

# NO. 08-0592

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IN THE SUPREME COURT OF TEXAS

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**FRESH COAT, INC.,**

Petitioner/Cross-Respondent

v.

**K-2, INC.,**

Respondent/Cross-Petitioner

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

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

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**ORAL ARGUMENT REQUESTED**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

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

## **PRELIMINARY STATEMENT**

Fresh Coat’s response further highlights the need for this Court to take this case and clarify Texas products liability law. Fresh Coat claims that it is a “seller” and that EIFS is a “product.” But Fresh Coat’s job was to assemble various EIFS components (including the roll of mesh and buckets of mud it purchased from Finestone) and build exterior walls of homes sold by Life Forms. Fresh Coat was not hired to “sell” EIFS, and the cost of any materials Fresh Coat used in its work, including the EIFS components, was merely incidental to its construction services. Moreover, the “product” the homeowners later claimed was defective is not the components Fresh Coat purchased

from Finestone, but the finished EIFS wall that Fresh Coat built, which is itself real property and not a “product” under Texas law. Fresh Coat is not a product seller and cannot recover statutory indemnity under Chapter 82 of the Civil Practice and Remedies Code.

## **ARGUMENT**

### **I. Because Fresh Coat was not a “seller,” it cannot recover indemnity from Finestone under Chapter 82.**

To recover Chapter 82 indemnity, Fresh Coat must prove that it was a “seller” of a product—in other words, it must prove that it “distribute[d] or otherwise place[d], for any commercial purpose,” the product or any component part “in the stream of commerce for use or consumption.”<sup>1</sup> TEX. CIV. PRAC. & REM. CODE § 82.001(3); *K-2, Inc.*, 253 S.W.3d at 393. Fresh Coat contends that it was a product “seller” because it “provided” the EIFS components it purchased from Finestone and applied to homes. For example, Fresh Coat claims that it:

- “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.” (FC Resp. at 7)
- “acquired title to the EIFS components and later charged for them, thereby reaping a commercial benefit for the product itself in performing its work.” (FC Resp. at 10)
- “was in the business of purchasing EIFS components and applying them to homes in exchange for payment, thus placing the EIFS in the stream of commerce.” (FC Resp. at 12)

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<sup>1</sup> Fresh Coat apparently does not dispute that it was not a “wholesale distributor” or “retail seller” of EIFS. Thus, the only issue is whether Fresh Coat “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.” (CR 4120) TEX. CIV. PRAC. & REM. CODE § 82.001(3).

But the evidence established that Fresh Coat was not a “seller” of the EIFS components. The only seller involved here was the distributor, Griesenbeck, who purchased the EIFS components from Finestone and supplied them to Fresh Coat. (See 14 RR 44-46) Fresh Coat provided services—in the form of assembling EIFS components into a finished wall—and any sale of EIFS components was merely incidental to Fresh Coat’s service contract.

**A. Fresh Coat is not a “seller” of EIFS components.**

Fresh Coat’s Independent Contractor Agreement with Life Forms shows that Fresh Coat was a service provider, not a seller of EIFS components:

THIS INDEPENDENT CONTRACTOR AGREEMENT (the "Agreement") entered into this 9<sup>th</sup> day of July, 1993 prescribes the contract price, the payment schedule (if applicable) and a general description of the Work. The term "Work" shall mean the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction related activities generally described below:

SYNTHETIC STUCCO APPLICATION AND FINISH

(FS 525 at 1) This agreement was for the performance of work, not for the sale of goods. Fresh Coat tries to distance itself from the contract it signed by characterizing its role as “provid[ing] ‘services’ in addition to EIFS materials.” (FC Resp. at 9) But Fresh Coat cannot escape the fact that the “thing bargained for” was the application and assembly of EIFS into a finished exterior, and not the sale of individual EIFS components.<sup>2</sup> (See FC Resp. at 13) Fresh Coat even concedes that it is not a product seller: “Its activity is to

<sup>2</sup> David Antonio, Fresh Coat’s former owner, testified that the EIFS components his company assembled were delivered to the jobsite by suppliers such as Griesenbeck, further refuting Fresh Coat’s claim that it “sold” such components or placed them in the stream of commerce. (24 RR 144-45)

apply a synthetic stucco exterior cladding to homes.” (FC Resp. at 13 n.6)

Fresh Coat claims that the EIFS components were not incidental because the components were “necessary and material elements to complete the exterior cladding of the house.” (FC Resp. at 14) But Fresh Coat cites to no authority for this proposition. By the very terms of the contract, the provision of any materials was incidental to Fresh Coat’s obligation to construct an EIFS exterior wall. (FS 525 at 1) This is further shown by Fresh Coat’s correspondence with Life Forms regarding pricing information, excerpted as follows:

RE: EIFS Pricing

Dear Donna:

As per your request, the standard pricing for application of exterior insulation finish system to Life Forms homes is as follows:

0 sf - 500 sf	\$ 6.50 per square foot
500 sf -1000 sf	\$ 5.50 per square foot
1000 sf - 2000 sf	\$ 5.00 per square foot
2000 sf and over	\$ 4.50 per square foot

Please note that the pricing for application of exterior insulation finish system to jobs which are under 1000 sf will be subject to negotiation and pricing may vary accordingly.

(FS 530) Fresh Coat did not transfer “title” or “charge” Life Forms for the base coat, finish coat, and mesh it bought from Finestone. (See FC Resp. at 10, 12) Fresh Coat did not charge any particular price for the materials nor did it sell any particular quantity of the materials, as all sellers of goods obviously do. Rather, Fresh Coat charged Life Forms for the “application of exterior insulation finish system” by the square foot. Fresh Coat’s employees used two buckets of a mud-like substance, combined it with other

materials, and created an exterior wall of a home.<sup>3</sup> (14 RR 63-64, 89) Although the components were necessary to the construction of the EIFS wall, they were incidental to Fresh Coat's contract for the service of building a wall. This is just like *Barham v. Turner Construction Company of Texas*, in which the contractor's alleged sale of steel columns was necessary to the construction of the building, but was nevertheless incidental to the contractor's agreement to provide construction services. *See* 803 S.W.2d 731, 738 (Tex. App.—Dallas 1990, writ denied). Indeed, this case is stronger than *Barham* because steel columns keep their integrity and separate identity, whereas the mesh and mud in this case turn into an exterior wall.

Fresh Coat attempts to distinguish *Barham* because the steel columns were sold by “someone else” and not by the general contractor. (FC Resp. at 12) That was not the basis of the court's decision. The court assumed the general contractor had provided the steel columns but held that the contractor's business was providing construction services, not selling steel columns. 803 S.W.2d at 738. Fresh Coat also dismisses *Barham* because it pre-dates Chapter 82 and the Third Restatement. But *Barham* applies a test similar to the language of Chapter 82: “Although phrased in terms of sellers, it is not necessary that the defendant actually sell the product; the defendant need only be engaged in the business of introducing the product into channels of commerce.” *Id.* at 737. *Barham*'s holding should apply here with equal force.

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<sup>3</sup> For this same reason, Fresh Coat's reliance on section 20 of the Restatement is misplaced. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20. (FC Resp. at 11-12) Just because Fresh Coat used EIFS components bought from Finestone in creating the EIFS wall does not transform Fresh Coat into a seller or the situation into a sales-service hybrid. After the wall has dried, those components are irremovable and indistinguishable from the wall of the home.

Further, Fresh Coat claims that *Peterson Homebuilders, Inc. v. Johnny H. Timmons, Sr. d/b/a Bay Servs. Co.* is not on point. In that case, a homebuilder sued a subcontractor for Chapter 82 indemnity. No. 14-03-00400-CV, 2004 Tex. App. LEXIS 6765, at \*2-3 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The issue was whether the subcontractor, when it constructed a structural pad for the home’s foundation, placed the pad in the stream of commerce. *Id.* at \*13-14. That is the very same issue involved here—i.e., whether a subcontractor who builds a structural part of a house places what it has built into the stream of commerce. The *Peterson* court said “no.” *Id.*

Fresh Coat’s position is analogous to a law firm claiming to have “sold” paper to its clients when it submits a brief to a court. According to this “reasoning,” the paper is not incidental, and the law firm is a mandatory link in the distribution chain. But this Court does not (presumably) want blank paper, just as a homeowner does not want a bucket of EIFS “mud”; nor can a brief be filed on any other substance. This does not make the law firm a seller of paper. In the same way, Fresh Coat was not a seller of EIFS components and cannot recover statutory indemnity under Chapter 82.

Lastly, Fresh Coat notes that two states have expressly excepted service providers from their indemnity statutes. (FC Resp. at 11) But that just shows it is a good idea to do so. It does not mean that the Texas legislature had a contrary, but hidden, intent, or that the courts are precluded from interpreting the definitions in the statute.

**B. Fresh Coat relies on cases from other jurisdictions that offer no support.**

Finestone has directed this Court to decisions from Colorado, Connecticut,

Nevada, Utah, and the Seventh Circuit where other jurisdictions have held that contractors similar to Fresh Coat were not sellers placing products in the stream of commerce. (See FS Br. at 14-17) Fresh Coat addresses only three of these cases, and distinguishes two of them merely on the basis that the definition of seller in those cases was based on the Second Restatement.<sup>4</sup> (FC Resp. at 17-18)

Instead, Fresh Coat cites cases that are simply irrelevant. In *Sipari v. Villa Olivia Country Club*, the issue was whether the trial court erred in granting a directed verdict in favor of the defendant manufacturer based on the plaintiff's misuse of a golf cart. 380 N.E.2d 819, 825 (Ill. App. Ct. 1978). There was no issue in *Sipari* about whether one of the parties was a seller; the issues there—assumption of the risk, misuse, and an exculpation clause—are in no respect at issue here. In *Wright v. Massey-Harris, Inc.*, the issue was how the newly-adopted strict liability theory would apply to claims of design defect—obviously not the issue in this case. 68 Ill. App. 2d 70, 71 (Ill. App. Ct. 5th Dist. 1966). In *Malloy v. Doty Conveyor*, a Pennsylvania court recognized that a contractor may sometimes be subject to strict liability for a hybrid sales-service transaction, but held that the installer was not a seller. 820 F. Supp. 217, 221 (E.D. Pa. 1993). The fact that a court noted in dicta that a sales-service hybrid situation may exist somewhere else, under

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<sup>4</sup> In one of those cases, *Maack v. Resource Design & Construction, Inc.*, 875 P.2d 570, 581 (Utah App. 1994), the court held that the contractor was not a seller because it “simply utilized these component parts when constructing the residence.” There, as here, a contractor incidentally used materials in its scope of work to provide a stucco exterior to a home.

Fresh Coat attempts to distinguish *Wright v. Creative Corp.*, 498 P.2d 1179 (Colo. App. 1972), on the grounds that it did not discuss whether the builder qualified as a seller. But that case also noted the “important differences between strict liability as applied to manufactured products and as applied to building construction situations.” *Id.* at 1182.

facts other than those before it, does not help Fresh Coat here.

Further, in *US Airways v. Elliott Equip. Co.*, the court did not, as Fresh Coat suggests, “effectively reject[] the same argument Finestone makes here.” No. 06-1481, 2008 U.S. Dist. LEXIS 76043 (E.D. Pa. Sept. 29, 2008). (FC Resp. at 17) There, the court denied summary judgment because there was a genuine issue of material fact “as to whether Fluidics was a mere installer or was the seller of the equipment.” 2008 U.S. Dist. LEXIS 76043, at \*14. The court did not hold that an installer of equipment was a seller and noted that there was a dispute as to whether “Fluidics [was] even a member of the marketing chain.” *Id.* This case is inapplicable. Similarly, Fresh Coat’s reliance on *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033, 1033-34 (Fla. Dist. Ct. App. 1981) is misplaced. There, the defendant product distributor, like Griesenbeck here, did not dispute that it was a seller. *Id.* The court decided whether strict products liability applied to a seller and whether the home builder was an “ultimate consumer” who had standing to sue. *Id.* at 1034.<sup>5</sup>

In short, Fresh Coat has not directed this Court to any persuasive authority from other jurisdictions. At most, Fresh Coat can argue that there is some dispute over this area of law that this Court should clarify.

**II. Because EIFS is not a “product,” Fresh Coat’s alleged losses do not arise out of a “products liability action” and Fresh Coat cannot recover statutory indemnity under Chapter 82.**

To recover indemnity from Finestone under Chapter 82, Fresh Coat was required

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<sup>5</sup> Ironically, even though Fresh Coat criticizes Finestone for citing cases applying the Second Restatement, three of Fresh Coat’s cases—*Malloy*, *US Airways*, and *Adobe*—rely on the Second Restatement.

to prove that it incurred a loss arising out of “products liability action.” TEX. CIV. PRAC. & REM. CODE § 82.002 (a). Section 82.001(2) defines a “products liability action” as an action for recovery of damages allegedly caused by a defective “product.” *Id.* § 82.001(2). As discussed in Finestone’s brief on the merits, the definition of “product” is fundamental.

Fresh Coat’s discussion of the definition of “product”—including various definitions applied by other jurisdictions—highlights the need for this Court to grant Finestone’s petition. (*See* FC Resp. at 22-25) This is an important issue for Texas jurisprudence, especially in the context of residential and commercial construction. Texas has enacted RECLA to provide a comprehensive scheme to manage construction litigation. This Court should take this opportunity to examine and clarify Texas’ definition of a “product” and under what circumstances a manufacturer may be subject to liability under Chapter 82 for tangible property it produces which is then incorporated into a home. But regardless of which definition is ultimately applied, EIFS is not a “product.” Fresh Coat’s statutory indemnity must fail.

**A. This Court may properly consider Finestone’s arguments.**

Contrary to Fresh Coat’s assertion, Finestone’s product arguments are properly before this Court. In its brief on the merits, Finestone argues, among other things, that Fresh Coat cannot recover statutory indemnity because its alleged losses did not arise out of a products liability action. (Finestone Br. at 20) Finestone also argued that the “product” at issue is the exterior EIFS wall Fresh Coat built for Life Forms, and not the component parts Finestone produced, because the homeowners brought the underlying

suit for damages arising out of defects in their home, not the individual EIFS component parts. (*Id.* at 22-23) Finestone preserved these arguments in the trial court in at least the following ways:

- Arguing in its motion for JNOV that “the findings are not supported by legally sufficient evidence.” (CR 4253)
- Arguing in its brief in support of JNOV that “Fresh Coat did not incur any loss concerning the EIFS components manufactured by Finestone.” (CR 4640)
- Arguing in its brief in support of JNOV that “[t]here is no evidence to support the jury’s affirmative answers to” Question 3 of the jury charge, that Fresh Coat “incurred any arising out of a products liability action.” (CR 4640)
- Arguing in its supplemental motion for JNOV that “the jury’s findings are not supported by legally sufficient evidence.” (CR 4764)
- Arguing in its supplemental motion for JNOV that Finestone owes no duty to Fresh Coat “under statutory or common law because the product defect claims of the Brunson homeowners cannot fairly be read as directed at the EIFS components manufactured by Finestone.” (CR 4766)

These pleadings sufficiently brought Finestone’s complaints to the attention of the trial court.<sup>6</sup> See TEX. R. APP. P. 33.1(a)(1)(A); *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 52 (Tex. 1998) (holding that no-evidence point preserves argument that no implied warranty arose). As one court has held, “[i]t is not necessary, however, to use specific words to preserve an appellate complaint. All that

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<sup>6</sup> Fresh Coat also complains that Finestone’s witnesses and attorneys referred to EIFS as a product at trial. (FC Resp. at 21, 35-37) But determining the extent of Chapter 82’s definition of a “product” is a legal issue for the Court. Whether Finestone’s attorneys’ and witnesses’ colloquially referred to EIFS as a product rather than “item” or “thing” or “real property part of the structure of the home” is of no moment.

is required to preserve error is to timely bring the complaint to the attention of the trial court ‘with sufficient specificity to make the trial court aware of the complaint.’” *Wal-Mart Stores, Inc. v. Barrera*, No. 04-00-00002-CV, 2001 Tex. App. LEXIS 938, at \*4 (Tex. App.—San Antonio 2001, no pet.)

Moreover, Fresh Coat did not raise its waiver argument at the court of appeals and should not be able to do so now for the first time. Finestone argued that EIFS is not a product in the court of appeals and, without any objection from Fresh Coat, the court of appeals considered the argument was properly before it. If Fresh Coat wanted to argue waiver, it should have done so before the court of appeals issued a significant opinion on Texas products liability law. Fresh Coat’s waiver argument is incorrect and comes too late. *See In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005) (holding party waived arguments by failing to raise them in the court of appeals).

**B. The “product” at issue is the finished EIFS wall of the home, not the individual EIFS components.**

Fresh Coat contends that any difference between the completed EIFS exterior wall and the individual EIFS components is “not material to the outcome.” (FC Resp. at 26) But Fresh Coat misses the point. The object of the underlying suit is critical to determine whether a seller incurred a loss arising out of a products liability action. Here, the homeowners did not allege, nor is there any evidence, that the base coat, finish coat, and mesh Finestone produced were defective or caused any damage. Rather, as Fresh Coat notes in its response, the homeowners claimed that their damages were caused by the “EIFS system.” (FC Resp. at 27) Therefore, to determine whether Fresh Coat’s loss

arose out of a products liability action, the Court must determine whether the completed EIFS system is a “product.” This is where the court of appeals erred. Instead of focusing on what the homeowners bought—a house with exterior walls made of EIFS—the court of appeals focused on the individual EIFS components that Finestone sold to Fresh Coat. *K-2*, 253 S.W.3d at 391. Fresh Coat cannot use the nature of the components sold by Finestone to determine whether the EIFS system bought by the homeowners was tangible personal property under Chapter 82.

Fresh Coat’s reliance on the Restatement’s discussion of component parts is also misplaced. Fresh Coat claims that the Restatement “contemplates liability for component manufacturers regardless [of] whether the final product or the components are allegedly defective.” (*Id.* at 26) Essentially, Fresh Coat contends that even if the property at issue is the completed EIFS exterior wall, Finestone is still subject to liability merely because it produced EIFS components. But this is wrong. Under the Restatement, a component part manufacturer is subject to liability only if “the component is defective in itself” or “the integration of the component causes the product to be defective.” *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5. Here, as discussed above, there has been no allegation that the EIFS components were defective, and the EIFS components were not incorporated into a “product.” Instead, they were incorporated into a house. Further, there has been no allegation or evidence that the incorporation of the components caused the EIFS system to be defective.

**C. An exterior EIFS wall is not a “product” because it is not tangible personal property.<sup>7</sup>**

EIFS is not tangible personal property because it is an integral, indivisible, and inseparable part of the structural integrity of the home, which is real property. *See Keck v. Dryvit Sys.*, 830 So.2d 1, 6 (Ala. 2002). Nevertheless, Fresh Coat claims that Texas cases have implicitly understood EIFS to be a product. (FC Resp. at 28) But the definition of “product” or whether EIFS is a “product” was not at issue in any of the cases Fresh Coat cites.<sup>8</sup> In fact, in *Pugh v. General Terrazzo Supplies, Inc.*, the court applied the economic loss rule and held that EIFS was not “other property” separate from the house to which it was applied. 243 S.W.3d 84, (Tex. App.—Houston [1st Dist.] 2007, pet. denied). If EIFS is not separable from a house in the context of applying the economic loss rule, then it should be considered real property, just like the house, for purposes of Chapter 82. Fresh Coat does not address the economic loss rule cases cited by Finestone. (*See Finestone Br.* at 26-27)

Instead, Fresh Coat relies heavily on the Restatement’s definition of “product,”

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<sup>7</sup> EIFS is also not a “product” because it is not distributed or otherwise placed in the stream of commerce, as discussed in section I.A above and in Finestone’s brief on the merits.

<sup>8</sup> *See Pugh v. General Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 93-94 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding damage to home caused by EIFS was not damage to “other property”); *R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus.*, 208 S.W.3d 85, 89 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (discussing whether plaintiff adequately alleged that window flashing, a component part of EIFS, was defective); *Hixon v. Tyco Int’l, Ltd.*, No. 01-04-01109-CV, 2006 Tex. App. LEXIS 9494, at \*39 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (discussing whether defendant established statute of limitations defense); *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823, 831 (Tex. App.—Dallas 2006, pet. denied) (deciding whether EIFS applicator’s conduct fell within insurance policy’s exclusion); *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 675 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (discussing whether negligently performed work (installing EIFS) covered under insurance policy). The same is true for Fresh Coat’s out of state cases. *See Key Constr., Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 06-2395-KHV, 2008 U.S. Dist. LEXIS 2175, at \*9 (D. Kan. Jan. 10, 2008) (mem. op.) (discussing an insurer’s duty to defend); *Pulte Home Corp. v. Parex, Inc.*, 942 S.2d 722, 729 (Md. 2008) (involving warranty claims); *Mayer v. Sto Indus., Inc.*, 132 P.3d 115, 118 (Wash. 2006).

which includes other items such as real property “when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property.” (See, e.g., FC Resp. at 30) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19. But the comments and reporter’s notes make clear that this applies to mass-produced or pre-fabricated homes, such as mobile homes. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19, comment e and reporter’s note to comment e. Fresh Coat does not and cannot dispute that the Life Forms homes at issue here were single-family, custom-built homes that do not fall within this exception.

Fresh Coat also asserts that the comments to the Restatement treat sellers of improved real property as product sellers. (FC Resp. at 30-31) But again, the comments make clear that this statement is not as broad as Fresh Coat would hope:

More recently, courts have treated sellers of improved real property as product sellers in a number of contexts. When a building contractor sells a building that *contains a variety of appliances or other manufactured equipment*, the builder, together with the equipment manufacturer and other distributors, are held as product sellers with respect to such equipment . . . .

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19, comment e (emphasis added). But EIFS is not an appliance or piece of manufactured equipment affixed to a house. It “is a multilayer exterior wall system that *actually* constitutes the four walls of the [house].” *Keck*, 830 So.2d at 5 (emphasis in original). Fresh Coat’s reliance on the Restatement is misplaced.

Fresh Coat further claims that, assuming a house is not a “product,” EIFS is nevertheless a product because, “in Texas, a product does not lose its character as a product by its mere incorporation into a house.” (FC Resp. at 31) But Fresh Coat again

misses the point. EIFS is not like an air-conditioning unit, fabricated siding, PVC piping, gas furnace grate, or a kitchen appliance that is pre-assembled and attached to the home. EIFS cannot be scraped off like paint or removed like nails or shingles on a roof. Most of the cases Fresh Coat cites involves these very things.<sup>9</sup> (See FC Resp. at 32 n. 14) In contrast, EIFS is constructed as the exterior wall itself. (See 14 RR 63-64, 89) Removing EIFS from a home requires removing and destroying the exterior wall itself. Fresh Coat's assumption is faulty. There is no "EIFS system" before it is created as part of the wall. In other words, EIFS does not cease being a product because it was never a product to begin with. Similarly, whether the individual pieces of wood in a staircase could be considered tangible personal property when they leave the lumberyard, there is little question that the completed staircase in the home is an inseparable part of the home and thus, real property. An EIFS wall is the same.

Lastly, Fresh Coat suggests that EIFS is still a product even if it is incorporated into the structure of the building (FC Resp. at 33-35), relying on two roof cases from intermediate appellate courts in Michigan and Ohio. See *Fenton Area Public Sch. v. Sorensen-Gross Constr. Co.*, 335 N.W.2d 221 (Mich. App. 1983); *Federal Ins. Co. v. HPG Int'l, Inc.*, 758 N.E.2d 261 (Ohio Ct. App. 2001). But these cases are not persuasive. *Fenton* involved a two-ply roof that was "assembled and installed" on an

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<sup>9</sup> In addition, Fresh Coat asserts that Finestone's only issue with the cases relied on by the court of appeals is that they did not *hold* that EIFS is a product. (See FC Resp. 32) But Finestone also distinguished those cases on several other bases. For example, Finestone argued that two of the cases involved products—a firebox and PVC pipe—that were not indivisible parts of the structural integrity of the home. See *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 13-15 (Tex. App.—Fort Worth 2002, no pet.); *Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615, 616 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). Another case involved asbestos, which courts treat differently because it is an unreasonably dangerous product. See *Rylander v. Associated Technics Co., Inc.*, 987 S.W.2d 947, 950 (Tex. App.—Austin 1999, no pet.).

elementary school building. 335 N.W.2d at 222. But, as discussed above, EIFS is not pre-assembled and placed onto the side of the house—it is the side of the house. The court in *Fenton* did not examine whether the roof was part of the real property or whether real property can be a product. In addition, the court was influenced by unique Michigan legislative history, and noted that the legislature “enacted this statute after judicial criticism of distinctions between purchasers of personal property and purchasers of buildings.” *Id.* at 224. There is no such legislative history here in Texas.

*Federal* is even less persuasive. That case involved a Trocal roof system, which is “a synthetic stretchable sheet which is ‘loosely laid’ over the ‘entire roof continuously from edge to edge.’” 758 N.E.2d at 265. The product brochure stated that the membrane can be rolled up and re-used: “Should an additional story have to be added at a later date, the original Trocal roof can be rolled up and installed on the new roof platform . . . .” *Id.* Contrary to Fresh Coat’s contention, *Federal* did not involve a roof system that was part of the structural integrity of the house. (*See* FC Resp. at 33-34) The court explained its holding, as follows:

The fact that the roof system was not attached to the roof and could be “rolled up and installed on [a] new roof platform,” indicates that it is similar to the type of vapor recovery system, which was found to be a product by the Ohio Supreme Court in *Wireman*.

*Federal*, 758 N.E.2d at 265. Moreover, the court noted the definition of “product” does not include “an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it.” *Id.* at 264. The very reason the court held the Trocal roof system was a product was because, unlike

EIFS, it was not part of the structure of the building. Fresh Coat's reliance on *Federal* is misplaced.

The Alabama Supreme Court decision in *Keck* is the only case cited by either party that addresses the exact issue before this Court. Fresh Coat would have this Court dismiss *Keck* because, according to Fresh Coat, it only applied one test.<sup>10</sup> (FC Resp. at 34) But Fresh Coat's rejection of the *Keck* case because of its use of too simple a test is nonsense. Complexity does not always connote wisdom; sometimes it connotes obtuseness. Fresh Coat offers no explanation or argument why this test is insufficient or should not be applied here. Fresh Coat also claims that *Keck* "disregards" the Restatement's acknowledgment "that products incorporated into real property can remain products for strict liability purposes." (*Id.* at 34) But as discussed above, that is not what the Restatement says and, moreover, the Restatement's exception does not apply to, as here, single-family, custom-built homes.

*Keck's* reasoning makes sense. Some items incorporated into a home, like appliances and equipment, are products before they are incorporated and remain the same after incorporation. But other items, such as EIFS, are actually constructed as part of the structure of the home. Contrary to Fresh Coat's assertion, Finestone does not ask the Court to read into the text an exception for home construction cases. (*See* FC Resp. at 37) The question is simply whether EIFS is a product. Because EIFS "*actually is the exterior wall of the building,*" it is real property and not a product. *Keck*, 830 So.2d at 7

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<sup>10</sup> That is, "whether the item is a part of the structural integrity of the house or building that is reasonably expected to last for the useful life of the house or building." (FC Resp. at 34) *Keck*, 830 So.2d at 6.

(emphasis added). For all of these reasons, the Court should grant Finestone’s petition to clarify this area of Texas products liability law, hold that EIFS is not a “product,” and reverse the trial court’s judgment in its entirety.<sup>11</sup>

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

The court of appeals properly held that Fresh Coat could not recover indemnity under Chapter 82 for the \$1.2 million settlement paid to Life Forms because the evidence conclusively established that was a loss for which Fresh Coat was independently liable as a result of its contractual agreement with Life Forms. *K-2, Inc.*, 253 S.W.3d at 397. For the same reasons, it is undisputed that a significant portion of the more than \$726,000 awarded to Fresh Coat for its fees, expenses, and costs included amounts it incurred while litigating its contractual liability. (20 RR 20, 28)

Here, the court’s charge instructed the jury *not* to include any amount of fees, expenses, and costs incurred by Fresh Coat as a result of any act for which it was independently liable—the same instruction that barred Fresh Coat’s recovery of the \$1.2 million it paid Life Forms. (CR 4125) Despite that instruction, and despite the fact that the jury awarded Fresh Coat the entire amount of fees, expenses, and costs it sought, the court of appeals held that Finestone had waived its legal sufficiency challenge to this award by not requesting an additional jury finding on the precise amount that the jury should *not* have awarded. *K-2, Inc.*, 253 S.W.3d at 397-98. In other words, even though

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<sup>11</sup> Fresh Coat’s citation to the recent EIFS cases noted above confirms that this Court should grant Finestone’s petition because cases involving EIFS and other home construction product liability claims are likely to continue in sizeable number.

the jury was instructed not to award Fresh Coat any unrecoverable fees, expenses, and costs, it was Finestone's burden—according to the court of appeals—to ask the trial court to submit a second charge question regarding the amount the jury found was not recoverable. No Texas case holds that a defendant must request such a duplicative question, and the court of appeals' holding on this issue is error.

The instructions in the trial court's charge placed the burden on Fresh Coat to segregate its recoverable fees, expenses, and costs (CR 4125), and there was no need for Finestone to request additional submissions segregating these amounts. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006). Because the evidence is legally insufficient to support the entire amount awarded by the jury, this issue must be reversed and remanded to the trial court. *See Texarkana Memorial Hospital v. Murdock*, 946 S.W.2d 836, 837 (Tex. 1997).

**A. This Court's holdings, which Fresh Coat has not addressed or attempted to distinguish, compel reversal and remand of the award of fees, costs, and expenses.**

Fresh Coat does not dispute that it presented only unsegregated evidence of the entire amount of its fees, expenses, and costs, including amounts it incurred in connection with its attempt to resist paying \$1.2 million to Life Forms under its contractual indemnity obligation. (*See* 20 RR 20) Fresh Coat could have segregated its fees, but admittedly chose not to. (20 RR 28) The court of appeals held that the portion of Fresh Coat's fees attributable to this contractual liability claim was not recoverable under Chapter 82, but flipped the burden of proof on this issue and assigned it to Finestone. The court of appeals' holding directly conflicts with (1) this Court's prior holdings and

(2) the instructions submitted in the charge. This is undoubtedly why Justice Horton dissented from the court of appeals denial of Finestone's motion for rehearing on this point. (FS Br. at Appendix E)

A challenge to the sufficiency of the evidence must be measured against the court's charge as submitted. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). Fresh Coat did not object to the language of Question 7, which instructed the jury exclude "any amount that constitutes loss caused by Fresh Coat's own negligence, intentional misconduct, or other act or omission, if any . . . for which Fresh Coat is independently liable" from any award of Fresh Coat's "[r]easonable attorneys' fees, expenses and costs in defending the products liability action and in pursuing its indemnity claim against Finestone." (CR 4125)<sup>12</sup> Fresh Coat attempts to make much of the fact that Finestone did not object to these instructions. But the instructions are not the problem. The problem is that there is legally insufficient evidence to support the entire amount of the jury's award of fees, expenses, and costs.

Neither *Meritor Automotive* nor the cases now cited by Fresh Coat hold that a manufacturer has the burden to obtain a separate finding on the unrecoverable amount of a seller's "loss." *Meritor's* focus concerned a manufacturer's burden to establish a seller's independent liability so as to avoid indemnity under Chapter 82, and this Court did not hold that this burden extended to proving the *amount* of loss attributable to that independent liability. *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 484 S.W.3d 86, 91

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<sup>12</sup> The jury was also instructed that any answer other than a "yes" or "no" must be proved by a preponderance of the evidence. (CR 4115)

(Tex. 2001). *Meritor* and the other cases cited by Fresh Coat hold simply that a manufacturer must prove that a seller has independent responsibility for its claimed “loss”—an evidentiary burden the court of appeals held Finestone conclusively satisfied with respect to the amount Fresh Coat paid Life Forms. The court of appeals relied on *Meritor* but erroneously extended the holding of that case to require Finestone to prove the amount of Fresh Coat’s fees that Fresh Coat was not entitled to recover. *K-2*, 253 S.W.3d at 397. No case addressing Chapter 82 requires such proof.

Moreover, in other contexts, defendants are not required to segregate and obtain findings as to the amount of a plaintiff’s unrecoverable fees or damages. For example, in a suit involving fraud, contract, and DTPA claims, is the defendant required to obtain a separate finding of the amount of a plaintiff’s attorney’s fees *not* related to the contract and DTPA claims? This Court said “no” in *Tony Gullo Motors*. *See id.*, 212 S.W.3d at 313-14 (“we reaffirm the rule that if any attorney’s fees relate solely to a claim for which such fees are unrecoverable, *a claimant* must segregate recoverable from unrecoverable fees”) (emphasis added). Similarly, in a healthcare liability suit, is a defendant required to obtain a separate finding on the amount of a plaintiff’s medical expenses that are *not* attributable to the defendant’s alleged wrongdoing? This Court said “no” in *Murdock*. *See id.*, 946 S.W.2d at 837 (holding that “a plaintiff should recover only for medical expenses specifically shown to result from treatment made necessary by the negligent acts or omissions of the defendant, where such a differentiation is possible”).<sup>13</sup> Fresh

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<sup>13</sup> In *Murdock*, this Court placed the burden of segregating recoverable and unrecoverable damages squarely on the plaintiff: “[I]t was incumbent upon the plaintiffs to prove which treatments were due to meconium aspiration and its effects, and the specific costs associated with those treatments sufficient to support a jury

Coat offers no cogent explanation of why the analysis should be different under Chapter 82.

In reaching its holding in *Murdock* that a remand was required, this Court relied on *International Security Life Insurance Co. v. Finck*, 496 S.W.2d 544, 546-47 (Tex. 1973). Fresh Coat has not addressed or distinguished this case. There, the claimant sought attorneys' fees under a provision of the Insurance Code limiting recoverable fees to those incurred for prosecution of an insurance claim. *Id.* at 546. The trial court in that case submitted a limited question mirroring the statute, similar to the charge in this case. *Id.* at 546-47. The defendant challenged the legal sufficiency of the evidence supporting the award of attorneys' fees, and this Court concluded that, because the evidence of the fees incurred was limited to the fees related to the plaintiff's fraud claim, there was no evidence to support the jury award. *Id.* at 547. As a result, this Court reversed the award and remanded the determination of recoverable fees to the trial court. *Id.*

The relevant inquiry on this issue is not whether Finestone objected to the charge or requested a separate—and unnecessary—finding. Rather, the issue is whether Fresh Coat presented legally sufficient evidence to support the jury's finding that the entire amount of fees, expenses, and costs sought by Fresh Coat was unrelated to its own independent conduct, as the charge required. Because the evidence conclusively established that Fresh Coat did not meet this burden, the court of appeals erred in not reversing the trial court's judgment and remanding the case.

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award of \$500,000 for medical expenses. Because they failed to do so, we must reverse.” 946 S.W.2d at 840.

**B. The significant reduction of Fresh Coat’s damage award necessitates a remand for a reduction of recoverable attorneys’ fees, if any.**

The court of appeals’ reduction of Fresh Coat’s recoverable damages—by more than one-half—also requires remand of the award of fees, expenses, and costs. As noted above, the court of appeals reversed and rendered judgment reducing Fresh Coat’s recovery of damages by approximately \$1.2 million. Under such circumstances, if an award of some, but not all, of a party’s attorneys’ fees is still appropriate, this Court and other courts have held that a remand on the award of fees is required for a determination of a “reasonable” fee in light of the reduced damage award. *See Young v. Qualls*, 223 S.W.3d 312, 314-15 (Tex. 2007); *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006); *see also Montague v. Nat’l Loan Investors, L.P.*, 70 S.W.3d 242, 252 (Tex. App.—San Antonio 2001, pet. denied) (remanding to trial court for determination of attorneys’ fees in light of disposition of the damages award); *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 894-95 (Tex. App.—Dallas 2001, pet. denied).

Fresh Coat mistakenly claims Finestone relies on *Barker* for the proposition that a new trial on all issues is required. But Finestone has never claimed that *Barker* requires anything more than a new trial on fees—a remedy this Court requires on this issue.

**C. A new trial on all issues is appropriate because Fresh Coat sought recovery of its fees as unliquidated damages.**

Fresh Coat sought recovery of its fees, expenses, and costs as unliquidated damages it argued was recoverable as a “loss” under Chapter 82. *See* TEX. CIV. PRAC. & REM. CODE § 82.002 (b). Because the evidence is legally insufficient to support the jury’s award of these damages, a new trial on all issues is necessary. Fresh Coat asserts

that a balancing test should be performed, presumably by this Court, as to whether “the matter in controversy”—Fresh Coat’s recovery of fees—can be considered “separable without unfairness to the parties” and a new trial ordered solely on that issue. *See* TEX. R. APP. P. 44.1(b). But the rule also expressly states that Texas courts “may not order a separate trial solely on unliquidated damages if liability is contested.” *Id.*; *see also* TEX. R. CIV. P. 320; *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001).

Finestone has never conceded liability on Fresh Coat’s claims. Thus, the trial court’s judgment in favor of Fresh Coat must be reversed in its entirety and remanded for a new trial on all issues, unless this Court determines rendition of a take-nothing judgment is appropriate. TEX. R. APP. P. 44.1(b); TEX. R. CIV. P. 320; *Estrada*, 44 S.W.3d at 562.

### **CONCLUSION AND PRAYER**

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

Respectfully submitted,

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