COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE:	§	No. 08-21-00020-CV
NCS MULTISTAGE, LLC and NCS MULTISTAGE HOLDINGS, INC.,	§	AN ORIGINAL PROCEEDING
Relators.	§	IN MANDAMUS

O P I N I O N

In this products-liability case, Relators NCS Multistage, LLC and NCS Multistage Holdings, Inc. filed a mandamus petition to challenge an order of the 109th District Court of Winkler County, denying Relators the opportunity to designate a component-part manufacturer as a responsible third party in the case. Boyd & McWilliams Energy Group, Inc.; Boyd & McWilliams Operating; Rubicon Oil & Gas II LP; OIE Winkler JV, LP; Harry M. Bettis, Jr., L.L.C.; John D. Bettis, L.L.C.; Collins Permian LP; Rockport Oil & Gas, L.L.C; David McWilliams; and EKH Minerals comprise the Real Parties in Interest (RPI). The RPI argue the party Relators seek to designate is precluded from designation as a responsible third party because of the exception under Section 33.011(6) of the Texas Civil Practice and Remedies Code. Additionally, RPI claim Relators failed to adequately plead factual allegations implicating the third party's responsibility for RPI's alleged damages.

We conditionally grant mandamus relief.

BACKGROUND

The RPI own oil and gas leasehold working interests in various oil and gas leases in West Texas. Relators manufacture and assemble frac sleeve assemblies known as the NCS Multicycle® frac sleeve assembly, which is the product at issue. The frac sleeve assembly is an oil and gas fracturing product. The assembly consists of multiple component parts, including a frac sleeve, two pup joints, and one coupling. Relators purchase the component parts from third-party suppliers and then constructs the end product assembly, which it sells to consumers as a single unit assembly.

The RPI drilled four horizontal wells on the leased lands. They purchased frac sleeve assemblies from Relators to use in the horizontal wells on the leased lands. After the assemblies were run into the wells in question, fracturing operations began. According to the RPI, assemblies in three of the four horizontal wells failed, forcing the RPI to suspend operations on those wells. Operations on the fourth well were also suspended at Relators' suggestion, since the assembly in the fourth well was from the same batch manufactured by Relators that failed in the other three wells.

According to the RPI, an investigation by Relators determined the leaks in the assembly "likely occurred between the pup joints and couplings due to a defect in the [a]ssemblies." As a result of the failures and required remediation in the four wells, the RPI allege they caused permanent damage both to the wells and the oil and gas formation on the leased lands. The RPI estimates their total damages exceed $20 million.

The RPI sued Relators for various causes of action sounding in products liability. On

January 17, 2020,[1] Relators served the RPI with a motion for leave to designate Aero Lift Machine, LLC (Aero Lift) as a responsible third party (hereafter, motion for leave). In their motion for leave, Relators claimed Aero Lift was responsible for any failure associated with the pup joints or couplings because Aero Lift manufactured those component parts of the assembly. However, Relators continued to deny any defect in the assembly product or its component parts.

Ten days after the motion for leave was served, the trial court granted the motion and entered an order designating Aero Lift as a responsible third party. The RPI filed a motion to set aside and objected to the motion for leave within the statutory deadline to do so. In their initial objection, the RPI objected on the grounds that Relators failed to plead adequate facts regarding Aero Lift's purported responsibility.

On April 2, 2020, the RPI filed its first amended motion to set aside, objecting to the order granting the designation, and arguing for the first time Aero Lift does not meet the definition of "responsible third party" because the definition excludes "a seller eligible for indemnity under Section 82.002." *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.011(6). Relators responded, arguing its allegations against Aero Lift were sufficient under Texas' notice-pleading standard, and Aero Lift is a proper responsible third party because Relators—and not Aero Lift—were the innocent-sellers of Aero Lift's allegedly-defective product.

On July 6, 2020, the RPI filed a second amended motion to set aside and motion to strike, in which it again sought to set aside the order designating Aero Lift as a responsible third party.

[1] The parties agree the motion for leave was served on this date. The file stamp date on the motion for leave indicates it was filed on January 27, 2020. Since the deadline for a party to object to a motion for leave to designate a responsible third party is calculated from the date the motion for leave is served, *see* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004, we rely upon the parties' agreement that the motion for leave was served on the RPI on January 17, 2020.

However, for the first time in their second amended motion, the RPI requested the trial court strike Aero Lift's designation, or, alternatively, set it aside. The substantive basis in the second amended motion was identical to the first amended motion, objecting to the designation as insufficiently pleaded and precluded under the exception to the definition of "responsible third party" in Section 33.011(6).

Three days after the second amended motion was filed, the trial court held a hearing. The trial court entered an order "set[ting] aside" its January 27, 2020, order granting leave to designate Aero Lift as a responsible third party. The same order denied Relators' motion for leave to designate Aero Lift as a responsible third party and struck Aero Lift as a responsible third party in the lawsuit.

Relators subsequently filed a motion to reconsider, which the trial court denied. This original proceeding followed.

DISCUSSION

Relators raise three issues in its petition for writ of mandamus:

1. Whether the trial court abused its discretion by striking and/or setting aside its order designating Aero Lift as a responsible third party;

2. Whether the trial court abused its discretion when it granted Plaintiffs' (RPI's) motion to strike because inadequate time for discovery had elapsed; and

3. Whether the trial court abused its discretion when it denied Relators' motion for leave to replead after striking its designation of Aero Lift as a responsible third party.

Standard of Review

Mandamus is an extraordinary remedy only available when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135-36 (Tex. 2004)(orig. proceeding). A trial court abuses its discretion if it acts arbitrarily,

capriciously, and without reference to guiding rules or principles, or if its decision is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005)(orig. proceeding).

When a trial court erroneously denies a party's motion for leave to designate a responsible third party, mandamus relief is the appropriate remedy. *In re Mobile Mini, Inc.*, 596 S.W.3d 781, 787-88 (Tex. 2020)(orig. proceeding)(*citing In re Coppola*, 535 S.W.3d 506, 507-09 (Tex. 2017)(orig. proceeding)). Mandamus in these cases is appropriate because "an adequate appellate remedy is ordinarily lacking because allowing a case to proceed to trial without a properly requested responsible-third-party designation 'would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of the relator's defense in ways unlikely to be apparent in the appellate record.'" *Id.* (*quoting In re Coppola*, 535 S.W.3d at 509).

Proportionate Responsibility in Texas

Texas tort law follows a proportionate responsibility allocation of liability in cases submitted to the trier of fact. *See* TEX.CIV.PRAC.&REM.CODE ANN. §§ 33.002, 33.003. Under Section 33.003, the trier of fact determines proportionate responsibility for each cause of action alleged by assigning a whole-number percentage of responsibility to each claimant, each defendant, each settling person, and each responsible third party designated under Section 33.004. *Id.* at § 33.003(a). However, a person's conduct may only be submitted to the trier of fact to determine their percentage of responsibility when sufficient evidence—that is, more than a scintilla—exists tending to show the person bears some responsibility for the alleged harm. *See id.* at § 33.003(b); *see also Gregory v. Chohan*, 615 S.W.3d 277, 292 (Tex.App.—Dallas 2020, pet. filed)("The evidence is legally sufficient if 'more than a scintilla of evidence exists.'")(*quoting Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993)).

A "responsible third party" is a person or entity not named as a party in the litigation but nevertheless may bear responsibility for the claimant's injury. *New Hampshire Ins. Co. v. Rodriguez*, 569 S.W.3d 275, 298 n.9 (Tex.App.—El Paso 2019, pet. denied)(*citing In re CVR Energy, Inc.*, 500 S.W.3d 67, 78 (Tex.App.—Houston [1st Dist.] 2016, orig. proceeding)(opin. on reh'g)). To designate a responsible third party, a defendant must file a motion for leave to designate the person or entity as a responsible third party. TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(a). Unless another party files an objection to the defendant's motion for leave on or before the fifteenth day after service of the motion, the trial court shall grant the requested leave to designate. *Id.* at § 33.004(f). Furthermore, even if an objection to the motion for leave is timely filed, the trial court still must grant leave to designate unless the objecting party can show: (1) the defendant failed to plead sufficient facts regarding the alleged responsibility of the person based on the Texas Rules of Civil Procedure's notice-pleading requirement; and (2) after opportunity to replead, the defendant still failed to plead sufficient facts regarding the alleged responsibility of the person. *Id.* at § 33.004(g); *see also In re Cordish Co.*, 617 S.W.3d 909, 913-14 (Tex.App.—Houston [14th Dist.] 2021, orig. proceeding)(referencing the notice-pleading standard under TEX.R.CIV.P. 47 as it pertains to pleading facts in a motion for leave to designate a responsible third party); *Pacheco-Serrant v. Munoz*, 555 S.W.3d 782, 793 (Tex.App.—El Paso 2018, no pet.)(discussing the notice-pleading standard in Texas).

The trial court's order striking the responsible-third-party designation does not specify what grounds the trial court deemed the designation to be improper; it states only it "finds and concludes that the [second amended motion] should be granted." Accordingly, Relators "must show that the ruling cannot be upheld on any ground asserted by [the Real Parties in Interest]" in

their second amended motion to strike. *In re Brokers Logistics, Ltd.*, 320 S.W.3d 402, 405 (Tex.App.—El Paso 2010, orig. proceeding).

In its second amended motion, the RPI asserted three arguments as to why Aero Lift should be struck as a responsible third party in the case. First, the trial court granted the motion for leave prematurely and failed to allow fifteen days for the RPI to file an objection. Second, Relators failed to plead sufficient facts to designate Aero Lift as a responsible third party. Finally, Aero could not be a responsible third party based on the exclusion contained in Section 33.011(6) of the Civil Practice and Remedies Code.

In its first issue, Relators raise three sub-issues for our consideration which address the grounds raised by the RPI in their second amended motion. Each sub-issue of Relators' first issue involves the trial court's alleged error in striking and/or setting aside the responsible third-party designation. First, whether the motion for leave to designate was adequately pleaded; second, whether the exception to the definition of responsible third parties apply to Aero Lift; and third, whether the designation was struck on a ground not provided for in Section 33.004(l).

Trial Court's Premature Grant for Leave to Designate Responsible Third Party

First, we address the trial court's premature granting of Relators' motion for leave to designate, considering RPI's deadline to object had not passed when the trial court granted the leave to designate. Because the order striking the designation does not state upon what grounds the strike was made, we are unaware if the trial court struck the designation because it prematurely allowed the designation in the first place. Relators concede the trial court granted leave to designate before the fifteen-day deadline passed.

Section 33.004(f) allows fifteen days for a party to file an objection to a motion for leave

to designate a responsible third party. *See* TEX.CIV.PRAC.&REM CODE ANN. § 33.004(f). If an objecting party fails to timely object, the trial court must grant leave to designate the responsible third party requested by the movant. *See id.* ("A court *shall* grant leave to designate the named person as a responsible third party unless another party files an objection . . . on or before the 15th day after the date the motion is served.")[Emphasis added]. However, even when an objection is timely filed, the trial court is still obligated to grant leave to designate unless the objecting party establishes:

> (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and
>
> (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

Id. at § 33.004(g).

Although there is no doubt the trial court granted the motion for leave before the RPI's window to object lapsed, the error would be harmless to the RPI if the RPI either failed to object or failed to satisfy its burden of showing insufficient pleading. *See* TEX.R.APP.P. 44.1(a)(1)(error is only reversible when the trial court's error "probably caused the rendition of an improper judgment"). Here, the RPI did file a timely objection. Accordingly, the onus remains with the RPI as the objecting party to establish Relators failed to plead sufficient facts regarding Aero Lift's alleged responsibility based upon Texas' notice pleading standard. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004 (the burden to establish insufficient pleading lies with the party objecting to the motion for leave to designate responsible third party).[2]

[2] To the extent the trial court struck the designation *solely* because the initial grant occurred before the RPI timely filed its objection, the trial court erred.

We thus proceed to our analysis of the substance of the RPI's objection to Relators' motion for leave.

Sufficiency of Facts Pleaded Regarding Aero Lift's Purported Responsibility

In the first subpart to its first issue, Relators assert they satisfied Texas' fair notice pleading standard in their motion for leave. The RPI argue it is "[Relators'] burden to both provide and prove sufficient facts[,]" which the RPI claims Relators failed to do. In their brief, the RPI state, "NCS failed to present any evidence that Aero's product was defective [at the hearing on the RPI's motion to strike]." As a result, according to the RPI, the trial court properly struck the designation.

Applicable Law

Texas follows a "fair notice" standard for pleadings in civil cases, in which courts assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence which might be relevant to the controversy. *See Low v. Henry,* 221 S.W.3d 609, 612 (Tex. 2007). "The procedural rules and the case law interpreting them require that pleadings give a short statement of the cause of action sufficient to give the opposing party fair notice of the claim involved." *City of Socorro v. Campos*, 510 S.W.3d 121, 129 (Tex.App.—El Paso 2016, pet. denied)(*citing Paramount Pipe & Supply Co., Inc. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988); TEX.R.CIV.P. 45; TEX.R.CIV.P. 47)).[3] The rules do not require a party to set out in the pleadings all the evidence upon which the party relies to establish a claim. *See City of Socorro*, 510 S.W.3d at 129. Likewise, "[t]he actual cause of action

[3] Rule 45 of the Texas Rules of Civil Procedure provides, in part: "Pleadings in the district and county courts shall (a) be by petition and answer; (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense." TEX.R.CIV.P. 45. Rule 47 provides, in part: "An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain: (a) a short statement of the cause of action sufficient to give fair notice of the claim involved; (b) a statement that the damages sought are within the jurisdictional limits of the court . . . ." TEX.R.CIV.P. 47.

and elements do not have to be specified in the pleadings; it is sufficient if a cause of action can be reasonably inferred." *Gaspard v. Beadle*, 36 S.W.3d 229, 234 (Tex.App.—Houston [1st Dist.] 2001, pet. denied)(*citing Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993)).

The same pleading standard applies to parties filing a motion for leave to designate a responsible third party. *See In re Cordish Co.*, 617 S.W.3d at 913-14 ("[A] responsible third party may be designated by notice pleading[.]"). A trial court evaluating a motion for leave to designate a responsible third party "is restricted to evaluating the sufficiency of the facts pleaded by the movant and is not permitted to review the truth of the allegations or consider the strength of the evidence." *Id.* at 914.

A motion for leave to designate a responsible third party must satisfy notice-pleading requirements to apprise the other parties to the litigation—primarily, the plaintiffs—that a person or entity which is not a part of the proceedings may bear responsibility for the damages the plaintiffs claim. *See id.* at 915 (notice pleading in a responsible third-party designation was satisfied because the "real parties in interest can ascertain from [the allegations] the nature and basic issues of the controversy . . . and what type of evidence might be relevant."). In doing so, the plaintiff(s) and other potential claimants could seek to join the responsible third party to the suit. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018)(orig. proceeding). Regardless of whether the responsible third party is joined as a party to the lawsuit, the defendant can put on evidence to the fact finder regarding the responsible third party's responsibility for all or a portion of the claimed damages. *See id.* ("[A] [responsible third party] designation enables a defendant 'to introduce evidence regarding a responsible third party's fault and to have the jury apportion responsibility to the third party even if that person has not been joined as a party to the lawsuit.'")(quoting

Withers v. Schneider Nat'l Carriers, Inc., 13 F.Supp.3d 686, 688 (E.D. Tex. 2014)). In this way, the parties have an opportunity to join all potentially responsible parties to (1) ensure the claimant has the greatest chance for recovery, and (2) ensure the defendant(s) is/are not found liable for a greater share of the damages than which they are responsible. *See id.* at 629; *see also MCI Sales and Service, Inc. v. Hinton*, 329 S.W.3d 475, 505 (Tex. 2010)("Chapter 33 expresses the Legislature's intent to hold defendants responsible for only their own conduct . . .[,] 'consistent with a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct.'")(*citing F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007)).

Analysis

In their motion for leave, Relators include the following facts regarding Aero Lift's alleged responsibility in the failure of the equipment:

> (2) Plaintiffs own interests in various oil and gas wells. Plaintiffs sue alleging 'multiple failures of equipment, manufactured and sold by NCS and/or NCS Holdings (the MutliCycle® frac sleeve assembly).' Plaintiffs allege three of their oil and gas wells 'experienced separate leaks and/or multiple failures in the MutliCycle® frac sleeve assembly (which consists of the frac sleeve, two pup joints and one coupling).' Specifically, Plaintiffs allege 'leaks at the top of the pup joint in the NCS manufactured and supplied frac sleeve assembly between the pup joint and coupling.' Plaintiffs' allegations are set forth more specifically within its various pleadings on file with the court.
>
> (3) The pup joints and couplings contained within the MutliCycle® frac sleeve assembly were manufactured and provided by:
>
> Aero Lift Machine, LLC
> 10800 Blackhawk Blvd.
> Houston, TX 77089
> Voice: 281-974-2165
> Fax: 713-947-6385
>
> (4) Defendants generally deny all allegations of the Plaintiffs, however, in the remote event Plaintiffs should prove any defects within the pup joints and couplings at issue in this dispute, Aero Lift Machine, LLC is a responsible third party for the alleged defects. The alleged defects as set forth in the Plaintiffs' pleadings existed

> in the pup joints and couplings at the time said components left Aero Lift Machine, LLC's manufacturing facility.

The RPI argue the facts alleged are insufficient because, although Relators "plead that Aero provided a part used in the end-product, they do not plead with specificity their own allegations against Aero." They also claim Relators "should be required to say *why* the Aero component part(s) were in fact defective[,]" and how they were defective. The RPI asserts Relators' general allegations Aero Lift "manufactured and provided" certain component parts within the end-product assembly Relators sold, and those component parts are the parts alleged by the RPI to have failed, is insufficient. The RPI's second amended motion states Relators fail to "allege when Aero manufactured the pup joints or couplings, to whom or on what terms Aero 'provided' and sold the pup joints and couplings, or any other reason why Aero is responsible for any defects with the pup joints and couplings as used as a component part of the end product." The RPI criticizes Relators' failure to plead additional facts supporting their contention the Aero Lift component parts used in the finished frac assembly were defective when they left Aero Lift's facility. Finally, the RPI claims Relators' motion fails to allege Aero Lift was negligent or the component parts it manufactured and sold to Relators were defective independent of the Relators' end-product.

First, we consider the RPI's allegations in their original petition, as they pertain to the failure of the frac sleeve assembly. The petition states, in pertinent part:

> [W]hile the NCS Multicycle® frac sleeves were in use, three of the four Wells experienced separate leaks and/or multiple failures in the Multicycle® frac sleeve assembly (which consists of the frac sleeve, two pup joints and one coupling). . . .
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> . . .
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> After the failures in [two of the wells], a 'hold hunt' operation revealed leaks at the top of the pup joint in the NCS manufactured and supplied frack sleeve assembly between the pup joint and coupling. . . . After several more stages of the frac operation were run, there were at least two more leaks. . . . Likewise, after a

> pressure drop and failure on [another well], a similar leak was identified between the top pup joint and the coupling of the frac sleeve assembly . . . .
>
> . . .
>
> NCS and/or NCS Holdings conducted an investigation to determine the cause of the multiple wellbore leaks (and separate occurrences) and to determine any non-conformities in the NCS Multicycle® frac sleeve assembly.
>
> . . .
>
> NCS determined that the most likely cause of these failures was improper thread run outs on the pup joints . . . . The propensity for the Multicycle® frac sleeve assembly to leak was further demonstrated in Phase 3 testing wherein at least two more leaks in the Quarantined Pup Joints were detected.

Here, the allegations supporting Relators' contention Aero Lift, as the manufacturer of certain component parts on the NCS Multicycle® frac sleeves, bears responsibility for at least a portion of the RPI's damages come from the RPI's own petition—namely, the component parts on the NCS Multicycle® frac sleeves Aero Lift manufactured leaked while in use. From the allegations in Relators' motion for leave, the RPI can certainly ascertain the nature of the purported responsibility of Aero Lift, because the RPI makes the same allegations against Relators in their petition. Relators' motion for leave informs the RPI a third party manufactured parts which the RPI claims failed in the final assembly. Relators are no more required to plead precisely how the failure occurred, how the parts were allegedly defective, or provide specific dates the parts were manufactured or sold, than the RPI is required to in its petition. *See City of Socorro*, 510 S.W.3d at 129. It is sufficient the allegations in the motion for leave apprise the RPI of the nature of the potential claims against Aero Lift, and the nature of the evidence relevant to determine to what extent responsibility lies with Aero Lift, if any. *See In re Cordish Co.*, 617 S.W.3d at 915. Here, both the nature of the claims and the type of relevant evidence necessary is apparent from Relators'

motion for leave because it is the same type of claim and evidence necessary for the RPI's causes of action against Relators.

In their response brief, the RPI claims Relators' conflicting defense theories necessarily show Relators pleaded insufficient facts to implicate Aero Lift's responsibility because it failed to admit a defect existed in the pup joints and couplings Aero Lift manufactured which Relators used in the end-product frac assembly. The RPI accuses Relators of "argu[ing] out [of] both sides of its mouth" when they deny any defect occurred in the final assembly, but the RPI also argue a defect in the pup joints or couplings is Aero Lift's responsibility as the manufacturer (and seller) of those component parts. However, in making this argument, the RPI fails to acknowledge a party's right to "plead conflicting claims and defenses . . . so long as they have a 'reasonable basis in fact [and] law.'" *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 164 (Tex. 2015)(*citing Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007)). When a defendant pleads alternative defensive theories—which may be inconsistent—the jury is left to '"choose the theory that it believes based upon its resolution of the conflicting evidence.'" *Id.* (*citing Wilson v. Whetstone*, No. 03-08-00738-CV, 2010 WL 1633087, at *10 (Tex.App.—Austin April 20, 2010, pet. denied)(mem. op.)). Here, Relators are free to both deny a defect exists in any part of the finished product, and allege, to the extent a defect does exist, it is the result of an error made by a component-part manufacturer of which Relators were unaware. *See id.*

We find the motion for leave alleges sufficient facts to satisfy Texas' notice pleading standard.

Applicability of the "Innocent-Seller" Exception in Section 33.011(6)

In the second subpart of its first issue, Relators argue the "innocent seller" exception contained in Section 33.011(6) does not apply to Aero Lift and cannot serve to preclude Aero Lift's

designation as a responsible third party. The RPI counter the definition of "responsible third party" expressly excludes "seller[s] eligible for indemnity under Section 82.002," and posits Aero Lift meets the definition as an innocent-seller. *See* TEX.CIV.PRAC.&REM.CODE ANN. §§ 33.011(6), 82.002(a). Thus, according to the RPI, Aero Lift cannot be designated a responsible third party, because, by definition, it is excluded from the definition of what constitutes a responsible third party.

Applicable Law

The RPI's lawsuit is a products liability action brought under Chapter 82 of the Civil Practice and Remedies Code. *See, generally*, TEX.CIV.PRAC.&REM.CODE ANN. § 82.001(2)(defining "products liability action"). Section 82.002 describes a manufacturer's duty to indemnify sellers for losses incurred in products liability actions, to the extent the sellers are not independently liable. *Id.* at § 82.002(a). Section 82.002 reads, in pertinent part,

> (a) A manufacturer shall indemnify and hold harmless a seller against **loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission**, such as negligently modifying or altering the product, **for which the seller is independently liable**.
>
> (b) For purposes of this section, 'loss' includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages. [Emphasis added].

Id. at § 82.002(a), (b). The Texas Supreme Court has repeatedly held, "[t]he purpose of section 82.002 is to protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers." *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 494 (Tex. 2014)(*citing Gen Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255-56 (Tex. 2006)).

In lawsuits by sellers seeking indemnity from manufacturers for losses sustained in products liability actions, the law is clear "the duty [to indemnify] is triggered by the injured

claimant's pleadings." *Petroleum Sols., Inc.*, 454 S.W.3d at 492 (*citing Hudiburg*, 199 S.W.3d at 256). Where there are "allegations of a defect in the manufacturer-indemnitor's product[,]" the manufacturer's duty to indemnify the seller is triggered, and "is not dependent on an adjudication of the indemnitor's liability." *Id.* (citing *Hudiburg*, 199 S.W.3d at 256). On the other hand—the exception to the duty to indemnify—namely, whether the seller is "innocent"—requires "an affirmative finding that the seller-indemnitee is independently liable" for the loss. *Id.* (*citing Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001)). Additionally, because "all manufacturers are also sellers" based on the definitions of the terms in Chapter 82,[4] situations can arise where two manufacturer-sellers may have competing duties to indemnify based upon the allegations of the defect(s) at issue in the product. *Petroleum Sols., Inc.*, 454 S.W.3d at 491-92. In those situations, who is ultimately obligated to indemnify whom depends on the evidence and the fact finder's determination of fault.

Meanwhile, in Chapter 33, the Legislature excluded from the definition of "responsible third party" those persons who are "seller[s] eligible for indemnity under Section 82.002." TEX.CIV.PRAC.&REM.CODE ANN. § 33.011(6). The question becomes, which sellers are eligible for indemnity?

Analysis

Relators offer two primary reasons as to why Aero Lift is not a "seller eligible for indemnity under Section 82.002"—first, it has not incurred "loss arising out of a products liability action[;]"

[4] "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof. TEX.CIV.PRAC.&REM.CODE ANN. § 82.001(3). "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce. *Id.* § 82.001(4).

and second, it is not an "innocent" seller.[5] We examine each in turn.

Relators assert "because Aero Lift has not been joined in [a] products liability action or otherwise suffered any loss as defined by Section 82.002(b), it has not suffered a 'loss arising from a products liability action.'" TEX.CIV.PRAC.&REM.CODE ANN. § 82.002(a), (b). The statute defines loss as including "court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages." *Id.* at § 82.002(b). Thus, according to Relators, Aero Lift cannot be eligible for indemnity when there is nothing for which it could be indemnified.

The RPI counter the injured claimant's pleadings determine whether a seller is "eligible for indemnity" under Section 82.002, citing *Petroleum Sols., Inc.*, 454 S.W.3d at 492-93. They maintain where the duty to indemnify arises, as triggered by the claimant's pleadings, the indemnitee-seller is thus a "seller eligible for indemnity under Section 82.002" as the phrase is used in the exception to the responsible third-party definition in Section 33.011(6). Thus, while competing duties to indemnify may exist between manufacturer-sellers which require an adjudication of liability to ascertain the extent of the duty between them, each is necessarily a "seller eligible for indemnity under Section 82.002" according to the RPI, and therefore precluded from designation as a responsible third party. The RPI's second amended motion insinuates all sellers are "sellers eligible for indemnity under Section 82.002" where the claimant's pleadings allege the part sold was defective.

Here, we are faced with a statutory construction question of first impression. Namely, did

[5] The RPI spends considerable argument on Aero Lift's status as a "seller" under Chapter 82, despite also being a "manufacturer." It does not appear Relators contest whether Aero Lift can be both a "seller" and "manufacturer" under Chapter 82, as the terms are defined therein; rather, Relators take issue with the RPI's argument because Aero Lift is a "seller" under Chapter 82, it is automatically a "seller eligible for indemnity under Section 82.002." Accordingly, we proceed with our analysis with the understanding Aero Lift and Relators are all "seller[s]" and "manufacturer[s]" as defined by Section 82.001.

the Legislature intend for a manufacturer in a products liability lawsuit to be precluded from designating a seller as a responsible third party in a lawsuit when (1) the seller has incurred no loss arising out of a products liability action involving the product it sold, and (2) the claimant's allegations implicate the conduct of the seller in causing at least a portion of the claimant's alleged damages? We conclude it did not.

> The polestar of statutory construction is legislative intent, which we determine from the enacted language. In doing so, we construe the Legislature's chosen words and phrases within the context and framework of the statute as a whole, not in isolation. We apply the plain meaning of statutory language unless (1) the Legislature has prescribed definitions, (2) the words have acquired a technical or particular meaning, (3) a contrary intention is apparent from the context, or (4) a plain-meaning construction leads to nonsensical or absurd results. We presume the Legislature knows the law and drafts statutes with care, choosing each word for a purpose and purposefully omitting all other words. That being the case, we endeavor to afford meaning to all of a statute's language so none is rendered surplusage, but we remain ever mindful of our obligation to avoid constructions that give rise to constitutional infirmities.

In re Tex. Educ. Agency, 619 S.W.3d 679, 687-88 (Tex. 2021)(orig. proceeding).

We first consider the plain language of the two sections at issue. Section 33.011(6) states, "[t]he term 'responsible third party' does not include a seller eligible for indemnity under Section 82.002." TEX.CIV.PRAC.&REM.CODE ANN. § 33.011(6). Because "eligible for indemnity" is included to modify "seller"—a term which is already defined in Chapter 82—necessarily means the Legislature did not intend all sellers to be excluded from designation as responsible third parties. *See In re Tex. Educ. Agency*, 619 S.W.3d at 687-88 ("We presume the Legislature knows the law and drafts statutes with care, choosing each word for a purpose and purposefully omitting all other words."). Otherwise, the exemption from Section 33.011(6) would read, "The term 'responsible third party' does not include a seller under Section 82.001." Likewise, if the Legislature intended all sellers to be indemnified by manufacturers of the product at issue, Section

82.002 would not include the caveat contained in Subsection (f), which requires "[a] seller eligible for indemnification under this section" to give notice of potential claims to the manufacturer. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 82.002(f).

"Eligible" is defined as "having the necessary qualities or satisfying the necessary conditions." *Eligible Definition*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/?q=Eligible (last visited October 13, 2021). Thus, for a seller to be "eligible" for indemnity, it must satisfy some condition beyond meeting the statutory definition of "seller." *See* TEX.CIV.PRAC.&REM.CODE ANN. § 82.001(3); 82.002(a), (f). In reading the plain language of the sections at issue, in conjunction with Supreme Court precedent interpreting Chapter 82, we find for a seller to be "eligible" for indemnity under Section 82.002, it must have sustained loss arising out of a products liability action. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 82.001(3), 82.002(a), (f); *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001). To have sustained a "loss," as the term is defined by Section 82.002(b), the seller must have been or currently be a party to a products liability action;[6] or, at the very least, have a claim made against it regarding the product resulting in the seller incurring attorney's fees and/or other expenses in defending against such a claim. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 82.002(b). The Texas Supreme Court explicitly indicated as much in *Meritor Automotive, Inc.*, when it said, "[T]he manufacturer's duty to indemnify the seller is invoked by the plaintiff's pleadings *and joinder of the seller as defendant*[.]" *Meritor Automotive, Inc.*, 44 S.W.3d at 91 [Emphasis added]. Because no duty to indemnify arises unless the seller has sustained a loss arising out of a products liability action, a seller is not "eligible for

[6] Action is defined as, "A civil or criminal judicial proceeding." *Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

indemnity" until it has sustained a loss as defined by Section 82.002, thus triggering the manufacturer's duty to indemnify. TEX.CIV.PRAC.&REM.CODE ANN. § 82.002(a), (b); *see also Petroleum Sols., Inc.*, 454 S.W.3d at 492 (the duty to indemnify a component-part manufacturer/seller was triggered by the plaintiff's pleadings where the component-part manufacturer/seller was joined to the lawsuit, even though it was subsequently dismissed by all claimants and only its indemnity counterclaim remained).

Based upon this finding, we hold Aero Lift is not a seller eligible for indemnity under Section 82.002 based on the facts presented here.[7] *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.011(6). Here, there is no evidence Aero Lift has incurred loss arising out of products liability lawsuits for the component parts at issue. The record clearly shows it has not, at any time, been a party to the instant lawsuit. Absent some evidence Aero Lift incurred loss arising out of a products liability lawsuit involving the product(s) in this case, we cannot conclude it is eligible for indemnification because, quite simply, one cannot be indemnified when one has not suffered a qualifying loss. *Id.* at § 82.002(a), (b). Because we hold the RPI failed to establish Aero Lift is eligible for indemnity under Section 82.002, we likewise hold the RPI has failed to establish the exception to the definition of "responsible third party" for "a seller eligible for indemnity under Section 82.002" applies to Aero Lift. *See id.* at § 33.011(6).

Having determined a "loss" is required before one can be eligible for indemnity, and the dearth of evidence does not indicate Aero Lift sustained such a loss, we do not reach Relators' argument regarding the requirement a seller must also be "innocent" to be eligible for indemnity.

We find Relators satisfied the requirements for filing a motion for leave to designate Aero

[7] We cannot rule out a scenario where a seller ineligible for indemnity at an earlier stage of litigation is subsequently eligible for indemnity at a later stage after it has incurred a qualifying loss.

Lift as a responsible third party under Section 33.004. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(a). We further find, although the RPI timely filed an objection to Relators' motion for leave, the RPI has failed to establish Relators pleaded insufficient facts regarding Aero Lift's alleged responsibility to satisfy the pleading requirements under the Texas Rules of Civil Procedure. *See id.* at § 33.004(g); TEX.R.CIV.P. 41. Finally, we find the RPI has failed to establish the exception to the definition of responsible third party applies to Aero Lift. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.011(6). Accordingly, to the extent the trial court sustained the RPI's objection on the basis the allegations against Aero Lift were insufficiently pleaded or Aero Lift failed to meet the definition of responsible third party, and set the designation aside accordingly, such error was a clear abuse of discretion.

Grounds for Striking a Responsible Third-Party Designation under Section 33.004(l)

Having determined Relators satisfied the requirements for designating Aero Lift as a responsible third party and finding the trial court had no discretion to sustain an objection to the designation under Section 33.004(g), we turn to whether the trial court struck Relators' third-party designation for a ground other than the one provided in Section 33.004(l). In the third and final sub-part of their first issue, Relators contend the trial court erred by striking Aero Lift's designation because it was not struck on the basis Relators failed to provide any evidence of Aero Lift's responsibility for the RPI's alleged damages. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l). The RPI counter their motion to strike sought to strike the designation or set it aside "because of a statutory exclusion" as well as insufficient facts pleaded by Relators to support the designation.

Applicable Law

Once a responsible third party has been designated, a claimant is left with a procedural safeguard to prevent a person against whom no evidence exists suggesting their responsibility for

the claimant's damages from being submitted to the jury to apportion fault. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l). Section 33.004(l) allows a claimant, after adequate time for discovery has elapsed, to move to strike a designation "on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage." *Id.* When the claimant makes such a motion, the trial court is required to strike the designation "unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage." *Id.*

Precedent mandates Section 33.004(l) provides but one reason a responsible third-party designation can be struck, and it is only where the party opposing the designation moves to strike the designation on the basis "there is no evidence that the designated person is *responsible* for any portion of the claimant's alleged injury or damage." TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l)[Emphasis added]; *see, e.g., In re Brokers Logistics*, 320 S.W.3d 402, 407 (Tex.App.—El Paso 2010, orig. proceeding)("Section 33.004(l) articulates a single ground for striking a designation of a responsible third party . . . . We conclude that the plain language of Section 33.004(l) reflects that the Legislature did not intend for a responsible third party designation to be struck on any ground other than the one contained in the statute.").

Analysis

In their response brief, the RPI assert because the trial court granted leave to Relators to designate Aero Lift as a responsible third party, despite the RPI's timely-filed objection, the RPI's only remedy to strike the designation was to file a motion to strike under Section 33.004(l), "or set it aside because of a statutory exclusion." We find the RPI's position problematic for two reasons. First, the RPI's second amended motion—and, indeed, its previous motions to set aside—make no

mention of Section 33.004(l) at all. The RPI's second amended motion also fails to claim Relators have not provided evidence supporting their position Aero Lift "is responsible for any portion of the claimant's alleged injury or damage." *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l). Instead, their second amended motion argues the trial court prematurely granted the designation, objects to the sufficiency of Relators' factual allegations against Aero Lift, and alleges Aero Lift is precluded from being designated a responsible third party because the statutory definition excludes sellers eligible for indemnity under Section 82.002.[8] The second amended motion discusses striking Relators' motion for leave for only one reason: the statutory exclusion of innocent-sellers from the definition of "responsible third party" under Section 33.011(6). Similarly, at the hearing on the second amended motion, as it pertains to the grounds for striking the motion, the RPI assert only that Aero Lift's designation should be struck "because [Aero Lift does] not fall within the definition or the class of persons that are included in the [definition of responsible third party]." Accordingly, even liberally construing the arguments in the RPI's second amended motion, we cannot ascertain from the record the trial court heard or ruled on their motion or the RPI intended to argue there was no evidence Aero Lift was responsible for a portion of the RPI's alleged damages. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l).

Further, the RPI appear to suggest, in their second amended motion, the innocent-seller exception under Section 33.011(6) precludes Aero Lift's designation as a responsible third party because it could not be found *liable* for any of RPI's damages since Relators would have to

[8] The RPI's argument concerning the so-called "innocent-seller" exception to Section 33.011(6) was raised for the first time in its second amended motion, filed well after fifteen days from the date of service of Relators' motion for leave. Instruments filed with the court indicating they amend a previous document supplant and supersede the original. *See* TEX.R.CIV.P. 65; *Leal v. State*, 469 S.W.3d 647, 652-53 (Tex.App.—Houston [14th Dist.] 2015, pet. ref'd). Because Relators do not raise the timeliness of the new objection in this appeal or with the trial court, we assume without deciding RPI's objection based on the innocent-seller argument was timely for purposes of Section 33.004.

indemnify Aero Lift based on Section 82.002. Thus, if we follow the RPI's argument newly-asserted in their brief—Aero Lift's designation should be struck under Section 33.004(l) because no evidence exists to show Aero Lift could be responsible for any part of the RPI's damages—it appears the RPI claims Aero Lift's ostensible eligibility for indemnification by Relators means it could not be found *responsible* for any damage to the RPI because ultimately it would not be *liable* for any damage to the RPI based on the indemnity provision. However, "[u]nder the proportionate-responsibility statute, 'responsibility' is not equated with 'liability.'" *In re Mobile Mini, Inc.*, 596 S.W.3d at 787 (*citing Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 (Tex. 2009)).

Here, even if the RPI intended to apply its "innocent seller" argument to a no-evidence issue in its second amended motion—a speculative assumption to make based on the motion's contents—claiming no evidence exists to support *liability* against the third party is not equivalent to claiming no evidence exists to support assigning *responsibility* against the third party. *See In re Mobile Mini, Inc.*, 596 S.W.3d at 787; *see also In re Brokers Logistics, Ltd.*, 320 S.W.3d at 407 (acknowledging a third-party designation may be proper against a party who has already been dismissed from the case). Moreover, we have already determined the exception under Section 33.011(6) does not apply to Aero Lift under the circumstances presented here. Thus, to the extent the RPI rely on the innocent-seller exclusion in Section 33.011(6) as a basis for seeking to strike Aero Lift's designation at this time, we find such reliance would be misplaced.

A plain reading of the second amended motion to strike basis was (1) Relators failed to plead adequate facts regarding Aero Lift's responsibility, and (2) Aero Lift was precluded from designation as a responsible third party because it was a seller under Chapter 82, and thus a "seller

eligible for indemnity under Section 82.002" falling under the exception to the definition of responsible third party. Neither is a basis upon which a trial court may strike a responsible third-party designation. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l). Accordingly, the trial court had no discretion to strike Aero Lift's designation as a responsible third party on any other ground moved for by the RPI.

We hold the trial court committed a clear abuse of discretion in striking and/or setting aside Aero Lift's designation as a responsible third party. Relators' first issue is sustained. We do not reach Relators' second and third issues.

No Adequate Remedy on Appeal

Having determined the trial court committed a clear abuse of discretion in setting aside and/or striking Aero Lift's designation as a responsible third party, we now consider whether Relators have an adequate remedy on appeal. Where no adequate remedy on appeal exists, mandamus relief is appropriate. *In re Mobile Mini, Inc.*, 596 S.W.3d at 787-88 (*citing In re Coppola*, 535 S.W.3d at 507-09). "The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments." *In re Brokers Logistics, Ltd.*, 320 S.W.3d at 408 (*citing In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008)). As previously stated, mandamus following the erroneous denial of leave to designate a responsible third party is appropriate because "an adequate appellate remedy is ordinarily lacking because allowing a case to proceed to trial without a properly requested responsible-third-party designation 'would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of the relator's defense in ways unlikely to be apparent in the appellate record.'" *In re Mobile Mini, Inc.*, 596 S.W.3d at 787-88 (*quoting In re Coppola*, 535 S.W.3d at 509); *see also In re Brokers Logistics, Ltd.*, 320 S.W.3d at 408.

Under these facts, denying Relators the ability to designate Aero Lift as a responsible third

party would cause precisely the type of harm contemplated by the Supreme Court in *Mobile Mini*; specifically, Relators would be unable to present evidence a third party manufactured the parts which the RPI allege were the primary cause of the assemblies' failures, thus compromising Relators' defense "in ways unlikely to be apparent in the appellate record." *See In re Mobile Mini, Inc.*, 596 S.W.3d at 787-88; *In re Brokers Logistics, Ltd.*, 320 S.W.3d at 408. Subsequent reversal on appeal would require all parties to retry the entire case with the submission of the responsible third party, at significant extra expense to all involved. *See In re Brokers Logistics, Ltd.*, 320 S.W.3d at 409 ("It is beyond dispute that there will be a substantial waste of the litigants' time and money if they [are] to proceed to trial without the error being corrected, proceed through the appellate process only to have the judgment reversed, and then retry the entire case with [the third party] as a designated responsible third party."). While additional time and expense alone should not be the justification to grant mandamus relief, it may be a factor considered by the appellate court to determine whether an appeal provides an adequate remedy. *Id.*

On the other hand, designation of Aero Lift as a responsible third party at this point in the litigation still affords the RPI the procedural safeguards of Section 33.004(l). Nothing about our decision precludes the RPI from moving to strike Aero Lift's designation because no evidence has been produced showing Aero Lift is responsible for any portion of the RPI's claimed injury or damage. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 33.004(l). In this way, Relators are afforded the protections of the proportionate responsibility determinations under Chapter 33, only insofar as evidence exists implicating Aero Lift as being responsible to some extent for the RPI's damages. All parties are spared the time and expense associated with needless appeal and retrial if we grant the relief sought by Relators here. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136; *In re Brokers Logistics, Ltd.*, 320 S.W.3d at 409. For this reason, we find Relators lack an adequate

remedy by appeal, and mandamus relief is appropriate.

CONCLUSION

Having sustained Relators' first issue, and finding no adequate remedy exists by appeal, we conditionally grant the writ. We do not reach Relators' second or third issues.

The trial court is hereby ordered to vacate its order setting aside and striking Aero Lift's designation as a responsible third party and reinstate the order granting leave to designate Aero Lift as a responsible third party. The writ of mandamus will issue only if the trial court fails to comply. *See* TEX.R.APP.P. 52.8(c).

October 14, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.