ORAL ARGUMENT – 01/14/04
02-1047
BOSTROM SEATING, INC. V. CRANE CARRIER CO.

COALSON: The primary issues in this case is whether a product manufacturer has a right to seek statutory indemnity from its component parts suppliers under §82.002 of the Civ. Pract. & Rem. Code, and whether a manufacturer has a right to seek common law indemnity from a component part supplier under the common law? Both of these issues are matters of first impression for this court.

I would like to start by discussing statutory indemnity, then I would like to talk about whether there is any right of common law indemnity, and then whether there was any evidence of a defect in this case.

The issue presented with respect to statutory indemnity is whether Crane is a seller for purposes of the product liability statute? When you look at the CA's opinion you will see that the CA didn't look beyond the definition of seller contained in the statute. It didn't construe the entire act. It merely looked at the definition of seller and reached the simplistic conclusion that well it placed the garbage truck in the stream of commerce, so it must have been a seller. And it's certainly our position before this court that the issue in this case is a lot more complicated than that.

HECHT: Your position is that in these circumstances the manufacturer of the truck could never get statutory indemnity against a component parts supplier?

COALSON: That's my reading of the statute. I think when you look at the statute, a good starting place in looking at this particular question, is not the definition of seller in 82.001(3). But instead 82.002(d), which provides that for purposes of this section, and you will remember that's the section that allows indemnification, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

HECHT: But you think the statute has to be informed by common law?

COALSON: Well I think the court can look at the common law as it existed in 1993 to determine what the legislature meant by the provision.

HECHT: And you think under the common law the truck manufacturer could get indemnity in these circumstances?

COALSON: Our position is that under the common law then, as now, the truck manufacturer could not get common law indemnity.

HECHT: If the truck manufacturer were totally innocent?

COALSON: It's our position that when this court in B&B basically changed the rules of common law indemnity it narrowed the scope of indemnity to basically limit the right of indemnification to the innocent retailer or mere conduit in the stream of commerce. It's our position that that does not include someone who manufacturers a product. Certainly somebody in the position of Crane.

HECHT: But you think if the truck manufacturer put the seat in, there was nothing wrong with the truck, and the only defect that injured the plaintiff was a defect in the seat itself, and in that situation the truck manufacturer was completely innocent that he could not get indemnity against the seat manufacturer?

COALSON: That's how I read the current state of Texas common law to be, and certainly that's how I read this statute.

WAINWRIGHT: In B&B Auto Supply didn't the court expressly exclude and not address situations of strict liability? It limited that case wholly to only negligence cases didn't it?

COALSON: I don't interpret B&B to be strictly a negligence situation. Certainly in subsequent cases this court has reiterated over and over that the right of indemnification is limited to the innocent retailer in vicarious liability context.

WAINWRIGHT: Are you suggesting that subsequent authority is different from B&B, because B&B expressly expresses no opinion whether the holding extends to strict liability. It only relates to negligence.

COALSON: I believe it's certainly buttressed by all of the repeated statements by this court that the right of common law indemnity is extremely limited and only applies in those two contexts. That being the innocent retailer and the purely vicarious liability context.

When you look at the wording of §82.002(d), I think there's - if you buy Crane's argument that this statute is broad enough to make any manufacturer entitled to statutory indemnity from its component parts suppliers, I think you would have to conclude that subpart (d) of 82.002 has no meaning whatsoever. In our opinion that provision is basically setting the limits of what the legislature believed a seller could be in terms of its level of involvement with respect to the product. And of course it talks about a wholesaler distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions. That being within the definition of seller. That being the case, Crane clearly does not fall within that definition. It's much more than just an assembler of a product in accordance with Bostrom's instructions. It built an entire garbage truck.

When you look at that language, and then you go to the definition of seller

within §82.0013, I think that helps clarify what the legislature was trying to say when it defined the term seller.

HECHT: Is it your position that seller and manufacturer are mutually exclusive?

COALSON: Yes. Actually it is my position.

HECHT: It can't be both at the same time?

COALSON: For purposes of 82.002, the indemnification provision, I don't think they can be. And I think the CA erred in generically concluding well it can be both. I think when you look at the definition or the statement in 82.002(d), that what the legislature was trying to do by that statement was tell everybody that you can't be both a seller and a manufacturer at the same time. And they were trying to create the division line between the two at that level where they are saying a wholesale distributor or retail seller who assembles under the instructions of the manufacturer will be considered a seller.

BRISTER: But the purpose of the statute since the plaintiff, the injured consumer can pick whoever they want to sue, and they are going to sue somebody local and keep it out of federal court, etc., and the purpose of the statute is to make whoever designed the thing wrong, they ought to bear the loss. Right? Rather than just who the consumer chose to sue. So if the answer to that is yes, that's why the statute is here. So just because you sue your local car dealership, if they had nothing to do with designing the Ford defectively, the person who did design it defectively it's to shift the expense to them. Right?

COALSON: Well in Fitzgerald this court specifically said from looking at the statute that it looked like the purpose of it was to basically protect small sellers from problems that they had no control over. And I think under that analysis...

BRISTER: Right. The innocent retailers.

COALSON: That would be an innocent retailer. That would not be a manufacturer such as Crane.

BRISTER: So if there's an innocent manufacturer why wouldn't the policy be just the same? I concede if the situation where the manufacturer should have tested. They took a lawnmower machine and put it in an airplane. They should have known that wasn't going to work. They are not innocent though. But if they are innocent, we're only looking here at somebody who is innocent, if it's an innocent manufacturer why should they bear the loss?

COALSON: Certainly one of the considerations that the legislature had when it was enacting the statute was the relative bargaining power of the parties.

BRISTER: I don't see anything in the statute about how big they are.

COALSON: It doesn't talk about how big they are. But I think if you look at the underlying legislative history it makes it pretty clear that it was concerned about the retailer who basically has nothing to do with the creation and production of the product. But it ends up with a large legal bill for having to defend itself in a lawsuit.

BRISTER: An innocent manufacturer who assembled a component part that was defective, but they were innocent. They had no reason to suspect, and didn't suspect. It's just tough. They just have to bear the loss.

COALSON: Certainly in this case, I think again if you look at the definition of, or the limitation put in there on 82.002(d), they are basically saying that this doesn't extend to a manufacturer of that nature. It's basically saying it extends to someone at the furthest ends of the spectrum who assembled the product in accordance with the instructions of the product manufacturer.

HECHT: You say the answer to this is contribution.

COALSON: That's one answer.

HECHT: Or contract?

COALSON: Or you could do it by contractual indemnity.

HECHT: But in a contribution action you couldn't get attorney fees could you?

COALSON: No. You could not.

HECHT: So it's not really the answer. You're just trying to get your attorney fees really in having to defend the case.

COALSON: It's a remedy. Crane has suggested in its briefing that it's just completely without a remedy here. And I think the reality is that contribution provides a remedy, just as it provides a remedy in a general negligence auto case where somebody else is involved in causing an accident.

HECHT: But it doesn't provide the remedy of attorney fees that the statute provides.

COALSON: Right. Against the backdrop of this question of the meaning of §82.002(d) I think you've got to look at the wording of the definition itself. And the legislature chose the words, used the words in the business of distributing. And certainly it's our position that by using that term they were trying to address someone other than a manufacturer. They were talking about people who

are in the business of passing along products. And, therefore, we think that to the extent that the definition goes on to talk about placing products in the stream of commerce, what the legislature was talking about was a situation such as where it might not quite be considered a distribution, or there might be some question about whether it's a distribution such as a bailment or a rental or something like that. It was never intended to extend the definition of seller all the way out to a manufacturer.

I think when you look at those definitions and then you go beyond that and look at the legislative history and the consequences of the particular construction, I think you come to the conclusion that the statute was never intended to cover a manufacturer against a component parts supplier.

HECHT: What would be the legislative thinking in excluding that if it was the component parts supplier that was at fault?

COALSON: I think the thinking is that the manufacturer is big enough and sophisticated enough to look after its own interests and protect itself from these things. I think you could argue that there's a public policy reason for not giving a manufacturer this sort of indemnification especially where the legislature has put the burden of proof basically on the party from whom indemnity is being sought to prove that there's nothing wrong with - or that the other party wasn't at fault.

HECHT: But I suppose there are manufacturers like with speciality vehicles that buy chassis or motors from GM, somebody who is much bigger than they are, and that reasoning doesn't work there.

COALSON: But I think in any event when you commit to design and manufacture something, no matter how big you are, I think the reality is that you go into it with your eyes wide open, you select your components and you're better able to assess your risks than a product retailer who basically buys things and then sells them on the shelf. You know. It wasn't involved in the planning. I think frankly if you want to talk about the public interest, if you put this burden on a component parts supplier it gives the manufacturer every reason in the world to care less about safety, because they figure at the end of the day if they can join the component parts supplier they can just simply let them worry about it.

BRISTER: Not if a jury finds them 1% individually negligent. Right?

COALSON: If there is some independent responsibility. Right. Like in this case where it's a dubious products liability case to begin with from the plaintiffs perspective, and the manufacturer, the component parts supplier, they all prevail what happens. Bostrom Seating just bought Crane's $225,000 legal bill even though there were all kind of other allegations in the case against Crane that have nothing to do with Bostrom.

HECHT: What's the status of the case? Did the plaintiff's case go back to trial?

COALSON: My understanding is it's been abated and it's just in limbo waiting to see what happens in this case.

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RESPONDENT

PHILLIPS: Why didn't you seek to bring in Bostrom as a third party defendant?

AKERS: I did.

PHILLIPS: The brief indicated that you didn't. If this case gets back to trial...

AKERS: Procedurally it's cattywompis, but it's not my fault. I third partied in Bostrom, and Beams, the two component part manufacturers. Beams manufactured the seat belt. Bostrom manufactured the seat. They were not originally sued by plaintiffs. Among other reasons because we were sued on the eve of the passing of the statute of limitations. I brought them in after the plaintiff's expert identified the seat and the seatbelt as the two component parts that were at issue.

At trial, at the close of the plaintiff's case, plaintiffs joined in the motion for directed verdict of both Bostrom and Beams. And the court despite the same arguments I will be making here today granted those motions.

PHILLIPS: Why isn't there a collateral estoppel problem with that ruling by the TC?

AKERS: Well there would be except that it's not final. Beams did not sever. They stayed making it an interlocutory. Because at the trial the case mistried. The jury was out for 6 days and finally mistried it. And after the mistrial Bostrom severed in order to make their judgment final, forcing me to appeal on that circumstance.

PHILLIPS: Bostrom severed the motion for directed verdict that they got. And is that on appeal somewhere?

AKERS: That's this.

PHILLIPS: I thought this was an indemnity action brought separate from?

AKERS: No. This is my complaint of the TC's dismissing them from the lawsuit and precluding my ability to keep them in.

PHILLIPS: For both contribution and indemnity?

AKERS: Yes.

HECHT: The petitioner raises the argument that it would be difficult to apportion responsibility if there were multiple component manufacturers at fault. What's your response to that?

AKERS: On the pattern jury committee we think about those sorts of things. And absolutely it becomes hard, but that's what evidence is for. If indeed there are different component parts that are at stake, I believe that all need to be properly allocated. Ultimately in separate issues so that those comparative responsibilities to the extent that they are indeed comparative depending upon findings.

HECHT: Under your theory of the statute, there could be liability there but no proscribed way of apportioning it?

AKERS: The statute clearly does not proscribe...

HECHT: Nothing else does either that you know of?

AKERS: Not that I know of. The only guidance that I can think of is the manner in which - for instance. In other indemnity actions a second set of questions is asked in order to allocate that contribution. That would be my best guess.

HECHT: Who has the burden in the indemnity action? How is the burden of proof allocated? The petitioner is concerned about the effect of Meritor and Fitzgerald on this.

AKERS: I believe that those cases stand for the proposition that once it is established that a party is a manufacturer, or in this case a component part manufacturer, that the burden then shifts to them.

HECHT: So that it becomes the component part manufacturer's burden to prove that it was the truck manufacturer's assembly that was defective and not their part?

AKERS: Yes.

HECHT: But that's only triggered by a simple pleading by the truck manufacturer. Right? I mean all they have to do is say we want indemnity and the burden shifts. That seems sort of odd. In Meritor and Fitzgerald it was the plaintiff's pleading that triggers that the burden is between the product handlers, distributors, sellers, manufacturers. And that's one thing. But to have one of the people in the chain trigger it as between themselves just by filing a pleading, it seems awfully strange to say I want indemnity and all of a sudden the defendant has got to disprove that you are entitled to it.

AKERS: Between a manufacturer who was responsible for the product itself that is at issue, and someone who is a purchaser and thereby a seller of that product placing it into the stream of commerce, that burden ought to lay at the doorstep of the party. The clear intent of the statute is to impose on those parties who are manufacturing and fabricating products those additional responsibilities and not be in the position to sluff those off to someone else.

HECHT: But it just seems to me it would go a long way to solving some of the problems that the petitioner raises if the truck manufacturer had proved that it was the seat that was defective and not the manufacturing process of the truck. And ordinarily you would think in order to recover the party seeking affirmative relief would have to prove it.

AKERS: Yes. My fallback position in this case is I write to common law indemnity. That indeed if the facts of this case clearly indicate that there is evidence to keep these folks into and before the trier of fact, that evidence coming from the mouth of plaintiff's own expert as to the seat itself. He came up with four specific complaints about the seat: the headrest; the lack of armrest, the contour of the seat, and then concludes that this seat is not suitable for use in any product or any place because of these defects. That is surely enough evidence...

PHILLIPS: Take me back to the trial when the plaintiff throws this evidence in and say that's why the seat manufacturer should not be in the case.

AKERS: No. What happened was is that on deposition their expert did a flip. Because in his deposition he comes up with all these defects and problems consistent with his report in the seat and says no. This seat isn't suitable under any circumstances. And then at trial says Oh, no. What I really meant, because I don't want these other local Corpus lawyers to be ganging up on me. I want everybody to be focusing on Akers and his client, that what I really was interested in and what I really meant was that the whole design of the seating configuration in this cab - the seats okay as it is but where Crane puts it in the cab is wrong, and that's the defective design. So the evidence that I have in the record that ought to have kept them in the trial was my cross examination of their expert reciting to him the things that he told me in his deposition. The reason that I brought that out being that he was doing his 180 degree flip in my view.

BRISTER: And if the trial judge had not granted the directed verdict, we would have found out which one of those two the jury believed, if either, was defective right?

AKERS: Exactly.

WAINWRIGHT: Or both?

AKERS: Or both. Sure.

PHILLIPS: Is it your position that if the jury allocated anything other than 100 to nothing you're not going to get indemnity of course? If the jury puts 99% on Bostrom and 1% on you, that's

the end of your indemnity claim?

AKERS: Yes.

PHILLIPS: But if it were 100 to nothing, then you would get indemnity automatically or is there some other showings? Is there another step in here?

AKERS: No. I don't think that there is another step.

PHILLIPS: Once the jury comes back with a verdict and the TC accepts it, then under your reading of the statute, you can tell whether you're going to get nothing or a contribution or indemnity?

AKERS: I don't think that the statute clearly gives us that sort of guidance. But I think that your scenario would be the probable result.

PHILLIPS: This is what you had in mind. You brought out a third party action for contribution and indemnity both?

AKERS: Yes.

PHILLIPS: And that's your vision? Even if the statute isn't clear.

AKERS: My vision was that they were saying that these component parts are at fault. I need them in the party defending their product and being responsible for it.

WAINWRIGHT: You asserted a claim for contribution at trial?

AKERS: Yes.

WAINWRIGHT: And what's the status of that claim now?

AKERS: It was dismissed.

WAINWRIGHT: The contribution claim at the same time as the indemnity claim on directed verdict?

AKERS: Yes.

WAINWRIGHT: Do you consider your client a retailer?

AKERS: I do. My client is in actuality more of an assembler than it is a manufacturer. They buy a GM chassis, put it on another manufacturer's motor, the garbage truck part is

manufactured by somebody else. They are indeed in many respects an assembler with series of component products.

PHILLIPS: Does the purchaser have any choice about who's products are used? In other words are these made special to order and they say I want a Ford chassis and an Oldsmobile...

AKERS: As a matter of fact yes. The city of Corpus Christi was the purchaser. They specified this particular seat among other features.

PHILLIPS: So that's why you see yourself more just like a Walmart with products that are being sold here?

AKERS: That's how I can say it with a straight face. That we are something of an assembler. Obviously it says Crane Carrier on it. And there's a manufacturing process that goes with it. And indeed, we, the assembler, put all these things together. It is an integrated system. Among the complaints for instance was the seatbelt. The seatbelt and its location was directed by the directions from the seat manufacturer. In many, many respects we are only doing what the manufacturer tells us to do as we assemble the product.

WAINWRIGHT: I asked about whether you considered your client to be a retailer. And you said your client was more of an assembler than a manufacturer. Is your client a retailer or a wholesaler, or does that make a difference?

AKERS: We both sell and assemble.

WAINWRIGHT: The house report on the statute in a couple of parts uses retailers and sellers apparently interchangeably. Not throughout but in a couple of paragraphs. Does that make a difference to your case whether it's a retailer or a wholesaler?

AKERS: I don't think so. I think the resuscitations that were spoken about as to the legislative history that the simplistic concept of the legislature, and I don't mean to suggest that they are simplistic, but when this is probably enacted they are probably thinking more in terms of Wal Mart than they are thinking in terms of General Motors. And that makes sense. But I do believe absolutely that when GM or Crane buys a product whole and uses it, and then distributes it and places it in the stream of commerce, that indeed it becomes a seller and a placer into the stream of commerce of that particular product.

OWEN: The only testimony that I read is the Stilson testimony that was attached to the petition for review. And you go through in your brief and say their expert at least in his deposition as you brought out in cross, the seat was defective in certain ways. But is there any evidence in the record how these defects caused the injuries in this case?

AKERS: Yes. This is a flip over where a car jumps out in front of Mr. Gonzalez. It's

a rainy day. He swerves. It flips over three times and he goes up and down and around and gets injured in that process. The theory adduced by John Stilson, their expert, is that he was not able to be restrained in to the seat. They claimed against all logic to the contrary that Mr. Gonzalez was actually wearing his seatbelt at the time. And that somehow or another the configuration of both the seatbelt and the seat together prevented him from staying in place. Therefore, the armrests for instance would have prevented the lateral movement. The contour of the seat might have prevented some of the lateral movement. The headrest might have prevented some of the upward movement where he is alleged to have submarined somehow or another up above his seat.

So yes the record is...

OWEN: That's the in the trial record?

AKERS: Yes.

WAINWRIGHT: What are the limitations are on you definition of seller. If your approach to that definition is correct, in the process of manufacturing, wholesaling, distributing, retailing product isn't every entity in that chain a seller until you get to perhaps the raw manufacturer of the raw product seller? For instance, the entity that sold the material that covered the seat that Bostrom sold to Crane. That entity would be a seller. In fact under your approach Bostrom would be a seller. Correct?

AKERS: Yes. If indeed the complaint related to not the design that Bostrom was responsible for, but that there was something intrinsic about one of its component parts.

WAINWRIGHT: Let's assume that's the case, then what are the limitations on your definition of seller, or do you contend the statute doesn't intend any?

AKERS: I think that the plain reading is that either you can be a manufacturer or you can be a seller. And since we didn't design, formulate, construct or rebuild the seat, which comes whole to us, but we then place it in to our product and put it in to the stream of commerce, instead we become a seller as to that. There are other aspects of the truck that we are sellers of. There are other aspects of the truck that we are manufacturers of because we've designed it, we've formulated it, we've fabricated it.

PHILLIPS: There was no complaint about the fact that the truck flipped on a city street? I mean that there was something in the stability.

AKERS: It wasn't a city street. It was a rural area. He was on his way to the dump going 60 mph, and a car swerves out and he turns. Because it's a two-lane road, his right two passenger side wheels get over on the side and he can't control it.

SCHNEIDER: How does Crane typically market or sell their product?

AKERS: They market their product by way of salespeople. They go directly to cities like West University, and Corpus Christi and market their products directly there.

SCHNEIDER: Mostly to governmental units?

AKERS: Yes. Because they are the biggest purchasers of garbage trucks.

SCHNEIDER: Responding to bids, or do they actually have salespeople who go out and solicit the business?

AKERS: Both.

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REBUTTAL

COALSON: Let me clear up something that I think may be steering y'all in the wrong direction. That is, there is no contribution claim in this case. I think if you go look at the pleading that Mr. Akers filed it talks about two things. It talks about statutory indemnity under §82. It talks about common law indemnity. There's not a word mentioned in it about contribution. And, therefore, that's why our motion for directed verdict deals with those issues.

OWEN: And the plaintiff never cross claimed against the seat manufacturer?

COALSON: Never did. I think there's some insinuation that there is something under the table going on between Bostrom and the plaintiffs in this case. And the fact of the matter is, when you read the record you see what the plaintiff and his expert are contending all along is, it's not the seat in and of itself that's the problem. It's the way the seat is used in connection with this cab that Crane designed.

BRISTER: They don't waive anything about indemnity if they don't pursue a contribution. Right?

COALSON: Right.

BRISTER: Just because they've chosen to go for all or nothing doesn't mean they absolutely get nothing.

COALSON: I think indemnity is all or nothing. And if you don't plead for contribution you wouldn't have the opportunity to get contribution.

BRISTER: But it wouldn't affect indemnity?

COALSON: Right. It doesn't impact it one way or the other. It's just one less claim for y'all to worry about. Anyway it's been portrayed up here as being a simple matter of the seatbelt and the seat. And I think when you look at the trial testimony of Stillson, and the plaintiff's arguments in this case, they were complaining a lot more...

BRISTER: Are you saying there's no evidence? There's absolutely no evidence that the seatbelt or the seat played any role in his injuries?

COALSON: The seatbelt is not at issue here, because the seatbelt manufacturer isn't before this court. I'm saying that there's no evidence that the seat was defective in and of itself, and, therefore, there can be no liability under common law indemnity if this court finds that there is such a right of common law indemnity. Certainly, I think that's the first hurdle the plaintiffs have to overcome is you've got to first show if Crane falls within the concept of common law indemnity, and then and only then do you get to this question about was there a defect? But when you're looking at the evidence you will see that this isn't just about the seat. It's about the height of the roof, which of course Bostrom would have had no control over. It's about the metal engine box that the plaintiff allegedly hits his head on when he goes sideways. It's about the lack of padding on the roof. There's a lot of things in this case that have nothing to do with Bostrom. But as we interpret what Crane is attempting to do through indemnity, they are trying to shift the entire burden of this case, all the costs of this case, on to our client even though our client's role in it is small. Certainly in our opinion there is no defect at all.

WAINWRIGHT: Who is Mr. Stilson in this case?

COALSON: Mr. Stilson is the plaintiff's automotive expert.

WAINWRIGHT: The briefing indicates that he as an expert condemned the design of the seat for at least four reasons here: failure to have a headrest; failure to have a contour, etc. You contend none of that testimony constitutes legally sufficient evidence?

COALSON: I contend several things. One, we certainly argue that it didn't rise to the level of a defect under the definition of design defect under the Civ. Pract. & Rem. Code. But two, when you look at his testimony, he says repeatedly, I'm not complaining about the seat in and of itself. I'm talking about it as used in this particular application. And as such, it's our belief that under the component part doctrine we cannot be liable because what he is saying is this seat is perfectly good for some purposes. It just shouldn't have been used in this particular application. And under the component part doctrine that makes us innocent and we have no liability.

OWEN: Is the armrest testimony and the headrest and all of that that Mr. Akers was talking about, is that in the TC record?

COALSON: It is in the record.

OWEN: But you didn't attach to your brief?

COALSON: I may not have. I will say that in terms of that, we did make models - in fact this particular model you could have gotten a headrest. You could have gotten the armrest. That was the decision Crane made not to take those ____. In any event, we believe there is no right of indemnity in this case. We believe that the TC got it right and the CA ought to be reversed.