

# NO. 08-0592

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IN THE  
SUPREME COURT OF TEXAS

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FRESH COAT, INC.,

*Petitioner/Cross-Respondent,*

v.

K-2, INC.,

*Respondent/Cross-Petitioner.*

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On appeal from the 221st Judicial District Court  
of Montgomery County, Texas  
Trial Court Cause No. 00-09-05961-CV  
Court of Appeals No. 09-06-00251-CV

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## **PETITIONER'S BRIEF ON THE MERITS**

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Respondent/Defendant/  
Cross-Petitioner: K-2, Inc. (a/k/a Finestone)

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## STATEMENT OF THE CASE

- Nature of the case:* This case involves questions of first impression regarding indemnity rights under Texas Civil Practice & Remedies Code § 82.002. Alleging defective EIFS<sup>1</sup> in a products liability action, a group of homeowners sued their homebuilder, an EIFS subcontractor, and the EIFS manufacturer. Among other important issues, the Court must decide whether a product manufacturer owes indemnity for a payment one “seller” makes to another “seller” in settlement of claims arising from a products liability action.
- Trial court:* The Honorable Suzanne Stovall, 221st Judicial District Court of Montgomery County, Texas.
- Trial court result:* Jury verdict and judgment in favor of Fresh Coat against Finestone.
- Court of Appeals:* Ninth Court of Appeals. Opinion by Justice David Gaultney, joined by Chief Justice Steve McKeithen and Justice Hollis Horton. *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386 (Tex. App.—Beaumont 2008, pet. filed).
- Parties in the Court of Appeals:* Appellant: K-2, Inc.  
Appellee: Fresh Coat, Inc.
- Court of Appeals disposition:* The court of appeals affirmed the judgment in part, but reversed the portion of the judgment awarding Fresh Coat indemnity from Finestone for a settlement payment Fresh Coat made to Life Forms, the general contractor.

## STATEMENT OF JURISDICTION

This Court has jurisdiction over Fresh Coat’s petition for review under Texas Government Code §§ 22.001 (2), (3), and (6).

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<sup>1</sup> “EIFS” is an acronym for “Exterior Insulation and Finish System,” a synthetic stucco exterior cladding applied to homes. (24 RR 113; Ex. FS 525).

## ISSUES PRESENTED

As part of a products liability action, a seller asserted a cross-claim against another seller for, among other things, contractual indemnity under a subcontract between the two sellers. The sellers settled the cross-claim and the payor seller sought indemnity for the payment from the manufacturer under Civil Practice & Remedies Code § 82.002(a), which requires product manufacturers to indemnify innocent sellers for losses arising out of products liability actions. An exception to § 82.002(a)'s indemnity duty exists if the manufacturer proves that the loss was caused by the seller's negligent or other conduct for which the seller is "independently liable."

With this background, and broadly stated, the issue is whether a product manufacturer must indemnify a "seller" under Chapter 82 for the seller's settlement payment to another seller for qualifying products liability "losses." Included within this question of first impression are the following sub-issues:

1. With respect to a products liability action, is § 82.002(a)'s exception limited to situations where the seller's independent tortious conduct caused the loss to the plaintiffs? Or, does a seller's alleged contractual liability to indemnify another seller, in itself, satisfy the statutory exception to indemnity under § 82.002(a) and thereby relieve the manufacturer of its statutory duty to indemnify for the settlement?
2. Can a manufacturer establish § 82.002(a)'s exception without presenting evidence or securing a finding that the seller's negligence or other tortious conduct caused the loss?
3. Alternatively, does a seller's settlement of another seller's contractual indemnity cross-claim satisfy the statutory exception under § 82.002(a) when the manufacturer has not proven, or secured a finding, that the settling seller was independently liable under the contract to the other seller?

## STATEMENT OF FACTS

### *A homebuilder engages Fresh Coat to install Finestone's EIFS.*

Life Forms, Inc., a homebuilder, contracted Petitioner Fresh Coat to apply a synthetic stucco exterior cladding system known in the construction industry as “EIFS” to homes under construction in The Woodlands, Texas. (8 RR 18; 14 RR 44-46; 19 RR 74-84; Ex. FS 525). Under its contract with Life Forms, Fresh Coat’s scope of work was limited to “synthetic stucco application and finish,” together with the “labor, services, and/or materials, equipment, transportation or facilities necessary” to accomplish its task. (Ex. FS 525). Respondent K-2 (“Finestone”) is the manufacturer of the EIFS components at issue. Fresh Coat installed Finestone’s EIFS on 41 of the 90 homes involved in this lawsuit. (19 RR 86-88).

### *Fresh Coat applied EIFS based on Finestone's training and instruction.*

EIFS is an exterior cladding or siding used to insulate a house or other building. (5 RR 19-20). Finestone’s EIFS is comprised of several component parts: (a) extruded polystyrene boards (an insulating material like styrofoam), (b) a cementitious base coat, (c) a plastic mesh, and (d) another cementitious finish coat that has the look and texture of traditional stucco. (14 RR 63-64; 24 RR 144-145). In performing its work, Fresh Coat assembled all Finestone’s EIFS component parts on site. Fresh Coat performed its task based on the training and certification it received from Finestone and according to Finestone’s instructions and specifications. (5 RR 34-36; 14 RR 21, 42, 63-64) (Ex. LF 387). Before permitting an EIFS applicator to apply its EIFS to a home, Finestone conducted a training and instruction course to certify that the applicator had sufficient

training and skill to install its EIFS. (5 RR 34-36; 7 RR 69-70, 73) (Ex. LF 387). It is undisputed that Fresh Coat applied Finestone's EIFS consistent with the instructions and otherwise performed its work properly.

***Homeowners complain of water intrusion and damage caused by defective EIFS. They subsequently file a products liability action against Life Forms, Fresh Coat, and Finestone.***

In 1997, Life Forms notified Fresh Coat that numerous homeowners whose homes were clad with Finestone's EIFS were experiencing significant water leaks and damage. (9 RR 141-43). The homeowners complained that the EIFS cladding allowed the intrusion of, and then trapped, water in the area between the EIFS and the structures' framing. (9 RR 152-70). In an effort to assist Life Forms in addressing homeowners' complaints, and to discover the source of the intrusion, Life Forms and Fresh Coat went to great lengths to identify the cause and create a remedy. Life Forms hired an engineer to devise a repair plan addressing the perceived source of water intrusion. (8 RR 142). Life Forms consulted directly with Finestone about the repair methodology, and Finestone agreed with the engineer's findings and recommendations for the repair. (8 RR 150-57). The repairs proceeded, but failed to resolve the homeowners' problems with water intrusion and damage. (15 RR 12, 47-48).

In 2000, over ninety homeowners whose homes were clad with Finestone's EIFS sued Life Forms, Fresh Coat, and Finestone (among others)<sup>2</sup> because of water penetration and mold growth allegedly caused by EIFS. (1 CR 12-28; 2 CR 351-84; 5 RR 12, 19-20).

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<sup>2</sup> Another defendant was Griesenbeck Architectural Products, Inc. ("Griesenbeck"), an EIFS distributor. Griesenbeck's indemnity claims against Finestone were tried with Fresh Coat's claims, but Griesenbeck and Finestone settled on appeal.

The lawsuit was known in the courts below as the “Brunson” suit. The homeowners asserted numerous causes of action arising out of the marketing, sale and distribution of EIFS, which they alleged to be a defective product. (8 RR 170-71; 2 CR 351-384). They sought damages for the lost value of their homes, repair costs, and compensation for personal injuries suffered as a result of mold contamination. (1 CR 12-28, 351-84).

Life Forms filed cross-claims against Fresh Coat and Finestone, seeking indemnity for losses arising out of the homeowners’ products liability action. (3 CR 580-595; 10 CR 2299-2321; Ex. FC 298; Ex. LF 144; Ex. FS 525). Like the homeowners, Life Forms asserted claims against Fresh Coat and Finestone for damages arising from a defective product. Fresh Coat also asserted a claim for indemnity against Finestone under Texas Civil Practice & Remedies Code § 82.002. Ultimately, the defendants collectively reached a settlement agreement with the plaintiff homeowners. Fresh Coat’s portion of the settlement with the homeowners was \$1,036,686.23. (20 RR 9-10).

However, the homeowner settlement did not resolve the indemnity disputes between Life Forms, Fresh Coat, and Finestone. Through its cross-claim, Life Forms sought indemnity from Fresh Coat under multiple theories, including negligence, products liability, breach of warranty, DTPA, statutory indemnity under § 82.002(a), and contractual indemnity. Life Forms’s contract claim was based on an indemnity provision contained in the subcontract between Fresh Coat and Life Forms. (Ex. FS 525). Life Forms and Fresh Coat eventually settled all claims between them, which included a payment of \$1,203,995.50 by Fresh Coat to Life Forms as reimbursement for a portion of the loss from the homeowners’ products liability action. (20 RR 9-10) (Ex. FS 813). As

part of the settlement, Fresh Coat expressly denied it was liable to Life Forms.<sup>3</sup>

***Fresh Coat seeks indemnity from Finestone  
and obtains a judgment in its favor.***

In settling with Life Forms, Fresh Coat reserved all of its rights to indemnity against Finestone under Texas law. (Ex. FS 813, p. 6). In Fresh Coat's Second Amended Cross-Claim (2 CR 270-71), Fresh Coat sought indemnity from Finestone under § 82.002(a) for (1) the \$1,036,686.23 settlement amount Fresh Coat paid to the homeowners, (2) the \$1,203,995.50 settlement amount paid to Life Forms, and (3) reasonable and necessary attorneys' fees and costs. These claims were tried to a jury. At the conclusion of trial, the jury found in favor of Fresh Coat and against Finestone, awarding damages in the full amounts requested of \$1,036,686.23 for the settlement payment to the homeowners, \$1,203,995.50 for the Life Forms settlement payment, and attorneys' fees and costs of \$726,642.23. (18 CR 4113-51). The trial court signed a final judgment in accordance with the verdict on March 15, 2006. (21 CR 4715-16; 22 CR 4786-88).<sup>4</sup>

Finestone appealed. The Beaumont Court of Appeals affirmed the judgment as to the homeowner settlement, but reversed as to Fresh Coat's settlement payment to Life

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<sup>3</sup> The settlement agreement between Life Forms and Fresh Coat states: "[i]t is understood and agreed that, by entering into the Agreement, the Parties do not admit liability for any of the Homeowners' Claims, Life Forms' or Fresh Coat's Indemnity Claims or that have been asserted between or among them, or that could have been asserted, such liability being expressly denied. The Parties have entered into the Agreement in compromise and settlement of disputed claims." (Ex. 813, pp. 6-7).

<sup>4</sup> The jury also found in favor of Life Forms and others on their respective claims against Finestone. On appeal, the issues between Life Forms and Finestone were resolved so that the only disputes remaining are between Fresh Coat and Finestone.

Forms. The court concluded Fresh Coat could not recover indemnity from Finestone for the settlement amount paid to Life Forms because the payment fell within the exception to indemnity contemplated by § 82.002(a), which excludes from the manufacturer's indemnity duty "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." TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(a) (Vernon 2005). According to the Beaumont Court of Appeals, Fresh Coat settled with Life Forms solely to compromise Life Forms's contractual indemnity claim and, therefore, the settlement fell within the exception. *K-2*, 253 S.W.3d at 395-96. This was the only basis for the court of appeals's decision to reverse as to the Life Forms settlement payment.

## SUMMARY OF THE ARGUMENT

The court of appeals held that Fresh Coat's payment to Life Forms was "solely" due to its contractual relationship with Life Forms and therefore fell within the exception to indemnity under Chapter 82, which relieves a manufacturer from indemnification to a seller to the extent the seller is "independently liable" for losses it caused. However, Finestone's argument for applicability of the exception is inconsistent with the statute's design and suffers from several fatal shortcomings.

For instance, Finestone has demonstrated only that Fresh Coat settled a products liability action. Such a showing is not sufficient to allow a manufacturer to avoid its indemnity duty under Chapter 82. Contrary to the court of appeals's view, Finestone, like all product manufacturers, is required to absorb Fresh Coat's Chapter 82 losses, which include payments to compromise cross-claims asserted against it in a products liability action.

Moreover, Finestone did not present evidence, or secure the necessary findings, of independent liability against Fresh Coat to support the exception. The court of appeals erroneously assumed that a contractual indemnity promise one seller makes to another seller qualifies as the type of conduct or event for which a seller can be "independently liable" to trigger the exception under § 82.002(a). But the Act's text and legislative history confirm that only a seller's negligence or other *tortious* conduct in connection with its involvement with the product, such as negligently modifying or altering the product, can support the exception. No such evidence exists here. Even assuming a finding of Fresh Coat's contractual indemnity liability to Life Forms would be

sufficient—and it is not—Finestone did not offer evidence or obtain a finding on that contention either.

Indeed, courts must construe and apply Chapter 82’s duties as though no separate contractual indemnity rights exist. As the Act states, a manufacturer’s statutory duty to indemnify sellers exists *independently* of any contractual obligations between parties. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(e)(2). Therefore, the court of appeals erred in holding that Finestone was relieved of its statutory indemnity duty simply because Fresh Coat settled the claims asserted against it by Life Forms based on separate indemnity provisions in the subcontract.

Additionally, for a manufacturer to invoke the exception against a seller, the “loss” to the claimants must have been caused by the seller. Because the settlement to Life Forms was representative of compensable “loss” as defined by the code, and further, because there is absolutely no evidence that Fresh Coat caused any portion of the losses complained of by the Brunson plaintiffs, the exception does not apply.

Upholding Fresh Coat’s right to indemnity for the Life Forms settlement is fully consistent with the statute’s purpose, which is to protect innocent sellers like Fresh Coat. Holding otherwise insulates defective product manufacturers from absorbing losses for which, as here, they are otherwise responsible under the Act. The court of appeals’s decision vitiates the well-considered legislative scheme and will have a severe and adverse impact on contractors across the state if not corrected. The Court should reverse the court of appeals judgment, in part, and fully affirm the trial court’s judgment.

## STANDARDS OF REVIEW

### A. Statutory review is *de novo*.

Statutory construction is a legal question, which this Court reviews *de novo*. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). The Court's goal is to "give effect to all [a statute's] words and, if possible, ... not treat any statutory language as mere surplusage." *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006). The Court is to use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008); TEX. GOV'T CODE ANN. § 311.011(b) (Vernon 2006). Otherwise, if the statute is clear and unambiguous, the Court must apply its words according to their common meaning in a way that gives effect to every word, clause, and sentence,<sup>5</sup> unless a contrary intention is apparent from the context,<sup>6</sup> or unless such a construction leads to absurd results.<sup>7</sup> Courts presume the Legislature intended a just and reasonable result by enacting the statute. TEX. GOV'T CODE ANN. at § 311.021(3). When a statute's language is clear and unambiguous, it is unnecessary to resort to rules of construction or extrinsic aids to construe the language. *See St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505

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<sup>5</sup> *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004).

<sup>6</sup> *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n*, 616 S.W.2d 187, 189 (Tex. 1981).

<sup>7</sup> *University of Tex. S.W. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004). *See also Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004) (noting when statutory text is unambiguous, courts must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results).

(Tex. 1997); *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974).

**B. The legal sufficiency framework is well-established and must be applied viewing the evidence most favorably in support of the verdict.**

The court of appeals interpreted Finestone’s argument as a legal sufficiency challenge to the jury’s adverse finding that the Life Forms settlement payment was recoverable. When conducting a legal sufficiency review, an appellate court views the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). This Court has held that a no evidence challenge will be sustained when:

- (1) the record discloses a complete absence of evidence of a vital fact;
- (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact;
- (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or
- (4) the evidence establishes conclusively the opposite of the vital fact.

*Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 Tex. L. Rev. 361, 362-63 (1960)). Because Finestone’s challenge is to an adverse finding on which it bore the burden of proof, it “must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.” *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

Though review of statutory text and consideration of “legal sufficiency” issues are questions of law, the Court must also remain mindful that, insofar as its legal review

depends on the facts both expressly found by the jury and implicit in the jury's verdict, the Court must view the facts in the light most supportive of the verdict. In so doing, the Court must defer to jurors as the sole judges of witnesses' credibility and the weight to give their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex. 1993). Jurors may choose to believe one witness and disbelieve another, *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986), and may even discredit uncontradicted and unimpeached testimony from disinterested witnesses. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 653-54 (Tex. 1999). Reviewing courts cannot impose their own opinions to the contrary. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000). “[W]henver reasonable jurors could decide what testimony to discard, a reviewing court must assume they did so in favor of their verdict, and disregard it in the course of legal sufficiency review.” *City of Keller*, 168 S.W.3d at 820. Further, it is the jury's sole province to resolve conflicts in the evidence. *Id.* Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume jurors resolved all conflicts in accordance with that verdict. *Id.*

## ARGUMENT AND AUTHORITIES

### A. Introduction.

In relevant part, the Texas Products Liability Act provides:

(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.

TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(a) (emphasis added). To begin with, there is *no evidence* and *no finding* that Fresh Coat was negligent in applying Finestone's EIFS to the homes. Fresh Coat did nothing wrong in performing the task it contracted with Life Forms to perform and did not negligently modify or alter the product in any way. Finestone has not argued to the contrary. Fresh Coat is precisely the type of innocent seller the Act is designed to protect. Finestone, on the other hand, and as the jury found, designed and marketed defective EIFS, committed fraud, and intentionally violated the DTPA. (CR 4126-4128, 4132, 4135-4140).

Accordingly, this case is not about whether Fresh Coat was negligent, as it is undisputed Fresh Coat was not negligent. Rather, Finestone has attempted to significantly broaden the scope of § 82.002(a)'s exception to encompass issues it was not designed to reach. The court of appeals agreed with Finestone on this point, holding that the settlement of a claim (brought as part of a products liability action) between sellers (or sellers/manufacturers) based on an indemnity contract between them, with nothing more, establishes the exception. Yet, historically in Texas, innocent sellers have always had the right to full indemnity from manufacturers whose products, like Finestone's, are

defective.<sup>8</sup> Until now, that right has never been curtailed by independent contractual indemnity duties (or rights) of innocent sellers. Other than the Beaumont Court of Appeals, no appellate court has ever recognized such a rule under the common law or Chapter 82. For the many reasons summarized herein, the court is incorrect and its opinion jeopardizes the effective operation of the Act as the Legislature intended.

**B. As the product manufacturer, Finestone has the burden to prove and secure findings establishing § 82.002(a)'s exception to indemnity.**

After having found Fresh Coat was a “seller,” Finestone was a “manufacturer” of a defective product, and that Fresh Coat incurred “losses” as a result of a products liability action, the jury assessed damages, guided by instructions tracking the statutory text which told the jury to exclude from its award any losses caused by Fresh Coat’s own wrongful conduct:

What is the amount, stated in dollars and cents, of Fresh Coat’s loss?

Consider the following elements of damages, if any, and none other. Answer in dollars and cents for damages, if any, that were sustained. In answering this question, *exclude any amount that constitutes loss caused by Fresh Coat’s own negligence, intentional misconduct, or other act or omission, if any (such as negligently modifying or altering the product), for which Fresh Coat is independently liable.* Do not add any amount for interest on damages, if any. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss.

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<sup>8</sup> *E.g., Humana Hosp. Corp. v. American Med. Sys., Inc.*, 785 S.W.2d 144, 145 (Tex. 1990) (“Generally speaking, a person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to *full* indemnity from the other for expenditures properly made to discharge the liability.”) (emphasis added).

a. Reasonable settlement amounts paid to homeowners.

Answer: \$ 1,036,686.23

b. Reasonable settlement amounts paid to Life Forms.

Answer: \$ 1,203,995.50

c. Reasonable attorneys' fees, expenses, and costs in defending the products liability action and in pursuing its indemnity claim against Finestone.

Answer: \$ 726,642.23

d. Reasonable attorneys' fees, expenses, and costs for an appeal to the court of appeals.

Answer: \$ 30,000

e. Reasonable attorneys' fees, expenses, and costs for an appeal to the Supreme Court of Texas.

(i) if a petition for review is filed:

Answer: \$7,500

(ii) if the court requests briefs on the merits and argument:

Answer: \$ 13,000

(CR 4125) (emphasis added).

As the answers to Question Nos. 3 and 7 indicate, the jury found that Fresh Coat did not cause any of the losses for which it sought recovery. Specifically, in responding to Question No. 7, the damage question, the court expressly instructed the jury to “exclude any amount that constitutes loss caused by Fresh Coat’s own negligence . . . or other act or omission, if any . . . for which Fresh Coat is independently liable.” (CR 4125). That the jury awarded \$1.2 million relating to the reasonable amount Fresh Coat

paid to Life Forms shows that it found the settlement was not an amount for which Fresh Coat was independently responsible. In accordance with the applicable standard of review, the Court must view the evidence in the light most favorable to this finding.<sup>9</sup>

To the extent Finestone contended the Life Forms settlement payment fell within the exception to indemnity, it was unquestionably Finestone's burden to prove it. In its response to Fresh Coat's petition, Finestone argues it has no duty whatsoever to prove or secure a finding of Fresh Coat's liability for its alleged independently wrongful conduct and, further, that "Fresh Coat cites to no authority requiring such." (Response, p. 6, n. 2). To the contrary, precedent of this Court and other Texas appellate courts explicitly imposes on product manufacturers the burden to prove and obtain a finding establishing the exception to indemnity under Chapter 82. This Court, since its earliest teachings on the subject, has expressly and consistently required product manufacturers to (a) *prove* and (b) obtain a *finding* that the indemnitee (or seller) is "independently liable" for the loss in question. *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255, 258-60 (Tex. 2006) ("To escape this duty to indemnify, the indemnitor must *prove* the indemnitee's independent culpability") (emphasis added); *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001) ("exception applies only upon a *finding* that the seller was independently liable.") (emphasis added).

Intermediate appellate courts are in accord. *E.g.*, *Oasis Oil Corp. v. Koch Ref. Co. L.P.*, 60 S.W.3d 248, 254 (Tex. App.—Corpus Christi 2001, pet. denied) (exception to

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<sup>9</sup> Notably, in the court of appeals, Finestone did not challenge the instructions included with Question No. 7.

indemnity established only by *finding* the seller's independent conduct was cause of plaintiff's injury) (emphasis added); *Panatrol Corp. v. Emerson Elec. Co.*, 163 S.W.3d 182, 190 (Tex. App.—San Antonio 2005, pet. denied); *Freeman Fin. Inv. Co. v. Toyota Motor Corp.*, 109 S.W.3d 29, 34 (Tex. App.—Dallas 2003, pet. denied) (exception to indemnification duty established only by *finding* the seller's independent conduct caused the loss) (emphasis added); *Bren-Tex Tractor Co. v. Massey-Ferguson, Inc.*, 97 S.W.3d 155, 158 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (same).

That a manufacturer must secure a finding, supported by evidence, of the seller's independently culpable conduct should be of no surprise, considering this substantial body of case law. Indeed, the Beaumont Court of Appeals, following this Court's pronouncements, explicitly noted Finestone's burden on the issue, stating "the statute imposes on the manufacturer the burden not only to prove the statutory exception, *but also to obtain a finding of the amount of the portion of the loss excluded under the exception.*" *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 397 (Tex. App.—Beaumont 2008, pet. filed) (emphasis added) (citing *Meritor*, 44 S.W.3d at 91). The court of appeals quite correctly made that point because the statute squarely compels the manufacturer to prove every "loss" it claims was caused by the seller's independently wrongful conduct.<sup>10</sup>

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<sup>10</sup> The court of appeals held Finestone met its burden with respect to the Life Forms settlement payment, but did not meet its burden with respect to the attorneys' fee issue. Curiously, the court of appeals reached both conclusions despite the fact that Finestone did not obtain the required findings on *either* issue. The court should have held Finestone failed to meet its burden of proof as to the Life Forms settlement payment as well.

**C. Finestone did not meet its burden and the court of appeals’s holding is error.**

At trial, Fresh Coat met its initial burden to show entitlement to indemnity under the Act. It demonstrated and obtained jury findings that: (a) Finestone is a “manufacturer;” (b) Fresh Coat is a “seller;” (c) Fresh Coat was joined in a “products liability action;”<sup>11</sup> and (d) Fresh Coat incurred a “loss” arising from the action. Fresh Coat’s burden is not heavy, as “a manufacturer’s duty to indemnify the seller is invoked by the plaintiff’s pleadings and joinder of the seller as a defendant.” *Meritor*, 44 S.W.3d at 91. Where these elements are established, “[a] manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action... .” TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(a).

The only time this is not true is when a loss is “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.” *Id.* Again, to establish § 82.002(a)’s exception, it is the manufacturer’s burden to prove by evidence—mere pleadings or allegations do not suffice—that the indemnitee is “independently liable” for the loss. *Meritor*, 44 S.W.3d at 91; *Oasis Oil*, 60 S.W.3d at 254; *Panatrol*, 163 S.W.3d at 190; *Freeman Financial*, 109 S.W.3d at 34.

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<sup>11</sup> Consistent with Chapter 82, the trial court instructed the jury that a “products liability action” means “any lawsuit against the party for recovery of damages arising out of personal injury, death, or property damage allegedly caused by Finestone’s EIFS—regardless whether the case went to trial or was settled; regardless whether the lawsuit is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories; and regardless whether the party sold the particular product claimed to have harmed the plaintiffs in the lawsuit.” (CR 4121). Finestone has not challenged any portion of this definition on appeal. Nor has Finestone challenged any of the definitions in the charge, all of which tracked the statutory text.

Finestone has failed to meet its burden in several critical respects. It has, for instance, shown only that Fresh Coat settled a products liability action. That is not sufficient to allow a manufacturer to avoid its indemnity duty under Chapter 82. Moreover, Finestone did not present evidence, or secure the necessary findings, of independent liability against Fresh Coat. To invoke the statutory exception, Fresh Coat must have been negligent, or otherwise culpable in tort, in connection with its involvement with the product. Even assuming a finding of Fresh Coat's contractual indemnity liability to Life Forms would be sufficient—and it is not—Finestone did not offer evidence or obtain a finding on that contention either. In any event, there is no evidence any independent conduct by Fresh Coat caused the homeowners' losses.

1. *First, Finestone showed merely that Fresh Coat settled a claim in a products liability action, which is not sufficient to establish the exception to indemnity.*

It is undisputed a subcontract existed between Fresh Coat and Life Forms. (Petition, tab E). That contract contained an indemnity clause enuring to the benefit of Life Forms, the general contractor. (Petition, tab E, pp. 8-9). However, Fresh Coat and Life Forms disagreed as to whether, and to what extent, the indemnity provision was valid or applied to the Brunson homeowners' claims. Life Forms's cross-claim against Fresh Coat in the homeowners' products liability action was based not only on the purported breach of the contract's indemnity provision, but also on allegations of negligence, products liability, breach of warranty, and DTPA. All Life Forms' claims related to EIFS. Life Forms alleged EIFS was defective, that Fresh Coat was negligent in performing its work and supplying materials, and that the homes (and Life Forms)

sustained damages as a result.

Eventually, Life Forms and Fresh Coat settled the cross-claim. (Ex. 813). As part of the settlement, Fresh Coat paid \$1,203,995.50 in exchange for a release. Further, the settlement agreement and release explicitly states that the parties are compromising all claims and denying liability: “[i]t is understood and agreed that, by entering into the Agreement, the Parties do not admit liability for any of the Homeowners’ Claims, Life Forms’ or Fresh Coat’s Indemnity Claims or that have been asserted between or among them, or that could have been asserted, such liability being expressly denied. The Parties have entered into the Agreement in compromise and settlement of disputed claims.” (Ex. 813, pp. 6-7).

At trial, Fresh Coat’s counsel testified about the Life Forms settlement and the motivation to enter into it. This testimony is the sole basis of Finestone’s evidentiary challenge, which Fresh Coat discusses later in this brief. But even construing the evidence in the light most favorable to Finestone, though contrary to the proper standard of review, the bottom line is that Fresh Coat merely settled allegations made against it in the products liability action. As Chapter 82, and this Court, make clear, a seller has the right to be indemnified by a manufacturer for all losses arising from the seller’s joinder in a products liability action, including costs to settle claims asserted against it. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(b) and (e)(1); *Hudiburg*, 199 S.W.3d at 255-56 (seller entitled to statutory indemnity even if claims settled); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999).

Further, the nature of the claims alleged against a seller as part of a products

liability action is of no consequence, so long as they are “properly joined,” as here. *Meritor*, 44 S.W.3d at 89. As *Meritor* instructs, costs associated with defending causes of action other than products liability claims, but which are properly asserted in a products liability action, are necessarily included as part of the “loss.” *Id.* at 87. If costs to defend causes of action other than a “products liability” claim are included as part of the “loss” arising out of a products liability action, then costs to *settle* those causes of action are likewise properly included. This Court’s precedent compels that result because Chapter 82 does not differentiate between how underlying claims are resolved, whether by settlement, as here, or otherwise. *Fitzgerald*, 996 S.W.2d at 867. Under the Act, and this Court’s precedent, Fresh Coat was entitled to settle claims brought against it arising from the products liability action (including Life Forms’ breach of contract claim) with the full expectation that it could pass on those costs to the manufacturer.

Because Fresh Coat was joined in a products liability action, and settled the claims against it, Finestone owes indemnity for all those amounts. The term “reasonable damages” includes amounts the seller was made to pay due to any judgment against it, as well as any settlements. *See* TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(b) , (e). Even assuming Fresh Coat paid money to Life Forms “solely” because of a contractual obligation, the settlement nonetheless constitutes damage to Fresh Coat “arising out of” the products liability action because Life Forms’ claims against Fresh Coat would not exist but for the products liability action. Whether the settlement was motivated by a perceived greater risk of exposure as to any one claim over another is irrelevant to the manufacturer’s indemnity obligation. The court erred in holding to the contrary.

2. *Second, Finestone failed in its burden because contractual indemnity obligations between sellers do not implicate § 82.002(a)'s exception.*
  - a. The exception applies only when a seller is independently liable in tort, not when a seller assumes indemnity duties under a contract.

A manufacturer may not rely on a seller's contractual obligations to trigger the exception. Construing the plain terms of the statute, § 82.002(a) does not include within the exception a seller's indemnity obligations agreed to in a contract with another seller. By holding Fresh Coat's settlement of the contractual indemnity claim satisfied the exception, the court of appeals has attributed meaning to § 82.002(a)'s exception that is not supported by the words the Legislature chose. Notably, the code speaks in terms of a seller's conduct in tort that causes the loss. It references "negligence" and "intentional misconduct," neither of which was found against Fresh Coat. The Act relieves manufacturers of the obligation to indemnify sellers only when, and to the degree, the seller's independent, *tortious* conduct caused the loss. This interpretation is supported by case law. "[O]nly loss caused by the seller's *negligence* will defeat a duty to indemnify." *Freightliner Corp. v. Ruan Leasing Co.*, 6 S.W.3d 726, 731 (Tex. App.—Austin 1999), *aff'd*, *Meritor*, 44 S.W.3d at 89 (emphasis added).

The Legislature's contemplation of tort liability is self-evident from the statutory text, which references "negligence" and "intentional misconduct." To be sure, a manufacturer can invoke the exception by showing a seller's "other act or omission" caused the loss. But the Legislature clearly identified the types of other "acts or omissions" it had in mind: conduct in tort, "such as negligently modifying or altering the product." TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(a).

Further, the exception’s incorporation of causative fault under tort principles is confirmed by legislative history, as discussed in *Meritor*. *Meritor*, 44 S.W.3d at 91. “The Senate Bill Analysis explains that the Act’s purpose was to ‘expand the indemnity rights sellers now have by requiring manufacturers to indemnify them, regardless of the outcome of the suit, for all losses from a products liability suit where the seller was not at fault.’” *Meritor*, 44 S.W.3d at 91 (citing SENATE COMM. ON ECONOMIC DEVELOPMENT, BILL ANALYSIS, Tex. S.B. 4, 73rd Leg., R.S. at 2 (1993)). “The House Bill Analysis likewise confirms that the Act requires manufacturers to indemnify sellers for all costs incurred in a products liability action “as long as the seller was not negligent or otherwise at fault.” *Id.* (citing HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 4, 73rd leg., R.S. at 3 (1993)). The bill analysis further explains that under the exception, “[r]etailers would still be held responsible if they were truly negligent, engaged in intentional misconduct or altered a product.” *Id.* Thus, the Act’s legislative history underscores the Legislature’s intent that a seller should bear a portion of the loss only when the seller is at fault under negligence principles for some of the loss. There is no such evidence here.

- b. The exception’s focus is Fresh Coat’s interaction with the product, not the business relationship between Fresh Coat and Life Forms.

The Act’s focus on causative tort principles makes sense because, at its core, the crux of the exception is on the seller’s fault *as it performs* work or otherwise assembles or modifies a product. From a practical standpoint, the consequence of the court of appeals’s view is that contractors like Fresh Coat will lose at least a portion of their

statutory indemnity rights simply by signing a contract containing an indemnity clause, which often occurs *before* they perform any work at all. And, according to Finestone, Fresh Coat must absorb a portion of the “loss arising from a products liability action” even though its work was perfect. The court of appeals’s holding vitiates the Act by denying innocent sellers the full measure of indemnity rights granted to them.

The court of appeals justified its holding, in part, on the perceived need to avoid interpreting § 82.002(a)’s exception from including within its scope “agreements to which a product manufacturer is not a party.” *K-2*, 253 S.W.3d at 396. Assuredly, and contrary to the court of appeals’s suggestion, Fresh Coat is not urging this Court to interpret the Act to make manufacturers parties to contracts they did not sign. Fresh Coat simply wants the Act enforced as it is written. Whether Finestone is privy to the relationship, contractual or otherwise, between Life Forms and Fresh Coat makes no difference with respect to operation of § 82.002(a)’s exception. Manufacturers like Finestone have mandatory, automatic indemnity duties to all sellers (and sellers/manufacturers) under Chapter 82, regardless whether they are privy to the business dealings between sellers (and sellers/manufacturers) in the chain of distribution.<sup>12</sup> The applicability of the exception does not turn on whether subcontractors

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<sup>12</sup> In *Hudiburg*, this Court discussed statutory indemnity in the context of component part manufacturers and those who assemble component parts into finished products. Finestone is a manufacturer of a “component product alleged by a claimant to be defective” and has a duty “to indemnify an innocent seller/manufacture of a finished product which incorporates the component from loss arising out of a products liability action related to the alleged defect.” *Hudiburg*, 199 S.W.3d at 256. Also, Fresh Coat squarely fits within the meaning of “seller/manufacture,” as this Court used the term, because it assembled Finestone’s EIFS components.

independently assume any indemnity obligations under subcontracts with homebuilders. The assumption of indemnity duties by sellers is not pertinent to application of the statutory exception; rather, it is a seller’s fault in “modifying or altering the product”<sup>13</sup>—for example, by assembling component parts negligently—that gives rise to application of the exception. Here, the sole basis for invoking the exception has nothing to do with any fault of Fresh Coat in its assembly of Finestone’s EIFS components.

- c. Courts must construe the exception independently of a seller’s contractual duties.

In concluding Fresh Coat’s payment to Life Forms fell within § 82.002(a)’s exception, the court of appeals disregarded explicit text elsewhere in the section, which requires manufacturers to indemnify innocent sellers regardless of other contractual rights or obligations. Assuming Fresh Coat was, in fact, “independently liable” to Life Forms for contractual indemnity, neither the existence of contractual indemnity rights between downstream sellers nor the settlement of disputes based on such rights extinguish manufacturers’ statutory indemnity duties under Chapter 82. This truth emanates directly from the Act, which plainly states that the manufacturer’s duty to indemnify is “in addition to any duty to indemnify established by ... contract.” *Id.* at § 82.002(e)(2). *See R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus., Inc.*, 208 S.W.3d 85, 88 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Notably, § 82.002(e)(2)’s reference to “any” indemnity contracts is broad; it means the statutory duty exists independently of *any* other obligations that may exist by contract, even indemnity contracts between sellers in

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<sup>13</sup> TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(a).

the chain of commerce to which manufacturers may not be privy.

Accordingly, § 82.002's obligations bind manufacturers regardless whether any other contractual duties exist. Any independent contractual indemnity duties existing between manufacturers and sellers—or, like here, between sellers—cannot override, supplant, replace, or extinguish the duty created by statute. The court of appeals's decision erroneously interprets the statutory indemnity duty as *extinguished* by settlement of Life Forms' contractual claim, but, to the contrary, Finestone's statutory duty exists separately from, and is not affected by, Fresh Coat's contract with Life Forms. To effectuate the legislature's directive, the Court must examine Finestone's statutory duties as though no contractual indemnity rights existed between any parties along the chain of commerce.

Unfortunately, the court of appeals interpreted the statute as though it said the exception is triggered by a seller's agreement to indemnify another seller in a contract. But the Act contains no such language. The omission is significant because had the legislature intended what Finestone urges, and what the court of appeals held, it would create a clear inconsistency in the statute. The statute would conflict internally if, in one section, it gave a benefit to manufacturers where a seller has a contractual duty to indemnify another seller, *id.* at § 82.002(a), but in another section, required manufacturers to indemnify regardless of any such contractual duties. *Id.* at § 82.002(e) (2) (statutory duty exists independently of any other duties established by contract). Statutory construction principles preclude such an interpretation because this Court must read the statute to give effect to all provisions and render none meaningless. *See Clint*

*Indep. Sch. Dist.*, 970 S.W.2d at 539. In ruling as it did, the court of appeals erroneously conflated the concept of proximate cause under tort constructs (which the statutory exception contemplates) with the assumption of liability by contract (which the statutory exception does not address).

Finally, not only is the court of appeals's decision improperly grounded on the existence of contractual indemnity duties between sellers, the result implicitly alters the meaning and effect of the subcontract between Fresh Coat and Life Forms. By signing the contract with Life Forms, Fresh Coat never agreed to waive its Chapter 82 indemnity rights against any product manufacturers. An EIFS subcontractor cannot be held to have effectively relinquished statutory rights existing under Chapter 82 simply by entering into a contract with a home builder, especially when the contract does not expressly say so. By holding as it did, the court of appeals read the subcontract as though Fresh Coat agreed, and intended, to waive statutory rights that exist independently of the contract. The contract contains no such language and Fresh Coat made no such agreement.

3. *Third, Finestone failed in its burden because it did not show Fresh Coat's wrongful conduct, for which it is independently liable, caused the homeowners' loss.*

In addition to proving the seller's negligence, § 82.002(a)'s exception requires a manufacturer to prove and secure a finding that the plaintiffs' loss was caused by the seller, which, in this case, means obtaining a finding that Fresh Coat's negligence caused the homeowners' loss. *Hudiburg*, 199 S.W.3d at 255, 258-60 (“To escape this duty to indemnify, the indemnitor must prove the indemnitee's independent culpability”; discussing whether seller's independent conduct caused plaintiff's loss). “[W]e think it is

not entitled to indemnity under the statute . . . if the *plaintiff's loss* was caused, not by alleged defects in GM's chassis or Rawson-Koenig's service body, but by acts or omissions attributable to Hudiburg independently." *Id.* at 260 (emphasis added). *See also Bren-Tex*, 97 S.W.3d at 158 & n. 5 (exception established only by finding that seller's independent conduct was *a cause of plaintiff's injury*) (emphasis added).

The statutory exception "requires a manufacturer to indemnify an innocent seller for certain damages and litigation expenses arising out of a products liability action, but requires sellers to bear the damages and expenses for *losses they cause*." *Meritor*, 44 S.W.3d at 88 (emphasis added); *Fitzgerald*, 996 S.W.2d at 867. "These words suggest that we are to include all direct allegations against the seller that relate to plaintiff's injury as part of the 'products liability action' and that we *exclude only those losses 'caused by' the seller*." *Meritor*, 44 S.W.3d at 90 (emphasis added). While Finestone's response to the petition contends Texas law imposes no such requirement, Finestone conceded the issue in its reply filed December 12, 2008, in which it acknowledged "...the exception 'is established by a finding that the seller's independent conduct was *a cause of the plaintiff's injury*.'" (Finestone's Reply, p. 3) (emphasis added) (citing *Meritor*, 44 S.W.3d at 91).

Finestone's admission further supports granting review and fully reinstating the trial court's judgment because Fresh Coat did not cause the loss to the Brunson plaintiffs and there is no evidence indicating otherwise. As discussed subsequently, the payment to Life Forms was made to settle claims arising out of the products liability action representative of losses suffered by the homeowners or Life Forms in defense costs.

These are amounts Life Forms could permissibly seek to recover from Finestone. Finestone has not shown that Fresh Coat had any liability to the homeowners or caused their loss in any way. There is no evidence that Fresh Coat failed to assemble the EIFS component parts in accordance with Finestone's instructions and Finestone does not contend otherwise. There was no jury question inquiring as to Fresh Coat's negligence. Indeed, by not submitting a question on Fresh Coat's negligence, Finestone conceded Fresh Coat did its work properly.<sup>14</sup> And the jury made no deductions from the damages sought and proved by Fresh Coat, meaning the jury found the settlement was not an amount for which Fresh Coat was independently responsible. The statutory exception "requires sellers to bear the damages and expenses for losses they cause." *Meritor*, 44 S.W.3d at 88. Because there is no finding, and no evidence, that Fresh Coat caused the loss to the underlying homeowners, the exception does not apply.

4. *Fourth, Finestone failed in its burden because it did not prove and secure a finding that Fresh Coat actually owed indemnity to Life Forms under the subcontract.*

Assuming the Court were to hold that a seller's contractual indemnity duties can satisfy the exception, the Court should nonetheless affirm the trial court's judgment in full because there is no finding that Fresh Coat was independently liable to Life Forms under the subcontract. All Finestone has shown, at most, is that Life Forms alleged Fresh Coat breached the subcontract's indemnity provisions and that Fresh Coat and Life Forms settled that allegation. The trial court did not find (or rule), and was not asked by

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<sup>14</sup> In contrast, Finestone specifically submitted a jury question on Life Forms's negligence. (CR 4130). Hence, Finestone's omission of a negligence question for Fresh Coat was deliberate.

Finestone to find (or rule), that Fresh Coat actually owed contractual indemnity to Life Forms. Moreover, absent submitting an issue to the jury and obtaining a finding on Fresh Coat's "independent liability," Finestone could have moved for directed verdict on the issue, but it did not do that either.

Rather, Finestone, and the appellate court, have focused entirely on Fresh Coat's *motivation* for the settlement, that is, whether the settlement was consummated by a desire to settle only the contractual indemnity claim, or Life Forms's other claims as well. But that issue is inconsequential. The reasons driving Fresh Coat's decision to settle claims in the products liability action are simply not relevant and do not foreclose indemnity under Chapter 82 for the full settlement amount from Finestone. This is because § 82.002(e) (1) clearly requires manufacturers to indemnify innocent sellers "without regard to the manner in which the action is concluded." TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(e) (1). If the manner in which claims against a seller are concluded does not diminish the seller's indemnity rights, then the *reason* for concluding the claims by settlement certainly does not diminish the seller's indemnity rights either. Nothing in the statute requires that the seller prove it settled a products liability claim only for some reasons over other reasons before its indemnity rights against the manufacturer vest. Nothing in the statute reduces a seller's indemnity rights depending on the reasons underlying a settlement of any part of a products liability action. Nothing in the statute reduces a seller's indemnity rights depending on whether it settled solely to resolve a contractual indemnity claim, or to resolve a contractual indemnity claim in

addition to other claims.<sup>15</sup> An allegation of “independent liability” against a seller in a products liability action—whether based on theories of contract, tort, or anything else—does not trigger the exception, nor does the settlement of such an allegation. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(e) (1). In ruling that Fresh Coat’s *settlement of an allegation* of contractual liability—as opposed to a *finding* of contractual liability—meets the statutory exception, the court of appeals abandoned the bedrock principles embodied in this Court’s jurisprudence and adopted a view that has absolutely no basis in statutory text.

**D. Fresh Coat’s position furthers the Act’s purpose because the settlement was for qualifying losses and the burden for them properly rests with Finestone.**

Affirming Fresh Coat’s right to indemnity for the Life Forms settlement is fully consistent with the statute’s purpose, which is to “protect innocent sellers who are drawn into products liability litigation solely because of the vicarious nature of that liability by assigning responsibility for the burden of that litigation to product manufacturers.” *Hudiburg*, 199 S.W.3d at 262. Fresh Coat is an innocent seller in every sense of the word. The statute places “primary liability on manufacturers, who are usually in a better position to recognize and remedy defects.” *Oasis Oil*, 60 S.W.3d at 253. Life Forms’s allegations against Fresh Coat, and the damages it sought from Fresh Coat, “relate[d] to

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<sup>15</sup> As the release shows, in connection with the homeowners’ claims, Life Forms “asserted various claims against Fresh Coat and sought to recover attorneys’ fees and settlement payments Life Forms had already incurred or would incur to defend and settle the Homeowners’ Claims against Life Forms.” (Ex. 813, p. 1). Life Forms claims were based upon, among other theories, statutory indemnity under Chapter 82 and contractual indemnity. (*Id.*) Even so, Fresh Coat would nonetheless be entitled to indemnity if the *only* claim Life Forms pleaded, and hence the *only* claim settled, was for contractual indemnity.

the plaintiffs' injury" and arose from the products liability action. It is Chapter 82's design to pass those costs on to the manufacturer. Finestone, therefore, is statutorily obligated to fully reimburse *all* losses incurred by any and all sellers arising from the products liability action based on its defective product.

Contracts between sellers do not, and should not, insulate defective product manufacturers from absorbing losses for which, as here, they are otherwise responsible under the Act. It makes absolutely no sense in light of the statutory scheme to preclude indemnity to innocent sellers when the amount paid by Fresh Coat to Life Forms could have been recovered by Life Forms directly from Finestone under Chapter 82 anyway because the amount represents qualifying statutory "losses." (20 RR 22; and Ex. FS 813). Finestone already owed Life Forms indemnity for the \$1.2 million figure because it represents amounts Life Forms incurred in defense of the products liability action and in settling homeowners' claims. Finestone owes this money under statute regardless of the existence, or terms, of subcontracts between downstream sellers. Had Fresh Coat paid the \$1.2 million directly to the Brunson homeowners as opposed to Life Forms, there is no dispute it would be entitled to indemnity from Finestone for the full amount of the settlement.<sup>16</sup> Finestone owes statutory reimbursement to *both* Fresh Coat and Life Forms. While Finestone cannot be made to pay twice for the same costs, it is immaterial whether Finestone pays all losses directly to the homeowners, to Life Forms, or pays some of the amount to Fresh Coat because Fresh Coat had previously reimbursed Life

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<sup>16</sup> Indeed, a portion of the damages awarded by the jury to Fresh Coat was for settlements paid directly to the Brunson homeowners. Finestone does not rely on the subcontract between Fresh Coat and Life Forms to challenge the recoverability of those settlements.

Forms for a portion of the losses. The point is that the amount paid from Fresh Coat to Life Forms was an amount representative of loss incurred by a seller in the *Brunson* products liability action and which related to the Finestone homes. Finestone cannot escape its obligation to pay for that loss merely because Life Forms was first reimbursed (in part) by Fresh Coat. Indeed, Finestone would be, and should be, responsible for the \$1.2 million figure had that amount been awarded as part of a judgment against Fresh Coat rather than paid as a settlement. Finestone, as a manufacturer, is statutorily obligated to *fully* reimburse *all* losses incurred by *any and all* sellers arising from a products liability action.

Assuming Fresh Coat had not settled with Life Forms, the only way Finestone could have escaped its obligation to reimburse the \$1.2 million to Life Forms directly was by proving Life Forms was negligent, which it failed to do. The jury expressly found no negligence or other wrongful conduct on the part of Life Forms. Thus, Finestone, having submitted an issue as to Life Forms's conduct and lost, failed to establish the statutory exception as to Life Forms. Yet, based on the court of appeals's outcome, Finestone—which committed fraud and intentional DTPA violations—is now the beneficiary of a most undeserved windfall because it is relieved of a portion of its statutory indemnity duty merely because Fresh Coat and Life Forms settled products liability claims, when the statute clearly allows such settlements to occur without any impairment of a seller's indemnity rights. As Finestone would otherwise owe Life Forms indemnity for the \$1.2 million amount, the statute certainly does not endorse shifting that burden to a completely innocent seller who did nothing more than settle allegations in the

products liability action.

This result makes perfect sense and is consistent with the overall statutory scheme, which ensures manufacturers bear ultimate responsibility for their products and all loss arising from products liability actions. The court of appeals's holding undermines this important legislative goal. Manufacturers should not be permitted to escape the obligations the Texas legislature has placed on them in such circumstances when it is uncontroverted the settlement funds all reimburse qualifying losses under the Act. Finestone simply wants to unfairly benefit from the fact that a contract between statutory "sellers" happens to contain an indemnity provision. The Court should flatly reject Finestone's efforts to place the costs of defective product litigation upon parties other than those on whom the Legislature has seen fit to put them.

**E. Affirming the court of appeals opinion will severely and adversely impact contractors across the state.**

The reverberations of the court of appeals's decision throughout Texas cannot be overstated. Contractual indemnity obligations running from subcontractors to homebuilders are not only the industry standard, one would be hard-pressed to find formal construction contracts not containing such provisions in the homebuilder's favor, as they are quite common in the construction industry. *K-2*, 253 S.W.3d at 396 (quoting testimony). Indeed, contractual indemnity provisions are not limited solely to the construction industry, as they are commonplace in other relationships as well. An important and extremely undesirable consequence of the court of appeals's ruling is the chilling effect it will have on voluntary settlement of claims between contractors who are

“sellers.” If, as the appellate court has ruled, a settlement of a contractual indemnity claim between sellers *extinguishes* the manufacturer’s indemnity duty under § 82.002(a), then intermediate sellers such as Fresh Coat will have no choice but to avoid settling product liability claims because their statutory indemnity rights will disappear. Any subcontractor potentially owing a contractual duty of indemnity will have a clear disincentive to settle for fear of permanently losing its statutory indemnity rights against the product manufacturer. Of course, Texas public policy strongly encourages settlements. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 267 (Tex. 1992). Insofar as product liability actions are concerned, the court of appeals’s decision forces subcontractors to defend contractual indemnity claims (and possibly other claims) through trial, even if settlement is otherwise an appropriate and sensible resolution for all parties.

**PRAYER**

Therefore, for the above reasons, Petitioner Fresh Coat, Inc., respectfully requests the Court to grant its petition for review, reverse the court of appeals in part, and affirm the trial court's judgment in its entirety. Petitioner further requests general relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been provided to counsel listed below in the manner indicated on this \_\_\_\_ day of March, 2009.

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