

CASE NO. 08-0799

IN THE SUPREME COURT OF TEXAS

STATE FARM LLOYDS AND ERIN STRACHAN, *Petitioners*

v.

WANDA M. PAGE, *Respondent*

On Petition for Review from Cause No. 10-07-00228-CV
In the Court of Appeals for the Tenth District of Texas

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT AND AUTHORITIES.....	1
(1) <u>This Court’s decision in <i>Balandran</i> supports the lower court’s finding that mold damage to the dwelling caused by plumbing leaks is a covered loss. ...</u>	1
(2) <u>Fiess did not hold that mold damage is universally excluded as argued by State Farm</u>	5
(3) <u>Mold damage to personal property is clearly covered under the insurance policy at issue in this case.</u>	6
(4) <u>Review of this case is unnecessary by this Court</u>	7
PRAYER	8
CERTIFICATE OF SERVICE	8

State Farm argues in its petition for review that this Court's decision in *Fiess v. State Farm* allegedly expressly declared that mold damage to a dwelling was never a covered loss no matter what. *See Fiess*, 202 S.W.3d 744, 746 (Tex.2006). The insurance industry's coverage lawyers, including State Farm's, apparently made a monumental error of coverage interpretation that cost the industry billions of dollars in claims that it supposedly never had to pay. This notion is absurd. Something caused State Farm and other insurance companies to pay these claims, despite a supposedly clear "mold exclusion," and part of that something was this Court's recent decision in *Balandran v. Safeco Ins. Co. of America*, 972 S.W.2d 738, 741 (Tex.1998).

The insurance policy clearly repeals Exclusion 1.a through 1.h, including the so-called mold exclusion or exclusion f., for damage caused by accidental discharge or leakage from a plumbing, heating or air conditioning system, such as in the present case. That is undisputed. The only issue to be decided is whether the repeal of this exclusion applies just to personal property (which is beyond dispute), or to both the dwelling and personal property. In dealing with this issue as it related to a foundation exclusion, exclusion 1.h., this Court in a 7-2 decision squarely held that the plumbing leak repeal of the foundation exclusion applied to damages to both the dwelling and personal property. *See id.*

The same principals that led this Court to find that the plumbing leak exception applied to both the dwelling and personal property as it relates to the foundation exclusion apply to the so-called mold exclusion as well. First, this Court found that the policy on its

face stated that exclusion 1.h did not apply to loss caused by a plumbing leak and that the repeal of exclusion 1.h was not expressly limited to “personal property” loss. *See id.* at 741. This exact same reasoning applies to exclusion 1.f as well. There is no difference whatsoever in applying this argument.

Second, to adopt State Farm’s interpretation would either render a portion of the policy meaningless, or it would mean you would have to apply the exact same language differently to two different exclusions with no basis for doing so. As noted in *Balandran*, to interpret the plumbing leak exception to only apply to personal property and not the dwelling would render a portion of the policy meaningless. *See id.* Since exclusion 1.h. only applied to the foundation, which itself only could apply to damages to the dwelling and not personal property, to interpret the policy in the manner asked for by State Farm would be to render meaningless the exception to the exclusion.

While mold damage is different than foundation damage in that it can apply to both the dwelling and the personal property, how can you interpret the policy, which clearly states a plumbing leak exception applies to exclusion “1.a through 1.h,” to mean it does apply to exclusion 1.h. for the dwelling but somehow does not apply to exclusion 1.f regarding the dwelling? That is an extremely tortured reading of the policy and makes no sense. Either the exception repeals the exclusion for all of 1.a through 1.h as to damage to the dwelling, as interpreted by this Court in *Balandran*, or none. It makes no sense to read the policy as applying to exclusion 1.h but not exclusion 1.f when the language of the policy in the

exception makes no distinction between them.

Finally, this Court looked to the surrounding circumstances when the policy was written in 1990. *See id.* at 741-42. Starting in 1978, it was clear that the plumbing leak exception repealed the exclusions at issue here both as to personal property and as to the dwelling. In 1990, the policy was re-written by the State Board of Insurance, somewhat ironically for the purpose of making it “easier to read,” but no substantive changes in coverage were to take place. *See id.* A representative of State Farm, Don Olson, repeatedly assured the committee re-writing the policy that the revisions were “accomplished in line with [the Board’s] charge of making sure that there is no restriction in coverage available to any insured under an existing homeowner policy in Texas.” *Id.* at 742.

After assuring the committee that no substantive changes had been made, State Farm started arguing to the Courts that the plumbing leak exception no longer applied to dwelling, and thus foundation damage was clearly excluded. *See Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258 (5th Cir.1997). State Farm managed to convince a federal court of this argument. *See id.* This Court ultimately (and correctly) disagreed in *Balandran*.

Similarly, after telling the entire State of Texas that mold was a covered loss (in order to get the policy changed), State Farm started arguing to the Courts that mold damage was clearly excluded. And while this Court has agreed with State Farm as it relates to the “ensuing-loss” clause found immediately after the so-called mold exclusion, this Court’s decision in *Balandran* supports a finding that damage caused by plumbing leaks is a covered

loss. *Fiess* never addressed this issue because it was not properly preserved on appeal. Most of the federal and concurring opinions cited by State Farm in its petition do not even mention *Balandran*. Because Respondent's claims for mold damage in the present case result from plumbing leaks, the appellate court's decision should be upheld.

(2) ***Fiess* did not hold that mold damage is universally excluded as argued by State Farm**

Contrary to the argument State Farm is making, this Court in *Fiess v. State Farm Lloyds*, did not hold that mold is never covered under the HO-B homeowners policy at issue in this case. *See Fiess*, 202 S.W.3d 744, 746 (Tex.2006). Rather, this Court stated that mold damage in certain instances, such as mold resulting from roof leaks and window leaks, is not covered.

The Court left open the question of whether or not mold that was caused by water damage from plumbing, heating or air conditioning leaks was covered under the policy. *See id.*, at 746 n.3. Policyholders arguing for mold coverage in the past have relied on two separate clauses contained in the policy: (1) the "ensuing loss" clause, and (2) the "plumbing leak" exception. As to the "plumbing leak" exception, this Court stated in a footnote that the *Fiess*'s had not properly preserved that issue for appeal, and thus it was not addressed. *See id.*

This distinction was recently noted by the Fifth Circuit Court of Appeals in *Betzel v. State Farm Lloyds*, 480 F.3d 704 (5th Cir.2007). As noted by the Fifth Circuit:

In *Fiess*, the Supreme Court of Texas answered our certified question, holding that

the ensuing loss provision of the Texas HO-B policy did not cover mold contamination. Way back in federal district court, the Fiesses had also urged a backup argument, contending that coverage for mold was provided by the exclusion-repeal provision. Due to a defect in the notice-of-appeal, we declined to exercise jurisdiction over the backup argument. The Supreme Court of Texas declined as well. That question is presented here, however, since the exclusion-repeal provisions relates to losses resulting from “accidental discharge, leakage, or overflow of water or steam from within a plumbing, heating or air conditioning system of household appliance.”

Betzel, 480 F.3d at 709.

The plaintiff in *Fiess* failed to properly preserve the issue that was before the lower courts in the present case. As such, *Fiess* does not apply to this situation.

(3) Mold damage to personal property is clearly covered under the insurance policy at issue in this case.

State Farm claims that mold to personal property is not covered because there is a so-called “mold exclusion” which allegedly applies to both the dwelling and personal property. Confounding this argument is the undisputed fact that the insurance policy states the following:

COVERAGE B (PERSONAL PROPERTY)

We insure against physical loss to the property described in Section I Property Coverage, Coverage B (Personal Property caused by a peril listed below, unless the loss is excluded in Section I Exclusions. . . .

9. Accidental Discharge, Leakage or Overflow of Water or Steam from within a plumbing, heating or air conditioning system or household appliance.

A loss resulting from this peril includes the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance. But this does not include loss to the system or appliance from which the water or steam escaped.

Exclusions 1.a. through 1.h. under Section I – Exclusions do not apply to loss caused by this peril.

(I C.R. at 89-90) (emphasis added).

As it relates to personal property, the policy could not have been written clearer. Exclusions 1.a through 1.h (which includes the so-called “mold exclusion” or exclusion f.) do not apply to a loss resulting from accidental discharge, leakage or overflow of water from within a plumbing, heating or air conditioning system. The so called mold exclusion or exclusion f. is repealed when the loss is caused by water from a plumbing, heating or air conditioning system. As it relates to personal property, this issue should be undisputed.

(4) Review of this case is unnecessary by this Court

Finally, it is unnecessary for this Court to revisit this area of the law again. Essentially, State Farm is asking this Court to overrule its decision in *Balandran*, or at a minimum distinguish it based on tortured reasoning. There is no good reason for this Court to do this.

The “mold crisis” is over. The homeowners insurance policy has changed. Mold exclusions have been clearly written into many policies and absent some showing of misrepresentation or bad faith, most homeowners’ policies do not cover mold damage. State Farm in this case is similar to the Japanese holdouts who continued to fight after the surrender in World War II. While this case is extremely and critically important to Ms. Page, who just would like to get her house fixed so she can move back in it, the rest of the State of Texas has moved on. This case is of minimal importance to the state’s jurisprudence. Granting the petition for review will affect very few outside of the parties in this case.

Finally, while Chief Justice Gray of the Court of Appeals dissented in the case, he did so without even writing an opinion. It is impossible therefore to discern exactly what areas of the law he disagreed with regarding the majority opinion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays this Court refuse the petition for review, or alternatively deny the petition for review, or alternatively affirm the Court of Appeal's decision and remand this action for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the petitioners in compliance with Rule 9.5, Texas Rules of Appellate Procedure, on this 15th day of January, 2009, addressed to:

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