UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-11035

(Summary Calendar)

GLEN R. GURLEY and JEAN E. GURLEY,

Plaintiffs-Appellants,

versus

AMERICAN STATES INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3:94-CV-1057-P)

(May 5, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Glen R. Gurley and Jean E. Gurley ("the Gurleys") appeal from the district court's grant of summary judgment to American States Insurance Company ("American States") on their breach of contract suit. We affirm.

I

Richard C. Hogue and Helen M. Hogue ("the Hogues") sued the Gurleys for damages arising out of the Gurleys' failure to disclose

---

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

structural defects in a house that they had sold to the Hogues. American States, which had issued the Gurleys' homeowners' policy, refused to defend the Gurleys against the Hogues' suit. In American States' opinion, the Hogues' suit alleged only intentional actions by the Gurleys, and the policy excluded intentional torts. After they settled their dispute with the Hogues, the Gurleys filed suit against American States, alleging that American States had breached its contractual duty to defend them in the underlying suit. The district court granted American States' motion for summary judgment on the grounds that the Hogues had not alleged any facts triggering coverage under the policy. The Gurleys appeal from the district court's judgment, arguing that the district court erred in considering the Hogues' Fourth and Fifth Amended Petitions in determining whether American States owed the Gurleys a duty to defend against the Hogues' suit.

II

The Gurleys argue that the district court should not have granted American States' motion for summary judgment because both the Hogues' First and Second Amended Petitions in the underlying suit triggered a duty to defend. We review a grant of summary judgment de novo. *Taylor v. Travelers Ins. Co.*, 40 F.3d 79, 80 (5th Cir. 1994); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is appropriate when no genuine issue of material fact exists the resolution of which would require a trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317,

323-25, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986); *Gulf States Ins. Co. v. Alamo Carriage Serv.*, 22 F.3d 88, 90 (5th Cir. 1994). We view all facts in the light most favorable to the nonmovant. *Gulf States*, 22 F.3d at 90; *Walker*, 853 F.2d at 358.

Because the insurance policy at issue in this case was issued in Texas, Texas law governs this diversity dispute. *See Taylor*, 40 F.3d at 81 (looking to the law of the state in which subject of policy was located). Whether an insurer has a duty to defend is a question of law, which we review de novo. *Id.*; *Gulf States*, 22 F.3d at 90.

Under Texas law, we determine whether a duty to defend exists by looking to the provisions of the policy and the allegations in the underlying petition. *Taylor*, 40 F.3d at 81 (describing this method as following the "eight corners" rule).[1] We construe the allegations liberally, resolve doubts about liability in favor of the insured, and give no consideration to the truth or falsity of the allegations. *Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385, 391-92 (Tex. App.))Houston [14th Dist.] 1994, n.w.h.); *Terra Int'l v. Commonwealth Lloyd's*, 829 S.W.2d 270, 272 (Tex. App.))Dallas 1992, writ denied); *Colony Ins. Co. v. H.R.K., Inc.*, 728 S.W.2d 848, 850 (Tex. App.))Dallas 1987, no writ).

To determine whether the claims raised in a petition invoke

---

[1] *See also Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973) (looking to "the allegations of the petition when considered in the light of the policy provisions"); *American Alliance Ins. Co. v. Frito-Lay, Inc.*, 788 S.W.2d 152, 153 (Tex. App.))Dallas 1990, writ dism'd) (defining "Eight Corners" rule as limiting examination to "only the allegations in the complaint and the insurance policy").

coverage under an insurance policy, thus triggering a duty to defend, we examine the facts alleged in the petition, not the legal theories asserted for recovery. *Clemons*, 879 S.W.2d at 392; *see also Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex. App.))Houston [14th Dist.] 1993, writ denied), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994) ("It is not the cause of action alleged which determines coverage but the *facts* giving rise to the alleged actionable conduct."); *Terra Int'l*, 829 S.W.2d at 272 (focusing on "the *factual* allegations in the complaint, not on the *legal* theories asserted"); *Continental Casualty Co. v. Hall*, 761 S.W.2d 54, 56 (Tex. App.))Houston [14th Dist.] 1988, writ denied) ("[O]ur focus must be on the origin of the damages, not the legal theories asserted for recovery."), *cert. denied*, 495 U.S. 932, 110 S. Ct. 2174, 109 L. Ed. 2d 503 (1990). "[T]he insurer is entitled to rely on the plaintiff's allegations in determining whether the facts are within the coverage. If the petition only alleges facts excluded by the policy, the insurer is not required to defend." *Fidelity & Guar. Ins. Underwriters v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982); *see also Gulf States*, 22 F.3d at 90 (holding that, under Texas law, "when the plaintiff's petition makes allegations which, if proved, would place the plaintiff's claim within an exclusion from coverage, there is no duty to defend"); *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994) (requiring allegations of "facts within the scope of coverage" before imposing a duty to defend).

The Gurleys argue that the district court should have

considered only the Hogues' First and Second Amended Petitions in determining the existence of a duty to defend under the policy. They contend that, although the Hogues' later pleadings contained allegations of intentional conduct only, these earlier pleadings alleged negligence within the scope of the policy. Indeed, if these initial pleadings alleged facts raising a negligence claim, the Gurleys are correct that later deletion of that claim is irrelevant to whether a duty to defend existed at the time of the filing of the Hogues' First and Second Amended Petitions. *See Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983) ("If, in the case at bar, the duty to defend arose under the original . . . complaint, the duty was clearly breached by the insurer's . . . failure to defend."). "The subsequent filing of an amended complaint does not erase the breach." *Id.* Therefore, we look to the allegations in the Hogues' First and Second Amended Petitions.[2]

In these pleadings, the Hogues claimed that:

> The Gurleys' failure to disclose the existence of the cracks in the foundation as well as previous foundation repair work constitute[s]:
>
> (a) negligence, both simple and gross; more specifically the Gurleys failed to inform the Hogues or their agents of prior foundation work, cracks in the home or other structural problems with the house in conscious disregard for the rights and welfare of the Hogues . . . ;[3]

---

[2] The Gurleys contend that the district court improperly based its decision on the Fourth and Fifth Amended Petitions. Because we review this issue de novo, we need not decide on which petition(s) the district court relied.

[3] The Hogues further alleged that the Gurley's failure to disclose the defects constituted:
(b) fraudulent inducement into the Earnest Money Contract

After an independent review of the record, we agree with the district court that, while the Hogues assert a legal theory of negligence in their First and Second Amended Petitions, they do not allege any facts supporting that theory. Indeed, the factual portion of the allegation containing the reference to negligence states that the Gurleys "failed to inform the Hogues [of the defects] *in conscious disregard* for the rights and welfare of the Hogues" (emphasis added). Later in the petition, the Hogues also alleged that "[t]he unlawful acts and practices described above were committed *knowingly* by the Gurleys" (emphasis added). Therefore, the factual assertions support a theory of intentional conduct rather than a theory of negligence. Although litigants have the privilege to plead alternative theories of recovery, the district court correctly found the Hogues' bald legal assertion of negligence insufficient to trigger a duty to defend under the policy. *See Clemons*, 879 S.W.2d at 392 (rejecting duty to defend where, although cause of action alleged could support damages included by policy, facts only alleged basis for equitable relief excluded by policy); *Terra Int'l*, 829 S.W.2d at 273 (rejecting duty to defend where petition alleged broad negligence claim, but facts

---

because if the Hogues had been informed of these material facts concerning the foundation of the home, they would not have entered into the Contract;

(c) fraudulent inducement into the Earnest Money Contract by falsely representing the condition of the home's foundation to the Hogues . . . ;

(d) actual fraud in that the Gurleys falsely represented the condition of the home's foundation. The Gurleys were fully aware of the foundation's actual status when they made this representation. The Gurleys made this representation . . . intending for the Hogues to act upon it . . . .

only supported misrepresentations excluded by policy); *Continental Cas. Co.*, 761 S.W.2d at 55-56 (rejecting duty to defend where petitions alleged damages for constitutional rights violations generally, but facts only supported violations arising out of excluded bodily injury); *McManus*, 633 S.W.2d at 788-89 (rejecting duty to defend negligent entrustment claim when facts showed that only entrustment at issue arose out of excluded conduct). Accordingly, we hold that American States had no duty to defend the Gurleys in the underlying lawsuit.[4]

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

[4] Because we dispose of this case on the duty-to-defend issue, we do not address the remaining arguments of both parties that concern the duty to indemnify.