IN THE COURT OF APPEALS OF TENNESSEE

PRUETT ENTERPRISES, INC.,	)	C/A NO. 03A01-9609-CH-00309
	)	
Plaintiff-Appellant,	)	
	)	
	)	
	)	
v.	)	APPEAL AS OF RIGHT FROM THE
	)	HAMILTON COUNTY CHANCERY COURT
	)	
	)	
	)	
THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE CO.,	)	
	)	
	)	HONORABLE HOWELL N. PEOPLES,
Defendant-Appellee.	)	CHANCELLOR

For Appellant:	For Appellee:
THOMAS CRUTCHFIELD	MICHAEL A. KENT
Frazier, Crutchfield & Solomon	Cleary & Lockett, P.C.
Chattanooga, Tennessee	Chattanooga, Tennessee

O P I N I O N

AFFIRMED IN PART
REVERSED IN PART
AND REMANDED

Susano, J.

This non-jury case involves the interpretation of a commercial insurance policy ("the policy") issued by The Hartford Steam Boiler Inspection and Insurance Company (Hartford) to Pruett Enterprises, Inc. (Pruett). Pruett, the owner and operator of a chain of grocery stores in Hamilton County, sued Hartford under the policy for "spoilage losses to various perishable items [caused] when electrical power to [two of Pruett's] grocery stores was interrupted as a result of a heavy snow blizzard [on or about March 13, 1993]." Each of the parties filed a motion for summary judgment. Based upon the parties' stipulation of facts, the trial court granted Hartford partial summary judgment, finding that the loss at 6925 Middle Valley Road, Hixson ("Middle Valley Store") was not covered by the policy. As to the loss at Pruett's store at 3936 Ringgold Road, East Ridge ("Ringgold Road Store"), the trial court found a genuine issue of fact and denied Hartford's motion.

After receiving the oral testimony of the plaintiff's expert, the trial court dismissed the remaining claim as to the loss at the Ringgold Road Store. Pruett appealed, raising one issue:

> Were the spoilage losses, which were incurred by the plaintiff as a result of power outages at two of its grocery stores, "accidents" within the meaning of defendant's "All Systems Go" Business Equipment Protection insurance policy which insured plaintiff for spoilage losses at the time of the loss?

Hartford advances three issues in its brief; however, all of its issues are subsumed in the basic question before us on this

appeal: Does the coverage of the policy extend to Pruett's losses at these two stores?

I. *Posture of This Appeal*

This case has an unusual procedural history. As noted, the trial court initially acted on the parties' stipulation and granted Hartford partial summary judgment. It then heard the oral testimony of Barton K. Craver, after which it held that Pruett's claim as to its Ringgold Road Store was not covered by the Hartford policy, and dismissed the plaintiff's complaint.

Pruett offered Mr. Craver's testimony on the loss at its Ringgold Road Store *as well as* with respect to the loss at the Middle Valley Store, even though the loss at the latter store had earlier been disposed of by the summary judgment. On this appeal, the parties treat this entire case as one decided on undisputed facts, including facts and opinions testified to by Mr. Craver. We believe this is an appropriate way to view this case. Since the facts are not in dispute, the trial court's determinations are ones of law. Therefore, we are not bound by them. ***Adams v. Dean Roofing Co., Inc.***, 715 S.W.2d 341, 343 (Tenn.App. 1986). We must decide anew who is entitled to judgment based upon these undisputed facts.

II. *Facts*

The parties filed the following stipulation of facts:

Pruett Enterprises, Inc. (“Pruett’s”) was the named insured under a policy of insurance (the “Policy”) issued by The Hartford Steam Boiler Inspection and Insurance Company (“Hartford”) with a policy period of May 1, 1992 to May 1, 1993. A copy of the Policy and endorsements is attached as Exhibit A.[1]

Pruett’s was the owner and operator of two grocery stores material to the issues herein, and covered under the Policy, the address of said stores being:

(1) 3936 Ringgold Road, East Ridge, Tennessee (the “Ringgold Store”).

(2) 6925 Middle Valley Road, Hixson Tennessee (the “Middle Valley Store”).

The Policy may also have covered other stores not material to the issues in this lawsuit.

On or about March 13, 1993 a winter storm occurred in the Hamilton County area.

Electrical power to the Ringgold Store was interrupted on or about March 13, 1993.

The interruption of electrical power to the Ringgold store resulted in spoilage of perishable goods at that location.

Electrical power to the Middle Valley Store was interrupted on or about March 13, 1993.

The interruption of electrical power to the Middle Valley store resulted in spoilage of perishable goods at that location.

Fuses on a utility pole near the Ringgold Road Store were opened and electrical power could not proceed past the opened fuses to the Ringgold Road Store. It was necessary to replace the fuses to restore power to the Ringgold Road Store. It cannot be determined with certainty what caused the fuses to open, although lightening is a possible cause.

One function of the fuses is to interrupt a surge of power.

An electrical circuit breaker opened at [the Power Board’s] Middle Valley Substation and

[1]The policy is attached to the stipulation.

> electrical power could not proceed past the opened circuit breaker to the Middle Valley Store. Power was restored when the circuit breaker was reset. The circuit breaker was not damaged and did not require repair or replacement.
>
> One function of the circuit breaker was to interrupt a surge of power.
>
> The circuit breakers were located within 500 feet of the Middle Valley Store.
>
> As a result of the lack of power to the Middle Valley Store, certain frozen and refrigerated foods spoiled or were condemned by health authorities resulting in a loss of $7,763.00 to Pruett's (the "Loss"). There was a $2,500.00 deductible applicable to this loss.
>
> As a result of the lack of power to the Ringgold Store, certain frozen and refrigerated foods spoiled or were condemned by health authorities resulting in a loss of $32,191.94 to Pruett's (the "Loss"). There was a $2,500.00 deductible applicable to this loss.
>
> Pruett's made claims under the Policy for the losses at the Ringgold and Middle Valley Stores, and Hartford denied the claims on the basis that the losses were not covered by the policy, and/or were excluded by the Policy.
>
> Pruett's has received payment for the Loss from Huffaker Insurance Agency, the agency which sold the Policy to Pruett's. Pruett's has agreed to reimburse such agency if Pruett's is successful in this action.
>
> The Loss did not result from any physical damage to equipment owned by Pruett's, and no repair or replacement of equipment or parts of equipment owned by Pruett's was necessary.

Mr. Craver, who was the only "live" witness, is an electrical engineer. He was working for the Chattanooga Electric Power Board (Power Board) in March, 1993, at the time of the winter storm in question. His duties included the investigation of the causes of power outages.

While disavowing certainty regarding the causes of the two power outages at issue in this case, Mr. Craver expressed his expert opinion that the probable cause of the power outage at the Ringgold Road Store was lightning[2] while the probable cause of the outage at the Middle Valley Store was trees falling on the Power Board's lines. In both cases, the precipitating event caused a power surge. That surge was interrupted with respect to the Ringgold Road Store by a fuse on the Power Board's utility pole; and by an electrical circuit breaker at the Power Board's substation near the Middle Valley Store. Mr. Craver testified that there would have been a complete loss of power at both stores even if the fuse and circuit breaker had not been present. His testimony indicates that, in either event, the stores would have been without power for a sufficient period of time to spoil Pruett's perishable goods.

III. *The Policy*

The policy provides, in pertinent part, as follows:

> **ALL SYSTEMS GO®**
> **Business Equipment Protection**
>
> Various provisions in this Policy restrict coverage. Read the entire Policy carefully to determine rights, duties and what is and is not covered.
>
> Throughout this Policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company identified on the Declarations which is providing this insurance.

[2]This particular snow storm included a significant amount of lightning.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section F--DEFINITIONS.

A. **COVERAGE**

We will pay for . . . Spoilage caused by an “accident” at the location(s) specified in the Declarations.

1. **Covered Property** . . .

* * *

4. **Spoilage**

We will pay for loss of perishable goods due to spoilage resulting from lack of power, light, heat, steam or refrigeration caused solely by an “accident,” including an “accident” to any transformer, electrical apparatus, or any covered equipment that is:

a. Located on or within 500 feet of your “location;”

b. Owned by the building owner at your “location,” or owned by a public utility company; and

c. Used to supply telephone, electricity, air conditioning, heating, gas, water or steam to your “location.”

* * *

F. **DEFINITIONS**

1. “**Accident**”

a. “Accident” means a sudden and accidental breakdown of the

following covered equipment:

* * *

(5) Any mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power.

At the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof.

* * *

b. None of the following is an “accident:”

* * *

(2) The functioning of

any safety or protective device;

* * *

c. None of the following are covered equipment:

(1) Any furnace;

(2) Any sewer piping, underground gas piping, or piping forming a part of a sprinkler system;

(3) Water piping other than boiler feed water piping, boiler condensate return piping or

water piping forming a part of a refrigerating or air conditioning system;

(4) Insulating or refractory material;

(5) Media used with any electronic computer or electronic data processing equipment;

(6) Vehicle, elevator, escalator, conveyor, hoist or crane.

(Bold print in original). At no place in the policy is there an exclusion for lightning or trees falling on power lines.

We must decide if this policy covers either or both of these losses.

IV. *Law*

The interpretation of an insurance contract is a question for the court. ***Rainey v. Stansell***, 836 S.W.2d 117, 118 (Tenn.App. 1992). When, as here, there is no conflict in the evidence, the issue on appeal becomes a pure question of law. ***Tennessee Farmers Mut. v. American Mut.***, 840 S.W.2d 933, 936 (Tenn.App. 1992).

"Insurance contracts are subject to the same rules of construction and enforcement as apply to contracts generally." ***McKimm v. Bell***, 790 S.W.2d 526, 527 (Tenn. 1990); ***Allstate Ins. Co. v. Wilson***, 856 S.W.2d 706 (Tenn.App. 1992). Therefore, contracts will be enforced as written, absent fraud or mistake, even though they contain arguably harsh or unjust terms. *Id.*

It is the obligation of the courts "to enforce contracts according to their plain terms." ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578, 580 (Tenn. 1975).

"[T]he paramount rule of construction in insurance law is to ascertain the intent of the parties." ***Blue Diamond Coal v. Holland-America Ins. Co***., 671 S.W.2d 829, 833 (Tenn. 1984).

Like other contracts, insurance policies are to be interpreted by giving words "their common and ordinary meaning." ***Tata v. Nichols***, 848 S.W.2d 649, 650 (Tenn. 1993).

Insurance policies are strictly construed in favor of the insured. ***Sturgill v. Life Insurance Co. of Georgia***, 465 S.W.2d 742, 744 (Tenn.App. 1970). Exceptions, exclusions, and limitations in insurance policies are construed against the insurer. ***Travelers Ins. Co. v. Aetna Casualty and Surety Company***, 491 S.W.2d 363, 367 (Tenn. 1973).

If a contract of insurance is ambiguous and susceptible to two reasonable meanings, ". . . the one favorable to the insured must be adopted." ***Boyd v. Peoples Protective Life Insurance Company***, 345 S.W.2d 869, 872 (Tenn. 1961); ***Kentucky Home Mut. Life Ins. Co. v. Rogers***, 270 S.W.2d 188, 193 (Tenn. 1954).

V. *Analysis*

A. *In General*

Hartford contends that, with respect to both stores, Pruett's loss was caused by the "functioning of [a] safety or protective device"; that the policy expressly provides that the "functioning" of such a device is not an "accident" as defined in

the policy; that the policy only covers losses caused by an "accident"; and, therefore, since there was no "accident," there is no coverage applicable to Pruett's losses.

As pertinent to the facts of this case, portions of the policy can be "put together" to describe the following coverage:

> [Hartford] will pay for loss of perishable goods due to spoilage resulting from lack of power . . . caused solely by . . . a sudden and accidental breakdown of . . . [a]ny . . . electrical apparatus used for the . . . transmission . . . of . . . electrical power.
>
> At the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof.

This is not a forced interpretation of the policy language; on the contrary, it is exactly what the policy says.

We agree with Hartford that the "functioning of [a] safety or protective device" is not an "accident" under the policy. We also agree with Hartford that the fuse and circuit breaker both functioned as safety devices in this case; but all of this begs the question. The critical question in this case is what *caused* these losses. We believe it is clear that the losses were *caused* by lightning with respect to the loss at the Ringgold Road Store and trees falling on the Power Board's lines with respect to the power loss at the Middle Valley Store. In both cases, the accidental event--lightning and trees falling--damaged an "electrical apparatus used for the . . . transmission . . . of . . . electrical power." In one case--the Ringgold Road Store--

lightning caused damage that required repair, i.e., a fuse had to be replaced. In the other case--the Middle Valley Store--the Power Board's lines were knocked down by falling trees. In order to restore power to the Middle Valley Store, the lines had to be repaired. In each case, once the unintended event--lightning in one case and trees falling in the other--occurred, the loss of power was inevitable. The safety devices did not "cause" the loss; the unintended accidental events did. The safety devices merely *prevented* additional and perhaps more serious damage.

It is true that the "accident" identified by us with respect to each of the stores may not have occurred "within 500 feet of" the store; but this is not determinative because the policy does not *limit* the concept of an "accident" to those occurring "within 500 feet of" the store. Under the previously-quoted "Spoilage" coverage, the policy provides as follows:

> We will pay for loss of perishable goods due to spoilage resulting from lack of power, light, heat, steam or refrigeration caused solely by an "accident," *including* an "accident" to any transformer, electrical apparatus, or any covered equipment that is:
>
> a. Located on or within 500 feet of your "location;"
>
> b. Owned by the building owner at your "location," or owned by a public utility company; and
>
> c. Used to supply telephone, electricity, air conditioning, heating, gas, water or steam to your "location."

(Emphasis Added). The key to understanding this provision can be found in the definition of the word "include." Generally

speaking, the word “include” or the derivative version, “including,” is intended to introduce some, but not all, of the components of the concept preceding the word “including.”[3] **The American Heritage Dictionary** 665 (New College ed. 1978) states the following in its definition of the word “include”:

> To have as a part or member; be made up of, at least in part; contain.
>
> * * *
>
> Synonyms: *include, comprise, comprehend, embrace, involve*. These verbs mean to take in or contain one or more things as part of something larger. *Include* and *comprise* both take as their objects things or persons that are constituent parts. *Comprise* usually implies that all of the components are stated: *The track meet comprises 15 events* (that is, consists of or is composed of). *Include* can be so used, but, like the remaining terms, more often implies an incomplete listing: *The meet includes among its high points a return match between leading sprinters.*

(Italics in original; underlining added). As we read this policy, an accident within 500 feet of the store is just one illustration of the meaning of the word “accident.” The descriptive material following the word “including” is an “incomplete listing” of those events encompassed in the word “accident.”

We find nothing in the policy excluding accidents that occur at some distance from the store, if the accident in fact *causes* damage to the store’s goods as described in the policy.

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[3]For an identical interpretation of the word “include” as used in a statute, see ***Cohen v. Cohen***, 937 S.W.2d 823, 828 n.4 (Tenn. 1996).

That is exactly what happened with respect to the losses at both of the stores. Again, we would emphasize that as we read the policy it covers a loss caused by an "accident" *without limiting where that "accident" can occur;* but, even assuming, for the purpose of argument, that Hartford is correct when it argues that the policy limits coverage to an "accident" that occurs within 500 feet of the covered location, the parties' stipulation shows that the "accident" in each of these cases was not complete until an effect of the precipitating event had been "felt" within 500 feet of Pruett's location.

B. *Ringgold Road Store*

With respect to the Ringgold Road Store, the blown-out fuse had to be replaced in order to restore power to that store. As we have earlier conceded, the functioning of the fuse as a safety device cannot be construed as an "accident"; but this does not mean that the fuse and its replacement cannot be viewed as "physical damage that requires repair or replacement of the covered equipment or part thereof." When these words of the policy are given their "common and ordinary meaning," they clearly contemplate damage to the fuse and its subsequent replacement.

We find and hold that Pruett is entitled to summary judgment as to that portion of its complaint seeking to recover for the loss sustained by it at the Ringgold Road Store. The trial court erred when it granted Hartford summary judgment as to this loss.

C. *Middle Valley Store*

With respect to the loss at the Middle Valley Store, it was caused when trees fell on the Power Board's lines. There is nothing in the policy that excludes damage to the Power Board's lines as the offending "accident." Damage to the lines falls within the definition of "accident" because an "accident" is defined to include "a sudden and accidental breakdown of [a]ny . . . electrical apparatus used for the . . . transmission . . . of . . . electrical power." A power line certainly falls within the "common and ordinary meaning" of this policy language. Furthermore, the lines are not expressly excluded by the policy

language found under the heading “[n]one of the following are covered equipment.”

The more serious question in this case is whether the downing of the Power Board’s lines satisfies the requirement that “[a]t the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof.” The quoted language sets forth a coverage requirement which is obviously different from, and in addition to, the requirement that the loss be caused by an “accident.” There must be “physical damage” and it must be such as to require “repair or replacement of the covered equipment or part thereof.” This is a prerequisite to coverage.

Unlike “covered property,” “accident,” and other words in the policy, “covered equipment” is not defined. However, the policy does tell us what is *not* “covered equipment.” This can be found under the heading, “[n]one of the following are covered equipment,” as quoted earlier in this opinion; but this exclusionary provision is of no help to us in this case, because none of the excluded equipment is involved in the factual scenario before us.

“Covered equipment,” while not specifically defined in the policy, is alluded to in the “Spoilage” section of the policy. It refers to

> . . . any covered equipment that is:
>
> a. Located on or within 500 feet

of your "location;"

b. Owned by the building owner at your "location," or owned by a public utility company; and

c. Used to supply telephone, electricity, air conditioning, heating, gas, water or steam to your "location."

However, as we have pointed out earlier in this opinion, this language follows the word "including" and is therefore not intended to be exclusive in nature. Be that as it may, the language just quoted is of no help to the plaintiff in this case because the parties stipulated that the equipment that is within 500 feet of the Middle Valley Store--the circuit breaker--"was not damaged and did not require repair or replacement." Furthermore, the parties entered into another stipulation that is also relevant to the matter under discussion:

> The Loss [at the Middle Valley Store] did not result from any physical damage to equipment owned by Pruett's, and no repair or replacement of equipment or parts of equipment owned by Pruett's was necessary.

The only equipment that had to be repaired to resume power to the Middle Valley Store was the Power Board's lines; but we can find no reasonable interpretation of the policy which would sanction a holding that these lines, more than 500 feet

from the Middle Valley Store, are "covered equipment." We conclude from this that the loss at the Middle Valley Store was not covered by the policy since "[a]t the time the breakdown occur[red]," it did not "become apparent by physical damage that require[d] repair or replacement of the covered equipment or part thereof."

We have considered Pruett's argument that its loss at the Middle Valley Store is covered by an endorsement to the policy that does not include the "repair or replacement" language upon which we have relied to justify our finding of lack of coverage. The coverage language of that endorsement is identical to the coverage language of the main policy. In both instances the word "accident" is set off by quotation marks. While we do not know why the endorsement was issued since the coverage is identical to that found in the main policy, we do not believe that it was intended to furnish new coverage without the definitions found in the main policy, especially the definition of an "accident."

The Chancellor was correct in granting Hartford summary judgment as to the loss at the Middle Valley Store.

The judgment of the trial court is reversed in part and affirmed in part. Exercising our discretion, we assess the costs on appeal against the appellee. This case is remanded to the trial court for the entry of an order consistent with this opinion.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

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Herschel P. Franks, J.