a manufacturer, who allegedly produced the defective product, to indemnify certain sellers for reasonable products-liability litigation costs, except for those costs due to the sellers’ own fault. Anyone who qualifies as a “seller” may seek indemnification, subject to the limitations of section 82.002(a). That is, anyone 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” qualifies as a “seller.”<sup>20</sup> This definition includes Fitzgerald, who sells spinal fixation devices, a product, for use by its customers. The statute does not explicitly require that the seller be proven to have been in the chain of distribution.

We think that to make such a requirement implicit in the statute conflicts with subsection (e)(1), which states in part: “The duty to indemnify under this section . . . applies without regard to the manner in which the action is concluded.”<sup>21</sup> An action may be concluded with a settlement, in which no underlying facts are admitted or established and the liability of a defendant seller or a defendant manufacturer is not determined. A seller of a manufacturer’s product who is alleged to have sold the product to the plaintiff should not be denied indemnity if it proves that it is innocent but given indemnity if he settles without admitting or denying the fact.

The dissenting opinion contends that a literal reading of the statute would permit a seller to obtain indemnity from “every other manufacturer sued,” not just the manufacturer whose product

---

<sup>18</sup> *Id.* § 82.002(e)(2).

<sup>19</sup> *Id.* § 82.002(f).

<sup>20</sup> EX. CIV. PRAC. & REM. CODE § 82.001(3).

<sup>21</sup> EX. CIV. PRAC. & REM. CODE § 82.002(e)(1).

the seller sold. Our construction of the plain language of section 82.002(a) must avoid absurd results if the language will allow.<sup>22</sup> And when the terms of the statute are read in context, as we are required to do,<sup>23</sup> only manufacturers of a product alleged by a plaintiff to have been defective are subject to a claim of indemnity. Whether that manufacturer must also be in the seller’s “chain of distribution” is not raised here because Fitzgerald has not sought indemnification from any other manufacturer.

In short, the statute unambiguously requires indemnification of certain sellers. It excludes certain sellers, but nothing in the statute suggests the exclusion the manufacturer urges. The manufacturer’s interpretation would have us judicially amend the statute to add an exception not implicitly contained in the language of the statute. We may add words into a statutory provision only when necessary to give effect to clear legislative intent.<sup>24</sup> Only truly extraordinary circumstances showing unmistakable legislative intent should divert us from enforcing the statute as written. No such extraordinary circumstances are present in this case, as the rest of this opinion discusses.

The manufacturer argues that the common law did not permit an innocent seller to recover indemnity, that the Legislature sought to codify the common law with only a few explicit changes, and that the definition of “seller” does not explicitly alter the common law to include innocent sellers such as Fitzgerald. The manufacturer cites our opinion in *Duncan v. Cessna Aircraft Co.*<sup>25</sup> and a federal court opinion in *Jackson v. Freightliner Corp.*<sup>26</sup> But the question of whether a seller must be in the chain of distribution to claim indemnification for product litigation costs was not at issue

---

<sup>22</sup> See *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994).

<sup>23</sup> See *Liberty Mut. Ins. Co.*, 966 S.W.2d at 484.

<sup>24</sup> See *Jones v. Liberty Mut. Ins. Co.*, 745 S.W.2d 901, 902 (Tex. 1988); see also *Public Util. Comm’n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (“A court may not write special exceptions into a statute so as to make it inapplicable under certain circumstances not mentioned in the statute.”).

<sup>25</sup> 665 S.W.2d 414, 432 (Tex. 1984).

<sup>26</sup> 938 F.2d 40 (5<sup>th</sup> Cir. 1991).

in these cases. In *Duncan*, we were primarily concerned with adopting a scheme of comparative causation in strict liability and merely pointed out as an aside that the new scheme would not affect the ability of a seller to recover indemnity.<sup>27</sup> The Fifth Circuit in *Jackson*, citing *Duncan*, stated that Texas common-law indemnity for products liability exists only when a member of the marketing chain is held purely vicariously liable, without independent culpability.<sup>28</sup> The court disallowed indemnity because of the independent culpability of the party seeking it.<sup>29</sup>

The *Duncan* dicta forms the only relevant common law support for the manufacturer's position. Similar propositions appear in *Firestone Steel Products Co. v. Barajas*,<sup>30</sup> *Gaulding v. Celotex Corp.*,<sup>31</sup> and *Armstrong Rubber Co. v. Urquidez*.<sup>32</sup> All state that a defendant must have distributed the product as a prerequisite to liability, but those cases all deal with a defendant's liability to the plaintiff, not with indemnity rights between co-defendants.<sup>33</sup> Likewise, a state court of appeals opinion cites *Duncan* for a similar proposition in *Central Consolidated, Inc. v. Robertshaw Controls Co.*,<sup>34</sup> but the issue there was whether a retailer could recover indemnification of attorney's fees after a jury found in favor of the retailer on the user's products liability action.<sup>35</sup>

To sum up, it appears that the exact issue has never been litigated in a reported decision.

---

<sup>27</sup> See *Duncan*, 665 S.W.2d at 432.

<sup>28</sup> See 938 F.2d at 42.

<sup>29</sup> See *id.* at 43.

<sup>30</sup> 927 S.W.2d 608, 614 (Tex. 1996).

<sup>31</sup> 772 S.W.2d 66, 68 (Tex. 1989).

<sup>32</sup> 570 S.W.2d 374, 376 (Tex. 1978).

<sup>33</sup> See *Firestone Steel Prods. Co.*, 927 S.W.2d at 614; *Gaulding*, 772 S.W.2d at 68; *Armstrong Rubber Co.*, 570 S.W.2d at 376.

<sup>34</sup> 868 S.W.2d 910 (Tex. App.—Beaumont 1994, writ denied).

<sup>35</sup> See *id.*

Thus, even assuming the Legislature intended to codify indemnity case law, the cases shed little light on the issue before us.

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."<sup>36</sup> Thus, the state of the common law sheds little light on what the Legislature intended when it defined "seller" in section 82.001(3), and required manufacturers to indemnify sellers in section 82.002(a).

Nonetheless, the manufacturer uses its reading of prior case law to speculate on the goals the Legislature intended to accomplish. The manufacturer argues that in light of the common law, the Legislature must have meant to codify some but change other aspects of the common law. It is just as likely that the Legislature's purpose was to pass on the costs of products litigation from an innocent seller to the manufacturer, "without regard to the manner in which the action is concluded."<sup>37</sup> The Legislature's goal in crafting this statute cannot be known except as revealed in its text.

Viewed in context, section 82.002 is a part of a scheme to protect manufacturers as well as sellers of products. First, the new law ensured that the relatively small seller need not fear litigation involving problems that are really not in its control. Second, it established uniform rules of liability so that manufacturers could make informed business decisions and plaintiffs could understand their rights. The Legislature sought to protect both manufacturers and sellers, but gave preference to

---

<sup>36</sup>T EX. CIV. PRAC. & REM. CODE § 82.002(e)(2).

<sup>37</sup>*Id.* § 82.002(e)(1).

sellers with no independent liability. Indemnifying sellers such as Fitzgerald, who did not even sell the product in question, certainly achieves the Legislature's objective of protecting innocent sellers while still providing a remedy for plaintiffs injured by defective products.

The consequence of the manufacturer's interpretation would be that a seller who is strictly liable to the plaintiff may recover indemnity from the manufacturer, while a totally innocent seller with no liability to the plaintiff, but who was nonetheless brought into the suit as a seller of the manufacturer's products, may not recover indemnity from the manufacturer.

In conclusion, we decline to read a condition into section 82.002(a) that is inconsistent with its apparent purpose as revealed in its text and is not required to effectuate legislative intent. We therefore answer the Fifth Circuit's question, "Yes."

---

Alberto R. Gonzales  
Justice

OPINION ISSUED: July, 1 1999