

NO. 08-0592

IN THE SUPREME COURT OF TEXAS

FRESH COAT, INC.,

Petitioner/Cross-Respondent

v.

K-2, INC.,

Respondent/Cross-Petitioner

On Appeal from the Ninth Court of Appeals of Beaumont, Texas
No. 09-06-00251-CV

K-2, INC.'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

- Nature of the case: This appeal arises from a suit for statutory indemnity brought by Fresh Coat, Inc. (“Fresh Coat”) against K-2, Inc. (“Finestone”) under Chapter 82 of the Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 82.002.
- Trial court and judge: The 221st Judicial District Court of Montgomery County, the Hon. Suzanne Stovall, presiding.
- Disposition by trial court: Following a jury trial, the trial court signed a judgment on March 15, 2006 awarding Fresh Coat actual damages of \$2,240,681.73; attorneys’ fees, expenses, and costs totaling \$726,642.23; prejudgment interest, appellate attorneys’ fees, and post-judgment interest. (Appendix tabs A, B)
- Appellant in the court of appeals: K-2, Inc. (a/k/a Finestone)
- Appellee in the court of appeals: Fresh Coat, Inc.
- Court of Appeals: The Court of Appeals for the Ninth District of Texas at Beaumont
- Participating justices: Chief Justice Steve McKeithen and Justices David Gaultney and Hollis Horton
- Citation to opinion: *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386 (Tex. App.—Beaumont 2008, pet. filed). (Appendix tab F)
- Disposition by court of appeals: The court of appeals reversed, in part, the trial court’s judgment, holding that Fresh Coat had no statutory right to indemnity from Finestone for \$1.2 million Fresh Coat paid to settle the claims of another defendant pursuant to a contractual obligation. The court of appeals affirmed the remainder of the trial court’s judgment. Both parties then filed motions for rehearing, which were denied, with Justice Horton dissenting from the denial of Finestone’s motion for rehearing. (Appendix tabs D, E)

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction to consider the questions of law raised in this case because (i) the court of appeals held differently from prior decisions of other courts of appeals, including *Peterson Homebuilders, Inc. v. Johnny H. Timmons, Sr. d/b/a Bay Servs. Co.*, No. 14-03-00400-CV, 2004 Tex. App. LEXIS 6765 (Tex. App.—Houston [14th Dist.] 2004, no pet.), regarding the application of Chapter 82 to indemnity claims such as those at issue here, and held differently from prior decisions of this Court, including *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006), regarding the reconsideration of attorney’s fees awards, (ii) the court of appeals has committed errors of law of such importance to the state’s jurisprudence that they should be corrected, (iii) this case involves the construction of a statute—Chapter 82 of Civil Practice and Remedies Code—necessary to the determination of the case, and (iv) as evidenced by the dissent from the denial of Finestone’s motion for rehearing, the justices of the court of appeals apparently disagree on a question of law material to the decision. *See* TEX. GOV’T CODE §§ 22.001(a)(1), (2), (3), (6).

ISSUES PRESENTED

1. The jury returned a verdict in favor of Fresh Coat—an applicator of exterior insulation and finish systems (“EIFS”)—and against Finestone—a manufacturer of EIFS components—for more than \$3 million on Fresh Coat’s claim for statutory indemnity under Chapter 82 of the Civil Practice and Remedies Code. To recover indemnity under the statute, a party must establish that it is a product “seller.” TEX. CIV. PRAC. & REM. CODE § 82.002. Here, Fresh Coat was a subcontractor hired to fabricate EIFS walls on homes pursuant to a service contract, and did not “sell” EIFS or place a product into the stream of commerce. Fresh Coat’s former president conceded that it was not a wholesale distributor or retail seller.
 - *Did the court of appeals err in concluding that Fresh Coat met the definition of a “seller” under Chapter 82?*
 - *Did the court of appeals err in not rendering judgment that Fresh Coat take nothing on its Chapter 82 claim?*

2. If a party proves its status as a product “seller,” it may seek indemnity from a product manufacturer for losses arising out of a products liability action—i.e., an action for damages allegedly caused by a defective “product.” See TEX. CIV. PRAC. & REM. CODE § 82.001(2). The court of appeals defined a “product” as “tangible personal property placed, for commercial purpose, in the stream of commerce for use.” But the “product” purchased by the homeowners in this case, and for which Fresh Coat seeks indemnity, is an inseparable part of the finished wall of a house. A house is real property and is not a “product.” Because EIFS is not merely a component included with a house but is an inseparable part of the house, courts in other jurisdictions have concluded that EIFS is real property and is not a “product.” See *Keck v. Dryvit Sys.*, 830 So.2d 1, 7 (Ala. 2002); *Murray v. Dryvit Sys.*, No. 01-04-7383, 2002 Va. Cir. LEXIS 420, at *8 (Va. Cir. Ct. 2002).
 - *Is a home a “product” for purposes of Chapter 82? Is an EIFS wall of a house a “product” under Chapter 82?*
 - *Did the court of appeals err in not rendering judgment that Fresh Coat take nothing on its Chapter 82 claim?*

3. The jury awarded Fresh Coat more than \$1 million for settlement amounts it paid to the homeowners, more than \$1.2 million for settlement amounts it paid to the homebuilder, Life Forms, and more than \$726,000 in attorneys’ fees, expenses, and costs. The court of appeals correctly concluded that Finestone was not obligated to indemnify Fresh Coat for the \$1.2 million it paid to Life Forms

because that was a loss for which Fresh Coat was independently liable, based on its contractual obligations, and was outside the provisions of Chapter 82. It was undisputed that the award of fees, costs, and expenses included amounts Fresh Coat incurred litigating its contractual claims with Life Forms, but the jury awarded Fresh Coat the full amount of its fees, including those it had no right to recover.

- *Did the court of appeals err in holding that a manufacturer has the burden under Chapter 82 to obtain a jury finding proving the amount of loss that a seller cannot recover, especially when that loss is attorneys' fees?*
- *Did the court of appeals err in holding that Finestone waived its sufficiency challenge by not requesting submission of additional blanks for the jury to answer in the charge?*
- *Did the court of appeals err in not remanding the attorneys' fees award for a new trial?*

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On Appeal from the Ninth Court of Appeals of Beaumont, Texas
No. 09-06-00251-CV

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent/Cross-Petitioner, K-2, Inc. (“Finestone”) files this Brief on the merits, in support of its Petition for Review.

PRELIMINARY STATEMENT

In this case, Fresh Coat, a service provider who constructed from raw materials an exterior wall finishing system for residential homes, claims to be a “seller” of a “product” entitled to seek indemnity for the payments it made to those homeowners from the manufacturer of the raw materials. Here, the consumers did not buy “products,” they bought homes. Fresh Coat did not sell homes or parts of homes, but contracted to sell its services to the homebuilder.

This is not the kind of claim the Legislature had in mind when it enacted Chapter 82 of the Civil Practice and Remedies Code. That statute was not created to provide an indemnity action for service providers whose “sales” of products are merely incidental to

their work. This Court should take this case to clarify that a service provider is not a product seller entitled to indemnity under Chapter 82, and should decide whether a custom-built home is a product for purposes of product liability and indemnity law, or whether the Residential Construction Liability Act provides such a comprehensive scheme for these kinds of claims that no further expansion of the common law is needed.

STATEMENT OF FACTS

The opinion of the court of appeals correctly states the overall nature of the case. Finestone provides this section to briefly add pertinent background information.

Background

A group of more than 90 homeowners in The Woodlands, Texas, sued their homebuilder and others in 2000 for damages allegedly caused by water penetration in their homes. (CR 12-28, 351-84)¹ Each of these homes was clad in part with an exterior wall finishing system known as “EIFS.”² (*Id.*; 5 RR 12, 19-20) EIFS is an exterior cladding used to insulate a house or other building. (5 RR 19-20) It was created as a method to insulate a building and reduce energy costs by stopping “the heat and the cold at the outermost plane” of the building. (5 RR 25-26) EIFS was intended to provide a seal to prevent water and air from compromising the integrity of the house or building. (19 RR 124-27) It consists of several component parts—including mesh, various adhesive coats (base and finish) similar to cement, and insulation boards (“EPS

¹ Citations to the Clerk’s Record will be made as “(CR [page number])” and to the Reporter’s Record as “([volume] RR [page]).” With regard to trial exhibits referenced, the names of the parties will be abbreviated as follows: Finestone (“FS”), Fresh Coat (“FC”), and Life Forms (“LF”).

² EIFS is an acronym for “exterior insulation and finish system.” (CR 4117)

Board”)—that, when combined, form the exterior wall of a house in its finished form. (14 RR 21, 42, 63-64)

Finestone and other companies produced some of the component parts for EIFS. (19 RR 93-95) Distributors marketed the system to homebuilders and sold the various materials to applicators, such as Fresh Coat, who then contracted directly with homebuilders to apply EIFS to homes. (13 RR 8-15) Here, through a distributor, Finestone sold Fresh Coat three of the EIFS components—two buckets of adhesive coat (base and finish) and a roll of mesh—and Fresh Coat obtained the other components from third-party vendors. (14 RR 63-64)

During the EIFS application, these separate components—some of which are mixed in buckets to form a paste-like substance—are assembled together on site to become a unified feature of the exterior wall structure. (14 RR 21, 42, 63-64) Unlike shingles or nails, after an EIFS wall is finished, its components cannot be individually removed. According to the testimony at trial, once applied, EIFS becomes the exterior wall of the building itself. (14 RR 64, 89) Fresh Coat begins the EIFS process by purchasing from Finestone two buckets of adhesive coat and a roll of mesh, and finishes the process by creating an exterior insulating wall of a home.

Trial proceedings

The homeowners alleged a number of claims against the homebuilder, Life Forms, Inc., as well as Fresh Coat and Finestone, asserting various theories of liability regarding the construction of the homes. (CR 12-28, 351-84) The homeowners’ claims focused, in part, on the alleged “failure” of EIFS. (*Id.*) Life Forms, Fresh Coat, and Finestone all

settled separately with the homeowners. Life Forms then sued Fresh Coat based on a contractual indemnity agreement between them and brought various claims against Finestone. Fresh Coat settled with Life Forms, and then pursued a statutory indemnity claim against Finestone under Chapter 82 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 82.002. (CR 2299-2321, 3812-14, 3815-17) Under Chapter 82, “a manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action.” TEX. CIV. PRAC. & REM. CODE § 82.002(a). Fresh Coat sought indemnity for both settlements it paid, as well as for attorneys’ fees, expenses, and costs it incurred in litigating those claims. Fresh Coat’s Chapter 82 claim was tried to a jury, which reached a verdict in favor of Fresh Coat, and against Finestone, for more than \$3 million—\$1,036,686.23 for the settlement amounts paid to the homeowners, \$1,203,995.50 for the settlement amounts paid to Life Forms, and \$726,642.23 in attorneys’ fees, expenses, and costs. (CR 4125) All of these awards were based solely on Fresh Coat’s Chapter 82 indemnity claim. The trial court signed a final judgment in accordance with that verdict on March 15, 2006. (CR 4715-16)

Appellate proceedings

Finestone appealed from the judgment in favor of Fresh Coat³ and, on April 17, 2008, the court of appeals issued its opinion and judgment, affirming in part and reversing in part the judgment of the trial court. The court of appeals reversed the portion of the trial court’s judgment awarding Fresh Coat more than \$1.2 million for settlement

³ Finestone also appealed from the trial court’s judgment in favor of the homebuilder and the EIFS distributor, but later resolved its dispute with those parties before the court of appeals issued its opinion and judgment.

amounts paid to Life Forms because Fresh Coat’s attorney testified that Fresh Coat had paid this settlement solely because of its contractual obligation to do so. *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 396 (Tex. App.—Beaumont 2008, pet. filed). The court of appeals reasoned, as follows: “The provisions of Chapter 82 do not provide a seller with a right of indemnity—under the circumstances in the record presented here—against a product manufacturer for that seller’s independent liability under a contract.” *Id.*

The court of appeals affirmed the portion of the trial court’s judgment awarding Fresh Coat more than \$1,036,686.23 for settlement amounts paid to the homeowners and \$726,642.23 in attorneys’ fees, expenses, and costs. *Id.* at 339. Finestone challenged these awards on the grounds that Fresh Coat cannot recover indemnity under Chapter 82 because EIFS is not a “product” and Fresh Coat is not a “seller.”⁴ Specifically, Finestone argued that, because a house is not a “product” for purposes of strict products liability and because EIFS, once applied to a wall, becomes an integral and inseparable part of the house, EIFS is also not a “product.” However, the court of appeals overruled this issue and held that, because “[t]he component parts [of EIFS] are tangible personal property sold and distributed commercially by Finestone to be assembled by an applicator into a finished material and applied to a structure,” Finestone’s EIFS “is a product within the meaning of the Texas Products Liability Act.” *K-2, Inc.*, 253 S.W.3d at 392.

Finestone challenged the sufficiency of the evidence to support the jury’s finding

⁴ Finestone also challenged the award of \$1.2 million for settlement amounts paid to Life Forms on this basis, but, as discussed above, the court of appeals reversed that award because it was a loss for which Fresh Coat was independently liable.

that Fresh Coat was a “seller” of EIFS because Fresh Coat was a service provider and did not place EIFS into the stream of commerce. The court of appeals held the evidence supported the jury’s finding that Fresh Coat was a seller, reasoning that “Fresh Coat’s application of the EIFS on Life Forms’s houses, ultimately sold by Life Forms to the homebuyers, is legally and factually sufficient evidence of Fresh Coat’s placement of the Finestone product in the stream of commerce for use.” *Id.* at 393-94.

Finestone also challenged the \$726,642.23 in attorneys’ fees, expenses, and costs awarded to Fresh Coat on the ground that this award included amounts for which Fresh Coat was independently liable. Fresh Coat did not submit any segregated evidence of its fees, expenses, or costs (FC 295, 295A, 219), and it is undisputed that the jury’s award included amounts Fresh Coat incurred in litigating the contractual indemnity claim for its settlement with Life Forms. *K-2, Inc.*, 253 S.W.3d at 397. The charge correctly instructed the jury not to award any amount of fees, expenses, or costs caused by any act or omission “for which Fresh Coat is independently liable.” (CR 4125) Although the court of appeals acknowledged that the award of fees, expenses, and costs likely included unrecoverable amounts—those incurred in litigating the claims for which Fresh Coat was independently liable—it held that Finestone had waived its challenge to this award by not obtaining a finding on the amount of unrecoverable fees and expenses and by not objecting to the aggregate submission of evidence of Fresh Coat’s fees, expenses, and costs. *K-2, Inc.*, 253 S.W.3d at 397-98.

On rehearing, Finestone asked the court of appeals to remand the case for a recalculation of attorneys’ fees, given the court’s substantial reduction of Fresh Coat’s

damage award. The court of appeals denied Finestone’s motion without opinion, with Justice Hollis Horton dissenting. (*See* Appendix tab E)

SUMMARY OF THE ARGUMENT

Fresh Coat is not entitled to indemnity under Chapter 82 because it is not a product “seller.” To recover indemnity under Chapter 82, a party must prove its “seller” status. TEX. CIV. PRAC. & REM. CODE § 82.002. In other words, it must prove that it “distribute[d] or otherwise place[d], for any commercial purpose,” the product “in the stream of commerce for use or consumption.” *Id.* § 82.001(3); *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 393 (Tex. App.—Beaumont 2008, pet. filed). Here, Fresh Coat was an applicator performing a service—constructing EIFS walls—and was not selling EIFS components, except as an incidental part of its work. Fresh Coat did not place EIFS in the stream of commerce. Further, because EIFS is not intended or expected to be replaced during the useful life of the home, there is no evidence that the EIFS walls on the home at issue were to be “used” or “consumed” through normal wear and tear. Fresh Coat’s former president also conceded at trial that Fresh Coat was not a wholesale distributor or retail seller of EIFS. Thus, Fresh Coat did not prove its “seller” status to sustain its Chapter 82 claim.

Fresh Coat also is not entitled to indemnity from Finestone under Chapter 82 because EIFS is not a “product.” The EIFS walls purchased by the ultimate consumers (the homeowners)—and for which Fresh Coat seeks indemnity—are not “products.” A seller of products who meets the requirements of Chapter 82 can seek indemnity from the product manufacturer for its losses arising out of a products liability action, defined as an

action for damages allegedly caused by a defective “product.” TEX. CIV. PRAC. & REM. CODE § 82.001(2). Here, Fresh Coat cannot recover from Finestone the losses Fresh Coat incurred in the underlying action through a Chapter 82 indemnity claim because the EIFS walls are not “products.” Rather, the EIFS walls are an inseparable part of the finished house. A house is real property and is not a “product.”

Other courts have reasoned that, because of its integral function as a wall, EIFS is real property and is not a “product.” *See Keck v. Dryvit Sys.*, 830 So. 2d 1, 7 (Ala. 2002); *Murray v. Dryvit Sys.*, No. 01-04-7383, 2002 Va. Cir. LEXIS 420, at *8 (Va. Cir. Ct. 2002). Thus, because the homeowners sought recovery of damages allegedly caused by real property, and not by a defective “product,” Fresh Coat’s alleged losses did not arise out of a “products liability action” and its Chapter 82 claims must fail.

Fresh Coat cannot recover attorneys’ fees it incurred in litigating its independent liability. The court of appeals properly held that Fresh Coat could not recover indemnity under Chapter 82 for the \$1.2 million settlement paid to Life Forms because that was a loss for which Fresh Coat was independently liable as a result of its contractual agreement with Life Forms. *K-2, Inc.*, 253 S.W.3d at 397. For the same reasons, a significant portion of the amount of attorney fees, expenses, and costs awarded to Fresh Coat fell outside the scope of its Chapter 82 claim. The court of appeals correctly noted, and Fresh Coat does not dispute, that the award of more than \$726,000 in fees, expenses, and costs included amounts it incurred while litigating its contractual liability, but Fresh Coat did not segregate the recoverable amounts of those fees, expenses, and costs. Here, the charge instructed the jury *not* to include any amount of fees, expenses, and costs

incurred by Fresh Coat as a result of any act for which it was independently liable—the same instruction that barred Fresh Coat’s recovery of the \$1.2 million it paid Life Forms. Those instructions placed the burden on Fresh Coat to segregate its recoverable fees, expenses, and costs, and there was no need for Finestone to request additional submissions segregating these amounts. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006). Because the evidence is legally insufficient to support the amount awarded by the jury, this issue must be remanded to the trial court.

Moreover, when a court of appeals substantially reduces a prevailing party’s recovery of damages on which an award of attorneys’ fees is based, the judgment must be reversed and remanded to the trial court for a factual determination of an appropriately reduced fee award. *See Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006). The court of appeals reduced Fresh Coat’s award of damages by more than one-half, but refused to remand the award of attorneys’ fees to the trial court for reduction. At a minimum, this Court should reverse the award of attorneys’ fees on this ground and remand it to the trial court.

ARGUMENT

I. Fresh Coat cannot recover any damages for statutory indemnity under Chapter 82 because, in applying EIFS to form the exterior walls of the homes at issue, Fresh Coat did not “sell” EIFS or place it in the stream of commerce.

As the court of appeals noted, to sustain an indemnity claim against a product manufacturer under Chapter 82, a party must prove its status as a “seller” of the product—in other words, it must prove that it “distribute[d] or otherwise place[d], for any commercial purpose,” the product “in the stream of commerce for use or consumption.”

TEX. CIV. PRAC. & REM. CODE § 82.001(3); *K-2, Inc.*, 253 S.W.3d at 393. Here, with respect to Fresh Coat’s claim for statutory indemnity, and specifically its status as a product “seller,” the jury was charged as follows in Question 2:

“Seller” means either: (a) any company engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof, or (b) a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer’s instructions.

(CR 4120) The jury found that Fresh Coat was a “seller” of EIFS (*Id.*), and the court of appeals concluded that Fresh Coat had met its burden to sustain this finding under part (a) of the charge’s definition of “seller.” The court expressed its holding as follows:

Fresh Coat mixed together the various materials (adhesive base coat, mesh, and EPS board) to make a finished material and then applied it to a house. Fresh Coat’s application of the EIFS on Life Forms’s houses, ultimately sold by Life Forms to the homebuyers, is legally and factually sufficient evidence of Fresh Coat’s placement of the Finestone product in the stream of commerce for use.

K-2, Inc., 253 S.W.3d at 393-94.

Although the court of appeals correctly described the essence of the services Fresh Coat provided, its conclusion that Fresh Coat is entitled to indemnity from Finestone under Chapter 82 is both legally incorrect and in conflict with existing Texas case law.

A. Courts in Texas and in other jurisdictions have held that conduct similar to Fresh Coat’s does not constitute placing a product in the “stream of commerce.”

The court of appeals’ conclusion that, by applying the EIFS to the homes in question, Fresh Coat placed the EIFS in the “stream of commerce” conflicts with the holdings of other Texas appellate courts, as well as the holdings of courts in other

jurisdictions that have considered the same issue.

1. A foundation subcontractor is not a Chapter 82 product “seller.”

In *Peterson Homebuilders, Inc. v. Johnny H. Timmons, Sr. d/b/a Bay Services Company*, No. 14-03-00400-CV, 2004 Tex. App. LEXIS 6765 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the court of appeals held that a trial court had properly rendered summary judgment in favor of a subcontractor and against a home builder’s claim for indemnity under Chapter 82. *Id.* at *13-15. There, a homeowner had sued the home builder, Peterson, for various defects in the house. Peterson then sued its subcontractors, including Timmons, seeking indemnity under Chapter 82. In its third-party petition, Peterson alleged that the structural pad for the home’s foundation, which had been supplied and constructed by Timmons, was defective. *Id.* The trial court rendered summary judgment in favor of Timmons on Peterson’s statutory indemnity claim, and the court of appeals affirmed, reasoning as follows:

Peterson also asserts the trial court erred in granting summary judgment as to its indemnity claim against Timmons under Chapter 82 . . . because there is a genuine issue of material fact as to whether that chapter applies to the facts of this case. We disagree. The undisputed summary-judgment evidence shows that Timmons provided certain services relating to the construction of the [homeowner’s] house, including building a structural pad for the foundation. Peterson asserts it raised a fact issue as to whether Timmons owes indemnity under [Chapter 82] as a manufacturer of this structural pad. Presuming for the sake of argument that this pad is a product, as asserted by Peterson, the summary-judgment evidence conclusively proved that Timmons did not place this structural pad in the stream of commerce, as required by Chapter 82. Accordingly, the trial court correctly granted Timmons’s motion for summary judgment as to Peterson’s indemnity claim under Chapter 82 of the Texas Civil Practice and Remedies Code.

Id. at *14 (citations omitted).

Under the holding of *Peterson Homebuilders*, assembling a structural portion of a house—such as the foundation—does not constitute placing a product in the “stream of commerce” for purposes of a Chapter 82 indemnity claim, even when the house is later sold to a homeowner. For the same reasons, Fresh Coat’s assembly of the EIFS components to form the walls of homes later sold by Life Forms did not place EIFS into the “stream of commerce” and does not provide a basis for Fresh Coat to seek indemnity from Finestone under Chapter 82.

2. A service provider is not a “product” seller.

Other courts of appeals have addressed similar products liability issues, although outside the context of statutory indemnity. Strict products liability law generally does not apply to service contracts such as the contract between Fresh Coat and Life Forms. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(b) (1998) (“Services, even when provided commercially, are not products.”); *see also Freitas v. Twin City Fisherman’s Coop. Ass’n*, 452 S.W.2d 931, 937 (Tex. Civ. App.—Corpus Christi 1970, writ ref’d n.r.e.) (“As we construe [section 402A of the Restatement] and the comments, the rule of strict liability does not apply to persons who merely construct items but are not engaged in the business of selling such items.”). Because the nature of Fresh Coat’s activities was to provide services—in the form of constructing EIFS walls—rather than products, Fresh Coat is not a product seller and is not entitled to seek indemnity from Finestone under Chapter 82.

In *Barham v. Turner Construction Company of Texas*, 803 S.W.2d 731 (Tex. App.—Dallas 1990, writ denied), the court of appeals upheld a trial court’s directed

verdict on a products liability claim raised by an injured construction worker against a general contractor regarding alleged defects in a steel column. *Id.* at 738. The trial court refused to submit a products liability question to the jury, and the court of appeals affirmed, reasoning as follows:

Barham’s evidence showed that . . . Turner Construction was the general contractor in construction of the building. Turner Construction is in the business of selling its services as a general contractor. We find nothing in the record to indicate that Turner Construction is in the business of selling the steel columns and erection plates which caused Barham’s injury. Any alleged “sale” of the steel columns by Turner Construction was incidental to its contract to provide the services necessary to construct a building. At most, Turner Construction was an occasional seller of components of buildings; it was not engaged in the sale of steel columns as part of its business. Thus, we hold that the underlying consumer protection principles of strict liability do not apply in this case. We conclude that, under the facts of this case, Turner Construction did not introduce the steel columns manufactured by SISCO into channels of commerce by releasing them to the consuming public and that Turner Construction was not in the business of selling such steel columns.

Id. (citations omitted).

3. Fresh Coat sold services, not goods.

Here, any “sale” of EIFS materials by Fresh Coat to Life Forms was incidental to its contract to provide the services necessary to assemble the EIFS components into the walls of the homes on which it worked. For the same reasons the *Barham* court found there was no evidence supporting submission of a products liability claim against the general contractor, there was no evidence to support the jury’s finding that Fresh Coat was a “seller” of EIFS because it did not place the EIFS in the “stream of commerce.” Instead, Fresh Coat contracted with Life Forms to apply EIFS to Life Forms’s homes. Bruce Cohoon, Life Forms’s former CFO, testified that Fresh Coat never sold EIFS to

Life Forms. (15 RR 7-8) Instead, Fresh Coat was hired as an EIFS applicator and provided the raw materials to complete the work. (FS 110; 29 RR 150-51)

Fresh Coat's contract with Life Forms was a *service* contract, not a *sales* contract. (FS 525) That contract described Fresh Coat's scope of work as "synthetic stucco application and finish" and included "the labor, services and/or materials, equipment, transportation or facilities necessary." (*Id.*) Fresh Coat's former owner, David Antoniono, testified that it did not sell Finestone's EIFS to Life Forms. (24 RR 144-45) Life Forms paid Fresh Coat "to provide EIFS services" including materials and labor "for a contracted fee." (*Id.*; FC 238A, 239A, 240A) Fresh Coat applied the various Finestone EIFS components as a finished system on the exterior of Life Forms's homes. (*Id.*) As Antoniono explained,

Q: What Life Forms did is they cut you a check and what they got was your scope of work using EIFS.

A: Yes. The EIFS scope of work.

K-2, Inc., 253 S.W.3d at 393.

There was no evidence that Fresh Coat was engaged in selling EIFS to Life Forms, other than as an incidental part of its application work. Instead, Fresh Coat sold its services as an applicator of EIFS. (*See* FS 536)As a result, the court of appeals' conclusion that Fresh Coat's actions amounted to placing a product in the "stream of commerce" is legally incorrect and must be reversed.

4. Other jurisdictions hold similar subcontractors are not product sellers.

Courts in other jurisdictions have addressed similar circumstances and have held

that the actions of a subcontractor such as Fresh Coat do not constitute placing a product in the “stream of commerce.” The Supreme Court of Nevada, in *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000), held that contractors were not subject to liability for allegedly defective roofing and siding under strict products liability claims. *Id.* at 1272. The court reasoned that, although a contractor may install certain products as part of its construction or remodeling work, the installation of those products, without more, does not constitute the business of “selling” those products for purposes of products liability law. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A.⁵

In *Maack v. Resource Design & Construction, Inc.*, 875 P.2d 570 (Utah App. 1994), a Utah court of appeals held that a defendant home builder was not a “seller” of the stucco and its various components used to construct the exterior of a home. *Id.* at 581. The fact that the cost of the materials used to assemble the stucco exterior was included in the cost of the work did not transform the contract into the sale of a product. *Id.* Likewise, in *Wright v. Creative Corp.*, 498 P.2d 1179 (Colo. App. 1972), a Colorado court of appeals held that a defendant builder who installed non-shatterproof glass in the claimant’s home was not subject to strict products liability claims as a “seller” of glass, even if it was a “mass” installer of such a product. *Id.* at 1182-83. Courts in other jurisdictions have similarly concluded that a building contractor or subcontractor generally is not a seller of the materials used in its work. *See, e.g., Scordino v. Hopeman Bros., Inc.*, 662 So.2d 640, 645-46 (Miss. 1995) (subcontractor hired to outfit interior of

⁵ The *Calloway* court also overruled an earlier decision and held that a strict products liability claim could not be asserted against a contractor who had provided and installed an allegedly defective gas line fitting while performing remodeling work on a home. 993 P.2d at 1272; *see Worrell v. Barnes*, 484 P.2d 573 (Nev. 1971).

ship, including furnishings); *Sapp v. Morton Bldgs., Inc.*, 973 F.2d 539, 543 (7th Cir. 1992) (builder hired to construct barn and custom fittings).

Connecticut courts have also addressed whether and under what circumstances a contractor such as Fresh Coat will be considered a product “seller.” The applicable Connecticut statute, which is worded very similarly to Texas’ section 82.001(3), defines a “product seller” as “any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption.” CONN. GEN. STAT. § 57-572m(a).

In applying this statute, Connecticut courts focus on the object of the transaction between the parties in deciding, as a legal issue, whether a party is a product seller. Where one party’s sale of a product is merely incidental to its provision of a service, courts in that jurisdiction generally conclude the party is not a product “seller.” *See Truglio v. Hayes Construction Co.*, 785 A.2d 1153, 1156 (Conn. App. 2001) (holding construction of sidewalk constituted furnishing services, not a product); *Lang v. Brom Builders, Inc.*, 1998 Conn. Super. LEXIS 280, *17-18 (Conn. Super. Ct. 1998) (holding general contractor who built home with prefabricated chimney was not engaged in business of selling prefabricated chimneys); *Regal Steel, Inc. v. Farmington Ready Mix, Inc.*, 414 A.2d 816, 817 (Conn. Sup. Ct. 1980) (holding defendant who allegedly built and then improperly bolted steel columns to concrete foundation was not a product seller); *see also Gulash v. Stylarama*, 364 A.2d 1221, 1223 (Conn. Super. Ct. 1975) (“Where the contract is basically one for the rendition of services, and the materials are only incidental to the main purpose of the agreement, the contract is not one for the sale

of goods.”).

This Court should adopt a similar analysis in considering whether Chapter 82 indemnity is available to a party claiming “seller” status under the statute. The analysis of the court of appeals—that Fresh Coat was both a seller of EIFS and a service provider—ignores the main purpose of the contract between Fresh Coat and Life Forms and the fact that supplying the various EIFS components was merely incidental to Fresh Coat’s application and construction of the walls of the homes at issue. Indeed, Fresh Coat held itself out as an “applicator,” not a “seller.” (29 RR 150-51; 24 RR 144-45; FS 536)

B. There is no evidence that Fresh Coat was a “seller” of a product that would be “used” or “consumed.”

As noted in more detail in section II below, EIFS is unlike any traditional consumer product because in its finished, intended form, it is the exterior wall of a home. For these same reasons, EIFS is not a product to be “used” or “consumed” and, as a result, there is no evidence to support a finding the Fresh Coat was a seller under Chapter 82’s definition of that term—which was recited in the charge instruction provided in this case. (CR 4120)

Neither “use” nor “consumption” were separately defined in the charge, but Texas courts apply the common definitions of these terms. *See, e.g., Sharp v. F.W. Gartner*, 971 S.W.2d 707, 709-10 (Tex. App.—Austin 1998, no pet.) (applying dictionary definition of “use” as “to convert to one’s service; to employ”); *L&M-Surco Mfg., Inc. v. Winn Tile Co.*, 580 S.W.2d 920, 927 (Tex. Civ. App.—Tyler 1979, writ dism’d w.o.j.)

(applying dictionary definition of “consume” as “to use up, expend, waste, devour”); TEX. GOV’T CODE § 311.011(a).

Here, there is no evidence that the EIFS walls constructed by Fresh Coat were designed to be “consumed” by the homeowners. As noted by the Alabama Supreme Court, the structural components of a home—such as an exterior wall, a staircase, or a fireplace—are not intended or expected to be replaced during the useful life of the home. *Keck v. Dryvit Sys.*, 830 So.2d 1, 6 (Ala. 2002). These products differ from others—such as shingles, a dishwasher, a furnace, or a water heater—that are incorporated into a home but will be “consumed” through normal wear and tear and have to be replaced. *Id.*

C. The court of appeals did not conclude—and Fresh Coat did not try to prove—that it was a “wholesale distributor” or “retail seller” of EIFS.

Although the court of appeals addressed and affirmed the underlying judgment based on the definition of “seller” set out in part (a) of Question 2 in the charge, there is also no evidence to support a finding that Fresh Coat was a “seller” of EIFS under part (b) of the definition of that term in the court’s charge. (CR 4120)⁶ The court of appeals did not affirm the judgment on this issue, and the evidence refutes any claim Fresh Coat might have made to “seller” status under that alternative language.

The terms “wholesale distributor” and “retail seller” were not defined in the charge, nor does Chapter 82 provide a definition of these terms. The jury was therefore free to apply the commonly used meanings of these terms. *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 923 (Tex. App.—Corpus Christi 1991, writ dismissed)

⁶ As noted above, “seller” was defined in this portion of the charge as “a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer’s instructions.” (CR 4120)

w.o.j.) (“Ordinary words used in their common meanings are not required to be defined.”). “Wholesale” is commonly defined as “the sale of commodities in quantity, usually for resale in large quantities (as by a retail merchant).” MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1346 (10th ed. 2002). “Distributor” is commonly defined as “one that distributes” or “one that markets a commodity.” *Id.* at 338. Similarly, the noun “retail” is commonly defined as “the sale of commodities or goods in small quantities to ultimate consumers.” *Id.* at 998.

Gerald Banks, Fresh Coat’s former president, confirmed that it was neither “a wholesale distributor” nor “a retail seller who completely or partially assembled” EIFS. (19 RR 70, 89-90) Banks explained that Fresh Coat was not a retailer and did not sell EIFS to the general public. (*Id.*) Instead, Fresh Coat sold a service to Life Forms in the form of fabricating and assembling the EIFS components into a finished cladding on the homes. (*Id.*) It was also undisputed that the general public cannot buy Finestone’s EIFS at a retail store. (*See* 14 RR 63) Accordingly, no evidence supports any finding of Fresh Coat’s “seller” status under this portion of the charge.

D. This Court should resolve the conflicts between the court of appeals in interpreting and applying Chapter 82 to cases like this one.

Despite the advent of statutes like the Texas Residential Construction Liability Act,⁷ the fact of the matter is that it is highly unlikely that lawsuits filed by Texas homeowners over the construction of homes will decline in the future. These lawsuits will continue to involve the inevitable cross-claims and third-party actions among

⁷ *See* TEX. PROP. CODE § 27.001, et. seq.

homebuilders, general contractors, and subcontractors, many of whom will invoke Chapter 82 to seek indemnity wherever possible in response to the broad claims of homeowners. This area of litigation is an ongoing and significant part of Texas jurisprudence, and this Court should take this opportunity to speak on and clarify the circumstances under which a subcontractor is entitled to seek statutory indemnity. Because the court of appeals' holding in this matter is in apparent conflict with other Texas cases—including *Peterson Homebuilders* and *Barham*—on this issue, this Court should resolve the conflict over the proper interpretation of Chapter 82 in this and similar contexts.

II. EIFS is not a “product,” but an integrated part of a home. Thus, Fresh Coat’s Chapter 82 statutory indemnity claims fail, as a matter of law, because its alleged losses do not arise from a “products liability action.”

To recover indemnity from Finestone under Chapter 82, Fresh Coat was required to prove it incurred a loss arising out of “products liability action.” TEX. CIV. PRAC. & REM. CODE § 82.002(a). Section 82.001(2) defines a “products liability action” as an action for recovery of damages allegedly caused by a defective “product.” *Id.* § 82.001(2). Therefore, the definition of “product” under Chapter 82 is fundamental.

The court of appeals defined “product” to “include[] tangible personal property placed, for commercial purpose, in the stream of commerce for use.” *K-2, Inc.*, 253 S.W.3d at 392. In coming to this conclusion, the court first noted that Chapter 82 does not define “product.” The court then examined the definition of “seller” in section 82.001(3) and the definition of “product” in the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998) and in BLACK’S LAW DICTIONARY 1245 (8th ed.

2004). *See id.* Both the Restatement and Black's Law Dictionary define a "product" as "tangible personal property," and all three sources note that a product is placed into the stream of commerce for commercial distribution.

Other publications and jurisdictions have approached the definition of "product" differently. For example, the Model Uniform Product Liability Act defines "product" as "any object *possessing intrinsic value*, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce." MUPLA § 102(C), 44 Fed.Reg. 62714 (1979) (emphasis added). Other jurisdictions that, like Texas, lack a controlling definition of a "product," examine public policy considerations in fashioning a working definition. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19, cmt.a; *Leahey v. Lawrence D. Coon & Sons, Inc.*, No. CV044002738, 2006 Conn. Super. LEXIS 2157, at *12-13 (Conn. Super. Ct. 2006); *Board of Education v. W.R. Grace Corp.*, 609 A.2d 92, 106 (N.J. Super. Ct. 1992); *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 147-48 (Ill. App. 1983).

This is an important issue for Texas jurisprudence, especially in the context of residential and commercial construction. Many individual components are used in conjunction to create a house or building. This Court should take this opportunity to examine and clarify Texas' definition of a "product" and under what circumstances a manufacturer may be subject to liability under Chapter 82 for tangible property it produces which is then incorporated into a home. Here, regardless of which of the above definitions is ultimately applied, EIFS is not a "product" and Fresh Coat's statutory indemnity claims fail.

A. The “product” at issue is not the separate EIFS components produced by Finestone but the finished EIFS wall of the home itself.

Before determining whether certain property is a “product,” it is imperative to identify what property is at issue. This is because, under Chapter 82, the object of the underlying suit is critical to determining whether a seller incurred a loss arising out of a products liability action. Here, instead of focusing on what the homeowners bought—a house with exterior walls made of EIFS—the court of appeals focused on the individual EIFS components that Finestone sold to Fresh Coat. The court of appeals explained its conclusion that EIFS is a “product,” as follows:

EIFS is a synthetic stucco system made of component parts manufactured by Finestone. The component parts are tangible personal property sold and distributed commercially by Finestone to be assembled by an applicator into a finished material and applied to a structure. The EIFS, as sold by Finestone, was tangible personal property placed by Finestone for commercial purposes in the stream of commerce for use. . . . We conclude the Finestone EIFS is a product within the meaning of that term as used in the Texas Products Liability Act.

Id. at 392. The problem is that these components are not the property at issue here.

The undisputed testimony at trial established that the components Finestone sold to Fresh Coat consisted merely of two buckets of adhesive coat (base and finish) and a roll of plastic mesh. (14 RR 63-64) That is the entirety of the tangible personal property that Finestone sold to Fresh Coat. Fresh Coat would then purchase a fourth component—an insulation board—from a third party vendor and follow a set of detailed instructions to create the exterior wall of a home. (14 RR 63-64, 89) But the “product” sold to the homeowners, and for which Fresh Coat seeks indemnity, is not merely paint or cement or even stucco. It is not something that an applicator pre-assembles and then attaches to an

exterior wall, such as prefabricated siding or an HVAC unit. Rather, it is the exterior wall itself. (See 14 RR 63-64, 89) It cannot be scraped off like paint or removed like nails or shingles on a roof. Removing EIFS from a home requires removing and destroying the exterior wall itself. The EIFS distributor, Mr. Griesenbeck, confirmed this understanding of EIFS, as follows:

Q. They would then take those buckets and rolls and assemble these components. At the end of the day what you would have is an EIFS wall.

A. They took the adhesive base coat, the mesh, the EPS board and constructed an EIFS system.

* * * *

Q. They didn't just take the bucket of stuff as Mr. Gustafson referred to it and leave it out there. They actually put it into the system, right?

A. Yes.

Q. And when the day was done they had a finished product, the wall.

A. Yes.

(14 RR 64, 89) As one court aptly explained, "EIFS is a multilayered exterior wall system that actually composes the exterior walls of a building. Once applied, the EIFS becomes a part of the structural integrity of the building and *actually is the exterior wall of the building.*" *Keck*, 830 So.2d at 7 (emphasis added).

Here, the homeowners did not sue Fresh Coat for damages arising out of defective paint or plastic mesh. In fact, there has been no allegation by any party in this or the underlying case that the base coat, finish coat, or mesh Finestone sold was defective. Instead, the homeowners sued Fresh Coat for damages arising out of the home itself—

i.e., the exterior wall system. That is the property at issue to which the definition of “product” must be applied.

B. EIFS is not a “product” because it is an integral, indivisible, and inseparable part of a home, which is real property.

Because the property at issue, EIFS, is the exterior wall of the home, and not buckets of adhesive coat or rolls of mesh, whether EIFS is a product depends on whether a home is a product under Chapter 82.⁸

1. A home is real property, not a product.

The law of this state, and in other jurisdictions, is that real property—such as non-mass produced homes, condominiums, townhouses, or other buildings—is not a “product.” *See, e.g., In re Van Blarcum*, 19 S.W.3d 484, 492 (Tex. App.—Corpus Christi 2000), *mand. cond. granted sub nom., In re American Homestar of Lancaster*, 50 S.W.3d 480 (Tex. 2001) (home is not a product); *Heller v. Cadral Corp.*, 406 N.E.2d 88, 90 (Ill. App. 1980) (condominium is not a product); *Calloway*, 993 P.2d at 1272 (townhomes are not products); *Kennedy v. Vacation Internationale*, 841 F. Supp. 986, 990 (D. Haw. 1994) (condominium unit is not a product); *Wells v. Clowers Construction Co.*, 476 So.2d 105, 106 (Ala. 1985) (house is not a product). Neither Fresh Coat nor the court of appeals appears to have disputed this below. In fact, the court of appeals’ definition of product—“personal tangible property”—necessarily excludes real property. *K-2*, 253 S.W.3d at 392. Further, Fresh Coat cannot dispute that the Life Forms homes at issue were custom-

⁸ The court of appeals’ definition of “product” requires that it be placed in the stream of commerce, as discussed above in section I. For the same reasons that Fresh Coat is not a seller because it does not place EIFS into the stream of commerce, EIFS is not a product because it is not placed into the stream of commerce.

built homes and do not fall within any possible exception to this rule. (8 RR 14, 18; 9 RR 108) *Cf. Bastian v. Wausau Homes, Inc.*, 620 F. Supp. 947, 950 (N.D. Ill. 1985) (prefabricated factory-built home is a product); *Foremost Ins. Co. v. Indies House, Inc.*, 602 So.2d 380, 382 (Ala. 1992) (manufactured mobile home is a product); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 321 (N.J. 1965) (mass produced home is a product).

2. EIFS, as an inseparable part of a home, is also not a product.

For the same reasons a home is real property and not a product, the EIFS wall of a home is real property. This is because, when finished, the EIFS wall becomes an integral, indivisible, and inseparable part of the structural integrity of the home. *See Keck*, 830 So.2d at 6. In *Keck*, the Alabama Supreme Court examined the exact issue before this Court, and explained as follows:

Now that the question is squarely presented to us again, we take this opportunity to define with greater clarity when an item attached to realty may be considered a “product” for purposes of the AEMLD [the Alabama Extended Manufacturer’s Liability Doctrine]. . . . When considering whether an item attached to realty constitutes a “product” for purposes of the AEMLD, we must consider the overall function and life span of the item.

The owner of a house or of any building should reasonably expect that many components will have the same useful life as the house or building itself and will not need to be replaced over the life of the building. Such components include, by way of example, an exterior brick wall, a staircase, or a fireplace. There are also certain components of a house or a building the purchaser reasonably expects to wear out and to require replacement in the course of normal and ordinary usage, such as roof shingles, a dishwasher, a furnace, or a hot-water heater. Whether an item that is incorporated into real property may be considered a “product” for purposes of the AEMLD is determined by whether the item is a part of the structural integrity of the house or building that is reasonably expected to last for the useful life of the house or building. If it is, then the item cannot be considered a “product” for purposes of the AEMLD.

Id. at 6. The court then concluded that EIFS is not a “product” because it “actually is the exterior wall of the building.” *Id.* at 7; *see also Murray v. Dryvit Sys.*, No. 01-04-7383, 2002 Va. Cir. LEXIS 420, at *8 (Va. Cir. Ct. 2002) (holding that EIFS is “incorporated into realty”); *Wells*, 476 So.2d at 106 (“Once affixed to a house, a fireplace becomes as much a part of that house as the four walls, and a house cannot be classified as a ‘product.’”); *Boddie*, 455 N.E.2d at 147-48 (holding strict liability does not apply “to those items which are an indivisible part of the building structure itself, such as the bricks, supporting beams and railings”); *Walker v. Shell Chemical, Inc.*, 428 N.E.2d 943, 946 (Ill. App. 1981) (“[W]e conclude that if the guardrail involved in the instant case was actually a component and indivisible part of the entire building structure, it may not be considered a product.”).

Although Texas courts have not squarely addressed whether an EIFS wall is a “product” under Chapter 82, at least one Texas court has examined the relationship between EIFS and a home in the context of the economic loss rule. In *Pugh v. General Terrazzo Supplies, Inc.*, the First Court of Appeals held that damage to a home caused by EIFS was not damage to “other property.” 243 S.W.3d 84, 94 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Many other courts have held likewise. *See, e.g., Marrone v. Greer & Polman Constr., Inc.*, No. A-3651-07T2, 2009 N.J. Super. LEXIS 24, at *29 (App. Div. Feb. 4, 2009) (plaintiff could not bring products liability suit for water damage to house allegedly caused by EIFS); *Wilson v. Dryvit Systems, Inc.*, 206 F. Supp. 2d 749, 754 (E.D.N.C. 2002) (damage to house allegedly caused by EIFS system not

“other property damage”); *Fireman’s Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 143 (D. Me. 1999) (damage to hotel from masonry façade and weep holes was not damage to “other property”); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 602 (E.D. La. 1998) (water and infestation damage to dwelling allegedly caused by hardboard siding was not damage to “other property”); *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 1096 (N.Y. App. Div. 2005) (recovery of damages caused by EIFS to home’s plywood substrate was barred by economic loss doctrine); *Herman v. McCarthy Enterps., Inc.*, 61 Va. Cir. 697 (Va. Cir. Ct. 2002) (economic loss rule applied because claimant made no allegations that EIFS system resulted in personal injury or damage to “property other than the home itself”). Although *Pugh* and these other cases include a different legal doctrine, they are instructive because they hold that EIFS is not other property from the home of which it is a part. Therefore, if a house is real property, so is EIFS.

3. The cases relied on by the court of appeals do not support its conclusion.

Neither the court of appeals nor Fresh Coat in its brief as appellee provided any authority holding or implying that an exterior wall system, such as EIFS, is not part of the realty or is a “product.” In two of the cases cited by the court of appeals, *Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615, 616 (Tex. Civ. App.—El Paso 1979, writ ref’d n.r.e.) and *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 13-15 (Tex. App.—Fort Worth 2002, no pet.), the products at issue—PVC pipe and a firebox—were not indivisible parts of the structural integrity of the home. Both remain in the same form

when installed in the home as when they are purchased, and they can be removed and replaced with relative ease. In contrast, once EIFS “sets” and dries, it is indivisible and inseparable from the wall—it *is* the wall.

In *Hovenden v. Tenbush*, the claimant sued a seller of secondhand bricks for damage to his home. 529 S.W.2d 302, 305-06 (Tex. Civ. App.—San Antonio 1975, no writ). But the question of whether the brick wall was realty or personal tangible property was not raised. Moreover, courts overwhelmingly characterize a brick wall as part of the realty of the home. Further, a brick wall retains more of its separate identity, in that individual bricks can be removed; whereas the EIFS components cannot be separated from a finished wall and individually removed. In *Bennet v. Span Indus., Inc.*, 628 S.W.2d 470, 472 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.), the court noted that, had one of the concrete roof sections at issue been defectively designed or manufactured, a legitimate claim of products liability might be made. However, this statement was dicta, the court did not address whether concrete in a roof is real property, and the claimant was not the building owner, but an employee who fell through an opening in the roof. Fresh Coat also cited an asbestos case. *Rylander v. Associated Technics Co., Inc.*, 987 S.W.2d 947, 950 (Tex. App.—Austin 1999, no pet.). But courts treat asbestos differently because, unlike EIFS, asbestos is considered an unreasonably dangerous product. *See, e.g., Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 841 (E.D. Tex. 1980).

Finally, EIFS possesses no intrinsic value apart from the home. A purchaser of EIFS does not value the adhesive coat and mesh in their individual component forms apart from the building; rather, it purchases an exterior wall system that insulates the

building while providing a stucco finish.

Just as the Alabama Supreme Court took the opportunity in *Keck* “to define with greater clarity when an item attached to realty may be considered a ‘product’” under that state’s products liability scheme, this Court should do the same with respect to Chapter 82. Texas already has a very specific statutory framework for addressing homebuilding claims in Texas—the Residential Construction Liability Act. If courts were to define “product” under Chapter 82 to include property such as EIFS that actually constitutes the walls of a structure, potential liability exposure to manufacturers of building raw materials and component parts would be astounding.

III. There is no evidence to support the award of Fresh Coat’s unsegregated fees, expenses, and costs.

Fresh Coat also sought indemnity from Finestone, pursuant to Chapter 82, for its attorneys’ fees, expenses, and costs, including amounts incurred resisting Life Forms’s claim for contractual indemnity. The jury awarded Fresh Coat \$726,642.23 in fees, expenses, and costs—the entire amount it sought. (*See* FC 295, 295A, 219) Finestone challenged this award in the trial court, but the trial court adopted this finding in its final judgment. (CR 4715-16, 4725, 4755, 4760) The court of appeals correctly determined that the \$1.2 million Fresh Coat paid to Life Forms because of Fresh Coat’s contractual liability was not recoverable under Chapter 82 and that the fees, expenses, and costs awarded Fresh Coat likely included amounts it incurred while litigating its contractual liability. *K-2, Inc.*, 253 S.W.3d at 397. But the court of appeals stopped short of reversing and remanding this award; instead, it held that Finestone should have objected

to the evidence or to the charge and had waived the issue. *Id.* at 397-98. In other words, the court of appeals held that a manufacturer has the burden under Chapter 82 to obtain a finding for the amount a seller cannot recover. For several reasons, the court of appeals erred by not reversing and remanding this award.

A. The undisputed evidence established that the jury's award included unrecoverable amounts.

When questioned concerning the total amount of its fees, expenses, and costs, Fresh Coat's attorney testified that he could have segregated the amounts incurred in connection with Fresh Coat's Chapter 82 claim from those incurred in connection with Life Forms's contractual indemnity claim, but chose not to:

Q: You have not and you don't believe you're capable of segregating those fees that were incurred in defending this contract or these provisions of this contract from the allegations of product liability or negligence, right?

A: I pause only because I am trying to understand your question. Okay? Am I able to segregate the fees I incurred from defending against a contractual allegation versus the claims being made by the Plaintiffs? It could be done. You bet. . . . We don't think it makes any difference if the segregation takes place or not.

(20 RR 28)

Fresh Coat does not dispute that it presented only unsegregated evidence of the entire amount of its fees, expenses, and costs, including amounts it incurred in connection with its attempt to recover the \$1.2 million it paid to Life Forms solely as a result of a contractual indemnity obligation. (*See* 20 RR 20) Fresh Coat's attorney further testified that Fresh Coat could have segregated its fees, but chose not to. (20 RR 28) This uncontradicted testimony conclusively established that the jury's award included Fresh

Coat's unrecoverable fees, expenses, and costs.

B. It was Fresh Coat's burden—not Finestone's—to prove the recoverable amount of its fees, expenses, and costs.

The evidence conclusively showed, based on the testimony of Fresh Coat's own attorney, that some portion of the fees, expenses, and costs submitted were unrecoverable because they were incurred in connection with Fresh Coat's litigation with Life Forms over Fresh Coat's contractual liability. The court of appeals held that the portion of Fresh Coat's fees, expenses, and costs attributable to this contractual liability claim was not recoverable under Chapter 82, but it effectively flipped the burden of proof on this issue and assigned it to Finestone. Based on Court's prior holdings and the language of the instructions submitted in the charge, the court of appeals' holding was erroneous.

A challenge to the sufficiency of the evidence must be measured against the court's charge as submitted, not some other unidentified law, when the opposing party fails to object to the charge. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). This is true even when one party alleges that the charge was defective with respect to the burden of proof. *Id.* Question 7(c) of the charge asked the jury to determine the amount of Fresh Coat's loss measured as its "[r]easonable attorneys' fees, expenses and costs in defending the products liability action and in pursuing its indemnity claim against Finestone." (CR 4125) Just as it was instructed with regard to Fresh Coat's damage claims, the jury was instructed in answering this question to exclude "any amount that constitutes loss caused by Fresh Coat's own negligence, intentional misconduct, or other act or omission, if any . . . for which Fresh Coat is independently liable." (*Id.*) The jury was also instructed that

any answer other than a “yes” or “no” must be proved by a preponderance of the evidence. (CR 4115) The question and instructions obviously placed the burden of proof on Fresh Coat, and Fresh Coat did not object to the question or to the instructions. (30 RR 19-20)

The court of appeals reliance on *Meritor Automotive*, which it cites “generally,” is misplaced. *K-2*, 253 S.W.3d at 397. *Meritor* does not suggest that a manufacturer has the burden to obtain a finding on the amount of the unrecoverable loss. In *Meritor*, this Court held that, in order for a manufacturer to invoke Chapter 82’s exception, “it must be established that the seller’s conduct ‘caused’ the loss.” *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 484 S.W.3d 86, 91 (Tex. 2001). In other words, the exception “is established by a finding that the seller’s independent conduct was a cause of the plaintiff’s injury.” *Id.* *Meritor* focuses on the manufacturer’s burden to establish the seller’s independent liability. It does not even discuss whether the manufacturer’s burden extends to proving the amount of loss attributable to that independent liability. Often, that proof will be under the control of the seller, who litigated and either tried or settled the underlying case. With respect to attorneys’ fees, that proof will always be under the control of the seller or its attorney. It makes no sense to require one party to segregate another party’s recoverable damages and fees from their unrecoverable damages and attorneys’ fees. Nothing in the statute requires the burden of segregation to be imposed on the manufacturer. This Court should take this case to set the record straight on which party has the burden of proof under Chapter 82 to establish the amount of recoverable loss.

Accordingly, the only relevant inquiry is whether Fresh Coat presented sufficient evidence to support the jury's finding that the full amount of fees, expenses, and costs sought by Fresh Coat did not relate to its own independent conduct. Because the evidence is undisputed that Fresh Coat did not meet this burden, the court of appeals erred in not reversing the trial court's judgment and remanding the case.

C. Finestone was not required to object to the charge or to the unsegregated evidence of these amounts.

The court of appeals also erred in concluding Finestone waived its legal sufficiency challenge to the jury's award of fees, costs, and expenses. Finestone was not required to object to the "aggregate" submission of Fresh Coat's fees, costs, and expenses or to request separate blanks in the charge for Fresh Coat's recoverable and non-recoverable fees, costs, and expenses. Unlike a standard pattern jury charge question—which simply asks the jury to determine a reasonable attorney's fee—here, the jury was explicitly instructed *not* to award amounts to Fresh Coat for "loss caused by Fresh Coat's own negligence, intentional misconduct, or *other act or omission*, if any . . . *for which Fresh Coat is independently liable.*" (CR 4125) (Emphasis added.) Thus, the jury was told not to award Fresh Coat *any* fees, expenses, or costs for matters such as Fresh Coat's contractual litigation with Life Forms, and it was Fresh Coat's burden to prove the amount of its recoverable fees. *Tony Gullo Motors*, 212 S.W.3d at 313-14. The charge correctly instructed the jury on this issue, and it was not necessary for Finestone to object to this question. Moreover, because Fresh Coat put on no evidence of segregated fees, costs, or expenses, the jury would have had no evidentiary basis on which to segregate

the amounts of these items into two answer blanks. Submitting separate blanks under the evidence in this case would have been error. *See* TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). And submitting a blank for fees that cannot be awarded is a pointless exercise.

Fresh Coat made the conscious decision not to present evidence of its fees, costs, and expenses in a segregated form. However, Texas law places the burden on Fresh Coat to present evidence segregating its recoverable attorneys' fees, expenses, and costs from those related to claims for which such amounts are not recoverable. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10-11 (Tex. 1991). Texas follows the "American Rule" that permits recovery of attorneys' fees only when authorized by statute or by contract. *Gulf States Utils. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002). This Court has explained that segregation of fees "ought to be required" whenever possible:

[W]e reaffirm the rule that if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. . . . [W]hen . . . it cannot be denied that at least some of the attorney's fees are attributable only to claims for which fees are not recoverable, segregation of fees ought to be required and the jury ought to decide the rest.

Tony Gullo Motors, 212 S.W.3d at 313-14. The *Tony Gullo* decision modified *Sterling* by restricting the exception to the American Rule so that "intertwined facts" no longer justify a failure to segregate. *Id.* at 313 ("To the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom 'inseparable' and all legal fees recoverable, it went too far."). Under the holdings of these cases, Finestone was not required to undertake the task of segregating Fresh Coat's recoverable fees,

expenses, and costs—that burden rested with Fresh Coat. Contrary to the prior holdings of this Court and to the language in the charge, the court of appeals improperly shifted the burden of proof to Finestone.

As the court of appeals acknowledged, there is no statutory basis for imposing on Finestone the fees, costs, and expenses incurred by Fresh Coat in litigating the merits of its contract with Life Forms. *See K-2, Inc.*, 253 S.W.3d at 397. Fresh Coat conceded that it did not segregate its non-recoverable fees, costs, and expenses—the amounts it incurred resisting the contractual indemnity claim—from the amounts sought from Finestone. (19 RR 197-99)

This Court has previously upheld a similar legal sufficiency challenge, in *International Security Life Insurance Co. v. Finck*, 496 S.W.2d 544, 546-47 (Tex. 1973). There, the claimant sought attorneys' fees under a provision of the Texas Insurance Code, which authorizes the recovery of attorneys' fees, but expressly limits the amount of recoverable fees to those incurred for collection of the insurance claim. *Id.* at 546. The trial court in that case did not submit a broad form charge question on attorneys' fees, but submitted a limited question mirroring the statute, similar to the charge in this case. *Id.* at 546-47. The defendant did not object to the charge but challenged the legal sufficiency of the evidence supporting the award of attorneys' fees. *Id.* at 546. This Court concluded as follows:

The special issue properly limited the jurors' consideration to attorney fees for the collection of the claim under the insurance policy; however, all the evidence submitted to the jury had to do with the attorneys' services in preparing the case pertaining to the alleged fraud and deceit cause of action, and not upon the claim under the insurance policy. We therefore conclude

there is no evidence to support the jury finding.

Id. at 546-47. In other words, because the jury charge limited the claimant's recoverable attorneys' fees to those incurred for pursuing the insurance claim, but the evidence established that the jury's award included attorneys' fees incurred for *other* matters, there was no evidence to support the jury's fee award and that issue was remanded. *Id.* Here, as in *Finck*, the jury's award included non-recoverable fees and there is no evidence to support the full amount of Fresh Coat's award of fees, costs, and expenses, and the trial court's judgment on this issue must be reversed and remanded for a factual determination of the recoverable amounts. *Id.*

D. The court of appeals' reduction of Fresh Coat's damage award necessitates a remand on attorneys' fees.

The court of appeals' significant reduction of Fresh Coat's recoverable damages also requires remand of the award of fees, expenses, and costs. As noted above, the court of appeals reversed and rendered judgment reducing Fresh Coat's recovery of damages by approximately \$1.2 million—more than one-half of the actual damages awarded by the judgment. (CR 4125) Under such circumstances, if an award of “some, but not all” of a party's attorneys' fees is still appropriate, this Court's teaching is to reverse and remand the award of fees for a new trial on what constitutes a “reasonable” fee, in light of the reduced damage award. *See Young v. Qualls*, 223 S.W.3d 312, 314-15 (Tex. 2007); *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006); *see also Montague v. Nat'l Loan Investors, L.P.*, 70 S.W.3d 242, 252 (Tex. App.—San Antonio 2001, pet. denied) (remanding to trial court for determination of attorneys' fees in light of disposition of the

damages award); *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 894-95 (Tex. App.—Dallas 2001, pet. denied).

In *Barker*, the court of appeals held the party challenging the attorneys' fees award had waived its appeal of the issue by not objecting to the jury charge—the same reason given by the court of appeals in this case. 213 S.W.3d at 312-13. But this Court held that the party challenging the award was not required to object to the charge because it was not complaining about the language of the charge. *Id.* Like the appellant in *Barker*, Finestone does not complain about the instructions given to the jury in Question 7. Rather, Finestone challenged the sufficiency of the evidence to support the award of attorneys' fees, expenses, and costs.

As in *Barker*, the court of appeals here could not have conducted a meaningful sufficiency review of the jury's erroneous finding of fees, expenses, and costs because that finding assumed an incorrect amount of actual damages. *See id.* at 313-14. Accordingly, in light of the court of appeals' substantial reduction of Fresh Coat's actual damages, this Court should reverse the portion of the trial court's judgment awarding Fresh Coat its attorneys' fees, costs, and expenses and remand to the trial court for a new trial on these amounts.

E. Because Fresh Coat sought recovery of its fees as unliquidated damages, the trial court's judgment in favor of Fresh Coat must be reversed and remanded for a new trial on all issues.

Ordinarily, the award of Fresh Coat's attorneys' fees could be reversed and remanded for a new trial solely on the amount of recoverable attorneys' fees. *See Young*, 223 S.W.3d at 314-15; *Barker*, 213 S.W.3d at 314. But Fresh Coat sought recovery of its

fees, aggregated with its other expenses and costs, as part of its unliquidated damages—the alleged “loss” it argued was recoverable under its statutory indemnity claims. *See* TEX. CIV. PRAC. & REM. CODE § 82.002(b). Texas courts may not order a separate trial solely on unliquidated damages when liability is contested. TEX. R. APP. P. 44.1(b); TEX. R. CIV. P. 320; *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001). Here, Finestone has never conceded liability on Fresh Coat’s claims. Thus, the trial court’s judgment in favor of Fresh Coat must be reversed in its entirety and remanded for a new trial on all issues, unless this Court determines rendition of a take-nothing judgment is appropriate. TEX. R. APP. P. 44.1(b); TEX. R. CIV. P. 320; *Estrada*, 44 S.W.3d at 562.

CONCLUSION AND PRAYER

For all of the foregoing reasons, Respondent/Cross-Petitioner, K-2, Inc. (a/k/a Finestone) respectfully requests that this Court grant Finestone’s Petition for Review, reverse the judgment of the trial court, and render judgment that Fresh Coat take nothing. In the alternative, Finestone respectfully requests that this Court reverse the judgment of the trial court and remand this matter for a new trial. Finestone further prays for any and all other relief to which it may be entitled.

Respectfully submitted,

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