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Supreme Court of Texas
State Farm Lloyds and Erin Strachan, Petitioners,
v.
Wanda M. Page, Respondent.
No. 08-0799
November 19, 2009

Oral Argument

Appearances:Levon G. Hovnatanian, Martin Disiere Jefferson & Wisdom, LLP, Houston, TX, for petitioners.

John F. Melton, Melton & Kumler, LLP, Austin, TX, for respondent.

Before:

Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

CONTENTS

ORAL ARGUMENT OF LEVON G. HOVNATANIAN ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF JOHN F. MELTON ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF LEVON G. HOVNATANIAN ON BEHALF OF PETITIONER

JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 08-799, State Farm Lloyds against Page.

MARSHALL: May it please the Court, Mr. Hovnatanian will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF LEVON G. HOVNATANIAN ON BEHALF OF THE PETITIONER

ATTORNEY LEVON G. HOVNATANIAN: Well said. I can barely pronounce it that well myself. Your Honors, my name Levon Hovnatanian and I represent the Petitioners in this case, Start Farm Lloyds and Erin Strachan. General Robert E. Lee surrendered at Appomattox, Virginia on April 9th, 1865, and the Civil War ended not long after that. But two months later, the Confederate Ship Shenandoah sailed into Alaskan waters and attacked eight Yankee whalers. Before the Shenandoah was finished, she had destroyed 22 Yankee whalers and captured two others. The problem was that the news that the war had ended had not reached

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the Shenandoah's point of origin before it left for Alaska. That's something similar to what we have here.

JUSTICE DAVID MEDINA: But it was a great victory nonetheless.

ATTORNEY LEVON G. HOVNATANIAN: Agreed, Your Honor. Unlike the petitioners in Waco that --

JUSTICE HARRIET O'NEILL: Spoken from the Shenandoah.

ATTORNEY LEVON G. HOVNATANIAN: The Shenandoah fared much better. In Waco, the Waco Court of Appeals is still fighting the mold war, and that's because apparently the news that was sent out by the Fourteenth Court's opinion in Lundstrom, which Justice Guzman wrote, the Carrizales opinions from the Fifth Circuit in 2008, and especially from this Court's 2006 opinion in Fiess has not reached the Waco Court of Appeals yet, because they are still insisting that the HOB policy in Texas covers mold damage to a dwelling in the face of all the authorities that say it does not.

JUSTICE HARRIET O'NEILL: Let me read you Footnote 26 in Fiess. “The Fiesses failed to preserve a claim for mold caused by air-conditioning and plumbing leaks.”

ATTORNEY LEVON G. HOVNATANIAN: Correct, Your Honor.

JUSTICE HARRIET O'NEILL: So we have not addressed that question.

ATTORNEY LEVON G. HOVNATANIAN: Well, that depends, Your Honor. I respectfully disagree and several other Courts do as well and I'll tell you why. Justice Jones concluded, for example, in Carrizales, that this Court had addressed the question that the Court went further, as it was entitled to do, than the certified question that the Fifth Circuit gave you. And she pointed to two particular quotes from this Court's opinion, and the Smith Court and the Gordon Court and Pinson Court and Justice Frost in Justice, they all point to these same quotes. The first one is, “We cannot hold that mold damage is covered when the policy expressly says it is not,” and that's a very broad holding. And the second one is, “It's hard to find any ambiguity in the ordinary meaning of, ‘We do not cover loss caused by mold.”’ So there is a school of thought led by Chief Judge Jones that this Court did decide this issue in Fiess regardless of what was preserved.

JUSTICE HARRIET O'NEILL: Well, in Fiess, it said -- my understanding of Fiess was mold caused by water is not covered, but if it's water damage, that's a different question.

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, respectfully I think that's probably the same question. In other words, if you look at all the cases that I just mentioned, with the exception of Fiess of course because it wasn't preserved, the issue was plumbing leaks. Then you had, Hurricane Alison or Tropical Storm Alison, rather. There were HVAC leaks, there was a plethora of water causes that led to the mold. In none of those cases did the specific cause of the water damage make any difference because it was the resulting loss of mold that was excluded.

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JUSTICE HARRIET O'NEILL: But the Court said water damage is something more like a single event. It's not seepage, it's not drop by drop, it's not leak by leak --

ATTORNEY LEVON G. HOVNATANIAN: Right.

JUSTICE HARRIET O'NEILL: But if it's a like cause, you know, building collapse, breakage, damage, that might be a different thing. I mean this Court seemed to very clearly leave the question open there.

ATTORNEY LEVON G. HOVNATANIAN: I think, well, Your Honor, at most that's all the Court left open in Fiess, correct. I mean there is a footnote in Fiess that says, "We're not going to address, for example, personal property coverage under the Accidental Discharge Provision," because that's something else that the Fiesses didn't preserve for appeal. And we're not here to tell you, "Well, yes, they did, and the Fifth Circuit was wrong and you were wrong and the Fiesses were right." That's not what we're here to say, but what we are here to say is we think you decided this issue in Fiess, but if you didn't, if you didn't, then this is the right case to come out and say that all of the federal district courts and Judge Jones, Chief Judge Jones in Carrizales and Judge Reavley in Carrizales were all correct that Balandran does not provide mold coverage for a dwelling under the HOB policy. So if this Court did leave it open in Fiess, and obviously you're the best determiner of what your opinion said and meant and you're the best arbiter of what your judgment means, if you did leave it open in Fiess, then we suggest the right blueprint to close that loophole is the opinions in Carrizales, Judge Jones' majority and Judge Reavley's concurrence. They both focused on the fact that Balandran involved a much different type of damage and a much different exclusion, being the foundation damage. And the difference in Balandran and this case is that in Balandran it was necessary for the court to say that the foundation damage exclusion does not apply because if you didn't, then it robbed the Exclusion Repeal Provision of any meaning whatsoever, and the reason for that is because foundation damage cannot possibly occur to personal property. But as Chief Judge Jones said and Judge Reavley said in his concurrence, that's not true of mold. Mold -- I beg your pardon, Your Honor.

JUSTICE DAVID M. MEDINA: Is there also a claim here for personal property in an exclusion that perhaps triggers the denial of coverage there?

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, there is a claim for personal property, and as the record shows, State Farm has paid that claim. I think there's a dispute over whether there's any evidence in the record of damage to personal property that has not been paid for. Of course, our argument is it's all been paid for.

JUSTICE DAVID M. MEDINA: Is that exclusion any different from the exclusion that we're talking about here today?

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, the coverage is different because that's Named Peril Coverage instead of the so-called "All Risk Coverage." But we're not arguing that the water damage that led to the mold that damaged the personal property, we're not arguing that that's excluded. In fact, we've paid a substantial amount of money for that.

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So, yes, we recognize the coverage is different, but, no, we're not arguing that an exclusion applies to that particular damage. Our argument instead is there's just no evidence of damage to personal property above and beyond what we've already paid for that personal property. Now they also point out correctly in their court of appeals briefing that, well, State Farm, you paid for mold remediation to the house as well, and now you're saying that it's not covered. Well, to put that in perspective, those payments were made before Fiess came out and before Lundsford came out and before Carrizales came out. And we've not gone knocking on Ms. Page's door and said, “Give us our money back,” and we're not going to, but that's why we made those mold payments is because the law wasn't set. This Court and others had not yet ruled on the question of whether mold damage to the dwelling was covered. So that explains the difference in the payments that were made in this case. Because mold can and does affect personal property, just like it does real property, you can apply the exclusion in this case to mold damage to the dwelling and not render the Exclusion Repeal Provision meaningless. As Chief Judge Jones and Judge Reavley pointed out, it's still going to have meaning, it's still going to apply to personal property, which makes perfect sense because it is in the personal property portion of the policy.

JUSTICE EVA GUZMAN: Do her extra-contractual claims survive then if mold to personal property is covered?

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, they would. In this case, they don't because they have all been paid. There's two grounds in which a plaintiff's contractual -- I beg your pardon -- extra-contractual claims would not survive as a matter of law. The first is if the contract claims aren't covered, and we think that defeats Ms. Page's claim for personal -- I beg your pardon -- for mold damage to the dwelling of course. And the second one is if they're already been paid, and in this case, if her contract claim for her residence isn't covered and her contract claim for her personal property has already been paid, then as a matter of law she cannot have extra-contractual damages.

JUSTICE EVA GUZMAN: Were there any fact issues, though, that remained on the personal property?

ATTORNEY LEVON G. HOVNATANIAN: No, Your Honor, there are not.

JUSTICE DAVID M. MEDINA: I thought that the set in Fiess was correct. Is this --

ATTORNEY LEVON G. HOVNATANIAN: I recall, I recall.

JUSTICE DAVID M. MEDINA: Is this the same policy language, is it the same exclusion? Is the exclusion found in the same place? This seems to me to be more specific than Fiess, but maybe I misread the contract.

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, it's the same. It's the standard Texas HOB policy. And maybe that explains your dissent because you didn't quite understand.

JUSTICE DAVID M. MEDINA: You're pushing it, Counsel.

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ATTORNEY LEVON G. HOVNATANIAN: The answer is a very respectful, yes, Your Honor, it's the same policy.

JUSTICE HARRIET O'NEILL: Let me ask you, the Department in Fiess weighed in, and as I recall their position, it was mold that's an ensuing loss that is ensuing from water damage is covered and always has been.

ATTORNEY LEVON G. HOVNATANIAN: Right.

JUSTICE HARRIET O'NEILL: And insurers have been paying forever on that presumption. That changed in Fiess. Do you know if the Department has made any effort to amend these forms to cover it, or is this still the standard form? Is there any proceeding before the Department of Insurance to change coverage to encompass mold?

ATTORNEY LEVON G. HOVNATANIAN: I'm not aware if there's anything current, Your Honor. There is a new policy, a new homeowner's policy and it does speak to mold, and I know there's a particular rider you can get on that policy, so the answer to your question is, yes, the Department has addressed it and there is a new policy. The reason that this case, of course, is so important is, and we showed this in one or both of our briefs, there's at least 25 insurers in Texas who still issue the HOB policy, to say nothing of those that don't but still have open claims under HOB policies throughout the state. So it's still critical, but I believe there is a new policy, correct, that does speak to this specifically. And that policy hopefully will never come before this Court because it is, you know, rock solid on the type of coverage that is or is not available for mold.

JUSTICE HARRIET O'NEILL: And under that policy, mold in a dwelling caused by water damage is covered?

ATTORNEY LEVON G. HOVNATANIAN: Is not.

JUSTICE HARRIET O'NEILL: Is not.

ATTORNEY LEVON G. HOVNATANIAN: Is not covered, correct, Your Honor. But again, now there are riders and supplements that you can add and maybe different coverages you can buy, but in the basic policy it's not covered. And let me just add one thing to that. You bring up the Department and I recall, because I was one of the lawyers in Fiess, I recall the amicus briefing that was filed. One of the points was, well, there's always been mold coverage in Texas, and that really wasn't true. There's a great law review article written in 1960 by a man named Larry Gallaher who showed that in fact there has been an exclusion, and a viable exclusion in the HOB policy since 1960 and maybe before. And then of course the Court will remember that there were competing opinions on whether mold was covered. There was a nonpublished opinion from the Dallas Court of Appeals that Justice Rosenberg wrote that said it's covered. Then there were others that we pointed to that said it was not. So that was the Department's position, it's never been correct, it's not correct today. There has always been a mold exclusion, at least since 1960 in the HOB policy. But these are the reasons, those that were articulated by Chief Judge Jones and by Judge Reavley that the Balandran rationale does not work on the question of whether there is mold coverage for the dwelling in the HOB policy. Once

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you strip it down to its essentials and look at the real reasons that Balandran came out the way it did, which was to avoid making a policy provision meaningless, you see that that concern does not exist in this case, or as Judge Reavley put it, “The same concern in Balandran is not present,” and he was correct. Now, the Waco Court of Appeals treated the Carrizales opinion as saying, “Well, that's the one that explains why all the federal district courts that wrote on this issue were compelled to say mold coverage doesn't exist.” And of course with all due respect to that court, they got it exactly backwards. As we pointed out to the Waco Court of Appeals and have done so to this Court, it was Carrizales that's at the end of the stream of federal opinions, not the beginning. Independent federal district courts concluded before Carrizales that Balandran didn't apply and that the coverage didn't exist. In fact, Judge Reavley in his concurrence followed one of those, the Salinas opinion from the Southern District of Texas, and so they got it backwards. The federal district courts across the state were concluding before the Fifth Circuit ever ruled that the Balandran argument doesn't work, and the Fifth Circuit followed them, it's not that they were forced to follow the Fifth Circuit. And the other authority that they dealt with was the Justice opinion from the Fourteenth Court of Appeals that Justice Frost wrote, the concurrence. And the Waco Court disposed of that opinion by saying, “Well, that wasn't mold coverage.” The particular policy provision at issue there was the provision for falling objects. But if you read that opinion, that's clearly not true. The falling objects provision is not even mentioned in the Fourteenth Court's opinions, instead it's mold coverage and the Mold Exclusion that was at issue. The only difference is the majority decided the case on waiver and Justice Frost preferred to reach the merits, and she said this was wrapped up in Fiess and there's no mold coverage. I guess, Your Honor, what it boils down to is if you think Fiess controls, then there's no mold coverage. If you don't believe Fiess controls, then we suggest you look to the opinions that have discussed the issue in that context, mainly Carrizales and hold the Balandran argument doesn't work anyway. And I guess what we're trying to do is get this Court to write something similar that Chief Judge Jones wrote in Carrizales when she characterized this Court's Fiess opinion, and that is a broadly phrased and unambiguous “no.”

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Hovnatanian.

ATTORNEY LEVON G. HOVNATANIAN: Thank you, Your Honor.

JUSTICE NATHAN L. HECHT: The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Melton will present argument for the Respondent.

ORAL ARGUMENT OF JOHN F. MELTON ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN F. MELTON: May it please the Court, Counsel. As Counsel alluded to in the beginning of his argument, the mold crisis is over. There are two parties that I know of that are still fighting this battle, that is my client and State Farm. And the reason for that is that the new policy, as it's been written, is clear and unambiguous that mold is not covered. But we're not discussing the new policy in

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this state, we're talking about the homeowner's insurance policy, the HOB policy that was in effect way back in 2001 when Wanda Page first made her claim with State Farm. State Farm obtained summary judgment sometime ago in the trial court in this case, arguing that this Court in Fiess had held that mold damage, whether it be to the residence or the dwelling or the personal property, was never covered.

JUSTICE PHIL JOHNSON: Let me stop you there just a moment.

ATTORNEY JOHN F. MELTON: Yes, Your Honor.

JUSTICE PHIL JOHNSON: Is personal property involved in the suit, or do you agree with opposing counsel that it's not an issue?

ATTORNEY JOHN F. MELTON: I do not agree with that, Your Honor. It is our contention that there is evidence in the record that the personal property was damaged by mold and that there is a dispute over the amount that it cost to remediate the personal property.

JUSTICE PHIL JOHNSON: Okay, but they're paying the mold claim on personal property, you're just arguing over dollars?

ATTORNEY JOHN F. MELTON: As far as the personal property, yes, that's what I'm saying here.

JUSTICE PHIL JOHNSON: So the mold issue here is on the dwelling, you agree with that though?

ATTORNEY JOHN F. MELTON: I agree that they contest that mold as to the dwelling is covered. I think, based on reading their briefs, they are now conceding that mold damage to personal property, if it results from a plumbing leak is covered. But that's not what they told the trial court when summary judgment was granted, and that's not the argument they made before the court of appeals, but I think they have conceded that, that personal property, mold damage to personal property caused by plumbing leaks is covered. And the reason for that is simple, that the policy, as it's written back then, clearly covered that type of damage.

JUSTICE NATHAN L. HECHT: Is there yet a question of whether that damage has been fully paid for? Is there still a dispute about that?

ATTORNEY JOHN F. MELTON: Yes, there is a dispute about that, Your Honor.

JUSTICE NATHAN L. HECHT: And how is that reflected, in the summary judgment record or?

ATTORNEY JOHN F. MELTON: Yes, Your Honor, it's reflected in the record before this Court that there was, I believe they're saying that it cost 12,000, and then I think the expert for Ms. Page at the trial court was double that or close to that amount. So there is a dispute over the cost. Now as to the dwelling, of course, that is in dispute, whether or not mold damage resulting from plumbing leaks to the dwelling is covered. And I think the reason for that is, well, the way that the policy is written and that it is ambiguous, and that is precisely what this Court found in Balandran, not that the Mold Exclusion was

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ambiguous but that the Exclusion Repeal Provision that follows those perils insured against, that that language is ambiguous, yes, Your Honor.

JUSTICE EVA GUZMAN: We're talking about different provisions though. Does that have bearing on your argument that it's ambiguous in this context?

ATTORNEY JOHN F. MELTON: It does, and it is a different exclusion. There's no doubt about that. In Balandran it was talking about the Foundation Exclusion, and I understand their argument is is that, well, because damage can only be to the foundation, therefore it can only apply to the dwelling, therefore it's ambiguous. But that was not the only reason that this Court found that the Exclusion Repeal Provision was ambiguous in Balandran, that was one of the reasons. But the first reason was that the policy on its face states that Exclusion H does not apply to a loss caused by a plumbing leak. And I'm quoting from this Court's decision in Balandran, "This repeal of Exclusion 1H is not expressly limited to personal property loss, that the Exclusion Repeal Provision is contained in Coverage B does not necessarily dictate Safeco's narrow reading." In my interpretation of what this Court was interpreting in Balandran was not exclusions, the Foundation Exclusion or the Mold Exclusion or any of the other exclusions, but the Exclusion Repeal Provision, and more specifically the word "loss." Exclusion 1A through H do not apply to a loss caused by this peril. It doesn't say whether or not it applies to personal property loss, it doesn't say whether it only applies to dwelling loss, and therefore this Court found that it was ambiguous, and that was the very first reason for the finding.

JUSTICE NATHAN L. HECHT: As you say --

ATTORNEY JOHN F. MELTON: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: -- there were two reasons in Balandran, but is the second one off the table? I mean do you agree with the Circuit's reasoning and Judge Reavley's opinion?

ATTORNEY JOHN F. MELTON: I don't agree with it. I agree with what they stated, but I don't agree with the conclusion that they drew from that reasoning.

JUSTICE NATHAN L. HECHT: But you think the second reason in Balandran is gone? It's not a reason to hold it ambiguous in this case?

ATTORNEY JOHN F. MELTON: I would agree with that, Your Honor.

JUSTICE NATHAN L. HECHT: So we're down to the first one?

ATTORNEY JOHN F. MELTON: That's correct. As well as the third the one, the surrounding the circumstances argument as well.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY JOHN F. MELTON: But I do believe that the first one is the strongest one for following Balandran in this particular case. And again, it's because "loss" is not defined. Exclusion 1A through H do

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not apply to a loss caused by this peril. The confusion arose in that it is placed in the perils insured against, Section B Personal Property Section. The placement of it is what creates the ambiguity. If it wasn't placed in that area, which is where it was prior to the change in the policy in 1978, then there wouldn't be -- then it would be unambiguous, but this Court found it to be ambiguous in the same rationale for finding an ambiguity as it applies to the Exclusion Repeal Provision as to foun-dation damage also applies to mold damage. In addressing the personal property argument, again I think it's been conceded by counsel in briefing that they're conceding that mold damage to personal property is a covered loss. From reading their brief, one of their arguments as to why the case should not be, I guess, remanded for further proceedings was that they're arguing that there's no evidence that plumbing leaks caused mold damage to the personal property, but there's a number of problems with them making that argument in front of this Court. Number one, they never made it to the trial court. They did not make that argument in their Motion for Summary Judgment, they clearly did not make it in their Motion for Reconsideration, which was strictly based on the Fiess decision which ultimately led to a final judgment in this case. But as the Court knows, you can't grant summary judgment based on a ground that's not asserted to the trial court, so the argument, and it's their second argument in their brief, wasn't made to the trial court, therefore summary judgment based on it is improper. The second argument that they make is that they're complaining that we're relying on their own expert witnesses. RCI provided a report on behalf of State Farm which found that there was mold damage to the personal property and that it needed to be remediated. They're arguing that we didn't designate their own experts as an expert witness and therefore we can't rely on their opinions. I don't see the justification for that particular argument because it's their own experts.

JUSTICE EVA GUZMAN: Does that go to creating a fact issue on what the value was of the property that was damaged? Because it seems like everyone agrees that, at least as to this policy at that time, they were going to cover the personal property.

ATTORNEY JOHN F. MELTON: I think they're making a causation argument in their briefing, that there's no evidence of causation between the plumbing leaks and the damage to the personal property. And so does that answer your question, Your Honor? I mean the damages, they did argue at the trial court level that there was no evidence of damage to the personal property, but that is I think based on the record clearly in dispute. But what they're arguing before this Court is that there's no evidence of causation between the covered loss, the plumbing leak and the mold damage to the personal property. And what I'm saying is that their own experts said that there is. They're complaining about our use of their own experts, but I do not see how they can be unfairly surprised or unfairly prejudiced by their own expert testimony.

JUSTICE EVA GUZMAN: Well, that goes to the surprise element, but did you have an obligation to designate your experts? And if their expert was going to be one of yours, should you have designated them?

ATTORNEY JOHN F. MELTON: Well, we have an obligation to designate our own experts, but I don't see the point in --

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JUSTICE EVA GUZMAN: When you're going to call their expert as an expert, you don't have to designate him as an expert?

ATTORNEY JOHN F. MELTON: I don't believe so, Your Honor. I mean especially in the context of the summary judgment, it's their own affidavit and report that provides the evidence in support of the causation element of the claim, so I really just do not see a point in imposing a rule that you have to designate the other side's expert witnesses, because they can't be unfairly surprised or prejudiced by their own expert testimony.

JUSTICE HARRIET O'NEILL: Could you focus on your argument that doesn't deal with the Exclusion Repeal Provision. If we disagree with you on that point, what's your argument of what's left under Fiess?

ATTORNEY JOHN F. MELTON: Well, if you disagree with my argument that the Exclusion Repeal Provision applies, then as far as mold coverage then I don't think there is another argument, Your Honor.

JUSTICE HARRIET O'NEILL: I thought you were claiming that this question was left open in Fiess?

ATTORNEY JOHN F. MELTON: We are. Fiess dealt with the Ensuing Loss Clause, which came directly after the Mold Exclusion. It dealt with a completely different provision.

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY JOHN F. MELTON: What we're arguing is, we're not arguing the Ensuing Loss Clause on Fiess because that's been decided, what we are arguing is the -- and later on, a page or so in the policy is the Exclusion Repeal Provision -- well, actually it's page 4, sorry -- where there's enumerated covered losses under Coverage B and whether or not the Exclusion Repeal Provision, where it says, "Exclusion 1A through H do not apply to losses caused by this peril," whether or not that reinstates, I guess would be the correct terminology, coverage for mold damage. And as for personal property, I think it's undisputed. Again, they're not disputing that anymore. But as for dwelling, it is, but it's our position that the policy is ambiguous and our position derives from this Court's decision Balandran. Which leads to the extra-contractual claims. State Farm only made two arguments in its Motion to Reconsider regarding the extra-contractual claims. One is the known principle that if the contract claims are barred, then the extra-contractual claims are barred. I don't really dispute that statement, although we obviously dispute that the contractual claims are barred in this particular case. One of the arguments they made in their briefing is that what this Court should look to is all of the arguments that were before the trial court in their Motion for Summary Judgment, as opposed to just focusing on their Motion to Reconsider. The reason I don't think that this has any basis is that I think from the record it's clear that the trial court was believing their argument that Fiess foreclosed all mold coverage, which I think now they're conceding is not true, at least as to personal property, and didn't address any of the other arguments that were made in the previously filed and denied Motion for Summary Judgment. State Farm filed a Motion for Summary Judgment, the trial court denied it. Fiess issued its ruling. The next day, State Farm filed its Motion to Reconsider, and the only argument

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they made in the Motion to Reconsider was that Fiess foreclosed any mold coverage in this case. The court, after hearing, signed an order that granted the Motion to Reconsider and it wrote in language regarding any and all claims for mold damage and crossed out language which stated, "in all things." And then later on after hearing, entered a final judgment. Given that record, I don't think that this Court can look to the Motion for Summary Judgment and the grounds asserted in it and from that interpret the trial court's decision as granting summary judgment in full. The trial court in this case was specific and the circumstances that led up to it were even more specific, that what the trial court was basing its ruling on was State Farm's argument regarding this Court's decision in Fiess. Now on appeal before the court of appeals and in front of this Court, they are expanding that and they want to have the judgment affirmed on any ground asserted in the Motion for Summary Judgment. The main problem with that is the trial court's written order. But the other problem is that, and that we objected to in the court of appeals, is that when they filed their Motion to Reconsider, the trial court attorney in this case objected to the Motion to Reconsider as not clearly specifying what grounds State Farm was seeking summary judgment on. Clearly they were seeking grounds based on Fiess. That was not in dispute, but the trial court attorney objected to anything further being decided because they didn't know what exactly to respond to. So the point is is that on appeal they're trying to expand their argument. I think they recognize that Fiess didn't say what they told the trial court it said, that mold was never ever covered no matter what, because it didn't address the Exclusion Repeal Provision related to plumbing leaks. Recognizing that, on appeal they're trying to go back to their Motion for Summary Judgment which the trial court denied and say, "Well, there's all these other bases for reversing the court of appeals and rendering judgment in favor of State Farm," and I just don't think that's, based on the record, that's a fair way to approach this case because they didn't argue that in front of the trial court. And the trial court, or lawyer for Ms. Page objected to their Motion to Reconsider, which was only based on Fiess. The big picture, as I see it, is that State Farm argued in Fiess and this Court decided that the Ensuing Loss Provision provided no coverage for mold. We're not disputing that, but as this Court noted in its opinion in the footnote, it did not address the Exclusion Repeal Provision because the lawyers in that case had not preserved that issue on appeal in front of the Fifth Circuit. So now State Farm is arguing that Balandran itself and the Exclusion Repeal Provision doesn't provide coverage at least for the dwelling. Well, it begs the question in my opinion, what State Farm and all the insurance companies were doing paying for damages to mold to the residence to all the people who made claims in the state, when they're saying it's an unambiguous exclusion. To me what it shows is that the exclusion, at least the Mold Ex-clusion as you apply it to the plumbing leak exception or Exclusion Repeal Provision is ambiguous or else they wouldn't have paid all that money. And it's ambiguous because this Court said it was back in 1997 in the Balandran vs. Safeco decision. Again, the mold crisis is over. This is a very important case to Wanda Page, this is I'm sure an important case to State Farm, but this is the last battle, which I believe states that the Petition to Review should not be granted because it's not an issue that affects the rest of the state. It clearly affects Ms. Page, it clearly affects State Farm, but the rest of the state has moved on. The policy has been changed, mold is excluded, there's no more of these claims. This is the last one. So

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what we're asking the Court to do is to either affirm the Waco Court of Appeals' opinion or alternatively have the Petition for Review be dismissed as improvidently granted. Any further questions?

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel.

ATTORNEY JOHN F. MELTON: Thank you, Your Honor.

REBUTTAL ARGUMENT OF LEVON G. HOVNATANIAN ON BEHALF OF PETITIONER

ATTORNEY LEVON G. HOVNATANIAN: May it please the Court. Your Honors, just a few brief points on rebuttal. The first is that the argument that because State Farm paid these claims originally shows an ambiguity. There's two particular rules of law that defeat that argument, and we have explained, as we did in Fiess and we ex-plained in this case also why these claims were paid. And the answer is of course because no court had yet ruled. Lundstrom had not come out, Fiess had not come out, Carrizales had not come out. That's why these claims were paid at the same time State Farm was saying, "We don't think there's coverage, but we're going to err on the side of the insured and pay these claims until somebody says we're right."

JUSTICE DAVID M. MEDINA: Were they really saying that, or did they testify at some hearing that they thought there was coverage and that's why they need an absolute exclusion to molds?

ATTORNEY LEVON G. HOVNATANIAN: Your Honor, I believe -- I know the testimony you're referring to, and there was testimony to that effect, but of course this Court said that one person testifying at a hearing on what he or she thinks the policy means is not what the policy means. This Court says what the policy means and said so in Fiess. That's why the first rule that I'm going to say is the no insurance by estoppel rule. You cannot find an ambiguity or coverage based on the fact that State Farm paid these claims. That would be true even if they continued paying them after Fiess, which of course they did not or we wouldn't be here. And of course, the second rule is just because the parties may disagree, and even this Court has said because courts might disagree with what particular language in a contract or a statute means does not mean that that language is ambiguous, because the court determines and the court hands down what the language means, not the parties and not lower courts. So we think those two rules defeat Ms. Page's argument on ambiguity. As far as there not being an argument in our Motion for Summary Judgment.

JUSTICE NATHAN L. HECHT: Well, let me ask you in the limited time.

ATTORNEY LEVON G. HOVNATANIAN: Certainly.

JUSTICE NATHAN L. HECHT: What is your answer to Mr. Melton's argument that there were other grounds for holding the Repeal Provision ambiguous in Balandran?

ATTORNEY LEVON G. HOVNATANIAN: There were, Your Honor, I believe there were three. And think he's got the right three.

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JUSTICE NATHAN L. HECHT: Right. And so he concedes two no longer applies.

ATTORNEY LEVON G. HOVNATANIAN: Correct.

JUSTICE NATHAN L. HECHT: What about one and three?

ATTORNEY LEVON G. HOVNATANIAN: Well, one is the surrounding circumstances. And of course we would argue that doesn't apply here because the surrounding circumstances, as this Court said in Balandran, is that the policy had always provided that kind of coverage and it was Safeco that was saying, “We want you to go in the other direction.” That doesn't apply here because since 1960 there's been a Mold Exclusion, and we're not saying reverse course, we're saying. “Say what the policy has always said, that there is a Mold Exclusion.” So we think the first one favors us not Ms. Page.

JUSTICE NATHAN L. HECHT: And the second one?

ATTORNEY LEVON G. HOVNATANIAN: The second one, Your Honor, is the one that Justice Owen pointed out in Balandran which is look at the location of the Exclusion Repeal Provision. What she wrote was, perhaps it's in the Personal Property Coverage Section only because that's where the Accidental Discharge Provision is found, and she is correct. The difference though in that case and this case is that the Accidental Discharge Provision, while it's found in Coverage B Personal Property, is subject to an exclusion, the Mold Exclusion that applies to Coverage A and Coverage B, whereas this Court said in Balandran that the Foundation-Movement Exclusion could not possibly apply to Coverage B because it can't ever happen to personal property.

JUSTICE NATHAN L. HECHT: Well, of course, I thought Justice Owen was right, but we lost. But the argument, as I understood it, that the Court accepted was that the placement of the Repeal Provision under Coverage B didn't matter.

ATTORNEY LEVON G. HOVNATANIAN: Right.

JUSTICE NATHAN L. HECHT: It's the only place in the policy you could put it.

ATTORNEY LEVON G. HOVNATANIAN: Correct.

JUSTICE NATHAN L. HECHT: And that would render the applicability of all of the Paragraph 1 exclusions ambiguous. And what's your answer to that?

ATTORNEY LEVON G. HOVNATANIAN: Well, Your Honor, and the answer to is, and this is why I'm relying on Justice Owen's dissent, that the answer is actually found in Chief Judge Jones' majority opinion in Carrizales. And she said that taking the three reasons together, if you look at the reason of the location, if the first reason and the third reason do not apply, and they would not in this case, then the second reason standing alone is not persuasive for the reason that Justice Owen said, and that is because standing alone, it's no evidence of coverage. Standing alone, all that is is evidence of where the drafters of the policy intended to put that particular provision. In that event, the location

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doesn't matter. What matters is the exclusions specify, “These apply not only to Coverage A, the dwelling, but also to Coverage B, personal property,” and the location can't change that.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. The case is submitted. The Court will take another brief recess.

MARSHALL: All rise.

[End of proceedings.]

State Farm Lloyds and Erin Strachan, Petitioners, v. Wanda M. Page, Respondent.
2009 WL 4823927 (Tex.) (Oral Argument)

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