

REVISED - August 5, 1999

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 97-50563

KEN FITZGERALD, doing business
as Performance Orthopaedics,

Plaintiff-Appellant,

versus

ADVANCED SPINE FIXATION SYSTEMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

July 21, 1999

Before POLITZ, SMITH, and DUHÉ, Circuit Judges.

POLITZ, Circuit Judge:

The undisputed facts of this case are relatively straightforward. Ken Fitzgerald, doing business as Performance Orthopedics, was dismissed from a products liability suit because, although Fitzgerald sold some of the allegedly defective spinal fixation devices, he did not sell the devices which were implanted in the plaintiffs. Fitzgerald subsequently sought indemnification from the manufacturer of the allegedly defective products, Advanced Spine Fixation Systems, for the attorneys' fees and costs incurred defending the action. The district court denied Fitzgerald's motion for summary judgment and granted Advanced Spine's adverse motion, finding that the Texas Products Liability Act of

1993, Tex. Civ. Pract. & Rem. Code Ann. § 82.002, did not provide for manufacturer indemnity to retailers that did not sell the “injuring product” to the plaintiffs.

On appeal we noted that this was an unresolved issue of state law and certified the following question to the Supreme Court of Texas:

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 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.¹

The Supreme Court of Texas accepted certification and, in a majority opinion, answered the question in the affirmative.² Accordingly, in this diversity jurisdiction action, being informed by the Supreme Court of Texas that the Texas Products Liability Act of 1993 allows Fitzgerald to seek indemnity from Advanced Spine for attorneys’ fees and costs, we VACATE the judgment of the district court and REMAND for further proceedings consistent herewith.

¹ **Fitzgerald v. Advanced Spine Fixations Sys., Inc.**, 143 F.3d 935, 936 (5th Cir. 1998).

² **Fitzgerald v. Advanced Spine Fixation Sys., Inc.**, No. 98-0560, 1999 WL 450861, at * 1 (Tex. July 1, 1999).