STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0063

Zulfe Enterprises, Inc., et al.,
Appellants,

vs.

State Farm Fire and Casualty Company,
Respondent.

Filed December 21, 2020
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-17-11460

Joseph M. Barnett, J. Robert Keena, Hellmuth & Johnson, Edina, Minnesota (for appellants)

Michelle Christensen, HKM, P.A., St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

On appeal following a jury trial in a storm-damage property insurance dispute, appellant-insureds argue that the district court erred by (1) excluding their expert witness's testimony and reports, (2) denying them judgment as a matter of law (JMOL) on their

appraisal claims, (3) submitting to the jury the issue of whether covered events occurred, and (4) adopting the jury's findings regarding covered events. We affirm.

FACTS

Appellant Mir Ali and his companies, appellants Zulfe Enterprises Inc., Ashraf LLC, and Penrod Lane LLC (collectively, Ali) own or manage more than 30 real properties in Minneapolis and its northern suburbs. Most are residential rental properties. Ali obtained property insurance from respondent State Farm Fire and Casualty Company.

The insurance policies[1] cover "accidental direct physical loss to the property," including loss from "windstorm or hail." But they exclude loss from "wear, tear," or "neglect." The policies also set out procedures for reporting and resolving loss claims. In the event of a "loss to which [the] insurance may apply," the policies require Ali to notify State Farm immediately and provide "proof of loss" within 60 days. If the parties "fail to agree on the amount of loss," either may demand appraisal. Appraisal proceeds as follows:

> [Ali and State Farm] each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, [Ali] or [State Farm] can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to [State Farm], the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the

[1] Ali obtained different types of policies according to the type of insured property. All of the policies at issue in this appeal contain substantially the same relevant terms. We refer to them generally as "the policies."

> umpire. Written agreement signed by any two of these three shall set the amount of the loss.

Between July 2015 and April 2016, Ali submitted claims to State Farm with respect to ten properties, alleging damage from a June 29, 2015 storm. Ali retained a public adjuster to assess the losses and communicate with State Farm. State Farm determined that covered losses occurred at three of the properties and issued payment. But it denied Ali's claims with respect to the other seven properties because (1) the storm did not damage several of the properties; (2) Ali did not respond to inquiries regarding the claim for one property; (3) the cost of repairs at another property did not exceed Ali's deductible; and (4) one mixed-use (commercial and residential rental) property was not insured on the date of the storm. Ali did not notify State Farm that he disagreed with its decision as to any of these properties.

On June 13, 2017, Ali initiated this action, asserting that State Farm breached its obligations by denying coverage for the mixed-use property that State Farm determined was not insured at the time of the storm.

Approximately one week later, Ali's lawyer wrote to State Farm. The letter stated that Ali was "notif[ying] State Farm" of loss claims regarding 22 properties. It also asserted that Ali and State Farm "ha[d] not reached agreement as to the extent of damages and loss to each property" and requested "initiation of the appraisal procedures required in the event of disagreement between the insurer and the insured as to the extent of the insured's loss."

At the end of June, Ali interposed an amended complaint asserting covered losses at 22 additional properties, including 13 for which he had not previously submitted a claim.

The amended complaint alleges that State Farm "failed to pay all amounts owing to [Ali] on account of insured losses from the June 29, 2015 wind, rain and hail storm respecting the properties." And it asserts that Ali and State Farm disagree as to the amount of the insured losses, that Ali demanded appraisal, and that "such appraisal has not yet occurred."

The district court issued a scheduling order that required Ali to identify his expert witnesses by March 1, 2018, and disclose expert reports by April 1, 2018. Ali did not meet either deadline. On April 9, he sent State Farm his expert Paul Norcia's loss-appraisal reports for all 23 properties. He subsequently filed a motion asking the district court to deem the disclosure timely, which the court denied.

In the same motion, Ali also asked the district court to order appraisals as to all of the properties to determine the amounts of loss. The district court denied the request, explaining that, while the policies permit either party to demand appraisal upon a failure to agree, "submitting a proof of loss is a necessary predicate to determining whether the parties disagree regarding the amount of loss," and Ali presented no evidence that he did so. But the court noted that it would entertain the motion again if Ali established that he had "taken all steps necessary to determine whether a disagreement exists."

In late 2018, State Farm moved for summary judgment, arguing, in relevant part, that Ali was barred from recovering under the policies because he did not provide timely proof of loss. State Farm also filed a separate motion asking the district court to exclude Norcia's testimony and reports. While those motions were pending, Ali again requested appraisals.

The district court denied summary judgment, reasoning that even though it was undisputed that Ali did not file the required proof of loss for the subject properties, fact questions remained as to whether State Farm waived the requirement. But the court granted State Farm's motion to preclude Norcia from testifying at trial.[2] And the district court denied Ali's second request for appraisals on much the same reasoning as it used when denying Ali's first request.

Ali withdrew his claim as to four of the properties and the matter proceeded to a jury trial in June 2019. At trial, the parties disputed: whether the properties were insured on June 29, 2015; the amount of the deductibles; whether Ali satisfied the post-loss notification requirements as to insured properties, and, if not, whether State Farm waived the requirements or was not prejudiced by the failure; whether the parties "fail[ed] to" agree regarding the amount of loss at the insured properties, thereby triggering the right to appraisal; and whether a "covered event" occurred at the insured properties. In its special-verdict answers, the jury found that two of the properties were not insured on June 29, 2015. With respect to the 17 insured properties, the jury found that (1) Ali did not comply with post-loss notification requirements for some, but State Farm waived and was not prejudiced by those failures; (2) the parties failed to agree regarding the amount of loss with respect to only one, the mixed-use property; and (3) a covered event occurred at the mixed-use property and several others but not at five of the properties.

[2] The district court clarified that it "express[ed] no opinion" about the use of Norcia's testimony or reports in an appraisal proceeding.

The district court adopted the jury's findings, ordered an appraisal with respect to the mixed-use property, and dismissed Ali's claims as to all of the other properties.[3]

Ali moved for amended findings of fact. The district court noted that such a motion does not apply to a jury trial. But the court went on to rule that even if it construed the motion as seeking JMOL, Ali's claims of legal error based on submission of the special-verdict questions regarding whether the parties "fail[ed] to agree" and whether there was a "covered event" fail. Ali appeals.

D E C I S I O N

I. Ali waived any challenge to the exclusion of Norcia's testimony and reports.

A district court may sanction a party that violates a scheduling order or fails to make disclosures required by the Minnesota Rules of Civil Procedure. Minn. R. Civ. P. 16.06, 37.01(b). Sanctions may include exclusion of evidence. Minn. R. Civ. P. 37.02(b)(2), 37.03(a). We review a district court's imposition of sanctions for an abuse of discretion. *Knight v. McGinity*, 868 N.W.2d 298, 302 (Minn. App. 2015).

Ali argues that the district court abused its discretion by excluding Norcia's testimony and reports at trial. But he did not make this argument to the district court. We generally will not consider arguments that were not presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *cf. Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007) (permitting argument that was not new but "refined

[3] The district court also declared State Farm the prevailing party. Ali challenged the subsequent award of costs and disbursements, but a special term panel of the court dismissed that aspect of the appeal in a February 6, 2020 order.

the argument . . . made to the district court"). Our review of the record reveals no reason to depart from this principle.

State Farm moved to exclude Norcia's testimony and reports from "any appraisal, trial, or other matter relating to the properties and claims that are the subject of this lawsuit" because the reports were untimely and did not address the substantive requirements of Minn. R. Civ. P. 26.01(b). In opposing the motion, Ali did not offer any excuse for the untimeliness and inadequacy of his disclosures. He objected only to the court excluding the evidence from an appraisal, affirmatively stating that he intended to rely on Norcia's testimony and reports only in the appraisal process, not at trial. Indeed, the district court noted, in excluding the expert from trial, that Ali "raised no defenses regarding the exclusion of Mr. Norcia's testimony or reports in this case." Now—for the first time—Ali contends he should have been permitted to present Norcia's testimony and reports as evidence that the parties failed to agree as to the amount of loss. This assertion does not refine the arguments Ali presented to the district court. In fact, it wholly contradicts Ali's statement to the district court that he only wanted to present Norcia's testimony and reports at an appraisal. Accordingly, Ali waived this argument and we do not consider it.

II. Ali is not entitled to JMOL on his claim that he is entitled to appraisals.

When presented with a post-verdict motion for JMOL, a district court may "(1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of judgment as a matter of law." Minn. R. Civ. P. 50.02. We review the denial of JMOL de novo. *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012).

Ali argues that he is entitled to appraisals as a matter of law because the parties failed to agree about the amounts of loss. He contends (1) the policies require only that he "not accept[] State Farm's position on the claims," and (2) his rejection of State Farm's position was apparent from his pursuit of this action, his requests for appraisal, and his expert's reports. We consider each part of Ali's argument in turn.

The first part of his argument requires us to interpret the language of the insurance policies. Because an insurance policy is a contract, principles of contract interpretation govern our analysis. *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013). Our goal is to effectuate the parties' intentions. *Id.* To do so, we construe unambiguous terms in an insurance policy according to their plain and ordinary meaning, and consistent with the policy as a whole. *Id.*

The policies provide: "If [Ali] and [State Farm] fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal." The word "if" indicates that the right to demand appraisal is conditional—the parties must first "fail to agree." *See River Valley Truck Ctr., Inc. v. Interstate Cos.*, 704 N.W.2d 154, 160 (Minn. 2005) (stating that "if" indicates a conditional contractual duty); *see also Boston Ins. Co. v. A. H. Jacobson Co.*, 33 N.W.2d 602, 604 (Minn. 1948) (stating, regarding similar appraisal provision, that "[f]ailure or inability of the parties to agree as to the amount of the loss conditions the right to an appraisement"). In parsing this condition, Ali focuses on the word "agree," which means to "share an opinion" or "concur." *The American Heritage Dictionary of the English Language* 34 (5th ed. 2011). But the condition has another operative word—"fail." The word "fail" means to "prove deficient" or "be unsuccessful."

Id. at 634. To prove deficient or be unsuccessful in reaching a shared opinion or concurrence, Ali and State Farm must first try to do so.

Other policy provisions support this interpretation by establishing a process by which the parties try to reach agreement. In the event of "a loss to which this insurance may apply," Ali must "submit to [State Farm], within 60 days after the loss, [his] signed, sworn proof of loss" that "sets forth" certain information about the claimed loss, including "detailed estimates for repair of the damage."[4] Ali must also enable State Farm to form its own assessment of the amount of loss by exhibiting the property to State Farm, providing State Farm with records and documents that it requests, and submitting to examinations under oath, all "as often as [State Farm] reasonably require[s]."

These provisions together demonstrate that the policies require more than a disagreement as to the amount of loss to invoke appraisal; they require a process in which the parties actively seek but fail to reach an agreement. Even if the parties do not do so by following the specific proof-of-loss process indicated in the policies, they must each assert a position as to the amount of loss that provides sufficient information for comparison and a determination whether they agree. *See Boston Ins.*, 33 N.W.2d at 604 (stating that there can be no "controversy" requiring appraisal "until the insured has rendered to the insurer the written statement of loss and the insurer has notified the insured as to its intentions with

[4] Ali urges us to disregard the "proof of loss" provision and focus exclusively on the "fail to agree" provision because the jury found that State Farm waived its entitlement to receive Ali's proof of loss. But State Farm's waiver of the "proof of loss" as a condition precedent to coverage does not require us to ignore the role that requirement plays in the policy as a whole. *See Midwest Family*, 831 N.W.2d at 636 (requiring that insurance policy be construed "as a whole" (quotation omitted)).

respect to the matter"). Only if that process fails is either party entitled to demand appraisal.

We therefore turn to Ali's second contention, that he is entitled to JMOL because he demonstrated the requisite failure to agree. A court may grant JMOL if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01. If the record reasonably supports different conclusions on the issue, JMOL is "inappropriate." *Daly*, 812 N.W.2d at 119. We view the evidence in the light most favorable to the prevailing party and will affirm denial of a motion for JMOL if there is "any competent evidence" in the record "reasonably tending to sustain the verdict." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 220 (Minn. 2014) (quotation omitted).

Ali contends that he demonstrated failure to agree as a matter of law by bringing this action and demanding appraisal. We disagree. Both acts suggest that Ali does not accept whatever position State Farm has taken as to the amount of loss, but neither indicates that Ali *tried* to reach agreement with State Farm on this point. Ali also points to Norcia's excluded reports, arguing that the undisputed difference between Norcia's assessment of loss and the assessments of State Farm's expert indicates failure to agree. This argument is unavailing because it relies on evidence outside the record. And the evidence presented to the jury amply sustains its findings that the parties did not fail to agree: (1) Ali accepted, without dispute, State Farm's payments for three properties where he claimed losses prior to this litigation; (2) he did not dispute State Farm's denial of payment as to the other seven properties where he claimed losses prior to litigation until he commenced this action; (3) he

did not claim any loss as to more than half of the properties in question before initiating this action; and (4) he never provided State Farm proofs of loss or any other detailed indication of his assessment as to the cause and amount of his claimed losses such that State Farm could discern whether it agreed or not. On this record, the district court did not err by rejecting Ali's contention that he is entitled to appraisals as a matter of law.

III. The district court did not abuse its discretion by asking the jury whether a "covered event" occurred at each property.

An insured bears the "initial burden" of demonstrating coverage. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 736 (Minn. 1997). The existence of coverage is generally a matter of law for the court to decide. *Mork v. Eureka-Sec. Fire & Marine Ins. Co.*, 42 N.W.2d 33, 35 (Minn. 1950). But "[t]he proper scope of coverage . . . will depend on the facts of the case." *Domtar*, 563 N.W.2d at 733. When coverage depends on disputed facts, a district court may present the dispute to the jury in a special verdict. Minn. R. Civ. P. 49.01(a); *AMCO Ins. Co. v. Ashwood-Ames*, 534 N.W.2d 740, 741 (Minn. App. 1995), *review denied* (Minn. Sept. 28, 1995). A district court has broad discretion in deciding whether and how to use a special verdict. *Poppler v. Wright Hennepin Coop. Elec. Ass'n*, 845 N.W.2d 168, 171 (Minn. 2014).

Ali argues that the district court abused its discretion by asking the jury: "Ha[s] [Ali] proven that a 'covered event' occurred on June 29, 2015 at the [insured] locations?" He contends the question was improper because it implicates the issue of causation, which, under *Quade v. Secura Ins.*, 814 N.W.2d 703 (Minn. 2012), is a matter reserved for the appraisal process. We are not persuaded.

In *Quade*, a wind storm damaged several buildings on the insureds' farm. 814 N.W.2d at 704. The insurer did not dispute that its policy covered wind damage and that a wind storm damaged some of the buildings. *Id.* at 706. But the insurer denied claims related to roof damage on three buildings, contending the damage resulted from inadequate maintenance, which is subject to a policy exclusion, rather than the storm. *Id.* at 704. As in this case, the insurance policy contained an appraisal clause that is implicated when the parties "fail to agree on 'the amount of loss.'" *Id.* But the insureds opted to pursue a breach-of-contract action. *Id.* at 705.

The district court dismissed the action, concluding that determining the amount of loss is an issue for the appraisal process, even if the inquiry involves a question of causation. *Id.* Our supreme court agreed, noting that "[i]n this case, the causation question involves separating loss due to a covered event from a property's preexisting condition." *Id.* at 707. The supreme court acknowledged the long-standing principle that appraisers decide damage questions and courts decide liability (coverage) questions. *Id.* at 706. But it hearkened back to caselaw holding that "'questions of law or fact, which are involved as mere incidents to a determination of the amount of loss or damage' are appropriate to resolve in an appraisal in order to ascertain the 'amount of *the* loss.'" *Id.* at 707 (citing *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W.2d 425, 427 (Minn. 1928)).

The question whether a covered event—wind or hail—occurred at each of Ali's properties is more than merely incidental to the determination of the amount of loss. Unlike the insurer in *Quade*, State Farm disputed whether a storm producing damaging wind or hail struck certain of Ali's properties at all. State Farm countered Ali's evidence that his

properties were damaged by a storm "in the Twin Cities area" on the day in question with evidence that the storm did not produce damaging wind and hail—covered events under the policies—everywhere it passed through.[5] Accordingly, Ali is required to prove the policies provide coverage before he can obtain an appraisal "separating loss due to a covered event from a property's preexisting condition." *Id.*

On this record, we discern no abuse of discretion by the district court in asking the jury to weigh the conflicting evidence and decide whether Ali proved that the "windstorm or hail" events that the policies cover occurred at each of the properties.

IV. The district court did not err by adopting the jury's findings that a covered event did not occur at five of the properties.

We will not set aside a jury's answers on a special-verdict form "unless they are perverse and palpably contrary to the evidence or where the evidence is so clear as to leave no room for differences among reasonable people." *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 410 (Minn. App. 2007), *review denied* (Minn. Dec. 11, 2007). Our role is to "harmonize all findings," reconciling special-verdict answers in any reasonable manner. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008). We will affirm if the record evidence, viewed in the light most favorable to the prevailing party, reasonably tends to sustain the jury's findings. *Gieseke*, 844 N.W.2d at 220.

[5] The district court was not asked to and did not define "covered event" for the jury. But the court instructed the jury, without objection, that Ali must "prove by the preponderance of the evidence that [his] loss for each property is covered by the insurance contract applicable to each property." And the jury heard evidence that the policies cover windstorm and hail damage.

Ali argues that the district court erred by adopting the jury's findings that a covered event did not occur at five of the properties because the evidence does not support them. But Ali did not present this argument to the district court. He challenged the evidentiary support for the jury's "fail[ure] to agree" findings and argued that the district court erred by presenting the "covered event" question to the jury. He did not challenge the evidentiary support for the jury's "covered event" findings. As such, he has forfeited this argument. *See Thiele*, 425 N.W.2d at 582.

Moreover, even if we accept Ali's assertion that he necessarily implied an evidentiary challenge by indicating his acceptance of other special-verdict findings, that challenge is unpersuasive. Ali contends the record cannot support the jury's findings that covered events occurred at some but not all properties because "conclusive evidence showed a weather event occurred at [his] properties." We disagree. State Farm presented weather reports and testimony indicating that the June 29, 2015 "weather event" did not impact all areas surrounding Minneapolis equally and, specifically, did not affect all of Ali's properties equally. The storm approached from the north, passed through the northern suburbs and extended only a limited distance into Minneapolis. Weather records show the storm produced different conditions in different locations—larger hail in some areas, smaller hail in others, and no hail in still others. And the jury heard State Farm's explanation for what Ali describes as inconsistencies—that it found covered wind damage on some properties near others where weather records indicated no hail-related covered event. While Ali identifies evidence that could have justified contrary findings, he has not demonstrated that competent evidence does not support the findings that the jury actually

rendered, as required to overturn them. Accordingly, he is not entitled to relief based on the district court's acceptance of the jury's findings that a covered event did not occur at five of his properties.

In sum, our careful review of the record in this unique case reveals no reversible error. Ali waived any challenge to the exclusion of his expert's reports and testimony. The district court acted within its discretion and consistent with applicable law in asking the jury whether Ali proved that the parties "fail[ed] to agree" and whether a "covered event" occurred at the properties. And the record evidence reasonably supports the jury's findings that he proved those facts as to some but not all of his properties.

Affirmed.