D. Todd Smith

From: Osler McCarthy [Osler.McCarthy@courts.state.tx.us]
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Subject: Texas Supreme Court orders and opinions 11.14.08

TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED NOVEMBER 14, 2008
One petition granted oral argument in today's orders

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.
NOTE: ***Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.*** Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). Click here to download a free Adobe Reader.

NOVEMBER 14 ORDERS (in HTML)
Decisions in cases (motions, requests, etc.) from November 6 through Wednesday (PDF)

OPINIONS

05-0721
SSP Partners and Metro Novelties Inc. v. Gladstrong Investments (USA) Corp.
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
For petitioner SSP Partners: Jennifer R. Henderson, Corpus Christi
For petitioner Metro Novelties: Roger W. Hughes, Harlingen
For respondent: Michael A. Choyke, Houston
AFFIRMED, opinion by Justice Hecht:

In this indemnity action arising from a wrongful-death and products-liability settlement, the principal issues include (1) whether the U.S. importer is considered a manufacturer because it and its closely allied foreign company are indistinguishable as single business entity and (2) whether the court of appeals erred by holding the "apparent manufacturer" doctrine applied to a U.S. company held out as the product manufacturer by the closely allied foreign company. SSP Partners sued Gladstone USA for indemnity after SSP, the end seller settled in a case alleging a child died as a result of a defective lighter. The trial court granted Gladstrong USA's motion asserting that no evidence showed it manufactured the lighter. The court of appeals reversed, holding in part that the common-law apparent manufacturer doctrine survives statutory indemnity provisions in Texas Civil Practices and Remedies Code chapter 82.

The Supreme Court HOLDS (1) the single business enterprise theory will not support imposition of one corporation's obligations on another and (2) that common-law indemnity, which is not precluded by statutory immunity, does not impose an indemnity obligation on an innocent seller.

● *Statutory indemnity and single business enterprise liability*. Texas Civil Practices and Remedies Code chapter 82 includes among manufacturers "producers," which arguably can be defined broadly enough to encompass distributors. But to equate them in the statute would destroy all distinction between manufacturers

and sellers. If all sellers were manufacturers because all sellers are producers, then the indemnity obligation would be unlimited and everyone in the distribution chain would owe everyone else indemnity, contrary to the statute's stated purpose. In the statutory definition producer is confined by the words that surround it: "designer, formulator, constructor, rebuilder, fabricator, . . . compounder, processor, or assembler" — that is, involved in making a product. SSP relies on *Paramount Petroleum Corp. v. Taylor Rental Center* (14th Court of Appeals, 1986), but its support for single business-enterprise liability is inadequate for the multi-factored theory it sets out. That theory was not among the Court's bases for imposing liability despite corporate structure reviewed shortly after *Paramount Petroleum* in *Castleberry v. Branscom*. Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. The Court has never held corporations liable for each other's obligations merely because of centralized control, mutual purposes and shared finances.

● *Common-law indemnity*. The parties confined their arguments regarding Restatement (Second) of Tort's section 400 applicability to statutory indemnity claims, but the court of appeals improperly discusses section 400's applicability to common-law claims. The principle underlying common-law indemnity does not support an indemnity obligation on someone innocent of wrongdoing. SSP argues that an importer of a defective product is at fault for facilitating entry of the product into this country. Even if this is true, any such fault is not the kind of actionable wrongdoing on which common law indemnity is predicated

Opinion in HTML
Opinion in PDF
Briefs

06-0097
Gilbert Kerlin, et al. v. Gloria Soto Arias, et al.
from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg
REVERSED AND JUDGMENT RENDERED, per curiam opinion:

The issue is whether an affidavit by a modern-day heir attesting to evidence of fraud in 1847 is sufficient in another challenge so set aside a deed to much of Padre Island. The trial court granted summary judgment against the heirs, but the court of appeals reversed. The Supreme Court HOLDS that the only evidence of fraud in 1847 – the affidavit by one of the current heirs – is inadequate because the affiant could not have personal knowledge of those events attested to.

Opinion in HTML
Opinion in PDF
Briefs

07-0301
Emory B. Perry, et al. v. Darryl R. Cohen, et al.
from Travis County and the Third District Court of Appeals, Austin
REVERSED AND REMANDED, per curiam opinion:

The issue is whether error was preserved by a challenge in the body of a brief and not in the appeal notice or issues set out in the appellate brief. In this case the trial court dismissed a suit with prejudice after determining that the plaintiffs' amended pleadings failed to comply with an order granting defendants' special exceptions. The court of appeals held that the plaintiffs waived error as to the merits of the order sustaining special exceptions because they did not separately challenge the order on appeal. The Supreme Court HOLDS the plaintiffs preserved error by challenging the merits of the special exceptions order in the body of their appellate brief, even though they did not separately and specifically challenge the order in their notice of appeal or in the issues of their appellate brief.

Opinion in HTML
Opinion in PDF
Briefs

07-0608

In re Transcontinental Realty Investors Inc.
from Kaufman County and the Fifth District Court of Appeals, Dallas
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether an amendment to the permissive-venue statute in the 1980s should be interpreted to eliminate businesses from every venue statute that refers to where a party "resides." The Supreme Court HOLDS that it should not and the defendant corporation is entitled to be sued in Dallas County where it "resides."

Opinion in HTML
Opinion in PDF
Briefs

07-0987
In re Union Carbide Corp.
from Galveston County and the First District Court of Appeals, Houston
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

In this case family members who survived John Hall intervened in a pending personal-injury suit filed by another man who worked at Union Carbide and claimed the same exposure injury as Hall. Union Carbide, a defendant in both the pending suit and the intervention, filed a motion to strike the intervention. Instead of ruling on that motion, the trial court severed the Halls' claims into a new suit that then remained pending in the same court. The Supreme Court HOLDS that (1) the trial court abused its discretion by failing to rule on Union Carbide's motion to strike before considering whether to sever the intervention; (2) the trial court only had discretion to grant the motion to strike; and (3) Union Carbide does not have an adequate remedy by appeal.

Opinion in HTML
Opinion in PDF
Briefs

08-0125
In re Shondra Buster
from Nacogdoches County and the 12th District Court of Appeals, Tyler
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether the court of appeals erred by holding that an expert report in a health-care liability claim could not be cured by a second report by a separate expert. The nursing home defendant moved to dismiss the first report on the ground that the report was signed by a nurse when the statute requires a physician's report on causation. Before the hearing on the motion, Brewer served a supplemental report by a physician and moved for a 30-day extension to allow the supplement to cure the deficiency. The trial court denied the defendant nursing home's motion to dismiss. The court of appeals held that the trial court did not err in granting the 30-day extension, but did err by allowing a new report from a different expert. The Supreme Court HOLDS that the trial court did not err by allowing the supplemental report from a physician, citing *Lewis v. Funderburk*.

Opinion in HTML
Opinion in PDF
Briefs

08-0192
In re NEXT Financial Group Inc.
from Harris County and the 14th District Court of Appeals, Houston
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether a former securities broker must arbitrate a claim that his employer wrongfully discharged him for refusing to commit an illegal act. The Supreme Court HOLDS that the employee's *Sabine Pilot* claim falls within the scope of his arbitration agreement and is not subject to an exception limited to statutory employment-discrimination claims.

Opinion in HTML

Opinion in PDF
Briefs

ISSUES SUMMARIES ON PETITIONS GRANTED ORAL ARGUMENT IN TODAY'S ORDERS

08-0061
State of Texas v. Central Expressway Sign Associates, et al.
from Dallas County and the Fifth District Court of Appeals, Dallas
Oral argument set January 13, 2009

Among issues in this challenge to damages awarded in a condemnation is whether expert testimony on billboard-advertising income should have been be factored into the award and whether testimony about the income should have been excluded.

Briefs
Court of appeals opinion