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Supreme Court of Texas
Fresh Coat, Inc., Petitioner/Cross-Respondent,
v.
K-2, Inc., Respondent/Cross-Petitioner.
No. 08-0592
December 17, 2009

Oral Argument

Appearances:Kevin D. Jewell, Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX, for petition-er-cross-respondent.

Thomas C. Wright, Wright Brown & Close, Houston, TX, for respondent-cross-petitioner.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0592, Fresh Coat, Inc. v. K-2, Inc.

MARSHALL: May it please the Court, Mr. Jewell will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KEVIN D. JEWELL ON BEHALF OF THE PETITIONER

ATTORNEY KEVIN D. JEWELL: Good morning and may it please the Court, last one of the morning, of the year. Let's end it with a bang and not a whimper. This case is about a seller's right to indemnity from the manufacturer of a defective product. The Court has examined Chapter 82's indemnity provisions on a handful of occasions in the past, twice ruling in favor of a seller's indemnity rights and, on other occasions, either ruling against indemnity or holding that fact questions exist.

But in all cases, this Court has been clear and consistent in its statement of the section's purpose and the broad rights it affords to innocent seller of defective products. The court of appeals' decision here constitutes a significant encroachment on those indemnity rights under the statute and the focus of Fresh Coat's argument here and challenge to the court of appeals' interpretation of the statute lies in its holding on the exception to the indemnity right. Now we know what the exception says, but just in brief, section 82.002(a) provides and requires a manufacturer to indemnify a seller for all losses arising out of the products liability action excepting only those caused by the sellers negligence, intentional misconduct or other act or omission, such as negligently modifying or altering the product for which the seller is independently liable.

JUSTICE DAVID M. MEDINA: There's a lot of discussion in the opinion by Justice Gaultney about whether or not this is a product.

ATTORNEY KEVIN D. JEWELL: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: This is a stucco type of application applied here and perhaps the environment it shouldn't be applied in, but that aside, let's talk about that.

ATTORNEY KEVIN D. JEWELL: About the product issue?

JUSTICE DAVID M. MEDINA: Yeah.

ATTORNEY KEVIN D. JEWELL: We committed a substantial amount of effort in the briefing to addressing that issue, which is one the cross issues raised by Finestone. The court of appeals' decision on that point is absolutely correct. The materials here were components manufactured by Finestone. In fact, they manufactured all of the components except for one that were used to basically ship to this site or sold to Fresh Coat and then Fresh Coat put them together.

JUSTICE DON R. WILLETT: Can an ordinary consumer, could I go to Home Depot or Lowe's and purchase this product?

ATTORNEY KEVIN D. JEWELL: I don't believe you could. I think under the evidence presented in this case, the products, or the components of the product were distributed by a Finestone distributor to contractors, such as Fresh Coat. They purchased them and then they sold them to home builders and then applied those components to the homes and create the cladding around the home.

JUSTICE DAVID M. MEDINA: Aren't there a lot of products that go into assembly of homes that you can't buy at Home Depot, but address this issue, please, on this stucco, because it is a unique type of component that needs to be assembled properly in order for it to work.

ATTORNEY KEVIN D. JEWELL: Clearly so and, of course, one of the points that I make in the brief is that I feel that Finestone has not preserved the issue its challenge to the product in the trial court. Finestone does commit at least 10 pages of its brief to arguing that EIFS is not a product, but you won't find any of that in any of the record of the trial court. In fact, Finestone took the position at the charge conference and in its post trial motions and briefing that EIFS

was a product, that the components it manufactured were products. So, to begin with, it's our position that that has not been properly preserved. But apart from that, the authority that we have cited in our briefing clearly supports the argument that a product is defined as having tangible qualities that can be used for commercial purpose. The Res-tatements support that. The decisions that have been decided in Texas, at least, have implicitly assumed that EIFS is a product of those cases that have evaluated the issue of EIFS or complaints about EIFS.

JUSTICE DAVID M. MEDINA: Can you think of anything that would go in construction of a residential or commercial building that would not be a product? I can't. I just mention that.

ATTORNEY KEVIN D. JEWELL: I don't think that there is one and I don't agree with Finestone's position that simply because the components of the EIFS are put together and incorporated into a home or residence or other structure makes them cease to be products. I don't think that's supported in the Restatements and it's certainly not supported in the decisions which have addressed that issue and I cited two cases from other jurisdictions in the brief, which I thought were very compelling, which involved the construction of a roof on a, I guess one was a school, but a structure and it was the same factual scenario where you had components that were manufactured by an entity, shipped to a site, assembled onsite, put together and create one roof on the structure and in both cases, the appellate courts in those states held that those components in that system was a product and that the claimants in those cases were allowed to assert product defect claims just like the Brunson claimants did here.

JUSTICE EVA GUZMAN: Is there an issue here about the product going through a substantial change in condition once it's incorporated such that it really isn't the same object or tangible item?

ATTORNEY KEVIN D. JEWELL: Not to me there isn't. There certainly is evidence that the components of the product must be put together. You've got base coats. You've got a meshing that has to go on that goes over an insu-lation board and then there's a final coat and all that is applied to the house. Of course, there's no issue here that we did all that properly. In fact, Fresh Coat's conduct was not even submitted to the jury. There wasn't even a jury question on it as to whether Fresh Coat was negligent. There was, of course, a jury question on whether Life Forms, the home builder, was negligent and its connection with the work and the jury found that they were not.

JUSTICE EVA GUZMAN: We don't look to their argument that a house is not a product so ultimately, this is not a product.

ATTORNEY KEVIN D. JEWELL: Well that's Finestone's position, but I think clearly that's not supported by the authority that we included in our brief and, of course, the witnesses for Finestone themselves testified if you look at the evidence, that the components were a product. They all referred to the EIFS materials as products.

JUSTICE NATHAN L. HECHT: Did the Brunson homeowners complain that there was anything wrong with the components as opposed to the wall it was made out of?

ATTORNEY KEVIN D. JEWELL: They did. I believe their petition is broad enough to include an allegation of defective products and the components because the Brunson homeowners alleged defects in both the design and the marketing and the manufacturer of the EIFS system and they used the word “system” repeatedly and the system includes all of the components that are used to construct the ultimate cladding so the allegations in the Brunson's complaint and I think it's their 12th amended petition because of the live pleading at the time, clearly alleged those defects.

JUSTICE NATHAN L. HECHT: But just trying to understand it, you use the roof example, but surely you can't get indemnity from the manufacturer of the nails if there's nothing wrong with the nails.

ATTORNEY KEVIN D. JEWELL: No dispute there.

JUSTICE NATHAN L. HECHT: Even if the roof leaked and the nails were in the roof. So it's hard to understand whether there was something wrong with the adhesive or the solvent or the mesh or whatever was involved here or if you just when you make a wall out of these things, they're all perfectly good things. You just can't make a wall of a house out of them.

ATTORNEY KEVIN D. JEWELL: Well, that's part of it. It's the design. Part of the issue was the design of the system itself because it traps moisture. It allows moisture to come in and it traps it there and that's the way the system works and that's part of the faulty design of it. I'm not sure if the testimony supports the contention that there was any particular part of the components that was defective over another. I'd have to look back at the record on that, but the principal complaint was the trapping of the moisture behind the cladding.

JUSTICE NATHAN L. HECHT: If this system used one adhesive coat that was obtainable just in the general commerce, you could go to Home Depot and get it, would the manufacturer of that adhesive coat be obligated to indemnify it in a situation like this?

ATTORNEY KEVIN D. JEWELL: If it was alleged to be defective.

JUSTICE NATHAN L. HECHT: But if it's just the system, in this case you say that Fresh Coat took two buckets of adhesive coat and a roll of mesh, but got other product somewhere else.

ATTORNEY KEVIN D. JEWELL: Correct.

JUSTICE NATHAN L. HECHT: Would the people, I'm not sure what the product was.

ATTORNEY KEVIN D. JEWELL: It was the insulation board that was behind the coating.

JUSTICE NATHAN L. HECHT: Could you get indemnity from them even though it was not part of the “system,” it was just used to assemble the “system?”

ATTORNEY KEVIN D. JEWELL: I think it was part of the system and it was alleged to be defective and I think that is encompassed within the Brunson plaintiffs' complaint, then I think that manufacturer would be subject to indemnity under the Act.

JUSTICE NATHAN L. HECHT: But you think it depends on whether the components themselves were alleged to be defective versus the thing that they put together with them?

ATTORNEY KEVIN D. JEWELL: Well, the Court has made clear in some of its case law that there must be an allegation or there must be a nexus between the alleged defective part, if it's a component of the final product, and the manufacturer of that part and so I think that rule would apply here as well.

JUSTICE DON R. WILLETT: But the only basis for your settlement with Life Forms was simply the damages caused by the EIFS and nothing beyond that, right?

ATTORNEY KEVIN D. JEWELL: That's right. The settlement monies that were pain from Fresh Coat to Life Forms were representative of, were intended to be reimbursement to Life Forms for the money they spent or portions of the money they spent in settling overall with the homeowners or contributing to that settlement and then Life Forms' defense of the products liability action. So those were all monies paid that were a part of the qualifying losses [in-audible].

JUSTICE DON R. WILLETT: But it was just to cover damages that arose because of the EIFS and nothing else, not a leaky roof or anything else?

ATTORNEY KEVIN D. JEWELL: That's correct and that was, the evidence on that was carefully segregated at trial.

JUSTICE NATHAN L. HECHT: Let me ask you about the seller issue. Would the, it seems to me that Fresh Coat is pretty close to being an ultimate user or consumer rather than a seller. Why isn't that the case? I mean, it's got to stop somewhere. Surely, if this homeowner sold the house to someone else, he wouldn't be a seller under the indemnity statute would he?

ATTORNEY KEVIN D. JEWELL: Well I think the evidence is more than sufficient to show that Fresh Coat falls within the statutory definition of a seller. All of the testimony from Fresh Coat's witnesses and including the testimony of Griesenbeck, others in the case, was to the effect that Fresh Coat bought the components, sold their services and those products in the context of its work as an applicator and thus placed those products into the stream of commerce. In fact, the statute doesn't even require us to have sold them. I mean, the statute, the statutory definition of seller doesn't even use the word “sell.” It just says distribute or otherwise place in the stream of commerce and the evidence clearly shows that we did that.

JUSTICE NATHAN L. HECHT: You say in your brief that you sold the components to Life Forms, but the brief in response shows that it was just a contract for putting up the wall. They didn't buy buckets of adhesive.

ATTORNEY KEVIN D. JEWELL: No, that's not accurate. First of all, the testimony that is cited by Finestone in the seller issue is testimony that the jury was free to disregard and, in fact, did disregard and this Court must view the evidence in the light most favorable to the verdict. We cite the evidence from the other witnesses that establishes that, in fact, our agreement with Life Forms was for the provision of both services and products and that, in fact, we pro-vided both services and products and that was sufficient to meet the definition under the statute.

JUSTICE NATHAN L. HECHT: It seems like one impact of this case is that subcontractors will be liable for indemnity in faulty construction cases. Is that one aspect of it?

ATTORNEY KEVIN D. JEWELL: That is one of a number of adverse consequences to basic contractors.

JUSTICE NATHAN L. HECHT: Do you think that's well understood in the construction industry?

ATTORNEY KEVIN D. JEWELL: I do think if it isn't now, it certainly would be if this Court were to adopt the court of appeals' opinion because the fact of the matter is in the construction industry almost invariably the contracts that are entered into with the subcontractors contained in these indemnity provisions. In fact, you could go to any standard form and the most common of which is the American Institute of Architects. Those standard forms all contain indemnity provisions in them. You can't get a job as a subcontractor unless you agree to indemnify somebody else and when there are products cases brought whether it's in the residential industry, the commercial industry, what have you, if there is a products defect case brought and these contractors are included in there, they have an extreme risk if they settle and if they try to get out of the case and they settle with the general contractor or whomever and there are indemnity provisions involved, according to the court of appeals, they are going to lose their rights of indemnity against the manufacturer even when the manufacturer made a defective product and even when the contractor did absolutely nothing wrong as here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The Court is now ready to hear argument from the cross-petitioner and respondent.

MARSHALL: May it please the Court, Mr. Wright will present arguments for the cross-petitioner/respondent.

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE RESPONDENT

ATTORNEY THOMAS C. WRIGHT: Chief Justice Jefferson and may it please the Court, there are three reasons I would like to discuss why Chapter 82 should not be applied to residential construction cases such as this.

JUSTICE EVA GUZMAN: Mr. Wright, can you address the preservation issue?

ATTORNEY THOMAS C. WRIGHT: Yes, we address that in our reply brief at pages 8 to 10. We made numerous no-evidence points and if Justice Calvert who is looking down on us, if his article still means anything today, it means that no-evidence points preserve any legal reason why the particular finding of the jury should not be given effect. We raise no-evidence points that Fresh Coat had suffered no loss as a result of a products liability action. In fact, we briefed in the court of appeals that it was not a product and Fresh Coat did not argue in the court of appeals that we had waived the argument there. So, we have a waiver of waiver argument that we had put in our reply brief. This issue is well briefed and well presented and this Court would be well served to address the issue that this stucco material that is applied to a house is not a product. At least it's not a product once it is applied to the house.

JUSTICE EVA GUZMAN: How is that different from PVC pipe or the bricks that were discussed in [inaudible] brief?

ATTORNEY THOMAS C. WRIGHT: Well, in those two cases, PVC pipe and bricks could conceivably be changed out. I think the better answer is those cases were wrongly decided and in fairness to those courts, those cases came before a lot of development in the case law and in the statutes particularly. It came before the passage of Chapter 82 and before the passage of the RECLA, which I want to get to in a few minutes, which is really inconsistent with the thinking that this is a products liability claim, that the common law products liability applies as well as Chapter 82.

JUSTICE DON R. WILLETT: Can you go back through your three reasons and kind of tick them off for me?

ATTORNEY THOMAS C. WRIGHT: Yes, not a seller, Fresh Coat is not a seller. The EIFS is a not a product and the third reason is the inconsistency between the RECLA and Chapter 82 and I bring that as a reason that Chapter 82 should not be seen as applying to this case and, in fact --

JUSTICE NATHAN L. HECHT: You don't list among those your 82.002(a) argument.

ATTORNEY THOMAS C. WRIGHT: Well that's the exception to the payment. My primary argument is that Chapter 82 should not apply at all. Now, when we get to the argument about what they paid to Life Forms because of their own conduct, that is their own, independent decision to assign not just a regular indemnity agreement, but an indemnity agreement which we've reproduced in the bench book, I believe at tab one, the second and third pages, that indemnifies Life Forms even for Life Forms' own sole negligence, but that should not be flipped by them under Chapter 82 even if it otherwise applies and laid at our feet.

JUSTICE NATHAN L. HECHT: But there's no evidence that what they paid was for anything other than what they could get indemnify for under Chapter 82 is there?

ATTORNEY THOMAS C. WRIGHT: Well, --

JUSTICE NATHAN L. HECHT: Even though there was that agreement, that's not what they paid for.

ATTORNEY THOMAS C. WRIGHT: Well, the conclusive evidence is that the only reason they paid the indemnity was the contractual indemnity so that there was no reason to look beyond that. What this does if you take --

JUSTICE NATHAN L. HECHT: It's hard for me to understand why that matters if what the money actually went for was the kind of thing that Chapter 82 covers.

ATTORNEY THOMAS C. WRIGHT: Well, Chapter 82 goes one step at a time on this indemnity. As to Fresh Coat, we are not permitted to look behind and say well, wait a minute, the builder, Life Forms, had its own negligence which we did allege and the findings, the adverse findings as to which have been set aside by the court of appeals by virtue of our settlement without reference to the merits, but we can't, when Fresh Coat is bringing the indemnity claim under the statute, we can't look behind them and say well wait a minute, Life Forms was independently negligent. You shouldn't have paid them and we shouldn't have to pay you. The way the statute works is we have to say Fresh Coat did something independent for their own independent liability and Counsel is right, this Court has many times and the legislative history reconfirms the idea this is to protect innocent sellers, people who take somebody else's product and put it on their shelves and so forth. This is not an innocent seller at least when they have decided to sign a broad indemnity and pay under that indemnity without regard to any other legal obligation.

JUSTICE DAVID M. MEDINA: Mr. Wright, the briefs are very well written.

ATTORNEY THOMAS C. WRIGHT: Thank you.

JUSTICE DAVID M. MEDINA: I'm interested in the first argument you were going to talk about on Chapter 82 not applying at all to residential construction.

ATTORNEY THOMAS C. WRIGHT: Well here's one problem with applying Chapter 82 to residential construction. First of all, this Court has never held that a house is a product. Most courts hold that a house is not a product. Many courts hold that anything that is so integrated into a house that it can't be distinguished from the house or taken away from the house without destruction cannot be a product and that's that Keck case from Alabama that best says that in exactly this situation of EIFS.

JUSTICE EVA GUZMAN: How is it so integrated? It's applied outside of the house and --

ATTORNEY THOMAS C. WRIGHT: Well it becomes part of the wall. It's attached. There's a Styrofoam piece that's attached to plywood, the plywood that you see when a house is going up, the Styrofoam piece that is bought from others is attached to that and then the mesh is attached to the Styrofoam and then this mud in a bucket is what we call it, but it's basically a cementitious product with some polymers added to it, which distinguishes it from Portland cement and that is applied and it

becomes the wall of the house, the exterior wall of the house and so you can't, of course, you can take anything off a house if you're willing to destroy it, but you can't just take it out and replace it without taking the wall of the house, that piece of the wall down.

JUSTICE EVA GUZMAN: Well, is that really true for this product? If I recall when they did begin the repairs on these homes, they were able to remove that and replace it.

ATTORNEY THOMAS C. WRIGHT: Well, like I say, you can remove it, but it's not like an air conditioning unit or something that keeps its own integrity that you just pull out and there's no damage. When you're pulling a wall off, you're reconstructing the house. But back to your point about Chapter 82 not applying, Texas has adopted the Residential Construction Liability Act, which is highly inconsistent with the idea that a house is a product for common law products liability claims and, of course, the 402A concepts are tied in with Chapter 82. Those inconsistencies, some of which favor the homeowner and some of which do not, are numerous. The standard of causation is different under RECLA. It's a proximate causation standard. Under the RECLA, the contractor cannot be liable for the negligence, it says, of other people. Well that's not at all true if this is a product. If this home is a product and the contractor is a seller, he's responsible for the product. So I think in looking at Chapter 82 and trying to figure out is this, are we well served in saying that this is an appropriate vehicle for residential construction, you have to look at the other statutes and --

JUSTICE PAUL W. GREEN: Can paint be a product?

ATTORNEY THOMAS C. WRIGHT: Well, paint, when it's, and I would say like EIFS, paint when it goes from the manufacturer to the distributor is still a product, okay? If the paint can explodes and hurts the distributor, there's a product claim. Once the paint is applied to the house, that's debatable. Some say well you can scrape the paint off without hurting anything.

JUSTICE PAUL W. GREEN: Why wouldn't this be like somebody, the seller sells paint that has lead in it and the paint is applied to the inside of the house causing some damages there and it seems to me that the paint would be a defective product in the commerce in a residential construction project.

ATTORNEY THOMAS C. WRIGHT: Well the stream of commerce, I don't believe that when you construct a house and put something in the house it's in the stream of commerce. It has stopped there and that goes to Justice Hecht's statement in a little different way. The builder becomes really the ultimate consumer because he's using this product to create what he is selling and that is a house. Under the RECLA, if you put lead paint in a house, the homeowner is still restricted under RECLA about what claims he can bring against the contractor and if and that does not include a strict products liability claim and so if he can't bring a strict products liability claim against the contractor, then what business do we have of saying yes, but nevertheless we're going to hold that that claim was a products liability action for purposes of indemnifying. And kind of to take it to the next level, the contractor doesn't need an indemnity right because under RECLA, the contractor that builds the house is not responsible for anybody's

negligence other than his own and so if he's not responsible in the first place for anybody's negligence other than his own, he doesn't need this other right. But on the other hand, the RECLA gives greater rights to a homeowner. If you try to bring a product defect case under Chapter 82, you have to show a safer alternative design. Well, a home buyer does not have to show that as to the builder. He's got a warranty. It started out being a common law warranty. Then the RCCA was passed and there's a statutory warranty and then there's questions about that sunsetting, but we'll still have at least a common law warranty of habitability. A non-manufacturing seller, for example, under Chapter 82, is not liable anymore since that chapter was amended in 2003. What does that mean as to a home builder? When the home builder puts a heater, heating unit, air conditioning unit in the house and if we say Chapter 82 applies, he did not manufacture that heater. He is not liable. It doesn't say not liable in products. It says he's not liable unless one of the exceptions applies and none of those are likely to trigger in the situation of a home builder putting an appliance in a house.

JUSTICE DAVID M. MEDINA: I was going to ask you if your theory applies, your argument applies just to fixtures, but you seem to indicate it applies broadly to everything, fixtures, nonfixtures.

ATTORNEY THOMAS C. WRIGHT: Well, if a home buyer buys a house with a defective appliance and the appliance is already in there, he's got his claims against the builder for whatever warranties he's got. If that is a defective product, the home buyer has a direct action against the manufacturer because that product reached the consumer in the same condition that it left the manufacturer, which is another one of the tests under the common law for determining whether something is a product. Is this intended to reach the consumer in the same condition that it left the manufacturer except sometimes for assembly, but this is, what happened here was far more than assembly. These people were contractors that were hired to do a service, to take this, these elements that would be of no use to a homeowner and following instructions to apply it to a wall and the defect that people have complained about is that it's not drainable. Nobody has ever said that water goes through the face of this product. Water goes in where it's not sealed correctly between this and windows or doors and the testimony at trial mostly was that builders just cannot do this to the standard that is required in residential construction although it's used with great success in commercial construction.

JUSTICE EVA GUZMAN: Well is it because there's something wrong with the product and a builder cannot adapt it to residential construction?

ATTORNEY THOMAS C. WRIGHT: Well, the evidence is disputed on that. Of course --

JUSTICE DAVID M. MEDINA: Tim Tynan says they shouldn't build any of those houses down in this --

ATTORNEY THOMAS C. WRIGHT: I'm sorry?

JUSTICE DAVID M. MEDINA: Tim Tynan, the builder, says you shouldn't build any of these type of stucco homes in this type of environment we have here [inaudible].

ATTORNEY THOMAS C. WRIGHT: I think people have stopped using this on residences, but for this very reason. In this case, for example, Fresh Coat and we, both said Life Forms, you didn't seal this stuff. No wonder it leaks and they made a bid to the builder to seal it and the builder rejected it and said well, we'll just have the painter fix it. Well, that's not up to the standard that this needs to be, but that's why I say in commercial buildings where people have the money and the expertise to do this right, it is very effective and now they make, I think, a drainable system that will let the water drain out. Obviously, you lose some of the insulating qualities of it, I think, when you do that, but to say that and I know we've gone around answering a lot of questions, but let me get back to a couple of basic points. When anything is incorporated into a house, it is this Court's province to decide whether that's a product for product liability purposes. Chapter 82 does not define product and I believe the best course of action would be to say that a house is not a product and anything incorporated into the structure of a house is not a product.

JUSTICE DAVID M. MEDINA: What about a swimming pool? Swimming pools are assembled essentially the same thing. You bring in, dig the hole, bring in the wire, get the mud ready and apply it to the walls and then come in and blast it.

ATTORNEY THOMAS C. WRIGHT: Yes, it's hard for me to imagine a problem with a swimming pool that's not really going to be a problem in how it was constructed and not just the materials. But an interesting sideline to that is, unless there's a personal injury with the swimming pool, which, again, is going to be hard to imagine how that could come from a product defect, but unless there's a personal injury there or with the house, this 402A remedy is going to be useless because of the economic loss rule, which this Court has discussed before. So, and that's a situation in which the statute, RECLA, provides a better remedy for the homeowner than 402A would because RECLA lists the damages you can recover. It lists the repair costs, the costs of staying in another house, engineering costs, legal fees. All that's recoverable under RECLA, but that would not be recoverable under 402A and some of those, not in any kind of a case and in most of these cases we're talking about where there's just a construction defect that causes the house to be worth less than what you paid for it, there's not going to be a recovery under 402A's court theories.

JUSTICE DAVID M. MEDINA: So what type of remedy would your adversary have or would his client have in a situation like this? What should have been done?

ATTORNEY THOMAS C. WRIGHT: Well, as to the homeowners, Life Forms, at least, pleaded the RECLA. They could have tried to cut off some of those claims, but my opponent and his company, once they signed an indemnity agreement to indemnify Life Forms for their own negligence at least on that piece, they've got exactly what they bargained for.

JUSTICE DAVID M. MEDINA: Contractual obligation?

ATTORNEY THOMAS C. WRIGHT: They've got a contractual obligation and the AIA contract, by the way, the standard form that was mentioned, that does not indemnify the indemnitee for, i.e., the builder, for its

own negligence. The standard architect form just has you indemnifying for your own negligence and so I don't think it is commonly known out in the construction industry having done some of this and talked to others involved in it that subcontractors and contractors can turn around and try to start getting indemnity from people who sell lumber and bricks and shingles and nails, you know. What's next? This is going to foster litigation and litigation that's not necessary. The builder has plenty of protection under the RECLA. Now with regard to the seller argument, I wanted to make just a couple of other points. This Court has dealt with who was a seller. They've held that an auctioneer is not a seller. We've talked about the Barnham case and we've provided that in the bench book to the Court. The Barnham case and the Peterson case, I guess it's Barham and Peterson Builders both find that the general contractor was not a seller when they provided steel beams. Turner Construction in the Barham case provided steel beams in connection with their services. The Dallas Court says they are not a seller for purposes of product liability. The Peterson case, I believe it was the First Court that said a supplier of, Fourteenth Court said a supplier of a pad that built a pad for a house is not a seller. So there is ample authority for saying that a service provider like Fresh Coat, even though a service provider uses materials, is not a seller. If the general contractor, Turner Construction, who sold a steel beam that maintains its own identity is not a seller of that beam because that was just incidental. They weren't in the business of selling. Then surely Fresh Coat is not in the business of selling the mud in a bucket and the mesh. They were a service provider. Chapter 82 is inapplicable to them. I see my time has nearly expired. If there are no more questions, I thank the Court for your time and attention.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Mr. Wright.

JUSTICE DAVID M. MEDINA: Mr. Jewell, would the Court be opening Pandora's box to or litigation for these types of matters or taking them to the court of appeals?

REBUTTAL ARGUMENT OF KEVIN D. JEWELL ON BEHALF OF PETITIONER

ATTORNEY KEVIN D. JEWELL: I think the effect of that would be astounding if the Court were to hold that Chapter 82 did not apply to residential construction, and it seems, it seems odd that if Chapter 82 was not intended by the legislature to apply that the legislation made no statement to that effect in the statute itself, that seems to be a pretty big exception. And, I mean just imagine what the consequences are and going back to Justice Green's example about paint, I mean let's talk about what the effect would be on an interior wall of the house. I mean, you take sheetrock that's delivered to the house and you put it up, you attach it and you combine it with paste and things on it and then you paint it and you put it all together and it's a wall just like an exterior cladding wall is to a house and the result of Finestone's position is that none of that would be considered a product.

JUSTICE EVA GUZMAN: Are there products that once incorporated into a home change their character if you will such that they're no longer a product under 82?

ATTORNEY KEVIN D. JEWELL: I don't believe that there are and certainly we've addressed all the cases that Finestone cites in their brief on that topic and I just think in response to Justice Medina's question, that would be, that would leave, I mean just numerous people without recourse and the effects of that would be astounding in my view.

JUSTICE NATHAN L. HECHT: There are inconsistencies with RECLA. What are we to do with those?

ATTORNEY KEVIN D. JEWELL: Well, I think the issue confronting the Court is the focus of the statutory exception here. That was the claim that was brought under Chapter 82 or that's the claim that was decided and the Court has to focus on whether or not the remedy is available under Chapter 82. We contend that clearly the indemnity duty is invoked and they contend the exception is triggered and, of course, we say it's not. I don't think the fact that a settlement was paid to the general contractor, whether it was because of a contractual obligation or not makes any difference whatsoever under the statutory text.

JUSTICE NATHAN L. HECHT: Would it make a difference if the, what was paid for was not included in the statutory obligation?

ATTORNEY KEVIN D. JEWELL: If there were losses that were paid for as part of that settlement that did not fall within the scope of qualifying losses under Chapter 82, then I think in that situation, Fresh Coat would not have, would not be able to prove or trigger the indemnity duty and you wouldn't even get to the exception because you wouldn't have a qualifying loss and so I don't take issue with that. But here we have a situation where all of the money was paid for qualifying losses and if Fresh Coat wasn't even involved in the situation and Life Forms alone paid all of the homeowners' losses and incurred all of the defense costs, it would be undisputed that Life Forms would have every right to get all of that money back from Finestone and here, Finestone is seeking to use Fresh Coat's involvement and Fresh Coat's participation in settlement as a loophole to avoid a responsibility that the legislature has squarely put on the manufacturers. This outcome and the outcome we advocate makes perfect sense because it is consistent with the statutory design and it is fair to boot and this Court has repeatedly refused to interpret Chapter 82 in such a way as to lead to absurd or inequitable results and it should do so here. We ask the Court to reverse the court of appeals in part and affirm the trial court's judgment in full. Unless there are further questions, I thank you for your time and Happy Holidays to all.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Jewell, and that cause is submitted. That concludes the arguments for this morning. Happy Holidays to you all. And the Marshall will adjourn the Court.

Fresh Coat, Inc., Petitioner/Cross-Respondent, v. K-2, Inc., Respondent/Cross-Petitioner.
2009 WL 5113430 (Tex.) (Oral Argument)

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