COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00315-CV

EUGENE AND MARY MCCLAIN — APPELLANTS

V.

STATE FARM FIRE AND CASUALTY COMPANY — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 2016-000955-2

MEMORANDUM OPINION[1]

Appellants Eugene and Mary McClain (the McClains) appeal the trial court's orders granting appellee State Farm Fire and Casualty Company (State Farm) judgment as a matter of law on the McClains' claims that State Farm had a

[1]*See* Tex. R. App. P. 47.4.

duty to defend. Concluding that State Farm had no duty to defend the McClains as a matter of law, we affirm the trial court's summary-judgment orders.

I. FACTUAL BACKGROUND

A. THE UNDERLYING LAWSUIT AND REQUEST TO DEFEND

Jose Luis Ramirez and Ofelia Ramirez (the Ramirezes) bought a home from the McClains (the property). The Ramirezes paid the McClains $7,500 and signed a promissory note, agreeing to pay the McClains the remainder of the purchase price—$60,500—in monthly installments for eighteen years. The Ramirezes' promissory note for the balance was secured by a deed of trust to the property. After the Ramirezes paid on the note for eight years, the McClains declared the note in default, accelerated the debt, and posted the property for foreclosure. On April 1, 2014, the McClains bought the property at the foreclosure sale for $42,000.

On August 15, 2014, the Ramirezes filed suit against the McClains,[2] raising claims for wrongful foreclosure; for breach of contract, i.e., the promissory note; for negligence per se based on their violations of the finance code, the property code, and a federal administrative regulation; and seeking a declaration

[2]The Ramirezes also named the McClains' attorney, Cecilia A. Thomas, as a defendant for her 2013 and 2014 actions (1) in notifying the Ramirezes of the past-due balances and the debt acceleration and (2) in conducting the foreclosure sale. Thomas was not a party to the McClains' duty-to-defend suit against State Farm and, thus, is not a party to this appeal.

of rights under the foreclosure-sale deed. The Ramirezes sought actual and exemplary damages.

The McClains requested that their insurer, State Farm, defend them against the Ramirezes' suit. State Farm had issued a commercial-liability, umbrella-coverage policy to the McClains.[3] As relevant to this case, the policy provided that State Farm would have "the right and duty to defend" the McClains against any "suit" seeking specified damages—"bodily injury," "property damage," or "personal and advertising injury"—caused by an "occurrence." An occurrence was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Each of the resultant type of damages also was specifically defined in the policy:

- Bodily injury was defined as "bodily injury, sickness, or disease sustained by a person," which included "mental anguish or other mental injury caused by the 'bodily injury.'"

- Property damage was defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property."

- Personal and advertising injury was defined as an "injury, including consequential 'bodily injury,' arising out of . . . the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling[,] or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor."

Within these specified damages, the policy contained exclusions from coverage. First, the policy did not apply to bodily injury or property damage that was

[3]No party disputes that the policy was in effect at the time State Farm's alleged duty to defend arose.

"expected or intended to cause harm as would be expected by a reasonable person" or was "the result of willful and malicious or criminal acts of the insured." Second, personal and advertising injuries were not covered if they were (1) "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'" or (2) arose out of a breach of contract.

B. STATE FARM DENIES COVERAGE AND THE MCCLAINS' SUIT

On February 19, 2015, State Farm notified the McClains that based on the allegations in the Ramirezes' petition, the policy did not trigger its duty to defend the McClains. Specifically, State Farm believed that because the Ramirezes did not allege a type of harm the policy covered and because any harm was not caused by an "occurrence," the policy did not require State Farm to defend the McClains.

The McClains eventually were granted judgment as a matter of law on the Ramirezes' claims and incurred $35,858.76 in attorney's fees. The McClains then filed suit against State Farm on February 18, 2016, arguing that because State Farm had the duty to defend the McClains based on the allegations in the Ramirezes' petition and on the terms of the policy, State Farm was liable for their attorney's fees. Both State Farm and the McClains moved for summary judgment.

In their summary-judgment motion, the McClains argued that State Farm's duty to defend arose based on the Ramirezes' allegations of unlawful entry and

invasion of their private-occupancy rights, their assertions that they suffered mental anguish, and their claims that their emotional distress allegedly arose from an occurrence as defined in the policy.[4] State Farm based its summary-judgment motion on its arguments that no duty to defend arose under the policy because the Ramirezes did not plead for any covered damages, there was no occurrence as defined in the policy, the McClains' actions as alleged caused expected harm, the McClains' actions as alleged were knowing violations of the Ramirezes' rights, and the harm arose out of a breach of contract.

The trial court held a hearing on the competing summary-judgment motions, but no reporter's record was made of the hearing. The trial court granted State Farm's motion because there was "no genuine issue of material fact regarding at least one essential element of [the McClains'] claims." *See* Tex. R. Civ. P. 166a(c). The trial court entered a separate order denying the McClains' motion for the same reason—the McClains failed to raise a genuine issue of material fact on at least one essential element of their claims. *See id.*

II. APPLICABLE LAW

A. SUMMARY JUDGMENT STANDARD AND SCOPE OF REVIEW

In a sole issue on appeal, the McClains argue that the trial court's summary-judgment rulings were in error because State Farm's duty to defend arose as a matter of law based on the Ramirezes' allegations and the terms of

[4]The McClains urged other grounds on summary judgment but do not raise them on appeal.

the policy. We review a summary judgment de novo. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). Here, the parties filed cross-motions for summary judgment; therefore, we consider the entire record and determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact on each element of the challenged claim and on all questions presented by the parties. *See* Tex. R. Civ. P. 166a(c); *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 & n.2 (Tex. 2012). In short, our "ultimate question is simply whether a fact issue exists." *Buck*, 381 S.W.3d at 527 n.2. When, as here, a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

B. AN INSURER'S DUTY TO DEFEND

An insurer's duty to defend is purely a creature of contract; thus, its parameters depend solely "on the language of the policy setting out the contractual agreement between insurer and insured." *See Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009). In determining whether the insurer has a duty to defend, we look to the facts alleged in the petition, not to the causes of action or legal theories asserted. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). We give those allegations a "liberal

interpretation," resolving any doubts against the insurer. *Id.* Facts outside the pleadings, even if easily ascertainable, are not material in determining whether there is a duty to defend under the policy; thus, we may not imagine factual scenarios that might trigger coverage. *See GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006); 4 J. Hadley Edgar Jr. & James B. Sales, *Texas Torts and Remedies* § 71.07[2][b] (2015). These principles are routinely referred to as the eight-corners rule: An insurer's duty to defend is determined on the basis of the four corners of the policy plus the four corners of the factual allegations in the suit. *See Nat'l Union*, 939 S.W.2d at 141; *see also GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 682–84 (5th Cir. 2012).

III. STATE FARM'S DUTY TO DEFEND

A. THE FOUR CORNERS OF THE RAMIREZES' PETITION

In their suit, the Ramirezes alleged detailed facts in support of their claims against the McClains. As State Farm contends, these facts included a "well-defined chronology." As alleged, the Ramirezes and the McClains entered into a contract for the purchase of the property, secured by a deed of trust on the property in March 2005. The McClains recorded a warranty deed on the property, showing that it had been sold and conveyed to the Ramirezes, subject to their vendor's lien. The Ramirezes paid the McClains $7,500, and the remaining balance reflected in the promissory note was $60,500 to be paid in monthly installments of approximately $547 until March 15, 2023. Between June

2005 and October 2013, the Ramirezes made payments on the note, totaling $62,713. They also made improvements to the property. During this time, the Ramirezes paid the McClains "additional money . . . for random and arbitrary fees that were not specified in their contract."

On October 18, 2013, a few days after the Ramirezes' October payment, the Ramirezes received a demand letter from Thomas, stating that their October payment was delinquent in the amount of $488.28, that they owed $15,580.47 in interest and $150 in attorney's fees, and that the remaining principal balance and accrued interest would be accelerated. The Ramirezes sent an additional $600 to the McClains, but the McClains returned it. In November 2013, the Ramirezes sent their usual monthly payment to the McClains, which was also returned. Thomas sent a second acceleration notice to the Ramirezes on November 19, 2013, demanding payment of $59,827.05 in principal plus an additional, indeterminate amount in accrued interest. On November 21, 2013, Thomas sent the Ramirezes a notice of foreclosure. After further notices, the property was posted for foreclosure sale with a balance owed of $60,606.95. The McClains bought the property at the April 1, 2014 foreclosure sale for $42,000. The foreclosure-sale deed, showing the McClains as the owners of the property, was recorded on April 2, 2014. At the time the Ramirezes filed their petition against the McClains—four months after the foreclosure sale—the Ramirezes continued to live on the property.

In their suit, the Ramirezes complained of the McClains' "verbal demands for money, unannounced and uninvited visits to the Property with prospective buyers or workmen, and written letters returning [the Ramirezes'] monthly payments," all of which allegedly occurred "[d]uring . . . Thomas'[s] mailed correspondence with [the Ramirezes]." They also alleged that Eugene McClain, while acting as a debt collector, "frequently visited the Property to intimidate and threaten [the Ramirezes] and their grandchildren and on such visits demanded increasing amounts of money and made threats towards [the Ramirezes] and the Property." The Ramirezes also alleged that the McClains would "slur" them and demand unauthorized, additional payments all while acting as debt collectors. In response, the Ramirezes claimed they would "frantically go out and obtain additional money orders and send registered mailings to [the] McClain[s] in an attempt to reduce their debt."

B. COVERAGE FOR OWNER, LANDLORD, OR LESSOR UNDER THE POLICY

The McClains argue that these allegations potentially could have occurred after the foreclosure sale—after the McClains had title to the property—and, thus, were covered under the policy as injuries "arising out of . . . the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling[,] or premises that a person occupies, *committed by or on behalf of its owner, landlord[,] or lessor*." [Emphasis added.]

First, the McClains contend that their alleged actions in bringing prospective buyers and workmen to the property "[a]ssumedly" occurred after

they had title to the property, "otherwise [they] would have been wasting [their] time and money on remodeling quotes and marketing on a property that [they] did not own." But this assumption goes too far. The four corners of the Ramirezes' petition clearly allege that these allegations occurred "during . . . Thomas'[s] mailed correspondence with [the Ramirezes]." All of Thomas's correspondence to the Ramirezes referenced in the petition was alleged to have occurred before the foreclosure sale. The Ramirezes did not allege that any of the complained-of correspondence occurred after the foreclosure sale. The last alleged correspondence from Thomas mentioned in the petition was the notice of foreclosure sale that Thomas sent to the Ramirezes on February 25, 2014—approximately one month before the foreclosure sale.

Second, the McClains urge that the allegation that Eugene McClain "frequently visited" the property to "intimidate," "threaten," and "demand[] increasing amounts of money" could have occurred after the foreclosure sale because the petition does not specify exactly when the visits occurred. However, the Ramirezes asserted that these actions occurred while Eugene McClain was acting as a debt collector, i.e., before the foreclosure sale at which the McClains became the owner of the property. Further, the Ramirezes' allegations regarding the McClains' actions were chronological and focused on conduct after the promissory note was executed but before the foreclosure sale; the chronological timeline ended with the foreclosure sale.

Although an insurer must defend its insured if the complaint potentially alleges a case within coverage, this potential for liability arises only "[w]here the complaint does not state facts sufficient to clearly bring the case within or without the coverage." *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965). The Ramirezes' alleged facts are detailed and sufficiently specify when the alleged conduct occurred. The McClains' attempts to imply or assume facts to argue potential liability go beyond the four corners of the Ramirezes' petition. Because the Ramirezes did not allege a personal or advertising injury as defined in the policy, this portion of the policy cannot invoke State Farm's duty to defend.

C. COVERAGE FOR BODILY INJURY UNDER THE POLICY

The McClains next argue that their policy provided coverage because the Ramirezes sought recovery for mental anguish, which is a form of bodily-injury damages as defined in the policy. The Ramirezes alleged that the McClains' actions caused them and their grandchildren "extreme emotional distress." Covered bodily-injury damages were specifically defined in the policy: "'Bodily injury' means bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time. 'Bodily injury' includes mental anguish or other mental injury caused by the 'bodily injury.'" State Farm contends that this definition mandates that claims for mental injury are not covered under the policy unless they are accompanied by and caused by the

physical injury; "bodily injury" under the policy does not include "stand-alone mental anguish."

The McClains assert, on the other hand, that the Ramirezes' allegations of emotional distress are sufficient to constitute bodily injury because the phrase "caused by the 'bodily injury'" modifies only mental injury, not mental anguish. Therefore, mental anguish does not have to be a result of a physical injury to be covered under the policy. To support their argument, the McClains rely on the rule of the last antecedent to interpret this alleged ambiguity in the contract.[5] But a reading of the plain text of the bodily-injury definition in the policy reveals that only if the bodily injury—"bodily injury, sickness, or disease"—causes the alleged mental anguish or other mental injury will State Farm's duty to defend against mental anguish or other mental injury arise. *See, e.g.*, *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) (interpreting statute and noting that a clause following several terms is as applicable to the first as it is to the last). The

[5]The Ramirezes alleged "extreme emotional distress," which could be categorized as a mental injury as opposed to mental anguish. *See, e.g.*, *Travelers Indem. Co. of R.I. v. Holloway*, 17 F.3d 113, 115 (5th Cir. 1994); *Am. States Ins. Co. v. Hanson Indus.*, 873 F. Supp. 17, 26–27 (S.D. Tex. 1995); *cf. In re Transwestern Publ'g Co.*, 96 S.W.3d 501, 505 (Tex. App.—Fort Worth 2002, orig. proceeding) ("A mental injury that warrants a psychological evaluation [under rule 204.1] is distinguishable from emotional distress that accompanies a personal injury action."); *Sw. Tex. Coors, Inc. v. Morales*, 948 S.W.2d 948, 954 (Tex. App.—San Antonio 1997, no pet.) ("Although physical injuries may lead to emotional distress, . . . a recovery for mental injuries requires more than a showing of the usual and ordinary emotional consequences of physical injury."). Thus, even under the McClains' desired reading using the rule of the last antecedent, the Ramirezes' alleged mental injury would have to be accompanied by a bodily injury.

McClains' desired reading is tortured and relies too heavily on the absence of a comma between "injury" and "caused." *See generally Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380 (2003) (noting that although rule of the last antecedent is grammatically sensible, it is "not an absolute and can assuredly be overcome by other indicia of meaning"). Indeed, this clearly written provision means exactly what it says: Stand-alone claims for the recovery of damages for mental anguish or other mental injury are not covered by the policy.[6] *Cf. Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823–24 (Tex. 1997) (interpreting similar definition of bodily injury to exclude "purely emotional injuries"). *See generally TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.").

IV. CONCLUSION

We recognize that we are to liberally construe the Ramirezes' factual allegations in favor of coverage in determining State Farm's duty to defend the McClains. But even under this standard, the Ramirezes' factual allegations do not fall within the contractual coverage as a matter of law. Therefore, the trial

[6]Because we conclude that the Ramirezes' allegations of extreme emotional distress were not bodily injuries as defined in the policy, we need not address the McClains' alternative argument that the bodily-injury coverage was triggered because the Ramirezes' injuries were based on an "occurrence" as defined in the policy.

court did not err by granting State Farm judgment as a matter of law on the McClains' duty-to-defend suit. We overrule the McClains' sole issue and affirm the trial court's summary-judgment orders.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: March 2, 2017