STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0201

Colby Lake Fourth Association,
Appellant,

vs.

Hiscox Insurance Company, Inc.,
Respondent.

Filed October 2, 2023
Affirmed
Reyes, Judge

Washington County District Court
File No. 82-CV-19-4946

Adina R. Bergstrom, Brenda M. Sauro, Brock P. Alton, Sauro & Bergstrom, P.L.L.C., Oakdale, Minnesota (for appellant)

Christopher L. Goodman, Thompson, Coe, Cousins & Irons, L.L.P., St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

On appeal following remand in this insurance-coverage dispute, appellant-insured challenges the district court's denial of its motion for default judgment and grant of summary judgment for respondent-insurer. Appellant argues that the district court erred by (1) failing to follow this court's remand instructions; (2) denying its motion for default

judgment; (3) sua sponte granting summary judgment for respondent-insurer; and (4) determining that appellant was not entitled to replacement-cost value (RCV) and miscalculating pre-award interest. We affirm.

FACTS

On May 16, 2017, a wind and hail storm damaged property owned by appellant-insured Colby Lake Fourth Association (Colby). Colby had an insurance policy with respondent-insurer Hiscox Insurance Company Inc. (Hiscox) that covered the property consisting of 20 buildings and 80 units in a residential condominium. The policy provided coverage for actual cash value (ACV), or "actual loss" sustained by Colby. The policy also provided RCV coverage, the cost to repair or replace the damaged, property, subject to certain conditions.

Colby notified Hiscox of the loss on July 7, 2017. An adjuster retained by Hiscox inspected the property on July 20, 2017. On November 13, 2017, the adjuster provided an RCV estimate of $765,463.04.

Colby submitted a signed proof of loss to Hiscox on January 31, 2018, which claimed ACV of $497,691.42. Hiscox paid Colby this amount on February 12, 2018. The adjuster submitted a second proof of loss to Colby on August 15, 2018, in the amount of $188,521.62, for RCV. Colby did not sign the proof of loss and demanded an appraisal on August 24, 2018. Hiscox paid Colby $188,521.62 on September 12, 2018, bringing the total payments to $686,213.04.

Hiscox sent Colby several letters requesting that it provide documents showing that it had made repairs to the damaged buildings. The parties entered into a tolling agreement

in May 2019 in which they agreed to toll the suit-limitation period to 60 days from the date of the appraisal award. On July 15, 2019, the appraisal panel awarded ACV damages of $673,653.84 and RCV damages of $1,122,756.40.

Colby demanded payment from Hiscox in the amount of ACV awarded. Hiscox wrote back, citing "serious coverage issues" relating to the "dates of the loss, cooperation, [and Colby's] failure to produce relevant, requested information." In a later letter, Hiscox pointed out that it had already paid Colby $686,213.04, which was more than the appraisal panel's ACV award of $673,653.84.

Colby commenced the underlying civil action on September 12, 2019, alleging breach of contract and seeking a declaratory judgment that Colby was entitled to RCV and preaward interest on the appraisal award. Hiscox did not timely answer, and Colby filed a motion for default judgment. Hiscox then answered and opposed the default-judgment motion. The district court denied the motion. The district court also denied Colby's request to file a motion for reconsideration.

Colby filed a motion for summary judgment, arguing that no genuine issue of material fact existed and that it was entitled to RCV and pre-award interest. Hiscox opposed the summary-judgment motion, arguing that Colby was not entitled to RCV and that it had already paid the amount of pre-award interest on ACV. The district court denied Colby's motion for summary judgment and entered summary judgment in favor of Hiscox, determining as a matter of law that the RCV conditions were not satisfied.

Colby appealed, challenging the denial of its motion for default judgment and the summary judgment in favor of Hiscox. *Colby Lake Fourth Assoc'n v. Hiscox Ins. Co.,*

Inc., No. A20-1447, 2021 WL 3611276 (Minn. App. Aug. 10, 2021) (*Colby Lake I*). We reversed and remanded in an order opinion, directing the district court to make further findings regarding its denial of Colby's default motion based on the record available on February 26, 2020. *Id.* at *3. The district court held a motion hearing, denied default judgment a second time, and granted summary judgment to Hiscox. This appeal follows.

DECISION

Colby argues that the district court erred by (1) failing to follow this court's remand instructions; (2) denying default judgment; (3) sua sponte granting summary judgment in favor of Hiscox; and (4) determining Colby was not entitled to RCV and miscalculating pre-award interest. We recognize the peculiar posture of this second appeal. The first appeal came to us after the district court granted summary judgment, but we did not substantively address the summary-judgment arguments because we reversed and remanded for further findings related to denial of the default-judgment motion. However, now that the district court has denied default judgment with additional findings and again granted summary judgment, the summary-judgment issue is appropriately before us.

Before we can review the district court's default-judgment denial and grant of summary judgment, we need to review the insurance-policy language. Colby argues that the insurance policy's 200-day deadline to begin repairs or replacements does not start until after the ACV has been paid and that Colby therefore did not fail to satisfy the conditions for seeking RCV. We disagree.

The interpretation of an insurance policy is a question of law, which appellate courts review de novo. *Visser v. State Farm Mut. Ins. Auto. Ins. Co.*, 938 N.W.2d 830, 832 (Minn.

2020). Insurance policies are interpreted based on the same general principles as contract interpretation. *Quade v. Secura Ins.*, 814 N.W.2d 703, 705 (Minn. 2012). If the language of the insurance policy is unambiguous, courts must interpret it according to its plain and ordinary meaning. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). "But if the language is ambiguous, it will be construed against the insurer, as drafter of the contract." *Id.* Courts should "fastidiously guard against the invitation to create ambiguities where none exist." *Am. Com. Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224, 227 (Minn. 1996) (quotations omitted). A provision in an insurance policy is ambiguous when it is "reasonably subject to more than one interpretation." *Latterell v. Progressive N. Ins. Co.*, 801 N.W.2d 917, 920 (Minn. 2011).

The policy provides in relevant part:

> When Replacement Costs Coverage is listed in the Property Declarations, we will pay no more than the least of the following:
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> a. The cost to replace the lost or damaged property . . . without deduction for depreciation . . . ;
>
> b. The amount actually spent that is necessary to repair or replace the lost or damaged property at the same site; or,
>
> c. The Limit of Insurance applicable to the lost or damaged property.
>
> However, we will not pay more than:
>
> a. Actual cash value of the damage until the repair or replacement is completed. After the actual cash value of the damage has been paid, you may still make a claim

> on a replacement cost basis *if you notify us that repair or replacement of the damage[d] property has commenced within 200 days after the loss or damage* and provide us with all reasonable documentation we may require regarding such repair or replacement . . . .

(Emphasis added.)

The only reasonable interpretation of the policy is that RCV is available if Colby notified Hiscox that Colby had commenced repair or replacement of the damaged property "within 200 days *after the loss or damage*." Although the policy states that a claim for RCV may be made after ACV is paid, the same clause of the sentence limits its availability with conditions unrelated to the ACV payment. Because courts may not read ambiguity into the plain language of an insurance policy to construe it against an insurer, we decline to do so here. *See Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960).

I. The district court acted within its discretion by complying with the remand instructions from this court.

Colby asserts that the district court abused its discretion by failing to comply with this court's remand instructions by (1) expanding the record; (2) failing to analyze Hiscox's responsibility for the "ensuing delay;" and (3) exceeding the scope of the remand instructions by granting summary judgment to Hiscox. According to Colby, this abuse of discretion requires reversal and vacatur of the judgment and allows this court to analyze the *Finden*[1] factors de novo. We disagree. We analyze the first issue here and the remaining issues in Sections II and III.

[1] *Finden v. Klaas*, 128 N.W.2d 748 (Minn. 1964); *Coller v. Guardian Angels Roman Cath. Church of Chaska*, 294 N.W.2d 712, 715 (Minn. 1980) (explaining that consideration of a motion for default judgment involves four *Finden* factors: (1) reasonable defense on the

"After an appellate court has remanded a case, a district court must abide by the appellate court's mandate 'strictly according to its terms' and 'has no power to alter, amend, or modify' the mandate." *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs*, 799 N.W.2d 619, 631 (Minn. App. 2011) (quoting *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982)). But "district courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). Accordingly, we review the district court's compliance with remand instructions for an abuse of discretion. *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 633 (Minn. 2017).

We remanded "for further findings regarding whether Hiscox met its burden to establish each of the four *Finden* factors" and directed the district court to make its determinations based on the record before it as of February 26, 2020. *Colby Lake I* at *3. We also stated:

> Although Hiscox maintains that it has a reasonable excuse for failing to serve a timely answer because the delay was caused solely by Hiscox's counsel, this argument may overlook the fact that the complaint was served on Hiscox's corporate office in Chicago on September 12, 2019. If Hiscox itself was aware of the complaint, then the responsibility for any ensuing delay might not solely lie with Hiscox's counsel. The district court did not explain how these factors favored denial of the motion.

Id. at *2.

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merits; (2) reasonable excuse for failing to answer; (3) the defendant acted with due diligence; and (4) substantial prejudice to other parties).

At the hearing on remand, Colby raised concern about the "parameters" of additional briefing, and Hiscox's counsel argued that, to address the facts surrounding service on the corporation, an additional declaration would be necessary. The district court agreed with Hiscox.

Colby now challenges the district court's consideration of a February 2022 declaration from Hiscox's claims manager. We conclude that the district court's reliance on the February 2022 declaration was consistent with our remand instruction because it simply clarified facts available to the district court as of February 2020 and allowed the district court to evaluate Hiscox's responsibility for its late answer.

Colby also asserts that the district court erred by failing to "weigh Hiscox's corporate culpability" for the delayed answer.[2] We are not persuaded. The district court referenced the February 2022 declaration for its finding that Hiscox followed up with counsel and relied on counsel's assurances that the complaint would be answered. The district court therefore complied with our remand instructions.

II. The district court did not abuse its discretion by denying default judgment based on its analysis of the *Finden* factors.

Colby asserts that Hiscox's failure to meet its burden under the *Finden* factors requires default judgment. We are not persuaded.

"The decision to grant or deny a motion for a default judgment lies within the discretion of the district court, and this court will not reverse absent an abuse of that

[2] While we recognize that this is part of the *Finden* factors, which we analyze substantively in Section II, here we address it in the context of a threshold question of whether the district court properly followed remand instructions.

discretion." *Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005); *see also Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *rev. denied* (Minn. Apr. 29, 2008). A district court abuses its discretion if its ruling relies on "a misapprehension of the law" or if "its factual findings are clearly erroneous." *Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016) (quotations omitted).[3] We view the record in the light most favorable to the district court's decision. *Imperial Premium Fin., Inc. v. GK Cab Co.*, 603 N.W.2d 853, 857 (Minn. App. 2000).

A party seeking default judgment "generally need do no more than aver that the defendant has failed to timely answer the complaint." *Laymon v. Minn. Premier Props. LLC*, 903 N.W.2d 6, 17-18 (Minn. App. 2017), *aff'd*, 913 N.W.2d 449 (Minn. 2018); *see* Minn. R. Civ. P. 55.01. But a district court may deny a motion for default judgment when the four *Finden* factors are met: (1) the defendant has a reasonable defense on the merits; (2) the defendant has a reasonable excuse for failing to answer; (3) the defendant acted with due diligence after becoming aware of the failure; and (4) denial of the motion will not result in substantial prejudice to other parties. *Coller*, 294 N.W.2d at 715; *see Finden*, 128 N.W.2d at 750; *Black*, 700 N.W.2d at 526 (explaining that district court considers these same factors when determining whether to deny motion for default judgment and whether

[3] Colby appears to argue that the district court's failure to follow this court's remand instructions renders the district court's decision "invalid," leaves this court without a *Finden* analysis to review, and requires us to conduct a de novo *Finden* analysis. We disagree. Upon review of the record and the relevant caselaw, the applicable standard of review is an abuse of discretion. *Black*, 700 N.W.2d at 525.

to vacate default judgment). The party seeking to avoid a default judgment must make a showing on all four factors. *Black*, 700 N.W.2d at 526.

We will review the district court's consideration of the *Finden* factors individually and collectively.

A. The district court acted within its discretion by determining that Hiscox had a reasonable defense on the merits.

Colby argues that Hiscox does not have a reasonable defense on the merits. We disagree.

A party seeking to avoid default judgment must show "a debatably meritorious claim" that "presents a cognizable claim for relief." *Cole v. Wutzke*, 884 N.W.2d 634, 638 (Minn. 2016). The crux of the parties' dispute is whether Hiscox breached the contract by refusing to pay RCV. *See Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract. *Id.*

1. Hiscox did not waive enforcement of the notice provision by its initial payments to Colby.

The district court found, and Colby does not dispute, that Colby "failed to notify Hiscox that repair or replacement work was commenced within 200 days of the May 16, 2017 loss." Instead, Colby asserts that Hiscox waived the notice requirement because Hiscox paid RCV through its September 12, 2018 payment of $188,521.62, which Hiscox labeled as replacement-cost damages. According to Colby, because Hiscox's second payment matched the amount in the unsigned proof of loss labeled RCV, prepared by its adjuster, Hiscox paid RCV and waived the policy's conditions for payment of RCV. But

nothing in the policy required Hiscox to make payments within the 200-day period. The policy specifically required Colby to provide notice that repair or replacement commenced by, in this case, December 2, 2017. Just because Hiscox provided a payment labeled as replacement-cost damages after December 2, 2017, it did not waive its right to enforce the terms of the policy and its conduct did not estop enforcement of the 200-day repair provision.

Accordingly, we are not persuaded that Hiscox waived the policy conditions by paying the full amount of the initial adjustment. The district court did not abuse its discretion by determining that Hiscox did not waive its defense on the merits that Colby failed to give notice of commencing repairs within 200 days of the loss.

2. Hiscox had a reasonable defense on the merits due to Colby's failure to complete repairs.

Colby argues that both parties "knew that the siding work would not be completed until [a]ppraisal concluded." And Colby confirmed that siding repairs remained incomplete at the January 2020 default-judgment hearing. The district court determined that Colby's failure to complete siding repair amounted to a failure to satisfy "the conditions precedent to recover replacement cost damages" and thus operates as a complete defense to Colby's breach-of-contract claim and prayer for declaratory relief.

The policy language does not contemplate events, such as an appraisal, that would change the requirements under the policy. Again, the policy plainly limits its payment to "[a]ctual cash value of the damage *until the repair or replacement is completed*." Here, Hiscox paid ACV and it is undisputed that repairs were not complete until well after the

litigation commenced. As a result, the district court did not abuse its discretion by determining that Hiscox had a reasonable defense on the merits due to Colby's failure to complete repairs.[4]

B. The district court acted within its discretion by determining that Hiscox had a reasonable excuse for failing to answer timely.

Colby asserts that "[n]either outside counsel . . . nor Hiscox corporate had any reasonable excuse for failing to [a]nswer timely." We are not persuaded.

In considering this factor, "it is generally for the district court to determine whether the excuse offered . . . is true and reasonable under the circumstances." *Cole*, 884 N.W.2d at 639. Such an inquiry is "fact intensive." *Id.*

As for Hiscox's counsel, the January 2020 affidavit from Hiscox's New York counsel stated that, on the same day Colby filed the complaint, "approximately 28 files" were transferred to their office, including the Colby file. The firm reviewed the newly transferred files and did not discover that Colby had filed or formally served a complaint on Hiscox. The affidavit claimed that the New York counsel became aware of the motion for default judgment on or about November 5, 2019, and they realized that they had "overlooked" the filed and formally served complaint. Hiscox's local counsel then "sought an extension of time to answer," which Colby denied. Hiscox's counsel then filed an answer.

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[4] Colby also appears to assert other arguments related to whether Hiscox has a reasonable defense on the merits based on Colby's interpretation of the policy language. For example, Colby asserts theories related to impossibility, illusory coverage, reasonable expectations, and that there was no requirement to complete repairs within a "reasonable time." We have carefully reviewed Colby's arguments, and we are not persuaded.

"Minnesota courts have consistently held that default caused by a party's attorney rather than by the party [them]self should be excused." *Coller*, 294 N.W.2d at 715. The district court noted that "Hiscox entrusted its defense to its counsel and retained [New York counsel] to represent Hiscox in each of the 28 Minnesota cases" transferred to it. Moreover, the district court determined that Hiscox's counsel had a reasonable excuse for the late answer filing, emphasizing that Hiscox's counsel's "slight delay in answering this matter was not intentional." It was well within the district court's discretion to determine that the delay caused by Hiscox's counsel should be excused.

As for Hiscox, Colby urges us to consider whether Hiscox's knowledge of the proceedings and failure to act amounted to neglect. *See Coller*, 294 N.W.2d at 715; *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *rev. denied* (Minn. July 31, 1986) ("Neglect of the party itself which leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment."). Colby asserts that when there is a "paucity of evidence" supporting a party's "reasonable excuse" on this factor, default is proper.

Here, the district court determined that several facts indicate that "Hiscox did everything it could reasonably be expected to have done to ensure that its interests were protected," including: (1) its representation was "in a state of flux when [Colby] served its [c]omplaint on Hiscox;" (2) the parties disagree on whether [Colby] had granted local counsel an indefinite extension to answer; and (3)"Once [Colby's] pleadings were served, Hiscox followed up with [New York counsel] and relied on [New York counsel's]

assurances that an answer would be timely filed." These findings are supported by the record.

Moreover, the caselaw Colby relies on does not indicate that the district court misapplied the law. Colby relies on *Black* to assert that if a self-represented litigant "who did not understand the need to answer could not establish reasonable excuse, how then can a professional litigant like Hiscox be afforded more latitude?" *See Black*, 700 N.W.2d at 526. But *Black* is distinguishable. There, the district court determined that Black acted intentionally by failing to obtain legal counsel. *Id.* at 527-28. This is simply not the record here.

Similarly, Colby urges this court to apply the same reasoning we used in *Safeco* to conclude that a company, not its attorney, "bore some responsibility for the late filing." *Safeco Ins. Co. v. Holmgren Bldg. Repair, Inc.*, 946 N.W.2d 638, 645 (Minn. App. 2020), *rev. denied* (Minn. Sept. 15, 2020). But in *Safeco*, the district court found that mistakes from Safeco's attorney did not excuse Safeco's "unreasonable failure to respond to settlement offers" for two years. *Id.* As a result, this court concluded that the district court acted within its "wide discretion" by determining that Safeco did not satisfy the reasonable-excuse factor. *Id.* at 645. Here, Hiscox did not ignore settlement offers, causing a delayed answer filing.

In sum, "[i]t is within the district court's purview to conduct a fact-intensive inquiry to determine if a stated excuse for the failure to file is reasonable." *Id.* at 646-47. Because the results of the district court's fact-intensive inquiry are supported by the record and the district court properly applied the law, we conclude that the district court acted within its

discretion by determining that Hiscox had a reasonable excuse for its failure to timely answer Colby's complaint.

C. The district court did not abuse its discretion by determining that Hiscox acted with due diligence after notice.

Colby asserts that, based on the record, "there can be no serious argument Hiscox acted with due diligence after being served with the default judgment motion."[5] We are not persuaded.

The due-diligence factor focuses on Hiscox's actions from the time that it learned of its error or omission. *See Cole*, 884 N.W.2d at 639. The district court determined that Hiscox's efforts constituted due diligence upon learning that Colby had moved for a default judgment and that it answered within a reasonable time based on Minnesota caselaw. *See, e.g.*, *Imperial Premium Fin., Inc.*, 603 N.W.2d at 858 (acting within three months is due diligence); *Black*, 700 N.W.2d at 528 (acting within five weeks is due diligence). Upon becoming aware of the motion for default judgment on or about November 5, 2019, Hiscox's counsel contacted Colby eight days later and asked them either to withdraw the motion or give them more time to answer. Colby's counsel refused. Hiscox then filed an answer on December 10, 2019, and opposed the motion for default judgment. Based on

[5] Hiscox asserts that Colby failed to preserve for appeal and waived any argument related to the due-diligence factor. The district court's acknowledgement of Colby's waiver is harmless because the district court still provided a substantive analysis on this factor. *See* Minn. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) ("Although error may exist, unless the error is prejudicial, no grounds exist for reversal.").

this record, we conclude that the district court appropriately exercised its discretion by determining that Hiscox acted with due diligence.

D. The district court acted within its discretion by determining that Colby was not substantially prejudiced by Hiscox's delay in answering.

Colby asserts that Hiscox failed to meet its burden to show that "no substantial prejudice would result to Colby."[6] We are not persuaded.

Under the prejudice factor, the party opposing default judgment must show that the delay caused by the error "has not resulted in a real and particular harm to the other party." *See Cole*, 884 N.W.2d at 639. But prejudice will necessarily result whenever the trial of a case is delayed. *Finden*, 128 N.W.2d at 751. Thus, the type of prejudice suffered generally must be more than additional expense and delay, such as the loss of witnesses or evidence, or the endangerment of a substantial right or advantage. *Cole*, 884 N.W.2d at 639; *Black*, 700 N.W.2d at 528.

Here, the district court determined that there was not substantial prejudice to Colby. The district court found that Colby acknowledged during the January 2020 default-judgment hearing that, if Hiscox had requested an extension to file an answer before Colby filed the default motion, then Colby would have agreed to it. The district court also found

[6] Colby also asserts that "the [district] court erred in foisting that burden onto Colby to articulate how it was prejudiced when Hiscox had not even met that burden to begin with." However, the impact of burden shifting is harmless because the district court considered Hiscox's arguments that Colby did not suffer prejudice and provided a substantive analysis on this factor. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Kallio*, 407 N.W.2d at 98. Moreover, a "strong showing on the other factors may offset relative weakness on one factor." *Imperial Premium Fin., Inc.*, 603 N.W.2d at 857. We are therefore unpersuaded that any burden shifting on the prejudice factor creates an abuse of discretion in this case.

that Colby "departed from the procedures and civilities customary in civil litigation, all of which, undoubtedly, have added to the time and expense of this litigation" and that Colby was "trying to take advantage of the confusion attendant the transfer of [Hiscox's] files" by serving the summons and complaint on Hiscox's office in Chicago at the time of the file transfer. These facts are supported by the record.

Moreover, district courts are in the best position to evaluate prejudice as part of this four-prong test. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4 n.3 (Minn. 2003). We discern no abuse of discretion by the district court.

In sum, the district court did not abuse its discretion by denying Colby's default-judgment motion.

III. Colby forfeited its argument that the district court erred by sua sponte granting summary judgment in favor of Hiscox.

Colby argues that the district court's sua sponte summary-judgment decision deprived Colby of any opportunity to be heard and violated the remand instructions for further findings on the motion for default judgment only. We conclude that Colby has forfeited this procedural argument and that, even if we consider the argument on the merits, Colby's argument fails.

A party's failure to brief and argue an issue on appeal results in forfeiture of that issue. *See Grinnell Mut. Reinsurance Co. v. Ehmke*, 664 N.W.2d 409, 411 (Minn. App. 2003), *rev. denied* (Minn. Sept. 24, 2003). This includes situations in which a party fails to brief an issue during a previous appeal in the same case, resulting in forfeiture for any subsequent appeals. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990).

Whether an issue is forfeited is a legal question which we review de novo. *See Smigla v. Schnell*, 547 N.W.2d 102, 103 (Minn. App. 1996) (applying de novo review to construction of procedural and general-practice rules).

Colby originally filed a motion for summary judgment in February 2020. Hiscox opposed the motion. The district court held a hearing on the motion in June 2020 and issued an order in September 2020 denying Colby's motion for summary judgment. Reasoning that there were no disputed issues of material fact and, applying the law to the facts, the district court sua sponte granted summary judgment to Hiscox. Colby did not challenge this issue during the first appeal, resulting in forfeiture of the issue of sua sponte granting of summary judgment.

Even if we consider this argument on the merits, Colby's claim is unpersuasive. Our conclusion is further supported by our prior opinion. There, we remanded for the district court to make findings on the *Finden* factors. *Colby I* at *2. Although Colby asserts that this instruction limited the district court's activity on remand only to an analysis of the *Finden* factors, we disagree. After the district court did its *Finden*-factors analysis and denied default judgment, it had to bring the case to a resolution, and it did so by again granting summary judgment in favor of Hiscox. *See Janssen*, 704 N.W.2d at 763 ("[D]istrict courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided."). Moreover, even Colby asserted that the facts were undisputed by being the first to move for summary judgment.

IV. The district court did not err in its calculation of pre-award interest.

Colby next asserts that the district court did not properly apply Minnesota law "for interest owed on appraisal [a]wards." *See* Minn. Stat. § 549.09 (2022); *Elm Creek Courthome Ass'n, Inc. v. State Farm Fire & Cas. Co.*, 971 N.W.2d 731 (Minn. App. 2022), *rev. denied* (May 17, 2022). Colby claims entitlement to 10% interest on the entire appraisal award (ACV and RCV) from the first written notice of the claim until entry of judgment. We are not persuaded.

Pre-award interest accrues from the "demand for arbitration, or the time of a written notice of claim, whichever occurs first." Minn. Stat. § 549.09, subd. 1(b). Under the statute, the "action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim." *Id.*

Here, the district court calculated the 10% interest for the period between July 5, 2017, the notice of claim, and the date of Hiscox's first payment, February 12, 2018. For that period, Colby was entitled to receive interest in the amount of $35,724.07. Therefore, Hiscox was obligated to pay Colby $648,136.65 based on $612,412.58 (ACV) plus $35,724.07. But Hiscox tendered payment for $497,691.42, leaving a balance of $150,445.23. In calculating the 10% interest on the remaining $150,445.23 from February 12, 2018 to September 12, 2018, the date of the second payment, Colby was entitled to receive interest in the amount of $8,770.96.[7] Therefore, as of September 12, 2018, Hiscox

[7] The district court appears to have inadvertently changed the $150,445.23 remaining balance to $155,445.23 remaining balance when conducting the interest calculation and remaining balance owed for the period between February 12, 2018, and September 12,

owed Colby $159,216.19, but paid $188,521.62. Hiscox thus overpaid Colby by $29,305.43. The district court determined that Hiscox had already paid Colby more than it was owed. Colby's reliance on *Elm Creek* to argue that it is entitled to interest on RCV is misguided. *See Elm Creek*, 971 N.W.2d at 734-36. Entitlement to RCV was not at issue in *Elm Creek*.[8] *See id.*

The district court appropriately applied the law by determining that Hiscox did not owe Colby any pre-award interest on RCV.

Affirmed.

2018. Regardless, Hiscox overpaid Colby, making the mathematical error harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

[8] The district court separately determined that, because Colby failed to commence suit within two years of notifying Hiscox of the claim, interest did not begin to accrue until the pleadings were served on September 12, 2019. Nevertheless, the result is the same because Hiscox still overpaid Colby.