

# NO. 08-0592

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IN THE  
SUPREME COURT OF TEXAS

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FRESH COAT, INC.,

*Petitioner/Cross-Respondent,*

v.

K-2, INC.,

*Respondent/Cross-Petitioner.*

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

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## **FRESH COAT'S REPLY BRIEF**

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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.

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Cross-Respondent: Fresh Coat, Inc.

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

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## ARGUMENT AND AUTHORITIES IN REPLY

### A. **Fresh Coat did not “bargain away” its Chapter 82 indemnity rights and the record soundly refutes Finestone’s argument to the contrary.**

According to Finestone, this lawsuit is nothing more than an attempt to burden Finestone with Fresh Coat’s obligations under its subcontract with Life Forms. At the heart of Finestone’s mischaracterization is its assertion that “Fresh Coat chose to bargain away its statutory right to assert that the loss at issue here was a result of Life Forms’s independent liability.” (Response Br. at 8). In other words, Finestone is arguing that Fresh Coat waived its statutory indemnity rights when it entered into the subcontract with Life Forms. This position has no support in Texas law or the record. As its premise collapses, so goes the rest of Finestone’s argument.

To be sure, under Texas law, one may generally waive statutory rights by contract unless a statute or fundamental public policy precludes waiver. *See Williams v. Williams*, 569 S.W.2d 867, 869-70 (Tex. 1978) (surviving spouse could contractually waive statutory homestead rights); *Dillee v. Sisters of Charity of Incarnate Word Health Care Sys.*, 912 S.W.2d 307, 308-09, 311 (Tex. App.—Houston [14th Dist.] 1995, no writ) (employee could contractually waive contract right to due process and hearing upon termination of employment); *Beago v. Ceres*, 619 S.W.2d 293, 295 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (owner may contractually waive statutory right to partition real property). Because “waiver is the intentional relinquishment of a known

right,”<sup>1</sup> Finestone, had it sought to establish waiver in the trial court, was required to prove: (1) an existing right, benefit, or advantage; (2) Fresh Coat’s actual or constructive knowledge of its existence; and (3) an actual intent by Fresh Coat to relinquish the right. *ASI Technologies, Inc. v. Johnson Equip. Co.*, 75 S.W.3d 545, 548 (Tex. App.—San Antonio 2002, pet. denied). Of these elements, intent is the key. *Id.*; *Sedona Contracting*, 995 S.W.2d at 196. Further, “[i]n order to establish waiver, the act must be clear and decisive.” *Sedona Contracting*, 995 S.W.2d at 196.

At least one Texas appellate court has held that a Chapter 82 “seller” may, by contract, waive its statutory indemnity rights. *ASI Technologies*, 75 S.W.3d at 548. However, the court’s holding was based on the seller having entered into a verdict sharing contract with the manufacturer itself. Clearly, the present circumstance is not comparable.

Finestone neither presented evidence of the elements of waiver nor requested a jury finding on the issue. Most important, it offered no proof on the “key” element of Fresh Coat’s intent to waive statutory rights. Thus, to the extent Finestone wanted to claim Fresh Coat waived its indemnity rights by entering into the Life Forms contract, it failed in its burden.<sup>2</sup>

Indeed, the record conclusively disproves Finestone’s contention. The subcontract between Fresh Coat and Life Forms is completely silent on the issue of Fresh Coat’s

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<sup>1</sup> *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 195 (Tex. App.—San Antonio 1999, pet. denied).

<sup>2</sup> Finestone’s waiver argument is, unfortunately, one more attempt, of Finestone’s many attempts, to argue points for the first time on appeal that it did not present in the trial court.

Chapter 82 indemnity rights and contains no language that could reasonably be construed as an intentional waiver of those rights. (Ex. 525; Fresh Coat's Petition at tab E). Any waiver of statutory rights by Fresh Coat in its Life Forms contract must be clear and express. The agreement contains no such terms. Therefore, no waiver of rights occurred.

Moreover, Fresh Coat's settlement agreement with Life Forms makes abundantly clear that it was not waiving, but expressly reserving, all statutory indemnity rights against Finestone. (Ex. 813, p. 6). Specifically, the settlement agreement acknowledges that Fresh Coat's release of Life Forms was "not intended and shall not be construed to encompass the Parties' claims against Finestone" and that the parties "remain free to settle or litigate with Finestone as each may deem appropriate." (*Id.*) Clearly, the settlement agreement reserves Fresh Coat's indemnity rights against Finestone.

Fresh Coat did not "bargain away" its statutory rights and is not seeking to "shift" contractual obligations to Finestone. Fresh Coat wants the Court to enforce Chapter 82's indemnity provisions. Manufacturers like Finestone have mandatory indemnity duties to sellers, subject only to the exception set out in § 82.002(a), the applicability of which does not turn on whether subcontractors independently assume any indemnity obligations under subcontracts with homebuilders. A seller's fault in "modifying or altering the product" which causes damage to consumers gives rise to the exception, not a seller's contracts with another seller. Fresh Coat was not at fault here and the exception does not apply.

Nor should Finestone be relieved of its statutory duty to fully reimburse all losses arising out of the Brunson products liability action. As Fresh Coat has argued, the

amount it paid in settlement to Life Forms could have been recovered by Life Forms directly from Finestone under Chapter 82 anyway because the amount represents qualifying “losses” under the statute. Finestone takes issue with this assertion, in part, claiming no evidence shows that any of the \$1.2 million actually went to the homeowners. Yet, the uncontroverted evidence shows that the settlement money was paid to reimburse Life Forms for its expenses incurred in defending and settling the Brunson products liability claims. (Ex. 813, p. 1; 20 RR 9).<sup>3</sup> These costs are included within the “losses” recoverable against the manufacturer under § 82.002(a) and (b).

**B. Finestone has the burden to prove § 82.002(a)’s exception to indemnity.**

Despite the wealth of authority to the contrary, Finestone persists in its position that a manufacturer does not have the evidentiary burden to establish § 82.002(a)’s exception. Finestone says the many cases Fresh Coat cites hold only that evidence must support the exception, but not that the manufacturer must present the evidence. Yet, every court addressing the issue, including this Court, has squarely placed on the manufacturer the duty to prove the exception. *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255, 258-60 (Tex. 2006) (“To escape this duty to indemnify, the *indemnitor* must prove the indemnitee’s independent culpability”) (emphasis added) (citing *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001) (“[F]or the *Manufacturers* to implicate section 82.002(a)’s exception to that

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<sup>3</sup> Exhibit 813 is the settlement agreement and release between Fresh Coat and Life Forms. It specifically provides that the settlement is for Life Forms claims “to recover attorneys’ fees and settlement payments Life Forms had already incurred or would incur to defend and settle the Homeowners’ Claims against Life Forms.” (*Id.*)

duty, it must be established that seller’s conduct ‘caused’ the loss.”) (emphasis added)); *Dean’s Campin’ Co. v. Hardsteen*, No. 01-00-01190-CV, 2002 WL 1980840 at \*4 (Tex. App.—Houston [1st Dist.] August 29, 2002, pet. denied) (not designated for publication) (“[*Meritor’s*] holding imposes on the manufacturer the burden to prove that the exception to the manufacturer’s duty to indemnify the seller applies); *Oasis Oil Corp. v. Koch Ref. Co. L.P.*, 60 S.W.3d 248, 254 (Tex. App.—Corpus Christi 2001, pet. denied) (“... the manufacturer has the burden of proof to avoid the duty to indemnify an innocent seller”).<sup>4</sup> Considering this substantial precedent, the Beaumont Court of Appeals’s holding placing the burden on Finestone is amply supported. *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 397 (Tex. App.—Beaumont 2008, pet. filed) (citing *Meritor*, 44 S.W.3d at 91). Thus, case law plainly refutes Finestone’s assertion.

Moreover, nothing about the language or instructions accompanying Question No. 7 in the jury charge shifted the manufacturer’s well-established burden to Fresh Coat to *disprove* the exception. To assist the factfinder in determining an amount of Fresh Coat’s damages, the trial court instructed the jury merely to “exclude any amount that constitutes loss caused by Fresh Coat’s own negligence, intentional misconduct, or other act or omission, if any (such as negligently modifying or altering the product), for which Fresh Coat is independently liable.” (CR 4125). The court’s instruction did not place the

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<sup>4</sup> Finestone is well aware of Texas law on this point, as its counsel represented the alleged manufacturer in *SSP Partners v. Gladstrong Inv. (USA) Corp.*, 169 S.W.3d 27, 35 (Tex. App.—Corpus Christi 2005), *affirmed*, 275 S.W.3d 444 (Tex. 2008), in which counsel argued to the court of appeals that “when a manufacturer seeks to avoid liability to a seller, the manufacturer bears the burden to show that the seller is not innocent and that its independent conduct resulted in the plaintiff’s injury.” *Id.*

burden of proof on Fresh Coat to affirmatively show that all its losses were not caused by its own independently tortious conduct. Nor did Finestone ever argue in the trial court that such a burden existed on Fresh Coat.

Thus, it is Finestone's burden, not Fresh Coat's burden, to prove the exception to indemnity. Finestone did not do what was required to establish the exception as to the Life Forms settlement payment. There is no evidence that Fresh Coat failed to assemble the EIFS component parts in accordance with Finestone's instructions. Finestone does not contend otherwise. Nor did Finestone ask for, or obtain, a finding or ruling that Fresh Coat in fact owed contractual indemnity to Life Forms under the subcontract—assuming such a finding would satisfy the exception to indemnity, which, as Fresh Coat has explained, it does not. Fresh Coat merely settled allegations made against it in the products liability action.

**C. Again, Finestone has shown only that Fresh Coat settled a claim in a products liability action, which is not sufficient to invoke the exception to indemnity.**

A manufacturer's duty to indemnify applies "without regard to the manner in which the action is concluded." TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(e) (Vernon 2006). This language means that a seller's settlement of claims made against it in a products liability action does not preclude a seller from seeking to recover its losses from the manufacturer. *See Hudiburg*, 199 S.W.3d at 255-56; *Fitzgerald*, 996 S.W.2d at 867. Further, "losses" recoverable from a manufacturer include "reasonable damages," *i.e.*, settlement costs, and reasonable attorneys' fees, expenses, and costs. TEX. CIV. PRAC. & REM. CODE ANN. at § 82.002(b).

The record shows that Life Forms (among others) sued Fresh Coat in a products liability action. Life Forms's claims against Fresh Coat sounded in tort, products liability, and contract. The merits of Life Forms's claims against Fresh Coat were never finally decided because they were settled, with both parties denying all liability. (Ex. 813). Thus, Fresh Coat is legally entitled to recover its settlement from Finestone unless Finestone establishes the exception under § 82.002(a), which it failed to do. This is the trial court's result and the Court should affirm it.

**PRAYER**

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

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply Brief has been provided to counsel listed below in the manner indicated on this 27th day of April, 2009.

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