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

REPLY BRIEF FOR APPELLANT

WANDA PAGE

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ARGUMENT AND AUTHORITIES

On February 21, 2006, Defendants State Farm Lloyds and Erin Strachan (hereinafter sometimes collectively referred to as "State Farm") moved for summary judgment. (I C.R. at 38-70). On May 25, 2006, the trial court denied the motion. (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*. The very next day State Farm in the present case filed its Motion to Reconsider Defendants' Motion for Summary Judgment, falsely 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). Plaintiff timely and properly objected to the "Motion to Reconsider" arguing that it did not specify the grounds sought for summary judgment and appeared to only address *Fiess v. State Farm Lloyds*. (IV C.R. at 605). 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). The trial court subsequently entered a Final Judgment on April 23, 2007 (V C.R. at 836).

Appellee's brief in this case is a pretty good example in and of itself as to why the trial court should have sustained Plaintiff's objection to the "Motion to Reconsider." The brief goes way beyond the issues raised in the motion to reconsider filed with the trial court, essentially making the Plaintiff a moving target. It should go without saying that when a party seeks summary judgment, taking a case completely out of the hands of a jury, at a minimum the responding party should be able to decipher the grounds sought contained in the motion. This

case is a good illustration of why this is necessary.

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

Interestingly, despite clear policy language to the contrary, State Farm attempts to argue that the mold damage to Plaintiff's personal property is not covered. State Farm, in its aggressive pursuit of any and all defenses in a first party insurance case, cannot even be counted on to concede the obvious. State Farm cites no case law in support of this argument, because it knows very well that none exist. Instead, through somewhat tortured reasoning that in the end is not very clear, State Farm argues 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 letter "F" is found in the alphabet between the letters "A" and "H." 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.

2. <u>There is substantial evidence of damage to the personal property</u>

State Farm next argues that Plaintiff has no evidence that any of her personal property was damaged due to the mold. The initial problem with this argument is it was never made at the trial court.

State Farm's initial 31 page motion for summary judgment never argued that Plaintiff's personal property was not damaged. (I C.R. at 38-70). Nor is this argument found in the "Motion to Reconsider." (III C.R. at 555-61) Rather, State Farm concedes that there was damage when it notes that it paid $12,206.24 for remediation of Plaintiff's contents. (I C.R. at 45). Is State Farm really arguing that it paid Plaintiff $12,206.24 to remediate personal property that was not damaged by mold? What then was the money for?

Furthermore, there is much more than a scintilla of evidence that the personal property was damage due to the mold. As noted, the most obvious evidence is that State Farm paid over twelve thousand dollars to remediate it. Additional evidence comes from the affidavit and

report of State Farm's own expert witness, RCI Environmental, Inc. ("RCI"). (II C.R. at 324-82) State Farm's own expert 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 due to the leaks, the home and contents be remediated and some of the contents discarded. (II C.R. at 340-46). Page 17 of the report specifically states the following:

> 9. Dispose the personal items, clothing, linens, and furniture in the residence discovered supporting the amplification of microbiological contamination. (II C.R. at 341).

State Farm complains the Plaintiff should not be able to use evidence emanating from its own expert witnesses because Plaintiff allegedly failed to designate State Farm's expert as testifying experts. This is a somewhat unusual argument as State Farm seems to argue that Plaintiff cannot use evidence in support of her claims if that evidence happens to come from an expert hired by State Farm. So if in a medical malpractice trial the expert witness for the Defendant/doctor were to suddenly admit on the stand that the doctor was indeed negligent, the Plaintiff/patient could not point to that in support of evidence of a breach of the standard of care? This makes no sense.

Furthermore, the case State Farm cited in support, *Cunningham v. Columbia/St. David's Healthcare Sys., L.P.*, states that "a non designated expert's affidavit cannot be considered as summary judgment evidence absent a showing of good cause or a lack of unfair surprise or prejudice." *Cunningham*, 185 S.W.3d 7, 13 (Tex.App.–Austin 2005, no pet.). It would be difficult to imagine a situation in which State Farm could persuasively claim that it

was *unfairly* surprised or prejudiced by its *own expert witness*. Perhaps surprised or prejudiced, as in this case, but not unfairly so. At a minimum, and to the extent State Farm is making a hearsay argument, the evidence, testimony and report of State Farm's own experts constitute admissions of a party opponent. SEE TEX.R.EVID. 801(e)(2).

Finally, in addition the evidence stated above, there is also the affidavit and report of Plaintiff's expert Peter de la Mora. State Farm correctly notes that in an earlier ruling while Plaintiff was acting pro se, the trial court struck Mr. de la Mora as an expert witness. There is a fundamental problem with the reasoning of this argument, however, in the context of arguing there is no evidence of some element in support of Plaintiff's causes of action.

The ruling on Mr. de la Mora was made on January 30, 2006. (I supp. C.R. at ___); See (II R.R. (1/30/06 hearing) at 8. On February 21, 2006, State Farm moved for summary judgment. (I C.R. at 38-70). On May 25, 2006, the trial court denied the motion. (III C.R. at 554).

After State Farm filed its motion to reconsider based on *Fiess*, out of an abundance of caution in the event State Farm was arguing something besides *Fiess*, Plaintiff filed affidavits of expert witnesses, including Mr. de la Mora. (IV. C.R. at 631-707). State Farm thereafter filed objections to the affidavits, including that from Mr. de la Mora arguing that the trial court had struck him as an expert witness. (IV. C.R. at 757-762). The trial court never sustained these objections or issued any further rulings dealing with Mr. de la Mora.

In this appeal, State Farm is improperly attempting to bootstrap its entire motion for summary judgment into its motion to reconsider. If, as State Farm claims, the trial court

granted a no evidence summary judgment and did not consider the affidavits of Mr. de la Mora, then why did it deny the motion in the first place after striking Mr. de la Mora as an expert witness? Why did the trial court not sustain State Farm's strenuous objections to his affidavit? The likely reason is because the trial court was misled by State Farm into thinking that the Texas Supreme Court had ruled that mold was never covered under the insurance policy, so it likely believed it did not need to reach the merits of any objection made to his affidavit.

By failing to sustain State Farm's objection to Mr. de la Mora's affidavit, and given the somewhat convoluted circumstances present in this case, the trial court implicitly overruled the objections to his affidavit. *See Williams v. Bank One*, 15 S.W.3d 110, 114-15 (Tex.App.–Waco 1999, no pet.). As such, to the extent it is even necessary, this Court should consider it on appeal as well as further evidence of mold damage to the personal property and regarding causation.

3. The Texas Supreme Court decision in *Balandran* mandates a finding that mold damage to the dwelling is a covered loss.

Sticking with the same argument it made to the trial court, State Farm again argues in its brief that the Texas Supreme Court in *Fiess* allegedly expressly declared that mold damage to a dwelling was never a covered loss no matter what. 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 is

the 1998 Texas Supreme Court 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, or to both the dwelling and personal property. In dealing with this issue as it related to a foundation exclusion, exclusion 1.h., the Texas Supreme 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 the Texas Supreme 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, the 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 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 the Texas Supreme 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, the Texas Supreme 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.* The Texas Supreme Court ultimately disagreed in *Balandran.*

Similarly, after telling the entire State of Texas that mold was a covered loss, State Farm started arguing to the Courts that mold damage was clearly excluded. And while the Texas Supreme Court has agreed with State Farm as it relates to the "ensuing-loss" clause found immediately after the so-called mold exclusion, no court that is binding precedent on this Court has ever found otherwise. *Balandran* is still the law and is binding precedent on this Court. [1] Most of the federal and concurring opinions cited by State Farm in its brief do not even mention *Balandran*. Because Plaintiff's claims for mold damage in the present case result from plumbing leaks, summary judgment was improper and should be reversed.

4. <u>State Farm's concurrent causation argument is unavailing</u>

State Farm claims that, pursuant to the doctrine of concurrent causation, that Plaintiff cannot segregate between covered and non-covered losses. This argument is easily defeated as State Farm's own experts, supported by Plaintiff's expert Mr. de la Mora, provide all of the

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[1] In its brief, State Farm argues that Plaintiff never claimed to the trial court that the policy was ambiguous as to the dwelling. This contention is incorrect as Plaintiff clearly made this argument to the trial court. See IV C.R. at 608-09.

evidence needed. A plaintiff is not required to segregate the damage with mathematical precision. *See State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320-21 (Tex.App.–San Antonio 2002, pet. den.).

Evidence of causation regarding the home includes State Farm's report of RCI. State Farm's own experts 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) State Farm's other 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, the only mold damage to the residence and personal property that was caused by a leak held excluded in the *Fiess* case was the mold contained in the attached garage. Everything else was caused by covered plumbing leaks. As such, there is more than a scintilla of evidence regarding the segregation of mold damages.

5. **Plaintiff has not waived her claims against Strachan**

State Farm claims that Plaintiff did not properly challenge the judgment as it pertains to the adjuster on the case, Erin Strachan, individually. This contention is without merit.

Texas Rule of Appellate Procedure 38.1(e) states that the brief must identify all issues **or** points presented for review. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." See TRAP 38.1(e).

Contrary to State Farm's argument, Plaintiff did not only list points of error in the table of contents, nor is it required that Plaintiff include in "Issues Presented" section. Both points of error are listed in the body of the brief on page 6 and page 22. Furthermore, the rule provides for a listing of all issues presented or points presented, there is no requirement for both. State Farm makes much of the fact of the number of times Ms. Strachan is listed individually, yet it notes in a footnote that on page 6 of the brief Plaintiff stated that it was going to list them collectively as "State Farm." Furthermore, the misrepresentation complained of in the brief, was made by Ms. Strachan as well. In fact, on page 22 of the brief, where Plaintiff discusses evidence of the misrepresentation, Plaintiff specifically cites a letter written by Ms. Strachan to Plaintiff. (I C.R. at 156-57). Given the liberal construction of briefs, State Farm's argument that Plaintiff has waived her claims against Ms. Strachan is without merit. See TRAP 38.1(e) and 38.9; *See also Williams*, 15 S.W.3d at 114.

6. Plaintiff has a valid misrepresentation claim.

The only other argument State Farm made in its motion to reconsider was regarding Plaintiff's misrepresentation claims. Characterizing this sad situation as a "windfall" for Ms. Page, State Farm seeks to excuse away its telling everyone in the entire State, including Ms. Page, the Texas Department of Insurance (when it wanted the policy changed again), and the entire general public, that mold was a covered loss while at the same time running to court to

argue differently. State Farm repeatedly represented to Plaintiff that her claims were covered. In reliance on that, she has waited and waited and waited for State Farm to finally pay what it owes on this claim. Now, armed with an opinion which defeats only one of the two arguments in favor of coverage, State Farm seeks to deny the entire thing ever happened.

The fact is State Farm knew these claims were covered, told Plaintiff that they were covered, paid inadequate amounts (at least there is a fact issue on that point), and now seeks to get out of paying anything at all. State Farm cannot have it both ways. Either the claims were covered, and therefore summary judgment was not proper. Or they were not covered, so they repeatedly lied to her in telling her differently. A lie she has relied on to her detriment.

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 25th day of February, 2008:

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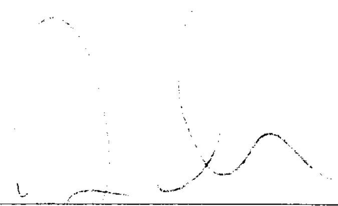

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