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IN SUPREME COURT
OF TEXAS
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06-1018

MOTION
MOTION FOR REHEARING-PET REV

**IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS**

D.R. HORTON-TEXAS, LTD.

Petitioner

v.

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.

Respondent

PETITIONER'S MOTION FOR REHEARING

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POINTS RELIED ON FOR REHEARING

1. The Court erred in denying D.R. Horton's petition for review because it was error for the court of appeals to conflate "duty to defend" with "duty to indemnify" and hold that because D.R. Horton could not introduce extrinsic evidence to establish a duty to defend, it also could not establish a duty to indemnify.

2. The Court erred in denying D.R. Horton's petition for review because it was error for the court of appeals to hold that D.R. Horton may not rely on extrinsic evidence consisting of coverage-only facts to establish that it was entitled to a defense as an additional insured on its subcontractor's liability insurance policy.

THIS CASE IS IMPORTANT EVEN AFTER *PINE OAK*

I. *Pine Oak* did not address an important issue raised in this case.

In *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, Cause No. 06-0867, this Court did not address an important issue raised by this case: whether a ruling on the duty to defend question necessarily answers the duty to indemnify question. In holding that its duty-to-defend holding also resolved the duty-to-indemnify issue in this case, the court of appeals fundamentally misunderstood and misapplied *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997). As a result, D.R. Horton has been improperly and unfairly deprived of its right to indemnification.

Two commentators discussing the Fourteenth Court's holding in this case put it this way: "The court mistakenly reasoned that the same arguments that disposed of the duty to defend also disposed of the duty to indemnify. This is wrong, because at trial, evidence could establish the subcontractor's fault, despite the absence of a specific pleading regarding the subcontractor." Mark L. Kincaid & Suzette E. Selden,

Annual Survey of Texas Insurance Law 2006, 10 J. CONSUMER & COM. L. No. 2 at 69 (Univ. of Hous. 2007).

The same commentators also observed that: "The court's error is an outgrowth of the mistaken notion that the duty to defend is always broader than the duty to pay." *Id.* In other words, even though there may be no duty to defend, "there nevertheless may be a duty to pay, if a covered claim is proven." *Id.* It is not uncommon for Texas courts to make this same mistake, and this Court's guidance is needed. *See* Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 TEX. TECH. L. REV. 869, 889 (2000) [hereinafter "Pryor"] (forecasting that courts "may misunderstand" *Griffin's* "unfortunate suggestion that a kind of eight-corners rule can be used for the duty to indemnify.").

II. The Court should reconsider its eight-corners-rule holding in *Pine Oak.*

This case also presents a recurring issue that the Court did not reach in *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006). The issue – which has percolated in the lower courts for many years without a consistent answer – was not answered in *Pine Oak*: Does Texas recognize the exception to the eight-corners rule for coverage-only facts? The Court should reconsider its reasoning in *Pine Oak* and formally approve this eminently-reasonable and much-needed exception to the eight-corners rule.

The Court denied D.R. Horton's petition for review, apparently because it believed that like Pine Oak, D.R. Horton's extrinsic evidence contradicts the

allegations in the underlying plaintiffs' petition. Pine Oak has filed a motion for rehearing, and D.R. Horton urges the Court to grant that motion. The Court's reasoning that the extrinsic evidence offered by Pine Oak cannot be considered because it contradicts the plaintiff's allegations is not sound. Extrinsic evidence that does not contradict a material allegation of the plaintiff's petition and is relevant only to an insurance coverage issue should be not deemed verboten. A rule that an insurer or policyholder can never contradict any allegation in the plaintiff's petition is unworkable and will lead to absurd and inequitable results.

ARGUMENT AND AUTHORITIES

I. Scope of the duty to indemnify.

Whether an insurer owes a duty to indemnify its insured in a particular case is ordinarily determined from the actual, adjudicated facts, not the pleaded facts. "Conceivably, even if a pleading does not trigger the duty to defend, a duty to indemnify may eventually exist." Pryor, 31 TEX. TECH. L. REV. at 887-88. This is not to say that an insurer's indemnity obligation can never be resolved before completion of the underlying lawsuit or that a full trial is always necessary on the duty to indemnify. As this Court explained in *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997), if the "same reasons" that the court relied on to negate a defense obligation apply with equal force on the indemnity question, then the duty to indemnify can be resolved at the same time. Even after *Griffin*, however, "the test for

the duty to indemnify is not what the pleaded facts support, but what the actual facts support." Pryor, 31 TEX. TECH. L. REV. at 888.

The court of appeals in this case fundamentally misunderstood and misapplied this Court's holding in *Griffin.* The court mistakenly reasoned that because D.R. Horton could not rely on extrinsic evidence to establish a duty to defend, as a matter of law it also could not establish that Markel owed a duty to indemnify it. But under *Griffin,* "the same reasons that negate the duty to defend" must also "negate any possibility the insurer will ever have a duty to indemnify." 955 S.W.2d at 84. Here, even if the court of appeals did correctly hold that the eight-corners rule precluded D.R. Horton from relying on extrinsic evidence to establish a duty to defend, it does not follow that D.R Horton could not establish a duty to indemnify. The court of appeals was required to consider D.R. Horton's extrinsic evidence because an insurer's duty to indemnify is determined not "by allegations but rather proof at trial." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236, 240 (Tex. 2007).

Lamar Homes' correct statement of the law on the duty to indemnify cannot be reconciled with the court of appeals' reasoning that Markel owes no duty to indemnify D.R. Horton because "the *Holmes* suit did not allege facts covered by the policy. . . ." *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 2006 WL 3040756, at *6 (Tex. App.—Houston [14th Dist.] 2006). Again, it is not uncommon for Texas courts to make this mistake, and the Court should "modify or greatly restrict *Griffin's* unfortunate suggestion that a kind of eight-corners rule can be used for the duty to

indemnify." Pryor, 31 TEX. TECH. L. REV. at 890. In this case, *Griffin's* "unfortunate suggestion" caused a policyholder to improperly and unfairly be denied the indemnification it contracted and paid for and was entitled to receive.

II. Eight-corners rule.

Liability insurers have long advocated an exception to the eight corners rule that would permit courts to consider extrinsic evidence relevant only to a coverage issue when deciding whether the insurer must defend against a particular lawsuit. This case demonstrates that an exception for coverage-only facts will also preserve policyholders' contractual expectations. If the Court does not alter its eight-corners ruling in *Pine Oak*, then an insurer will be have the right to deny a defense in, for example, any case where the plaintiff's petition makes no mention of the dates when the events giving rise to the lawsuit occurred. Likewise, insurance companies will be forced to defend cases whenever a plaintiff tactically inserts allegations that have no relevance in the litigation are included in the petition solely to trigger insurance coverage.

A. D.R. Horton's extrinsic evidence does not contradict any allegation in the plaintiffs' petition.

Even if *Pine Oak* did correctly reason that an insured or an insurer should never be permitted to contradict <u>any</u> allegation in the plaintiff's petition to resolve a duty-to-defend issue, D.R. Horton's extrinsic evidence would not be barred because it does <u>not</u> contradict the Holmeses' allegations. Markel contends that the evidence

establishing that D.R. Horton subcontractor Rosendo Ramirez built and repaired the Holmeses' chimney contradicts the Holmeses' allegation that D.R. Horton built and repaired their house. But it borders on sophistry to say that evidence showing that a subcontractor built part of a house for a homebuilder "contradicts" an allegation that the homebuilder built the house.

Courts should not be required to feign ignorance of the fact that homebuilders use subcontractors to build the houses they sell. D.R. Horton is relying on its extrinsic evidence to say nothing more than: "Yes, we built the Holmeses' house, and we used subcontractor Ramirez to do the allegedly defective chimney work; therefore we are entitled to coverage as an additional insured under his liability policy with Markel." By using its extrinsic evidence for that purpose, D.R. Horton is in no way fundamentally challenging the truth of the plaintiffs' petition, and it makes no sense to hold that its extrinsic evidence cannot be considered for coverage-only purposes.

B. D.R. Horton's extrinsic evidence does not contradict any allegation in the plaintiff's petition that is material to their claims.

At the very least, D.R. Horton's extrinsic evidence would not have contradicted any allegation in the plaintiffs' petition that was material to their claims against D.R. Horton. D.R. Horton could not have avoided liability by asserting that the defects in question were caused by an independent contractor. Thus, the extrinsic evidence would have done nothing more than add Ramirez's name to the Holmeses' petition, and the only effect of doing so would have been to trigger Markel's duty to defend.

Under those circumstances, it is entirely proper to consider extrinsic evidence. *See Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712, 714-15 (Tex. Civ. App.—Texarkana 1967, no writ) (extrinsic evidence that had no bearing on merits of underlying case admissible to determine duty to defend issue); *see also* Rick Virnig, *Perspectives on the "Eight Corners": Making Sense of the Complaint Allegation Rule,* 4 J. TEX. INS. LAW 12, 18 (Winter 2003) ("[A] court should always allow a challenging party (which will almost always be the insurer) to supplement or contradict "insurance facts.").

GuideOne cited *Int'l Serv. Ins. Co. v. Boll*, 392 S.W.2d 160 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) as an example of a case where the exception for coverage-only extrinsic evidence was applied. 197 S.W.3d at 310. The Court seemingly approved *Boll's* holding because the extrinsic evidence went strictly to the coverage issue and "did not contradict any allegation in the third-party claimant's pleadings material to the merits of that underlying claim." *Id.* (emphasis added). *Pine Oak*, however, now seems retreat to a rigid rule that extrinsic evidence may not be considered if it contradicts any allegation in the plaintiff's petition, whether material to the merits of the plaintiff's claim or not. That approach is hostile to the interests and expectations of insurers and policyholders alike, and it should not be the law.

One commentator uses an example that aptly underscores why the reasoning in *Pine Oak* is problematic. *See* Virnig, 4. J. TEX. INS. LAW at 18. In Virnig's hypothetical, a plaintiff attempts to bring his claims within the defendant's insurance coverage by pleading that the defendant "was a named insured under an insurance

policy issued by Acme Insurance Company which was valid, fully paid up, in force on the date of the accident, and which covered just such an occurrence." *Id.* In that situation, the defendant's insurance company should be permitted to introduce extrinsic "insurance facts" contradicting the plaintiff's allegation because the allegation does not present a "liability fact":

> It has nothing to do with the [plaintiff's] case against the defendant; it only addresses who will pay the damages if liability is found. It is a pure "insurance fact," and should be ignored by a court determining the issue of insurance coverage. At the very least, if the court will not ignore the allegation, it should allow the insurer to contradict the allegation with extrinsic evidence showing the true situation.

Id. Instead of focusing on the question of whether the extrinsic evidence contradicts the plaintiff's petition, "[t]he key issue should be whether the extrinsic evidence overlaps with the merits of the underlying lawsuit." Pryor, 31 TEX. TECH. L. REV. at 880.

CONCLUSION

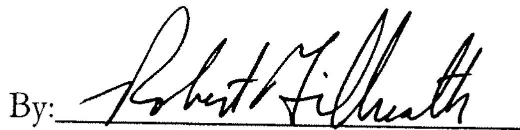
This case presents the Court with the opportunity to correct two significant problems with the state's insurance-law jurisprudence. First, the court of appeals' holding evidences the need for this Court to clarify its decade-old holding in *Griffin* on the duty to indemnify. A number of courts do not seem to fully grasp that just because the allegations in the plaintiff's petition do not trigger a duty to defend does not automatically mean there is no duty to indemnify. Correcting the court of appeals' misapplication of *Griffin* in this case will do much to clear up the problem.

Second, for many years now Texas courts have struggled with, and reached differing conclusions on, the question of whether there is an exception to the eight-corners rule for facts that (i) would clarify whether a plaintiff's allegations fall within the ambit of the defendant's insurance policy thus triggering the insurer's duty to defend, but (ii) would not have any effect on the defendant's liability or the plaintiff's damages in the underlying lawsuit. This Court still has not definitively addressed that question, and the lower courts still need this Court's guidance.

PRAYER

Petitioner D.R. Horton-Texas, Ltd. prays that the Court grant its motion for rehearing, grant its petition for review, reverse that portion of the court of appeals' judgment affirming in part the trial court's summary judgment for Respondent Markel International Insurance Company, Ltd., and remand this case for further proceedings consistent with the Court's opinion and judgment. D.R. Horton also requests any other relief to which it may be justly entitled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of February 2009, I forwarded a true and correct copy of this Motion for Rehearing to those identified below via First Class United States Mail, Return Receipt Requested.

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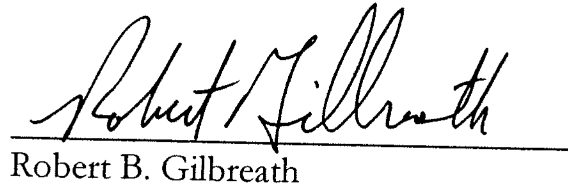

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