

# 06-1018

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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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D.R. HORTON-TEXAS, LTD.

Petitioner

v.

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.

Respondent

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PETITION FOR REVIEW

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## STATEMENT OF JURISDICTION

The Court has jurisdiction under the following subsections of Texas Government Code Section 22.001: (a)(2), (a)(6), and (e).

## ISSUES PRESENTED

1. Did the court of appeals err in holding that D.R. Horton may not rely on extrinsic evidence consisting of coverage-only facts to establish that it was entitled to a defense and indemnification under its subcontractor's insurance policy?
2. Did the court of appeals err by conflating "duty to defend" with "duty to indemnify" and holding that because D.R. Horton could not introduce extrinsic evidence to establish a duty to defend, as a matter of law it also could not establish a duty to indemnify?

## WHY THIS CASE IS IMPORTANT

The concurring Justices in *GuideOne* accurately characterized the issue presented by this case as important and difficult, but it is difficult only in the sense that the lower courts have ruled inconsistently in the absence of this Court's guidance.<sup>1</sup> Unlike *GuideOne*, this case presents a factual setting enabling the Court to recognize a rule that the Fifth Circuit and commentators have predicted this Court might embrace: extrinsic evidence may be used to determine whether a claim is covered when "it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006) (quoting *Northfield Ins. Co. v. Loving Home Care, Inc.*,

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<sup>1</sup> "If the conflicting language and views identified so far suggests to the reader a certain confusion as to the scope of the complaint allegation rule, he is not alone." Rick Virnig, *Perspectives on the "Eight Corners": Making Sense of the Complaint Allegation Rule*, 4 J. TEX. INS. LAW 12, 14 (Winter 2003) (Apx. Tab D).

363 F.3d 523, 531 (5th Cir. 2004)). In this case, the Court may not only embrace this eminently-reasonable and much-needed exception to the eight-corners rule, but also demonstrate how it should be applied in a manner that will supply guidance to the courts of this state, which are routinely confronted with this issue.

### STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case. The relevant facts are simple and undisputed. The controlling issue is purely legal: Whether this Court will join other courts that have recognized an exception to the eight-corners rule “permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim.” *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006).

In 2002, James and Cicely Holmes sued Petitioner D.R. Horton alleging their house contained latent defects that led to the propagation of toxic mold, rendering the house uninhabitable. (CR 79). The latent defects allegedly existed in the chimney and other portions of the house. (CR 81). Not mentioned in the Holmes’ petition is the fact that subcontractor Rosendo Ramirez did the masonry work on the house for D.R Horton. As an additional insured on Ramirez’s liability insurance policies with Respondent Markel and Sphere Drake Insurance, Ltd., D.R. Horton is entitled to coverage for claims arising out of Ramirez’s work. (CR 66, 156, 382). Accordingly, D.R. Horton asked Markel and Sphere Drake to defend it against the Holmes’ claims. (CR 319). Neither insurer agreed to do so. Accordingly, D.R Horton defended itself and eventually settled with Mr. and Mrs. Holmes for \$50,000. (CR 319).

In 2003, D.R. Horton sued Markel and Sphere Drake for reimbursement of settlement funds and defense costs. (CR 2). The trial court rendered summary judgment for the insurers, (CR 599, 600), and D.R. Horton appealed. The Fourteenth Court of Appeals held that because this Court has never recognized an extrinsic-evidence exception to the eight-corners rule, that rule precluded D.R Horton from introducing any extrinsic evidence whatsoever. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd. & Sphere Drake Ins., Ltd.*, No. 14-05-00486-CV (Tex. App.—Houston [14th Dist.] June 29, 2006) (Apx. Tab C).<sup>2</sup> The court therefore affirmed the summary judgment in favor of Markel on the duty to defend and duty to indemnify issues. *Id.* The court reversed the summary judgment in favor of Sphere Drake on the grounds that its summary judgment evidence was inadequate. *Id.*

The next day, this Court issued its opinion in *GuideOne*. D.R. Horton moved for rehearing, explaining to the court of appeals that this Court had acknowledged an exception to the eight-corners rule for coverage-only facts and that the exception applies in this case. D.R. Horton also moved for rehearing en banc because the court of appeals' opinion is inconsistent with its decision in *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, \_\_\_ S.W.3d \_\_\_, 2006 WL 1892669 (Tex. App.—Houston [14th Dist.] 2006, pet. pending), which was issued seven days later. In *Pine Oak* – despite the court's original decision in *D.R. Horton* refusing to apply any exception to the eight-corners rule, and without citing or discussing *GuideOne* – another panel of the Fourteenth Court recognized an exception to the eight-

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<sup>2</sup> The court of appeals' June 29, 2006 opinion was issued after Sphere Drake and D.R. Horton filed motions for rehearing. The court of appeals withdrew its original January 26, 2006 opinion.

corners rule that is semantically different from and more limited than the exception this Court acknowledged in *GuideOne*.<sup>3</sup>

The court of appeals denied D.R. Horton's motions for rehearing but issued a new opinion on rehearing. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd. & Sphere Drake Ins., Ltd.*, 2006 WL 3040756 (Tex. App.—Houston [14th Dist.] October 26, 2006, pet. pending) (Apx Tab B). The court disagreed with the idea – hotly debated among attorneys specializing in this area – that *GuideOne* implicitly approved an exception to the eight-corners rule for coverage-only facts. *Id.* at \*5, n. 11. To shore up its prior opinion, the court correctly observed that *GuideOne* rejected an exception for evidence that relates to both coverage and liability and then erroneously declared that all of D.R. Horton's extrinsic evidence was relevant to both coverage and liability. *Id.* Based on that mischaracterization, the court again affirmed the summary judgment in favor of Markel. *Id.* at \*5. This petition for review ensued.

### ARGUMENT AND AUTHORITIES

Under the so-called “eight-corners” rule, a court ordinarily may not consider evidence outside the eight corners of the plaintiff's complaint and the defendant's insurance policy to determine whether the plaintiff's claims are covered by the defendant's policy. In *GuideOne*, this Court raised questions for the bench and bar by acknowledging, without formally approving, an exception to the eight-corners rule for coverage-only facts:

Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very

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<sup>3</sup> The Court has requested a response to the petition for review filed in *Pine Oak*, which is pending under cause number 06-867.

narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim. Recently, the Fifth Circuit observed that if this Court were to recognize an exception to the eight-corners rule, it would likely do so under similar circumstances, such as: “when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity if any facts alleged in the underlying case.”

*GuideOne*, 197 S.W.3d 308-09 (citations omitted).

D.R. Horton now asks the Court to formally approve an exception to the eight-corners rule for coverage-only facts. As such, the Court’s first concern likely will be whether the court of appeals did in fact mischaracterize all of D.R. Horton’s extrinsic evidence as relevant to both coverage and liability. If D.R. Horton proffered extrinsic evidence relating only to a coverage issue, then this is an appropriate case for the Court to answer the questions engendered by its opinion in *GuideOne*.<sup>4</sup> We will therefore first demonstrate that D.R. Horton did indeed proffer extrinsic evidence related only to coverage. Next, we will explain why the Court should take this opportunity to end the speculation and formally recognize an urgently-needed exception for coverage-only facts. Finally, we will show that the court of appeals erred when it held that as a matter of law D.R. Horton could not establish a duty to indemnify.

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<sup>4</sup> See, e.g., Jonathon R. Dotson, *Duty to Defend: Does Supreme Court Soften Eight Corners Rule?*, [http://www.hughesluce.com/news/news\\_detail.aspx?id=2470](http://www.hughesluce.com/news/news_detail.aspx?id=2470) (July 10, 2006) (“However, the language of the opinion [in *GuideOne*] raises the question whether the Court will soften or is softening its position on the use of extrinsic evidence when such evidence goes solely to an issue of coverage and does not overlap with the merits of or engage the truth and/or falsity of the facts alleged in the underlying suit.”).

**I. The Court Of Appeals Erred In Holding That All Of D.R. Horton's Extrinsic Evidence Related To Both Coverage And Liability.**

In its opinion on rehearing, without saying how or why, the court of appeals declared that all of D.R. Horton's extrinsic evidence on the coverage issue "is relevant to both coverage and liability. . . ." *D.R. Horton*, 2006 WL 3040756 at \*5. The court then held that D.R. Horton's extrinsic evidence was inadmissible because *GuideOne* refused to recognize an exception for extrinsic evidence relating to both coverage and liability. *Id.* The court of appeals, however, erred in concluding that all of D.R. Horton's extrinsic evidence overlapped with liability issues.

**A. D.R. Horton submitted extrinsic evidence consisting of coverage-only facts establishing that it is entitled to coverage as an additional insured.**

D.R. Horton is an additional insured under Rosendo Ramirez's insurance policy with Markel for "liability arising out of [Ramirez's] work." (CR 66, 156). The policy declaration page identifies Ramirez as a masonry contractor. (CR 154, 155). The Holmes' petition, however, alleged that the chimney on their house was defective without identifying Ramirez as the person who built the chimney for D.R Horton. (CR 81). Seizing on that omission, Markel moved for summary judgment asserting that it did not owe a duty to defend or indemnify D.R. Horton under the eight-corners rule. (CR 61). In response, D.R. Horton offered extrinsic evidence establishing that Ramirez built the chimney for D.R Horton and that D.R. Horton is therefore covered under the policy as an additional insured.

Among other things, D.R. Horton submitted a cost detail, authenticated by D.R. Horton employee Stephan Perison, that identified Ramirez as the masonry laborer on the Holmes' house. (CR 311, 335). Additionally, former D.R. Horton employee Clark Bottoms

testified that Ramirez performed the original brick work on the home. (CR 314). This extrinsic evidence did not contradict the Holmes' allegation that D.R. Horton built the chimney; it merely identified the person who performed the work for D.R Horton and was thus admissible on the issue of coverage. See *Int'l Serv. Ins. Co. v. Boll*, 392 S.W.2d 160, 160-61 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

*GuideOne* cited *Int'l Serv. Ins. Co. v. Boll* as an example of a case where the exception for coverage-only extrinsic evidence was applied. 197 S.W.3d at 310. There, an auto insurer denied a defense based on an exclusion for accidents occurring “while any automobile is being operated by Roy Hamilton Boll,” the insured’s son. *Boll*, 392 S.W.2d at 160. Although the plaintiff’s petition alleged that the insured’s son was driving the car, it did not supply his name. *Id.* Nonetheless, the insurer refused to defend based on extrinsic evidence that Roy Hamilton Boll was driving the car. *Id.* The court of appeals considered this extrinsic evidence and found that the insurer did not have a duty to defend. *Id.* at 161. *GuideOne* appears to have approved that holding because “the extrinsic evidence . . . went strictly to the coverage issue. It did not contradict any allegation in the third-party claimant’s pleadings material to the merits of that underlying claim.” 197 S.W.3d at 310.

Here too, D.R. Horton’s extrinsic evidence identifying Ramirez as the person who built the chimney went strictly to the coverage issue. D.R. Horton’s extrinsic evidence merely adds a name to the Holmes’ petition. As discussed below, this evidence establishing that Ramirez performed the work in question for D.R. Horton does not tend to either weaken or strengthen the liability or damage components of the Holmes’ claims. Accordingly, the court of appeals erred in excluding D.R. Horton’s coverage-only facts. See

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.").

**B. D.R. Horton's extrinsic evidence did not have any bearing on liability or damages.**

D.R. Horton's extrinsic evidence identifying Ramirez as the person who performed the masonry work in question also established Ramirez's independent contractor status. (CR 341). The court of appeals may have thought that aspect of the evidence made it relevant to both coverage and liability because it suggested a potential independent-contractor defense that would insulate D.R. Horton from liability. If so, then the court was wrong.

Mr. and Mrs. Holmes asserted a claim for breach of the implied warranty of good and workmanlike performance. (CR 82). They also alleged a claim for breach of the implied warranty of habitability arising from the "acts or omissions of Defendants in the design, workmanship, and construction of that home." (CR 82). Both of those claims were necessarily against D.R. Horton alone. A homeowner does not have a claim against a subcontractor for breach of the implied warranty of good and workmanlike performance arising out of the home's initial construction. *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322, 331-32 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Likewise, the implied warranty of habitability claim must be maintained against the homebuilder, not its subcontractors. *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002). D.R. Horton could not avoid liability for an alleged breach of these warranties by asserting that an independent contractor performed the work. Rather, D.R. Horton is limited to a claim for contribution or indemnity against the independent contractor. *Rosenberg*, 95 S.W.3d at 332.

Therefore, that Ramirez performed the work as an independent contractor does not affect D.R. Horton's liability to Mr. and Mrs. Holmes, and the court of appeals erred in holding that all of D.R. Horton's extrinsic evidence was relevant to both coverage and liability. If D.R. Horton had been permitted to rely on its extrinsic evidence, it would have been able to conclusively establish that Markel owed a duty to defend and indemnify it against the Holmes' claims as an additional insured under Ramirez's insurance policy. As discussed next, an inflexible rule excluding this type of extrinsic evidence is neither justified nor workable. See Randall L. Smith & Fred A. Simpson, *Extrinsic Facts & the Eight Corners Rule Under Texas Law – The World is not as Flat as Some Would Have You Believe*, 46 S. TEX. L. REV. 463, 470-74 (2004); ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES, REPRESENTATION OF INSURANCE COMPANIES AND INSURED, § 4.3 (4th Ed. 2001); Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 TEX. TECH. L. REV. 869, 890-98 (2000).

## **II. The Court Should Take This Opportunity To Formally Recognize An Exception To The Eight Corners Rule For Extrinsic Evidence Consisting Of Coverage-Only Facts.**

Perhaps no area of insurance coverage law has been the subject of more concern in Texas over the past decade than the scope of the duty to defend. Concurring in *GuideOne*, Justice Hecht called this a difficult and important issue. 197 S.W.3d at 314. And although this Court has made clear that the duty to defend is ordinarily governed by the eight-corners rule, lower courts and federal courts have often been confused about the scope of the rule, especially as it concerns an extrinsic evidence exception.

In the last half-year, a number of courts have cited to *GuideOne*, including the court of appeals here, as this Court's latest and definitive word on the use of extrinsic evidence in a duty to defend determination. There are reasons to suggest, however, that *GuideOne* is not definitive. First and foremost, this Court twice observed in *GuideOne* that the "circumstances of this case present no basis for an exception to" the eight-corners rule. 197 S.W.3d at 307, 311. Yet the Court appears to have implicitly approved the earlier holding in *Boll* that coverage-only extrinsic evidence may properly be considered. *Id.* at 310 (citing *Boll*, 392 S.W.2d at 160); see also *Bayou Bend Homes, Inc. v. Scottsdale Ins. Co.*, 2006 WL 2037564, \*5-6 (S.D. Tex. July 18, 2006) Finally, because it was clear from the pleadings that *GuideOne's* defense duty was triggered without the need to resort to extrinsic evidence, three justices joined in Justice Hecht's concurring opinion declaring that this Court had "no need to consider what exception the rule might have, and given the importance of this difficult issue, I would express no opinion on it." 197 S.W.3d at 314.

The Court's roundabout approval of a "coverage-only" exception to the eight-corners rule has created confusion. Within a matter of months, a number of courts have disagreed as to the proper interpretation or effect of *GuideOne*. See, e.g., *B. Hall Contracting, Inc. v. Evanston Ins. Co.*, \_\_\_ F.Supp.2d \_\_\_, 2006 WL 2527679, \*10 (N.D. Tex. Sept. 1, 2006) (explaining that *GuideOne* "described such an exception, which permits the use of extrinsic evidence 'when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim'"); *Bayou Bend Homes*, 2006 WL 2037564, at \*5 (finding that *GuideOne* "did not rule on the validity of [an] . . . exception that would allow extrinsic evidence solely on the issue of coverage. . . . In fact, the language of the opinion

hints that the court views [a coverage-only] exception favorably”); *Pine Oak*, 2006 WL 1892669, \*5-6; cf. *D.R. Horton v. Markel*, 2006 WL 3040756, \*5, n.11 (concluding that neither this Court in *GuideOne* nor the Fourteenth Court of Appeals in *Pine Oak* adopted an exception to the eight-corners rule).

Some courts, including the court of appeals in this case, opine that extrinsic evidence may not be considered in determining an insurer’s duty to defend. Other courts have opined that extrinsic evidence may be considered to determine a “coverage-only” question, “such as (1) whether the person being sued is excluded as an insured under the policy, (2) whether the property at issue in the lawsuit is excluded from coverage, and (3) whether an insurance policy exists.” See *Pine Oak*, 2006 WL 1892669, \*5. And the Fifth Circuit has recently staked out a third position, suggesting that Texas courts are more receptive to an exclusion if an insurer is attempting to use the extrinsic evidence to prove the *applicability of a particular exclusion*. See *Liberty Mut. Ins. Co. v. Graham*, \_\_\_ F.3d \_\_\_, 2006 WL 3743108, \*6 (5th Cir. Dec. 21, 2006). (Of course, that position would lead to the inequitable result of an insurer being allowed to use extrinsic evidence to prove an exclusion, which is construed against the carrier, but a putative additional insured, as here, would not be allowed to use extrinsic evidence to prove that it is an “insured” under the policy.)<sup>5</sup>

The facts in *GuideOne* did not present a basis for recognizing an exception to the eight-corners rule. The circumstances of this case, however, present the Court with an

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<sup>5</sup> Other courts seem to straddle the fence. See, e.g., *Fair Operating, Inc. v. Mid-Continent Cas. Co.*, 193 Fed. Appx. 302, 305, n.4 (5th Cir. Aug. 1, 2006) (not designated for publication) (explaining first that the 5th Circuit had earlier concluded – in *Northfield* – that there was not any exception to the eight-corners rule, but that the *GuideOne* court followed the two-prong test set out in *Northfield* for when to apply an extrinsic evidence exception).

opportunity to clarify an issue that has long bedeviled the lower courts and practitioners of this state. Currently, Texas appellate and federal courts are issuing opinions based on perceived “hints” in *GuideOne* as to the appropriate use of extrinsic evidence in a duty to defend context. *Bayou Bend*, 2006 WL 2037564, \*5 (finding that “the language of [*GuideOne*] hints that the court views the more narrow exception favorably.”) If courts are left to infer the correct state of the law, practitioners and parties alike are left in a precarious position where they cannot proceed with clarity because different courts may, and in fact do, reach different outcomes.

D.R. Horton is not urging this Court to abandon the time-honored eight-corners analysis. The eight-corners rule is born out of the historical obligation of insurers to defend their insureds against claims, even those that are groundless or false. But permitting courts to consider extrinsic evidence that does not tread on the truth or falsity of the allegations – such as the evidence D.R. Horton sought to introduce – does not contravene the fundamental underpinning of the eight-corners rule. As such, a limited exception to the eight-corners rule for coverage-only facts not only preserves the rights of the insured *vis-a-vis* the defense obligation, but also permits the insurer to secure the benefits of its contractual rights as well.

Further, rigid application of the eight-corners rule without an exception for coverage-only extrinsic evidence is unworkable. The fact scenario involved here demonstrates the inequities resulting from strict adherence to the rule. A plaintiff bringing a suit against a general contractor for alleged construction defects often has no economic incentive to sue the responsible subcontractor. Whether particular work was performed by a subcontractor

might not have any bearing on the general contractor's liability to the plaintiff, but such a fact may be determinative as to whether or not the general contractor qualifies as an additional insured under the subcontractor's insurance policy. Under a strict eight-corners rule, an insurer may be able to avoid a duty to defend otherwise owed simply based on the litigation strategy of a plaintiff. Applying the eight-corners rule under these circumstances eviscerates the transfer of risk that the general contractor and the subcontractor sought to accomplish in their contract.

### **III. The Court Of Appeals Erred In Holding That Because D.R. Horton Could Not Introduce Extrinsic Evidence To Establish A Duty To Defend, As A Matter Of Law It Also Could Not Establish A Duty To Indemnify.**

Citing to this Court's opinion in *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997), the court of appeals held that because Markel owed no duty to defend, it owed no duty to indemnify D.R. Horton for the settlement amount. Not only did the court of appeals err in relying on *Griffin* in its indemnity determination, but even if the *Griffin* analysis is appropriate, the court erred in its application of that analysis.

In *Griffin*, the insured sought a defense for a petition alleging that the defendant committed a drive-by shooting. *Id.* at 82. This Court ruled that the insured was not owed a defense because a drive-by shooting was not an "auto accident" as required by the policy. *Id.* at 83. Typically, a duty to indemnify is not justiciable before the underlying suit has been adjudicated because the duty to indemnify is based on developed *facts*, not *allegations*. In *Griffin*, this Court articulated a limited exception to this time-honored rule: "[T]he duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any*

*possibility the insurer will ever have a duty to indemnify.” Id. at 84 (emphasis in original).<sup>6</sup> This Court reasoned that for the “same reasons” there was no duty to defend based on the allegations, there could not be any set of facts brought out at trial that could transform a drive-by shooting into a covered “auto accident” *Id.**

In this case, the exception does not apply. *Griffin* addresses the prohibition against adjudicating the duty to indemnify while the underlying lawsuit is pending. By contrast, the underlying litigation in this matter was settled before the court’s ruling. Nonetheless, even if the *Griffin* analysis is applicable, the court of appeals should not have granted summary judgment on the indemnity issue. In *Griffin*, the duty to indemnify was justiciable before trial of the underlying suit because no facts could be developed in the underlying lawsuit that could transform a drive-by shooting into a covered claim. *Griffin*, 955 S.W.2d at 84. The “same reasons” that the court of appeals in this matter relied upon to negate the duty to defend (*i.e.* no allegations in the pleadings that Ramirez performed the masonry work) do not likewise negate the possibility that an indemnity obligation will arise. Facts can be (and in fact have been) developed in this matter that confirm D.R. Horton’s status as an additional insured under the applicable policies. As such, the court of appeals erred in ruling that D.R. Horton could not establish a duty to indemnify as a matter of law.

### PRAYER

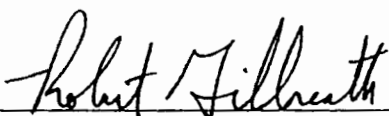
Petitioner D.R. Horton-Texas, Ltd. prays that the Court grant this petition for review, reverse that portion of the court of appeals’ judgment affirming the trial court’s judgment

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<sup>6</sup> Subsequent decisions have reinforced the limited circumstances under which *Griffin* will apply. See *Westport Ins. Corp. v. Atchley, Russell, Wasdrop & Hlavinka, L.L.P.*, 267 F.Supp.2d 601, 632 (E.D. Tex. 2003).

for Respondent Markel International Insurance Company, Ltd., and either render judgment that Markel must reimburse D.R Horton for its defense costs and its settlement with Mr. and Mrs. Holmes or remand this case to the trial court 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,

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CERTIFICATE OF SERVICE

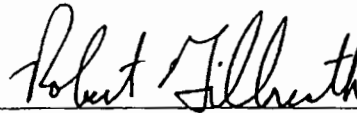
This is to certify that on the 10th day of January 2007, a true and correct copy of this Petition for Review was forwarded to those identified below via Federal Express overnight delivery.

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