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Supreme Court of Texas.  
D.R. Horton - Texas, Ltd., Petitioner,  
v.  
Markel International Insurance Company, Ltd., Respondent; Sphere Drake  
Insurance, Ltd., Interested Party.  
No. 06-1018.

September 8, 2009.

Appearances:  
Robert B. Gilbreath, Hawkins Parnell & Thackston, LLP, Dallas, TX,  
for petitioner.  
Blake S. Evans, Schubert & Evans, P.C, Dallas, TX, for petitioner  
on rebuttal.  
Les Pickett, Galloway Johnson Tompkins Burr & Smith, Houston, TX,  
for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet  
O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and  
Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear  
argument in 06-1018 D. R. Horton Texas, Ltd., v. Markel International  
Insurance Company, Ltd.

MARSHALL: May it please the Court, Mr. Gilbreath and Mr. Evans  
will present argument for the petitioner. Petitioner has reserved five  
minutes for rebuttal. Mr. Gilbreath will open with the first 15  
minutes. Mr. Evans will present the rebuttal.

ORAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT B. GILBREATH: May it please the Court, when this  
Court issued its opinion in GuideOne, it appeared to be on the verge of  
recognizing a limited exception to the complaint allegation or eight  
corners rule, which is used for determining whether an insurance  
company owes a duty to defend its insured and that was a breakthrough  
for a couple of reasons. First, the lower courts in Texas had been  
reaching inconsistent conclusions about when extrinsic evidence may be  
considered in order to determine whether there's a duty to defend and,  
second, there was a great need for at least a limited exception to the  
eight corners rule, which would benefit both policyholders and insurers  
alike, but earlier this year, when the Court issued its opinion in the  
Pine Oak Case, it seemed to retreat back to a rather rigid approach to  
the eight corners rule, and on its face, Pine Oak might seem to  
preclude any argument that the lower courts erred in refusing to give

effect to the extrinsic evidence that my client proffered in this case in order to show that Markel Insurance Company owed a duty to defendant.

JUSTICE DAVID M. MEDINA: Why would this be a fact situation where perhaps where GuideOne suggested we, the Court should go in this type, these types of facts?

ATTORNEY ROBERT B. GILBREATH: Why would be this be the type of fact situation?

JUSTICE DAVID M. MEDINA: Yes.

ATTORNEY ROBERT B. GILBREATH: Well, for a couple of reasons, Your Honor. One, the most important, I think, to consider here is that in Pine Oak, when the Court rejected the use of extrinsic evidence, it did so to prevent the named insured from showing that an exclusion in the policy did not apply. Remember, the insured was a home builder and it wanted to show that it used subcontractors because if it did, then it would be able to avoid exclusion L in the policy and show that it didn't apply.

JUSTICE DAVID M. MEDINA: Well here you have a subcontractor as well, correct?

ATTORNEY ROBERT B. GILBREATH: Correct, Your Honor. But we're trying to do, Pine Oak did not involve the threshold question of whether the party seeking insurance coverage qualifies as an insured in the first instance and that's what this case is about. Here, D. R. Horton wants to show that it used a particular subcontractor to build the house in question, not to avoid the application of an exclusion, but rather to show to establish its status as an additional insured under its subcontractors liability insurance policy and that's an important distinction.

JUSTICE DAVID M. MEDINA: Was, I think the builder was even named as an additional insured or is it an additional insured because of the work performed?

ATTORNEY ROBERT B. GILBREATH: He, Ramirez, had the policy that D. R. Horton was named as an additional insured under for certain purposes. In order to show that we were an additional insured, we had to show that the work that the plaintiffs were complaining about on the house arose out of something that Ramirez did, but it's a very important distinction in this case from Pine Oak because courts and commentators have long recognized that extrinsic evidence should always be admissible to determine whether a person is a complete stranger to the policy or an insured and let me give an example. Let's assume that a plaintiff sues me alleging that as a Baker Botts attorney, I committed malpractice and then let's assume further the truth, I'm not a Baker Botts attorney. So should Baker Botts' liability insurer be required to defend me, a complete stranger to the policy, based on allegations made by another complete stranger to the policy? Well most courts and commentators.

JUSTICE PHIL JOHNSON: Don't most policies say we're going to defend you, we're talking about indemnity here, I understand that, but most policies say we're going to defend you whether they're true, false, fraudulent or whatever. Policies themselves cover those situations, do they not on defense.

ATTORNEY ROBERT B. GILBREATH: They do, but that goes to the allegations, the liability facts that are alleged in the petition. The policy before you get to that point, the policy says you first have to have an insured and so that's why courts and commentators have said, look, when it comes to the question of whether you're an insured in the first instance, then extrinsic evidence is admissible.

JUSTICE PAUL W. GREEN: How is that different from GuideOne?

ATTORNEY ROBERT B. GILBREATH: GuideOne is different because in GuideOne, the attempt to use extrinsic evidence was to show whether the person seeking additional insured, or insured status, was working for the church at the time of the alleged events and I don't think that the issue there was whether, in fact, they were an insured, but also another distinction with GuideOne is that our evidence doesn't overlap with liability issues, which I will address, but I wanted to make the point and emphasize this point because I urge the Court to address this head-on, this question of whether you can use extrinsic evidence to show that somebody is an insured in the first instance because it's an issue that will keep coming up before the Court. I think Mr. Taylor, Ben Taylor, is still out in the audience and he has a case before the Court right now, the Erickson case, in which as a respondent on behalf of an insurance company, he's arguing to the Court you ought to consider extrinsic evidence on this narrow question of whether a person has insured status, whether they're an insured.

JUSTICE DAVID M. MEDINA: If you'd like to yield some of your time to Mr. Taylor, he is indeed out there. He may make the argument.

JUSTICE HARRIET O'NEILL: But that can be no so straightforward a question and, I mean, the purpose of the eight corner rule is just so that the insurer can look at the complaint, look at the policy and make that determination.

ATTORNEY ROBERT B. GILBREATH: I think so, but it's more often the insurance companies, as in Mr. Taylor's case, where they want to say, this guy's a stranger to the policy and he's not an insured so we don't have any obligation to defend until you are determined to be an insured. So the whole question of the eight corners rule, it goes to the duty to defend and the allegations in the petition, but you don't get there until you figure out well is this person an insured or not.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, we can agree that D. R. Horton is an insured. It's an additional insured. The question is when you read the petition, are they named? I mean, is it the conduct of Ramirez, the subcontractor, that's at issue or is it D. R. Horton and that is determined by the eight corners of the petition plus the policy.

ATTORNEY ROBERT B. GILBREATH: Well the petition is silent on that point and it doesn't contradict the petition for us to say because we all know, I can't think of a, maybe there's a solo home builder out there, but for the rest of the home builders in the world, everybody knows they use subcontractors. So when the petition is silent and says D. R. Horton built this house, all we want to say is yes, we built the house, but like every other home builder, we use subcontractors to do it and we used Ramirez and that one fact triggers additional insured coverage for us.

JUSTICE DAVID M. MEDINA: Why wouldn't it just come out in the course of discovery and then there will be a supplemental request for coverage and you could amend the pleadings to correct that or I guess the plaintiff's lawyer in this case could amend the pleadings so that they can plead into coverage as opposed to pleading out of coverage.

ATTORNEY ROBERT B. GILBREATH: That could happen, yes, Your Honor.

JUSTICE DAVID M. MEDINA: Wouldn't that be simpler?

ATTORNEY ROBERT B. GILBREATH: That could happen, but at this point for the Court to say because what the Court said, the lower court said well, there's just flat no duty to defend because if it's not in the petition, then there's no duty to defend and even if it came out during discovery, there's no guarantee that the plaintiff is going to amend

and I don't think we want to encourage collusion between a defendant and a plaintiff where the defendant says hey you need to amend your petition.

JUSTICE DAVID M. MEDINA: It wouldn't be collusion. Either the facts exist that there's an additional insured or they don't. There wouldn't be no collusion at all. It seems to me that would be the simplest way to handle it.

ATTORNEY ROBERT B. GILBREATH: I think so too, Your Honor, but the way the eight corners rule has been developing, at least in Pine Oak, is it's got to be in the petition. So if it's in the discovery, it's not going to trigger the duty to defend.

JUSTICE PHIL JOHNSON: Doesn't that go to the duty to defend and aren't we here on indemnity?

ATTORNEY ROBERT B. GILBREATH: We have two issues before the Court, Your Honor. We have both duty to defend and duty to indemnify. Now the court's opinion in Pine Oak might seem to preclude our arguments on duty to defend, but that's why I'm pleading with the Court to consider, reconsider that in this situation, this limited situation where the question is not whether an exclusion to coverage applies, but rather whether we have insured status to begin with.

JUSTICE HARRIET O'NEILL: Again, that's not so simple a question. Whether somebody's insured it may depend upon whether an employee was acting in the course and scope. So although it may sound easy, I can envision many, if not most circumstances where it would not be.

ATTORNEY ROBERT B. GILBREATH: That may be true, Your Honor, and it may need to be dealt with on a case-by-case basis, but I think in a case like this one where it's a simple fact of did we use Ramirez or not, it's a question that you get to before the eight corners rule kicks in and it's going to keep coming up before this Court so I would urge the Court to take it on in this case because if you just say Pine Oak controls, they lose on duty to defend and you haven't addressed this question, well what about the issue of insured status.

JUSTICE DAVID M. MEDINA: How does it work in reverse? What if there's an allegation that appears to trigger the duty to defend when, indeed, the allegation is not correct so that the insurer could rely on additional evidence to exclude coverage?

ATTORNEY ROBERT B. GILBREATH: I think it does work both ways. The rule that we're proposing is impact neutral. Both insurance companies and policyholders could use it. So if it goes not to exclusions, nothing like that, but just to the question of is this person an insured, then, yes, the insurance company like that Baker Botts' example I gave, insurance company could come in and say wait a minute. Gilbreath's not an attorney with Baker Botts. He's a complete stranger to this policy. We owe no duty to defend.

JUSTICE DALE WAINWRIGHT: In the home suit, if D. R. Horton had brought the Ramirez's in as third-party defendants for contribution or something, would that have addressed your concern and then be in the pleadings in the case? Maybe not the plaintiff's pleadings.

ATTORNEY ROBERT B. GILBREATH: I don't know the answer to that question because I don't think we have any case law that says whether you can consider a third-party complaint under the eight corners rule and so I would, I mean, as the eight corners under the strictest view of the eight corners rule, which seem to be adhering to these days, the answer would be no. It's the plaintiff's petition and the insurance policy that control. You can't look to a third-party complaint. It doesn't make sense to me. I think you should be able to look at some other complaint like that, but let me also say that.

JUSTICE DALE WAINWRIGHT: It's an open question. We haven't said you can't.

ATTORNEY ROBERT B. GILBREATH: That's right.

JUSTICE DALE WAINWRIGHT: And we haven't said you can.

ATTORNEY ROBERT B. GILBREATH: That's right, but why would we want to encourage people like D. R. Horton to bring in the subcontractor when it would do us no good because we could not avoid liability on the basis of an independent contractor defense. So bringing him would be an exercise in futility. The only purpose would be to try to get us insurance coverage. So we wouldn't want to encourage that, I would think.

JUSTICE PHIL JOHNSON: Could we talk about the indemnity question here for a little while?

ATTORNEY ROBERT B. GILBREATH: Yes, Your Honor.

JUSTICE PHIL JOHNSON: We talked about the duty to defend and you settled the case and there's no question that your sub actually did some or all of the work as I understand on the summary judgment evidence, but yet you've been denied indemnity. Was there ever a request for an indemnity or was there any information exchange between the D. R. Horton and the carriers about the indemnity question?

ATTORNEY ROBERT B. GILBREATH: Yes, Your Honor, I think there was after the suit settled, we said you need to indemnify us.

JUSTICE PHIL JOHNSON: How about before the suit was settled?

ATTORNEY ROBERT B. GILBREATH: Well, it wasn't, probably the issue of indemnification wouldn't be right, but let me do say this, Your Honor, about 16 days after suit was filed, we sent a letter to Markel Insurance Company saying look, Ramirez did this work and you ought to defend us and I can't remember if the letter said indemnify us as well. It probably did, although indemnification doesn't come up until there's been a settlement or a verdict.

JUSTICE PHIL JOHNSON: It's kind of important if you're demanding, if they're going to deny whether you demand an indemnity or defense it would seem.

ATTORNEY ROBERT B. GILBREATH: Oh well sure, but.

JUSTICE PHIL JOHNSON: Is that letter in the record?

ATTORNEY ROBERT B. GILBREATH: The letter is in the record, Your Honor. I don't happen to have the page number, but I can get it to the Court, but it's there. So we did tell them, you know, Ramirez was involved. We told them 16 days after suit was filed. They had plenty of time to file a declaratory judgment action or whatever they wanted to do, but they didn't.

JUSTICE PHIL JOHNSON: Is there anything in the record about whether while you were negotiating for settlement, you told the company, look, you didn't defend us, but you still have an indemnity obligation out there and we're negotiating to get rid of this case. Do you want to come participate or do you want us to sue you later. Was there any of that conversation?

ATTORNEY ROBERT B. GILBREATH: I'm not aware of that being in the record. I would suspect that that was going on between the carrier and the D. R. Horton's attorneys, but I can't say for sure, Your Honor.

JUSTICE DAVID M. MEDINA: What is legally obligated to pay mean?

ATTORNEY ROBERT B. GILBREATH: Legally obligated to pay refers to, actually it's an interesting question. I mean, it would have referred to a judgment, a settlement and I think the.

JUSTICE HARRIET O'NEILL: Well that's the question. Does it apply to a settlement?

ATTORNEY ROBERT B. GILBREATH: Yes, Your Honor, and I can't cite

you case and verse on that right now, but that was.

JUSTICE HARRIET O'NEILL: Because we don't allow a settling party to get contribution, is that right? Why should we allow a settling party to get indemnity irregardless of the policy?

ATTORNEY ROBERT B. GILBREATH: Well because I think that my recollection of the way the law has developed is that the insurance company always has the right to challenge the settlement as unreasonable, but it's always been the duty of an insurance company to pay a settlement or a judgment. They do have the opportunity to say well we think this settlement was unreasonable and we shouldn't have to pay it.

JUSTICE HARRIET O'NEILL: But under the terms of this policy, it does say that the insured becomes legally obligated to pay and that would seem to imply a legal finding of liability.

ATTORNEY ROBERT B. GILBREATH: Well I think it's broader than that. I think that it should cover the duty, I mean a settlement, but.

JUSTICE DAVID M. MEDINA: You can't get to that step unless it's been determined that there's coverage and that there's a duty to defend first, right?

ATTORNEY ROBERT B. GILBREATH: No, not on duty to indemnify because there's no, that's the problem. That's what happened in this case is.

JUSTICE DAVID M. MEDINA: Well you can't say we don't have a duty to defend, but we're going to go ahead and settle the case. That makes no sense.

ATTORNEY ROBERT B. GILBREATH: If there's no duty, even if there's no duty to defend, there's still a duty to indemnify because the duty to indemnify is based on the actual facts of the case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let's look, how would, let's say there's no settlement. How would D. R. Horton establish that it was Ramirez's work that was responsible for this?

ATTORNEY ROBERT B. GILBREATH: If there was no settlement.

CHIEF JUSTICE WALLACE B. JEFFERSON: So it goes to a jury. How does D. R. Horton and you haven't sued for contribution the subcontractor. You haven't brought them in as a responsible third party. How would get a fact-finding that would establish their work to be the underlying cause of this?

ATTORNEY ROBERT B. GILBREATH: I can think of a couple of ways. The first way, probably, is not the answer you're looking for, Your Honor, but just let me say that it might have, it probably would have come out in this case because D. R. Horton probably would have defended on the grounds that hey, the chimney was properly built. It wasn't defective and so in order to show that, we'd have Ramirez testify. Here's how I built the chimney. I did it in a good and workmanlike manner. So that would have come out perhaps in the underlying case. If not, then there is an opinion by Judge Sidney Fitzwater called in the Swicegood case where he addresses, makes an Erie guess at Texas law and he says, I think that under Texas law, you would be able to bring in facts that were not developed in the underlying case to show that there was a duty to indemnify and so the Swicegood case is cited and quoted in our brief and there's a more recent Fifth Circuit case that would support that proposition. It's the Res-Care case and I can, I think the citation I will just give to the Court real quick. It is 529 Fed 3rd 649. It's not directly on point, but it does support the proposition that you would be able to bring in evidence that wasn't developed in the underlying case on this duty to indemnify question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counselor. The Court is ready to hear argument from the

respondent.

MARSHALL: May it please the Court, Mr. Pickett will present argument for the respondent.

ORAL ARGUMENT OF LES PICKETT ON BEHALF OF THE RESPONDENT

ATTORNEY LES PICKETT: May it please the Court. Your Honors, if I seem nervous, I am. I apologize for my first time to appear before this Court. I do wish to point out a couple of things that I think are outcome determinative. These lawyers appeared on behalf of Horton in a motion rehearing at the Court of Appeals. That was the first time that there was any briefing asking for a limited exception to the eight corners rule. Indeed, at the trial court and at the Court of Appeals, Horton had said the eight corners rule guides this Court's determination on the duty to defend and the second issue, which they've never once acknowledged in their briefing is that the trial court overruled all of my objections to their summary judgment evidence. Not only did we object that it was extrinsic evidence and couldn't be considered in the duty to defend, but we objected that it was replete with hearsay, that there were incomplete contracts, there were contradictory statements in the evidence that they submitted, but nonetheless, the Court found that there was no scintilla, there was no proof, there was no fact questions that Rosendo Ramirez did the work that caused the molds' propagation, which is.

JUSTICE DAVID M. MEDINA: We all know that mold's not covered that's to Justice Brister in the Feiss case, but here what would be so wrong if this additional extrinsic evidence is applicable to both sides to either deny coverage or to show that there is a, I'm sorry, deny the duty to defend or establish that there's a duty to defend at the onset before a lot of money is expended by both parties to try to get issues resolved?

ATTORNEY LES PICKETT: I believe that this Court and other courts have already recognized a limited coverage facts-only extrinsic evidence exception. The evidence that they wanted to present here is directly the same evidence in the Glass petition from Pine Oaks. The Holmeses', the underlying plaintiffs here, pleaded that D. R. Horton and only D. R. Horton designed and built this house. The evidence that they wanted to introduce said no, no, no. A subcontractor did this and so that the record's clear here, it wasn't just the chimney that the Holmeses' complained about. They complained about windows and window framing and vent pipes and I don't know that they may have filed a lawsuit against those other subcontractors' insurers as well and that's the problem. In their extrinsic evidence they wanted to introduce is not coverage-facts only. It challenged the actual factual allegations. I have in my office a case that is a coverage-facts only. The insured supplied doors and windows on a construction job and it along with other contractors was sued for defective construction. I'm asked to analyze coverage. The petition has no dates. It doesn't say when the construction took place or when the damages occurred. We asked the insured give us your invoice to show when you sold these doors and lo and behold it was after our policy expired. I think that's the type of extrinsic evidence that doesn't challenge the allegations in the lawsuit. It only provides a date when they did the work. That's the type of limited exception I would say this Court could find, but the facts of this case are horrible. This is not the case to issue that. The underlying case, they apparently sent a letter to somebody that

they thought was an agent for Markel, this letter that went out 16 days after the underlying case was filed and it did not go to our agent identified in the policy. There is no, there are no facts that were developed to address the indemnity issue. There are no facts that were developed in the underlying case that connected Rosendo Ramirez to any work on this house.

CHIEF JUSTICE WALLACE B. JEFFERSON: If there were those facts, would you agree there'd be a duty to indemnify even if there wasn't to defend under the original petition?

ATTORNEY LES PICKETT: No, Your Honor, and I addressed that in our motion for summary judgment at the trial court level. We said even if they could somehow show that there was, that the additional insured endorsement was triggered, there are several exclusions to the claims that the Holmeses' pleaded. We have a total pollution exclusion endorsement, mold's a contaminant and we asserted that the Holmeses' case was based upon mold and so therefore that it would not be covered.

CHIEF JUSTICE WALLACE B. JEFFERSON: If there were no exclusions, is there a scenario where there could be no duty to defend initially, but because of the way facts were developed or established at trial, there is a duty to indemnify because additional insured status was triggered?

ATTORNEY LES PICKETT: There could be. I can't think of one right now, Your Honor.

JUSTICE PHIL JOHNSON: How about a settlement?

ATTORNEY LES PICKETT: That's the real problem is that because all the cases that I've read that talk about the duty to indemnify, they all say it's based upon the facts determined during the litigation of the underlying case and in this case, they didn't develop. They did not develop any facts.

JUSTICE PHIL JOHNSON: Does the policy say that you will only indemnify based upon the facts developed in the underlying case or does it say you will indemnify if you have liability for certain matters that are covered within the policy? What does your policy say about indemnity?

ATTORNEY LES PICKETT: The policy, it has the standard CGL language. We will pay those sums that the insurer becomes legally obligated to pay.

JUSTICE PHIL JOHNSON: So it doesn't restrict it to simply the underlying case development?

ATTORNEY LES PICKETT: No, it says.

JUSTICE PHIL JOHNSON: So if they sue you on the policy and say look, we settled this case over here. The allegations were we built this chimney wrong, let's just assume those were the allegations, but the facts are, as you know from your insured and we're going to sue you and prove your insured built that chimney so we're an additional insurer. If you don't step up the plate now and do something on the settlement, we're going to sue you for that. Now, wouldn't your policy liability depend on what's proved up in that suit independent of what went on in the original case?

ATTORNEY LES PICKETT: If all those facts were true.

JUSTICE PHIL JOHNSON: Okay, so your liability depends on what's in your policy not what happened in the original case?

ATTORNEY LES PICKETT: No, it's all tied together. Our policy is a contract and we are obligated to do what our contract says, but it also depends on what facts are developed and as this Court and other courts have held, it's the facts developed in the underlying case that determine whether or not we have a duty to indemnify.



JUSTICE NATHAN L. HECHT: But how does that make any sense? The plaintiff wants to settle and the defendant says okay, we want to settle, but first we've got to put on a big bunch of evidence about how come somebody else really did this. The plaintiff doesn't care. We just want to get through. The trial court certainly doesn't want to hear it if everybody's settled, but if we don't put it on, we can't get indemnity.

ATTORNEY LES PICKETT: I don't know that they couldn't develop facts in a coverage case, but under the facts of this case, they didn't do that. They had that opportunity. In our summary judgment.

JUSTICE NATHAN L. HECHT: I was trying to make sure that I understood that you think they can develop the facts leading to indemnification in the coverage case not in the underlying case?

ATTORNEY LES PICKETT: I don't know the answer to that. I haven't read a case that says you can do that. I have read their brief where they suggest that there's a decision from another I think you said Swicegood.

JUSTICE PHIL JOHNSON: Well it seems that if we go that way though, if we don't allow that, then what's going to happen it would seem logical is that D. R. Horton is going to join the end liability carrier in the primary suit so you will be bound by those facts. Otherwise, they won't ever get to prove, it seems like you end up with the liability carrier as a named party in the primary suit and that's not probably what the liability carriers generally wanted as I recall.

ATTORNEY LES PICKETT: Your Honor, typically the way I handle those cases when I defend a case that has facts similar to Horton, I would sue my subcontractor, not just Ramirez.

JUSTICE PHIL JOHNSON: Who would sue the subcontractor?

ATTORNEY LES PICKETT: D. R. Horton. I would sue, and in this case, it wasn't just the chimney that they complained about. Again, it was the windows and the framing and the vent. I would sue all of those subcontractors if my position as D. R. Horton's counsel is that I have a contract with the subcontractor and I think that the damages I'm being sued about were caused by your work. I understand their argument about the Recla issue. Recla only says that a contractor can't avoid liability for the negligence of its subcontractors. It does not prohibit the homeowner from suing those subcontractors. In the reality, in the practical effect, you as the contractor or the home builder, you sue all of your subs. You bring them in.

JUSTICE PHIL JOHNSON: But they didn't want to in this case apparently and that's their choice.

JUSTICE DALE WAINWRIGHT: But they may not think they need to if they are named expressly as an additional insured, right?

ATTORNEY LES PICKETT: Right.

JUSTICE DALE WAINWRIGHT: Let me back up and ask on the conceptual level to see exactly where you stand, I hope. You believe the eight corners rule determines the duty to defend.

ATTORNEY LES PICKETT: Correct.

JUSTICE DALE WAINWRIGHT: Beyond that when you're talking about indemnity, there are scenarios where the eight corners rule does not limit indemnity. In other words, additional facts that are developed can provide for indemnity outside of the boundaries of the eight corners rule.

ATTORNEY LES PICKETT: If I imagine factual scenarios, yes, I believe that could happen.

JUSTICE DALE WAINWRIGHT: And what's the, so you believe that those exceptions or those other circumstances are very narrowly defined it

sounds like if I can read from what you're saying and your gesture.

ATTORNEY LES PICKETT: I believe that's going to have to be on a case-by-case basis. That's why I keep trying and I'm not artfully saying it very well, but the facts of this case. We litigated in the trial court. If the court of appeals' decision on the indemnity was not as well reasoned or well written as an opinion from this Court would be or as some of the commentators have complained about it, what they failed to grasp is that the trial court had before it all of that evidence on the indemnity issue and the Court overruled all my objections and still said your evidence doesn't create a fact question. I don't know what the basis of the trial court's grant of summary judgment to me was because it doesn't say. It just says you win.

JUSTICE DALE WAINWRIGHT: And that's true, but the court of appeals said looking at our opinions, looking at what we said in Pine Oak and GuideOne, that you can't even look at that extrinsic evidence notwithstanding what the trial court may or may not have done and the court of appeals relied primarily on the Res-Care case, which purported to cite Griffin and say that you can't look at these extrinsic facts. I agree with the court of appeals that Resser says that. I don't agree with Resser that Griffin is that restrictive, however. Griffin was the drive-by shooting case that said there are no set of facts that can turn a drive-by shooting into an auto accident. I think that may be misinterpreted by some of our courts of appeals by saying you can't look at extrinsic evidence. There we're just saying a drive-by shooting can't be an auto accident under any set of circumstances.

ATTORNEY LES PICKETT: Right.

JUSTICE DALE WAINWRIGHT: So I think Griffin may be being mischaracterized.

ATTORNEY LES PICKETT: And that's why I said it may be that the court of appeals' analysis in writing on the indemnity issue may not be as well done as it would be from this Court, but the conclusion is correct. The fact was the pleadings in the underlying case said Horton and only Horton negligently built this house and built and designed the house. Proof of those facts in that pleading would not trigger any coverage under this policy. That's the way I interpret what the court of appeals did, but what I think the court of appeals did is they stopped, after they realized that under the extrinsic evidence rule there would be no duty to.

JUSTICE DALE WAINWRIGHT: Let me stop you, if I may, counsel, and I apologize. From what you just said, it sounds like you're limiting indemnity to the eight corners of the petition in the policy though and I thought we had agreed that indemnity depends on the facts proven.

ATTORNEY LES PICKETT: And I agree with you.

JUSTICE DALE WAINWRIGHT: Or developed whatever those terms may end up meaning.

ATTORNEY LES PICKETT: I agree with you. I think the court of appeals' analysis on that issue may be flawed, but their conclusion is correct because the trial court, we litigated the duty to indemnify in the underlying case. Horton produced evidence that was not part of the record from the Holmes' litigation. They created affidavits in our. In fact, one was like a seven-page affidavit from their lawyer going on and extolling how Rosendo Ramirez did this work and it was his opinion that there was coverage, but my point is is that we litigated. We had the facts. They had an opportunity to present their facts to prove a duty to indemnify under our policy.

JUSTICE PHIL JOHNSON: Your position would be then as far as what we should do is we address the eight corners rule on duty to defend and

whether we should allow extrinsic evidence and then separately look at your trial court record to see if you were entitled to summary judgment on the duty to indemnify or for fact questions raised on the duty to indemnify. So we look at it two separate ways when we address it in this case, is that your position?

ATTORNEY LES PICKETT: I believe the record supports the court's granting of summary judgment to me on the duty to indemnify as well.

JUSTICE PHIL JOHNSON: Right, but you believe that it supports it both on duty to defend and separately on duty to indemnify.

ATTORNEY LES PICKETT: Yes.

JUSTICE PHIL JOHNSON: And that is the position you took in the trial court.

ATTORNEY LES PICKETT: And in the court of appeals.

JUSTICE PHIL JOHNSON: And that's the way, and the court of appeals combined those and our analysis would be appropriate in your view if we looked at them separately and addressed them separately based upon the records.

ATTORNEY LES PICKETT: Right, I think what the court of appeals did was once they determined under the extrinsic evidence rule there's no duty to defend, they stopped and said, well, we don't need to go any further on the duty to indemnify whereas we had briefed through the court of appeals, I won on the duty to indemnify not only on that issue of the pleadings issue, but also because of the policy exclusions, pollution exclusion and other insurance clauses that said our policy was excess over other available insurance.

JUSTICE PHIL JOHNSON: Justice O'Neill asked a while ago if a settlement is legal liability to pay, what's your view on that?

ATTORNEY LES PICKETT: It's correct. If there is a settlement that they are legally obligated to pay because it is a contract and if they are an insured under the policy and if it, and if the claims that are addressed in that settlement are covered by the policy, then perhaps there is a duty to pay.

JUSTICE DALE WAINWRIGHT: And so you think the trial court? I'm sorry.

JUSTICE DAVID M. MEDINA: Clarification from me having been involved in insurance on both sides for about 18 years, I was always taught that the duty to defend is much broader than the duty to indemnify, which seems to me to indicate that if you have no duty to defend, then you have no duty to indemnify, but I heard otherwise from Mr. Gilbreath that you could have no duty to defend, but a duty to indemnify. What's your response to that?

ATTORNEY LES PICKETT: I was always taught and always read the cases to say that if you've got no duty to defend, you should have no duty to indemnify, but what I've heard from the bench and from opposing counsel is that say, for example, there are other facts that come out during the course of the trial which contradict the pleadings. It may be that that could happen.

JUSTICE DAVID M. MEDINA: In the course of discovery if you learn other things that may trigger the duty of indemnify then you go on to the trial with it.

JUSTICE HARRIET O'NEILL: But you seem as though that's unusual. That happens all the time doesn't it? I mean, if something doesn't fit the four corners rule, but then the question will come up under the evidence as to coverage. So I would say that is the norm as opposed to some aberration.

ATTORNEY LES PICKETT: I would say that typically when you have your pleadings that set out the allegations of the case, if there are

new facts developing during the course of the trial, there will be amended pleadings so then the duty to defend could be addressed again later, but it's been my practice that all of the facts are known before you go to trial. It's very rare that some new fact pops up during the trial.

JUSTICE DALE WAINWRIGHT: But, counsel, that approach would then make the insurance coverage dependent upon an independent party's willingness to amend rather than dependent upon the terms of your policy with your insured. Are you comfortable placing your duty to cover or not cover in the hands of a third party unconnected to you who's suing you?

JUSTICE DAVID M. MEDINA: Well in the real life, that's the way it generally works, I mean, they're not going to plead out of coverage if there's an opportunity to have coverage so.

ATTORNEY LES PICKETT: That's what I'm stuck with on the eight corners rule.

JUSTICE DALE WAINWRIGHT: And the options are, at least a couple of the options, the extent of your coverage being dependent upon a party on the other side of the case from you versus your coverage obligations being dependent upon the terms of your policy and the facts that are proven. You're saying that you're dependent upon the pleadings and you may be saying you're comfortable with that.

ATTORNEY LES PICKETT: Maybe I'm not understanding your question, but I can't control what pleadings there are. The pleadings and the facts included in the pleadings, that determines the duty to defend.

JUSTICE DALE WAINWRIGHT: Right and we're talking about indemnity.

ATTORNEY LES PICKETT: Right and so I can't control what the facts of the case are. Maybe it's an old cliché, the facts are the facts. I don't make the facts. So if the facts come out and show that there's something that might be covered under the policy, we have to address that separately from the duty to defend.

JUSTICE HARRIET O'NEILL: But as a practical matter, if facts come out that would indicate an indemnity obligation, doesn't the insurer then want to come in and voluntarily defend because they're defending their own indemnity obligation?

ATTORNEY LES PICKETT: If those facts are created during the pendency of the underlying suit, certainly the insurance company would want to be involved, but typically what you'll find there is for the reasons that they denied coverage originally, they're going to issue a reservation of rights letter and the insurers going to reject their attorneys.

JUSTICE DON R. WILLETT: We talked about whether legally obligated to pay does or doesn't include a voluntary settlement, but assume it does. Am I wrong in remembering isn't there a provision in the policy that says unless the insurer signs off on the agreed settlement, there's no duty to pay up.

ATTORNEY LES PICKETT: Correct, Your Honor, and that was part of our summary judgment. I argued in the trial court not only do we not owe an obligation to indemnify because of the pleadings issue, but you violated the consent to payment clause while you made a voluntary payment under the policy and their position.

JUSTICE DON R. WILLETT: By settling without your involvement or consent.

ATTORNEY LES PICKETT: It was never brought to our attention. I don't know that this is in the record, but from my understanding handling this case from the day that Horton filed it in the trial court, we never did discovery to find out what happened with that

letter they sent, but I know that there was no contact with my client to come and try to pay on the settlement with the Holmeses'.

JUSTICE PHIL JOHNSON: If there was a demand for indemnity and your client, as I understand, has denied coverage.

ATTORNEY LES PICKETT: My client never was notified of the case. That's our position.

JUSTICE PHIL JOHNSON: There were not.

ATTORNEY LES PICKETT: They sent the letter to someone who was not our agent so my client didn't know anything about anything the Holmes' case.

JUSTICE PHIL JOHNSON: Let's assume, we're talking about settlement now. Let's assume the letter did go to your client demanding coverage and your client says we deny coverage, was that a denial of defense or indemnity and defense?

ATTORNEY LES PICKETT: If I wrote the letter, I would write it to both, Your Honor.

JUSTICE PHIL JOHNSON: To both?

ATTORNEY LES PICKETT: Yes.

JUSTICE PHIL JOHNSON: So once you deny coverage and facts and the underlying facts, however, show potential indemnity liability, once you denied coverage, don't our cases say that you have denied the right to then invoke your exclusions on that, that once you say it's not our coverage then isn't the insured entitled to go ahead and settle and look to you if there is, in fact, coverage?

ATTORNEY LES PICKETT: Under that scenario I'm not sure. The facts of this case, they settled and then came back to us and sued us for breach of contract for failing to provide a defense or for failing to pay the settlement and we prevailed in the trial court on summary judgment on those issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counselor.

ATTORNEY LES PICKETT: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any rebuttals?

JUSTICE DON R. WILLET: Forgive me for jumping in, but going back to the question I asked about whether or not voluntary settlements are captured by the phrase legally obligated to pay, the policy also says even if it does well the policy doesn't say even if it does, but even if it does, if there was no sort of notice or involvement by the insurer is there any kind of duty to pay the agreed settlement?

REBUTTAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF PETITIONER

ATTORNEY ROBERT B. GILBREATH: Your Honor, I think what I'd like to stress here again is that we're not here to really fight a complete coverage battle or try this coverage lawsuit. We may go back and if this case is remanded and we may have to deal with some coverage issues, possible exclusions, whether or not conditions were complied with, but that's a separate story for on down the line.

JUSTICE NATHAN L. HECHT: Those were raised in the court of appeals or not?

ATTORNEY ROBERT B. GILBREATH: Those were not, Your Honor. What we're here to talk about today is whether or not the court of appeals erred in concluding that because there was no duty to defend, there automatically was no duty to indemnify applying the Griffin rule and what I think needs to be stressed here is one of the reasons why we submit that that was a mistake, a misapplication of the Griffin rule

and one of the reasons why.

JUSTICE DALE WAINWRIGHT: The court of appeals tried carefully to follow our opinion in signing GuideOne and signing Reserr, the San Antonio court of appeals opinion which was in Opett and even our recent language in Pine Oak seems to be very strict about extrinsic evidence. How would you thread that needle or address your position in light of our pending precedence?

ATTORNEY ROBERT B. GILBREATH: Well that's correct, Your Honor, with respect to the question of whether or not we should consider extrinsic evidence to determine the additional insured issue that my co-counsel pointed out, but, again, with respect to the indemnity question, I think it's very clear that the court misapplied what this Court had previously clearly stated in the Griffin case and, again, I think that arises out of some black letter law that the duty to defend is broader than the duty to pay and in many cases that's correct, but it's not automatically true across the board. This Court has told us on numerous occasions that the duty to defend and the duty to indemnify are separate and distinct. One is measured by the pleadings the duty to defend and one is measured by the actual facts, the duty to indemnify. So you can have situations and I sometimes like to think about it schematically with a large circle that encompasses the duty to defend and in some cases there can be a smaller circle within that that has the duty to indemnify, but because those two duties are separate and distinct, that doesn't hold true across the board and that's the mistake that the court of appeals make here in applying Griffin.

CHIEF JUSTICE WALLACE B. JEFFERSON: So because there's an obligation to indemnify even if there may not have been initially an obligation to defend, you would want us what? To reverse the court of appeals' judgment and have them consider those exclusion issues as it pertains to the duty to indemnify or what?

ATTORNEY ROBERT B. GILBREATH: Yes, you're correct, Your Honor. We would like for you to overrule the court's granting of summary judgment not only with respect with the duty to defend and I will address that in a second, but more importantly with respect to the point on the duty to indemnify, we need to be able to go back and have that evidence that we had submitted properly considered on the duty to indemnify.

JUSTICE NATHAN L. HECHT: Counsel says that the trial court considered it over all the objections and ruled.

ATTORNEY ROBERT B. GILBREATH: Well, Your Honor, I would respectfully submit that overruling objections of summary judgment evidence is not tantamount to actually considering that evidence for the duty to indemnify. We really don't know. I'm sure we got a one-liner from the trial court saying that we're going to grant your summary judgement on duty to defend and indemnity. We really don't know whether and to what extent that trial court relied on the extrinsic evidence to come up with that holding and then, secondly.

JUSTICE DAVID M. MEDINA: In light of the recent Court's decision requiring the trial court to give reasons for its decisions, could this case be sent back just on that alone?

ATTORNEY ROBERT B. GILBREATH: Well I believe that you probably could send the case back, but, again, I think that may be the right result here because it would give us an opportunity to go back and have that court and stress to that court that they need to be able to consider the extrinsic evidence and again stress to them that simply because you may have concluded albeit we argue incorrectly that there wasn't a duty to defend, you can't then automatically under these circumstances determine that there wasn't a duty to indemnify. Again,

that works in most cases.

JUSTICE HARRIET O'NEILL: We're assuming that the duties are different. I'm a little bit hung up on the legally obligated to pay point. Is there agreement among the parties that if there's a settlement, that then there's a legal obligation to pay? I thought that was disputed.

ATTORNEY ROBERT B. GILBREATH: I'll probably side with, I think, the viewpoints of the other folks that have been up here talking before me and say that the policy language is pretty clear on legally obligated to pay, that that would apply not only to judgments and settlements.

JUSTICE HARRIET O'NEILL: But is there a consent to settlement clause in the policy?

ATTORNEY ROBERT B. GILBREATH: Yes, ma'am, there is.

JUSTICE HARRIET O'NEILL: And if there's no consent to settlement, then there's no legal obligation, would that be correct?

ATTORNEY ROBERT B. GILBREATH: Well that's a condition, okay? And what you're talking about the language that we're talking about is up in the insuring agreement of the policy that really sets forth the two primary duties that we're here to talk about today, the duty to defend and the duty to indemnify and quite frankly, I think some of the confusion may be created. I think we've given you excerpts from the standard policy that the very first line, the very first requirement on the insurance policy is the duty to pay and then comes a sentence about duty to defend, but in practice, as we know, we're confronted with the inverse. We're confronted with the duty to defend and ascertain whether or not that's proper and then we work on the duty to indemnify on the back end, but it's very clear from the policy itself that those two duties flow from the insuring agreement and that the consent provision that you were talking about is a condition much like an exclusion that you would find later in the policy and, again, I think the important thing to stress here is that we're not here to fight the entire coverage battle. What we're here is to ask this Court to overrule the summary judgment that was handed down by the appellate court.

JUSTICE DALE WAINWRIGHT: The insurer says it was never advised of the settlement until after the fact. You agree?

ATTORNEY ROBERT B. GILBREATH: I believe that's probably correct, Your Honor, but again 16 days after this case was filed, we made demand upon that insurer for defense and indemnity. They denied that and so we were left on our own. We were left out in the cold by the insurance company to go ahead and defend the case as we saw fit. For reasons that are outlined in our pleadings, there really wasn't any reason for us to bring in Mr. Ramirez or even reference Mr. Ramirez in the pleading. We know there's no subcontractor defense that would be available to use and, again, we can't rely on the pleadings of the plaintiff typically in these kinds of situations to invoke a duty to defend because they simply have no reason to. They have D. R. Horton on the hook as the general contractor. So.

JUSTICE PHIL JOHNSON: One question, did you notify the company or did you notify some other person that does not function as an agent of the insurance company?

ATTORNEY ROBERT B. GILBREATH: Your Honor, to be honest, I do not know the answer to that question.

JUSTICE DALE WAINWRIGHT: It's in the record though somewhere?

ATTORNEY ROBERT B. GILBREATH: Yes, I believe it would be.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

ATTORNEY ROBERT B. GILBREATH: Thank you.



CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counselor. The cause is submitted and the Court will take another brief recess.

MARSHALL: All rise.

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