

NO. 10-07-00228-CV

IN THE
COURT OF APPEALS
FOR THE
TENTH DISTRICT OF TEXAS
AT WACO

WANDA PAGE, Appellant

V.

STATE FARM LLOYDS, ET AL., Appellees

Appealed from the 18th District Court
of Johnson County, Texas, Cause # 2004-00452

APPELLANT HEREBY REQUESTS ORAL ARGUMENT

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
NAMES OF PARTIES	4
INDEX OF AUTHORITIES	5
STATEMENT OF THE CASE	6
POINT OF ERROR ONE	6
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	9
ARGUMENT AND AUTHORITIES.....	10
POINT OF ERROR TWO.....	22

POINT OF ERROR ONE RESTATED:

The trial court erred in granting appellees’ motion for summary judgment.

- (1) **Fiess did not hold that mold damage is universally excluded as argued by State Farm to the trial court**.....10

- (2) **There is evidence that the damage to Plaintiff’s personal property was caused by accidental discharge from a plumbing, heating or air-conditioning system, and as such is covered under the policy**16

- (3) **There is evidence that State Farm has not fully paid for the damages to Plaintiff’s personal property owed under the policy**18

- (4) **There is evidence that the damage to Plaintiff’s residence was caused by accidental discharge from a plumbing, heating or air-conditioning system, and as such is covered under the policy**18

- (5) **There is evidence that State Farm has not fully paid for the damages to Plaintiff’s residence owed under the policy**20

- (6) **Because Plaintiff’s contractual claims are viable, summary judgment should not have been granted on Plaintiff’s extra-contractual claims as well**.....20

POINT OF ERROR TWO RESTATED:

The trial court erred in failing to sustain Plaintiff's Objection to the Motion for Reconsideration.

- (1) **To the extent the Court granted summary judgment on any grounds not presented in the Motion for Reconsideration, the trial court erred in failing to sustain Plaintiff's objection to the motion.....22**

PRAYER 24

NECESSARY CONTENTS APPENDIX

- (A) May 25, 2006 Order on Defendants' Motion for Summary Judgment, attached hereto as "Exhibit A."
- (B) October 4, 2006 Order on Defendants' Motion for Summary Judgment, attached hereto as "Exhibit B."
- (C) April 24, 2007 Order of Final Judgment, attached hereto as "Exhibit C."
- (D) Plaintiff's insurance contract with State Farm, attached hereto as "Exhibit D."

OPTIONAL CONTENTS APPENDIX

- (A) Plaintiff's Original Petition, attached hereto as "Exhibit A."
- (B) Defendants' Motion for Summary Judgment (without Exhibits), attached hereto as "Exhibit B."
- (C) Defendants' Motion to Reconsider Defendants' Motion for Summary Judgment, attached hereto as "Exhibit C."
- (D) Plaintiff's Response to Defendants' Motion to Reconsider Defendants' Motion for Summary Judgment (without Exhibits), attached hereto as "Exhibit D."
- (E) Affidavit of Gary Pennington, attached hereto as "Exhibit E."
- (F) Affidavit of Peter de la Mora, attached hereto as "Exhibit F."
- (G) *Fiess v. State Farm Lloyds* decision, attached hereto as "Exhibit G."
- (H) *Betzel v. State Farm Lloyds* decision, attached hereto as "Exhibit H."

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INDEX OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Balandran v. Safeco Ins. Co. of America</i> , 972 S.W.2d 738 (Tex.1998)	12-15
<i>Bean v. Reynolds Realty Group</i> , 192 S.W.3d 856 (Tex.App.–Texarkana 2006, no pet.) ...	25
<i>Betzel v. State Farm Lloyds</i> , 480 F.3d 704 (5 th Cir.2007)	11
<i>Canutillo School Dist. v. Nat. Union Fire Ins. Co.</i> , 99 F.3d 695 (5 th Cir.1996)	13
<i>City of Pinehurst v. Spooner Addition Water Co.</i> , 432 S.W.2d 515 (Tex.1968	12
<i>Fiess v. State Farm Lloyds</i> , 202 S.W.3d 744 (Tex.2006)	10, 11
<i>Golden Triangle Energy v. Wickes Lumber</i> , 725 S.W.2d 439 (Tex.App.—Beaumont 1987, no writ)	24
<i>McConnell Const. Co. v. Ins. Co. of St. Louis</i> , 428 S.W.2d 659 (Tex. 1968)	13

<i>McConnell v. Southside Indep. School Dist.</i> , 858 S.W.2d 337 (Tex.1993)	23-24
<i>Meru v. Huertas</i> , 136 S.W.3d 383 (Tex.App.–Corpus Christi 2004, no pet.)	25
<i>Murray v. Lester Dyke</i> , 41 S.W.3d 746 (Tex.App.–Corpus Christi 2001)	24
<i>National Union Fire Ins. Co. v. Hudson Energy Co.</i> , 811 S.W.2d 552 (Tex.1991)....	12, 16
<i>Nationwide Fire & Cas. Co. v. Vaughan</i> , 968 S.W.2d 931 (Tex.1998)	12, 16
<i>Oasis Oil Corp. v. Koch Ref. Co., L.P.</i> , 60 S.W.3d 248 (Tex.App.–Corpus Christi 2001, pet. den.)	25
<i>O’Neill v. Startex Petroleum, Inc.</i> , 715 S.W.2d 802 (Tex.App.–Austin 1986)	23
<i>Oram v. State Farm Lloyds</i> , 977 S.W.2d 163 (Tex.App.–Austin 1998, no writ)	14
<i>R & P Enterprises v. LaGuarta, Gabrel & Kirk, Inc.</i> , 596 S.W.2d 517 (Tex.1980)	12
<i>Science Spectrum, Inc. v. Martinez</i> , 941 S.W.2d 910(Tex.1997).....	24
<i>State Bar of Texas v. Heard</i> , 603 S.W.2d 829 (Tex.1980)	23
<i>State Farm Fire & Cas. v. Price</i> , 845 S.W.2d 427 (Tex.App.–Amarillo 1992, writ dism’d by agr.)	14
<i>Stiles v. Resolution Trust Corp</i> , 867 S.W.2d 24 (Tex.1993)	24
<i>Texas Farmers Ins. Co. v. Murphy</i> , 996 S.W.2d 873 (Tex.1999)	12, 13
<i>Universal Life Insurance Company v. Giles</i> , 950 S.W.2d 48 (Tex. 1997)	21-22

STATUTES AND RULES

TEXAS INSURANCE CODE §§ 541.003, 541.060 and 541.061 (formerly Article 21.21, Sec. 4(1), (2), (10) and (11) of the Texas Insurance Code	21
TEXAS INSURANCE CODE §§ 542.055, 542.056, 542.057, 542.058 and 542.060 (formerly Article 21.55, Sec. 2, 3, 4 and 6 of the Texas Insurance Code)	21
Tex.R.Civ.P. 166a(b) and (i)	24

STATEMENT OF THE CASE

This is a case involving a homeowners insurance claim for mold and water damage. Wanda Page filed suit against State Farm Lloyds and Erin Strachan (hereinafter collectively referred to as “State Farm”) for breach of contract, common law bad faith, Insurance Code violations, Deceptive Trade Practices Act (“DTPA”) violations and fraud. (I C.R. at 12-23) State Farm moved for summary judgment on all claims. (I C.R. at 38-70). The trial court initially denied the motion. (III C.R. at 554). State Farm then filed a motion to reconsider. (III C.R. at 555-61) The trial court granted the motion to reconsider. (IV C.R. at 781-82) The court then entered a final judgment. (V C.R. at 836). This appeal followed.

POINT OF ERROR ONE

The trial court erred in granting appellee’s motion for summary judgment.

STATEMENT OF THE FACTS

On June 29, 2001, Plaintiff Wanda Page discovered mold and water damage in her home located at 406 W. Hillcrest Street, Keene, Texas 76059. (I C.R. at 13) The mold and water damage was primarily caused by plumbing and air conditioning leaks. (IV C.R. at 631-634) Ms. Page had purchased homeowners insurance with State Farm Lloyds. (I C.R. at 13) Since Ms. Page had paid all her premiums for this insurance, the policy was fully in effect in June, 2001 when the loss occurred. *Id.* The insurance policy was the standard “HO-B” policy that most Texas homeowners had at the time. *Id.* It is undisputed that the policy covered water damage resulting from the accidental discharge of water from a plumbing, heating or air conditioning system. Ms. Page turned the matter over to her insurance carrier, State Farm, to investigate the

claim. (I C.R. at 42)

An investigation by a plumber confirmed the presence of plumbing leaks, including sewer line leaks. *Id.* A company State Farm hired called Industrial Hygiene & Safety Technology, Inc. (“IHST”) investigated the home and found several types of potentially dangerous mold, including *Aspergillus/Penicillium*, *Stachybotrys*, and *Chaetomium*. (II C.R. at 256-59) State Farm’s investigators concluded that both the home and contents required remediation and in some cases, that the contents be discarded. (II C.R. at 260-62) On September 5, 2001, an adjuster for State Farm, Erin Strachan, informed Ms. Page that State Farm would pay for the scope of work recommended by IHST. (I C.R. at 101) State Farm subsequently issued a check in the amount of \$12,644 for remediation and repair of the home, and a check in the amount of \$13,631.24 for remediation of the personal contents in the home, plus three months of additional living expense (“ALE”) coverage at \$475 a month. (I C.R. at 122)

A dispute arose over the amounts necessary to properly remediate and repair the home and contents. On May 7, 2002, Ms. Page requested that State Farm make payment to replace the carpet in the home due to the presence of mold. (I C.R. at 146) On May 10, 2002, State Farm wrote back refusing to pay to replace the carpet. (I C.R. at 148) Ms. Page subsequently notified State Farm that the amounts paid were inadequate to properly repair her home and contents. (I C.R. at 150-52)

On July 1, 2003, State Farm wrote to Ms. Page and informed her that no further amounts would be paid to fix her home. (I C.R. at 156-58) In her letter, the adjuster stated the

following:

State Farm has thoroughly evaluated your claim and issued payments to you totaling \$31,893.26 for water and mold damage *covered by your policy*. We believe this to be a correct evaluation of the *covered damages*. *Id.*

Although State Farm claimed it had paid all it owed on July 1, 2003, apparently realizing its error, over two years later on October 12, 2005, it tendered to Ms. Page another check for remediation of the attic area of the home. (I C.R. at 45) In other words, State Farm made all payments it claims it owed under the policy over four years after the claim was originally made. In summary, State Farm has tendered payment to Ms. Page \$25,686.21 to remediate and repair her home, and \$12,206.24 for remediation of the contents. *Id.* Ms. Page's experts dispute that this amount is adequate to properly fix the home and contents, and to this day, the home and contents remain unrepaired. (IV C.R. at 709-711)

At the same time State Farm was telling Ms. Page that the mold damage to her home and contents was a covered loss, State Farm was telling the Courts of this State that in fact mold damage (at least to the dwelling) was not covered at all. On February 21, 2006, State Farm moved for summary judgment on all of Plaintiff's claims arguing, among other things, that mold damage to her home was not covered. (I C.R. at 38-70) At the time, Plaintiff was acting *pro se*. (I C.R. at 72) Importantly for the purposes of this appeal, State Farm did not argue that the mold damage to Plaintiff's personal property was not a covered loss. On May 25, 2006, the trial court denied State Farm's Motion for Summary Judgment. (III C.R. at 554)

On August 31, 2006, the Texas Supreme Court issued its ruling in the case styled *Fiess v. State Farm Lloyds*. In that case, the Court held that the so called "ensuing loss" provision

does not provide coverage for mold damage. Because error had not been preserved, the Court did not reach the question of whether the so-called “plumbing leak” exception provided coverage for mold damage to a dwelling or personal property.

Acting with somewhat remarkable speed, the very next day State Farm in the present case filed its Motion to Reconsider Defendants’ Motion for Summary Judgment, claiming that the Texas Supreme Court had ruled that mold was never a covered loss under Plaintiff’s homeowners insurance policy. (III C.R. at 555-61) On October 4, 2006, the trial court granted Defendants’ Motion to Reconsider “regarding any and all claims for mold damage.” (IV C.R. at 781) State Farm then filed its Request for Entry of Final Judgment arguing that “Plaintiff’s claims in this matter all arise out of and are dependent on her insurance claim for mold damage to her home.” (IV C.R. at 787-88) The trial court granted this Request and entered a Final Judgment on April 23, 2007, (V C.R. at 836)

SUMMARY OF THE ARGUMENT

The trial court erred in granting State Farm’s motion for summary judgment. State Farm misrepresented to the trial court the holding in *Fiess v. State Farm*. That case did not hold that mold was never a covered loss, rather, that the “ensuing loss” provision did not provide mold coverage. The typical situation in which a homeowner claimed mold coverage pursuant to the “ensuing loss” provision would be water damage resulting from roof or window leaks.

The Texas Supreme Court specifically noted that it did not reach the issue over whether the “plumbing leak” exception provided mold coverage because error had not been preserved below. In the present case, all of the mold and water damage, with the exception of the mold

found above the detached garage, resulted from plumbing and air conditioning leaks. As will be shown below, the policy language itself, as well as the 1997 Texas Supreme Court decision in *Balandran v. Safeco*, show that the mold damage to the home and personal property in the present case resulting from plumbing leaks is a covered loss. As such, because the loss is covered, and because there is evidence that State Farm has not paid the amount required to properly fix the home and contents, summary judgment was granted in error.

Furthermore, to the extent the trial court granted summary judgment on any ground not specifically contained in the Motion to Reconsider, the trial court erred by not sustaining Plaintiff's objection to the Motion to Reconsider. As such, this cause should be remanded for further proceedings on the merits.

ARGUMENT AND AUTHORITIES

(1) **Fiess did not hold that mold damage is universally excluded as argued by State Farm to the trial court**

Contrary to the argument State Farm made to the trial court, the Texas Supreme 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, the Court said 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, the 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. As such, the court declined to address this “unsettled and important question of state law.” *Id.*

The discussion below will focus on why mold damage to the *dwelling* resulting from plumbing and air conditioning leaks is covered under the policy. Despite State Farm’s representations to the trial court, and pursuant to the clear policy language, Plaintiff presumes that State Farm is not attempting to argue to this Court that mold damage to Plaintiff’s *personal property* caused by plumbing and air conditioning leaks is not covered. The insurance policy at issue in this case clearly states that the mold exclusion as to personal property is repealed by the plumbing leak exception. (I C.R. at 89-90) In other words, mold damage resulting from plumbing or air conditioning leaks is clearly covered under the policy at issue in this case. If in fact State Farm actually advances a contrary argument, however, it will be

addressed in Plaintiff's reply brief.

A. General rules of insurance contract interpretation

The general rules of contract construction govern the interpretation of an insurance policy. *See Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex.1999). The question of whether a contract is ambiguous is one of law for the court. *See City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex.1968). The primary concern of courts in interpreting contracts is to ascertain and give effect to the intent of the parties as expressed in the instrument. *See R & P Enterprises v. LaGuarta, Gabrel & Kirk, Inc.*, 596 S.W.2d 517, 518-59 (Tex.1980). To achieve this goal, the court will read all parts of the contract together, striving to give meaning to every sentence, clause, and word to avoid rendering any portion meaningless. *See Balandran v. Safeco Ins. Co. of America*, 972 S.W.2d 738, 741 (Tex.1998).

If a contract is so worded that a court may give it a certain or definite meaning, it is not ambiguous. *See LaGuarta*, 596 S.W.2d at 519. If, however, a contract is subject to two or more reasonable interpretations, it is ambiguous. *See Balandran*, 972 S.W.2d at 741.

If an insurance policy is ambiguous and subject to more than one reasonable interpretation, the Court must adopt the construction most favorable to the insured. *See Nationwide Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex.1998); *See Balandran*, 972 S.W.2d at 741 (contracts subject to two or more reasonable interpretations are ambiguous and construed in favor of the insured). In particular, limitations on liability are strictly construed against the insurer and in favor of the insured. *See National Union Fire Ins. Co. v. Hudson Energy Co. Inc.*, 811 S.W.2d 552, 555 (Tex.1991).

Under Texas law, the insured bears the initial burden of showing that there is coverage. *See Canutillo School Dist. v. Nat. Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir.1996). It is not disputed that Plaintiff made all payments and was covered under the insurance policy issued by State Farm. Plaintiff's insurance policy states the following:

COVERAGE A (DWELLING)

We insure against all risks of physical loss to the property described in Section I Property Coverage, Coverage A (Dwelling) unless the loss is excluded in Section I Exclusions.

(I C.R. at 89) Therefore, Plaintiff can easily establish her burden that she was covered under the policy. *See McConnell Const. Co. v. Ins. Co. of St. Louis*, 428 S.W.2d 659, 660 (Tex. 1968) (“As the policy contains an ‘all risks’ insuring clause, damage to property by corrosion is covered unless excluded from the policy coverage.”). The policy covers all risks unless excluded.

Once the insured establishes coverage, the *insurer* bears the burden of establishing that an exclusion in the policy applies. *See Canutillo*, 99 F.3d at 701; TEX.INS.CODE art. 21.58(b); *See also Murphy*, 996 S.W.2d at 879-80 (insurer has the burden to plead, prove, and secure findings to sustain an affirmative defense that limits are bars recovery).

B. Mold damage to the dwelling resulting from plumbing leaks is covered

The mold damage in this case resulted from water damages that was as a result of plumbing and air conditioning leaks. Exclusion f. (the so-called “mold exclusion) is inapplicable to mold damage resulting from a plumbing and/or air conditioning leak. *See Balandran*, 972 S.W.2d 738 (Tex.1998). In *Balandran*, the insureds brought an action against

their homeowners insurer to recover for damage to their foundation caused by water from a broken sewer line. *See id.* The Balandrans' policy had the exact same language as the policy in the present case. *See id.* at 739-40. The insurance company argued that section 1.h. of the Exclusions section precluded coverage. The Court, however, dismissed that argument because of the language in the "Perils Insured Against" section of the policy which states:

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 such, exclusion f. does not apply to mold damage as a result of a plumbing leak. *See also Oram v. State Farm Lloyds*, 977 S.W.2d 163 (Tex.App.–Austin 1998, no writ); and *State Farm Fire & Cas. v. Price*, 845 S.W.2d 427 (Tex.App.–Amarillo 1992, writ dism'd by agr. (evidence supported verdict finding coverage for plumbing leak and foundation damage caused by plumbing leak)).

State Farm may attempt to argue that the Court in *Balandran* found that the policy only repealed exclusion 1(h) as to the dwelling because to do so would render a portion of the meaningless. What State Farm will probably fail to mention, however, is that was one of the bases for finding an ambiguity in the policy, not the only basis. The Court also noted that "the policy on its face states that Exclusion 1(h) does not apply to loss caused by a plumbing leak;

this repeal of Exclusion 1(h) is not expressly limited to personal property losses.” *Balandran*, 972 S.W.2d 738, 741 (Tex.1998). The Court further looked to the surrounding circumstances in the change in the policy form in 1978. The Court noted that the change in location of the plumbing leak exception could not have been meant to make it only applicable to personal property loss since the plumbing leak exception applied to the dwelling before the re-write, and there was not to be any substantive changes to coverage after the re-writing of the policy. *See id.* at 742.

State Farm argues that the *Fiess* case precludes coverage, at least coverage for the dwelling. The facts in *Fiess*, however, do not apply to the plumbing leak exception found in the policy. As the Texas Supreme Court in *Fiess* noted, the plaintiffs in that case failed to preserve error regarding whether or not the plumbing leak exception provides coverage for mold damage. The issue before the Texas Supreme Court dealt with the “ensuing loss” clause found in exclusion f, not the plumbing leak exception found on the previous page.

The arguments set forth above show conclusively that the Texas HO-B Policy unambiguously covers mold damage resulting from water damage to a house and personal property as a result of plumbing, heating, air conditioning and appliance leaks.

C. Alternatively, the contract is ambiguous and therefore must be construed in favor of coverage

If an insurance contract is subject to two or more reasonable interpretations, it is ambiguous. *See Balandran*, 972 S.W.2d at 741. Plaintiff contends that the insurance contract between her and State Farm unambiguously provides coverage for mold damage.

In the alternative, however, Plaintiff contends that the contract is ambiguous and that since Plaintiff's interpretation (as stated above) is reasonable, that therefore the Court must adopt the construction most favorable to the insured. *See Vaughan*, 968 S.W.2d at 933 (Tex.1998); *See National Union*, 811 S.W.2d at 555 (Tex.1991) (limitations on liability are strictly construed against the insurer and in favor of the insured).

- (2) **There is evidence that the damage to Plaintiff's personal property was caused by accidental discharge from a plumbing, heating or air-conditioning system, and as such is covered under the policy.**

Although not argued by State Farm in its Motion for Summary Judgment or its Motion to Reconsider, and presumably not before this Court on appeal, in the interest of completeness, there is much more than a scintilla of evidence supporting Plaintiff's claim that plumbing and air-conditioning leaks caused damage to Plaintiff's personal property. The detailed affidavit and report of a licensed professional engineer, Peter de la Mora, states the following:

Based upon my education, training, experience and established engineering and mold assessment practices and principles it is my opinion that plumbing and air-conditioning leaks have caused water and mold damage to the Page residence and contents that require repair.

(IV C.R. at 631-34)

Mr. de la Mora basis this conclusion on the location of the plumbing and air-conditioning leaks, the correlation between the areas of water and mold damage and the location of the leaks, and the consideration and rejection of other plausible causes. *Id.*

In addition to the testimony and report of Peter de la Mora, evidence of causation includes the report of RCI Environmental, Inc. (“RCI”). (II C.R. at 324-82) That report found mold growing in the home and on the contents throughout the residence. (II C.R. at 339) It was RCI’s professional opinion, after having conducted over 2000 inspections over a thirteen year period, that the mold damage was caused by leaks in the sanitary sewer line, the air conditioner drain line, the master bathroom shower stall faucet, both supply lines to the hallway bathroom sink closet, and elevated humidity caused by the water leaks. (II C.R. at 339-40) Only the water damage above the attached garage was caused by a roof leak. (II C.R. at 340) The report recommended that due to the leaks, the home and contents be remediated and some of the contents discarded. (II C.R. at 340-46)

Finally, State Farm’s own experts, AirTech Environmental, Inc., concluded that “[t]he proximate cause of damage was a leak in the supply line under the house.” (II C.R. at 288) In addition, another State Farm expert, Risk Management & Engineering, Ltd. (“RME”) references a May 24, 2005 State Farm letter in its report which notes that a “total of \$12,206.24 was paid for ‘Covered Personal Property Damage.’”(I C.R. at 171) Although disagreeing with RCI’s conclusions as to causation, RME agreed with RCI’s conclusions that there was visible mold in the residence and contents and that remediation of the home and contents was required. (I C.R. at 170)

As such, there is more than a scintilla of evidence which supports Plaintiff’s claim that the mold damage to her personal property was caused by plumbing and air-conditioning leaks. Therefore, summary judgment was improper.

(3) **There is evidence that State Farm has not fully paid for the damages to Plaintiff's personal property owed under the policy .**

Although not argued by State Farm in its Motion to Reconsider, and presumably not before this Court on appeal, there is also evidence that State Farm has not fully paid for the damage to Plaintiff's personal property owed under the policy. Plaintiff submitted an affidavit and estimates from Gary Pennington in which he estimated the cost to remediate Plaintiff's personal property using a software system called Xactimate which is utilized by, and generally accepted by, insurance companies. (IV C.R. at 709-11) Mr. Pennington estimated that it would cost \$26,689.00 to clean the contents. Id. Since State Farm has only paid Plaintiff \$12,206.24 for cleaning of contents, a fact issue remains over whether State Farm breached its contract with Plaintiff by refusing to pay the difference.

(4) **There is evidence that the damage to Plaintiff's residence was caused by accidental discharge from a plumbing, heating or air-conditioning system, and as such is covered under the policy .**

Although not argued by State Farm in its Motion to Reconsider, and presumably not before this Court on appeal, there is much more than a scintilla of evidence supporting Plaintiff's claim that plumbing and air-conditioning leaks caused damage to Plaintiff's residence as well. As stated above, the detailed affidavit and report of a licensed professional engineer, Peter de la Mora, states the following:

Based upon my education, training, experience and established engineering and mold assessment practices and principles it is my opinion that plumbing and air-conditioning leaks have caused water and mold damage to the Page residence and contents that require repair.

(IV C.R. at 631-34)

Mr. de la Mora basis this conclusion on the location of the plumbing and air-conditioning leaks, the correlation between the areas of water and mold damage and the location of the leaks, and the consideration and rejection of other plausible causes. *Id.*

Similarly to the evidence of causation regarding contents, in addition to the testimony and report of Peter de la Mora, evidence of causation regarding the home includes the report of RCI Environmental, Inc. (“RCI”). That report found mold growing in the home and on the contents throughout the residence.(II C.R. at 339) It was RCI’s professional opinion, after having conducted over 2000 inspections over a thirteen year period, that the mold damage was caused by leaks in the sanitary sewer line, the air conditioner drain line, the master bathroom shower stall faucet, both supply lines to the hallway bathroom sink closet, and elevated humidity caused by the water leaks. (II C.R. at 339-40) Only the water damage above the attached garage was caused by a roof leak. (II C.R. at 340) The report recommended that due to the leaks, the home be remediated. (II C.R. at 340-46) Finally, State Farm’s own experts, AirTech Environmental, Inc., concluded that “[t]he proximate cause of damage was a leak in the supply line under the house.” (II. C.R. at 288)

As such, there is much more than a scintilla of evidence which supports Plaintiff’s claim that the mold damage to her residence was caused by plumbing and air-conditioning leaks. Therefore, summary judgment was improper.

(5) **There is evidence that State Farm has not fully paid for the damages to Plaintiff's personal property owed under the policy**

Although not argued by State Farm in its Motion to Reconsider, and therefore presumably not before this Court on appeal, there is also evidence that State Farm has not fully paid for the damage to Plaintiff's residence owed under the policy. Plaintiff submitted an affidavit and estimates from Gary Pennington in which he estimated the cost to remediate and repair Plaintiff's home using a software system called Xactimate which is utilized by, and generally accepted by, insurance companies. (IV C.R. at 709-11) Mr. Pennington estimated that it would cost \$54,527 to remediate the home, and \$25,494.91 to rebuild it after remediation. *Id.* Since State Farm has only paid Plaintiff \$25,686.21 for remediation and repairs to the home, a fact issue remains over whether State Farm breached its contract with Plaintiff by refusing to pay the difference.

(6) **Because Plaintiff's contractual claims are viable, summary judgment should not have been granted on Plaintiff's extra-contractual claims as well.**

Other than arguing that Plaintiff's misrepresentation claims failed due to lack of evidence, State Farm's only argument to the trial court regarding Plaintiff's extra-contractual claims was that since *Fiess* barred coverage for mold damage, that all of the extra-contractual claims failed as well. (III C.R. at 555-61) As shown above, however, *Fiess* does not completely bar Plaintiff's causes of action for mold damage, and as such State Farm's brief argument regarding Plaintiff's extra-contractual claims is incorrect.

Regarding State Farm's argument that there is no evidence of misrepresentations and therefore Plaintiff's extra-contractual claims must fail, State Farm's argument ignores the fact

that most of Plaintiff's extra-contractual claims do not involve misrepresentations. For example, Article 21.21, section 4 of the Insurance defines the following as unfair insurance practices which have been pled by Plaintiff:

1. Not attempting in good faith to effectuate prompt, fair, and equitable settlement of Plaintiffs' claims when liability has become reasonably clear;
2. Failing to promptly give Plaintiffs a reasonable explanation for the denial of the claim;
3. Refusing to pay a claim without conducting a reasonable investigation.

SEE TEXAS INSURANCE CODE §§ 541.003, 541.060 and 541.061 (formerly Article 21.21, Sec. 4(1), (2), (10) and (11) of the Texas Insurance Code.

In addition, Plaintiff has alleged statutory violations of the prompt payment provision of the Texas Insurance Code. SEE ID. §§ 542.055, 542.056, 542.057, 542.058 and 542.060 (formerly Article 21.55, Sec. 2, 3, 4 and 6 of the Texas Insurance Code). This provision does not involve any misrepresentations, but rather if Plaintiff can show violations of the timeliness portions of this provision, entitles Plaintiff to recover from State Farm the additional sum of 18 percent per year of the amount payable under the policy, as well as attorneys' fees and other damages. ID.

Furthermore, the standard for a common law bad faith claims is that an insurer commits bad faith by failing to attempt to effectuate a settlement of a claim when the insurer's liability has become reasonably clear. *See Universal Life Insurance Company v. Giles*, 950 S.W.2d 48, 55-56 (Tex. 1997). Whether an insurer acted in bad faith is a fact question for the jury.

See id. at 56.¹ Reasonableness is a fact issue for the jury. *See id.* at n.6. Furthermore, an insurer cannot escape liability by failing to investigate a claim so that it can later contend liability was not reasonably clear. *See id.* n.5. An insurance company can also breach its duty of good faith by failing to reasonably investigate a claim. *See id.* Therefore, the elements of a common law bad faith claim do not have to involve “misrepresentations” as well.

Finally, there is evidence of a misrepresentation by State Farm in the record. Namely, State Farm repeatedly represented to Plaintiff that her claims were covered, while at the same time arguing to the Courts of this State that in fact mold claims are not covered. (I C.R. at 156-57) For five years State Farm told Plaintiff that her claims were covered. Only after obtaining a ruling in its favor, did State Farm inform Plaintiff (by way of a motion for summary judgment) that even though the claims were previously paid and covered, that in fact they were not covered after all.

POINT OF ERROR TWO

The trial court erred in failing to sustain Plaintiff’s Objection to the Motion for Reconsideration.

- (1) **To the extent the Court granted summary judgment on any grounds not presented in the Motion for Reconsideration, the trial court erred in failing to sustain Plaintiff’s objection to the motion.**

State Farm filed its original Motion for Summary Judgment on February 21, 2006. (I C.R. at 38-70) The trial court denied the motion by written order on May 25, 2006. (III C.R.

¹ The Texas Supreme Court recognized that the Texas Constitution confers an exceptionally broad right to trial by jury for litigants in this State and warning that courts must not take this lightly by taking issues away from the jury. *See id.*; Tex. Const. art. I, § 15; art. V, § 10.

at 554) State Farm filed its Motion to Reconsider Defendants' Motion for Summary Judgment on September 1, 2006. (III C.R. at 555-561) Although the motion was entitled a "Motion to Reconsider," the grounds presented in the motion, other than arguing no evidence of misrepresentations, were exclusively based on the Texas Supreme Court decision in *Fiess*.² State Farm misrepresented the *Fiess* holding to the trial court, which was apparently persuaded by State Farm's argument that mold damage is never covered as the Court signed an order granting summary judgment "regarding any and all claims for mold damage" and crossing out the language that the motion should "in all things" be granted. (IV C.R. at 781)

On September 14, 2006, Plaintiff responded to the "Motion to Reconsider." In that response, Plaintiff specifically objected to State Farm's motion as follows:

Plaintiff objects to Defendants' Motion for Reconsideration for the reason that Defendants fail to identify the appropriate standard of review. Defendants neglect to specify if they are seeking a reconsideration on both traditional or no-evidence grounds, or both, or even Defendants' Motion for Partial Summary Judgment. Accordingly, Plaintiff is not clear as to the proper response. As Defendants' Motion for Reconsideration appears to only address *Fiess v. State Farm Lloyds* (see below) ruling and its effect on coverage afforded Ms. Page under her HOB policy with State Farm, Plaintiff's response will address this issue.

(IV C.R. at 605)

"Summary judgment is a harsh remedy which must be strictly construed." *See O'Neill v. Startex Petroleum, Inc.*, 715 S.W.2d 802, 803 (Tex.App.—Austin 1986). It has been squarely held by the Texas Supreme Court that a motion for summary judgment must be denied if the grounds are not presented in the motion. In *McConnell v. Southside Independent School*

² A court should look to the substance of the pleading to determine the nature of it, not merely the form of the title given to it. *See State Bar of Texas v. Heard*, 603 S.W.2d 829, 833 (Tex.1980).

District, the Court stated as follows:

Consistent with the precise language of Rule 166a(c), we hold that a motion for summary judgment must itself expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion. In determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence.

McConnell, 858 S.W.2d 337, 341 (Tex.1993); *See also Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex.1997). Furthermore, if a ground is not stated in the motion, it cannot be supplied by a general prayer for relief. *See Golden Triangle Energy v. Wickes Lumber*, 725 S.W.2d 439, 441 (Tex.App.—Beaumont 1987, no writ). On appeal, the summary judgment cannot be affirmed on a ground not presented to the trial court in the motion. *See Stiles v. Resolution Trust Corp*, 867 S.W.2d 24, 26 (Tex.1993).

It is not clear whether State Farm’s motion to reconsider is brought under Tex.R.Civ.P. 166a(b) (“Traditional Summary Judgment”) or under Tex.R.Civ.P. 166a(i) (“No-Evidence Motion for Summary Judgment”). The motion does not specifically say under which Rule it is brought under.

The failure to clarify whether summary judgment is sought under the no-evidence rule or under the traditional rule is one the courts of appeal see with increasing frequency. *See Murray v. Lester Dyke*, 41 S.W.3d 746, 750 (Tex.App.—Corpus Christi 2001). “This is troubling, because it has the potential of greatly increasing the burden on the responding party.” *Id.*

A no-evidence motion (1) can only be brought against a claim or defense on which an adverse party would have the burden of proof at trial, (2) must state the elements as to which

there is no evidence, (3) must be specific in challenging the evidentiary support for an element of a claim, (4) cannot be conclusory or general. *See Oasis Oil Corp. v. Koch Ref. Co., L.P.*, 60 S.W.3d 248, 252 (Tex.App.–Corpus Christi 2001, pet. den.).

In the present case, State Farm’s motion to reconsider, other than being obviously based on the *Fiess* decision, cannot be considered a no-evidence motion because it does not comply with the Rules of Civil Procedure regarding such a motion. *See Meru v. Huertas*, 136 S.W.3d 383, 386 (Tex.App.–Corpus Christi 2004, no pet.). This requirement is strictly construed. A motion that fails to present grounds is legally insufficient as a matter of law. *See id.*; *See also Bean v. Reynolds Realty Group, Inc.*, 192 S.W.3d 856, 859 (Tex.App.–Texarkana 2006, no pet.).

Furthermore, Plaintiff objected to the motion because it did not clearly specify the grounds it was seeking on summary judgment. The only argument that was clearly made was the *Fiess* precluded all of Plaintiff’s claims. As such, to the extent the trial court considered any other ground for summary judgment other than the *Fiess* argument presented in the Motion to Reconsider, the trial court erred in failing to sustain Plaintiff’s objection to the motion so that Plaintiff could clearly know what she was responding to. To the extent the trial court relied on any ground not presented in the motion, the trial court should have ordered State Farm to re-plead its motion to clearly identify the basis and grounds for the motion.

CONCLUSION

State Farm moved for summary judgment on all claims, which the trial court properly denied. After the *Fiess* ruling was issued, State Farm filed a motion to reconsider the motion,

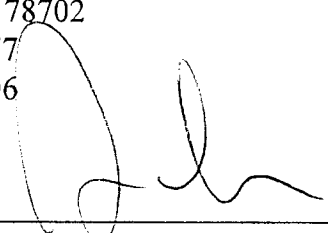
unfortunately misrepresenting the actual holding of the case. The trial court granted State Farm's motion to reconsider "regarding any and all claims for mold damage." This ruling was in error. Furthermore, Plaintiff properly and timely objected to the motion to reconsider because it did not clearly state upon what grounds it sought summary judgment. The trial court should have either denied State Farm's motion to reconsider, or at the very minimum, sustained Plaintiff's objection and required State Farm to accurately plead the grounds for its motion. As such, summary judgment was improperly granted and this cause should be remanded to the trial court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this court reverse the lower court's decision and remand this action in full for a trial on the merits, or alternatively, sever and remand those causes of action which this court finds proper, and that Appellant be granted any such other relief to which he may be justly entitled to.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing legal instrument has been forwarded to all parties of record via **CMRRR**, on this 30th day of October, 2007:

Levon G. Hovnatanian
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John F. Melton