ORAL ARGUMENT – 10/3/00
99-1291
MERITOR AUTOMOTIVE V. RUAN LEASING

MCELHENEY: The two manufacturers and Ruan who was the seller and lessor were sued in a product liability claim. That claim was, that this hood was defectively designed or manufactured causing the plaintiff to suffer damages. That was the only claim that was first asserted in the lawsuit, and the two manufacturers stepped up to the plate and immediately began to defend the case.

In that process an expert for Freightliner took a look at the hood to determine whether the hood was in fact defectively designed and manufactured. And he found that this accident could not have happened based on the design or the manufacture of this hood. That expert said that he believed that the only possible way that this accident could have happened is if some trauma occurred to the hood, which weakened it, and caused the handle to come loose.

Now the plaintiff ceased on that information and the plaintiff asserted a new cause of action in the lawsuit. This new cause of action was asserted solely against Ruan, the lessor. It was asserted in alternative to the product liability claim and most importantly it sought damages allegedly caused by Ruan's own conduct: Ruan's failure to inspect and repair the truck hood.

Now the manufacturers continued to defend the product. However, Ruan had to step in with their own attorney to defend their own conduct and the case proceeded and eventually settled.

All that remained in the lawsuit then was Ruan's cause of action under §82 against the two manufacturers and by that claim Ruan was asking the manufacturers to pay the attorneys' fees Ruan incurred to defend their own conduct.

Well the manufacturers disagree with that application of §82.

GONZALES: Are you saying this is not a product's liability action?

MCELHENEY: I'm saying part of the lawsuit was a product liability action, and part of the lawsuit was not a product liability action. And in fact, that's exactly what the first issue is in this case: What does the statute mean by the phrase "product liability action?"

GONZALES: Well the definition is pretty broad. It says any action including those actions for negligence.

MCELHENEY: I would disagree with you. I would say that the definition is actually very limited. Because the first part of the statute, that language by the way is at subsection .001, and what the legislature did was they started out broadly and said, it's an action. But then the legislature

included a modifying clause that specifically limits what category of claims is under the category of a product liability action. And it's real important to look at the exact language of the statute. Because what the legislature did was they focused on what caused the damages. The language in the statute is, damages allegedly caused by a defective product. So if the claim seeks damages...

HECHT: Not allegedly, just caused.

MCELHENEY: I think it's alleged damages caused by a defective product. Yes, it's damages and then it says allegedly caused by a defective product.

HECHT: What section are you in?

MCELHENEY: 82.001(2). So you will see that it starts off with a broad language action and then it limits what category of claims regardless of whether the claim is strict liability, or whatever character the claim is. The focus of the legislature for limiting what is a product liability action was what's the cause. If the cause is allegedly a defective product, then the manufacturer's duty to indemnity is triggered under §82. On the other hand, if following that plain language, if the damages are allegedly caused by something other than a defective product, then the claim falls outside the plain language of §82. So no duty is triggered for the manufacturer to defend that portion of the lawsuit. And that's based on the plain language of the statute.

So under one fundamental rule of statutory construction, which is apply the statute as written, the manufacturers contend that the third court got it wrong and Ruan got it wrong, because in this case, the allegations asserted by the plaintiff against Ruan were for damages allegedly caused by Ruan's failure to inspect...

O'NEILL: What if the allegations had not been by the plaintiff. What if the manufacturer had filed a cross-action and alleged this negligence, what would your position be then and what are the problems that would be created by that?

MCELHENEY: I think that question highlights the problems with the 3rd court's application of the statute. First of all, it doesn't matter whether it's the plaintiff or the manufacturer or somebody else who comes into the lawsuit. If the focus of the claim is for damages caused by something other than a defective product, then it falls out of §82.

O'NEILL: Wouldn't the manufacturer then always come in and claim a negligence cause of action against the seller and then by definition as you've defined it be exempt from this statutory provision?

MCELHENEY: No. The manufacturers have never argued that any allegation against the seller in any way limits the manufacturer's obligation under 82 to defend the product. Regardless of what is ever alleged against the seller.

O'NEILL: But typically the manufacturers are going to settle out, and what happens then? Why don't they just throw in the negligence allegation and settle the claim and they are off the hook for the indemnity?

MCELHENEY: No they are not. Because if the claim continues such that the plaintiff is still seeking damages allegedly caused by defective product, that is, if the product is defectively designed, manufactured, or marketed, then 82 still applies. And the manufacturer still has an obligation to defend those causes of action. Whether they settled out or not, they are still going to have to defend the product or pay the cost to defend the product. What we're contending is that 82 does not require the manufacturers to defend what is the seller's own conduct.

So it's very important, because throughout the entire case we've actually had to work with this notion that somehow the manufacturers are attempting to avoid their obligation to defend the product. And we're not. We've never argued that way. Our construction of the statute does not create that circumstance.

BAKER: Using your plain language interpretation part 2 of the definitions uses the word allegedly caused by a defective product. Whereas, 82.02(a) does not use the word allegedly. It just says except for any loss cause. Would that lead to a conclusion that the allegations of a defective product triggers the manufacturers' defense of its own product, but under 82.02 for indemnity purposes, there has to be a finding of the independent negligence of the "in _____ seller?"

MCELHENEY: That certainly was the interpretation of the statute of the 3rd court. It was different by the Texarkana CA, and I think the Texarkana CA is right. Product liability action which is defined in 82.001 determines whether the manufacturer's duty to indemnity is even triggered. Once we get past a triggering...

BAKER: But does it say in part 2 that we're only talking about the manufacturer in the context of this action, because it also really says manufacturer or seller, so they are both included in this concept of when it's a product liability action?

MCELHENEY: What we think the statute says is that under subsection (1), which uses the word allegedly, the duty to indemnify for the manufacturer triggers. We think then you go to 82.002 to look if there is an exception to that duty. And what the legislature said was, that under certain circumstances even though a duty has triggered for that part of the lawsuit, that's a product liability action. There may be certain circumstances where the manufacturer is exempted from that obligation. And it's in that portion of the statute that you need to make sure to read that entire subsection 2 in its entirety based on statutory construction rules. And when you do that, you have to consider (e). And (e) specifically provides that the indemnity duty is not based on how the case concludes, but rather whether - in other words you don't have to wait for a trial.

OWEN: Well let's assume that this case was settled as it was in this case, or a case was

settled, and we read the statute a little bit differently from you. And we read the statute to mean that loss caused by the seller's negligence or misconduct meant loss actually caused by. Wouldn't that mean that there would have to be a factual determination between the seller and the manufacturer after the settlement as to whether the seller in fact caused any of the damage?

MCELHENEY: Not when you consider (e) which says that you are supposed to determine the duty of indemnity without regard to the manner in which the action is concluded. And this court's already looked at this in *Fitzgerald*. Under *Fitzgerald*, you are supposed to consider the statute based on what's alleged.

OWEN: But you can sort out the indemnity after the settlement and then there can be a trial can there not on the fact issue as between the manufacturer and the seller?

MCELHENEY: Yes, that's true. You could interpret the statute in that manner but that interpretation would go against what the legislature intended to do. The legislature was trying to remedy what appeared to be a wrong in common law.

OWEN: You say what their intent was, but aren't we guided by what they actually said, the words they used, and they didn't say allegedly caused, they said loss caused by?

MCELHENEY: That's true, but they do put in the concept of the allegedly in (e). And so if you consider this statute in its entirety, then you do look at what is alleged. And that's what this court did in *Fitzgerald*. Because you looked at the word seller and (2)(a) uses the word seller. And this court engrafted alleged seller into the application of the statute. This court's already added allegedly into (2). And that makes sense because what this court said was look at (e). You are supposed to look at the statute based on what's alleged. And that conforms with the legislative intent because what the legislature was trying to do was take this whole issue of indemnity outside the courthouse, make it something you can decide based on the allegations without requiring the parties to take the case all the way through trial in order to determine the indemnity obligation.

BAKER: But that interpretation, and I don't mean to suggest this is possible or even raised in this case, is collusion between the plaintiff and the manufacturers to have the plaintiff allege somewhere down the line that the seller was independently responsible for this damage and then you could apply that vision here and they settled out and the plaintiff dismissed.

MCELHENEY: Right. Let's look at that in a number of different ways. The first way is to look at how does the manufacturer benefit here? Even if the manufacturer set up the seller for this independent negligence claim, the manufacturer still stays on the hook regardless of whether the seller is in the case, or the manufacturers in the case...

BAKER: Oh yes, but he's not on the hook for the additional cost that the seller incurred defending the case because of a mere allegation. And you could make that argument here. There

was nothing more than a mere allegation that caused the seller to see the conflict of interest and come in when it was "later dismissed."

MCELHENEY: That's a real good question. But it doesn't fall into 82. Let's assume that there is collusion and it's a setup to try and make the seller have to incur attorney's fees.

BAKER: No, no, that's not the purpose of the collusion. The purpose of the collusion is to get the manufacturer outside the scope of 82 so they don't have to indemnify under the exception.

MCELHENEY: No, the manufacturer still has to indemnify.

BAKER: On the product?

MCELHENEY: Absolutely.

BAKER: How so?

MCELHENEY: Because under 82, the manufacturer remains responsible for indemnifying the seller for every single cent the seller ever has to spend to defend the product. Even if the manufacturer is out, if the seller is defending the product because the plaintiff's claims are for damages allegedly caused by defective product, then whether the manufacturer settled out or not under 82 the manufacturer still has to pay. So there is no...

O'NEILL: But how do you envision that playing out then that the seller in a settlement situation has to prove up what amount of costs are allocated to defending against the negligence action and what amount are allocated to defending against the product's action?

MCELHENEY: That may be required. And actually that's not a difficult standard. In fact, if you look at the particular record in this case, you will see that there is specific language in the summary judgment record that shows specific tasks that are used to try and defend everyone's conduct. What they did was they tried to develop evidence showing that there was no trauma. They tried to develop evidence that Ruan effectively repaired and maintained. That's very different conduct than having to protect the product, having to show that the product was effectively designed and defectively manufactured...

O'NEILL: So I wouldn't say your answer is yes. It would require the seller to break down their expenses of defense.

MCELHENEY: Assuming that the seller was the entity that was defending the product, but in most cases that's not what happens, and that's no what happened in this case. Freightliner and Meritor took over defense of the product and defended the product from that point all the way on

regardless of what allegations were made against the seller.

ABBOTT: So the only cost incurred by Ruan in this case was the cost of defending the negligence claim against Ruan?

MCELHENEY: That's exactly right.

* * * * * * * * * *

RESPONDENT

ASHLEY: Manufacturers are asking the court to judicially enact a statute that they think the legislature should have enacted. Their interpretation of the statute is inconsistent with the statutory language. It's inconsistent with the bill analyses in both the House and the Senate, and it's inconsistent with the overall framework that the legislature constructed as part of the product's liability reform bill that they were considering in 1993.

ABBOTT: Will you concede that the claim does fall within 82.001(2), and your hope for an out is under 82.002(a)?

ASHLEY: We agree this is a product's liability action.

ABBOTT: My point though is, if all we look at is 82.001(2), you lose, correct?

ASHLEY: No.

ABBOTT: There is a claim involving an alleged product defect?

ASHLEY: And the claim was made at all relevant times in this action against both the manufacturer and the seller, but the statute makes this a product's liability action if that was true as to either.

ABBOTT: But here is the point, and that is, the claim against Ruan for negligence in no way involves a claim for damages allegedly caused by a defective product.

ASHLEY: That's correct. The claim that was made after Freightliner's expert came up with the report that indicated there was damage to the hood, that based on photographs that were taken in 1997 but on damage that wasn't evident in 1994, that claim was made. At the point in time that claim was made then Ruan not only was being sued in the action for product's liability for selling a defective product, but also for independent fault. And at that point in time, they had agreed previously to allow the manufacturers to come in and take over the defense. Nothing in the statute required them to do that.

ABBOTT: There were two claims against Ruan, right?

ASHLEY: Correct.

ABBOTT: One, was a claim that could be labeled a product's liability claim, because it was for damages arising out of allegedly by a defective product. But then there was a separate segregable claim involving negligence.

ASHLEY: If you want to try to distinguish between the independent negligence claim was not based upon a defective product - it was part of the product's liability action...

ABBOTT: But it was based upon the conduct and actions by Ruan, correct?

ASHLEY: Correct.

ABBOTT: It had nothing to do with the manufacturing or the...

ASHLEY: Absolutely correct.

ABBOTT: With that being the case, looking only at the negligence claim, how does that claim fall within the definition of a product's liability action?

ASHLEY: It falls within the definition of a product's liability action because the definition of a product's liability action does not depend upon the specific claim. It encompasses the entire lawsuit and I think that is clear. Obviously the question is, what the legislature intended when it used the term 'action'.

GONZALES: But if there were a claim for liable or slander instead of negligence, would you be seeking indemnification for that?

ASHLEY: No. And that claim for liable and slander was made in connection with...

GONZALES: In this action.

ASHLEY: In a product's liability action? Well obviously as Mr. Morris my co-counselor yesterday said, that's not my case. But that would be within the definition of a product's liability action. And I think it would then depend upon the outcome of the action under the statutory scheme that the legislature has constructed here. What the legislature did was they changed the common law system. Under the common law the presumption was the seller got no indemnity. The manufacturer had to pay nothing unless until at the end of the action you had a judgment in which the manufacturer was found liable and in which the seller was innocent. And even in that circumstance, as Justice Owen pointed out in her dissent in *Fitzgerald*, the seller while they could recover indemnity for the

damages awarded to the plaintiff for which they were responsible, they could not recover their attorney's fees. The legislature changed that. To the presumption is, it's a presumption of innocence, that the seller is innocent and that the seller is entitled to indemnity from the manufacturer unless and until at the end of the action there is a finding against the seller that establishes the seller was independently in fault.

O'NEILL: So how do you envision that works out? The manufacturer settles its claim and the pursues a trial to determine whether the seller was negligent?

ASHLEY: It could do that.

ABBOTT: So your approach discourages settlement?

ASHLEY: No it doesn't. This can all be - the strength or weaknesses of the claims can be negotiated in the settlement. In most cases, there is a global settlement. You don't have one party settling and not the other. But if ultimately they were not able to negotiate on that, yes, you could have a settlement with the plaintiff. And then they could litigate who was responsible for the occurrence, and you would have a comparative fault finding under ch. 33. And I think that is clearly what the legislature envisioned here. If there is no settlement, then the way that would play out...

O'NEILL: Why would you have a comparative fault finding or wouldn't you just submit a products claim and a negligence claim?

ASHLEY: If there is no settlement, what you have is the product's liability action proceeds to trial, and the allegations...

O'NEILL: We're saying if the manufacturers settled, I believe you said what would then happen is the manufacturer would have to go to court to prove that the seller's negligence caused the injury in order to avoid the indemnity?

ASHLEY: And to avoid their indemnity for the defense costs that the seller incurred in the product's liability action. In that case you've got a settlement with the plaintiff and the manufacturer would contribute some or all or none. The seller would contribute some or all or none.

ENOCH: I'm a little bit confused. I thought your position was that the duty to indemnify kicked in irrespective of the nature of the claim against the seller as long as it was included in a product's liability action.

ASHLEY: That's what the statute says.

ENOCH: So why would there be any trial or negotiations afterwards about the seller's negligence if the indemnity - it seems to me your point is, we don't reach that because under the

statute they are liable even if the jury determined the injuries were the result of the negligence of the seller since it was included in a product's liability claim they are liable for your damages?

ASHLEY: No. If I said that, that's not what I meant.

ENOCH: But if you're saying otherwise, then aren't you agreeing with the manufacturer that they are not liable for your attorney's fees for any of the defense costs for your defending on the negligence claim?

ASHLEY: My position is, that if there is a finding of - whether it's in the product's liability trial or whether they settle and then they have a subsequent trial on indemnity, if there is a finding of independent thought on the part of the seller that caused the occurrence and the damages that were being claimed by the plaintiff in the product's action, then you would have a submission under ch. 33, you would allocate responsibility between the manufacturer and the sellers. If it's 50/50, then if the plaintiff is still in the case, then under this statute the manufacturer pays half of the damages recovered by the plaintiff, the seller pays half. The manufacture pays half of the seller's loss and it's loss as defined under this section, which would include half of the seller's attorney's fees and costs.

ENOCH: Well they could that or they could have - we have other circumstances where causes of action some permit recovery of attorney's fees and some do not. And the courts routinely require the lawyer to break down the time so that - you could do it differently. You could simply say just present your time records for that defending the negligence, and that for product's liability and we could do it that way.

ASHLEY: There is nothing in the bill analysis or anything that I've seen that suggests that you would have more than one trial on the thought, and the language in the statute which is subsection 82.002(b) says for purpose of this section loss includes the court costs, reasonable expenses, reasonable attorney's fees and damages. So for purposes of applying the indemnity section, loss includes that. The next subsection talks about damages awarded by the trier of fact shall on final judgment be deemed reasonable for the purposes of this section. If there is no settlement, I think that section clearly refers to the plaintiff's damages as determined in the product's liability action. Because that's what's going to be allocated then as part of the loss under this section.

OWEN: Let's say there's a settlement, and there is litigation between the manufacturer and the seller to determine what percentage of the damages were caused by the seller's negligence as opposed to a product defect. And the seller loses some part of that. Some portion of the damages to the plaintiff were caused by the seller's negligence. Who pays for the seller's costs in litigating the indemnity issue?

ASHLEY: I think if the seller prevails and the manufacturer is denied indemnity, then the seller's costs in the indemnity action under subsection g, would be recoverable. Those costs

would be recoverable. What I don't think the legislature contemplated is that you would have the allocation of relative fault for the occurrence that was the basis for the plaintiff's suit in a product liability action, have a 50/50 allocation there and then have another trial where you are trying to parse out whether the seller's attorney was spending instead of 50% of their time on the product's liability actions and whether the seller's attorney was spending 70% of his or her time on the independent negligence allegations, I think the allocation of loss under this section for purposes of this section under (b) is determined by the determination under ch. 33 of a relative fault between the manufacturer and the seller.

OWEN: But does that necessarily make sense because what if the manufacturer assumed the full defense of the product, so the seller only hired counsel to defend the specific negligence claim, so essentially 100% of the seller's counsel time at trial and pre-trial was directed solely at that negligence claim? Why shouldn't the manufacturer have to pay for...

ASHLEY: Well first of all, there's absolutely no indication in the bill analysis or in the language of the statute, that it was sufficient for the manufacturer just to step in and defend the product. The indemnity runs to the defense costs of the seller and any liability that they have...

OWEN: Assume they divided up that way: the seller agrees with the manufacturer that you're going to defend the product, your lawyers will take care of all that, you will pay all the costs of that, I'm only going to hire counsel to defend the negligence issue.

ASHLEY: But there is absolutely no indication that the legislature intended to give the manufacturer any right of control over the seller or the seller's counsel.

OWEN: But they agree to that.

ASHLEY: If they agree to that may be that agreement can be used as a contractual allocation of how they are going to split things up and maybe that means that if the seller's attorney then spent a bunch of time that contractually they agreed he wouldn't spend, that could be litigated and a jury might determine whether or not that's reasonable. There is no hint in the statute that the legislature intended to give the manufacturer any control over the seller or the seller's attorney. The only thing the seller has to do is to provide notice so that the manufacturer has the opportunity to come in and participate if they want to or offer assistance if they want to, but the seller remains in control of its own defense under this statute.

PHILLIPS: Who has the burden of proof in this allocation effort, wherever and however it occurs?

ASHLEY: If there's no settlement, I'm not really sure there is a burden of proof.

PHILLIPS: Let's get to when there's been a settlement.

ASHLEY: But there would be a determination that would be submitted to the jury. If there is a settlement, then I think it is the manufacturer that has the burden of proof because under the definition of product's liability action, the duty to indemnify is triggered by the allegation and the statute provides that the seller gets indemnity for all loss arising out of the product's liability action which depends upon the allegations. The exception is triggered by the finding that the...

BAKER: That's what I'm not clear on. How does your theory work when there is a settlement as there was here and the seller is nonsuited by the plaintiff? You have to have a second lawsuit then to determine that the loss was actually caused by your client's negligence so they have to prove that. Is that where you're going?

ASHLEY: It's the manufacturer who would have to prove independent negligence on the part of the seller.

BAKER: Would however (e)(1) lead to a conclusion that all that's not necessary because they are required to indemnify regardless of how it was unless there was this exception?

ASHLEY: As I think the court recognized in *Fitzgerald* this was clearly directed to the problem that you had under the common law where is if the seller settled the action, then there wouldn't be any finding of fault on the part of the seller. And so this talks about the duty to indemnify under this section. It does not talk about the exception that reduces that obligation. The duty to indemnify applies...

BAKER: But (e) is in the same section that contains the exception. Doesn't that discourage settlements?

ASHLEY: I don't think it does, and for this reason. First of all, most of these cases settle globally anyway. And the strength of the independent negligence claim against the seller or the weakness of that claim would impact the amount that the seller would agree to contribute and would impact how the seller and the manufacturer negotiate their liability or the manufacturer's liability...

BAKER: But for whatever reason in this case, the seller wasn't included in any settlement negotiations apparently.

ASHLEY: The reason the seller wasn't included in this case and accused of independent negligence was because of the erroneous report.

BAKER: I understand that. But the seller was in there in the first place because they put the product in the stream of commerce under this strict liability theory.

ASHLEY: But the seller just didn't agree to contribute to the settlement in this case because the seller did not have any independent liability. As the HB analysis says, the manufacturers

would have to indemnify a seller regardless of the outcome of litigation as long as the seller was not negligent or otherwise at fault for the damage due to such actions.

ENOCH: On the posture of this case a summary judgment was granted in the TC saying that Ruan was entitled to be indemnified for their attorneys' fees. Doesn't that sounds like a question of law...

ASHLEY: Including the attorney's fees that included the independent negligence allegation.

ENOCH: It was included in the product's liability claim.

ASHLEY: No. It's because the manufacturer failed to raise a fact issue on Ruan's independent negligence. That's why we got the summary judgment.

ENOCH: And so the summary judgment here is not the claim that they had a duty to indemnify. The summary judgment is that you brought forth summary judgment evidence about this was included in the cause of action and they failed to create a fact issue about any of those attorneys's fees were the result of defending on the negligence case?

ASHLEY: No. They failed to create a fact issue on whether Ruan's independent negligence was a cause of the accident that injured Mr. Hampton. That's why we got the summary judgment. Now we have an alternative basis for that, but the principal basis upon which we rely for that summary judgment is their failure to raise a fact issue on Ruan's independent negligence. And because they failed to raise a fact issue on that, then the indemnity obligation which was triggered by the fact it was a product's liability action included the obligation under (b) to pay not only for Ruan's costs of defense including the costs of defense for the independent negligence allegation.

BAKER: So then in the context of this particular lawsuit it's confined to the 82.002 issue?

ASHLEY: In this particular lawsuit, I believe it is.

BAKER: Their view is that allegation by the plaintiff of independent negligence is enough to trigger the exception and take away the indemnity. Your view is, when you look at 82.002 by itself, rather than just a mere allegation, you have to have a fact finding or a fact issue that that loss was actually caused rather than allegedly caused and they failed to do that here? So that means there is always going to be two lawsuits unless the parties work it out in the settlement in the first case?

ASHLEY: There's not necessarily going to be two lawsuits. If you have the one lawsuit where you have the product's liability action that goes to trial no settlement, and you have the jury

determination that allocates...

BAKER: Well I understand, but if you have a lawsuit that goes all the way to the end you can do the charge?

ASHLEY: Just one lawsuit.

BAKER: But when settlements occur is where these problems arise. Is that right?

ASHLEY: I don't see how you are going to have - of course a lot of cases settle. But I don't think you are ever going to have or it would be an extremely rare situation where you had two trials. And if you did have...

BAKER: Then this is one of those occasions.

ASHLEY: No.

BAKER: I see what you mean. It was a settled case and now we are in the second lawsuit.

ASHLEY: Actually this was all in the first lawsuit. There wasn't a second lawsuit here. This was all accomplished in the first lawsuit. And if you did have two jury trials, the second jury trial would be limited to the determination of the reasonableness of the fees. That may not be a perfect system, but this was a compromise bill. It was negotiated by the trial lawyers and the tort reform groups, and it basically is a practical way to determine these issues either through the trial process or through negotiations. And the legislature could have done it differently. Obviously the manufacturers think they should have done it differently, but they didn't do it that way and it's this court's job to enforce the statute as it was written.

PHILLIPS: If this indemnity is all triggered on it having to be a product's liability action, and a product's liability action has to be allegedly caused by a defective product, was there a product liability action...

ASHLEY: Action for personal injury, property damage or death allegedly caused by a defective product.

PHILLIPS: Was there a product's liability action here insofar as the claim against Ruan for negligent damage was concerned?

ASHLEY: It was a product's liability action not because of the independent negligence allegations against Ruan. It was a product's liability action because of the allegations of defective product against both the manufacturer and Ruan. But the legislative history, both the bill analyses

talk in terms of involvement in the product liability litigation at one point. They talk about the suit at one point. And we did refer to Bryan Garner that the terms, action and suit are used interchangeably and in fact...

PHILLIPS: Garner says that in regard to this statute or as regard to the _____?

ASHLEY: In his law dictionary it says the terms, actions and suit are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as actions and of those in court of equity as suits. In olden time, there was a more marked distinction for an action was considered as terminating when a judgment was rendered. The execution forming no part of it. A suit on the other hand included the execution. But clearly those two terms are encompassing the entire lawsuit, the entire cause and it can change if the product's liability...

PHILLIPS: It's not your position that a loss is caused by a defective product merely because there's been negligence that affects the utility or functionality of that product, is it? You're not taking the words caused by a defective product to be broad enough to include anything that's wrong by a product regardless of whether it's the design or manufacture...

ASHLEY: No. If the exception is triggered when there is a finding that part of the plaintiff's loss is caused by the seller's independent fault(?) That's what triggers the exception. That's not what triggers the indemnify obligation.

PHILLIPS: So if you're in any kind of a suit and there's a product's claim within it, the indemnity obligation is triggered. It comes within the definition of .001 and there's an obligation to indemnify under .002.

ASHLEY: It is a product's liability action during the time there were product liability claims of defective product made against either the manufacturer or the seller. Once the settlement occurred, once the manufacturer's claim came in and settled the product's liability actions in my view *Hurst* correctly decided that if you assume that they were right that the settlement had actually occurred that it was no longer a product's liability action, then they correctly decided that the seller at that point was not involved in a product liability action as defined under this statute. So the seller couldn't get indemnity for the settlement payment that they made. Where I part company with *Hurst*, is not with the remand necessarily, but with the fact that they said the issue on remand was what portion of the seller's attorney's time was spent defending the product's allegations. Because there was no finding of independent fault, then the seller would be entitled to recover all of those attorney's fees that were incurred during the time it was a product's liability action.

* * * * * * * * *

REBUTTAL

OWEN: Assuming we read the statute to require that there be proof that there was

negligence of the seller, did you in your summary judgment papers raise a fact issue on the seller's negligence in this case?

MCELHENEY: We had never alleged negligence. That wasn't our allegation.

OWEN: _____ occurred and you've got a dispute over the indemnity obligation. Did you raise any fact questions on whether the seller in this case was in fact negligent?

MCELHENEY: That wasn't our burden at that point. We had never made an allegation that Ruan was negligent.

OWEN: Assuming we do not accept your rendition of the statute and assume we say that once a settlement occurs, the manufacturer is on the hook for the full indemnity costs unless you demonstrate that the seller's negligence caused some of its own loss. Did you put on any evidence in this case?

MCELHENEY: We did not put on any evidence to show that Ruan was in fact negligent. We don't think that the evidence that they presented gives them a right to summary judgment on that specific issue. So we're not willing to concede that they established that as a matter of law. We don't think the evidence that they submitted...

BAKER: That they established what as a matter of law?

TAPE 1, SIDE A Runs out.

MCELHENEY: ...be entitled to summary judgment.

BAKER: Well they could say we were dismissed by the plaintiff who was the only one making an allegation against us for negligence because you said just now that you didn't make it.

MCELHENEY: They didn't make that argument. That would not have been the basis...

O'NEILL: Doesn't that beg the question? I mean the question is, who's got the burden?

MCELHENEY: The really first question is we need to make sure to understand that §82 creates a two-step analysis. The first analysis is 82 triggered? And that's dependent upon...

HECHT: But if we think the action is everything, then what?

MCELHENEY: Well if the action is everything, we then go to the exception clause and our exception clause, our argument is that under (e) you have to look at what is alleged. And the this court did that in *Fitzgerald*. They read the word allegedly right into 82.002(a). So that's not

something that would be contrary to what this court has already done.

OWEN: But there was no dispute in that case or claim in that case that the seller had done anything negligent because in that case the seller hadn't even sold the product that hurt anyone. So we didn't reach that question.

MCELHENEY: Actually you did. You looked specifically at 82.002(e), at least the way I read *Fitzgerald* and I may be reading it wrong, but I see the court actually having to look at whether it's seller or whether it's allegedly seller.

OWEN: In that case by the time it was all over everyone agreed the seller was totally innocent. The seller did not sell a defective product to anybody.

MCELHENEY: That's right. But what happened here was that the court had to look at what the plaintiff's allegations were to determine whether the indemnity obligation applied. And that's what this court did. It looked at what did the plaintiff plead? The plaintiff pleaded that the seller was in fact an alleged seller.

ENOCH: I don't understand Mr. Ashley to be arguing any differently than you are, that you're not liable for indemnifying for their negligent representation, for their representation on the negligence claim. He is simply arguing, and I don't think you disagree, that you are liable to indemnify him if it's a product's liability action. So let's begin with that. There is a product's liability action. You're argument is well we absorbed all of the attorneys' fees because we defended the product. That's your argument. Your argument is, I don't care. But my client could have defended the product as well and I'm entitled to get those attorneys' fees. And I don't see you disagreeing with that. So let's assume that the posture of the summary judgment is under ch. 82, this was a product's liability case. Yes it was. There is a defective product. Now I know there was an allegation of negligence sitting here. But the indemnity is triggered because unquestionably the defect of the product was in issue. So we've got this indemnity. It's out there. Okay. We now have opposing summary judgments that come in. The argument is, well some of their attorneys' fees is really the result of defending on a negligence, which we all concede that the manufacturer is not liable for. Mr. Ashley says, wait a minute. I said I was defending the product. This is my summary judgment. If you want to say that I'm charging you for some attorney's fees for negligence, you've go to raise a fact issue on the fact that I was defending a negligence claim and, therefore, you're not liable.

MCELHENEY: Ruan is never saying that they defended the product. There is no question in this lawsuit that the manufacturers defended the product. The manufacturers paid all of the attorneys' fees to defend the product. That's not the issue. The issue is who has to pay the attorneys' fees for defending something other than a product liability action? And I ask this court to look back at the specific language of 82.001. The court in Ruan wants this court to think that action means lawsuit. It's not. It's not because this exact language of the statute is very, very limiting. The

language says that it's that part of the action for damages allegedly caused by a product defect, by a defective product.

PHILLIPS: So you say action is short and for cause of action?

MCELHENEY: Correct. That's how every jurisdiction works. No lawsuit is just one kind of action. It could be a product liability action. It could be a defamation action. It could be a personal injury action. The word action has been narrowly defined by the legislature. And it does not mean the entire lawsuit. Under the 3rd courts analysis, if you just have one product liability claim, the rest of every single other claim in the lawsuit gets piled underneath a product liability action.

OWEN: The statute specifically includes negligence.

MCELHENEY: You're right. But the focus is not on the nature or the name of the claim. It's not the label. It doesn't matter whether it's negligence or strict liability or contract. The focus is on what caused the damages.

PHILLIPS: But isn't it possible, which neither one of you are arguing, that caused by a defective product encompasses pure negligence when it's been negligence that's damaged a product that then caused this person to be injured? Not in the design, manufacturing or anything else, but just in the way it's been maintained and then somebody gets hurt. Couldn't that be encompassed in the plain meaning of caused by a defective product?

MCELHENEY: That's a really good question. And here's the right answer. Defective product is a term of art within Texas jurisprudence for product liability _____. It means defectively designed, manufactured, or marketed. The case law is absolutely stellar about that. And that's how obviously this statute should be applied. What's really important and what Justice Gonzales pointed out with his hypothetical, you could have a situation where someone walks into Sears and by a Fridgidaire refrigerator and buys it on installment contract. They take it home. They pay for a couple of months and then they stop paying. And then Sears sends a couple of its employees out and they go out to the buyer's house and they rough them up, they assault him and they cause some property damage in the process of repossessing that refrigerator. Everyone in this courtroom would agree today that under that fact situation manufacturers have no duty under 82 to indemnify Sears if Sears is sued by the buyer. Those claims for assault and unfair debt collection would not fall under 82. Section 82 is not implicated.

But here's the strange thing about taking Ruan and the 3rd court's application of §82 and shows that their application of §82 is absurd. And that is, if in just one time what the buyer says is hey by the way, the reason why I didn't pay was because the refrigerator was leaking Freon and it hurt my floor and now I'm going to also assert a product liability claim contending that the refrigerator damaged me based on a defective product. Now suddenly under the 3rd court's opinion, this whole lawsuit becomes a product liability action and now Fridgidaire is not just

responsible for defending the product, which its always would be required to do under 82...

BAKER: With all due respect, wouldn't you as the manufacturer immediately move for a separate trial or a severance of the personal injury claims for assault and battery by Sears and its employees from your alleged defective product claim?

MCELHENEY: I hope so. But you know it depends on where you are in Texas whether you are going to get that severance or not.

BAKER: But would you have an adequate remedy by appeal to solve that problem?

MCELHENEY: That's a good point. The issue you have brought up a couple of times is kind of this underlying belief that Freightliner or Meritor, the manufacturers caused this all to happen. And so that blame must be put on Freightliner and Meritor and they should have to pay the attorneys' fees. The fact is, 82 is not a blame statute. Section 82 is more like a strict liability statute. If the claim is for damages allegedly caused by a defective product, the manufacturer pays. If the damages are allegedly caused by something else, then the seller pays.