

# 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 Ninth Court of Appeals of Beaumont, Texas  
No. 09-06-00251-CV

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**K-2, INC.'S RESPONSE TO FRESH COAT'S  
BRIEF ON THE MERITS**

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**ORAL ARGUMENT REQUESTED**

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## **ISSUES PRESENTED**

1. Under Chapter 82 of the Texas Civil Practice and Remedies Code, a manufacturer has no statutory duty to indemnify a seller against loss “for which the seller is independently liable.” Did the court of appeals correctly hold that Finestone had no duty to indemnify Fresh Coat because the evidence conclusively established that Fresh Coat’s loss was based solely on Fresh Coat’s independent contractual liability?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent/Cross-Petitioner, K-2, Inc. (“Finestone”) files this Response to Fresh Coat’s Brief on the merits, and would show the Court as follows:

## **PRELIMINARY STATEMENT**

Fresh Coat, a contractor who applied synthetic stucco (EIFS) to the exterior of houses built by Life Forms, conceded at trial that the only reason it paid Life Forms \$1.2 million was because it had a contractual indemnity obligation to do so. Fresh Coat now wants this Court to rescue it from that concession and permit it to seek statutory indemnity for this payment against Finestone, who manufactured the EIFS components. Fresh Coat’s claims are without merit, and there is nothing in its petition worthy of review.

## **STATEMENT OF FACTS<sup>1</sup>**

Because the opinion of the court of appeals correctly states the nature of the case with respect to the issues raised in Fresh Coat's petition and because Finestone has given a full recitation of the facts in its Cross-Petition for Review, Finestone does not repeat or set forth any additional facts here.

## **SUMMARY OF THE ARGUMENT**

This Court should deny Fresh Coat's petition for review because the court of appeals did not err in holding that Finestone owes no duty under Chapter 82 to indemnify Fresh Coat for its \$1.2 million settlement payment to Life Forms. The court of appeals correctly held that, as a matter of law, the evidence established that Fresh Coat paid the \$1.2 million settlement to Life Forms solely because of its independent contractual liability. Accordingly, section 82.002(a)'s exception applies here to bar Fresh Coat's indemnity claim against Finestone, regardless of whether Fresh Coat's independent liability is based on its written agreement to answer for such claims or on its own tortious conduct.

In addition, this Court should deny Fresh Coat's petition because the court of appeals' decision is limited to the circumstances of this case. As a result, Fresh Coat does not raise any issue of such importance to the jurisprudence of the state as to justify granting its petition for review.

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<sup>1</sup> Citations to the Clerk's Record will be made as "(CR [page number])" and to the Reporter's Record as "([volume] RR [page])." Citations to Fresh Coat's Petition for Review will be made as "(FC Pet. at [page])."

## STANDARD OF REVIEW

The issues raised in Fresh Coat’s brief on the merits involve the court of appeal’s review of Finestone’s challenge to the legal sufficiency of the evidence supporting one of the jury’s findings. In reviewing the legal sufficiency of the evidence supporting a jury finding, an appellate court may credit evidence that supports the finding only if a reasonable fact finder could, and may disregard contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The Court must sustain a legal sufficiency challenge when the evidence offered to prove a vital fact is no more than a scintilla, or the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810; Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 362-64 (1960). Evidence that does no more than create a mere surmise or suspicion that a fact exists does not meet the “more than a scintilla” standard. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). In some cases, a review of *all* the evidence presented is necessary to determine whether the evidence was legally sufficient to support a particular finding. *City of Keller*, 168 S.W.3d at 811.

This matter also involves the construction of a statute. The Court recently explained the standard of review for statutory construction as follows:

The meaning of a statute is a legal question, which we review de novo to ascertain and give effect to the Legislature's intent. Where text is clear, text is determinative of that intent. This general rule applies unless enforcing the plain language of the statute as written would produce absurd results. Therefore, our practice when construing a statute is to recognize that “the words [the Legislature] chooses should be the surest guide to legislative

intent.” Only when those words are ambiguous do we “resort to rules of construction or extrinsic aids.”

*Entergy Gulf States, Inc. v. Summers*, No. 05-0272, 2009 Tex. LEXIS 123, at \*9-7 (Tex. Apr. 3, 2009) (citations omitted).

## ARGUMENT

### **I. The court of appeals correctly held that Finestone had no duty under Chapter 82 to indemnify Fresh Coat for Fresh Coat’s independent liability.<sup>2</sup>**

Under Chapter 82 of the Civil Practice and Remedies Code, a manufacturer has no statutory duty to indemnify a seller against loss “for which the seller is independently liable.” TEX. CIV. PRAC. & REM. CODE § 82.002 (a). Here, the court of appeals correctly held that Finestone had no duty to indemnify Fresh Coat for Fresh Coat’s independent liability. *See K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 396 (Tex. App.—Beaumont 2008, pet. filed).

#### **A. Fresh Coat paid the \$1.2 million settlement to Life Forms solely because of its independent contractual liability and irrespective of whether Life Forms was negligent.**

The court of appeals correctly held that the testimony of Fresh Coat’s attorney, Robert Bateman, established that Fresh Coat had paid a \$1.2 million settlement to Life Forms because of Fresh Coat’s agreement to do so under a contract between those parties and not because of any other claim, products liability or otherwise. *See K-2*, 253 S.W.3d

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<sup>2</sup> In this Response, Finestone only addresses Fresh Coat’s arguments that the court of appeals erred in applying Chapter 82’s exception and reversing the portion of the trial court’s judgment awarding Fresh Coat \$1.2 million. But the issues raised in Fresh Coat’s brief should only be reached after consideration of the issues raised in Finestone’s brief on the merits—that the trial court’s judgment should be reversed in its entirety because Fresh Coat was not a seller and its loss did not arise out of a products liability action.

at 396. Mr. Bateman testified at trial, as follows:

Q. Your testimony is the \$1,200,000 was paid to Life Forms to settle the contractual indemnification provision in the contract between Life Forms and Fresh Coat. Is that my understanding?

A. Yes. . . .

Q. My specific question was you are aware within the contract signed by Fresh Coat with Life Forms there is a paragraph that is entitled contractual indemnification.

A. Right.

Q. And under that contractual indemnification, are you saying that the \$1.2 million all went to that?

A. Uh-huh.

Q. Okay.

A. There was no other reason to give Life Forms any money to my knowledge.

Q. So, the entirety of your belief of where the exposure lays for Fresh Coat as to the claims made by Life Forms stem through that provision.

A. Yes. That provision. That's correct.

(19 RR 202-03) On the following day of trial, Mr. Bateman testified yet again that Fresh Coat's contractual obligation was separate from any products liability or other action:

Q. Mr. Bateman, I appreciate you clearing up a few things. Let's put that contract back up for a moment. As I understand what you have just testified to – and tell me if I am wrong – based on what is called the contractual indemnification provisions within the contract between Fresh Coat and Life Forms, you felt that Life Forms's exposure and because of exposure that decision to settle with Life Forms was based solely on that contract, right?

A. It was solely on the contract. That's correct.

(20 RR 20) In fact, Mr. Bateman testified that, because of its agreement to do so, Fresh Coat would still have had to pay Life Forms whether or not Life Forms was found to have been independently negligent—and was thus unable to seek any indemnity under the statute.

[I]t makes no difference whether or not Life Forms was negligent or not negligent. I agreed by contract to indemnify them regardless if they were at fault or not which means I can't use as an excuse you screwed something up so, therefore, I shouldn't have to pay you. What this contract language says is it doesn't make any difference if – I'm not suggesting they did screw something up. I am simply saying by virtue of this language it makes no difference whether or not there is any factual support for a contention that they screwed something up. I still have to pay them. And these things are quite common in the construction industry, unfortunately, but – I usually try to tell my clients not – to tell my client not to sign a contract that has them. Point is it is there and we had that obligation. That's the reason why these payments were made to Life Forms.

(20 RR 12-13)

This testimony came from Fresh Coat's lead trial attorney, in response to several questions over multiple days of trial. Fresh Coat had ample time to correct, dispute, or contradict this testimony, but it chose not to. The court of appeals correctly held that this testimony conclusively established that the settlement payment Fresh Coat made to Life Forms was based solely on Fresh Coat's independent liability under its contract, which pre-existed and was independent of any product liability claims. *See K-2*, 253 S.W.3d at 396. Because the court of appeals did not err in holding that Finestone had no statutory duty to indemnify Fresh Coat, this Court should deny Fresh Coat's petition.

**B. Fresh Coat cannot rely on Chapter 82 to shift its contractual indemnity obligations to Finestone.**

The trial court's judgment awarding Fresh Coat \$1.2 million, had it not been reversed, would have impermissibly shifted Fresh Coat's contractual obligations to Finestone, a stranger to the contract. *See K-2*, 253 S.W.3d at 396. That is because Fresh Coat paid the Life Forms settlement based solely on a contractual indemnity provision that required Fresh Coat to indemnify Life Forms regardless of "whether or not Life Forms was negligent." (20 RR 12-13)

One of Fresh Coat's fundamental arguments in its brief is that the \$1.2 million settlement payment covers losses sustained by the underlying homeowners or by Life Forms that Life Forms could have recovered directly from Finestone, but instead were recovered from Fresh Coat. (*See FC Br.* at 30) As a result, Fresh Coat claims that it is entitled to recover this "loss" from Finestone. (*Id.*) But because Fresh Coat was "independently liable" under its indemnity contract with Life Forms regardless of whether Life Forms was negligent or not negligent, Fresh Coat cannot use Chapter 82 to shift its broad contractual indemnity obligation to Finestone. *See TEX. CIV. PRAC. & REM. CODE* § 82.002(a). Otherwise, the statutory indemnity obligation imposed on manufacturers could be expanded by indemnity contracts to which they are not parties under circumstances not covered by the statute.

Fresh Coat similarly claims, without citation to any authority, that privity "makes no difference" with respect to section 82.002(a)'s exception because manufacturers are "statutorily obligated to *fully* reimburse *all* losses incurred by *any and all* sellers." (FC

Br. at 22, 31) (Emphasis in original.) But a manufacturer does not have the duty to indemnify a seller against losses caused by the seller's negligence or other independent liability. *See* TEX. CIV. PRAC. & REM. CODE § 82.002(a). The absence of privity between Life Forms and Finestone *does* make a difference. Fresh Coat chose to bargain away its statutory right to assert that the loss at issue here was a result of Life Forms's independent liability—i.e., negligently constructing the homes. In contrast, Finestone did not make such a bargain or give up its statutory defenses. The trial court's judgment would have the effect of imposing such an agreement on Finestone.

Fresh Coat also claims that Life Forms's lack of negligence has already been determined and, therefore, Life Forms could have recovered the \$1.2 million directly from Finestone. (FC Br. at 31) But the issue is whether Fresh Coat can voluntarily enter into contractual indemnity agreements with third parties—presumably to Fresh Coat's benefit—and then try to shift that liability to Finestone. The answer is found in the statute, which clearly provides that a manufacturer is not liable for loss if the seller is independently liable. *See* TEX. CIV. PRAC. & REM. CODE § 82.002(a). Fresh Coat's choice to sign a contract containing an indemnity clause is an act—a business decision not forced upon it—for which Fresh Coat is independently liable.

Fresh Coat's argument stretches the limits of Chapter 82 beyond losses arising out of product liability actions to include private contractual agreements to which a product manufacturer is not a party. The Legislature did not intend to make product manufacturers parties to contracts they never signed. Reading the statute as Fresh Coat urges would have this effect and would not, as Fresh Coat claims, “further the Act's

purpose.” (FC Br. at 29-32) As the court of appeals noted, Fresh Coat’s argument requires Texas courts to shift contractual obligations—bargained for by the parties to the contract in exchange for specific consideration—to other persons or companies who never agreed to assume such obligations. *See K-2*, 253 S.W.3d at 396. This has never been the policy of Texas, and the court of appeals correctly reversed this portion of the trial court’s judgment. *See Gen. Am. Ins. Co. v. Pepper*, 339 S.W.2d 660, 663 (Tex. 1960) (“Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed.”).

**C. Fresh Coat’s arguments that Finestone has not met its burden to establish section 82.002(a)’s exception are without merit.**

**1. Finestone was not required to secure a separate finding establishing section 82.002(a)’s exception.**

While noting that the jury found that Chapter 82’s exception did not apply, Fresh Coat claims that Finestone nevertheless had “the burden to prove and obtain a finding establishing the exception to indemnity under Chapter 82.” (FC Br. at 14) Fresh Coat misses the point. Finestone challenged the legal sufficiency of the evidence supporting the jury’s finding; it was not required to obtain any other finding.

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). Question 7(b) of the charge asked the jury to determine the amount of Fresh Coat’s loss measured as its “[r]easonable settlement amounts paid to Life Forms.” (CR 4125). The jury was

instructed that, in answering this question, it was to “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.” (*Id.*) The jury was also instructed that any answer other than a “yes” or “no”—such as an award of monetary damages—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). Accordingly, the only relevant inquiry is whether Fresh Coat presented legally sufficient evidence to support the jury’s finding that the settlement amounts paid to Life Forms sought by Fresh Coat did not relate to its own independent liability. Because the evidence conclusively established—through the undisputed testimony of Fresh Coat’s lead trial attorney—that the Life Forms settlement was a loss for which Fresh Coat was independently liable, Fresh Coat did not meet its burden of proof under the charge submitted and the court of appeals correctly reversed that portion of the trial court’s judgment.

Notwithstanding the language of the charge submitted in this case, Fresh Coat claims that Finestone was required to prove and obtain a finding establishing the exception. But, Finestone did prove—through Mr. Bateman’s undisputed testimony—that the Life Forms settlement was a loss for which Fresh Coat was independently liable. Moreover, there is a jury “finding” regarding the exception. Question 7 of the charge, quoted above, and its instructions expressly mirrored the language of the exception from section 82.002(a). *See* TEX. CIV. PRAC. & REM. CODE § 82.002(a). By awarding Fresh

Coat \$1.2 million as its reasonable settlement amounts paid to Life Forms under question 7(b), the jury found that the exception did not apply. Finestone challenged the legal sufficiency of the evidence supporting that finding. What other “finding” is necessary? There is no statute or case that requires Finestone to submit a question on the exception rather than an instruction. If Finestone were required to obtain a separate finding, its legal sufficiency challenge would be rendered meaningless.

Fresh Coat relies on a line of cases stemming from *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86 (Tex. 2001). (FC Br. at 14-15) But none of these cases even suggest that the court of appeals erred in this case. All but one of them, including *Meritor*, involve the review of a summary judgment and not a trial on the merits with “findings.” See *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 252 (Tex. 2006); *Meritor*, 44 S.W.3d at 91; *Oasis Oil Corp. v. Koch Ref. Co. L.P.*, 60 S.W.3d 248, 251 (Tex. App.—Corpus Christi 2001, pet. denied); *Panatrol Corp. v. Emerson Elec. Co.*, 163 S.W.3d 182, 185 (Tex. App.—San Antonio 2005, pet. denied); *Freeman Fin. Inv. Co. v. Toyota Motor Corp.*, 109 S.W.3d 29, 33 (Tex. App.—Dallas 2003, pet. denied). The presence or absence of particular findings was not at issue in those cases. The other case, *Bren-Tex Tractor Co. v. Massey-Ferguson, Inc.*, involved the review of a trial court finding that “any loss suffered by Bren-Tex was caused by negligence, intentional misconduct, or other acts or omissions for which Bren-Tex would be independently liable.” *Id.*, 97 S.W.3d 155, 158 (Tex. App.—Houston [14th Dist.] 2002, no pet.) These cases hold that there must be sufficient evidence of the seller’s independent liability to establish the exception. In *Meritor*, this Court held that, although

the plaintiff's pleading invoked section 82.002(a)'s indemnity provision, the exception must be established by the evidence. 44 S.W.3d at 91. Here, the jury awarded Fresh Coat everything it asked for. The cases cited by Fresh Coat did not require Finestone to obtain another finding instead of challenging the legal sufficiency of the evidence supporting the jury's award of damages, when that finding incorporated an implicit finding that the exception does not apply.

Because the evidence conclusively established that Fresh Coat paid the settlement to Life Forms based solely on its independent liability, there was legally insufficient evidence to support the jury's finding that the exception did not apply. No "separate" finding was required. Therefore, the court of appeals correctly reversed that portion of the trial court's judgment and Fresh Coat's petition should be denied.

**2. The evidence established more than "merely that Fresh Coat settled a claim in a products liability action."**

Fresh Coat claims that "the bottom line is that Fresh Coat merely settled allegations made against it in the products liability action." (FC Br. at 18) According to Fresh Coat, Life Forms brought its contractual indemnity claim against Fresh Coat as one of several properly joined claims. Fresh Coat then asserts that because costs to defend claims properly asserted in a products liability action are included as part of the "loss" under Chapter 82, costs to settle those claims are likewise a "loss." (FC Br. at 19) Essentially, Fresh Coat argues that even if the Life Forms settlement was based solely on the contractual indemnity claim, it was still a loss arising out of a products liability action. But Fresh Coat again misses the point. The issue here is not whether the Life

Forms “settlement constitutes damage to Fresh Coat ‘arising out of’ a products liability action.”<sup>3</sup> (See FC Br. at 19) In fact, the application of Chapter 82’s exception assumes that the loss arose out of a products liability action. The issue is whether Fresh Coat’s loss was a result of Fresh Coat’s independent liability. Because the evidence conclusively established that it was, the court of appeals correctly held that Chapter 82’s exception applies. See *K-2*, 253 S.W.3d at 396.

**3. The statute does not limit section 82.002(a)’s exception to losses caused by a seller’s tortious conduct.**

To avoid the effect of its concessions at trial, Fresh Coat argues that the exception in section 82.002(a) must be read to apply only to losses caused by a seller’s tortious conduct. (FC Br. at 20-21) But that limitation appears nowhere in the text of section 82.002(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 § 82.002 (a). Fresh Coat attempts to rewrite the statute to create a limitation that does not otherwise exist and which is not a part of the statute’s plain language.

Fresh Coat’s construction would require the Court to rewrite the statute and insert the word “tortious” into the phrase “other act or omission.” But this is something the Court cannot do. As this Court stated recently in *Owens & Minor, Inc. v. Ansell*

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<sup>3</sup> As indicated above, and as argued in Finestone’s brief on the merits, Fresh Coat’s losses did not arise out of a products liability action and Chapter 82 indemnity should not apply at all.

*Healthcare Products*, a case involving the construction of section 82.002, “it is a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.” 251 S.W.3d 481, 483 (Tex. 2008); *see Entergy*, 2009 Tex. LEXIS 123, at \*9-7. If the Legislature had intended to limit the statutory exception to losses caused only by a seller’s tortious acts, it certainly knew how to do so. *See, e.g.*, TEX. BUS. ORG. CODE § 252.006(c) (“A tortious act or omission of a member . . . is not imputed to a person merely because the person is a member of the nonprofit association . . . .”); TEX. INS. CODE § 911.152(b) (“A farm mutual insurance company may not assume or issue an insurance policy that: (1) indemnifies an insured for liability to a third party the insured incurs in committing a tortious act . . . .”). Just as courts must presume that every word used by the Legislature has a purpose, courts must also presume that the Legislature had a purpose in excluding words from a statute. *See Quick v. City of Austin*, 7 S.W.3d 109, 122-23 (Tex. 1999); *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).

In support of its construction of section 82.002(a), Fresh Coat cites *Freightliner Corporation v. Ruan Leasing Co.*, 6 S.W.3d 726 (Tex. App—Austin 1999), *aff’d sub nom.*, *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86 (Tex. 2001). (FC Pet. at 8) In *Freightliner*, the only conduct of the seller that was at issue was a claim of negligence. The court of appeals’ concern was whether that negligence had to be proven or whether allegations of negligence were enough to trigger the exception. *See Freightliner*, 6 S.W.3d at 731. That court was not asked to decide, and did not decide, whether the exception was limited to tortious conduct or other “causative fault” despite

the statute's plain language to the contrary. Fresh Coat cites to no other authority for its allegation that the exception applies "only when, and to the degree, the seller's independent, *tortious* conduct caused the loss."<sup>4</sup> (FC Br. at 20) (Emphasis in original.) That is because there is none.

**4. Finestone was not required to prove that Fresh Coat's independent liability caused the homeowners' loss.**

Fresh Coat also asserts that the exception in section 82.002(a) does not apply because there was no evidence its conduct caused the underlying homeowners' injuries. (FC Br. at 25) Again, the statute imposes no such requirement. The exception applies to any loss "for which the seller is independently liable." TEX. CIV. PRAC. & REM. CODE § 82.002 (a).

Fresh Coat claims that the \$1.2 million settlement is "representative of losses suffered by the homeowners or Life Forms in defense costs." (FC Br. at 26) But the "loss" at issue here is not that of the homeowners. Fresh Coat did not enter into the \$1.2 million settlement with the homeowners and there is no evidence that the money ever went to the homeowners. Fresh Coat does not cite to any portion of the record to suggest otherwise. As Fresh Coat states, the "loss" for which Fresh Coat seeks indemnity is Fresh Coat's "costs to settle" the claims made against it by Life Forms. (FC Br. at 19)

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<sup>4</sup> Fresh Coat also refers to the legislative history of the statute discussed in *Meritor*. (FC Br. at 21) However, *Meritor* did not address whether section 82.002(a)'s exception is satisfied by independent contractual liability. Rather, the question in *Meritor* was whether a plaintiff's pleading that a seller was negligent was sufficient to invoke the exception. 44 S.W.3d at 91. This Court held that, while a plaintiff's pleadings are sufficient to invoke the manufacturer's duty, they are not sufficient to invoke the exception. *Id.* Instead, the manufacturer must prove the independent liability of the seller. *Id.* Neither *Meritor* nor the statute's legislative history precludes the application of the exception to this case. Fresh Coat's independent liability was conclusively established.

This is reinforced by the fact that Fresh Coat also seeks its attorneys' fees as a "loss."

In addition, Finestone has not, as Fresh Coat suggests, "conceded" that the exception requires Finestone to prove and secure a finding that the *homeowners'* loss was caused by Fresh Coat. (*See* FC Br. at 26) In its reply, Finestone cited *Meritor*, which held that the manufacturer had to prove that the seller's conduct caused the plaintiff's injury. But in *Meritor* and *Hudiburg*, the "loss" at issue was a settlement paid by the seller to the injured plaintiff. *See Hudiburg*, 199 S.W.3d at 253; *Meritor*, 44 S.W.3d at 91. Here, there is no evidence that the \$1.2 million Life Forms settlement was paid to or ever went to the homeowners. Neither the statute nor this Court's decisions in *Meritor* and *Hudiburg* require a manufacturer to prove—when the "loss" is a settlement payment made by an applicator to a builder—that the applicator's independent liability caused the underlying homeowners' injuries. Fresh Coat's reliance on *Meritor* and *Hudiburg* is misplaced. Fresh Coat cannot escape the fact that the evidence at trial conclusively established that its "loss" was caused solely by its independent contractual liability. Fresh Coat again seeks to have the Court rewrite the statute to insert language the Legislature omitted, which this Court may not do. *See Quick*, 7 S.W.3d at 122-23.

**5. Chapter 82 indemnity does not exist independently of "any" contract.**

Fresh Coat claims that Finestone's statutory duty to indemnify "exists independently of *any* other obligations that may exist in contract." (FC Br. at 23) (Emphasis in original.) In fact, Fresh Coat claims that "the Court must examine Finestone's statutory duties as though no contractual indemnity rights existed between

any parties along the chain of commerce.” (*Id.*) Not surprisingly, Fresh Coat cites no authority for this erroneous construction of the statute.

Section 82.002(e)(2) provides that the duty to indemnify, as defined in the statute, “is in addition to any duty to indemnify established by law, contract, or otherwise.” TEX. CIV. PRAC. & REM. CODE § 82.002. In other words, a manufacturer’s statutory duty to indemnify a seller, if any, “supplements the seller’s rights under common law or contract.” *Dutton-Lainson Co. v. Do It Best Corp.*, 180 S.W.3d 234, 237 (Tex. App.—San Antonio 2005, no pet.). The focus of the statute is on the manufacturer’s duties to the seller, not “any” duties along the “chain of commerce” between other product suppliers. Fresh Coat attempts to give this provision a much broader scope, arguing that it somehow prohibits a court from giving any consideration to a seller’s independent contractual indemnity obligations when determining the scope or existence of a manufacturer’s statutory duty to indemnify. But the plain language of the statute does not support Fresh Coat’s argument. Chapter 82 does not exist independently of “any” contract. Fresh Coat’s attempt to create an inconsistency where none exists should be disregarded.

Fresh Coat’s flawed argument is premised on its erroneous assumption that Chapter 82 is designed so that the manufacturer “is statutorily obligated to fully reimburse *all* losses incurred by *any and all* sellers” arising from products liability actions. (FC Br. at 31) (Emphasis in original.) To the contrary, section 82.002(a) plainly provides an exception for those losses caused by acts for which the seller is independently liable. As one court stated, “the statute deliberately places the duty to

indemnify on the manufacturers regardless of how the action is concluded *unless a seller is found independently liable.*” *Dutton-Lainson*, 180 S.W.3d at 237-38 (emphasis added). When a seller is found to be independently liable, no statutory duty arises “in addition to” the seller’s contractual duties. *See* TEX. CIV. PRAC. & REM. CODE § 82.002. Contrary to Fresh Coat’s assertion, Finestone does not argue—nor did the court of appeals hold—that the mere existence of contractual indemnity rights “extinguishes” a manufacturer’s statutory indemnity duties under Chapter 82. (*See* FC Br. at 24) The issue is whether Fresh Coat was independently liable. As the court of appeals correctly held, the evidence conclusively established that Fresh Coat was independently liable for its loss because it paid the \$1.2 million settlement to Life Forms based solely on its own, independently bargained-for, contractual obligations. *K-2*, 253 S.W.3d at 396.

As discussed above, Fresh Coat’s argument stretches the limits of Chapter 82 beyond losses arising out of product liability actions to include private contractual agreements to which a product manufacturer is not a party. The court of appeals correctly disregarded Fresh Coat’s argument, which would require Texas courts to shift Fresh Coat’s contractual indemnity obligations to Finestone. *See K-2*, 253 S.W.3d at 396; *Pepper*, 339 S.W.2d at 663.

In addition, the court of appeals’ decision does not, as Fresh Coat contends, alter the subcontract between Fresh Coat and Life Forms. (FC Br. at 25) Finestone was not a party to Fresh Coat’s subcontract with Life Forms and is not bound by any “reservation of rights” therein. Fresh Coat cannot shift its contractual indemnity obligation to Finestone and preclude Finestone from asserting the exception under the statute. Fresh

Coat also minimizes the significance of the evidence in this case. It did not relinquish statutory rights “simply by entering into a contract with a homebuilder.” (FC Br. at 25) Rather, Fresh Coat had no statutory right to indemnity when it paid the \$1.2 million settlement to Life Forms based solely on its independent contractual liability and irrespective of whether Life Forms was negligent.

**6. Finestone was not required to obtain a finding that Fresh Coat owed indemnity to Life Forms under the subcontract.**

Similarly to its argument that Finestone was required to obtain a finding establishing the exception, Fresh Coat argues that Finestone was required to obtain a finding that “Fresh Coat actually owed indemnity to Life Forms under the subcontract.” (FC Br. at 27) But again, Fresh Coat misses the point and attempts to avoid the effect of its concessions at trial. Finestone challenged the legal sufficiency of the evidence supporting the jury’s finding that the exception did not apply. The evidence at trial conclusively established that Fresh Coat was independently liable. (20 RR 12-13, 20) There is no statute or case, and Fresh Coat cites to none, requiring Finestone to submit a separate question to the jury or to obtain a separate finding regarding Fresh Coat’s contractual obligations. Moreover, such a finding was unnecessary here. The undisputed testimony of Fresh Coat’s lead trial testimony established that Fresh Coat, in fact, “actually owed indemnity” under the contract.<sup>5</sup> Mr. Bateman testified, as follows:

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<sup>5</sup> It should also be noted that at least one court has held that, as a matter of law, Fresh Coat was contractually obligated to indemnify Life Forms under the same contract at issue here. In *Fresh Coat, Inc. v. Life Forms, Inc.*, 125 S.W.3d 765, 768 (Tex. App.—Houston [1st Dist.] 2003, no pet.), the court of appeals explained the trial court’s ruling, as follows: “The issue presented to the trial court by Life Forms’s motion for summary judgment was whether Fresh Coat was contractually obligated to indemnify Life Forms for the attorney’s fees, costs, and settlements incurred and paid by Life Forms as a result of the class-action lawsuit. In its judgment, the trial court awarded, to the penny, the amount of damages which Life Forms claimed it was entitled to

I agreed by contract to indemnify them regardless if they were at fault . . . I still have to pay them. . . . Point is it is there and we had that obligation. That's the reason why these payments were made to Life Forms.

(20 RR 12-13)

Contrary to Fresh Coat's assertion, there is not merely an "allegation of contractual liability" in this case; there is conclusive evidence establishing Fresh Coat's independent contractual liability and, thus, the exception to Chapter 82. *See* TEX. CIV. PRAC. & REM. CODE § 82.002 (a); *K-2*, 253 S.W.3d at 396. Likewise, Fresh Coat's argument about its "motivation" should be disregarded. Fresh Coat argues that if statutory indemnity exists "without regard to the manner in which the action in concluded," the "*reason* for concluding the claims by settlement certainly does not diminish the seller's indemnity rights either." (FC Br. at 28) (Emphasis in original.) But Fresh Coat makes this logical leap without citation to any legal authority. The fact remains that the evidence conclusively established Fresh Coat's independent liability; Fresh Coat cannot escape its concessions at trial and cannot shift its contractual obligations to Finestone. The court of appeals correctly applied Chapter 82's exception and Fresh Coat's petition should be denied.

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recover from Fresh Coat, and the trial court could not have granted any more relief to Life Forms than it did."  
*Id.*

**II. The court of appeals’ holding reversing the jury’s award of \$1.2 million in damages was confined to the facts and circumstances of this case and is not of such importance to the jurisprudence of the state as to justify granting Fresh Coat’s petition.**

Fresh Coat grossly overstates the “reverberations” of the court of appeals’ decision. (*See* FC Br. at 32) The court of appeals limited its holding to the facts of this case, 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.” *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 396 (Tex. App.—Beaumont 2008, pet. filed) (emphasis added). The circumstances in this case are unlikely to recur with the frequency or in the magnitude claimed by Fresh Coat. This case involved particular contractual language and evidence—and the unequivocal testimony of Fresh Coat’s attorney—that the sole reason Fresh Coat paid the \$1.2 million settlement to Life Forms was because of Fresh Coat’s independent contractual liability.

The relevant inquiry under section 82.002(a)’s exception is whether the seller’s loss was a loss for which the seller was independently liable. TEX. CIV. PRAC. & REM. CODE § 82.002 (2)(a). The court of appeals did not hold, as Fresh Coat suggests, that the exception always applies when there is a contractual indemnity agreement, or that the mere existence of a contractual indemnity agreement “extinguishes” a manufacturer’s statutory indemnity rights. (*See* FC Br. at 33) Rather, the court of appeals held that, in this case, in which Fresh Coat conceded the contractual indemnity agreement was the only reason it paid the settlement to Life Forms, Finestone did not have a statutory duty



