



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00963-CV

JEFF MANKOFF AND STACI MANKOFF, Appellants

V.

PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE, Appellee

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-21-15131

DISSENTING OPINION

Before Justices Partida-Kipness, Reichek, and Miskel
Dissenting Opinion by Justice Miskel

I write separately to dissent from the majority opinion because I would affirm the summary judgment of the trial court.

I. Procedural History

In their original petition, the Mankoffs sought a judgment under the Uniform Declaratory Judgments Act that the October 20, 2019 tornado that damaged their house was not a windstorm, the special windstorm deductible of \$87,156 does not apply, the deductible waiver for general hazards does apply, and that PURE is liable to the Mankoffs for the \$87,156 windstorm special deductible that PURE withheld.

Based on the same reasoning, the Mankoffs also asserted a breach-of-contract claim against PURE seeking to recover \$87,156 in damages for the windstorm special deductible withheld by PURE, plus attorney's fees. PURE filed an answer generally denying the allegations and asserting the affirmative defense that the policy's windstorm exception resulted in an absence of coverage for the Mankoffs' underlying claim relating to the deductible, precluding their breach-of-contract claim.

PURE filed a traditional motion for final summary judgment on the Mankoffs' breach-of-contract claim and declaratory-judgment action, arguing that, as a matter of law, it proved its affirmative defense that the policy's windstorm exception applied, that the Mankoffs could not establish a breach of the insurance policy, and that PURE is entitled to a declaration that the windstorm deductible was correctly withheld.

The Mankoffs filed a response and traditional counter-motion for partial summary judgment on the liability and damages elements of their breach-of-contract claim. The Mankoffs did not move for traditional summary judgment on their declaratory judgment action.

After a hearing, the trial court (1) denied the Mankoffs' traditional counter-motion for partial summary judgment on two elements of their breach-of-contract claim, (2) granted PURE's traditional motion for summary judgment on the

Mankoffs' declaratory judgment action and breach-of-contract claim, and (3) ordered a take-nothing judgment.

II. Applicable Law

A. Contract Interpretation

Insurance policies are construed as contracts and enforced as contracts. *Am. Nat'l Ins. Co. v. Arce*, 672 S.W.3d 347, 353 (Tex. 2023). Insurance policies are interpreted under the rules of construction that apply to contracts in general. *See Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 198 (Tex. 2022). The primary goal of contract construction is to effectuate the parties' intent as expressed in the contract. *See id.* at 198–99. Courts consider the entire agreement and, to the extent possible, resolve any conflicts by harmonizing the agreement's provisions, rather than by applying arbitrary or mechanical default rules. *See Richards v. State Farm Lloyds*, 597 S.W.3d 492, 497 (Tex. 2020). When a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. *Id.*

Applying the ordinary rules of contract construction to insurance policies, a court ascertains the parties' intent by looking only to the four corners of the policy to see what is actually stated and does not consider what allegedly was meant. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746–47 (Tex. 2006).

Similarly, under the rules of contract interpretation, courts give policy language its plain, ordinary meaning unless something else in the policy shows the parties intended a different, technical meaning. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009). A court examines the entire insurance policy, reads all of its parts together, and seeks to give effect to all of its provisions so that none will be meaningless. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). To determine the common, ordinary meaning of undefined terms used in contracts, statutes, and other legal documents, courts typically look first to their dictionary definitions and then consider the term's usage in other statutes, court decisions, and similar authorities. *See Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 474 (Tex. 2017).

If the language of an insurance policy is worded so that it can be given a definite or certain legal meaning, then it is not ambiguous and courts construe it as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). Courts may not look to extrinsic evidence to prove the existence of an ambiguity. *See Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 283 (Tex. 1996).

Whether a particular provision or the interaction among multiple provisions creates an ambiguity is a question of law. *State Farm Lloyds v. Page*, 315 S.W.3d

525, 527 (Tex. 2010). That the parties may disagree about the policy’s meaning does not create an ambiguity; only if the policy is subject to two or more reasonable interpretations is it ambiguous. *Id.* If a court determines that only one party’s interpretation of the insurance policy is reasonable, then the policy is unambiguous and the reasonable interpretation should be adopted. *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015).

Alternatively, if the court determines that both interpretations are reasonable, then the policy is ambiguous. *Id.* In that event, the court must resolve the uncertainty by adopting the construction that most favors the insured, and if the court is construing a limitation on coverage, it must do so “even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.” *Id.* (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)).

B. Policy Exclusions and Exceptions

The policy at issue here insures against general hazards and contains other provisions limiting the general liability. *See* TEX. R. CIV. P. 94. The policy has a special deductible for windstorms, and the waiver of deductible for general hazards does not apply to windstorms. Under Rule 94, the insurer must specifically allege, as an affirmative defense, that a loss was due to a particular exception to the general liability. The Texas Insurance Code makes clear that language of exclusion in the

insurance contract or an exception to coverage claimed by an insurer must be pleaded as an affirmative defense and the insurer has the burden of proof. TEX. INS. CODE ANN. § 554.002. The Texas Supreme Court has confirmed that an insurer bears the burden of proof to establish that a policy exclusion or exception to general liability applies. *See Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 204 (Tex. 2004) (citing INS. art. 21.58(b);¹ TEX. R. CIV. P. 94).

III. Whether a Tornado is a Kind of Windstorm

PURE filed a traditional motion for final summary judgment on the Mankoffs' breach-of-contract claim and declaratory judgment action. With respect to the Mankoffs' breach-of-contract claim, it argued that, as a matter of law, the Mankoffs could not establish that PURE breached the insurance policy. With respect to the Mankoffs' declaratory judgment action, PURE argued that the Mankoffs were not entitled to a declaration that the windstorm deductible was incorrectly applied to their loss. In the Mankoffs' traditional counter-motion for partial summary judgment on two elements of their breach-of-contract claim, they argued they conclusively established as a matter of law that PURE breached the insurance policy and was liable to them for the amount of the withheld windstorm deductible.

I agree with the majority that the parties' dispute is one of contract interpretation. Under the policy, if a tornado is a windstorm, then the windstorm

¹ Texas Insurance Code art. 21.58(b) was recodified into § 554.002 of the Insurance Code in 2003.

deductible applied to the Mankoffs' loss. But if a tornado is not a windstorm, then under the policy, the deductible was waived. PURE argues that a tornado is a subcategory of the broader windstorm category, while the Mankoffs maintain that windstorms and tornados are two distinct types of meteorological events and that it is a reasonable interpretation of the insurance contract that a tornado cannot be considered a windstorm. To prevail on its traditional motion for summary judgment, PURE was required to show that the windstorm exception unambiguously applies to tornados.

A. The Policy Does Not Define Windstorm or Tornado

I would begin my analysis by trying to ascertain the parties' intent from the four corners of the policy to see what is actually stated. *See Fiess*, 202 S.W.3d at 746. Section II (Property Coverage), subsection B5, contains, among other things, the windstorm or hail deductible and the waiver of deductible provisions in the policy. Neither subsection B5 nor the definition section of the policy defines "windstorm" or "tornado."

B. Dictionary Definitions

Next, under the rules of contract interpretation, I would give the policy language its plain, ordinary meaning unless something else in the policy shows the parties intended a different, technical meaning. *See Tanner*, 289 S.W.3d at 831.

The majority provides an extensive summary of the parties' arguments on the meaning of these terms and then concludes that "[a]fter reviewing the insurance contract language in its entirety and after applying our well-developed rules of construction, it is our opinion that the term 'windstorm,' as used in the policy, is reasonably susceptible to more than one meaning, and that it therefore is ambiguous."

I note that the Mankoffs relied on expert testimony and the American Meteorological Society's Glossary (AMS Glossary), but the insurance policy does not indicate that the parties intended technical or scientific definitions to apply. Instead, § 2301.053(c) of the Texas Insurance Code requires that an insurance form for residential property insurance may not be used unless it is written in plain language. *See* INS. § 2301.053(c). Further, courts may not look to extrinsic evidence to prove the existence of an ambiguity. *See Friendswood*, 926 S.W.2d at 283.

To determine the common, ordinary meaning of these undefined terms, I would first look to their dictionary definitions. *See Pharr-San Juan-Alamo Indep. Sch. Dist.*, 642 S.W.3d at 474. Dictionaries provide the following definitions of "windstorm":

- "a storm marked by high wind with little or no precipitation." *Windstorm*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/windstorm> (last visited Dec. 13, 2023).

- “a storm with a strong wind but little or no rain, hail, etc.” *Windstorm*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed.), <https://www.collinsdictionary.com/us/dictionary/english/windstorm> (last visited Dec. 13, 2023).
- “a storm consisting of violent winds.” *Windstorm*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/windstorm> (last visited Dec. 13, 2023).
- “a storm that has very strong winds and usually very little rain or snow.” *Windstorm*, THE BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/windstorm> (last visited Dec. 13, 2023).

A common thread is that a windstorm is a storm whose main feature is strong, violent wind.

In its traditional motion for summary judgment, PURE argued that the plain meaning of windstorm included tornados and pointed to the following dictionary definitions of “tornado” as support, paraphrased as follows:

- “A violently rotating column of air extending from a cumulonimbus cloud to the ground, ranging in width from a few meters to more than a kilometer, with destructive winds up to 510 kilometers (316 miles) per hour or higher.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016).
- “A violent storm with winds whirling around a small area of extremely low pressure, usually characterized by a dark funnel-shaped cloud causing damage along its path.” COLLINS ENGLISH DICTIONARY—COMPLETE AND UNABRIDGED (12th ed. 2014).
- “A localized, violently destructive windstorm occurring over land, esp[ecially] in the Middle West, and characterized by a long, funnel-shaped cloud that extends to the ground.” RANDOM HOUSE KERNERMAN WEBSTER’S COLLEGE DICTIONARY (2010).

- “A violently rotating column of air ranging in width from a few yards to more than a mile and whirling at speeds estimated at 300 miles (483 kilometers) an hour or higher. A tornado usually takes the form of a funnel-shaped cloud extending downward out of a cumulonimbus cloud. Where funnel reaches the ground, it can cause enormous destruction.” THE AMERICAN HERITAGE STUDENT SCIENCE DICTIONARY (2d ed. 2014).
- “A highly localized, violent windstorm occurring over land, usually in the U.S. Midwest, characterized by a vertical, funnel-shaped cloud.” -OLOGIES & -ISMS (2008).
- “An intense cyclone where the spiraling wind-speed reaches over 200 miles (320 Km) per hour. DICTIONARY OF UNFAMILIAR WORDS BY DIAGRAM GROUP (2008).

Other dictionaries define “tornado” as follows:

- (1) A violent destructive windstorm accompanied by a funnel-shaped cloud that progresses in a narrow path over the land; (2) a violent windstorm; and (3) a tropical thunderstorm. *Tornado*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/tornado> (last visited Dec. 13, 2023).
- (1) In the U.S., a violently whirling column of air, with wind speeds of about 100 to 300 miles per hour, extending downward from a cumulonimbus cloud, especially in Australia and central U.S.: usually appearing as a rapidly rotating, slender, funnel-shaped cloud and typically causing great destruction along its narrow path; (2) in West Africa and the adjacent Atlantic, a severe thundersquall; and (3) any whirlwind or hurricane. *Tornado*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed.), <https://www.collinsdictionary.com/us/dictionary/english/tornado> (last visited Dec. 13, 2023).
- (1) A violent storm with winds whirling around a small area of extremely low pressure, usually characterized by a dark funnel-shaped cloud causing damage along its path; (2) a small but violent squall or whirlwind, such as those occurring along the African coast; and (3) any violent active or destructive person or

thing. *Tornado*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/tornado> (last visited Dec. 13, 2023).

- “[A] violent and destructive storm in which powerful winds move around a central point.” *Tornado*, THE BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/tornado> (last visited Dec. 13, 2023).
- “[A] violent rotating windstorm.” *Tornado*, COLOR OXFORD DICTIONARY (3d ed.).

Although not all dictionary definitions expressly define “tornado” using the term “windstorm,” all of the tornado definitions refer to wind or moving air. The definitions consistently describe the key feature of a tornado as violent wind.

C. Statutes

Turning next to statutes, I note that the Texas Insurance Code also does not define windstorm or tornado. The following sections do list tornadoes and windstorms separately:

- INS. § 252.003(21), (26) (“tornado” and “windstorm” listed as separate loss or damage events);
- INS. § 542A.001(2) (in the definition of “claim,” lists “tornado” and “wind” as separate “forces of nature”);
- INS. § 1806.102(c)(12) (lists “tornado” and “windstorm” as separate “weather or climatic conditions”);
- INS. § 2002.005(e) (refers to policies insuring against several “hazards,” including “tornado” and “windstorm,” listed separately);
- INS. § 2002.006(a)(1)(A) (lists “weather or climatic conditions,” including both “tornado” and “windstorm”);

- INS. § 2252.001(c)(12)(A) (same);
- INS. art. 5.13 (refers separately to “tornado” and “windstorm” insurance); and
- INS. § 862.051(3) (authorizes companies to insure motor vehicles against loss or damage by “windstorm” or “tornado”).

While listing the two weather events separately may imply that they are not identical phenomena, it does not necessarily weigh against an interpretation that a tornado is a subtype of a windstorm—just as not all rectangles are squares, but all squares are rectangles.

Additionally, the federal Windstorm Impact Reduction Program defines windstorm to include tornados. *See* 42 U.S.C. § 15702(5) (“The term ‘windstorm’ means any storm with a damaging or destructive wind component, such as a hurricane, tropical storm, northeaster, tornado, or thunderstorm.”).

D. Case Law

I agree with the majority’s conclusion that neither *Fireman’s Insurance Co. of Newark, N.J. v. Weatherman*, 193 S.W.2d 247 (Tex. App.—Eastland 1946, writ ref’d n.r.e.), nor the other cases cited by the parties directly answer the question at issue in this case. However, PURE cites several cases in which insurers paid tornado losses under windstorm policies:

- *Republic Ins. Co. v. Silverton Elevators, Inc.*, 493 S.W.2d 748, 750 (Tex. 1973) (“On April 17, 1970, a tornado destroyed the house and the household goods. On the date of the tornado there was in effect a Texas Standard Fire Policy . . . insuring against loss from windstorm Republic acknowledged coverage on the house and paid Silverton

\$7,000 for its damage,” but denied liability for household goods on other grounds.);

- *Little v. Tex. R.V.O.S. Ins. Co.*, 926 S.W.2d 830, 831 (Tex. App.—Eastland 1996, writ denied) (“On March 3, 1992, the house was severely damaged by a tornado. At that time, the house was insured by Texas R.V.O.S. . . . Within approximately ten days after the tornado, [the insurance agent] delivered two checks to [the insured] totaling \$106,129.50 to cover the loss. . . . The insurance policy issued by Texas R.V.O.S. expressly provides that the ‘Named Insured’ and ‘legal representatives’ are insured against a windstorm.”);
- *Brasher v. State Farm Lloyds*, No. 5:16-CV-1080-DAE, 2017 WL 9342367, at *1–2 (W.D. Tex. Feb. 2, 2017) (Dispute over “amount of property loss as a result of the hail and wind storm” where only property damage alleged was caused by a 2015 tornado under “an insurance policy . . . which specifically covered damage caused by windstorms.”).

PURE further argues that the absence of case law defining whether a tornado is a windstorm shows a common understanding that “windstorm” includes tornados.

E. Other Sources

Finally, I would analyze the plain meaning of these contested terms by looking at other relevant sources. In its traditional motion for summary judgment, PURE argued that the National Weather Service categorizes tornados based on their wind speed, which it claimed supported its contention that the plain meaning of the term windstorm as used in the policy includes tornados. In their response and traditional counter-motion for partial summary judgment, the Mankoffs argued the following encyclopedia entry supported their position that windstorms and tornados are two different types of storms:

- “[A] wind that is strong enough to cause at least light damage to trees and buildings and may or may not be accompanied by precipitation. Wind speeds during a windstorm typically exceed 55 km (34 miles) per hour. Wind damage can be attributed to gusts (short burst of high-speed winds) or longer periods of sustained winds. Although tornadoes and tropical cyclones also produce wind damage, they are usually classified separately.” Roger A. Pielke, BRITANNICA, “windstorm,” <https://www.britannica.com/science/cyclone-meteorology>.

On appeal, the Mankoffs also note that the National Weather Service issues different warnings based on different types of storms including windstorms and tornadoes. In addition to the parties’ arguments, the Texas Department of Insurance website states that “[w]indstorm insurance pays to repair or rebuild your house if it’s damaged by hail or wind, from a tornado, thunderstorm, or hurricane” and advises persons to get windstorm coverage, noting that how you get it depends on where you live because “[i]f you live anywhere in Texas—except along the coast—you probably have wind and hail coverage in your homeowners policy. Your homeowners policy will pay for wind and hail damage much like it pays for fire, lightning, or theft, although you may have a different deductible for windstorm damage.” TEXAS DEP’T OF INS., *What is windstorm insurance?*, <https://www.tdi.texas.gov/tips/what-is-windstorm-insurance.html> (last visited Dec. 13, 2023).

F. A Tornado Is a Kind of Windstorm

Asking abstractly whether a tornado is a windstorm seems like it may lead us into an unsolvable conundrum like the passionately debated controversy of whether

a hotdog is a sandwich. However, after applying the rules of contract interpretation, I agree with the trial court that the windstorm deductible unambiguously applies to a loss caused by a tornado.

I wish the insurance company had defined its terms. It is also persuasive to me that the Texas Legislature has arguably implied that windstorms and tornados are distinct weather events. But, at the end of the day, the damage in this case was caused by wind. The consistent thread throughout all of the ordinary dictionary definitions is that a windstorm is a storm with violent winds, and a tornado is marked by violent winds. Under a plain reading of the terms, it is not reasonable to deny that a tornado is a kind of windstorm. The Mankoffs' argument that a tornado is a specially defined storm with specific classifications and warnings does not mean a tornado is not just a special kind of windstorm. In other words, all tornados are a type of windstorm but not all windstorms are tornados.

All of the dictionaries and other sources can be read congruously if a tornado is a subtype of windstorm. The majority's analysis risks creating further ambiguities: is a squall a windstorm? A gale? A nor'easter? A downburst? A variety of colorfully named subtypes of storms could still be windstorms. I conclude that the plain, ordinary understanding of the term "windstorm" includes the various kinds of windstorms and specifically includes a tornado.

IV. Conclusion

I would conclude that the language of the insurance policy is worded so that it can be given a definite or certain legal meaning (that a tornado is a kind of windstorm), that it is not ambiguous, and that the trial court correctly construed it as a matter of law. I would affirm the judgment of the trial court.

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/Emily Miskel/
EMILY A. MISKEL
JUSTICE