

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

FRESH COAT'S RESPONSE TO FINESTONE'S BRIEF ON THE MERITS

BATEMAN | PUGH, P.L.L.C.

ROBERT H. BATEMAN
Texas Bar No. 01899500
ADAM BRETT CHAMBERS
Texas Bar No. 24036345
909 Fannin Street, Suite 1800
Houston, Texas 77010
Telephone: (713) 609-7700
Facsimile: (713) 609-7777

CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN

KEVIN D. JEWELL
Texas Bar No. 00787769
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

ATTORNEYS FOR PETITIONER,
FRESH COAT, INC.

IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

A. Parties:

Petitioner/Plaintiff/
Cross-Respondent: Fresh Coat, Inc.

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

B. Attorneys:

For Petitioner
Fresh Coat, Inc.: Kevin D. Jewell
kevin.jewell@chamberlainlaw.com
Chamberlain, Hrdlicka, White, Williams & Martin
1200 Smith Street, Suite 1400
Houston, Texas 77002

Robert H. Bateman
State Bar No. 01899500
Adam Brett Chambers
State Bar No. 24036345
Bateman | Pugh, P.L.L.C.
Two Houston Center
909 Fannin Street, Suite 1800
Houston, Texas 77010

For Respondent
K-2, Inc.: Thomas C. Wright
Michael Choyke
R. Russell Hollenbeck
Wright, Brown & Close, LLP
Three Riverway, Suite 600
Houston, Texas 77056

William V. Dorsaneo, III
3315 Daniel
Dallas, Texas 75272

Ralph E. Gustafson
Wade Reese
Tucker, Taunton, Snyder & Slade
10370 Richmond Ave., Suite 1400
Houston, Texas 77042

William A. Adair
Adair & Pettit
401 W. Davis St.
Conroe, Texas 77301

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL iv

TABLE OF CONTENTS iv

INDEX OF AUTHORITIES vii

ISSUES PRESENTED IN RESPONSE TO FINESTONE’S BRIEF..... xiv

SUMMARY OF THE ARGUMENT 1

ARGUMENT AND AUTHORITIES 4

 A. Fresh Coat is a “seller” and the affirmative finding in its favor is
 amply supported in the record. 4

 1. *Product “sellers” broadly include not only those who initially
 place products or their components into the stream of
 commerce, but many others in the chain of distribution.* 4

 2. *The evidence goes far beyond the minimal amount required to
 show Fresh Coat meets the definition of “seller.”* 6

 3. *Whether or not Fresh Coat also provided “services” in
 addition to EIFS materials does not alter its status as a seller
 under Chapter 82.* 9

 a. Fresh Coat provided both products and services. 9

 b. “Sales-service” or “hybrid” providers are “sellers.” 10

 c. Fresh Coat’s provision of EIFS materials is not
 “incidental” to its work. 14

 4. *Jurisprudential authority elsewhere weighs in Fresh Coat’s
 favor.* 15

 5. *EIFS and its components are “used” or “consumed.”* 18

B.	Chapter 82 applies to EIFS and as its component parts because they are defective products.....	20
1.	<i>Finestone did not preserve the argument that EIFS is not a product.</i>	20
2.	<i>The term “product” includes tangible personal property placed or otherwise distributed, for commercial purposes, in the stream of commerce</i>	22
a.	Though not expressly defining “product,” Chapter 82 assumes products are, at a minimum, tangible property.	22
b.	The Restatement defines products as including tangible personal property and, in some instances, more.....	22
c.	Courts from Texas and elsewhere have traditionally understood products to possess tangible properties.	23
d.	Statutory definitions in other jurisdictions mirror the approach taken by courts and the Restatement of Torts.	24
3.	<i>Chapter 82 applies to products <u>and</u> their component parts</i>	25
4.	<i>EIFS and its components are products because they are tangible property distributed or otherwise placed in the stream of commerce.</i>	28
a.	Texas cases have implicitly understood EIFS to be a product.....	28
b.	Other jurisdictions consider EIFS to be a product.	29
5.	<i>EIFS and its components do not cease being products by their incorporation into a house.</i>	30
6.	<i>Witnesses testified that EIFS is a product.</i>	35
7.	<i>Chapter 82 does not except home construction cases from its reach, nor has any Texas appellate court recognized such an exception</i>	37

C.	Should the Court grant review on the fee issue, it should affirm because the court of appeals correctly upheld the judgment as to Fresh Coat’s attorneys’ fees and expenses.....	38
1.	<i>It is the manufacturer’s burden to show what portion of the seller’s loss falls within § 82.002(a)’s exception to indemnity.</i>	39
2.	<i>Finestone waived any error as to its complaint that the charge does not segregate fees between those relating to recoverable damages and those relating to non-recoverable damages.....</i>	44
3.	<i>Because Finestone presented no evidence to meet its burden, the court of appeals result is correct and this Court should deny Finestone’s petition.</i>	47
4.	<i>In any event, Finestone is not entitled to a remand on attorneys’ fees.</i>	47
5.	<i>Even if Finestone were entitled to a new trial on fees, a new trial on all issues is neither warranted nor allowed in these circumstances.</i>	48
	PRAYER	50
	CERTIFICATE OF SERVICE.....	51

INDEX OF AUTHORITIES

CASES

<i>Abode Building Centers, Inc. v. Reynolds</i> , 403 So.2d 1033 (Fla. 4th DCA), <i>review denied</i> , 411 So.2d 380 (Fla. 1981)	17
<i>Alexander v. Beech Aircraft Corp.</i> , 952 F.2d 1215 (10th Cir. 1991)	24
<i>Alvarez v. Felker Mfg. Co.</i> , 41 Cal. Rptr. 514 (Cal. Ct. App. 1964)	26
<i>Auction Servs. v. Gomez de Hernandez</i> , 249 S.W.3d 400 (Tex. 2008)	5, 6
<i>Barham v. Turner Constr. Co.</i> , 803 S.W.2d 731 (Tex. App.—Dallas 1991, writ denied)	12, 13
<i>Barker v. Eckman</i> , 213 S.W.3d 306 (Tex. 2006)	48, 49
<i>Bennett v. Span Indus., Inc.</i> , 628 S.W.2d 470 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.)	32
<i>Berman v. Watergate West, Inc.</i> , 391 A.2d 1351 (D.C. 1978)	32
<i>Blagg v. Fred Hunt Co.</i> , 272 Ark. 185, 612 S.W.2d 321 (1981)	31
<i>Bossier Chrysler-Dodge II, Inc. v. Rauschenberg</i> , 238 S.W.3d 376 (Tex. 2007) (per curiam)	49
<i>Bostrom Seating, Inc. v. Crane Carrier Co.</i> , 140 S.W.3d 681 (Tex. 2004)	27
<i>Bradford v. Bendix-Westinghouse Automotive Air Brake Co.</i> , 517 P.2d 406 (Colo. Ct. App. 1973)	26
<i>Bren-Tex Tractor Co. v. Massey-Ferguson, Inc.</i> , 97 S.W.3d 155 (Tex. App.—Houston [14th Dist.] 2002, no pet.)	40
<i>Brokenshire v. Rivas and Rivas, Ltd.</i> , 922 P.2d 696 (Or. Ct. App. 1996)	32

<i>Burbage v. Boiler Eng'g & Supply Co.</i> , 249 A.2d 563 (Pa. 1969).....	26
<i>Burch v. Sears, Roebuck & Co.</i> , 320 Pa. Super. 444, A.2d 615 (Pa. Super. 1983).....	16
<i>Casrell v. Altec Indus., Inc.</i> , 335 So.2d 128 (Ala. 1976)	34
<i>Cupples Coiled Pipe, Inc. v. Esco Supply Co.</i> , 591 S.W.2d 615 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)	31
<i>Defore v. Bourjois, Inc.</i> , 105 So.2d 846 (Ala. 1958)	34
<i>Estate of Carey v. Hy-Temp Mfg., Inc.</i> , 702 F. Supp. 666 (N.D. Ill. 1988).....	26
<i>Federal Ins. Co. v. HPG Int'l, Inc.</i> , 758 N.E.2d 261 (Ohio Ct. App. 2001), review denied, 755 N.E.2d 355 (Ohio 2001)	33
<i>Fenton Area Public Sch. v. Sorensen-Gross Constr. Co.</i> , 124 Mich. App. 631, 335 N.W.2d 221 (Mich. App. 1983).....	33
<i>Firestone Steel Prods. Co. v. Barajas</i> , 927 S.W.2d 608 (Tex. 1996)	4, 24
<i>Fitzgerald v. Advanced Spine Fixation, Inc.</i> , 996 S.W.2d 864 (Tex. 1999)	5, 6, 38
<i>Freels v. Walker</i> , 26 S.W.2d 627 (Tex. 1930)	37
<i>Freeman Fin. Inv. Co. v. Toyota Motor Corp.</i> , 109 S.W.3d 29 (Tex. App.—Dallas 2003, pet. denied)	40
<i>Halpryn v. Highland Ins. Co.</i> , 426 So.2d 1050 (Fla. Dist. Ct. App. 1983).....	32
<i>Harris Co. v. Smith</i> , 96 S.W.3d 230 (Tex. 2002)	45
<i>Haskett v. Butts</i> , 83 S.W.3d 213 (Tex. App.—Waco 2002, pet. denied)	45

<i>Hines v. JMJ Constr. Co.</i> , No. CV92-506329, 1993 WL 7269 (Conn. Super. Ct. January 11, 1993)	24
<i>Hixon v. Tyco Int'l, Ltd.</i> , No. 01-04-01109-CV, 2006 WL 3095326 (Tex. App.—Houston [1st Dist.] October 31, 2006, no pet.)	29
<i>Houston Lighting & Power Co. v. Reynolds</i> , 765 S.W.2d 784 (Tex. 1988)	24
<i>Hovenden v. Tenbush</i> , 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ)	19, 31
<i>Hyman v. Gordon</i> , 111 Cal. Rptr. 262 (Cal. Ct. App. 1973)	31
<i>In re B.L.D.</i> , 113 S.W.3d 340 (Tex. 2003)	22
<i>Jones v. Aero-Chem Corp.</i> , 680 F. Supp. 338 (D. Mont. 1987)	26
<i>K-2, Inc. v. Fresh Coat, Inc.</i> , 253 S.W.3d 386 (Tex. App.—Beaumont 2008, pet. filed)	9
<i>Kaneko v. Hilo Coast Processing</i> , 654 P.2d 343 (Haw. 1982)	26
<i>Keck v. Dryvit Sys., Inc.</i> , 830 So.2d 1 (Ala. 2002)	34
<i>Key Constr, Inc. v. State Auto Prop. & Cas. Ins. Co.</i> , 2008 WL 110956 (D. Kan. 2008)	30, 31
<i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007)	29
<i>Lee v. Daniels & Daniels</i> , No. 04-07-00096-CV, 2008 WL 2037309 (Tex. App.—San Antonio 2008, pet. filed)	49
<i>Lennar Corp. v. Great Am. Ins. Co.</i> , 200 S.W.3d 651 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)	29
<i>Maack v. Resource Design & Constr., Inc.</i> , 875 P.2d 570 (Utah App. 1994)	17, 18

<i>Malloy v. Doty Container</i> , 820 F. Supp. 217 (E.D. Pa. 1993).....	16
<i>Mayer v. Sto Indus., Inc.</i> , 132 P.3d 115 (Wash. 2006).....	29, 31
<i>McKisson v. Sales Affiliates, Inc.</i> , 416 S.W.2d 787 (Tex. 1967).....	24
<i>Meritor Auto., Inc. v. Ruan Leasing Co.</i> , 44 S.W.3d 86 (Tex. 2001).....	6
<i>Miller v. Los Angeles Cty. Flood Control Dist.</i> , 8 Cal. 3d 689, 106 Cal. Rptr. 1, 505 P.2d 193 (1973).....	31
<i>North Common Sch. Dist. v. Live Oak County Bd.</i> , 199 S.W.2d 764 (Tex. 1946).....	37
<i>Oasis Oil Corp. v. Koch Ref. Co.</i> , 60 S.W.3d 248 (Tex. App.—Corpus Christi 2001, pet. denied).....	39
<i>O’Laughlin v. Minnesota Nat’l Gas Co.</i> , 253 N.W.2d 826 (Minn. 1977).....	32
<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 789 P.2d 309 (Wash. Ct. App. 1990).....	24
<i>Panatrol Corp. v. Emerson Elec. Co.</i> , 163 S.W.3d 182 (Tex. App.—San Antonio 2005, pet. denied).....	40
<i>Peterson Homebuilders, Inc. v. Timmons</i> , No. 14-03-400-CV, 2004 WL 1660936 (Tex. App.—Houston [14th Dist.] July 27, 2004, no pet.).....	15
<i>Pierce v. Pacific Gas & Elec. Co.</i> , 166 Cal. App. 3d 68, 212 Cal. Rptr. 283 (1985).....	24
<i>Pierson v. Sharp Mem. Hosp.</i> , 264 Cal. Rptr. 673 (Cal. Ct. App. 1989).....	24
<i>Pugh v. General Terrazzo Supplies, Inc.</i> , 243 S.W.3d 84 (Tex. App.—Houston [1st Dist.] 2007, no pet.).....	29
<i>Pulte Home Corp. v. Parex, Inc.</i> , 403 Md. 367, 942 A.2d 722 (Md. 2008).....	29, 31

<i>R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus., Inc.</i> , 208 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2006, no pet.)	29
<i>Ransome v. Wisconsin Elec. Power Co.</i> , 87 Wis. 2d 605, 275 N.W.2d 641 (1979)	24
<i>Rayon v. Energy Specialties, Inc.</i> , 121 S.W.3d 7 (Tex. App.—Fort Worth 2002, no pet.)	32
<i>Rylander v. Associated Technics Co.</i> , 987 S.W.2d 947 (Tex. App.—Austin 1999, no pet.).....	32
<i>Salka v. Dean Homes of Beverly Hills, Inc.</i> , 864 P.2d 1037 (Cal. 1993).....	31
<i>Scordino v. Hopeman Bros, Inc.</i> , 662 So.2d 640 (Miss. 1995)	17
<i>Sipari v. Villa Olivia Country Club</i> , 63 Ill. App.3d 985, 20 Ill. Dec. 610, 380 N.E.2d 819 (1978)	16
<i>Smith v. Fluor Corp.</i> , 514 So.2d 1227 (Miss. 1987)	32
<i>Spears v. City of San Antonio</i> , 223 S.W. 166 (Tex. 1920)	37
<i>Stewart Title Guar. Co. v. Sterling</i> , 822 S.W.2d 1 (Tex. 1991)	42
<i>Summit Custom Homes, Inc. v. Great American Lloyds Ins. Co.</i> , 202 S.W.3d 823 (Tex. App.—Dallas 2006, pet. denied)	29
<i>Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.</i> , 848 S.W.2d 724 (Tex. App.—Dallas 1993, writ denied).....	19, 32
<i>Terry v. Palace Aids, Inc.</i> , 2000 WL 1521347 (Conn. Super. 2000) (unpublished).....	10
<i>Tony Gullo Motors I, L.P. v. Chapa</i> , 212 S.W.3d 299 (Tex. 2006)	42, 43, 49
<i>Towers Tenant Ass'n v. Towers Ltd. P'ship</i> , 563 F. Supp. 566 (D.D.C. 1983)	31

<i>Trent v. Brasch Mfg. Co.</i> , 477 N.E.2d 1312 (Ill. App. Ct. 1985).....	32
<i>Trustees of Columbia Univ. v. Exposaic Indus., Inc.</i> , 505 N.Y.S.2d 882 (N.Y. App. Div. 1986).....	32
<i>USAirways v. Elliott Equip. Co.</i> , 2008 WL 4425238 (E.D. Pa. 2008) (unpublished)	16
<i>Wal-Mart Stores, Inc. v. Redding</i> , 56 S.W.3d 141 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).....	45
<i>Worrell v. Barnes</i> , 484 P.2d 573 (Nev. 1971).....	32
<i>Wright v. Creative Corp.</i> , 498 P.2d 1179 (Colo. App. 1972)	18
<i>Wright v. Massey-Harris, Inc.</i> , 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).....	16
<i>Wyrulec Co. v. Schutt</i> , 866 P.2d 756 (Wyo. 1993)	24
<i>Young v. Qualls</i> , 223 S.W.3d 312 (Tex. 2007)	49

STATUTES AND RULES

MD. CODE. ANN., CTS. & JUD. PROC. § 5-115 (Supp. 1993).....	25
OHIO PRODUCTS LIABILITY ACT, OHIO REV. CODE ANN. §§ 2307.71-2307.80 (Anderson 1991).....	11, 25
TENN. CODE ANN. § 29-28-102 (1980)	25
TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (Vernon 2006).....	passim
TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(4) (Vernon 2006).....	20, 22, 26, 27
TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(a) (Vernon 2006).....	v, 2, 39, 40
TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(d) (Vernon 2006).....	22, 26
TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(3) (Vernon 2006)	22, 26

WASHINGTON PRODUCTS LIABILITY ACT, WASH. REV. CODE § 7.72.010(1)	11, 12
WASHINGTON PRODUCTS LIABILITY ACT, WASH. REV. CODE § 7.72.010(3).....	25
TEX. R. APP. P. 25.1(d), 33.1, 38.1(f).....	21
THE MODEL UNIFORM PRODUCT LIABILITY ACT, MUPLA § 102(C), 44 Fed. Reg. 62714 (1979)	25

RESTATEMENTS

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(b) (1998)	10
RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 (1998).....	12
RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998).....	passim
RESTATEMENT (SECOND) OF TORTS § 402A	16, 17, 18, 24

MISCELLANEOUS

Annotation, Recovery, Under Strict Liability in Tort, for Injury or Damage Caused by Defects in Building or Land, 25 A.L.R.4th 351 (1983)	31
BLACK’S LAW DICTIONARY 1245 (8th ed. 1999).....	23
Morgan, When the Walls Come Tumbling Down-Theories of Recovery for Defective Housing, 56 St. John's L. Rev. 670 (1982)	31
W. Page Keeton et. al., PROSSER AND KEETON ON TORTS § 104, at 720 (5th ed. 1984).....	13

ISSUES PRESENTED IN RESPONSE TO FINESTONE’S BRIEF:

On Finestone’s challenge to EIFS as a product:

1. To preserve error for appellate review, a party must timely raise its complaint in the trial court. Finestone did not raise its complaint that EIFS is not a “product” in the trial court by objection or motion at any time. Therefore, the issue is waived and the Court need not consider it.

On Finestone’s challenge to attorneys’ fees:

2. A product manufacturer has the burden to prove Chapter 82’s exception to indemnity and the amount of “loss” excluded as a result of the seller’s conduct. Because a seller’s attorneys’ fees, expenses, and costs are part of the “loss” defined by Chapter 82, the manufacturer has the burden to prove the amount of fees, expenses, and costs it claims are excluded from indemnity.
3. Because Finestone presented no evidence, secured no findings, and made no objection to the jury charge regarding the attorneys’ fees, expenses, and costs it claims should have been excluded from indemnity because they related to the Life Forms settlement, the court of appeals correctly held that Finestone waived error.
4. Even if Finestone had objected to the jury charge on the fee issue, it nonetheless failed to meet its evidentiary burden because Finestone presented absolutely no evidence, and secured no findings, showing what portion of Fresh Coat’s attorneys’ fees, expenses, and costs were attributable to the Life Forms settlement.

SUMMARY OF THE ARGUMENT

Fresh Coat is a seller. Under Chapter 82, product “sellers” include not only those who initially place products or their components into the stream of commerce, but many others in the chain of distribution (and even some outside the chain of distribution). Clearly included in this group are those, like Fresh Coat, who interact with and modify product components with commercial purpose to bring products to the ultimate user. Abundant evidence at trial demonstrated irrefutably that Fresh Coat satisfied Chapter 82’s definition of seller. Whether or not Fresh Coat also provided “services,” in addition to products or product components, does not alter its status as a seller. Such “hybrid” providers are “sellers” because Chapter 82 does not exclude those who sell products coupled with services. Indeed, other authorities, such as the Restatement of Torts, plainly embrace “sales-service” type transactions as appropriate for products liability claims.

EIFS and its components are products. Finestone labors to convince the Court that Chapter 82 does not apply to EIFS because, being incorporated into a home, it is not a “product.” Its effort is an exercise in futility because Finestone did not preserve the point in the trial court. Finestone never raised the argument by objection or motion. In fact, Finestone’s post-trial briefing affirmatively acknowledged EIFS or its components are “products.” The Court need not consider the issue.

In any event, EIFS and its component parts are tangible personal property that qualify as products in the traditional sense. Nothing about the language of Chapter 82 evinces the legislature’s desire to exempt from its purview products liability actions based on allegations of defective EIFS. As noted by the court of appeals, Texas appellate

courts implicitly acknowledge EIFS as a product. Other jurisdictions consider EIFS to be a product and have expressly allowed products liability actions grounded on allegations of defective EIFS. Finally, EIFS (or its components) do not lose their character as products by mere incorporation into real property, as both the Restatement of Torts and sensible precedent accept many analogous types of tangible personal property as “products” despite their consolidation into a physical structure.

The Court should affirm the attorney fee issue. Finestone seeks a new trial on the assessment of attorney’s fees because Fresh Coat did not segregate its evidence between those fees, expenses, and costs which are undisputedly recoverable under Chapter 82, and those Finestone contends are not recoverable because they pertain solely to the Life Forms settlement. Finestone is incorrect because, in the context of Chapter 82’s scheme, it is not the seller’s burden to segregate its “losses”—including attorneys’ fees—between those it must prove as part of its case-in-chief and those which the manufacturer may or may not attempt to disprove by establishing they fall outside the indemnity duty under § 82.002(a)’s exception. It is the *manufacturer’s* burden to show the amount by which a seller’s “losses” should be reduced as a result of the seller’s independently tortious conduct. Finestone did not present evidence on that issue, which, if presented, would have enabled the jury to apportion a part of the total fees requested to the Life Forms settlement. Thus, the evidentiary record does not support any reduction of the award to Fresh Coat, even if Finestone had asked the trial court for segregated blanks on the fee question, which it did not.

Finestone's petition is simply an untimely attempt to secure a second opportunity to develop and submit evidence establishing that another portion of Fresh Coat's losses ought to be excluded under Chapter 82's exception to indemnity. There is no legal or equitable reason for this Court to allow Finestone a second chance to do what it chose not to do during the trial. The Court should deny Finestone's petition and grant Fresh Coat's petition, or otherwise affirm the judgment on the fee issue.

ARGUMENT AND AUTHORITIES

A. Fresh Coat is a “seller” and the affirmative finding in its favor is amply supported in the record.

Finestone’s first, and presumably best, argument challenges the jury’s finding that Fresh Coat is a “seller” under Chapter 82. According to Finestone, Fresh Coat is not a “seller” because it provides services, not products, and hence does not place EIFS components or a completed EIFS cladding into the “stream of commerce.” To the contrary, Chapter 82’s definition of “seller” is much more expansive than Finestone suggests and Fresh Coat fits comfortably within its scope.

1. *Product “sellers” broadly include not only those who initially place products or their components into the stream of commerce, but many others in the chain of distribution.*

Section 82.001(3) defines a “seller” as “a person who is 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.” TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (Vernon 2008). As evident from the statutory text, it is not essential that a person actually “sell” the product or its components to qualify as a “seller.” Chapter 82’s definition is notably much broader and includes not only “selling” a product but also “placing” or “distributing” the product, or its component parts, into the stream of commerce. *Id.* See *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996). In fact, the statutory definition does not even mention the word “sell.” Rather, it applies to anyone 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.” Thus, “sellers” are all who have commercial purpose in distributing or placing products or their components into commerce.

The legislature’s expansive approach to Chapter 82’s scope comports with this Court’s interpretation of strict products liability law under the Restatement,¹ which Chapter 82 does not displace except in only certain circumstances. *See New Texas Auto Auction Servs. v. Gomez de Hernandez*, 249 S.W.3d 400, 405 (Tex. 2008).² The Third Restatement of Torts, adopted in 1998, expanded the reach of strict products liability consistent with the common law trend by modifying its scope to include not only sellers but persons otherwise distributing products through “transfer[ing] ownership” or “provid[ing] the product.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY at § 1. Acknowledging those trends, this Court has construed Chapter 82’s definitions liberally. *New Texas*, 249 S.W.3d at 405 (Chapter 82’s “broad definitions were drafted to provide indemnity for all retailers, even if they are not proper defendants in an underlying products claim.”).

In fact, this Court has specifically held that the term “seller” is expansive enough to include those parties to products liability actions who are *outside* the distribution chain of the product in question. *Fitzgerald v. Advanced Spine Fixation, Inc.*, 996 S.W.2d 864, 865-67 (Tex. 1999). Others, like Fresh Coat, are intimately *within* the distribution chain

¹ RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY § 402A (1965); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

² As this Court noted in *New Texas*, it has always applied products liability laws broadly to reach well beyond mere “sellers” of products. For example, strict liability traditionally applies to manufacturers, distributors, lessors, bailors, and dealers. *New Texas*, 249 S.W.3d at 403 (cases cited).

and have a certain degree of control over application and modification of product components and their distribution or conveyance to intended users. Affording indemnity to the former but not the latter is inconsistent with the Act's goals to ensure manufacturers are fully accountable and "restrict liability for defective products to those who manufacture them." *New Texas*, 249 S.W.3d at 405. Had another company actually applied Finestone's EIFS, but Fresh Coat been joined as a defendant anyway, Fresh Coat would still qualify as a "seller" and be fully entitled to indemnity even though it was not a "proper defendant." *Id.*; *Fitzgerald*, 996 S.W.2d at 865-67.

Moreover, if companies that *interact with and modify* product components were not intended to be included within the definition of "seller," then there would be no need to specifically except them from indemnity when their independent conduct *through their interaction with the product* causes harm to claimants. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001) ("if 'a plaintiff's claim of sellers' negligence were not a part of the products liability action, then there would be no need for the exception in section 82.002(a)"). If intermediaries in the chain of commerce are in a position to potentially increase damage to a consumer through their involvement with or modification of a product, then they are "sellers" under Chapter 82.

2. *The evidence goes far beyond the minimal amount required to show Fresh Coat meets the definition of "seller."*

The jury's finding that Fresh Coat is a seller under Chapter 82 is supported by ample evidence. (CR 4120). The court of appeals correctly rejected Finestone's legal sufficiency challenge.

Fresh Coat's scope of work under the Independent Contractor Agreement with Life Forms called for Fresh Coat to provide "labor, services, and/or materials, equipment, transportation or facilities necessary" to provide "synthetic stucco application and finish." (Ex. FS 525). Finestone sells the various components of the system to independent distributors and provides instructions and specifications to applicators, who buy the components from various suppliers and produce the final EIFS cladding on the homes. Several witnesses testified that Fresh Coat, as an EIFS applicator, was in the business of providing (to Life Forms and ultimately the Brunson Plaintiffs) the EIFS components and installing them according to Finestone's instructions.

The testimony of David Antoniono, Fresh Coat's owner, provides a good sample of evidence the jury heard which supports the verdict:

- Q. In respect to the Life Forms and Fresh-Coat's relationship, was Fresh-Coat being paid to provide both labor, material and installation services in respect to putting up an EIFS wall?
- A. Fresh-Coat was hired as a contractor to provide EIFS services, which include purchasing the material, providing it to the job and purchasing the labor and providing it to the job for a contracted fee.
- Q. Right. I as I understand it—and tell me if this is wrong. In respect to Fresh-Coat, your company would go to like a Mr. Griesenbeck and buy the material that you need for a specific job or it was delivered to the job site, right?
- A. Yes.
- Q. And then you would have, through your company or subcontractors, labor provided to take those components and install them together so that at the end of the day, there was an EIFS—an EIFS system, right?

A. Yes, sir.

Q. And then you would take those—all of that together, the labor and the material, and Life Forms would pay you one lump sum for all of those—for those combined services and materials, right?

A. Yes. I would purchase the Finestone material for application on Life Forms' homes.

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

A. Yes. The EIFS scope of work.

(24 RR 144-45).

Finestone was Fresh Coat's "big provider of material." (24 RR 116). Griesenbeck, Finestone's agent and distributor (13 RR 9-10), purchased the EIFS components (base coat, mesh, and finish coat) from Finestone and sold them to Fresh Coat, which in turn sold them to Life Forms. (13 RR 9-11; 14 RR 63). When sold to Fresh Coat, the base and finish coats were in buckets and the mesh was in rolls. (14 RR 64). Fresh Coat bought the products and assembled Finestone's EIFS cladding on 41 homes. (14 RR 64 [Griesenbeck]; 19 RR 77 [Gerald Banks]; 24 RR 125-26 [David Antoniono]). Griesenbeck was the conduit for information between Finestone and the ultimate users of its products. (*Id.*) Gerald Banks, Fresh Coat's former president, confirmed Fresh Coat was an applicator of Finestone's EIFS and in the business of selling Finestone product. (19 RR 77-78, 88). Banks said Fresh Coat purchased the product components and assembled or fabricated an EIFS cladding. (19 RR 90). Further, the job files for all of the homes involved, which totalled several hundred pages, clearly

show Fresh Coat provided, and charged for, both the EIFS materials and the labor to install the component materials on the homes. (Exs. FC 238A – FC 286A).

Finestone also provided training and instruction to the applicators of its EIFS. (12 RR 21; 13 RR 29-35, 42). Finestone instructed the applicators on mixing the components and incorporating them into the system. (14 RR 88). Neither Griesenbeck nor anyone at Finestone ever expressed any criticisms or dissatisfaction with Fresh Coat’s work. (14 RR 20, 25). Fresh Coat followed Finestone’s instructions. (14 RR 89). Yet, now, Finestone contends it owes no indemnity duty whatsoever to Fresh Coat, which did absolutely nothing wrong in applying the product Finestone trained it to apply.

Make no mistake, Fresh Coat was engaged in the business of distributing or otherwise placing EIFS materials in the stream of commerce. The court of appeals was right in holding the evidence sufficient to support the finding. *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 393-94 (Tex. App.—Beaumont 2008, pet. filed).

3. *Whether or not Fresh Coat also provided “services” in addition to EIFS materials does not alter its status as a seller under Chapter 82.*

Finestone posits that “service providers” are not product “sellers” because they provide only installation services, not products. Based on this proposition, Finestone reasons Fresh Coat is not a seller because, as a factual matter, it provides only installation services. Finestone’s legal proposition is overstated; its factual premise is misstated.

- a. Fresh Coat provided both products and services.

From the authority cited, Finestone’s point appears to be that strict products liability laws do not apply to pure service providers. (Finestone Brief at 12) (citing

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(b) (1998)). To the extent the proffered axiom is ever true, it has no applicability here because Fresh Coat is not a pure service provider and Chapter 82 does not preclude contractors like Fresh Coat from qualifying as sellers. Finestone’s factual characterization—that Fresh Coat’s job was to provide *only* services, and *no* products—disregards both the standard of review on appeal and the evidence the jury could have, and did, reasonably accept. Finestone conveniently ignores the uncontroverted evidence, discussed previously, that Fresh Coat acquired title to the EIFS components and later charged for them, thereby reaping a commercial benefit for the product itself in performing its work. As confirmed by multiple witnesses, Fresh Coat provided the EIFS materials with its work. The evidence shows Fresh Coat is not a pure “service provider.”

b. “Sales-service” or “hybrid” providers are “sellers.”

Moreover, that Fresh Coat’s scope of work included installation services in no respect forecloses the jury’s finding that Fresh Coat placed EIFS, or its components, into the stream of commerce as contemplated by Chapter 82. As the court of appeals observed, the statutory definition of “seller” does not exclude a seller who also provides services, nor does it require the seller to only sell the product. *K-2*, 253 S.W.3d at 393. Indeed, as long as the service provider also distributes or otherwise places a product into the stream of commerce, it is a seller.³ In drafting § 82.001(3) as it did, the legislature intended its reach to be *inclusive*, not exclusive. Had the legislature desired to exclude

³ Even in Connecticut, which, as Finestone notes, views the definition of “seller” much more restrictively than Texas, an “installer” may also be a product seller. *Terry v. Palace Aids, Inc.*, 2000 WL 1521347 at *2 (Conn. Super. 2000) (unpublished).

from the definition of sellers the innumerable contractors in this state which necessarily perform “hybrid” jobs by providing services and products, but whose involvement in the distribution chain is nonetheless critical to bring ultimate products to the consumer, then the legislature could have easily crafted language to exclude such persons as “sellers.” State legislatures in Ohio and Washington, for example, have done so. *See* Ohio Products Liability Act, OHIO REV. CODE ANN. §§ 2307.71-2307.80 (Anderson 1991);⁴ Washington Products Liability Act, WASH. REV. CODE § 7.72.010(1).⁵ The Texas Legislature carved no such exception from Chapter 82. The Court should decline Finestone’s invitation to judicially create one.

In addition to the statutory text, the court of appeals’s conclusion is fortified by the Restatement of Torts, which specifically addresses the “hybrid” scenario where, as here, a contractor provides both goods and services within its scope of work:

- (a) One sells a product when, in a commercial context, *one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.*
- (b) One otherwise distributes a product when, in a commercial transaction other than a sale, *one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a*

⁴ Ohio R.C. 2307.71(O)(2) excepts from the definition of “suppliers” “[a] provider of professional services who, incidental to a professional transaction the essence of which is the furnishing of judgment, skill, or services, sells or uses a product.” *Id.*

⁵ “The term ‘product seller’ does not include: . . . (b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider.” *Id.*

means of promoting either the use or consumption of such products or some other commercial activity.

- (c) One also sells or otherwise distributes a product when, in a commercial transaction, *one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).*

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 (1998) (emphasis added).

Under these provisions, even if Fresh Coat did not actually sell the EIFS materials, it still qualifies as a seller because it “provides the product to another.” *See also id.* at § 20, cmt. d (noting that transaction in which product is consumed in providing service treated as sale of product). Thus, the Restatement shows that an installer or applicator that also provides products nonetheless qualifies as a “seller” under products liability law.

Barham v. Turner Constr. Co., 803 S.W.2d 731 (Tex. App.—Dallas 1991, writ denied), cited by Finestone, is not to the contrary. *Barham* merely held that a building general contractor was not in the business of selling steel columns, and therefore was not engaged in the business of selling such products under products liability law pre-dating Chapter 82. However, *Barham* is distinguishable because the steel columns at issue were in fact, as shown by the evidence, not sold by the general contractor but rather sold by someone else. As the court stated, there was no evidence the general contractor ever bought or sold steel columns. *Id.* at 738. In contrast, there exists evidence here that Fresh Coat was in the business of purchasing EIFS components and applying them to homes in exchange for payment, thus placing EIFS in the stream of commerce.

Notably, because *Barham* pre-dates both Chapter 82 and the Third Restatement,

its analysis of the general contractor's status is based on the Second Restatement's test of whether the person is "engaged in the business of *selling*" the product, as opposed to Chapter 82's substantially broader inquiry of whether the person "is engaged in the business of *distributing or otherwise placing, for any commercial purpose, in the stream of commerce*" a product or any component parts thereof. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.001(3). *Barham's* vitality is thus suspect, assuming it was correctly decided in the first place.

Some authorities suggest other factors in determining whether a "sales-service hybrid transaction" is appropriate for application of strict liability. *See, e.g.,* W. Page Keeton et. al., PROSSER AND KEETON ON TORTS § 104, at 720 (5th ed. 1984):

There are three primary factors that courts have utilized in deciding whether or not to impose strict liability on the defendant who causes harm in the course of using a defective product. These are: (1) the nature of the defendant's activity; (2) whether the defective product was transmitted by the defendant in the course of rendering a service or only used; (3) whether the service of the defendant or the product transmitted was the principal thing bargained for.

Id. Even relying on these suggested factors to evaluate the nature of a sales-service hybrid, Fresh Coat qualifies as a product seller.⁶ Its activity is to apply a synthetic stucco exterior cladding to homes. The defective EIFS was actually transmitted. The product was not some instrumentality Fresh Coat merely utilized in its work. The EIFS exterior was *the thing* bargained for. Life Forms did not hire Fresh Coat to build *any* kind of exterior; Life Forms hired Fresh Coat to supply and install an EIFS exterior.

⁶ This Court has never adopted these factors and Fresh Coat does not necessarily advocate that it should adopt them as a sole and exclusive test.

- c. Fresh Coat's provision of EIFS materials is not "incidental" to its work.

Though the nature of Fresh Coat's work falls easily within Chapter 82's (and the Restatement's) understanding of "seller," Finestone urges that Fresh Coat's sale of EIFS components was merely "incidental" to its job as an EIFS applicator. However, the EIFS components manufactured by Finestone are necessary and material elements to complete the exterior cladding of a house, without which Fresh Coat could not have fulfilled its job. Providing the service of application is important, but no more important than the EIFS components themselves. Fresh Coat's services cannot be fairly separated from the provision of EIFS components as part of the application of synthetic stucco because each time Fresh Coat is hired, EIFS cladding around a house is the result. The EIFS components are part and parcel to the work Fresh Coat performs. It is not as though Finestone is supplying a trowel or some minor instrument Fresh Coat uses in its work. Fresh Coat cannot do the job it contracted to do without the specific EIFS product components. They are necessary and indispensable.

Simply put, Fresh Coat is a mandatory link in the distributive chain. As such, Fresh Coat and contractors like it occupy such a position along the chain of commerce that, if negligent in modifying the EIFS product or its components, they might potentially increase harm to users (though no such negligence occurred here). By performing its job properly, Fresh Coat plays an integral part in helping deter future injuries that might result from EIFS. Viewed in the context of the commercial transactions that must occur to bring EIFS to its ultimate consumers, Fresh Coat's role of supplying EIFS components

is anything but “incidental.”

Finestone highlights *Peterson Homebuilders, Inc. v. Timmons*, No. 14-03-400-CV, 2004 WL 1660936 (Tex. App.—Houston [14th Dist.] July 27, 2004, no pet.) (not designated for publication), as its banner case illustrating why Fresh Coat is not a seller. *Peterson* is not on point. In fact, whether the contractor was a “seller” under Chapter 82 was not an issue in the case. The homebuilder hired a contractor to perform several types of grading services. *Id.* at *2. As one part of his grading duties, the contractor built a “structural pad” underneath the foundation (but did not build the foundation itself). According to the court, the contractor used unspecified “materials” for the underlying pad, but there is no indication from the opinion whether the contractor actually *supplied* the materials, or if he did not, who else may have supplied them. The opinion does not offer any factual background as to the nature of the contractor’s involvement with the structural pad materials, or what he did to “build” the pad. The court merely remarked that the evidence “conclusively proved that Timmons did not place the structural pad in the stream of commerce” so as to qualify as a product manufacturer. *Id.* at *5. *Peterson*’s holding provides no meaningful guidance here.⁷

4. *Jurisprudential authority elsewhere weighs in Fresh Coat’s favor.*

In other jurisdictions, work comparable to that provided by Fresh Coat qualifies as placing goods into the stream of commerce. For example, in Illinois, “strict liability

⁷ Besides, there is a significant distinction between the nature of the contractor’s work in *Peterson* and the nature of Fresh Coat’s work. Whatever materials were used in building a “structural pad,” they truly may have been incidental in the sense Finestone means. In contrast, the EIFS components are much more the core of the work Fresh Coat provided.

extends to manufacturers, sellers, *contractors*, those who hold themselves out to be manufacturers, *assemblers of parts* and suppliers and manufacturers of component parts.” *Sipari v. Villa Olivia Country Club*, 63 Ill.App.3d 985, 992, 20 Ill. Dec. 610, 616, 380 N.E.2d 819, 825 (1978) (emphasis added); *Wright v. Massey-Harris, Inc.*, 68 Ill. App. 2d 70, 74, 215 N.E.2d 465, 467 (1966).

Pennsylvania is in agreement. In *Malloy v. Doty Container*, 820 F. Supp. 217, 222 (E.D. Pa. 1993), the court held that strict liability does not apply to pure installation services, but does apply to hybrid product/services transactions. *Id.* at 221 (applying Restatement (Second) § 402A). The court recognized that a contractor can provide products along with a service and be a “seller” because “[i]t is not necessary that the seller be engaged solely in the business of selling such products.” *See also Malloy v. Doty Conveyor*, 820 F. Supp. 217, 220 (E.D. Pa. 1993) (quoting *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 467 A.2d 615, 621 (Pa. Super. 1983) (“seller” includes “all suppliers of a defective product in the chain of distribution, whether retailers, partmakers, *assemblers*, owners, sellers, lessors or any other relevant category”) (emphasis added)). Chapter 82 contains no such requirement either.

Only last year, a federal district court in Pennsylvania denied summary judgment to a contractor who claimed it was merely an installer and general contractor as opposed to a manufacturer, designer, or seller. *USAirways v. Elliott Equip. Co.*, 2008 WL 4425238 (E.D. Pa. 2008) (unpublished). In *USAirways*, various entities entered into contracts for the installation of twelve boom assemblies and associated deicing equipment at the Philadelphia International Airport. The general contractor, Fluidics,

Inc., purchased the deicing equipment from Global, and in turn, the City of Philadelphia purchased the equipment from Fluidics. Fluidics installed the pedestals and boom assemblies. US Airways, Elliott and Baker claimed Fluidics was involved in the design and manufacturing of the equipment and participated in the stream of commerce through its sale of the equipment to the City of Philadelphia, making Fluidics liable under strict products liability. The court agreed and denied Fluidics' summary judgment motion, effectively rejecting the same argument Finestone makes here.

Florida law is also consistent with Fresh Coat's position. In *Abode Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981), the court held that one who buys stucco products and mixes it with something else and then resells the resulting end product may recover against upstream providers of the product components. A supplier of portland cement and mortar mix sold these products to contractors who combined them with sand and water to make a stucco mix. The stucco was defective and damaged the exteriors of the houses to which it was applied. The court not only held that the supplier could be liable to those who purchased the product and prepared it for use by an ultimate consumer by mixing it with water, but also necessarily found the cement and mortar mix were products.

Finestone's reliance on authority such as *Maack v. Resource Design & Constr., Inc.*, 875 P.2d 570 (Utah App. 1994), and *Scordino v. Hopeman Bros, Inc.*, 662 So.2d 640 (Miss. 1995), is misplaced because the definition of "seller" at issue in those cases is, like other older cases, based on the prior, more restrictive version of Restatement (Second) § 402A. Additionally, *Wright v. Creative Corp.*, 498 P.2d 1179 (Colo. App.

1972), has even less relevance, as the court in *Wright* never discussed or evaluated whether the builder qualified as a “seller” under products liability laws. Finestone’s cases are also distinguishable on evidentiary grounds, as the proof in *Maack* is not as developed as it is here with respect to the defendant’s involvement with the product components. And the *Maack* Court’s discussion of the issue is dictum because the plaintiffs could not recover under Restatement § 402A for other reasons. *Maack*, 875 P.2d at 582 (product not “unreasonably dangerous”).

5. *EIFS and its components are “used” or “consumed.”*

Finally, Finestone contends, for the first time in the history of this case, that neither EIFS components nor a finished EIFS wall are placed in the stream of commerce for “use” or “consumption” in the sense meant by § 82.001(3). The Court should not consider the point because Finestone did not raise it earlier. As to Fresh Coat’s “seller” status, Finestone’s arguments in this Court have noticeably expanded beyond those it articulated in the court of appeals. In its court of appeals briefing, Finestone argued Fresh Coat was not a “seller” only because: (1) Fresh Coat’s contract was a service contract, not a sales contract; and (2) Fresh Coat was not a “wholesale distributor” or “retail seller” of EIFS. (*See* Finestone’s Appellant’s Brief at 54-55). However, Finestone did not argue to the court of appeals: (1) that Fresh Coat did not place EIFS in the stream of commerce; (2) that the products Fresh Coat provided were “incidental” to its job; or (3) that EIFS is not “used” or “consumed” as contemplated by § 82.001(3). Accordingly, the Court should decline to consider these issues.

Regardless, Finestone cites no authority deciding the question, but turns to the plain meaning of those words as found in the dictionary. Also, Finestone points to cases defining “use” to mean “to convert to one’s service; to employ.” (Finestone Brief at 17). Based on this record, it is hard to understand why EIFS or its components would not satisfy that definition. EIFS components are “converted to one’s service” because, among other things, they are mixed together and applied to a house. Further, Fresh Coat “uses” the components to create the finished EIFS cladding.

EIFS components are “used” and “consumed” in ways comparable to bricks or fiberboard, both of which serve as “walls” to buildings and are considered “products.” *Hovenden v. Tenbush*, 529 S.W.2d 302, 305-06 (Tex. Civ. App.—San Antonio 1975, no writ) (bricks used in building treated as products); *Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 731-32 (Tex. App.—Dallas 1993, writ denied) (products liability claim applied to fiberboard made of mixture of wood chips and asphalt substance). Bricks, when combined with mortar, make an exterior wall to a home. The fiberboard in *Temple* was used to construct interior walls of an apartment building. If they are products, there is no basis to treat EIFS any differently.

In sum, the evidence shows Fresh Coat was engaged in the business of distributing or otherwise placing EIFS and its components into the stream of commerce. Therefore, Fresh Coat is a seller under Chapter 82.

B. Chapter 82 applies to EIFS and as its component parts because they are defective products.

Finestone's challenge to Fresh Coat's status as a "seller" is entirely unsupported in evidence or Texas law. Even less persuasive is the notion advanced in Finestone's second point: that in designing and producing the component materials of an Exterior Insulation and Finish System, Finestone did not really manufacture a product.

Finestone is the manufacturer of the EIFS synthetic stucco at issue. Chapter 82 defines a "manufacturer" as "a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce." TEX. CIV. PRAC. & REM. CODE ANN. at § 82.001(4). Finestone does not challenge, and never has challenged, its status as a manufacturer of EIFS and its components or whether it places them into the stream of commerce. Nor does Finestone dispute that EIFS components are products *when made*. Rather, Finestone contends Chapter 82 does not apply to EIFS because, in finished form, it is an integrated part of a home and thus ceases to be a product. Though Finestone did not raise its argument in the trial court, the court of appeals easily rejected it on the merits; this Court should reject it as well.

1. *Finestone did not preserve the argument that EIFS is not a product.*

To begin with, the court of appeals should not have addressed whether EIFS is a product because Finestone did not complain about it in the trial court. Finestone's

objections to the jury charge (30 RR 23-28) and post-trial motions and briefing⁸ included no argument and no authority that EIFS or its components are not “products” under Chapter 82 because they are incorporated into real property.

In fact, Finestone’s trial court positions *affirmatively acknowledged* that EIFS and its components *are* products. For instance, during the charge conference, Finestone’s counsel clearly referred to EIFS or its components as “products.” (30 RR 28). Later, in its post-trial briefing, Finestone reiterated that it manufactured “products” and referred to EIFS as a product. (CR 4254, 4560 [Finestone’s Motion for Judgment Notwithstanding the Verdict, pp. 2, 8: referring to “the *product* of EIFS” and “the *products made by Finestone*”]; CR 4641, 4664-4666 [Finestone’s Brief in Support of its Motion for Judgment Notwithstanding the Verdict, pp. 6, 29-31: referring to “Finestone’s *EIFS products*”]) (emphasis added).

Having failed to raise the question in the trial court—indeed having acknowledged the contrary proposition—Finestone cannot raise the question in this Court. To obtain reversal, Finestone must have preserved error in the trial court. *See* TEX. R. APP. P. 25.1(d), 33.1, 38.1(f), 33.1, 38.1(f). Moreover, Finestone is not entitled to review of the issue here simply because the court of appeals addressed it. The court of appeals erred in discussing whether EIFS is a product, absent proper preservation in the trial court. *In re*

⁸ (CR 4282-4310 [Finestone’s Response to Life Forms’s Motion for Judgment]; CR 4253-4281 [Finestone’s Motion for Judgment Notwithstanding the Verdict]; CR 4627-4714 [Finestone’s Brief in Support of its Motion for Judgment Notwithstanding the Verdict]; CR 4763-4770 [Finestone’s Supplemental Motion for Judgment Notwithstanding the Verdict]; CR 4717-4762 [Finestone’s Motion for New Trial, Motion to Modify the Judgment, and in the Alternative, Motion for Remittitur]).

B.L.D., 113 S.W.3d 340, 343, 349-54 (Tex. 2003) (holding court of appeals erred in reviewing complaint not preserved in trial court). Thus, this Court need not consider whether EIFS is a product. In any event, to the extent the Court addresses the question, the Court should reject Finestone’s argument because Chapter 82 applies to EIFS and its component parts.

2. *The term “product” includes tangible personal property placed or otherwise distributed, for commercial purposes, in the stream of commerce.*
 - a. Though not expressly defining “product,” Chapter 82 assumes products are, at a minimum, tangible property.

Unlike some states’ product liability laws, Chapter 82 does not specifically define the term “product.”⁹ But language elsewhere in the statute helps illuminate the legislature’s understanding of the word “product.” In particular, the definitions of “seller” and “manufacturer” indicate that a product is something distributed, or otherwise placed, in the stream of commerce for use or consumption. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.001(3), (4). Also, a “product” is something that can be “completely or partially assemble[d],” or “installed.” *Id.* at §§ 82.002(d) and 82.003(a)(3) .

- b. The Restatement defines products as including tangible personal property and, in some instances, more.

As Chapter 82 does not fully answer the question, the court of appeals turned to other authority for additional guidance. The Restatement, a source this Court has often referred to (and sometimes adopted) in the products liability field, defines “product” broadly in the following way:

⁹ *See infra* at p. 25.

- (a) A product is *tangible personal property* distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY at § 19 (emphasis added). The Restatement definition is again indicative of an expanded view of what it means to be a “product” because almost any tangible personal property distributed for commercial use qualifies. Moreover, the Restatement substantially blunts Finestone’s “products incorporated into real property are not products” argument because § 19 emphasizes that items such as real property *are* products “when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate” for courts to consider them as products. *Id.*

Black’s definition of “product” echoes the Restatement. A product is “[s]omething that is distributed commercially for use or consumption and that is usu[ally] (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption.” BLACK’S LAW DICTIONARY 1245 (8th ed. 1999). All these definitions support the court of appeals’s conclusion that Chapter 82 applies to EIFS.

- c. Courts from Texas and elsewhere have traditionally understood products to possess tangible properties.

This Court’s decisions have generally embraced a view of products as, for the most part, tangible personalty. *See, e.g., Firestone Steel Products Co. v. Barajas*, 927

S.W.2d 608, 616 (Tex. 1996) (holding a design concept is not a product because it is intangible); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (beauty supplies). Also, based on Restatement (Second) § 402A, this Court held years ago that electricity in transmission lines is a product. *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988). In reaching its conclusion, the Court was influenced by certain tangible qualities of electricity as a commodity. Electricity, “like other goods, can be manufactured, transported and sold.” *Id.* (citing *Pierce v. Pacific Gas & Elec. Co.*, 166 Cal. App. 3d 68, 81, 212 Cal. Rptr. 283, 290 (1985)). Electricity is a form of energy that can be “made or produced by man, confined, controlled, transmitted and distributed.” *Id.* (citing *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 610, 275 N.W.2d 641, 643 (1979)). This Court is hardly alone in characterizing products as tangible personal material or property and some jurisdictions are even more expansive in their definitions.¹⁰

d. Statutory definitions in other jurisdictions mirror the approach taken by courts and the Restatement of Torts.

Several states’ products liability statutes specifically define “product.” The Maryland statute defines the term as “[a] tangible article, including attachments,

¹⁰ See, e.g., *Wyrulec Co. v. Schutt*, 866 P.2d 756, 760 (Wyo. 1993) (“a ‘product’ is anything made by human industry or art”); *Pierson v. Sharp Mem. Hosp.*, 264 Cal. Rptr. 673, 675 (Cal. Ct. App. 1989) (“[a product is] a physical article which results from a manufacturing process and is ultimately delivered to a consumer”); *Hines v. JMJ Constr. Co.*, No. CV92-506329, 1993 WL 7269 (Conn. Super. Ct. January 11, 1993) (adopts U.C.C. definition of “goods” in § 2-215(1): “goods ... [are] [a]ll things ... which are movable at time of identification”); *Olympic S.S. Co. v. Centennial Ins. Co.*, 789 P.2d 309, 313 (Wash. Ct. App. 1990) (“[products are] goods which are processed or assembled in the ordinary channels of commerce”); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991) (under Indiana Products Liability Act, “product” means any item or good that is personalty at time conveyed by seller to another party).

accessories, and component parts, and accompanying labels, warnings, instructions, and packaging.” MD. CODE. ANN., Cts. & Jud. Proc. § 5-115 (Supp. 1993). The Ohio statute defines a product as “any object, substance, mixture or raw material that constitutes tangible personal property and that satisfies all of the following: (1) ... capable of delivery itself ...; (2) produced, manufactured, or supplied for introduction into trade or commerce; and (3) intended for sale or lease to persons for commercial or personal use.” OHIO REV. CODE ANN. § 2307.71 (Anderson 1991). Tennessee’s definition is even broader, as “product” includes “any tangible object or goods produced.” TENN. CODE ANN. § 29-28-102 (1980). In Washington, “product” means “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.” Washington Products Liability Act, WASH. REV. CODE § 7.72.010(3). *See also* The Model Uniform Product Liability Act, MUPLA § 102(C), 44 Fed. Reg. 62714 (1979).

From these sources, the Court should have little difficulty in concluding, at a minimum, that “products,” for Chapter 82 purposes, include tangible personal property distributed or transferred for commercial purpose. Finestone’s EIFS clearly qualifies as a product under any of these definitions.

3. *Chapter 82 applies to products and their component parts.*

Finestone attempts to focus the inquiry on the completed form of EIFS, rather than its constituent parts, because, according to Finestone, it is the end EIFS product that is defective. This argument, assuming its accuracy, is not material to the outcome.

Chapter 82, by its very terms, encompasses products and their component parts.

TEX. CIV. PRAC. & REM. CODE ANN. at §§ 82.001(3), (4); 82.002(d); 82.003(a)(3). The Restatement treats products and their components similarly. “Component parts are products, whether sold or distributed separately or assembled with other component parts. An assemblage of component parts is also, itself, a product.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY at § 19 cmt. b.¹¹

Moreover, Restatement § 5 contemplates liability for component manufacturers regardless whether the final product or the components are allegedly defective:

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

- (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or
- (b)
 - (1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
 - (2) the integration of the component causes the product to be defective, as defined by this Chapter; and

¹¹ The reporter’s notes under § 19 comment b also observe that “when a defective component is incorporated into something larger, the supplier or manufacturer of the component may be held strictly liable in tort for any damages proximately caused by the defect.” *Id.* (citing *Estate of Carey v. Hy-Temp Mfg., Inc.*, 702 F. Supp. 666 (N.D. Ill. 1988) (applying Illinois law) (a component maker can be held liable if its component is defective for a known use); *Jones v. Aero-Chem Corp.*, 680 F. Supp. 338 (D. Mont. 1987) (applying Montana law) (tear gas canister valve); *Burbage v. Boiler Eng'g & Supply Co.*, 249 A.2d 563 (Pa. 1969) (boiler valve); *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1134 (1st Cir. 1978) (applying Rhode Island law) (“There is no dispute that strict liability applies to the manufacturer of the product, including the maker of a component part....”), *cert. denied*, 440 U.S. 916, 99 S. Ct. 1234, 59 L. Ed. 2d 466 (1979); *Alvarez v. Felker Mfg. Co.*, 41 Cal. Rptr. 514 (Cal. Ct. App. 1964) (manufacturer of defective blade strictly liable when blade incorporated into concrete cutting machine); *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 517 P.2d 406 (Colo. Ct. App. 1973) (truck brake pedal assembly); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw. 1982) (service platform)).

(3) the defect in the product causes the harm.

Id. at § 5.

Finestone’s effort to create legal separation between the completed EIFS exterior on the one hand, and the EIFS components on the other, is not supported by products liability law or the evidence. For purposes of Chapter 82, any difference between the two is inconsequential. More important, the Restatement’s collapse of any meaningful distinction between products and their component parts is clearly incorporated into Chapter 82 because it applies to manufacturers who place the “product *or any component part* thereof” in the stream of commerce. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.001(4) (emphasis added). *See also Hudiburg*, 199 S.W.3d at 256-57 (Chapter 82 applies to component manufacturer); *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681 (Tex. 2004) (products liability applies to component manufacturers).

The Brunson plaintiffs alleged that EIFS was a defective product and that Finestone knowingly manufactured, distributed, and marketed defective EIFS. (CR 2412-2439, 2426 [Plaintiffs’ Twelfth Amended Petition at 15, 17, 21-23]). Additionally, the plaintiffs alleged Finestone “failed to adequately design and manufacture” EIFS, *id.*, and that their damages were proximately caused by, among other things, inherent defects in the “EIFS system.” *Id.* at 2426. In the “Product Liability” count of their petition, the Brunson Plaintiffs alleged Finestone was negligent in the “design, formulation, manufacture, production, quality control, testing, labeling, instructions and warnings regarding the EIFS systems,” which were unreasonably dangerous as designed and marketed. *Id.* at 2432.

After hearing weeks of evidence establishing how EIFS fails to provide a sufficient barrier to water intrusion and fails to allow adequate drainage or evaporation of the moisture that accumulates behind the cladding, the jury (not surprisingly) found EIFS was both defectively designed and marketed. (CR 4126-4129). The jury's findings, particularly the defective design finding, necessarily encompasses the components of EIFS, as they are part of EIFS' design. The "EIFS system" as alleged by the plaintiffs includes the components of EIFS. The only part of a finished EIFS cladding that is not supplied by Finestone is the insulation board. Other than the EPS board, Finestone designed and manufactured all the component parts and provided the "very detailed instructions" (Finestone Brief at 22) directing Fresh Coat how to assemble the components parts according to Finestone's design.

4. *EIFS and its components are products because they are tangible property distributed or otherwise placed in the stream of commerce.*

As explained above, the evidence is uncontroverted that Finestone designed and created tangible personal property in the form of base coats, supporting mesh, and finish coats, and placed them in the stream of commerce. These products are capable of delivery and intended to be (and are in fact) delivered, manipulated, and assembled into a completed product according to instructions created and promulgated by Finestone. Understandably, courts have expressly or tacitly considered EIFS as a product.

- a. Texas cases have implicitly understood EIFS to be a product.

Texas appellate decisions involving defective EIFS implicitly acknowledge that EIFS is a product. *See Pugh v. General Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 93-95

(Tex. App.—Houston [1st Dist.] 2007, no pet.); *R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus., Inc.*, 208 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (products liability indemnity case in which both EIFS and window flashings were treated as products); *Hixon v. Tyco Int'l, Ltd.*, No. 01-04-01109-CV, 2006 WL 3095326 at *12 (Tex. App.—Houston [1st Dist.] October 31, 2006, no pet.) (not designated for publication) (products liability action referring to Finestone EIFS as a product); *Summit Custom Homes, Inc. v. Great American Lloyds Ins. Co.*, 202 S.W.3d 823 (Tex. App.—Dallas 2006, pet. denied), *abrogated on other grounds*, *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16-20 (Tex. 2007) (declaratory judgment action by home builder seeking defense and indemnity against liability caused by allegedly defective EIFS; court treats EIFS as product); *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 676-81 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

b. Other jurisdictions consider EIFS to be a product.

The above Texas cases are consistent with other jurisdictions expressly or impliedly permitting recovery under products liability law for claims of defective EIFS. *See Pulte Home Corp. v. Parex, Inc.*, 403 Md. 367, 942 A.2d 722 (Md. 2008); *Mayer v. Sto Indus., Inc.*, 132 P.3d 115 (Wash. 2006) (upholding judgment for homeowners based on defective EIFS under products liability and consumer protection laws; court noted testimony that EIFS is “known defective product.”). In both *Pulte* and *Mayer*, homeowners were allowed to bring precisely the type of products liability action brought by the Brunson homeowners here.

Further, in *Key Constr, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2008 WL 110956

(D. Kan. 2008) (not designated for publication), the court, though not directly addressing the question, tacitly acknowledged EIFS is a product. A general contractor sought indemnity from a subcontractor that applied EIFS to a house. *Id.* at *1. Like here, it was undisputed the subcontractor was not negligent and applied the EIFS in accordance with the manufacturer's specifications. *Id.* at *4. The court held: “[a]s a matter of law, because the Court cannot find negligence by [the subcontractor], liability for the alleged defects in the EIFS which are the subject of [the buyer's] arbitration claim must rest with either the project architect (the party who created the defective plans) or [the general contractor] (the first party who contractually agreed to assume the risk for the defective plans).” *Id.*

5. *EIFS and its components do not cease being products by their incorporation into a house.*

The crux of Finestone's theory is the idea that EIFS is not a product because it is part of a house, and houses are not products. Finestone quotes Restatement § 19, comment e, for the general proposition that “a home is not a product.” Yet, Finestone ignores other language in the very same section explaining that manufactured equipment, for example, incorporated into a home *is* a product. As mentioned, even the Restatement explicitly acknowledges that real property qualifies as a product “when the context of [its] distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.” *Id.* at § 19(a). Significantly, courts appear to be trending away from the inflexible view Finestone urges. “More recently,” the Restatement notes, “courts have treated sellers of

improved real property as product sellers in a number of contexts.” *Id.* at cmt. e. ¹²

Finestone directs the Court to cases from other states, principally Alabama, which have held that real property, in a general sense, is not a “product.” But the Court should be aware that Finestone’s premise is not universally accepted. Many jurisdictions take the opposite view and consider a house, building, or other structure as “products” for purposes of strict liability law.¹³

In any event, the reasoning of the decisions on which Finestone relies does not apply here because, in Texas, a product does not lose its character as a product by its mere incorporation into a house. Assuming a house is not a “product” as Finestone suggests, Texas courts have nonetheless consistently treated materials incorporated into real estate as “products” for strict liability purposes. *See generally Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615, 616-18 (Tex. Civ. App.—El Paso 1979, writ ref’d n.r.e.) (PVC pipe in apartment complex treated as product); *Hovenden v. Tenbush*, 529 S.W.2d 302, 305-06 (Tex. Civ. App.—San Antonio 1975, no writ) (bricks used in

¹² See also the more recent decisions in *Pulte* (2008), *Mayer* (2006)—both of which specifically approve product liability claims such as those brought by the Brunson homeowners here—and *Key Construction* (2008), as compared to the more dated opinions Finestone relies upon.

¹³ *See, e.g., Salka v. Dean Homes of Beverly Hills, Inc.*, 864 P.2d 1037 (Cal. 1993) (one family home); *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981) (stating that “product” applies to house just as to automobile); *Miller v. Los Angeles Cty. Flood Control Dist.*, 8 Cal. 3d 689, 106 Cal. Rptr. 1, 505 P.2d 193 (1973) (ruling that strict products liability applies to homes); *Hyman v. Gordon*, 111 Cal. Rptr. 262 (Cal. Ct. App. 1973) (residential building); *Towers Tenant Ass’n v. Towers Ltd. P’ship*, 563 F. Supp. 566 (D.D.C. 1983) (applying D.C. law) (converted condominiums). Commentators have also urged the propriety of allowing products liability claims based on defective products or components incorporated into real property. *See generally Morgan, When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN’S L. REV. 670 (1982) (arguing policy considerations justify recovery in strict liability for defects in houses). *See generally* Annotation, Recovery, Under Strict Liability in Tort, for Injury or Damage Caused by Defects in Building or Land, 25 A.L.R.4th 351, 365-66 (1983).

building treated as products); *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 13-15 (Tex. App.—Fort Worth 2002, no pet.) (firebox in house); *Bennett v. Span Indus., Inc.*, 628 S.W.2d 470, 472 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (incorporation of concrete blocks into structure does not by itself eliminate claim for strict products liability); *Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724 (Tex. App.—Dallas 1993, writ denied) (products liability claim applied to fiberboard used in construction of apartments). *See also Rylander v. Associated Technics Co.*, 987 S.W.2d 947, 950 (Tex. App.—Austin 1999, no pet.) (incorporation of asbestos into structure does not eliminate its status as hazardous waste). That EIFS or its components are incorporated into a residence does not destroy their status as products.

Finestone takes issue with the court of appeals's citation of these cases, claiming they are distinguishable because they do not *hold* that EIFS is a product. (Finestone Brief at 27-29). But the outcome in each of the cases necessarily assumes that EIFS is a product. In this respect, the court of appeals (and Texas law generally) is in line with many, if not most, courts that have considered the question and held that a defective product incorporated into real property does not lose its character as a product for purposes of strict liability.¹⁴

¹⁴ *See, e.g., Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. 1978) (air-conditioning system); *O'Laughlin v. Minnesota Nat'l Gas Co.*, 253 N.W.2d 826 (Minn. 1977) (grate of gas floor furnace); *Trustees of Columbia Univ. v. Exposaic Indus., Inc.*, 505 N.Y.S.2d 882 (N.Y. App. Div. 1986) (concrete panels); *Worrell v. Barnes*, 484 P.2d 573 (Nev. 1971) (fitting in water heater); *Halpryn v. Highland Ins. Co.*, 426 So.2d 1050 (Fla. Dist. Ct. App. 1983) (paint on driveway); *Smith v. Fluor Corp.*, 514 So.2d 1227 (Miss. 1987) (heat exchanger); *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312 (Ill. App. Ct. 1985) (heating, ventilating, and air-conditioning system); *Brokenshire v. Rivas and Rivas, Ltd.*, 922 P.2d 696 (Or. Ct. App. 1996) (defendant who installed acrylic floor in bakery was strictly liable for supplying sale-service "hybrid").

A different result does not obtain when the product in question is, as Finestone characterizes, incorporated into the “structure” of a building. A compelling example analogous to the instant case is *Fenton Area Public Sch. v. Sorensen-Gross Constr. Co.*, 124 Mich. App. 631, 335 N.W.2d 221 (Mich. App. 1983), in which a general contractor hired a subcontractor to install a two-ply flat roof on a school. Much like EIFS, the roof was assembled and installed from various component parts which were delivered to the job site from a manufacturer. *Id.* at 635-36. As the court stated, “[t]he only question is whether the assembly of the roof was an assembly of ‘a product or a component of a product.’” *Id.* at 639. “Guided by the statutory definition of a ‘products liability action’ and our interpretation of Michigan case law,” the court held that a suit based on damages resulting from the assembly of a defective roof is a “products liability action.” *Id.* at 640. The court easily concluded that a defective school roof, assembled and installed on site from various components, qualifies as a product and supports a claim under that state’s products liability statute. *Fenton* is highly persuasive here, because the action was brought under a products liability statute, which, like Chapter 82, does not define the term “product.” The court turned to other sources, such as the dictionary definition, and interpreted the term in accordance with its plain meaning.

Michigan is not the only state to have addressed defective roofs in the products liability context. In *Federal Ins. Co. v. HPG Int’l, Inc.*, 758 N.E.2d 261 (Ohio Ct. App. 2001), *review denied*, 755 N.E.2d 355 (Ohio 2001), an Ohio appellate court allowed a strict liability cause of action after determining a defective roof system is a “product.” *Id.* Significantly, in both *Fenton* and *Federal*, the roof “system” was assembled from

components manufactured elsewhere and built on site. In this respect, little difference exists between those decisions and Fresh Coat's case. The former involves a roof assembled from various components; the latter involves exterior cladding assembled from various components. A roof is just as much, or *more*, a part of the "structural integrity" of a building as EIFS cladding. If a defective roof system is a product, then so is EIFS. Chapter 82 clearly applies.

There are other compelling reasons to reject Alabama's approach in *Keck v. Dryvit Sys., Inc.*, 830 So.2d 1 (Ala. 2002). In *Keck*, Alabama adopted essentially a one dimensional test for determining whether a product incorporated into real property remains a "product" for purposes of Alabama's Extended Manufacturer's Liability Doctrine.¹⁵ The issue turns on the "overall function and life span of the item." *Id.* at 6. If 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," the item is not a product. *Id.* This is Alabama's sole test. And the court did not evaluate whether any other relevant factors should be considered. No Texas court has ever adopted such an approach to products liability law generally or EIFS specifically.

More troublesome, *Keck's* test obviously disregards the Restatement's acknowledgement, discussed previously, that products incorporated into real property can remain products for strict liability purposes. Notably, *Keck* does not discuss (or mention) the Restatement at all. Applying the Restatement's rule is particularly appropriate here,

¹⁵ The Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") is a judicial, not legislative, creation. See *Keck*, 830 So.2d at 5-8; *Casrell v. Altec Indus., Inc.*, 335 So.2d 128 (Ala. 1976); *Defore v. Bourjois, Inc.*, 105 So.2d 846 (Ala. 1958).

where the context of EIFS distribution and use is “sufficiently analogous to the distribution and use of tangible personal property.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a). For these reasons, *Keck* is ill-reasoned, contrary to recent trends in products liability law, and the Court should not follow it.

6. *Witnesses testified that EIFS is a product.*

Apart from the overwhelming weight of authority supporting Fresh Coat’s position that EIFS is a product, the evidence at trial confirmed as much. Here, all the testimony describing EIFS demonstrates that it is an exterior insulation system comprised of components which are tangible personal property fabricated and processed by Finestone, sold to distributors, purchased by Fresh Coat, and mixed, modified, and applied in accordance with Finestone’s instructions ultimately taking final form on the Brunson claimants’ homes. (*See, e.g.*, 14 RR 63-64, 24 RR 144-45). Witnesses, including Finestone’s own former employees and representatives, described EIFS and its components as “products”:

- Jack Mikuski, Finestone’s Vice-President of Sales and Director of Technical and Development:

Q. The product that we’re here about in this lawsuit was – is a Finestone barrier EIFS product. You’re familiar with that product. Correct?

A. Yes. (6 RR 7, 15).

- Michael Irving, former Director of Technical Services:

Q. Is it accurate to say that Finestone never tested EIFS with windows?

A. Correct. Finestone did not test windows. They tested the products that they made which was EIFS. (23 RR 65).

- James Van Doren, former head of the Finestone product line:

Q. Finestone is a product manufacturer, right?

A. Yes. (6 RR 139).

Other testimony confirmed that the EIFS components exist as tangible personal property and were used in the installation process and affixed onto the home:

Q. In order to put the EPS onto the gypsum board, you would use the base coat as adhesive?

A. Well, in order to apply the EPS board to the substrate you applied the base coat to the back of the EPS board and adhered it to the substrate.

Q. And the base board [sic] would come in a pail, correct?

A. The base coat came in a pail.

Q. And the mesh came in a roll?

A. That's correct. . . .

Q. And then the finish coat would come in a pail?

A. That's correct. . . .

Q. And it left your possession as buckets and rolls when it went to someone like Mr. Rutherford or to Fresh Coat.

A. Yes, it did.

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

A. [Fresh Coat] took the adhesive base coat, the mesh, the EPS

board and constructed an EIFS system.

(14 RR 63-64).

Gerald Banks, Fresh Coat's president, also reiterated that the EIFS materials were applied to the exterior of the homes and used in the installation process:

Q. And then you would have, through your company or subcontractors, labor provided to take those components and install them together so that at the end of the day, there was an EIFS—an EIFS system, right?

A. Yes, sir.

Q. And then you would take those—all of that together, the labor and the material, and Life Forms would pay you one lump sum for all of those—for those combined services and materials, right?

A. Yes. I would purchase the Finestone material for application on Life Forms' homes.

(24 RR 144-45). The evidentiary record clearly establishes that EIFS is a product. The jury was entitled to accept this evidence and return the verdict it did.

7. *Chapter 82 does not except home construction cases from its reach, nor has any Texas appellate court recognized such an exception.*

The existence or non-existence of legislative intent may be inferred from the fact that a certain provision is missing from a statute. *See Freels v. Walker*, 26 S.W.2d 627, 630 (Tex. 1930). Yet, a limitation or exemption may not be read into a statute by implication, unless it is apparent that the limitation was intended by the legislature but left unexpressed. *Spears v. City of San Antonio*, 223 S.W. 166, 169 (Tex. 1920); *North Common Sch. Dist. v. Live Oak County Bd.*, 199 S.W.2d 764 (Tex. 1946). Here, Finestone asks the Court to read into the text of § 82.002 an implied exemption for home

construction cases. But this Court has previously, and clearly, expressed its unwillingness to “judicially amend [Chapter 82] to add an exception not implicitly contained in the language of the statute.” *Fitzgerald*, 996 S.W.2d at 867.

In sum, the evidence and authority permit but one reasonable conclusion: EIFS and its components are products and Chapter 82 applies to them, regardless whether they are part of the “structural integrity” of a house. But again, the Court need not commit its valuable time to the issue, as Finestone did not raise it in the trial court.

C. Should the Court grant review on the fee issue, it should affirm because the court of appeals correctly upheld the judgment as to Fresh Coat’s attorneys’ fees and expenses.

The court of appeals did not reach the merits of Finestone’s complaint regarding attorneys’ fees because, in addition to Finestone’s failure to meet its evidentiary burden (discussed subsequently), it did not object or request segregation of fees in the charge. By not objecting to the aggregate submission of attorneys’ fees, Finestone “waived the statutory exception to the responsibility to indemnify Fresh Coat for attorneys’ fees, expenses, and costs.” *K-2*, 253 S.W.3d at 398. The court of appeals is correct.

Before addressing the waiver issue, however, Fresh Coat reminds the Court of authority clearly placing on the manufacturer the burden to prove the exception to indemnity and all portions of the claimed loss that fall within the exception. Finestone is incorrect in arguing that the seller has the burden to prove what portion of its losses ought to be excluded from its own recovery when the manufacturer has the clear obligation to establish the exception in the first place as part of its case-in-chief.

1. *It is the manufacturer's burden to show what portion of the seller's loss falls within § 82.002(a)'s exception to indemnity.*

The court of appeals reversed the portion of the judgment awarding Fresh Coat indemnity from Finestone for the Life Forms settlement payment, but otherwise affirmed the judgment, including the award to Fresh Coat for its attorneys' fees, expenses, and costs. As the basis for its partial reversal, the court reasoned that because Fresh Coat's contract with Life Forms included an indemnity clause, and because Fresh Coat settled its dispute with Life Forms "solely" because of the potential exposure under that indemnity clause, it assumed an independent indemnity duty. Therefore, according to the court, Finestone is not required to absorb the portion of the loss representative of the Life Forms settlement. The court concluded that Fresh Coat's payment to Life Forms was due to its contractual relationship with Life Forms and therefore fell within the exception to indemnity under Chapter 82, which relieves a manufacturer from indemnification to a seller to the extent the seller is "independently liable" for losses it caused. *K-2*, 253 S.W.3d at 396. Fresh Coat challenges this holding, as explained in its petition for review. Of course, if the Court agrees with Fresh Coat's position that Finestone owes statutory indemnity for the Life Forms settlement, then the Court need not address Finestone's challenge to the award of fees and costs.

As the Court is fully aware, to trigger the exception to indemnity under Chapter 82, it is the *manufacturer's* burden to present evidence—mere pleadings do not suffice—that the seller has independent responsibility for the "loss." *E.g.*, *Hudiburg*, 199 S.W.3d at 255; *Meritor*, 484 S.W.3d at 91; *Oasis Oil Corp. v. Koch Ref. Co.*, 60 S.W.3d 248, 254

(Tex. App.—Corpus Christi 2001, pet. denied); *Panatrol Corp. v. Emerson Elec. Co.*, 163 S.W.3d 182, 190 (Tex. App.—San Antonio 2005, pet. denied); *Freeman Fin. Inv. Co. v. Toyota Motor Corp.*, 109 S.W.3d 29, 34 (Tex. App.—Dallas 2003, pet. denied) (exception to indemnification duty established only by finding the seller’s independent conduct caused the loss); *Bren-Tex Tractor Co. v. Massey-Ferguson, Inc.*, 97 S.W.3d 155, 158 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (same).

Mindful of this authority, the court of appeals acknowledged Finestone’s burden by noting that “the statute imposes on the manufacturer the burden not only to prove the statutory exception, *but also to obtain a finding of the amount of the portion of the loss excluded under the exception.*” *K-2*, 253 S.W.3d at 397 (emphasis added) (citing *Meritor*, 44 S.W.3d at 91). The court of appeals quite correctly made that point because the statute squarely compels the manufacturer to prove *every* “loss” it claims was caused by the seller.¹⁶ In this case, the “losses” include not only the settlement payment to Life Forms (that Finestone erroneously contends is not recoverable by Fresh Coat) but also all other “losses,” *i.e.*, attorney’s fees and costs, Finestone believes were “caused by the seller’s negligence, intentional misconduct, or other act or omission, ..., for which the seller is independently liable.” TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(a). Because attorneys’ fees, expenses, and costs are part of the “loss” defined by Chapter 82, Finestone had the burden to prove what portion, if any, of Fresh Coat’s fees, expenses,

¹⁶ The court of appeals held Finestone met its burden with respect to the Life Forms settlement payment, but did not meet its burden with respect to the attorneys’ fee issue. Curiously, the court of appeals reached both conclusions despite the fact that Finestone did not obtain the required findings on *either* issue. The court should have held Finestone failed to meet its burden of proof as to the Life Forms settlement payment as well.

and costs were excepted from indemnity, as this Court has clearly mandated by its precedent. The court of appeals held that Finestone met its burden of proof with regard to the Life Forms settlement payment part of the “loss.” However, Finestone did not meet its burden of proof with respect to any other portion of the “loss,” such as attorneys’ fees, it claimed was excepted from the indemnity obligation (though the court of appeals did not reach the issue).

Fresh Coat’s position follows from the statute’s express text, which defines “loss” to include not only “reasonable damages” but also reasonable attorneys’ fees, expenses, and costs. *Id.* at § 82.002(b). Once the seller establishes evidence of fees and expenses covered by the manufacturer’s indemnity obligation, the burden shifts to the manufacturer to prove by what amount, if any, those fees and expenses should be reduced due to conduct of the seller for which it is independently liable. Fresh Coat met its burden to trigger the statutory indemnity duty by presenting evidence of all its losses, including attorneys’ fees, expenses, and costs.¹⁷ To the extent Finestone sought to challenge the recoverability of any “loss” it contended was caused by Fresh Coat’s conduct for which it was independently liable, *Finestone* was the party with the duty (and motivation) to arm the jury with evidence on which it could reasonably rely to reduce the amount of Fresh Coat’s fees because they represented legal services performed solely with respect to the Life Forms settlement.

¹⁷ Although Finestone has characterized its challenge to the fee award as a “no evidence” point, it is undisputed Fresh Coat presented legally sufficient evidence to support some award of fees, even if the Court were to hold that the Life Forms’ settlement is not recoverable by Fresh Coat. Finestone’s real point is that the fee award exceeds the amount it contends is permissibly recoverable if, in fact, it does not owe indemnity for the Life Forms settlement.

Adopting Finestone’s view that Fresh Coat had the burden to present fee evidence in segregated form relating to the *exception* under Chapter 82—an issue on which *Finestone* bore the burden of proof—contravenes the express statutory text and imposes on Fresh Coat a duty to limit or segregate proof of its “losses” during its case-in-chief, *before the manufacturer has even attempted to present evidence sufficient to trigger the exception*. Under Finestone’s theory, a seller would have the burden to introduce its evidence of attorneys’ fees in a segregated fashion before knowing whether, or to what extent, the manufacturer even sought to reduce the “losses” by attempting to prove that some portion of them was caused by the seller’s independent conduct. It is not the seller’s burden to remove a portion of its claimed loss pertaining to a defensive theory controlled solely by the manufacturer and on which the manufacturer bears the burden of proof. It is not the seller’s duty to submit segregated evidence of its losses in anticipation of what the manufacturer may or may not argue under the exception. Rather, it is the manufacturer’s burden to present evidence triggering the exception and supporting any reduction in damages. If the manufacturer has the burden to establish the applicability of the exception in the first instance by proving the seller’s independently wrongful conduct, then it naturally has the burden to show what portion of the loss is causally related to the seller’s independent conduct.

Not surprisingly, no Texas appellate court has placed on the seller the burden that Finestone is attempting to place on Fresh Coat. Cases cited by Finestone, such as *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), and *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991), are not applicable here and do not support the

result Finestone urges. To be sure, those cases agree it is generally the burden of the party seeking fees to segregate them unless “discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.” *Gullo*, 212 S.W.3d at 313-14. However, those cases were decided in the typical context where the party seeking fees bore the burden of proof with respect to all claims, some of which supported fee recovery and others did not. But here, Fresh Coat bore the burden of proof on triggering the indemnity duty in the first instance; Finestone bore the burden to show what portion, if any, of the claimed losses should not be recoverable due to independent conduct of Fresh Coat. Its burden applies not only to the Life Forms settlement itself, but any other losses, such as fees, Finestone claimed are not recoverable by operation of the statutory exception. Finestone certainly does not dispute it possessed the burden to prove that the Life Forms settlement payment fell within the exception to indemnity. There is no legal basis to place that burden elsewhere as to other portions of the “loss” Finestone contends fall within the exception. To hold otherwise ignores the clear statutory language and this Court’s jurisprudence.

The testimony of Fresh Coat’s counsel, quoted by Finestone, is of no moment. Whether attorneys’ fees are capable of segregation has historically been considered purely a legal question. Only recently, in *Gullo*, has this Court said the issue can be, under certain circumstances, one of mixed fact and law. *Gullo*, 212 S.W.3d at 313. Regardless, because it was Finestone’s burden to present evidence as to what amount of fees, if any, should be unrecoverable due to Fresh Coat’s independent conduct, and having had the opportunity to review the evidence, it was incumbent upon Finestone to

make an argument as to why the requested fees are capable of segregation and, further, what amount the jury should have attributed to legal services pertaining solely to the Life Forms settlement. Finestone's attorney fee expert witness, Don Weiting, offered no testimony on these points. Under questioning by Finestone's counsel, Mr. Weiting was not asked to offer an opinion as to what portion of Fresh Coat's attorneys' fees was attributable to the Life Forms settlement, even though Mr. Weiting believed the fees were capable of segregation. (28 RR 112). He only attempted to offer legal opinions as to whether the Life Forms settlement was recoverable under Chapter 82. (28 RR 61-65). Fresh Coat properly objected to that line of inquiry as delving into legal matters for the court, and the trial judge sustained the objections.

2. *Finestone waived any error as to its complaint that the charge does not segregate fees between those relating to recoverable damages and those relating to non-recoverable damages.*

With the understanding that it was Finestone's burden to prove what losses fell within the exception to indemnity, it is easy to grasp why the court of appeals was correct in holding Finestone waived error.

While Finestone objected to the inclusion of element "b" in Question No. 7 on the grounds the Life Forms settlement was not recoverable, Finestone did not raise any complaint about the form of element "c" pertaining to fees, expenses, and costs. Finestone should have asked the trial court to separate the answer blanks under Question 7(c) in the charge so that the jury, if so inclined, could have apportioned the requested fees for, in one answer blank, those that related to the defense of all claims other than Life Forms' contract claim, and in another blank, those that related solely to the Life

Forms settlement. *See Harris Co. v. Smith*, 96 S.W.3d 230, 233-34 (Tex. 2002); *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 150-51, 156 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (complaining party objected to inclusion of unsupported damage element in charge as well as court’s failure to segregate answer blanks). With the charge structured in such a manner, Finestone could have shown the appellate court any effect the purportedly erroneous inclusion of the Life Forms’ settlement had on the attorneys’ fee award. Not having requested the trial court to segregate the answer blanks, Finestone cannot obtain a new trial due to inclusion of purportedly non-recoverable damage elements in a jury answer. *See Haskett v. Butts*, 83 S.W.3d 213, 220 (Tex. App.—Waco 2002, pet. denied) (concluding defendant waived complaint that evidence was insufficient to show which of plaintiff’s medical expenses may have been associated with claims in lawsuit because defendant did not object or request segregated damages); *Redding*, 56 S.W.3d at 150-51 (rejecting plaintiff’s waiver argument where defendant both objected to non-recoverable damage element and requested segregated blanks).

Finestone claims it had no duty to request segregation of the damage blank pertaining to attorneys’ fees because the charge instructed the jury to exclude from its awards any amount constituting loss caused by Fresh Coat’s own conduct for which it was independently liable. But, contrary to Finestone’s argument, nothing about the charge instruction “obviously place[s] the burden of proof on Fresh Coat.” (Finestone’s Brief at 32). The charge language does not relieve Finestone of its burden of proof to develop and present evidence in support of the exception. Nor does the charge instruction relieve Finestone of its obligation to object to a charge that would not yield a

result consistent with its position. Asking for segregation of the answer blank in Question 7(c) would have greatly assisted the appellate court in the event it agreed, as it did, with Finestone's position that the Life Forms settlement was not recoverable.¹⁸ Rather, Finestone claimed on appeal, for the first time, that the answer to Question 7(c) contains elements of damage (*i.e.*, attorneys' fees) which are both recoverable and nonrecoverable. Because the parties disputed whether the Life Forms settlement was a recoverable damage element, Finestone was obligated to request two blanks under Question 7(c) to give the jury a chance to apportion the fees. Had Finestone made such a request, Fresh Coat might have agreed and then the Court would now know what portion of fees the jury attributed solely to the Life Forms settlement.¹⁹ Finestone did none of these things at the charge conference (30 RR 26-27)²⁰ and cannot complain about the fee award for the first time on appeal. Thus, the court of appeals correctly rejected Finestone's issue.

¹⁸ The charge instruction does not negate Finestone's burden to ask for a segregated answer blank with regard to attorneys' fees. This is because the jury could have found, as it did, that all the settlement payments were recoverable, and at the same time apportioned the fees between services pertaining solely to the Life Forms settlement and services pertaining to all other claims. Alternatively, had the jury answered "\$0" to Question 7(b)—that is, awarded no recovery for the Life Forms settlement—segregated answer blanks in Question 7(c) would have again allowed the jury to delineate an amount of fees pertaining to the Life Forms settlement (assuming Finestone had presented some evidence on that issue).

¹⁹ On the other hand, Fresh Coat also might have objected to segregated answer blanks in Question 7(c) on the grounds that Finestone failed to present any evidence of the amount by which it claimed the fees, or "loss," should have been reduced based on Finestone's analysis of the evidence. Because Finestone failed to meet its evidentiary burden to show an amount by which the fees should be reduced, whether Finestone also requested separate blanks under Question 7(c) is arguably irrelevant since the trial court would have been *required* to deny any such request based on the lack of legally sufficient evidence.

²⁰ In fact, Finestone raised absolutely no objection to Question 7(c) during the charge conference. (30 RR 26-27).

3. *Because Finestone presented no evidence to meet its burden, the court of appeals result is correct and this Court should deny Finestone's petition.*

The Court may readily deny Finestone's petition for the additional reason that it failed to meet its burden of evidentiary proof by failing to present evidence showing what portion of the claimed attorneys' fees were not recoverable under Chapter 82's exception to indemnity.

Finestone presented absolutely no evidence demonstrating any particular amount of Fresh Coat's "loss" in the form of attorneys' fees that should have been deducted based on Finestone's contention that the fees related solely to the Life Forms settlement. Finestone does not dispute that proposition. Finestone could have, and should have, identified for the jury what portion of the overall fees Finestone argued was attributable solely to the Life Forms settlement and requested separate blanks in Question 7(c) of the charge, thereby giving the jury the opportunity to say what portion of the fees related to the Life Forms settlement and what portion of fees related to all other claims. Its failure to present evidence in support of the issue, on which it bore the burden of proof, is fatal to its claim that there now ought to be a remand to reassess fees. On remand, Finestone would be required to present such evidence. It did not present that evidence when it had the opportunity and obligation to do so; it should not be afforded a second opportunity.

4. *In any event, Finestone is not entitled to a remand on attorneys' fees.*

Assuming the Court rejected all of Fresh Coat's arguments in its petition *and* held Finestone did not have the burden to present evidence to support a reduced fee award *and* held Finestone actually preserved its complaint, a remand for new trial is not necessarily

the appropriate remedy. While Finestone presents the remand option as essentially automatic, “not every appellate adjustment to the damages. . .will require reversal,” as even Finestone’s cited authority makes clear. *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006). *Barker* held that, in cases where an appellate court cannot make a factual sufficiency review of an attorney fee award based on the correct amount of damages (because a portion of the damages has been reversed on appeal), the error is reversible “unless the appellate court is reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered.” *Id.* at 313-14. Finestone has not made the showing required by *Barker*, and did not even attempt such a showing in the court of appeals. In fact, Finestone’s appellate brief did not cite *Barker* at all.

5. *Even if Finestone were entitled to a new trial on fees, a new trial on all issues is neither warranted nor allowed in these circumstances.*

Finally, Finestone argues that any decision by this Court requiring a reassessment of Fresh Coat’s attorneys’ fees must also result in a complete new trial on all issues of liability and damages under Texas Rule of Appellate Procedure 44.1(b). (Finestone’s Brief at 37). Though Finestone cites *Barker* for support, *Barker* actually remanded only the attorney fee issue for a new trial, not the entire case. *Barker*, 213 S.W.3d at 315. Additionally, concerns which might warrant a new trial on all issues do not exist here because other damage elements are undisputed, such as Fresh Coat’s entitlement to recover indemnity for the settlement with the Brunson homeowners. Finestone does not dispute that figure and we know the exact amount Finestone owes.

Of course, Rule 44.1(b), when read in full and in context, does not support a new trial for all issues of liability and damages in every instance. It provides:

(b) *Error Affecting Only Part of Case*. If the error affects part of, but not all, the matter in controversy **and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error**. The court may not order a separate trial solely on unliquidated damages if liability is contested.

TEX. R. APP. P. 44.1(b) (emphasis added). Considering the circumstances, a remand for new trial as to all issues of liability and damages imposes considerable unfairness on Fresh Coat, which would be put to the further expense of re-trying the case again (and naturally seeking to recover the entirety of its additional attorneys' fees and costs yet again from Finestone). Conversely, in the event any remand would ever be appropriate, a partial remand to address solely the reassessment of fees would work no unfairness on Finestone; indeed, it would clearly be the most judicially economical resolution. Not surprisingly, case authority—in particular, case authority relied upon by Finestone—supports a partial remand for reassessment of fees only. *See, e.g., Barker*, 213 S.W.3d at 315; *Young v. Qualls*, 223 S.W.3d 312, 315 (Tex. 2007) (remanding only attorney fee issue for new trial); *Gullo*, 212 S.W.3d at 315. *See Bossier Chrysler-Dodge II, Inc. v. Rauschenberg*, 238 S.W.3d 376, 376 (Tex. 2007) (per curiam); *Lee v. Daniels & Daniels*, No. 04-07-00096-CV, 2008 WL 2037309 *7 (Tex. App.—San Antonio 2008, pet. filed) (remanding for new trial on fees only).

PRAYER

Therefore, for the above reasons, Petitioner Fresh Coat, Inc., respectfully requests the Court to grant its petition for review, reverse the court of appeals in part, and affirm the trial court's judgment in its entirety. Petitioner further requests all other relief in law and in equity to which it is justly entitled.

Respectfully submitted,

CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN

By: _____

Kevin D. Jewell
Texas Bar No. 00787769
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

BATEMAN | PUGH, P.L.L.C.
Robert H. Bateman
State Bar No. 01899500
Adam Brett Chambers
State Bar No. 24036345
Two Houston Center
909 Fannin Street, Suite 1800
Houston, Texas 77010
Telephone: (713) 609-7700
Facsimile: (713) 609-7777

ATTORNEYS FOR PETITIONER,
FRESH COAT, INC.

CERTIFICATE OF SERVICE

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

Via Certified Mail - RRR

Thomas C. Wright
Michael Choyke
R. Russell Hollenbeck
WRIGHT, BROWN & CLOSE, LLP
Three Riverway, Suite 600
Houston, Texas 77056

Via Regular Mail

Robert Bateman
Bateman & Pugh, P.L.L.C.
Two Houston Center
909 Fannin, Suite 1800
Houston, Texas 77010

Kevin D. Jewell