GILBANE BUILDING- FURTHER CLARIFICATION?

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- FACTS:
- PARR SUSTAINED INJURY ON JOB SITE WHILE CLIMBING DOWN A LADDER
- GILBANE -- GENERAL CONTRACTOR
- BAKER CONCRETE-INSTALLED LADDERS
- EMPIRE STEEL-PARR'S EMPLOYER

- TRIAL COURT
- PARR SUED GILBANE AND BAKER CONCRETE
- ALLEGED THAT RECENT RAINSTORMS HAD CAUSED THE WORKSITE TO ACCUMULATE MUD AND GILBANE NEGLIGENT IN FAILING TO KEEP WORKPLACE CLEAN

- EMPIRE INSURED BY ADMIRAL
- GILBANE REQUESTED DEFENSE AS ADDITIONAL INSURED
- ADMIRAL ADDITIONAL INSURED ENDORSMENT PROVIDED:

- **SCHEDULE**
- **Name of Additional Insured Person(s) or Organization(s):**
  - Any person or organization that is an owner of real property or personal property on which you are performing ongoing operations, or a contractor on whose behalf you are performing ongoing operation, *but only if coverage as an additional insured is required by written contract or written agreement that is an "insured contract,"* and provided that the "bodily injury," "property damage" or "personal & advertising injury" first occurs subsequent to execution of the contract or agreement ....

- **A. Section II—Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, *but only with respect to liability for "bodily injury," "property damage" or "personal & advertising injury" caused, in whole or in part, by:*
  - *1. Your acts or omissions; or*
  - *2. The acts or omissions of those acting on your behalf;*

  in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above ....

- GILBANE REQUESTED ADDITIONAL INSURED COVERAGE FROM ADMIRAL BASED ON FACT THAT TRADE CONTRACTOR AGREEMENT (TCA) BETWEEN GILBANE AND EMPIRE STEEL AGREED TO SECURE COVERAGE FOR GILBANE AS AN ADDITIONAL INSURED AND EMPIRE AGREED TO INDEMNIFY GILBANE

- ADMIRAL DENIED COVERAGE
- GILBANE SETTLED WITH PARR
- GILBANE SUED EMPIRE AND ADMIRAL SEEKING DECLARATION THAT ADMIRAL HAD DUTY TO DEFEND AND INDEMNIFY
- TRIAL BY WRITTEN SUBMISSION UPON STIPULATED FACTS

- TRIAL COURT FOUND PARR TRIPPED WHILE CLIMBING DOWN LADDER CARRYING EXTENSION CORD AND FEET WERE TANGLED IN EXTENSION CORD
- COURT FOUND ADMIRAL WOULD HAVE DUTY TO INDEMNIFY BECAUSE JURY WOULD HAVE FOUND PARR OR EMPIRE AT LEAST 1% RESPONSIBLE

- STANDARD OF REVIEW-
  - "WE REVIEW A DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT *DE NOVO*, APPLYING THE SAME LEGAL STANDARDS THAT THE DISTRICT COURT APPLIED, AND WE VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY."

INDEMNITY

- Admiral argues that the TCA is not an insured contract because its indemnity provision is unenforceable under Texas law, and therefore Empire never actually assumed any tort liability. Because indemnity provisions effect an extraordinary result—"exculpat[ing] a party from the consequences of its own negligence" before that negligence even occurs—Texas imposes a fair notice requirement. *Dresser Indus., Inc. v. Page Petro., Inc.*, 853 S.W.2d 505, 508–09 (1993); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex.1987)

INDEMNITY

- “We assume, without deciding, that the TCA’s indemnity provision is unenforceable under Texas law. We therefore must decide whether the TCA can still be an insured contract under the policy.”

ADDITIONAL INSURED

- Here, as in *Swift,* Admiral's argument relies on the policy language defining an insured contract as one that "assume[s] the tort liability of another party," and concludes that an unenforceable provision does not actually assume liability. However, as we explained in *Swift,* the additional insured question turns not on enforceability, but on whether Empire Steel *agreed to* "assume the tort liability of another party." In the TCA, Empire Steel contracted not only to indemnify Gilbane, but also to secure insurance on its behalf; by doing so, it agreed to assume Gilbane's tort liability. That provision is not rendered void by the indemnity provision, even if it is unenforceable. As such, Empire Steel agreed to assume Gilbane's tort liability, and Gilbane qualifies as an additional insured.

DUTY TO DEFEND

- Texas strictly follows the "eight-corners rule," meaning the duty to defend may only be determined by the facts alleged in the petition and the coverage provided in the policy. *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex.2009) We consider only the facts affirmatively alleged in the Third Amended Pleading, *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 201–02 (Tex.2004), and we take those facts as true, *Pine Oak Builders*, 279 S.W.3d at 654. If the petition does not affirmatively allege facts that would trigger the duty under the policy, Admiral is not required to defend Gilbane. *See id.; Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex.2005)

THE POLICY

- Gilbane's argument fails, however, when we examine the policy at issue in this case as a whole. Unlike in *Evanston,* the policy here explicitly requires that the injuries be "caused, in whole or in part, by" Empire. Moreover, the Texas Supreme Court has defined "caused by" as requiring proximate causation. *Utica Nat'l Ins. Co.,* 141 S.W.3d at 202–03 (citing *Red Ball Motor Freight, Inc. v. Emp'rs Mut. Liab. Ins. Co.,* 189 F.2d 374, 378 (5th Cir.1951)). As such, Admiral owes Gilbane a duty to defend only if the underlying pleadings allege that Empire, or someone acting on its behalf, proximately caused Parr's injuries.

THE PETITION

- [T]he Gilbane Defendants failed to keep the construction site in a clean and functional condition. During the month of January 2007 the Houston area received large amounts of rainfall. As a result of this rainfall, the construction site accumulated large amounts of mud. This mud was tracked in from the surrounding area into the building under construction. As a result of the mud being tracked inside, the work area became slippery and hazardous. The Gilbane Defendants had actual notice of the danger caused by the mud from e-mails and other information given to them by their subcontractors.

THE PETITION

- Despite the Gilbane Defendants' knowledge of the dangers posed by the mud, these Defendants took no action to correct the problem, and as a result, Plaintiff slipped and fell causing his injuries .... [T]he Gilbane Defendants controlled the construction elevator on the jobsite .... Despite the fact that the construction workers worked until five o'clock each day, the Gilbane Defendants sent the elevator operator home around four o'clock. Due to the fact that the elevators were left unmanned and useless after the elevator operator went home, Plaintiff was forced to walk down the ladder where he ultimately slipped and fell.

THE PETITION

- Gilbane argued before the district court, as it does here, that because Parr or Empire could potentially be found contributorily negligent at a later trial, inferring facts to support the plaintiff's contributory negligence does not run afoul of the eight-corners rule. The district court accepted that argument, determining, "After reviewing only the eight-corners of the petition and the Admiral policy, the court cannot say that Parr himself, acting on behalf of Empire Steel in the course of his job, *was not possibly a contributing, proximate cause of his injuries*." In other words, it determined that the pleadings did not conclusively rule out Parr's negligence; it was possible a jury could eventually find that Parr caused his own injuries.

THE PETITION

- Such a construction, however, improperly shifts the burden of proof, requiring the party disputing coverage to establish that the pleadings *do not* potentially support a covered claim. Although the Texas Supreme Court has held that an insurer has a duty to defend "if a plaintiff's factual allegations potentially support a covered claim," it has never applied the "potentiality" standard to deviate from the eight-corners rule. *Zurich Am. Ins. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex.2008). Rather, it has used the standard to characterize the description of claims in the petition, determining whether they potentially were covered.

THE PETITION

- Applying the correct standard, the allegations in the pleadings do not implicate either Parr's or Empire Steel's fault. Indeed, even the portion of the petition relied on by the district court alleges that Parr's injuries were caused only by Gilbane: "Despite the Gilbane Defendants' knowledge of the dangers posed by the mud, these Defendants took no action to correct the problem, and as a result, Plaintiff slipped and fell causing his injuries." Simply put, the petition does not allege any facts suggesting that Parr's own negligence could have caused his injuries.

THE PETITION

- Nor does the petition allege that Empire caused Parr's injuries. Indeed, the only mention of Empire in the pleadings is, "Plaintiff was an employee of Empire Steel Erectors, L.P., performing work under a contract between Empire Steel Erectors, L.P. and Gilbane ...." In its brief, Gilbane concedes that the requisite language is not in the pleadings, recognizing "Parr's petition's silence as to any acts or omissions of Empire." Limiting our review to the face of the petition, as we must, it does not affirmatively allege any facts implicating the negligence of either Empire or Parr, and Admiral has no duty to defend.

THE PETITION

- First, Gilbane asks us to create an exception to the eight-corners rule because, it argues, a plaintiff would never allege his own negligence. It therefore argues that we should infer that Parr's negligence would be implicated at trial

THE PETITION

- Second, Gilbane argues that we should go outside the eight corners of the pleadings and policy in this case because Parr could not plead Empire's negligence without triggering workers' compensation issues. Gilbane recognizes the "silence" in the pleadings as to Empire's negligence but asks that we disregard it because it "indicate[s] not that Empire committed no acts or omissions, but only that Empire is statutorily immune to suit." Importantly, however, there is no allegation of a workers' compensation policy in the pleadings, and "[f]acts outside the pleadings, even those easily ascertained, are ordinarily not material to the determination."

THE PETITION

- The Texas Supreme Court has refused to recognize an exception to the eight-corners rule even when everyone involved in the suit knows the true facts. *See Pine Oak Builders,* 279 S.W.3d at 655. For example, in *GuideOne Elite Ins.,* the court declined to consider undisputed evidence that the employee who had allegedly assaulted the plaintiff ceased working for the defendant before the policy took effect. 197 S.W.3d at 307. Similarly, here, it is only by looking to evidence outside of the pleadings—which we may not do—that we know about the existence of the policy. Creating an exception here would be contrary to Texas law, and we decline to do so.[3] Moreover, even if we could consider the workers' compensation policy, Texas law would still require an affirmative allegation of Empire's negligence in the pleadings, as discussed above. *Pine Oak Builders,* 279 S.W.3d at 655–56. Thus, the district court erred in granting summary judgment in favor of Gilbane on the duty to defend.
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THE PETITION

- We recognize that this policy presents a seemingly difficult hurdle for additional insureds to trigger coverage while navigating difficult workers' compensation and contributory negligence issues. Nonetheless, it is not our place to create exceptions where the Texas Supreme Court has not shown that it would. As a practical matter, however, we observe that parties sometimes amend their pleadings to trigger coverage on the verge of settlement. *See, e.g., Huffhines,* 167 S.W.3d at 496.

DUTY TO DEFEND

- ISSUES NOT ADDRESSED:
  - LOOKED AT CONTRACT TO DETERMINE IF REQUIREMENT TO NAME AS AI -- OUTSIDE 8 CORNERS
  - OTHER PLEADINGS - CAN THEY BE VIEWED?
  - ADDITIONAL INSURED - SILENT PLEADINGS?

DUTY TO INDEMNIFY

- Next, we consider whether Admiral owes a duty to indemnify under the CGL policy. The duty to indemnify is separate and distinct from the duty to defend. *Zurich Am. Ins. Co.,* 268 S.W.3d at 490–91. The duty to defend is circumscribed by the eight-corners doctrine; the duty to indemnify, on the other hand, is controlled by the facts proven in the underlying suit. *Pine Oak Builders,* 279 S.W.3d at 656. Accordingly, we consider facts outside of those alleged in the petition in determining the duty to indemnify. *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co.,* 334 S.W.3d 217, 219 (Tex.2011) Here, if the facts proven at trial establish "liability for 'bodily injury' ... caused, in whole or in part, by ... [Empire's] acts or omissions; or ... [t]he acts or omissions of those acting on [Empire's] behalf," then Admiral owed a duty to indemnify.

DUTY TO INDEMNIFY

- The district court found that Parr was injured when he slipped while descending a ladder carrying an extension cord. He told a co-worker immediately after he fell that his “feet got wrapped up in the extension cord.” The district court concluded that “Parr’s own conduct was a contributing proximate cause of his damages claimed in the Underlying Lawsuit” and that “[a] jury in the Underlying Lawsuit would have found Michael Parr or his employer, Empire Steel, 1% or more responsible for causing the occurrence and/or injuries at issue.” Thus, under the terms of the policy, the district court concluded that Admiral had a duty to indemnify Gilbane.