

**NO. 08-0799**

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**IN THE SUPREME COURT OF TEXAS**

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**STATE FARM LLOYDS AND ERIN STRACHAN,**

*Petitioners*

**v.**

**WANDA M. PAGE,**

*Respondent*

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

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**REPLY TO RESPONSE TO PETITION FOR REVIEW**

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## ARGUMENT

### **I. THIS CASE IS IMPORTANT TO THE JURISPRUDENCE OF THE STATE.**

Page urges the Court not to grant review because “[t]he ‘mold crisis’ is over. The homeowners insurance policy has changed. . . . [M]ost homeowners’ policies do not cover mold damage.” Response at 7. These assertions are misleading.

The Texas Department of Insurance counts the HO-B policy as one type of homeowners’ policy currently sold in Texas. <http://www.tdi.state.tx.us/pubs/consumer/cb025.html> at “Types of Policies,” pages 1-2 (Appendix A). The Office of Public Insurance Counsel lists 21 different insurance companies which currently offer the HO-B policy in Texas. <http://www.opic.state.tx.us/hoic.php> at “Compare Policy Coverages,” pages 1-3 (Appendix B). The State of Texas Homeowners Insurance Provider List includes 25 different carriers who, as of January 12, 2009, sell the HO-B policy in Texas. <http://www.helpinsure.com/lcenter/providers.html> at “Homeowners Insurance Provider List,” pages 1-7 (Appendix C). And these lists do not even account for carriers who may not issue the HO-B policy any more, but still have many claims under that policy open throughout the state.

In *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 745, 747, 748 (Tex. 2006), this Court held that mold damage to a residence is not covered in the HO-B policy. Plaintiffs then began to argue that eight years before *Fiess* issued, this Court had somehow

furnished coverage for mold damage to a residence that resulted from plumbing leaks in *Balandran v. Safeco Insurance Co.*, 972 S.W.2d 738 (Tex. 1998).

The strategy did not work, as every opinion to address the issue of whether *Balandran* provides coverage when mold damage to a residence results from plumbing leaks held that it does not.<sup>1</sup> Some of those cases even offered more than one reason for their holding; for example, in *Carrizales*, two Fifth Circuit judges supplied three different reasons for deciding that *Balandran* does not convey mold coverage. 518 F.3d at 346-48, 351-53. It appeared the new argument was a failure.

Then the court of appeals' majority held that *Balandran* had provided mold coverage all along. See *Page v. State Farm Lloyds*, \_\_ S.W.3d \_\_, \_\_, 2008 WL 2374760 at \*4-5 (Tex. App.—Waco June 11, 2008, pet. filed). *Balandran* does not convey mold coverage, but plaintiffs throughout the state will point to *Page* and say it does. With the weight of a published opinion behind it, many trial courts will accept the now-viable argument. No, the “mold crisis” is not over.

But *Page* says there is no reason for the Court to “revisit” the issue that is presented here. Response at 1, 7. Obviously, this Court has never addressed whether the HO-B policy provides coverage for mold damage to a residence that resulted from plumbing leaks, let alone determined whether *Balandran* resolved the matter. Even

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<sup>1</sup> See *Carrizales v. State Farm Lloyds*, 518 F.3d 343, 346-48 (5th Cir. 2008); *Salinas v. Allstate Texas Lloyd's Co.*, 278 F.Supp.2d 820, 823-24 (S.D. Tex. 2003); *Mungia v. State Farm Lloyds*, 2008 WL 1874561 at \*1 (5th Cir. 2008) (not designated for publication); *Sailer v. State Farm Lloyds*, 2008 WL 638183 at \*1 (5th Cir. 2008) (not designated for publication); *Salinas v. State Farm Lloyds*, 2008 WL 552498 at \*3 (5th Cir. 2008) (not designated for publication); *Smith v. Allstate Ins.*, 2007 WL 677992 at \*4 (S.D. Tex. 2007) (not designated for publication); *Gordon v. Allstate Texas Lloyd's*, 2006 WL 2827233 at \*2 (S.D. Tex. 2006) (not designated for publication).

*Betzel v. State Farm Lloyds*, 480 F.3d 704, 709 (5th Cir. 2007), on which Page relies (Response at 5-6), called this coverage issue an “unsettled and important question of state law.” The Court should grant review and address these important matters now.

## II. **BALANDRAN DOES NOT APPLY.**

In its entirety, the court of appeals’ holding on the coverage question was that this Court said the exclusion repeal provision was ambiguous in *Balandran*, the provision has not become unambiguous since then, and so there is mold coverage. *Page*, \_\_\_ S.W.3d at \_\_\_, 2008 WL 2374760 at \*5. Page does not even try to defend this analysis. Nor does she try to defend the court of appeals’ gross mischaracterization of contrary case law.<sup>2</sup> Instead, Page presents her own theories on why *Balandran* should apply here.

**First**, Page says the “exact same reasoning” which led this Court to find the exclusion repeal provision ambiguous in *Balandran* “applies to exclusion 1.f [the mold exclusion] as well. There is no difference whatsoever in applying this argument.” Response at 3. But the reasons that the *Balandran* rationale does not apply to the mold

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<sup>2</sup> The court of appeals stated that “[t]he federal courts necessarily followed the lead of the Fifth Circuit” on the coverage issue. \_\_\_ S.W.3d at \_\_\_, 2008 WL 2374760 at \*14 n.5. In fact, *Gordon, Smith, Salinas*, and the district court opinion in *Fiess* came out *before* the Fifth Circuit first addressed the issue in *Carrizales*.

The court of appeals also stated that *Justice v. State Farm Lloyds Insurance Co.*, 246 S.W.3d 762, 768 (Tex. App.—Houston [14th Dist.] 2008, no pet.), “is inapposite because it involved mold damage resulting from a tree which had fallen on the Justices’ home. Thus, the Justices’ claim was governed by Item 10 of the ‘Section I – Perils Insured Against’ [section] in the HO-B policy for ‘Falling Objects.’” \_\_\_ S.W.3d at \_\_\_, 2008 WL 2374760 at \*14 n.5 (citation omitted). A tree fell on the Justices’ residence, rainwater came in through the hole, and mold developed from the rainwater. 246 S.W.3d at 764, 765. The claim was not governed by the Falling Objects provision; that clause was not even mentioned in the Fourteenth Court’s opinions. On the contrary, it was the mold exclusion that was at issue. *Id.* at 764, 766, 767, 768.

exclusion have been well articulated by the federal courts in opinions that Page, like the court of appeals, refused to analyze.

Chief Judge Jones, writing for the majority in *Carrizales*, explained that if this Court had held in *Balandran* that the exclusion repeal provision did not apply to foundation damage to the dwelling, then it could not have applied to any foundation damage at all and would have been a nullity. *Carrizales*, 518 F.3d at 347; *see Balandran*, 972 S.W.2d at 741. Page herself acknowledges that “exclusion 1.h [the foundation damage exclusion] only applied to the foundation, which itself could only apply to damages to the dwelling and not to personal property[.]” Response at 3. But the same is not true in regard to the exclusion repeal provision and mold damage; the provision can certainly apply to mold damage to personal property.

Indeed, the exclusion repeal provision is found *only* in the personal property section of the policy, Coverage B; it is not found in Coverage A, which addresses the dwelling. CR 89. The mold exclusion, on the other hand, clearly applies to Coverage A. CR 90 (“The following exclusions apply to loss to property described under Coverage A (Dwelling) or Coverage B (Personal Property) . . . . rust, rot, mold or other fungi . . .”).

Chief Judge Jones also observed another fact that the court of appeals and Page ignored – in *Balandran*, this Court “did not say that [the exclusion repeal provision] of Coverage B repealed all covered exclusions for both itself and Coverage A.” *Carrizales*, 518 F.3d at 347. On the contrary, this Court focused on exclusion 1.h, the foundation exclusion. *Id.* “[I]t does not follow that every exclusion is repealed with respect to plumbing leaks.” *Id.* at 348.

Judge Reavley, concurring in *Carrizales*, noted that mold – unlike foundation damage – can affect both real and personal property, so the exclusion repeal provision is not deprived of meaning by a holding (consistent with the policy language) that it reinstates mold coverage *only* for losses to personal property. 518 F.3d at 352. As Page herself observes, “mold damage is different than foundation damage in that it can apply to both the dwelling and the personal property[.]” Response at 3.

Judge Reavley also noted that the exclusion repeal provision expressly negates the mold exclusion with respect to “loss caused by this peril” and the “peril” referred to is plumbing leaks which affect the insured’s *personal property*. 518 F.3d at 352. The *Salinas* court was of like mind, holding that the exclusion repeal provision was intended to broaden coverage for certain *personal property* damaged by plumbing leaks, and that the provision did not apply to eliminate the mold exclusion when mold damage occurred to *the dwelling*. *Salinas v. Allstate Texas Lloyd’s Co.*, 278 F.Supp.2d 820, 823-24 (S.D. Tex. 2002).

**Second**, Page says that to adopt the federal courts’ interpretation “would either render a portion of the policy meaningless, or it would mean that you would have to apply the exact same language differently to two different exclusions with no basis for doing so.” Response at 3. Neither scenario would occur. As Chief Judge Jones and Judge Reavley both explained, to hold that the exclusion repeal provision, which is found only in the personal property section of the policy, does not repeal the mold exclusion in regard to the dwelling does not leave the provision without meaning because it would still apply to personal property. 518 F.3d at 347-48, 351-52. That is one basis for confining

the exclusion repeal provision, as applied to the mold exclusion, to the personal property section of the policy – right where it is found.

**Third**, Page says that, “Starting in 1978, it was clear that the plumbing leak exception [the exclusion repeal provision] repealed the exclusions at issue here both as to personal property and as to the dwelling.” Response at 4. She does not provide any authority for that statement, and there is none. Until the court of appeals’ opinion in this case, no court had ever held that the exclusion repeal provision, which is found only in the personal property section of the policy, somehow prevented the mold exclusion, which applies on its face to both the dwelling and personal property, from applying to the dwelling.

### **III. THE FIFTH CIRCUIT’S DICTA IN *BETZEL* – A CASE DECIDED BEFORE AND IGNORED BY *CARRIZALES* – DOES NOT HELP PAGE.**

As support for her argument that *Fiess* does not apply here, Page relies on the Fifth Circuit’s opinion in *Betzel*. Response at 5-6. In that case, State Farm asked the Fifth Circuit to affirm a summary judgment “on an alternative ground raised below: that the Texas HO-B policy does not cover mold. This argument, urges State Farm, is directly supported by the Texas Supreme Court’s recent decision in *Fiess*.” 480 F.3d at 709. The Fifth Circuit wrote that it “disagree[d] that *Fiess* is dispositive and decline[d] to affirm on this alternative ground.” *Id.* The court noted that it had not addressed the *Fiesses*’ exclusion-repeal provision argument because of a defect in their notice of appeal and that the Texas Supreme Court had declined to address it, as well. *Id.*

From this, Page concludes that “*Fiess* does not apply to this situation.” Response at 6. While the court of appeals was wrong for several reasons – not just because of *Fiess* – it is worth pointing out that Page’s reliance on *Betzel* is misplaced.

“Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta*, and lack the force of an adjudication.” BLACK’S LAW DICTIONARY 409 (5th ed. 1979); accord *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 662 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Burrage v. Hunt Prod. Co.*, 114 S.W.2d 1228, 1235 (Tex. Civ. App.—Dallas 1938, writ dism’d). Plainly, the Fifth Circuit’s remark that *Fiess* was not dispositive was neither “involved nor essential to [the] determination” of *Betzel* – the court even specified that it “decline[d] to further address this unsettled and important question of state law” because “[i]t is neither necessary to this opinion, nor was it fully briefed by the parties.” 480 F.3d at 709 (emphasis added).<sup>3</sup> Thus, *Betzel* presents a clear example of *obiter dictum*. See *Bucek v. State*, 724 S.W.2d 129, 131 (Tex. App.—Fort Worth 1987, no pet.) (rejecting sister court’s conclusion because it was “*dicta* and was made on an unbriefed and unassigned point of error”).

*Carrizales* proves this point. Nowhere in any of the *Carrizales* opinions is *Betzel* even mentioned. On the contrary, the *Carrizales* majority observed that in *Fiess*, this Court had answered the Fifth Circuit’s certified question “with a broadly phrased and

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<sup>3</sup> Under the Fifth Circuit’s jurisprudence, “issues not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals.” *Trico Marine Assets Inc. v. Diamond B Marine Servs.*, 332 F.3d 779, 790 n.6 (5th Cir. 2003); *In re Texas Mortgage Serv. Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985).

unambiguous ‘no’” and that “[n]otwithstanding *Balandran*, *Fiess* shows an obvious direction in the Texas Supreme Court’s mold jurisprudence that is easier to reconcile with the result we reach in this case than with the result plaintiffs ask us to announce.” 518 F.3d at 347, 348. Clearly, the *Carrizales* panel did not regard *Betzel* as controlling, as it would have if *Betzel* had really announced a holding on the issue. See *Kanida v. Gulf Coast Med. Pers., LP*, 363 F.3d 568, 574 (5th Cir. 2004) (“[I]t is the firm rule of this circuit that one panel may not overrule the decisions of another.”); *Foster v. Quarterman*, 466 F.3d 359, 367-68 (5th Cir. 2006) (“Absent an en banc, or intervening Supreme Court, decision, one panel of this court may not overrule a prior panel’s decision.”).

Even before *Carrizales*, the *Gordon* and *Smith* opinions concluded that *Fiess* is broad enough to foreclose the *Balandran* argument by itself. 2006 WL 2827233 at \*2; 2007 WL 677992 at \*4. *Betzel* is clearly not to the contrary.

#### **IV. WHETHER THE HO-B POLICY PROVIDES COVERAGE WHEN MOLD DAMAGE TO PERSONAL PROPERTY RESULTS FROM PLUMBING LEAKS IS NOT AT ISSUE HERE.**

Page devotes a portion of her response to arguing that the HO-B policy provides coverage when mold damage to personal property results from plumbing leaks. Response at 6-7. State Farm has not argued otherwise to this Court or even listed that question as an issue in its Issues Presented. Whether the HO-B policy provides coverage when mold damage to personal property results from plumbing leaks is not involved.

#### **CONCLUSION AND PRAYER FOR RELIEF**

State Farm and Erin Strachan respectfully ask the Court to grant their petition, reverse the judgment of the court of appeals, and affirm the trial court’s judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing reply has been forwarded to the individuals listed below by the indicated method on this \_\_\_\_ day of January 2009:

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