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**Kelly v. Travelers Lloyds of Texas Ins. Co.**  
 Tex.App.-Houston [14 Dist.],2007.

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**MEMORANDUM OPINION**

Court of Appeals of Texas,Houston (14th Dist.).  
 Ann **KELLY** and James E. **Kelly**, Appellants

v.

**TRAVELERS LLOYDS OF TEXAS**  
**INSURANCE COMPANY**, Appellee.

**No. 14-05-00825-CV.**

Feb. 22, 2007.

On Appeal from the 190th District Court, Harris  
 County, Texas, Trial Court Cause No. 03-61055.

Daniel J. Kasprzak, Joelle Grace Kenney, for Ann  
 Kelly and James E. Kelly.  
 Nicholas E. Zito, Jack McKinley, for Travelers  
 Lloyds of Texas Insurance Company.

Panel consists of Justices FOWLER, EDELMAN,  
 and FROST.

**MEMORANDUM OPINION**

KEM THOMPSON FROST, Justice.

\*1 This is an appeal from a no-evidence summary  
 judgment in favor of an insurer on the insureds'  
 claim for mold damage under their homeowners'  
 policy. We must decide if the evidence raises a fact  
 issue as to whether the alleged personal-property  
 loss was caused by a covered peril. Concluding that  
 it does not and that the trial court did not err in  
 granting the insurer's motion for summary  
 judgment, we affirm.

**I. Factual and Procedural Background**

Appellants/plaintiffs Ann Kelly and James E. Kelly

owned a home in Houston that had been under  
 about six feet of water from a 1994 flood. In May  
 2000, the Kellys purchased a homeowners'  
 insurance policy from appellant/defendant Travelers  
 Lloyds of Texas Insurance Company covering this  
 residence.

In November 2001, the Kellys called Travelers to  
 report what they believed to be a covered claim  
 based on water damage and mold in their home.  
 After failing to receive a response, the Kellys  
 placed another call to Travelers the following  
 month, to ascertain the status of the claim and to  
 request an investigator to inspect the damage.  
 During this phone call, the Kellys informed  
 Travelers that they had agreed to sell their home to  
 the Federal Emergency Management Administration  
 (FEMA), and the house would be demolished. The  
 Kellys explained that, in the meantime, they had  
 rented three storage units and, in November 2001,  
 had moved their personal belongings into these  
 units. They also stored some of their possessions in  
 their son's garage. Travelers advised the Kellys to  
 have a private mold inspector, Nova, come to their  
 home and test for mold.

The Kellys arranged for the inspection and on  
 December 20, 2001, Patrick O'Brien with Nova  
 tested the Kellys home for mold and water damage.  
 By the time he arrived, the Kellys' house had been  
 completely gutted. In anticipation of the FEMA  
 demolition, the Kellys had removed baseboards,  
 molding, appliances, and fixtures, and had knocked  
 several large holes in the walls. In O'Brien's  
 opinion, the house was completely unlivable.  
 O'Brien tested several areas of the gutted house, but  
 he did not visit the storage facilities or inspect the  
 Kellys' personal property. Relying on O'Brien's  
 testing results, Dr. Paul Pearce of Nova wrote a  
 report indicating elevated mold levels in some parts  
 of the Kellys' residence. The following day, on  
 December 21, 2001, the Kellys closed on the sale of  
 their home to FEMA.

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Travelers initially denied the Kellys' claim under the mistaken belief that the Kellys had cancelled their homeowners' insurance policy. However, Travelers realized its error and notified the Kellys on January 5, 2002, that Travelers had received their claim for mold and water damage and had corrected the confusion regarding the policy. Travelers assured the Kellys that it intended to investigate their claim. Shortly thereafter, on January 15, 2002, a Travelers adjuster, Tom Underwood, inspected the home, as well as the Kellys' personal property which was then located in the four separate non-climate-controlled storage facilities.<sup>FN1</sup> The following week Travelers sent a letter to the Kellys officially denying the claim on the basis that there was "no indication of direct physical damage caused by a covered peril."

FN1. Tom Underwood was the only inspector to actually inspect the personal property the Kellys had moved and placed in the storage facilities.

\*2 The Kellys filed suit against Travelers, alleging Travelers had breached the insurance contract by failing to pay their claim. Travelers filed a no-evidence motion for summary judgment contending there was no evidence that the alleged damage to their personal property was caused by a covered peril under the Kellys' homeowners' policy. After a hearing, the trial court granted Travelers' motion for summary judgment. A week after granting summary judgment, the trial court signed another order excluding from the summary-judgment evidence the affidavit of the Kellys' designated expert, Dr. Paul Pearce.

The Kellys now challenge the trial court's rulings and present the following issues for our review:

(1) The trial court erred in granting Travelers' objections to the Kellys' controverting summary-judgment evidence, specifically the Pearce affidavit.<sup>FN2</sup>

FN2. In our analysis, we fully consider the Pearce affidavit. Therefore, we need not

address the first issue as to whether the trial court erred in granting Travelers' objection to the Pearce affidavit.

(2) The Kellys presented sufficient causation evidence to allow the trier of fact to segregate covered losses from non-covered losses and determine that a covered loss caused damage to their personal property.

(3) The Kellys presented sufficient summary-judgment evidence to create a genuine issue of material fact, that their mold claim presented a covered loss under their insurance policy.<sup>FN3</sup>

FN3. Because of their similarity, issues two and three are addressed together in this opinion.

(4) The Kellys presented sufficient summary-judgment evidence creating a genuine issue of material fact that the Kellys' personal property is not subject to the automatic removal provision under the insurance policy.

## II. Analysis

In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206-08 (Tex.2002). We take as true all evidence favorable to the nonmovant, and we make all reasonable inferences therefrom in the nonmovant's favor. *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). A no-evidence motion for summary judgment must be granted if the party opposing the motion does not respond with competent summary-judgment evidence that raises a genuine issue of material fact. *Id.* at 917. When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm summary judgment if

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any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex.2000).

In its no-evidence motion for summary judgment, Travelers stated no evidence showed that (1) a covered loss caused the alleged damage to the Kellys' personal property or (2) the Kellys' personal property was damaged by a covered peril before they moved it to the non-climate-controlled storage facilities.<sup>FN4</sup> In their second and third issues, the Kellys argue they provided sufficient causation evidence to allow the trier of fact to segregate covered losses from non-covered losses, as well as to create a genuine issue of material fact on the issue of whether a covered loss caused damage to their personal property.

FN4. In their post-submission letter brief of September 7, 2006, Travelers relies on the recent Texas Supreme Court case of *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-50 (Tex.2006), and asserts that this case negates mold coverage and, therefore, summary-judgment on the Kellys' mold claim was proper. Although we acknowledge this opinion, the facts in this case do not require us to determine whether the *Fiess* opinion bars the Kellys' mold claim. *Fiess* notwithstanding, the Kellys failed to produce sufficient causation evidence to defeat a no-evidence motion for summary judgment.

\*3 Under their homeowners' policy, the Kellys' claim for personal property damage under Coverage B required proof of "physical loss" to their personal property caused by a named peril.<sup>FN5</sup> The only possible coverage for the Kellys' personal property claim was under the heading "Section I-Perils Insured Against," and subheading "Coverage B (Personal Property)." That subsection states the following in pertinent part:

FN5. The Kellys distinguish between "physical loss" as opposed to a "direct physical loss," contending that "direct

physical loss" is the standard Travelers used when it initially denied the Kellys' claim. The Kellys state that this standard is the incorrect standard. Regardless of the standard used when Travelers denied the Kellys' claim, the Kellys' claim requires proof of "physical loss" to their personal property by a covered peril. In this opinion, we do not address whether Travelers denied the claim under the incorrect legal standard, but discuss only whether the Kellys produced sufficient causation evidence to create a genuine issue of material fact on whether a covered loss caused damage to their personal property.

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

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

To defeat a no-evidence motion for summary judgment, the Kellys had to prove that a named peril, i.e., a plumbing, heating, air-conditioning, or appliance leak caused mold, the mold then became airborne, and thereafter contaminated their personal property. See *De Laurentis v. United Services Auto Ass'n*, 162 S.W.3d 714, 722-24 (Tex.App.-Houston [14th Dist.] 2005, pet. denied) (defining loss and concluding that the plain meaning of the policy language, covers tangible damage to the policyholder's personal property caused by a plumbing leak)<sup>FN6</sup>; *Travelers Indem. Co. v. Jarrett*, 369 S.W.2d 653 (Tex.App.-Waco 1963, no writ) (concluding that a provision insuring against "loss or damage caused by lightning" renders the insurer liable for all known effects of lightning, "and includes all loss or damage which results as a direct and natural consequence of the lightning, notwithstanding other incidental agencies may be incidental in adding to the loss or damage.")

FN6. In *De Laurentis*, the insured brought

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an action against the homeowner's insurer, alleging breach of a renter's insurance policy and various extra-contractual claims including bad faith handling of claim for mold damage to personal property allegedly caused by a leaking air conditioner. 162 S.W.3d at 722. The homeowner's insurer moved for and obtained summary judgment on the ground that mold was not a named peril. *Id.* Unlike this case, the homeowner's insurer did not attack the plaintiff's claim on a causation basis. *Id.* at 723, n. 7. This court stated that mold can constitute property damage and, therefore, remanded the case to the trial court because there was an issue as to whether a named peril had caused mold, which, in turn, caused damage to the plaintiff's personal property. *Id.* at 724-25.

An insured is not entitled to recover under an insurance policy unless she proves her damages are covered by the policy. *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex.1988), *overruled in part on other grounds by State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex.1996); *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex.App.-San Antonio 1999, pet. denied). Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 258 (Tex.App.-Austin 2002, pet. granted, judgment vacated w.r.m.); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320-21 (Tex. App. -San Antonio 2002, pet. denied).

The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove the damage is covered by the policy. *Allison*, 98 S.W.3d at 258. The insured must present some evidence upon which the jury can allocate the damages attributable to the covered peril. *Id.* at 258-59. Because the insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event

is a coverage issue for which the insured carries the burden of proof. *Rodriguez*, 88 S.W.3d at 321. Failure to segregate covered and noncovered perils is fatal to recovery. *Allison*, 98 S.W.3d at 259. "[A]lthough a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests." *Rodriguez*, 88 S.W.3d at 320.

\*4 Travelers contends the mold on the Kellys' personal property resulted from a combination of factors. According to Travelers, the Kellys failed to meet their burden under the doctrine of concurrent causes. To establish causation, the Kellys were required to prove (1) a named peril, for example, a plumbing leak, caused mold in their home, (2) that mold became airborne before the house was gutted and their personal property moved to storage, and (3) this same mold from the covered peril contaminated the personal property before it was moved to storage. In their response to Travelers's no-evidence motion for summary judgment, the Kellys proffered the following evidence:

- (1) The affidavit, report, and deposition testimony of Dr. Paul Pearce-their designated causation expert.
- (2) The deposition testimony of Patrick O'Brien-the technician for Dr. Pearce's mold testing company, Nova.
- (3) Portions of Travelers's adjuster Tom Underwood's report and deposition testimony.
- (4) Portions of Travelers's designated expert John Solook's report and deposition testimony.

We address, in turn, each piece of evidence the Kellys produced to defeat Travelers's no-evidence motion for summary judgment.

#### 1. Dr. Pearce's Testimony and Affidavit

The Kellys rely heavily on their causation expert, Dr. Pearce. They allege that through his affidavit testimony Dr. Pearce produced the following causation evidence, which they claim satisfies the doctrine of concurrent causes: (1) plumbing leaks existed in the Kellys' home, (2) these plumbing leaks caused mold, (3) Dr. Pearce can differentiate between mold from covered and non-covered

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claims, and (4) most, if not all of the mold found in the Kellys' home was due to plumbing leaks.

Even if we could properly consider Dr. Pearce's affidavit, it would not raise a genuine issue of material of fact on the issue of causation. Dr. Pearce never inspected the personal property that was in storage at the time the inspector (Patrick O'Brien) did the testing at the Kellys' home. After reviewing only photographs of the personal property and O'Brien's report, Dr. Pearce concluded (as stated in his affidavit) that the visible water damage found in the Kellys' home is consistent with water leaks from the roof, water leaks from the windows, and/or plumbing leaks. He confirmed this finding in his deposition, testifying that much of the mold resulted from a roof, window, or plumbing leak.

Dr. Pearce's report indicated elevated mold levels in some parts of the Kellys' residence. However, Dr. Pearce did not elaborate on how this mold might have caused the damage to personal property that had been stored in non-climate-controlled space for six months before any mold testing. Dr. Pearce admitted that Nova's testing did not reflect what the conditions would have been in the Kellys' home before they completely gutted it. When the home was tested-prior to the FEMA closing-the Kellys had moved all of their personal property to three non-climate-controlled storage facilities, and to their son's garage. Immediately thereafter, the Kellys knocked holes in the walls, and completely stripped the house of any useful materials. Dr. Pearce could not affirmatively state whether excess air-borne mold grew in the Kellys' residence before the Kellys removed the baseboards, wall boards, and other parts of the house.

\*5 Dr. Pearce thought it a reasonable probability that the mold contaminating the Kellys' personal property resulted from "specific plumbing and/or roof leaks prior to its removal from the home and subsequent storage." Roof leaks and window leaks are not covered under the Kellys' policy. But, Dr. Pearce did not allocate the Kellys' loss, if any, between any alleged plumbing leaks (covered peril), and the roof and window leaks (non-covered perils). He only concluded that one might be able to distinguish between mold caused by the 1994 flood

waters or another type of water intrusion. This conclusion still left three possible sources of mold-plumbing leaks, roof leaks, and window leaks.

Dr. Pearce has not identified any plumbing leak in the house and thus no specific plumbing leak in the master bedroom or master bathroom that caused contamination of the stored personal property. Dr. Pearce also admitted in his deposition that, because the Kellys' personal property had been placed in non-climate-controlled storage, it could have developed mold in as quickly as a week after being placed there.

When an expert does not rule out causes of loss other than the one he assigns, that "renders his opinion a little more than speculation and therefore, unreliable." *Emmett Prop., Inc. v. Halliburton Energy Serv., Inc.*, 167 S.W.3d 365, 373 (Tex.App.-Houston [14th Dist.] 2005, no pet.). Because the Kellys' expert failed to indicate the extent to which the covered peril damaged their home, we cannot conclude that a certain percentage of the damage was caused by the plumbing leaks-the covered perils. *Allison*, 98 S.W.3d at 304. This failure to allocate and identify the portion covered is "fatal to their claim." *Id.* We conclude that Dr. Pearce's affidavit and deposition testimony does not raise a genuine issue of material fact on the issue of causation.

## 2. Patrick O'Brien's Testimony

When Patrick O'Brien tested the Kellys' home for mold and water damage, the house had been totally gutted, and, in his opinion, was completely unlivable. O'Brien did not visit any of the storage facilities or inspect any of the personal property. O'Brien, who, unlike Dr. Pearce, actually inspected the Kellys' residence, could not determine whether the mold damage had developed within the weeks prior to his visit (in mid-December 2001) or some earlier time. He could not tell whether the water intrusion in the master bathroom resulted from a plumbing leak or was caused by a previous flood. Nor could he tell whether the water damage was caused by a leak in the windows or a leak in the roof above the window. We conclude O'Brien's

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testimony does not raise a material issue of fact on causation.

### 3. Tom Underwood's Testimony

On January 15, 2002, Tom Underwood of Travelers, inspected the Kellys' residence as well as their stored personal property. Of those who offered testimony or opinions on causation, he is the only individual who actually inspected the personal property while it was in storage. In his report of the residence, Underwood noted that the upstairs bath and master bath had some visible mold growth due to plumbing leaks. He produced a field inspection report and thirty-two photographs of the residence and personal property. We conclude that, although he noted visible mold growth in the home due to plumbing leaks, Underwood did not link the mold growth on the personal property to the mold in the home. Indeed, when he inspected the personal property in January of 2002, Underwood stated that he found no visible mold growth on the property. His detection of mold in the house does not necessarily mean that the Kellys' personal property was contaminated by mold from plumbing leaks before being put in non-climate-controlled storage for nearly six months. Therefore, Underwood's testimony also is no evidence of causation.

### 4. John Solook's Testimony

\*6 John Solook, the Certified Industrial Hygienist (CIH) hired by Travelers testified that he understood the thirty-two photographs depicted the house as it looked when Tom Underwood inspected it on January 15, 2002. At first, Solook assumed, as Underwood had stated, that there was a plumbing leak in the upstairs bathroom and master bathroom. However, during his deposition, after he had viewed color photographs of the bathrooms, he recanted his initial position and testified the water damage along the sides of the master bathroom tub was not due to a leak, but to a failure of grout or caulking, or even of the plate that goes behind the faucet in a sink or shower to prevent water from migrating down behind the wall. He also testified that the photographs indicated long-term overflow or

dripping of water from the sink, as opposed to a plumbing leak. A lack of caulking along the door to the master bathroom shower also would explain some of the water damage. Dr. Pearce agreed that the lack of caulking alongside the shower doors could have led to water damage to the baseboards and did not necessarily indicate a plumbing leak.

Noting that it is difficult to tell whether the personal property was contaminated prior to being placed in storage, Solook raised the following points in his report:

"The majority of cabinetry, appliances, bathroom, fixtures, A/C registers, HVAC unit, insulation, furniture and other items were removed and placed in what appeared [to be] non-climate controlled (environment) storage with probable inadequate ventilation."

"A non-climate controlled storage facility will have an environment favorable for supporting microbial growth and amplification."

"The method of removal is not known but if standard industry practices, such as wiping down, HEPA vacuuming were not used especially those items from the bathrooms and upstairs room, there is potential to contaminate the storage locations with mold spores."

"In addition, if the carpeting/padding from areas other than the master bedroom/bath/upstairs bath and adjacent areas were not adequately cleaned using standard industry practices this would also be a source of mold spores while in storage ..."

"Removal of known contaminated items without control methods, such as air filtration units (negative air movers) and isolation would disturb the mold contamination and would be distributed throughout the immediate area and potentially to other areas within the residence."

*"Storage of cleaned and/or non-contaminated contents in non-climate controlled locations will allow conditions to develop within a short period of time, possibl[y] 30 days or less, favorable for mold growth especially in this geographical area."*

(emphasis added). Even if we considered only Solook's recanted position, Solook's testimony still fails to establish any causal link between the property in storage and any leak in the master bathroom and upstairs bathroom. Solook's

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testimony is no evidence of causation.

### III. Conclusion

\*7 The Kellys produced no evidence of causation to link any alleged mold caused by plumbing leaks to the mold on their personal property held in storage. Even if mold was caused by a plumbing leak, the Kellys had to show that the damage to the unexamined, stored personal property was caused by the mold that resulted from a plumbing leak. The Kellys have not identified any specific plumbing leak that existed before the house was completely gutted and the plumbing fixtures removed. Moreover, the Kellys have not identified any mold caused by a specific plumbing leak existing in their home before this key event.

The Kellys admitted they suffered water damage in their home from roof leaks and window leaks, which events they also claim resulted in mold. The Kellys, however, did not offer the requisite proof to establish that the contamination of their personal property (if caused by any water damage in the home) was not related to the mold caused by these non-covered water events. The Kellys did not offer any evidence from their expert showing that their personal property was tested to determine if any mold contamination had occurred or the type or source of mold, if any. The storage units were not tested to see what types of mold, if any, were present in the units before the Kellys placed their belongings in storage. Mr. Kelly testified that when they went to remove the contents from the storage facilities (after six to seven months in a non-climate-controlled environment), it was "eaten up with mold." However, there is no evidence that mold due to a plumbing leak caused contamination to the personal property. The items placed in storage were apparently fine when initially stored and showed signs of mold only after being in non-climate-controlled units for several months. Because the Kellys had burned or otherwise disposed of the contents of the storage facilities, it was no longer possible to test these items.

Although the summary judgment evidence showed the Kellys' home may have had mold contamination,

it did not show that their personal property was contaminated by mold due to a covered peril, i.e., a plumbing leak. Because an insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue the insured must prove. *Telepak v. United Services Auto. Assoc.*, 887 S.W.2d 506, 507-08 (Tex.App.-San Antonio 1994, writ denied) (determining that insured carries burden to establish exception to exclusion because exception to exclusion creates coverage). Moreover, it follows that an insured's failure to carry the burden on segregation is material and fatal. *Wallis*, 2 S.W.3d at 302.

The Kellys' failure to segregate mold damage resulting from covered and noncovered perils is fatal to their recovery. *See Allison*, 98 S.W.3d at 259; *see also Texarkana Memorial Hosp. v. Murdock*, 946 S.W.2d 836, 840 (Tex.1997) (relying upon principle of concurrent causation doctrine in determining that plaintiff's award for medical expenses could not stand in light of failure to properly segregate expenses); *Wallis*, 2 S.W.3d at 302-03 (affirming judgment notwithstanding the verdict on the basis that the insured had no evidence that established the amount of damage from the plumbing leak). Accordingly, we overrule the Kellys' second and third issues.

\*8 We affirm the trial court's summary judgment in favor of Travelers.<sup>FN7</sup>

FN7. Because we affirm the summary judgment based on the causation ground, we need not address issue four regarding Travelers's argument that the Kellys' claim lapsed thirty days from the date they began removing their personal property from the house under the "automatic removal" provision in the policy.

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