STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1659

Allan Fishel, et al.,
Appellants,

vs.

Encompass Indemnity Company,
Respondent.

Filed May 1, 2017
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-16-116

E. Curtis Roeder, Timothy D. Johnson, Alexander M. Jadin, Jerri C. Adams, Roeder Smith Jadin, PLLC, Bloomington, Minnesota (for appellants)

William L. Davidson, Eric J. Steinhoff, João C. Medeiros, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

After the district court dismissed appellants' claim for prejudgment interest under rule 12.02(e), appellants argue that the district court erred in (1) determining that

prejudgment interest is not available on an appraisal award under Minn. Stat. § 549.09, subd. 1(b) (2016), and (2) applying the two-year statute of limitations under Minn. Stat. § 65A.01, subd. 3 (2016), and the insurance policy to appellants' claim. We affirm.

FACTS

On March 14, 2013, a fire rendered appellants Allan and Jane Fishel's house uninhabitable. At the time of the fire, respondent Encompass Indemnity Company insured the property under a homeowner's policy that provided coverage for the fire damage. The policy contained an appraisal clause, which required respondent to participate in an insurance appraisal to determine the amount of loss upon written demand from appellants. The parties disagreed on the amount of loss and participated in an insurance appraisal on January 7, 2015. The appraisal panel issued an appraisal award on January 19, 2015, which determined that the policy covered the loss and the total cost to repair the property was $376,720.88. Respondent paid the appraisal award on January 20, 2015.

On January 5, 2016 appellants filed a summons and complaint arguing, among other things, that respondent owed preaward interest to appellants pursuant to Minn. Stat. § 549.09 (2016).[1] In lieu of an answer, respondent filed a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) or, in the alternative, a motion for summary judgment under Minn. R. Civ. P. 56.03, arguing that (1) the statute of limitations has run on all claims and (2) appellants were not entitled to recover interest on an arbitration award that was timely paid and, therefore, appellants failed to state a claim for which relief can be granted. The

[1] The other claims raised by appellants have been dismissed or settled. The only remaining claim on appeal is the denial of preaward interest.

district court granted respondent's motion to dismiss, concluding that appellants' policy addresses interest and states that it shall accrue from the time when the loss shall become payable–language in compliance with Minn. Stat. § 65A.01 (2016). The district court concluded that because the policy addressed interest, Minn. Stat. § 549.09 was not applicable. Because the district court concluded that Minn. Stat. § 65A.01 applied and not Minn. Stat. § 549.09, the court concluded that the two-year statute of limitations prescribed by Minn. Stat. § 65A.01, subd. 3, precluded appellants' claim for preaward interest.

D E C I S I O N

Respondent brought a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) or, in the alternative, for summary judgment pursuant to Minn. R. Civ. P. 56.03. The district court granted the motion to dismiss pursuant to 12.02(e). Regardless of whether the motion was considered under Minn. R. Civ. P. 12.02(e) or under Minn. R. Civ. P. 56.03, our standard of review is de novo.

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before [an appellate] court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). "The standard of review is therefore de novo. The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true, and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). This court also reviews de novo a grant of summary judgment based on

the application of a statute to undisputed facts. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

I. Are appellants entitled to preaward interest on an insurance appraisal award under Minn. Stat. § 549.09?

"The availability of pre[award] interest is a legal issue that we review de novo." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). "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 . . . ." Minn. Stat. § 549.09, subd. 1(b). However, "the statute does not apply to appraisal awards pursuant to an insurance policy in the absence of an underlying breach of contract or actionable wrongdoing." *Poehler v. Cincinnati Ins. Co.*, 874 N.W.2d 806, 807 (Minn. App. 2016), *review granted* (Minn. Mar. 29, 2016).

Even though decisions of the court of appeals "do not have precedential effect until the deadline for granting review has expired," *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998), *review denied* (Minn. July 16, 1998), this court typically follows the rule of law announced in a published opinion, even one subject to further review, until the Minnesota Supreme Court announces a different rule of law. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (stating that we are "bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010). Citing *Hoyt Inv. Co. v. Bloomington Commerce & Trade Assocs.*, 418

N.W.2d 173, 176 (Minn. 1988), and *Collins*, 580 N.W.2d at 43, appellants argue that the decision in *Poehler* is not applicable law because "when the Minnesota Supreme Court accepts review of a Court of Appeals decision, that decision is not precedential authority until the Minnesota Supreme Court affirms or reverses it." We disagree. *Hoyt Inv. Co.* does not state that a decision is not precedential authority until the supreme court affirms or reverses it; rather, it says that an original court of appeals' decision becomes final by virtue of a denial of a petition for further review. 418 N.W.2d at 176. In that case, the supreme court actually concluded that they agreed with the decision of the court of appeals directing the trial court to enter judgment in favor of the appellant, but, on review, the supreme court modified the basis for the court of appeals' grant of extraordinary relief. *Id.* Until the supreme court announces a different rule of law, we will follow our rule in *Poehler*.

Because there has been no alleged breach of contract or actionable wrongdoing, Minn. Stat. § 549.09, subd. 1(b), does not provide appellants with preverdict interest relief. *See Poehler*, 874 N.W.2d at 807. However, in the interest of judicial economy, we also consider the district court's second reason for dismissal.

II. Does a two-year limitation for suit under an insurance policy control appellants' right to recover preaward interest under Minn. Stat. § 549.09?

Appellants argue that their claim is not subject to the two-year statute of limitations in the policy. Instead, they argue that their action for preaward interest is governed by Minn. Stat. § 549.09. Because Minn. Stat. § 549.09 does not have a statute of limitations, appellants argue that the six-year statute of limitations for a "liability created by statute"

should apply. *See* Minn. Stat. § 541.05, subd. 1(2) (2016). Even if the supreme court does not affirm this court's decision in *Poehler*, we cannot conclude that a six-year statute of limitations applies in this case.

"Interpretation of an insurance policy and statutory language are questions of law which we review de novo." *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 343-44 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). "When the language in an insurance policy is clear and unambiguous, it must be given its usual and accepted meaning." *Id.* The court interprets insurance policies to avoid an interpretation that "will forfeit the rights of the insured under the policy, unless such an intent is manifest in clear and unambiguous language." *Id.* (quotation omitted).

Appellants' insurance policy states "[*n*]*o action can be brought* unless the policy provisions have been complied with and the action is started . . . [w]ithin two years after the date of loss." (Emphasis added.) This language is slightly different from the language called for in Minn. Stat. § 65A.01, subd. 3, which states "No suit or *action on this policy* for the recovery of any claim shall be sustainable . . . unless all the requirements of this policy have been complied with, and unless commenced within two years after inception of the loss." (Emphasis added.) Appellants argue that the language, "action on this policy," must be read into their insurance policy. They argue that if the policy's limitation for suit is broader than "actions on the policy," it would be an impermissible deviance from the Minnesota standard fire policy and its limitation period for suit.

Minn. Stat. § 65A.01 (the Minnesota standard fire insurance policy) "was intended to secure uniformity in fire insurance policies. Use of the statutory form is mandatory, and

its provisions may not be omitted, changed, or waived. This principle is reflected in the statute's conformity clause . . . ." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 690 (Minn. 1997) (citation and quotation omitted). "[T]he Minnesota standard fire insurance policy guarantees a minimum level of coverage that supersedes any attempt to limit coverage to less than the statutory minimum. Insurance companies may, however, incorporate additional or different terms into their policies *that offer more coverage than the statutory minimum*." *Id.* (emphasis added) (citation omitted). The question becomes whether the policy's expansion of the two-year statute of limitations to cover more than "actions on the policy" is an attempt to limit coverage to less than the statutory minimum. We conclude that it is not.

Under the Minnesota standard fire insurance policy, all actions on the policy must be brought within two years. Minn. Stat. § 65A.01, subd. 3. Therefore, after two years from the time of the loss, no claim under the Minnesota standard fire insurance policy can be made. *Id.* It is not a limit on the protections of the Minnesota standard fire insurance policy to extend the two-year statute of limitations to cover more than the Minnesota standard fire insurance policy. Appellants would have every right and protection under the standard fire insurance policy and the clause would merely restrict other actions that would not fall under the policy.

As a result, the policy provision stating "[n]o action can be brought unless . . . the action is started . . . [w]ithin two years after the date of loss" applies to an action brought for preaward interest in this particular case. Minn. Stat. § 549.09 subd. 1(b), states, "[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[.]" Because the policy is broad enough to include an action for preaward interest in its two-year limitation period, Minn. Stat. § 549.09, subd. 1(b), does not apply given that protection is "otherwise provided by contract."

Appellants argue that the preaward-interest claim is entirely separate from the loss claim and therefore is outside the policy's prohibition on suits more than two years old. Appellants characterize the interest claim as an "extra-contractual statutory right." This argument also fails. "Unlike conventional interest, pre[award] interest cannot be calculated until the amount on which interest is allowed has been fixed by verdict." *Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 558 (Minn. 1994). Because of the connection between preaward interest and the amount fixed by the award, preaward interest is part of the underlying claim giving rise to the liability. *See id.* at 558-59 n.5 (concluding that, in the context of automobile insurance coverage, prejudgment interest was part of the underlying claim of damages from an automobile accident). Therefore, the time limitation on the underlying policy claim would apply to preaward interest as well.

Appellants also argue that enforcement of the two-year limitation would lead to absurd results and unjust consequences. "A statute is to be construed . . . so as to avoid irreconcilable difference and conflict with another statute. The general terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences." *Erickson v. Sunset Memorial Park Ass'n*, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961). Appellants argue that "[a]ppraisals are frequently demanded prior to the two-year deadline under policies,

but routinely take place after the two-year deadline to accommodate scheduling concerns or due to Minnesota weather conditions that require waiting for ice and snow to melt in order to review property damage." Additionally, appellants argue that the limitation language in the policy stating "no action can be brought unless the policy provisions have been complied with" prevents appellants from bringing an action until after the appraisal takes place.

However, this court is "not in a position to choose between public policy choices when [the law] unambiguously addresses the question before us." *Auto-Owners Ins. Co. v. Second Chance Invs., LLC*, 827 N.W.2d 766, 773 n.3 (Minn. 2013). "Within section 549.09 the legislature expressly forbade an award of pre[award] interest under that section when interest is otherwise provided by contract or allowed by law." *Burniece v. Ill. Farmers Ins. Co.*, 398 N.W.2d 542, 544 (Minn. 1987) (quotation omitted). "When an insurance policy contains a suit limitations clause which requires suit to be brought within a certain period, failure to bring suit within that period bars suit unless the limitation clause conflicts with a specific statute or is unreasonably short." *L & H Transport, Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 224 (Minn. 1987). Minn. Stat. § 549.09 does not have a specific statute of limitations. Additionally, because two years is an acceptable time period for claims arising under the policy pursuant to the Minnesota standard fire insurance policy, we conclude that the limit in the policy is not an unreasonably short period of time to bring a suit for preaward interest.

Affirmed.