Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00119-CV

INFINITY COUNTY MUTUAL INSURANCE COMPANY,
Appellant

v.

Michael **TATSCH**,
Appellee

From the 216th Judicial District Court, Gillespie County, Texas
Trial Court No. 12977
Honorable N. Keith Williams, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice
Concurring & Dissenting Opinion by: Luz Elena D. Chapa, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 24, 2020

REVERSED AND RENDERED

This is a case of first impression. Infinity County Mutual Insurance Company appeals a final judgment incorporating the trial court's order denying its renewed motion for partial summary judgment and granting Michael Tatsch's renewed motion for partial summary judgment.[1] The

[1] Tatsch filed a motion to dismiss this appeal for want of jurisdiction which was carried with the appeal. In his motion, Tatsch asserts this court lacks jurisdiction to consider Infinity's appeal because Infinity agreed to and consented to the entry of the final judgment against it. In *Bexar Cty. Criminal Dist. Att'y's Office v. Mayo*, 773 S.W.2d 642, 644 (Tex. App.—San Antonio 1989, no writ), this court held the word "approved" at the end of an order, followed by the signatures of counsel, "with nothing more [did not] indicate[] a consent judgment and a voluntary relinquishment of the right to appeal." Importantly, we noted "[n]othing in the body of the judgment suggests that the case had been settled or that judgment was rendered by consent." *Id*. Here, Tatsch relies on the attorneys' signatures following the

sole issue on appeal is whether the trial court erred in concluding the insurance policy exclusion for damage to a vehicle resulting from or caused by a mechanical breakdown or failure did not apply to Tatsch's claim. We reverse the trial court's judgment and render judgment for Infinity.

MOTIONS FOR SUMMARY JUDGMENT AND EVIDENCE AT ISSUE

In the underlying litigation, the parties filed multiple motions for partial or final summary judgment. The evidence attached to the motions and responses varied from motion to motion. At issue in this appeal are Appellant's and Appellee's renewed motions for summary judgment. The evidence presented in these two motions consisted only of portions of Tatsch's deposition testimony, Tatsch's June 6, 2013 affidavit, portions of Infinity's claims file, Infinity's denial letter dated August 31, 2011, and Tatsch's insurance policy. The trial court considered the two renewed motions and their evidence, and we limit our review to the same evidence.

BACKGROUND

On August 25, 2011, Tatsch's 2008 Dodge Ram truck, which is powered by a diesel engine, broke down immediately after he refueled, and it would not restart. Tatsch had the truck towed to Burns Motors in McAllen, Texas. At first, the mechanics at Burns Motors thought the truck just needed a fuel filter. Tatsch instructed them to replace the fuel filter. After they replaced the fuel filter, the mechanics told Tatsch that they found water contamination in the fuel tank and that the fuel system would need to be cleaned and the fuel filters would need to be replaced. After Burns Motors cleaned the fuel system, replaced the fuel filters, and filled the tank with new fuel, the truck

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words "[a]greed to by" at the end of the judgment as support for his assertion that the judgment was a consent judgment, thereby relinquishing Infinity's right to appeal. Contrary to Tatsch's assertion, however, the "body of the judgment" not only suggests Infinity did not consent to liability for Tatsch's claims, but expressly states as follows:

> It is stipulated that the parties have compromised and settled all claims stated by Plaintiff in this cause as to damages, but not as to liability. Specifically, Defendant contends that the trial court erred in granting summary judgment in favor of Plaintiff as to the issue of coverage under Defendant's insurance policy.

Accordingly, Tatsch's motion to dismiss is denied. *See id*.

still would not start. On August 30, 2011, Tatsch towed the truck to North Star Dodge in San Antonio, Texas, to be serviced.

The same day Tatsch delivered the truck to North Star Dodge, he made a claim under a Commercial Auto Policy issued by Infinity.[2] Tatsch reported to Infinity that bad diesel fuel was put into the truck which damaged the fuel injectors. Tatsch also gave Infinity a recorded statement. In that recording, Tatsch said that he stopped to get some fuel, then took the truck to a dealership where six injectors were found to be damaged and had to be replaced due to bad fuel.

On August 31, 2011, Infinity sent Tatsch a letter denying his claim with an explanation:

> The vehicle damage occurred due to poor quality fuel being added to the vehicle which caused mechanical failure to your insured vehicle. There is an applicable exclusion in Your Texas Commercial Auto Policy that states we do not provide comprehensive coverage for damages resulting from mechanical failure.

The letter quoted the applicable policy provisions.

While the truck was at North Star Dodge, the mechanics removed the fuel tank and the fuel injectors. They replaced the fuel pump and the fuel injection pump. This work was done under warranty. On September 15, 2011, Tatsch picked up his truck from North Star Dodge. Tatsch, however, noticed that the engine was knocking. Because the diesel mechanic at North Star Dodge could not immediately work on the engine knock, Tatsch had his truck towed to Boerne Dodge Chrysler Jeep in Boerne, Texas.

At Boerne Dodge, the mechanics removed the engine's cylinder head and found all six cylinders with signs of a dust-out condition. They also found that cylinder number three was "fuel washed." After performing a fuel analysis, Boerne Dodge concluded that there was no water in the fuel system but there was some evidence that a solvent such as kerosene contaminated the fuel

[2] Infinity contests the day Tatsch made the insurance claim. However, the summary judgment evidence before us supports that Infinity opened its claim file on August 30, 2011.

system. Boerne Dodge's final diagnosis was that the truck's problems were caused by fuel contamination and a dust-out engine condition. Boerne Dodge then recommended the entire engine system be replaced at a cost of $31,189.13. Tatsch declined the recommended repairs.

On December 19, 2011, Tatsch sued Infinity alleging claims for violations of the DTPA and the Insurance Code.[3] On September 16, 2013, the trial court granted a traditional and no-evidence summary judgment in favor of Infinity, dismissing all of Tatsch's claims against Infinity with prejudice.[4] Tatsch appealed.

On December 3, 2014, this court reversed the portion of the trial court's judgment granting Infinity's motion with regard to Tatsch's claim that Infinity violated section 541.060(a)(7) of the Insurance Code by not conducting a reasonable investigation before denying Tatsch's claim. *Tatsch v. Chrysler Group, LLC*, No. 04-13-00757-CV, 2014 WL 6808637, at *7–8 (Tex. App.—San Antonio Dec. 3, 2014, pet. denied) (mem. op.). We remanded the cause to the trial court to decide the section 541.060(a)(7) claim. *Id*.

After this court's mandate issued on December 4, 2015, Tatsch amended his pleadings. He continued to assert his claim against Infinity for a violation of section 541.060(a)(7) and added a claim against Infinity for breach of contract. Infinity filed an answer asserting the damage to Tatsch's truck was excluded from coverage under the insurance policy. The parties then filed competing motions for summary judgment. Tatsch's motion argued the exclusion did not apply. Infinity's motion argued the loss was excluded from coverage. Infinity's motion also argued Tatsch could not recover on his extra-contractual claim because Infinity did not breach the policy. The trial court denied both motions on June 5, 2017.

[3] Tatsch also sued Chrysler Group, LLC and Boerne Dodge Chrysler Jeep, LLC.
[4] The trial court also granted summary judgment in favor of Chrysler Group. After the summary judgments were granted, Tatsch nonsuited his claim against Boerne Dodge Chrysler Jeep, LLC.

As previously noted, Infinity and Tatsch filed renewed motions for summary judgment asserting the same arguments. On July 22, 2018, the trial court signed an order granting Tatsch's motion and denying Infinity's motion.

On January 30, 2019, the trial court signed a final judgment noting the parties compromised and settled all claims as to damages, but not as to liability. Infinity appeals.

STANDARD OF REVIEW

"We review summary judgments de novo. Summary judgment is proper when no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law." *Tex. Workforce Comm'n v. Wichita Cty.*, 548 S.W.3d 489, 492 (Tex. 2018) (citation omitted). "When competing summary-judgment motions are filed, 'each party bears the burden of establishing that it is entitled to judgment as a matter of law.'" *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018) (quoting *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 356 (Tex. 2000)). "[If] the trial court grants one motion and denies the other, [we] consider[] the summary judgment evidence presented by both sides, determine[] all questions presented, and if [we] determine[] that the trial court erred, render[] the judgment the trial court should have rendered." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

INSURANCE POLICY INTERPRETATION

"Whether a contract is ambiguous is itself a question of law." *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 126 (Tex. 2004). "We interpret insurance policies under the well-established rules of contract construction." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892 (Tex. 2017). "The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used." *Id*. at 893. The plain language of the contract controls, and "we assign terms their ordinary and generally accepted meaning unless the contract directs otherwise." *Id*. In our review, "we take care to ensure that no provision is rendered meaningless,

[and we will not] insert language or provisions the parties did not use or . . . otherwise rewrite private agreements." *Id.* at 892–93. We must "enforce the contract as made by the parties, and [we] cannot make a new contract for them, nor change that which they have made under the guise of construction.'" *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006) (quoting *E. Tex. Fire Ins. Co. v. Kempner*, 27 S.W. 122, 122 (Tex. 1894)). "If the [contract's] language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law." *Primo*, 512 S.W.3d at 893. "[A]n ambiguity does not exist simply because the parties interpret a policy differently." *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010); *see also Primo*, 512 S.W.3d at 893.

"An intent to exclude coverage must be expressed in clear and unambiguous language." *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993). "If a contract as written can be given a clear and definite legal meaning, then it is not ambiguous as a matter of law." *Gilbert Tex. Const.*, 327 S.W.3d at 133 (citing *Progressive Cty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997)).

In this case, we must first determine whether the policy language is ambiguous.

POLICY LANGUAGE

The policy at issue is a commercial auto policy that lists Tatsch's truck as an insured vehicle. The policy contains Part E, which covers damage to Tatsch's truck. Part E provides as follows:

> **PART E – COVERAGE FOR DAMAGE TO YOUR INSURED AUTO**
>
> **INSURING AGREEMENT**
> If **you** pay a specific premium for this coverage, **we** will pay for **loss** to **your insured auto**, including its factory-installed, permanently attached equipment which is considered standard for **your insured auto**, caused by:
>
> 1. **Collision**;
> 2. **Comprehensive**; or

3. **Fire and Theft with Combined Additional Coverage**

less any applicable deductible shown on the Declarations page for each separate **loss**.

ADDITIONAL DEFINITIONS USED IN THIS PART ONLY

. . . .

4. **"Collision"** means impact of **your insured auto** with another object or upset of **your insured auto**. . . .

5. **"Comprehensive"** means **loss** other than that caused by **collision**.

. . . .

9. "**Loss**" means direct and accidental loss of or damage to **your insured auto**, including its equipment which is permanently installed at the factory by the original make and model manufacturer and considered standard equipment for such vehicle. . . .

. . . .

EXCLUSIONS

READ THE FOLLOWING EXCLUSIONS CAREFULLY. COVERAGE WILL NOT BE AFFORDED UNDER THIS PART FOR ANY OF THE EXCLUSIONS LISTED BELOW.

We do not cover **loss**:

. . . .

5. Resulting from or caused by any of the following, unless caused by other **loss** that is covered by this insurance policy:

a. Prior **loss** or damage;
b. Manufacturer's defects;
c. Wear and tear;
d. Freezing;
e. Mechanical or electrical breakdown or failure; or
f. Blowouts, punctures, or other road damage to tires.

PARTIES' ARGUMENTS

The parties do not dispute that Part E's insuring agreement covers Tatsch's truck, and we agree. In dispute is what constitutes the loss under Part E of the policy and the interpretation of the exclusionary language "resulting from or caused by . . [m]echanical . . . breakdown or failure."

Infinity argues the plain language of the policy means any damage to Tatsch's truck resulting from or caused by mechanical breakdown or failure is expressly excluded from coverage. Because the damage to Tatsch's truck was the loss, which was caused by or resulted from the

mechanical breakdown of the truck's engine, Infinity contends the trial court erred in construing the policy language to provide coverage.

Tatsch, on the other hand, argues the loss or damage to his truck was caused by or resulted from contaminated fuel, not by a mechanical breakdown. Tatsch argues that because the mechanical breakdown was the "loss of or damage to" rather than the cause of the loss or damage, the exclusion was not triggered. Tatsch also argues coverage is only excluded for a mechanical breakdown caused by an internal cause, not an external cause.

ANALYSIS

The issue before us is the interpretation of the loss covered under the policy's insuring agreement and whether the "mechanical breakdown or failure" exclusion was triggered excluding that loss from coverage.

A. The Loss

We begin our analysis by identifying the loss that Tatsch claims he sustained under the policy. Tatsch argues that his insured loss was a mechanical breakdown, which he defines as the failure of the engine and injectors.[5]

Part E of the policy defines "loss" as a "direct and accidental loss of or damage to **your insured auto** including its equipment which is permanently installed at the factory by the original make and model manufacturer and considered standard equipment for such vehicle." The phrase "mechanical breakdown" is not defined in the policy.

The plain meaning of "mechanical" is "of or relating to machinery or tools." *See Mechanical*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/mechanical (last visited April 20, 2020). The plain meaning of

[5] Based on the facts before us, the fuel injectors were replaced by North Star Dodge under a manufacturer's warranty.

"breakdown" is "a failure to function." *See Breakdown*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/breakdown (last visited April 20, 2020). And "failure" is "an abrupt cessation of normal functioning." *See Failure*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/failure (last visited April 20, 2020).

Thus, the plain meaning of the phrase "mechanical . . . breakdown or failure" is a machinery's mechanism's failure to function. *See e.g.*, *Nat'l Inv'rs Fire & Cas. Co. v. Preddy*, 451 S.W.2d 457, 458 (defining mechanical breakdown "as a failure in the working mechanism of the machinery—a functional defect in the moving parts of the equipment which causes the latter to cease functioning or to function improperly").

Tatsch's argument that his loss was the mechanical breakdown of the engine ignores the definition of *loss* under Part E of the policy and asks us to substitute the phrase mechanical breakdown for the definition of *loss*. This we cannot do. "As with any other contract, the parties' intent is governed by what they said [in the contract]." *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 383 (Tex. 2009) (Johnson, J., dissenting) (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006)). When interpreting insurance policies, we do not add to or ignore language in the policy. *Id.* We simply "cannot make a new contract for them, nor change that which they have made under the guise of construction." *Id.* (quoting *E. Tex. Fire Ins. Co. v. Kempner*, 27 S.W. 122, 122 (Tex. 1894)).

For these reasons, we reject Tatsch's argument that the loss under the policy was the mechanical breakdown of his truck's engine.

We conclude that the policy's definition of the term loss is not ambiguous and hold that, under the plain language of that definition, the loss in this case is the loss of or damage to Tatsch's truck, including all factory installed equipment, such as the engine. The plain language of the

definition for loss "lends itself to a clear and definite legal meaning" of what constitutes a *loss* under the policy. *See Great Am. Ins. Co.*, 512 S.W.3d at 893.

We turn now to the interpretation of the exclusion in Part E of the policy.

B. Resulting From or Caused By

Under the exclusion in Part E of the policy, Infinity does not cover a *loss* "*resulting from or caused by . . . [m]echanical or electrical breakdown or failure*." Having established that the word *loss* means the loss of or damage to Tatsch's truck, our focus is on the plain meaning of the rest of the exclusionary language. In interpreting the exclusion, we remain mindful that exclusions in an insurance policy must be expressed clearly and without ambiguity. *See State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993).

We held above that the plain meaning of the phrase "mechanical or electrical breakdown or failure" was a machinery's mechanism's failure to function. Turning our attention to the terms "resulting from" and "caused by," we note that neither term is defined in the policy. Therefore, we begin with the plain meaning of these terms to determine if any ambiguity exists. *See Great Am. Ins. Co.*, 512 S.W.3d at 892.

"Resulting from" means when "a situation or problem results from a particular event or activity, it is caused by it." *See Resulting from*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/result-from-sth?q=resulting+from (last visited April 20, 2020). The word "caused" is the past tense of the verb "cause," which means "to serve as a cause or occasion of." *See Cause*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/cause (last visited April 20, 2020). The word "by" is a proposition that means "during the course of." *See By*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/by (last visited April 20, 2020).

Under the policy's plain language, the loss of or damage to Tatsch's truck's (the insured auto) resulting from or caused by the engine's failure to function (the *mechanical breakdown or failure*) is excluded from coverage. Tatsch's position, nonetheless, is that the exclusion does not apply because the mechanical breakdown resulted from or was caused by the fuel contamination and the dust-out engine condition.[6]

Under the policy's plain language, the exclusion is triggered if the loss or damage to the truck resulted from or was caused by mechanical breakdown or failure, even though another event might have caused the mechanical breakdown. Although no Texas court has directly addressed this issue, Infinity invites us to follow *State Farm Lloyds v. Marchetti*, 962 S.W.2d 58 (Tex. App.—Houston [1st Dist.] 1997, pet. denied), where the court addressed an insurance policy's exclusion involving the phrase "caused by or resulting from."

In *Marchetti*, the policy covered loss caused by the discharge or overflow of water from within a home's plumbing system. *Id*. at 60. However, the policy excluded loss caused by or resulting from flood or surface water. *Id*. The insureds sought coverage for damage caused by "water and raw sewage that discharged or overflowed from within the plumbing system of their home." *Id*. at 61.

The *Marchetti* court recognized that the cause of the damage to the house was the overflow of water from the home's plumbing system for which coverage was provided. *Id*. The court rejected the insurer's argument that the loss was excluded because the overflow of the water was indirectly caused by flood water or surface water. *Id*. The court reasoned "the fact that excessive

[6] In his brief, Tatsch cites *Blackwell v. Allstate Ins. Co.*, 643 S.W.2d 447 (Tex. App.—Corpus Christi 1982, no writ) and *Fireman's Fund Ins. Co. v. Cramer*, 171 So. 2d 220 (Fla. Dist. Ct. App. 1964) (opinion quashed 178 So. 2d 581 (Fla. 1965), in support of his position. In both cases, the policy language construed by the courts excluded damage "due and confined to" mechanical breakdown or failure. *Blackwell*, 643 S.W.2d at 448; *Cramer*, 171 So. 2d at 221. Because the exclusionary language in both cases add "due and confined to" mechanical breakdown or failure, the facts in *Blackwell* and *Cramer* are readily distinguishable from the instant case.

surface water may have initiated the chain of events that led to the [insured's] loss is immaterial." *Id*. The court noted the water that overflowed into the insureds' home was non-flood water and sewage directed from underground lines into the insureds' home when excessive rainfall caused the sanitation sewer system to exceed its capacity. *Id*. The court held "when the loss is a consequence of the invasion of the insured premises by non-flood water, even though the invasion may have been proximately caused by flood water, the exclusion does not apply." *Id*. Although the insured prevailed in *Marchetti*, the court's reasoning in deciding whether the loss was covered or excluded focused on the cause of the damage to the home.

We agree that the reasoning in *Marchetti* is on point. Tatsch's *loss resulted from* a mechanical breakdown or failure of the engine even though that breakdown or failure may have been caused by fuel contamination or a dust-out engine condition or negligence of whoever placed a foreign substance in the fuel tank. Under the policy's plain language, if the loss resulted from a mechanical breakdown or failure, the loss is excluded from coverage.

C. Internal or External Cause

Tatsch alternatively argues coverage is excluded only if the mechanical breakdown is due to an internal—as opposed to an external—cause. In support of this argument, Tatsch cites a Virginia Supreme Court opinion that held a policy which covered "damage to the insured property from any external cause" but excluded loss or damage caused by a mechanical breakdown only excluded "losses arising from internal or inherent deficiency or defect, rather than from any external cause." *Caldwell v. Transp. Ins. Co.*, 364 S.E.2d 1, 2–3 (Va. 1988). This case is distinguishable because the policy expressly covered damage caused by "external" causes.

Tatsch also points to one of the cases cited by Infinity in which evidence was presented that the damage to a printing press, which was covered by insurance, was caused by a mechanical failure when an object inside the printing press caused damage to its gears. *See Am. Graphics,*

Inc. v. Travelers Indem. Co., 17 Fed. App'x 787, 789 (10th Cir. 2001). The Tenth Circuit upheld the district court's conclusion that the damage was not covered by insurance because "the policy unambiguously excluded coverage for mechanical breakdown under the common meaning of that phrase." *Id*. at 792. Tatsch contends coverage was excluded in that case because the mechanical breakdown was due to an internal cause, not an external cause.

Tatsch does not, however, address a second case cited by Infinity in which the court held coverage was excluded where the loss was due to the mechanical failure of an engine traceable to the negligent work of a mechanic. *See Little Judy Indus., Inc. v. Fed. Ins. Co.*, 280 So. 2d 14, 15 (Fla. Dist. Ct. App. 1973) (per curiam). The court reasoned, "The fact that the failure thereof was traceable to negligence in its repair or to improper repair or assembly of the engine did not make it other than a mechanical failure." *Id*.

We need not further address these cases because the plain language of the policy does not differentiate between external and internal causes of a mechanical breakdown or failure. And, as previously noted, we may not insert language or provisions into a policy under the guise of construction. *See Great Am. Ins. Co.*, 512 S.W.3d at 893; *Fiess*, 202 S.W.3d at 753.

CONCLUSION

Because the loss of or damage to Tatsch's truck was the result of the mechanical breakdown or failure of the truck's engine, the policy unambiguously excludes the loss from coverage. Accordingly, we reverse the trial court's judgment and render judgment that Michael Tatsch take nothing from Infinity County Mutual Insurance Company.

Patricia O. Alvarez, Justice