STATE OF MINNESOTA

IN SUPREME COURT

A21-1587

Court of Appeals — Thissen, J.

Aaron Wesser,

Respondent,

vs.

Filed: April 26, 2023
Office of Appellate Courts

State Farm Fire and Casualty Company,

Appellant.

Anthony A. Remick, Timothy D. Johnson, Smith Jadin Johnson, PLLC, Bloomington, Minnesota, for respondent.

Scott G. Williams, Haws–KM, P.A., Saint Paul, Minnesota, for appellant.

Dale O. Thornsjo, Lance D. Meyer, O'Meara, Leer, Wagner & Kohl, P.A., Minneapolis, Minnesota, for amici curiae The Insurance Federation of Minnesota and The American Property Casualty Insurance Association.

Adina R. Bergstrom, Sauro & Bergstrom, PLLC, Oakdale, Minnesota, for amicus curiae United Policyholders.

S Y L L A B U S

A fire insurance policy claim provision stating that "[n]o interest accrues on the loss until after the loss becomes payable" is sufficient to preclude preaward interest under Minn. Stat. § 549.09 (2022).

Reversed.

O P I N I O N

THISSEN, Justice.

Minnesota Statutes section 549.09, subdivision 1(b) (2022), states that "*[e]xcept as otherwise provided by contract* or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed . . . from the . . . time of a written notice of claim." (Emphasis added.) The issue in this case is whether a fire insurance policy provision that states that "[n]o interest accrues on the loss until after the loss becomes payable" precludes preaward interest under the statute. Because we conclude that the policy language limits interest on a loss to amounts accruing after an appraisal award is issued, the insured is not entitled to recover preaward interest under Minn. Stat. § 549.09 (2022).

FACTS

The Insurance Policy Issued by State Farm to Wesser

Appellant State Farm Fire and Casualty Company (State Farm) issued a homeowner's insurance policy (the Policy) to respondent Aaron Wesser. In the Policy, State Farm agreed to reimburse Wesser for "all loss or damage" by fire to Wesser's home (minus a $1,000 deductible).

The Policy provides repair and replacement coverage: "[State Farm] will pay the cost to repair or replace with similar construction and for the same use on the premises . . . the damaged part of the property." The repair and replacement coverage requires that State Farm reimburse Wesser for the amount Wesser "actually and necessarily spend[s] to repair or replace the damaged part of the property" up to policy limits. Under the Policy, however, State Farm is not required to pay Wesser for what he actually and necessarily spends to repair or replace the damaged part of the property until Wesser completes the repair or replacement. Before repair or replacement is completed, State Farm is only required to pay Wesser the "actual cash value of the damaged part of the property." The Policy defines actual cash value as "the value of the damaged part of the property at the time of the loss, calculated as the estimated cost to repair or replace such property, less a deduction to account for pre-loss depreciation."

The Policy also addresses what happens in the event that Wesser and State Farm disagree on the "amount of loss." As required by Minn. Stat. § 65A.01 (2022), the Policy includes an appraisal clause, providing that either the insurer or the insured may demand an appraisal if they cannot agree on the amount of loss. *See* Minn. Stat. § 65A.01, subd. 3. The Policy further states that the appraisal panel will issue a written report that will "state separately the actual cash value, replacement cost, and if applicable, the market value of each item in dispute." The written appraisal report is "binding" on Wesser and State Farm.

Central to this appeal, the Policy includes a provision setting the time when State Farm must pay Wesser for his loss and when interest on the loss becomes payable:

> 8. **Loss Payment.** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment.
>
> Loss will be payable five business days after we receive your proof of loss and:
> a. reach agreement with you;
> b. there is an entry of a final judgment; or
> c. there is a filing of an appraisal award with us.
>
> *No interest accrues on the loss until after the loss becomes payable.*[1]

(Emphasis added.)

Fire Damage to Wesser's Home

A fire damaged Wesser's home on February 5, 2020. Wesser notified State Farm of the damage the same day and State Farm acknowledged the claim in an email. State Farm investigated the claim immediately. State Farm estimated that it would cost $193,721.81 to repair the damage.[2] On March 2, 2020, State Farm issued payment of $88,657.37 for the actual cash value of the damaged property less the deductible and a hold-back required by the City of Minneapolis.

Soon after the fire, Wesser notified State Farm that his contractor estimated it would cost $330,213.95 to rebuild Wesser's property. At some point after Wesser presented his estimate, State Farm reinvestigated the claim, estimated that the repair would cost

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[1] State Farm added this italicized language as an amendatory endorsement regarding interest accrual to the Policy following our decision in *Poehler v. Cincinnati Insurance Co.*, 899 N.W.2d 135, 141 (Minn. 2017), and before the fire here. The pre-amendment version of the provision did not include the final sentence stating that "[n]o interest accrues on the loss until after the loss becomes payable."

[2] State Farm's initial repair estimate was $176,038.04.

$242,451.45, and made additional payments. By July 10, 2020, State Farm had made payments of $241,451.45 to Wesser—the full amount of State Farm's estimated repair cost less Wesser's $1,000 deductible.

Wesser disagreed with State Farm's updated valuation and demanded an appraisal under the appraisal clause of the Policy. On January 29, 2021, the parties submitted the claim to appraisal. The appraisal panel determined that the actual cash value of the loss was $228,191.74 and that the loss replacement cost was $302,113.50. Because Wesser had not completed the repairs to his house and State Farm 7 months earlier had paid Wesser $241,451.45 (which was more than what the appraisal panel determined to be the actual cash value of the loss), State Farm did not pay Wesser any additional amounts following the appraisal panel award.[3]

On February 26, 2021, Wesser's attorneys demanded $30,211.35 in preaward interest on the appraisal award, citing section 549.09. Wesser calculated the amount of preaward interest by multiplying the entire amount of his loss replacement cost as determined by the appraisal panel—$302,113.50— by the 10 percent per annum rate set forth in statute. *See* Minn. Stat. § 549.09, subd. 1(c)(2) (providing that interest on an award greater than $50,000 shall accrue at a rate of 10 percent per year). According to Wesser, interest accrued for a total of 365 days from the date of written notice of Wesser's fire claim (February 5, 2020) and until the appraisal award was issued (February 4, 2021).

[3] The record does not disclose whether Wesser actually completed the repairs.

State Farm refused to pay preaward interest on the appraisal award. State Farm asserted that the Policy expressly provides that State Farm only owed Wesser interest if it failed to pay Wesser the total amount due as set forth in the appraisal award within 5 days of the award. Accordingly, because State Farm paid Wesser *more* than the actual cash value for the loss (the total amount due to Wesser until he completed the repairs) *before* the appraisal award was issued, State Farm maintained that there was no outstanding amount upon which interest could accrue.

The Litigation

On March 19, 2021, Wesser filed a declaratory judgment action against State Farm and demanded preaward interest from State Farm on the appraisal award based on section 549.09. Both parties moved for summary judgment.

The district court examined the language of section 549.09, subdivision 1(b). It observed that the statute qualified its mandate that preaward interest on pecuniary damages shall be computed from the time of a written notice of claim with the phrase "[e]xcept as otherwise provided by contract." Accordingly, the district court turned to the language in the Policy. The district court read the Policy language that "[n]o interest accrues on the loss until after the loss becomes payable" to "unambiguously preclude[] *any* interest until the [loss] becomes payable." Because the Policy, according to the district court, stated that the loss is "payable *after* proof of loss and filing of the appraisal award," the district court concluded that "any interest that would attach before the award ('preaward interest') is explicitly precluded by the [Policy] language." Consequently, Wesser was not entitled to preaward interest.

The court of appeals reversed and remanded. *Wesser v. State Farm Fire & Cas. Co.*, No. A21-1587, 2022 WL 1920604, at *5 (Minn. App. June 6, 2022). The court of appeals determined that the Policy language, "No interest accrues on the loss until after the loss becomes payable," was ambiguous because "the loss" had several meanings under the Policy (actual cash value, replacement cost value, or repair cost value). *Id.* at *3. Because the provision was ambiguous, the court reasoned, the ambiguity must be interpreted in favor of the insured and, accordingly, the language did not preclude Wesser from recovering preaward interest under section 549.09. *Id.* *3–4 (citing *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 316 (Minn. 2021)).

The court of appeals also noted as additional support for its conclusion that in *Poehler v. Cincinnati Insurance Co.*, 899 N.W.2d 135, 142 (Minn. 2017), we held insurance policy language must "explicitly preclud[e]" preaward interest to avoid the obligation to pay preaward interest under section 549.09, subdivision 1(b). *Wesser*, 2022 WL 1920604, at *4. Based on its conclusion that the no-interest-accrues-on-the-loss language is ambiguous, the court of appeals decided that the Policy language was not sufficiently "explicit." *Id.* The court of appeals also stated that Minnesota's standard fire policy set forth in section 65A.01 did not apply because the Policy provided greater coverage than the standard fire policy. *Id.* Accordingly, the court of appeals reversed summary judgment for State Farm and remanded for computation of preaward interest and entry of judgment for Wesser. *Id.* at *5.

We granted State Farm's petition for review.

ANALYSIS

This case comes to us from an order ruling on cross-motions for summary judgment interpreting and applying a statute and an insurance policy contract. Our review is de novo. *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 518 (Minn. 2001) (stating that we review interpretation of statutes de novo); *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc, Co.*, 825 N.W.2d 695, 704 (Minn. 2013) ("Interpretation of an insurance policy, and whether a policy provides coverage in a particular situation, are questions of law that we review de novo."); *St. Matthews Church of God & Christ v. State Farm Fire & Cas. Co*, 981 N.W.2d 760, 764 (Minn. 2022) (stating that we review summary judgment rulings de novo).

A.

We start with section 549.09, subdivision 1(b), the statute governing the award of preverdict, preaward, and prereport interest, which states in relevant part:

> *Except as otherwise provided by contract or allowed by law*, preverdict, preaward, or prereport interest on pecuniary damages shall be computed . . . from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first, except as provided herein.

Minn. Stat. § 549.09, subd. 1(b) (emphasis added).

This language is relevant here in two ways. First, although the quoted portion of section 549.09, subdivision 1(b), does not *expressly* state that a person is entitled to preverdict, preaward, or prereport interest on pecuniary damages, that conclusion is implicit, especially in light of subsequent language in subdivision 1(b) stating that preverdict, preaward, or prereport interest "shall *not* be awarded" on certain categories of

awards and damages.[4] *Id.* (emphasis added). And neither party disputes that conclusion. Second, the language states when preverdict, preaward, or prereport interest begins to accrue: the earliest of "the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim." *Id.*

We turn to the meaning of the proviso in section 549.09, subdivision 1(b): "Except as otherwise provided by contract . . . ." Because subdivision 1(b) provides for two things—the right to preverdict, preaward, or prereport interest and the timing of when such preverdict, preaward, or prereport interest begins to run—the proviso means that the parties to a contract (like an insurance policy) may state that a party is not entitled to preverdict, preaward, or prereport interest at all or specify that such interest shall run from a different time than that specified in the statute. If the contract so specifies, the party who obtained a verdict or award is not entitled to preverdict, preaward, or prereport interest under

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[4] Section 549.09, subdivision 1(b), expressly defines the circumstances under which preverdict, preaward, or prereport interest is not allowed:

> Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest shall not be awarded on the following:
> (1) judgments, awards, or benefits in workers' compensation cases, but not including third-party actions;
> (2) judgments or awards for future damages;
> (3) punitive damages, fines, or other damages that are noncompensatory in nature;
> (4) judgments or awards not in excess of the amount specified in section 491A.01; and
> (5) that portion of any verdict, award, or report which is founded upon interest, or costs, disbursements, attorney fees, or other similar items added by the court or arbitrator.

The exclusions suggest that preverdict, preaward, and prereport interest is to be awarded when the other conditions of section 549.09, subdivision 1(b) are satisfied.

section 549.09, subdivision 1(b), or is only entitled to preverdict, preaward, or prereport interest from the time specified in the contract.

B.

With that understanding of section 549.09, subdivision 1(b), in mind, we assess whether the Policy language that "[n]o interest accrues on the loss until after the loss becomes payable" provides that Wesser is not entitled to preaward interest.

We generally interpret insurance policies like other contracts. *Midwest Fam. Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013). We construe the policy "as a whole, and unambiguous language must be given its plain and ordinary meaning." *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). "Language in an insurance policy is ambiguous if it is reasonably susceptible to more than one interpretation." *King's Cove Marina, LLC*, 958 N.W.2d at 316 (citation omitted) (internal quotation marks omitted). If a policy provision is ambiguous, we construe it in favor of the insured. *See id.*

The word "interest" in the Policy provision is not limited or qualified in any way. This tells us that the parties' agreement that "no interest accrues" until the time specified in the contract applies broadly to *all* types of interest and does not exclude from its scope any type of interest. In addition, the "no interest" provision plainly states that interest on a loss only accrues when a loss becomes "payable." The immediately preceding sentence makes clear when "[l]oss will be payable" under the Policy: 5 business days after two

things have occurred: (1) State Farm receives Wesser's proof of loss,[5] and (2) the parties reach an agreement on the amount of loss, final judgment is entered on the amount of loss, or an appraisal award on the amount of loss is filed with State Farm. Accordingly, we conclude that the only reasonable interpretation of the Policy provision is that no form of interest starts to accrue until 5 days *after* receipt of proof of loss and the loss amount is ascertained by agreement, judgment, or appraisal award. Preaward interest under section 549.09, subdivision 1(b), however, necessarily accrues during the time period *before* an award is made. Therefore, Wesser is not entitled to statutory preaward interest because, under the Policy, interest does not begin to accrue until after an appraisal award is made.

Wesser argues that the provision "[n]o interest accrues on the loss until the loss becomes payable" does not preclude preaward interest under section 549.09, subdivision 1(b), because an award is different from a loss. In other words, Wesser argues that to "otherwise provide" that statutory preaward interest does not apply, the contract must specify that interest on the "award" does not accrue; it is not enough to say that interest on the "loss" does not accrue.

We disagree. The statute authorizes interest on the pecuniary damages ultimately awarded during a time period before the award (or verdict or report depending on the type of case) is made. Damages are compensation for the loss suffered by the insured. The "award" is simply the appraiser's ultimate determination of the amount of the "loss" that

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[5] State Farm does not dispute that Wesser provided sufficient proof of loss.

occurred (just as a verdict is a jury's determination of the amount of the loss)—the amount of compensation or damages to which the insured is entitled. The appraisal award is zero if there is no loss. Preaward interest, then, is interest on the loss; there is nothing else it could be.[6]

Our decision in *Poehler* does not compel a different result. In *Poehler*, we considered an insurance policy that did not include any provision addressing interest; the policy was silent on the issue. 899 N.W.2d at 142–43. In that context, we concluded that the policy did not "explicitly prohibit" preaward interest and, accordingly, the insured could recover interest in accordance with section 549.09, subdivision 1(b). *Id.* at 143. As just discussed, the Policy between State Farm and Wesser spoke to and explicitly precluded Wesser from recovering interest during the time before the appraisal award was issued.

The court of appeals concluded that the "no interest" provision was ambiguous because the word "loss" in that provision was ambiguous. *Wesser*, 2022 WL 1920604, at *3. The court of appeals found ambiguity because the Policy provides several ways that the amount of the loss can be calculated depending on the circumstances. *Id.* For instance, until the insured actually makes repairs, the Policy requires State Farm to pay the insured for the actual cash value of the lost property ("the estimated cost to repair or replace such property less a deduction to account for pre-loss depreciation"). But once the insured completes repairs, State Farm must pay the insured the replacement cost value (the actual

[6] The court of appeals also rejected Wesser's argument that the loss under the Policy is different from the "appraisal award." *Wesser*, 2022 WL 1920604, at *4 n.2.

cost to repair or replace the property with no deduction for depreciation). Here, the appraisal panel determined both amounts.

In our view, the fact that the Policy provides for different loss calculations is irrelevant to understanding the meaning of "loss" for purposes of the "no interest accrues" provision. While the ultimate amount of the loss may vary depending on whether the insured completes the repair or replacement, that fact has nothing to do with answering the questions of whether interest is owed on the loss (whatever its amount) and when interest on the loss (whatever its amount) begins to accrue. Actual cash value and replacement cost value—both measures of loss—are indistinguishable when it comes to resolving these two questions. Wesser is either precluded from receiving preaward interest or he is not—the answer is the same for either method of calculating the loss. And under the "no interest" provision, interest on the loss starts to accrue at the same time—regardless of whether it accrues on the actual cash value or replacement cost value.[7] Therefore, the fact that two measures of loss may apply under the Policy do not make the word "loss" ambiguous in the "no interest" provision.[8]

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[7] When interest on the loss starts to accrue under the Policy depends upon when proof of loss is received and when the parties either reach an agreement, there is an entry of final judgment, or when an appraisal award is filed. It does not depend upon the method used to calculate loss.

[8] On this point, State Farm's reliance on *Latterell v. Progressive Northern Insurance Co.*, 801 N.W.2d 917 (Minn. 2011), is apt. In *Latterell*, the insured was in an automobile accident while delivering books as a subcontractor. *Id.* at 919. His insurance contract with Progressive had a business-use exclusion that stated that certain coverage was not available "while using or occupying . . . [the vehicle] while being used to carry persons or property for compensation or a fee." *Id.* The insured "contend[ed] that the phrase 'for compensation or a fee' [was] ambiguous because it may refer to a per-trip charge, a daily charge for use

Wesser also argues that State Farm cannot eliminate an insured's right to preaward interest because it is unconscionable. At the court of appeals, Wesser raised public policy concerns regarding the elimination of preaward interest; however, those concerns are separate from the specific legal issue of unconscionability. *See Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (explaining that unconscionability is a common-law defense). We conclude that Wesser forfeited his unconscionability argument by not raising it at the district court, court of appeals, or in the petition for review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that appellate courts generally do not consider issues that were not presented to and considered by the district court).

C.

Finally, Wesser contends that Minnesota's standard fire policy, Minn. Stat. § 65A.01, precludes State Farm from denying preaward interest. We disagree. The

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of the car, or a fixed hourly wage." *Id.* at 920. We explained that the insured "mistakenly equate[d] breadth with ambiguity; just because contractual language is broad does not mean it is ambiguous. To the contrary, we have recognized that broad meanings in insurance policies do not necessarily create ambiguity." *Id.* at 921 (citation omitted) (internal quotation marks omitted). In other words, the fact that "for compensation or a fee" could refer to a wide variety of circumstances did not render the exclusion of coverage when a vehicle is being used for compensation or fee ambiguous—the exclusion applied whenever the vehicle owner carried a person or property for compensation or a fee, whatever those words mean. A dispute over what constitutes carrying a person or property for compensation or for a fee is different from a dispute over whether the insured is obligated to provide coverage when an accident occurs while a vehicle owner is carrying a person or property for compensation or a fee. So too here. A dispute over whether the insurer is required to pay actual cash value or replacement cost value for a loss is different from a dispute about whether the insured must pay preaward interest on that loss (whichever value measure applies).

standard fire policy requires that an insurer pay interest "from the time when the loss shall become payable," which, in a case involving an appraisal award, is 60 days after proof of loss is received by the insurer and ascertainment of the loss is made by the filing of the appraisal award with the insurer. Minn. Stat. § 65A.01, subd. 3; *see Else v. Auto-Owners Ins. Co.*, 980 N.W.2d 319, 326 (Minn. 2022) (explaining that the statutory term "award," in the context of the standard fire policy, refers to an appraisal award). The standard fire policy does not contemplate interest accruing *before* the appraisal award is filed with the insurer. Our decision on prejudgment interest in *Else* is not "analogous," as Wesser contends, because the insurer in *Else* had disclaimed all liability and there was no ascertainment of the loss either by agreement or appraisal. *See* 980 N.W.2d at 329. Here, in contrast, State Farm did not disclaim liability and engaged in the appraisal process to resolve the parties' dispute over the amount State Farm was obligated to pay Wesser for his loss. Accordingly, we hold that section 65A.01 does not preclude State Farm from denying Wesser preaward interest here.[9]

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

[9] Due to our resolution of the case, we need not reach the issue of whether, for the period before repair or replacement is completed, preaward interest would be calculated based on the actual cash value amount or the replacement cost value amount and we express no opinion on the court of appeals' resolution of that issue.