STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0476

Kyle Wendell Else,
Appellant,

vs.

Auto-Owners Insurance Company,
Respondent.

Filed December 21, 2020
Affirmed as modified
Bratvold, Judge

Blue Earth County District Court
File No. 07-CV-17-460

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Timothy P. Tobin, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

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

BRATVOLD, Judge

In this second appeal following a remand to the district court on prejudgment interest, appellant argues the district court erred by determining that he cannot recover prejudgment interest in excess of the limit on his homeowner's insurance policy. Because we conclude, first, that the district court's decision on this issue follows the applicable

statute and binding precedent, and, second, that the district court erred in calculating the amount of prejudgment interest, we affirm as modified.

FACTS

We briefly state the relevant facts here and note that our opinion from the previous appeal has a more detailed summary. *See Else v. Auto-Owners Ins. Co.*, No. A19-0650, 2020 WL 413351 at *1 (Minn. App. Jan. 27, 2020), *review denied* (Minn. Apr. 14, 2020).

On February 11, 2015, a fire damaged appellant Kyle Wendell Else's home in Truman. A second fire occurred at the Else's home on February 18, 2015. The state charged Else with arson, but the jury acquitted Else in November 2016.

Else telephoned his homeowner's insurer, respondent Auto-Owners Insurance Company, about the first fire on February 12, 2015. Auto-Owners sent Else a written request for proof of loss and records the next day and Else responded with written notice of claim on February 16, 2015. At the time of both fires, Else's homeowner's insurance policy covered property loss due to fire, including personal property up to a limit of $173,411, and additional living expenses (ALE) up to a limit of $49,420. Before and after Else's acquittal, Auto-Owners maintained that Else started the fire, and denied coverage for most policy benefits.

Else sued Auto-Owners and the case went to trial. The jury found for Else, awarding $153,667.70 for personal property loss, and $10,988.32 for ALE. In response to posttrial motions, the district court reduced the jury's award, first, by applying the $1,500 policy deductible, and, second, by crediting Auto-Owners for pretrial payments of $15,249.78 for personal property loss and $3,038.07 for ALE. The district court did not address Else's

posttrial motion to apply prejudgment interest to the award under Minn. Stat. § 549.09 (2018).[1]

Else appealed, asserting various errors, including that the district court erred by reducing the jury award and failing to apply prejudgment interest. *See Else*, 2020 WL 413351 at *1. Auto-Owners agreed that Else was entitled to prejudgment interest, but disagreed on the amount. *Id.* at *11. We affirmed the district court in part, but remanded the issue of prejudgment interest for a determination of the amount. *Id.*

On remand, the district court issued a written order awarding prejudgment interest. First, the district court noted that the parties agreed it could decide prejudgment interest without additional briefing and argument. Next, the district court turned to Minnesota's interest-on-judgment statute, Minn. Stat. § 549.09, and determined that Else was the prevailing party and therefore entitled to prejudgment interest under subdivision 1. The district court then made key findings: "[Else] made 'a written notice of claim' in this matter on April 15, 2015"; the district court entered judgment for Else on April 22, 2019; and four years and seven days passed after "written notice of claim" and before entry of judgment. The district court noted that section 549.09, subdivision 1(c)(2), provides for ten-percent interest per year on judgments exceeding $50,000 and that this rate applied to Else's

[1] The district court and parties have consistently referred to Else's claim as one for "prejudgment interest." Minn. Stat. § 549.01 (2018) authorizes recovery of interest on verdicts, awards, and judgments, and identifies interest from verdict to judgment and interest from "preverdict, preaward, or prereport" until the time of "verdict, award, or report." *Compare id.*, subd. 1(a) *with id.*, subd. 1(b). Because Else is seeking interest on a judgment from written notice of claim until entry of judgment, this opinion refers to Else's claim as one for "prejudgment interest."

judgment based on the total amount awarded. The district court finally determined that prejudgment interest of $55,632.32 accrued on the personal property portion of the judgment and $582.90 accrued on the ALE portion of the judgment.

But the district court agreed with Auto-Owners that an insurer is "not liable" for prejudgment interest "which, when added to total damages, would exceed the policy limits." (Quoting *Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 559 (Minn. 1994).) Based on the policy limits in Else's homeowner's policy, the district court determined that Else could recover prejudgment interest of $19,743.30 on his personal property loss, and $582.90 on his ALE loss.

This appeal follows.

D E C I S I O N

Else's appeal asks us to interpret and apply the interest-on-judgment statute, Minn. Stat. § 549.09, and the statute prescribing Minnesota's standard fire insurance policy, Minn. Stat. § 65A.01 (2018). We review statutory interpretation de novo. *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 139 (Minn. 2017). In part, Else's argument also relies on the language of his homeowner's policy. We review the interpretation of insurance policies, like other contracts, de novo. *Visser v. State Farm Mut. Auto. Ins. Co*., 938 N.W.2d 830, 832 (Minn. 2020).

I. The district court correctly determined that Else cannot recover prejudgment interest in excess of his homeowner's policy limit.

Else contends that the district court incorrectly reduced his prejudgment-interest award by applying the policy limit. Else's homeowner's policy is silent on prejudgment

interest. Minn. Stat. § 549.09 provides that prejudgment interest is added to a judgment "from the time of the verdict, award, or report until judgment is finally entered . . . ." Minn. Stat. § 549.09, subd. 1(a). Similarly, Minn. Stat. § 549.09 provides that prejudgment interest is added on behalf of the prevailing party, "[e]xcept as otherwise provided by contract or allowed by law . . . from the time of the commencement of the action or . . . the time of a written notice of claim, whichever occurs first, . . . until the time of verdict, award, or report." *Id.*, subd. 1(b). Read together, Minn. Stat. § 549.09, subd. 1, provides that prejudgment interest is added from written notice of claim to the time of the verdict and from the verdict until entry of judgment.

Here, the parties dispute whether the policy limit in Else's homeowner's policy constrains his recovery of prejudgment interest. Else's policy limit for loss of personal property is $173,411 and for ALE is $49,420. Before adding prejudgment interest, the district court entered judgment for Else of $138,417.92 for personal property and $1,450.25 for ALE.

The district court determined that the policy limit applied to limit Else's recovery of prejudgment interest, relying on *Lessard*, 514 N.W.2d at 558. There, an insured sought underinsured motorist (UIM) coverage for damages incurred in an automobile accident, plus preaward interest on the arbitrator's award of $221,000. *Id.* at 558. Both the district court and the court of appeals denied preaward interest. *Id.* The supreme court affirmed. *Id.* at 559.

The supreme court's reasoning in *Lessard* is important; the court relied on its own precedent establishing that prejudgment interest is "an element of compensatory

damages" because it is "awarded to provide full compensation by converting time-of-demand . . . damages into time-of-verdict damages." *Id.* at 558 (quoting *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988)). Next, the supreme court recognized that "[a]s an element of compensatory damages, prejudgment interest awarded under Minn. Stat. § 549.09, subd 1(b), is plainly subject to any applicable limitation on liability for such damages." *Id.* at 558. The supreme court held that an insured "may not recover preaward interest which, when added to total damages, would exceed the monetary limitation on liability contained in insured's policy." *Id.*

The supreme court rejected the insured's argument that section 549.09 mandates payment of preaward interest and countermands the policy limit. *Id.* at 559. Pointing to the language of Minn. Stat. § 549.09, subd. 1(b)—which states that preaward interest is added "*[e]xcept as otherwise provided by contract*"—the supreme court determined that the policy limit falls under this statutory exception. *Lessard*, 514 N.W.2d at 559 (emphasis added).

The supreme court agreed with the insured that recovery of preaward interest would "fully compensate him for his lost use of money from the time the claim was made until the time the award was entered," but added that the court is "unwilling to rewrite the unambiguous terms of his insurance policy." *Id.* at 558. Because the applicable policy limit was $220,000, and the arbitration award exceeded this amount, the supreme court determined that the insured could not recover preaward interest. *Id.* at 558. The supreme court thus held that an insurance policy limit constrains recovery of preaward interest, which "when added to total damages, would exceed policy liability limits." *Id.* at 559.

Else asks us to conclude that *Lessard* is not binding precedent in his case for four reasons. First, he contends that *Lessard* is inapplicable to the recovery of prejudgment interest under his homeowner's policy because *Lessard* was a UIM claim. Second, he argues that a more recent supreme court decision, *Poehler*, 899 N.W.2d 135, limited or modified the rule from *Lessard*. Third, Else contends that the language of his homeowner's policy provides coverage for prejudgment interest. And, fourth, he argues that he in entitled to prejudgment interest under the standard fire insurance policy, Minn. Stat. § 65A.01. We address each argument in turn.

A. *Lessard* is not limited to UIM cases.

Else is correct that *Lessard* involved UIM coverage. But the supreme court in *Lessard* did not rest its decision on the terms specific to UIM coverage or on the uninsured-motorist-coverage statute, even though the insurer contended that the relevant statute "did not permit preaward interest exceeding liability limits." 514 N.W.2d at 558.[2] Rather than rely on the UIM statute, the supreme court reasoned from precedent

[2] When *Lessard* was decided, the relevant statute provided that,

> [w]ith respect to underinsured motor vehicles, the maximum liability of an insurer is the lesser of the difference between the limit of underinsured motorist coverage and the amount paid to the insured by or for any person or organization that may be held legally liable for the bodily injury; or the amount of damages sustained but not recovered.

Minn. Stat. § 65B.49, subd. 4a (1986); *Lessard*, 514 N.W.2d at 558 n.2. The statute was later amended to specifically note that "in no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits." 1989 Minn. Laws ch. 213, § 2, at 648.

establishing that "prejudgment interest is an element of compensatory damages." *Lessard*, 514 N.W.2d at 558. In fact, the supreme court did "not reach the question of whether Minn. Stat. § 65B.49 imposes a statutory cap on liability equal to the policy limits." *Id.* at 559.

Precedent from this court establishes that the rule in *Lessard* is not limited to UIM coverage. *In re Estate of Sangren* considered whether an insured could recover prejudgment interest for fire loss under Minn. Stat. § 549.09, when the preverdict interest plus damages exceeded the homeowner's policy limit. 504 N.W.2d 786, 791 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993). This court decided *Sangren* after the supreme court had taken review in *Lessard*, but before the supreme court had issued its decision. *Sangren* held that "the sum of damages and preverdict interest may not exceed the liability limit provided by the parties' insurance contract." 504 N.W.2d at 791.

Thus, we conclude the district court followed binding precedent when it applied the homeowner's policy limit to Else's recovery of prejudgment interest. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010) ("The district court, like this court, is bound by supreme court precedent and the published opinions of the court of appeals . . . .").

B. The supreme court has not overruled or limited *Lessard*.

Else argues that *Poehler*, which the supreme court decided in 2017, conflicts with *Lessard* and *Sangren* and we should recognize *Poehler* to have limited the rule in *Lessard*. Under *Poehler*, Else contends that an insurer must state in the applicable policy that the policy limit applies to prejudgment interest.

We disagree with this view of *Poehler*. In *Poehler*, the supreme court held that an insured under a homeowner's policy was entitled to preaward interest on an appraisal award for a fire-damaged home. *Poehler*, 899 N.W.2d at 141 (noting that section 540.09 excludes interest on some pecuniary damages awards). The supreme court first rejected the insurer's primary claim that the addition of preaward interest under section 549.09 required an underlying action for breach of contract. *Id.* at 139.

Else's argument relies on the supreme court's analysis of the second issue, when the court rejected the insurer's argument that the loss-payment provision in the policy limited an insured's recovery of preaward interest. *See id.* at 141-42. *Poehler* held that "absent contractual language explicitly precluding preaward interest, an insured may recover preaward interest . . . notwithstanding a contractual loss payment provision stating that the loss is payable after the filing of an appraisal award." *Id.* at 142. The supreme court reasoned that the insurer "was free to contract with [its insured] on the accrual of interest" but the specific policy involved did not "explicitly prohibit" preaward interest. *Id.* at 143. Thus, the supreme court determined that the exception to section 549.09—"[e]xcept as otherwise provided by contract"—was "never triggered" under the applicable policy. *Id.*

But *Poehler* did not discuss *Lessard* or determine whether an insured may recover preaward interest that, when added to other damages, exceeds the applicable policy limit. In fact, *Poehler* cited *Lessard* without questioning its holding. *See Poehler*, 899 N.W.2d at 141 (citing *Lessard* to establish that section 549.09 "provides preaward interest on all awards of compensatory damages that are not excluded by the statute"); *see also Poehler*,

899 N.W.2d at 147, n.1 (Anderson, J., dissenting) (citing *Lessard* in footnote for its definition of "pecuniary damages"). Thus, we conclude that *Lessard* is still good law.

C. The policy unambiguously limits the amount of coverage.

Relying on the particular language of his homeowner's policy, Else also argues that the policy limit does not apply to prejudgment interest. Else cites to provision one, "how losses are settled," which provides that Auto-Owners

> shall pay the **actual cash value** of the *damaged covered property* at the time of loss. In no event shall [Auto-Owners] pay more than the smaller of either: (a) the limit of insurance to the damaged covered property; or (b) the cost to repair or replace the damaged covered property with property of like kind and quality.

(Italics added.) Else points out that the policy does not define "damaged covered property" and therefore argues that the "policy limits apply only to the actual cash value of the damaged property. By Auto-Owners contracted policy terms, all other damages that can be awarded to Mr. Else, including prejudgment interest, are not part of that definition . . . ."

Else's reading of the policy omits crucial language at the beginning of provision one: "*Unless the provisions of 2. or 3. below apply*, [Auto-Owners] shall pay . . . ." (Emphasis added.) We conclude that provision three applies here; it provides that "[w]hen replacement cost is shown in the declarations" of the policy, then Auto-Owners "shall pay the full cost to repair or replace," among other things, "damaged covered property." The declarations page in Else's policy states that personal property is covered at "replacement cost."

Because provision three applies to Else's personal property loss, we conclude that it also applies to prejudgment interest on that loss. Provision three states that "[i]n no event shall [Auto-Owners] pay more than the limit of insurance shown [for personal property] for *all loss and damage* in any one loss." (Emphasis added.)[3]

Separately, Else's homeowner's policy states the policy limit in the deductible provision: Auto-Owners will not pay any loss until the amount covered exceeds the deductible, and "shall then pay the amount of loss in excess of such deductible *not to exceed the applicable limit of insurance*." (Emphasis added.) This language unambiguously states that Auto-Owners will not pay loss or damages in excess of the applicable limit. Because "prejudgment interest is an element of compensatory damages," *Lessard*, 514 N.W.2d at 559, we also conclude that the policy limit in Else's homeowner's policy applies to recovery of prejudgment interest.

D. Else is not entitled to recover prejudgment interest in excess of the policy limit under the standard fire insurance policy.

Else next argues that he is entitled to prejudgment interest in excess of the policy limit under the standard fire insurance policy, Minn. Stat. § 65A.01. The terms of the standard fire insurance policy are mandatory, and cannot be omitted, changed, or waived.

[3] In Else's reply, he argues that because both provision one and provision three apply to his loss, the policy is ambiguous and the court must resolve ambiguity in favor of the insured. See *Poehler*, 899 N.W.2d at 150 ("[A]ny ambiguities are resolved in favor of the policyholder."). This is a new argument offered in reply, therefore, we need not consider it. "[L]itigants cannot raise new arguments in reply briefs." *Rochester City Lines Co. v. City of Rochester*, 913 N.W.2d 443, 448 (Minn. 2018) (citing Minn. R. App. P. 128.02, subd. 4, as limiting reply brief to new matter raised in respondent's brief). Even if we were to consider Else's new argument, we would reject it because the policy is not ambiguous. Provision three governs Else's personal property loss.

Poehler, 899 N.W.2d at 144-45. Parties may agree to additional or different provisions in the policy, but "only if it affords the insured all the rights and benefits of the Minnesota standard fire insurance policy or offers additional benefits which provide more coverage to the insured than the statutory minimum." *Id.* at 145 (quotation omitted). The purpose of the standard fire insurance policy is to protect the insured, and it should "not be used as a sword for the insurer." *Id.*

Else points to the statutory language providing that "[i]t is moreover understood . . . that the company will *not in any case be liable for more* than the sum insured, *with interest thereon* from the time when the loss shall become payable, as above provided." Minn. Stat. § 65A.01, subd. 3 (emphasis added). Else is correct that this language contemplates that the insurer may be liable for "more than the sum insured, with interest thereon." The provision states, however, only that the insurer will *not* be liable for an amount greater than the sum insured plus interest, and does not provide that an insured *is liable* for interest in excess of the policy limit. Because this language states a maximum, it is not a *minimum requirement*.

Poehler instructs us that the standard fire insurance policy "is not applicable when the parties have agreed to an insurance policy that affords the insured the minimum coverage required by the statute." 899 N.W.2d at 145. Because Else's homeowner's policy satisfies the minimum requirements of the standard fire insurance policy, the statute does not apply to his case or this issue. Else, therefore, is not entitled to prejudgment interest in excess of his homeowner's policy limit based on the standard fire insurance policy.

In sum, we reject each of Else's arguments against applying the rule from *Lessard* and affirm the district court's decision that Else's homeowner's policy limits apply to recovery of prejudgment interest.

II. The district court erred in its computation of prejudgment interest.

Else challenges the district court's calculation of prejudgment interest. He argues that he is entitled to compound interest, and that interest began accruing under Minn. Stat. § 549.09 on the date of written notice of claim, and not 60 days later, as the district court determined.[4] We discuss both arguments in turn.

A. Else is not entitled to compound interest.

For the first time on appeal, Else argues that he is entitled to compound interest. He acknowledges that he did not raise this issue in the district court. This court generally refuses to consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court generally considers "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it") (quoting *Thayer v. Am. Fin. Advisers, Inc*., 322 N.W.2d 599, 604 (Minn. 1982)).

But even if we consider Else's compound-interest argument, it fails based on the unambiguous language of the prejudgment-interest statute. Minn. Stat. § 549.09,

[4] Else also argues that the district court erred when it reduced the judgment by Auto-Owner's pretrial payments under the policy. Because the previous appeal decided the reduction issue, we do not address it here. *See Else*, 2020 WL 413351 at *10 (determining that "it was appropriate for the district court to credit Auto-Owners for undisputed payments it made").

subd. 1(a), provides that prejudgment interest is computed from verdict to judgment "as provided in paragraph (c) and added to the judgment or award." *See also* Minn. Stat. § 549.09, subd. 1(b) (providing same regarding interest from written notice to verdict). Paragraph (c) has two relevant provisions about how interest is computed: (1) "for a judgment or award of $50,000 or less . . . the interest shall be computed as *simple interest* per annum," *see* Minn. Stat. § 549.09, subd. 1(c)(1)(i) (emphasis added); and (2) "[f]or a judgment or award over $50,000, . . . the interest rate shall be ten percent *per year* until paid." *Id.*, subd. 1(c)(2).

Subdivision 2 also provides that the court administrator will compute and add the accrued interest and directs that "interest shall accrue on the unpaid balance of the judgment or award from the time that it is entered or made until it is paid . . . ." *Id.*, subd. 2. To support his position, Else relies on general caselaw discussing compound interest. But this general caselaw is inapplicable because section 549.09 states that interest of ten percent *per year* applies to judgments over $50,000, such as Else has here, and also provides that interest accrues only on the *unpaid balance of the judgment*. *Id.*, subd. 1(c), subd. 2. "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. The district court, therefore, did not err in adding prejudgment interest of ten percent per year to the unpaid balance of Else's judgment.

B. The district court erred in determining when interest began to accrue.

Else finally contends that the district court erred in determining when prejudgment interest began to accrue. As discussed above, Minn. Stat. § 549.09, subd. 1(b), provides

that prejudgment interest is added from commencement of the action or time of written notice of claim, "whichever occurs first." The parties agree that written notice of claim occurred before Else commenced his action; here, Else received a notice of proof of loss and records from Auto-Owners on February 13, 2015. The district court determined that prejudgment interest began accruing on April 15, 2015, adding 61 days to the date of written notice of claim.[5] Else argues the district court erred because, under the applicable statutory language, prejudgment interest began accruing on the date of written notice of claim, which was February 13, 2015.

Auto-Owners responds that, in adding 60 days to the date of written notice of claim, the district court may have relied on a provision in the standard fire insurance policy. For support, Auto-Owners cites *Nelson v. Illinois Farmers Ins. Co.*, 567 N.W.2d 538, 543 (Minn. App. 1997), *review denied* (Minn. Oct. 21, 1997). In *Nelson*, we affirmed the district court's determination that the accrual date for prejudgment interest was 60 days after the insured submitted its proof of loss form. *Id.* at 543. We relied on language in the standard fire insurance policy that requires payment 60 days after an insured submits proof of loss. *Id.*; *see also* Minn. Stat. § 65A.01, subd. 3 (stating that amounts owed by the insurer "shall be payable 60 days after proof of loss . . . is received"). But *Nelson* is inapplicable here, because, as explained above, the standard fire insurance policy does not apply to

[5] It is unclear why the district court added 61 days to February 13, even though the statute cited by Auto-Owners provides for 60 days. There is no explanation for this in the district court's order and we assume it was a clerical error.

Else's homeowner's policy. Auto-Owners does not argue that the terms of Else's homeowner's policy govern the date prejudgment interest began to accrue.

We therefore turn to the statutory language to determine when prejudgment interest begins to accrue. The prejudgment-interest statute unambiguously provides the date of accrual: "preverdict, preaward, or prereport interest on pecuniary damages shall be computed . . . from the time of the commencement of the action or demand for arbitration, or from the time of a written notice of claim, whichever occurs first . . . ." Minn. Stat. § 549.09, subd. 1(b). Here, Else notified Auto-Owners of the loss on February 12, 2015, and Auto-Owners sent a written request for proof of loss and records on February 13, 2015. Thus, we conclude that prejudgment interest began to accrue on February 13, 2015, because this was the first written notice of loss, and the district court erred in determining otherwise.

But the district court's error on the accrual date does not end our analysis. "[E]rror without prejudice is not grounds for reversal." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). We have already determined that Else is not entitled to prejudgment interest in excess of the policy limit. His judgment of $138,417.92 for personal property damages, plus the district court's prejudgment-interest award of $55,632.62, exhausted the applicable policy limit of $173,411. Thus, the district court's error on accrual date did not affect the personal property portion of the judgment.

The district court's error on accrual date, however, prejudiced Else on the ALE portion of the judgment. The applicable policy limit for ALE is $49,420 and the district court directed entry of judgment against Auto-Owners of $1,450.25 for ALE damages. The

district court determined that the prejudgment interest on the ALE portion of the judgment, at a rate of ten percent, was $145.03 per annum and $0.3973 per diem. Next, the district court awarded prejudgment interest of $582.90 for a period of four years and seven days, starting interest on April 15, 2015. Thus, the district court erred by omitting 61 days of prejudgment interest and Else is entitled to an additional $24.24 in prejudgment interest (61 days x $0.3973 = $24.2353).

In conclusion, the district court correctly determined that Else is not entitled to prejudgment interest in excess of the applicable policy limit and therefore correctly ordered prejudgment interest of $55,632.62 on the personal property portion of the judgment. Because we conclude that the district court erred in determining the date prejudgment interest began to accrue, we modify the prejudgment-interest award to add $24.24 on the ALE portion of the judgment.

Affirmed as modified.