STATE OF MINNESOTA

IN SUPREME COURT

A20-0476

Court of Appeals

Chutich, J.
Concurring in part, dissenting in part,
Thissen, J., Gildea, C.J., Anderson, J.

Kyle Wendell Else,

Appellant,

vs.

Filed: October 5, 2022
Office of Appellate Courts

Auto-Owners Insurance Company,

Respondent.

Michelle K. Olsen, Jacob M. Birkholz, Birkholz & Associates, LLC, Mankato, Minnesota; and

Timothy D. Johnson, Smith Jadin Johnson, PLLC, Bloomington, Minnesota, for appellant.

Timothy P. Tobin, Jeffrey M. Markowitz, Marissa K. Linden, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for respondent.

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

S Y L L A B U S

1. The Minnesota standard fire insurance policy, Minnesota Statutes section 65A.01 (2020), entitles insureds to prejudgment interest on a covered loss. The coverage

limit of the insured's policy does not control the amount of prejudgment interest that may be awarded under the standard fire policy.

2. When an insurer denies liability for a fire loss and the parties do not engage in appraisal, the Minnesota standard fire insurance policy entitles a homeowner to prejudgment interest that begins to accrue 60 days after the insurer receives proof of loss.

Reversed and remanded.

O P I N I O N

CHUTICH, Justice.

This appeal involves a dispute between a homeowner and an insurance company over prejudgment interest. At issue is whether a homeowner is entitled to prejudgment interest for a fire loss in an amount that brings the homeowner's total recovery above the coverage limit in the insurance policy. After fires damaged his home, appellant Kyle Else sought coverage from his homeowner's insurer, respondent Auto-Owners Insurance Company. Auto-Owners denied coverage, claiming that Else had intentionally set the fires. Else sued, and a jury found for Else on his claims against Auto-Owners. The district court awarded Else prejudgment interest, but limited the amount, finding that Else's total recovery for his personal property loss could not exceed the policy coverage limit. The court of appeals affirmed. Because we conclude that the Minnesota standard fire insurance policy, Minnesota Statutes section 65A.01 (2020), entitles Else to prejudgment interest in an amount that may result in a total recovery that exceeds the policy limit, we reverse the court of appeals' decision and remand to the district court to recalculate prejudgment interest.

FACTS

In 2015, two separate fires a week apart damaged Kyle Else's home. At the time of the fires, he insured his home under an insurance policy issued by Auto-Owners Insurance Company. Else made claims under the policy for the damage to his home and other losses, including the loss of personal property.

The dispute here relates to Else's claim for household personal property loss. The Auto-Owners policy covered property loss because of fire, including personal property up to a limit of $173,411. The policy provides that the insurer will pay the amount of loss in excess of the insured's deductible, "not to exceed the applicable limit of insurance." The policy does not specifically address interest.

Auto-Owners asserted that Else caused the fires and denied his claims. The State of Minnesota charged him with arson, but a jury acquitted him of all criminal charges. Despite this acquittal, Auto-Owners continued to maintain that Else caused at least one of the fires and accordingly continued to deny coverage for the fire losses. Else requested an appraisal, and Auto-Owners refused his request.

Else sued Auto-Owners for its denial of insurance coverage, and the case went to trial. The jury found that Else did not start either fire and awarded him damages. After considering post-trial motions, including Else's motion for prejudgment interest, the district court adjusted the amount of damages but did not award prejudgment interest.

In his first appeal, Else raised several issues, including the district court's failure to consider his motion for prejudgment interest. The parties agreed that he is entitled to prejudgment interest but disputed the amount. The court of appeals remanded to the district

court for a determination of the appropriate amount of prejudgment interest. *Else v. Auto-Owners Ins. Co.* (*Else I*), No. A19-0650, 2020 WL 413351, at *11 (Minn. App. Jan. 27, 2020), *rev. denied* (Minn. Apr. 14, 2020).

On remand, the district court applied Minnesota's prejudgment interest statute, Minnesota Statutes section 549.09 (2020), and found that prejudgment interest in the amount of $55,632 had accrued on the personal property portion of the judgment. But the district court also found that an insurer is "not liable" for prejudgment interest "which, when added to total damages, would exceed policy liability limits." The district court therefore reduced the amount of prejudgment interest by $35,889 to $19,743 so that Else's total recovery did not exceed the $173,411 policy limit for personal property loss. The district court rejected Else's reliance on the Minnesota standard fire insurance policy, Minnesota Statutes section 65A.01.

The court of appeals affirmed the district court's award of prejudgment interest on the personal property portion of the judgment. *Else v. Auto-Owners Ins. Co.* (*Else II*), No. A20-0476, 2020 WL 7490559, at *8 (Minn. App. Dec. 21, 2020). The court of appeals concluded that "the district court correctly determined that Else is not entitled to prejudgment interest in excess of the applicable policy limit" of the Auto-Owners policy. *Id.* The court of appeals also concluded that Else is not entitled to prejudgment interest in excess of the policy limit under the Minnesota standard fire insurance policy. *Id.* at *6. Else petitioned for further review, asking us to determine what effect the standard fire policy has on insurance companies' attempts to limit prejudgment interest. We granted Else's petition for review.

ANALYSIS

This case requires us to decide whether the Minnesota standard fire insurance policy, Minnesota Statutes section 65A.01, entitles Else to prejudgment interest in an amount that may cause his total recovery for his personal property loss to exceed the coverage limit of his homeowner's insurance policy. This case also requires us to determine when prejudgment interest began to accrue under the standard fire policy. The resolution of this dispute over prejudgment interest involves issues of statutory interpretation, which we review de novo. *Visser v. State Farm Mut. Auto. Ins. Co.*, 938 N.W.2d 830, 832 (Minn. 2020).

The district court awarded prejudgment interest under Minnesota Statutes section 549.09—the prejudgment interest statute. Under the prejudgment interest statute, "[*e*]*xcept as otherwise provided by contract* or allowed by law," the prevailing party is entitled to preverdict interest "from the time of the commencement of the action or . . . the time of a written notice of claim, whichever occurs first." Minn. Stat. § 549.09, subd. 1(b) (emphasis added). The court of appeals determined that, in limiting the insurer's total liability, the Auto-Owners policy imposed a contractual limit on prejudgment interest as permitted by section 549.09, and concluded that Else "is not entitled to prejudgment interest in excess of the applicable policy limit." *Else II*, 2020 WL 7490559, at *8. In reaching that conclusion, the court of appeals relied on our decision in a case involving benefits under an automobile insurance policy, which held that, " '[a]s an element of compensatory damages, prejudgment interest . . . is plainly subject to any applicable limitation on liability

for such damages.' " *Id.* at *2 (quoting *Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 558 (Minn. 1994)).

Else challenges the court of appeals' decision on a number of grounds. He argues that *Lessard* is distinguishable because that case involved underinsured motorist benefits and because the policy language here is different from the policy language at issue in *Lessard*. He also argues that he is entitled to prejudgment interest in excess of the policy limit under the Minnesota standard fire insurance policy. We resolve this dispute based on the interest provision of the standard fire policy. Minn. Stat. § 65A.01, subd. 3.

I.

The Minnesota Legislature first enacted the Minnesota standard fire insurance policy in 1895 "to secure uniformity in fire insurance policies." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 690 (Minn. 1997); *see* Act of Apr. 25, 1895, ch. 175, § 53, 1895 Minn. Laws 392, 417–22 (codified as amended at Minnesota Statutes section 65A.01). "Minnesota Statutes § 65A.01 requires that certain terms and conditions be included in fire insurance policies in Minnesota." *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 144 (Minn. 2017). The provisions of the Minnesota standard fire insurance policy generally "may not be omitted, changed, or waived." *Watson*, 566 N.W.2d at 690. Insurers may include "additional or different terms" in a fire insurance policy as long as those terms "offer more coverage than the statutory minimum." *Id.* We will uphold a provision in a fire insurance policy "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 691.

Because the Auto-Owners policy does not contain an interest provision, the interest provision of the standard fire policy, Minnesota Statutes section 65A.01, subdivision 3, applies to Else's fire loss. Minnesota's prejudgment interest statute does not control prejudgment interest under the standard fire policy because the prejudgment interest statute, by its express terms, does not control prejudgment interest that is "otherwise provided by contract or allowed by law." Minn. Stat. § 549.09, subd. 1(b). We therefore consider whether the Minnesota standard fire insurance policy permits the amount of prejudgment interest to exceed the coverage limit of the policy.

We have described prejudgment interest generally as "an element of damages awarded to provide full compensation by converting time-of-demand . . . damages into time-of-verdict damages." *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988). The interest provision of the standard fire policy provides that the insurer "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." Minn. Stat. § 65A.01, subd. 3 (emphasis added).

Else argues that the standard fire policy entitles him to prejudgment interest in excess of the coverage limit of the Auto-Owners policy. According to Else, the standard fire policy describes the liability of the insurer as its coverage limit *plus* interest. Auto-Owners counters that the interest provision does not require an insurer to pay prejudgment interest in excess of the policy limit. Pointing to the standard fire policy's interest provision being framed in terms of the company not being liable for *more* than a particular amount, Auto-Owners maintains that the interest provision is a cap on the insurer's liability, not a guarantee of minimum coverage. The court of appeals agreed with

Else that the interest provision contemplates that an insurer may be liable for prejudgment interest in an amount that exceeds the policy limit, but the court of appeals agreed with Auto-Owners that the interest provision states "a maximum" and "is not a *minimum requirement*." *Else II*, 2020 WL 7490559, at *6.

We hold that the plain language of the standard fire policy, by its express terms, entitles an insured to prejudgment interest in an amount that may cause the insured's total recovery to exceed the coverage limit of the policy. The inclusion in section 65A.01, subdivision 3, of the clause "*with interest thereon* from the time when the loss shall become payable" shows that the Legislature did not intend to cap insurer liability at "the sum insured." Minn. Stat. § 65A.01, subd. 3 (emphasis added). Moreover, we have consistently described the standard fire policy as guaranteeing "a minimum level of coverage." *Watson*, 566 N.W.2d at 690; *see also, e.g.*, *Oliver v. State Farm Fire & Cas. Ins. Co.*, 939 N.W.2d 749, 751 n.1 (Minn. 2020); *Poehler*, 899 N.W.2d at 145. And we have explained that insurers are free to issue fire insurance policies that offer additional benefits and "more coverage than the statutory minimum." *Watson*, 566 N.W.2d at 690. Consequently, interpreting the interest provision in the standard fire policy as a liability cap is inconsistent with our case law. We therefore conclude that Else is entitled to prejudgment interest under the standard fire policy in an amount that may cause his total recovery to exceed the applicable coverage limit.

Because we apply the Minnesota standard fire insurance policy, we have no need to consider the rule of law from *Lessard*. We held in *Lessard* that "an insured, *in the absence of any statutory command to the contrary*, may not recover preaward interest which, when

added to total damages, would exceed the monetary limitation on liability contained in insured's policy." 514 N.W.2d at 558 (emphasis added). Here, a statutory command to the contrary exists. The standard fire policy, Minnesota Statutes section 65A.01, subdivision 3, includes a provision that specifically entitles an insured to interest that may exceed the coverage limit. Accordingly, the limit on prejudgment interest that we discussed in *Lessard* has no application here.

II.

We next consider when prejudgment interest began to accrue under the Minnesota standard fire insurance policy. The court of appeals never reached this issue, based on its determination that the standard fire policy did not apply. *Else II*, 2020 WL 7490559, at *6. After oral argument, we requested supplemental briefing addressing "when prejudgment interest began to accrue under the Minnesota standard fire insurance policy" and "whether prejudgment interest may begin to accrue before ascertainment of the loss."[1] We address the accrual issue here in the interests of judicial economy. *See McGuire v. Bowlin*, 932 N.W.2d 819, 828 (Minn. 2019) (resolving a question of law not addressed by the court of appeals or district court in the interests of judicial economy).

The standard fire policy provides that an insured is entitled to interest "from the time when the loss shall become payable." Minn. Stat. § 65A.01, subd. 3. The loss becomes payable under the standard fire policy "60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement

[1] In response to our request for supplemental briefing, Auto-Owners requested supplemental oral argument. We deny that motion.

between the insured and this company expressed in writing or by the filing with this company of an award as herein provided." *Id.*

At issue is whether prejudgment interest can begin accruing before ascertainment of the loss when the insurer denies all liability. The standard fire policy provides that the loss becomes payable after the insurer receives the insured's proof of loss and ascertainment of the loss is made either by an agreement of the parties or an appraisal award. Minn. Stat. § 65A.01, subd. 3. The parties do not dispute that the term "award," in the context of the standard fire policy, refers to an appraisal award, not a jury verdict.[2] "The statute uses the phrase 'award as herein provided.' The only 'award' considered in the statute is that of the appraisers." *Craigie v. Firemen's Ins. Co. of Newark, N.J.*, 191 F. Supp. 710, 715 n.7 (D. Minn. 1961), *aff'd*, 298 F.2d 457 (8th Cir. 1962). It is further undisputed that the parties did not ascertain the amount of loss either by agreement or appraisal; we have only the insured's proof of loss.

Auto-Owners argues that no prejudgment interest accrued under the standard fire policy. According to Auto-Owners, the standard fire policy requires two events for

---

[2] Although the district court found that the standard fire policy does not apply here, the district court alternatively found—contrary to the parties' arguments here—that under the interest provision of the standard fire policy, section 65A.01, subdivision 3, interest would not begin to accrue until the date of the jury verdict. The district court thus concluded that if the standard fire policy applied here, it would not benefit Else because accrual from the date of the verdict would "shorten[] the period during which interest accrues by nearly 3.5 years," compared to the district court's finding that prejudgment interest began to accrue under the prejudgment interest statute at the time of Else's written notice of claim on April 15, 2015. *See* Minn. Stat. § 549.09, subd. 1(b) (providing that prejudgment interest on pecuniary damages shall be computed "from the time of the commencement of the action or . . . the time of a written notice of claim, whichever occurs first").

prejudgment interest to accrue: (1) the insurer must receive the insured's proof of loss, and (2) "ascertainment of the loss" must occur either by an agreement of the parties or an appraisal award. *See* Minn. Stat. § 65A.01, subd. 3. Because the parties did not agree on the loss or appraise the loss, Auto-Owners maintains that the loss never became payable. Else argues that our prior decisions support the proposition that interest can begin to accrue absent ascertainment of the loss.

We have previously awarded prejudgment interest under the standard fire policy starting 60 days after proof of loss without ascertainment of the loss. *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 300 (Minn. 1959). In *Marshall*, a fire caused property damage, and the insurers denied liability under the property owner's policies. *Id.* at 284, 286. Applying the same loss-payable provision as appears in the current standard fire policy, Minnesota Statutes section 65A.01, subdivision 3, we held that the insured was "entitled to interest" on the fire loss beginning 60 days after the insurers received the proof of loss. *Marshall*, 98 N.W.2d at 300 & n.7 (citing authorities). Our opinion in *Marshall* merely identified the date on which interest began to accrue, *id.* at 300; there is no dispute, however, that this date was 60 days after the insurers received the proof of loss.

Auto-Owners acknowledges that we awarded prejudgment interest under the standard fire policy in *Marshall* without ascertainment of the loss. Auto-Owners contends, however, that we should not treat that outcome as stare decisis because the opinion "includes no analysis on interest." Although we did not state the rationale for awarding prejudgment interest 60 days after proof of loss, 98 N.W.2d at 300, we could not have

decided whether and when prejudgment interest began to accrue without interpreting and applying the language of the standard fire policy. Further, we supported our interpretation of the standard fire policy with citations to legal authority. *See* 98 N.W.2d at 300 n.7.[3]

Two years after our decision in *Marshall*, a Minnesota federal district court addressed a similar fire insurance claim—a suspected case of arson and an insurer disclaiming liability with no ascertainment of the loss by agreement or appraisal—and

---

[3] The dissent suggests that the legal authorities that we cited in *Marshall* do not support our interpretation of the standard fire policy because none of the cases cited actually "interpreted the section 65A.01, subdivision 3, loss payable provision." *See* 98 N.W.2d at 300 n.7. It is true that the cases cited were not interpreting the precise statutory language we were interpreting and applying in *Marshall*—the current loss-payable provision of the standard fire policy. But that was because *Marshall* was our first decision interpreting and applying the current loss-payable provision. The current statutory language took effect on January 1, 1956. Act of Apr. 18, 1955, ch. 482, § 6, 1955 Minn. Laws 751, 760 (stating that the amendments to the standard fire policy became effective on January 1, 1956). The fire at issue in *Marshall* took place on March 13, 1956, a mere 3 months later. *Marshall*, 98 N.W.2d at 284. Given the recent amendment to the standard fire policy, the insured in *Marshall*, in its brief, cited legal authorities to support the following general principles:

> (1) an insured has the right to recover interest on fire insurance claims, *Schrepfer v. Rockford Ins. Co.*, 79 N.W. 1005, 1007 (Minn. 1899); *H. F. Shepherdson Co. v. Cent. Fire Ins. Co. of Baltimore*, 19 N.W.2d 772, 778 (Minn. 1945);
>
> (2) interest ordinarily begins to run under a fire insurance policy 60 days after the insured has furnished proof of loss, *Concordia Ins. Co. of Milwaukee v. Sch. Dist. No. 98 of Payne Cnty., Okla.*, 282 U.S. 545, 554–55 (1931); and
>
> (3) interest begins to run from the date the insurer declares that it will not make payment, *Perine v. Grand Lodge A.O.U.W.*, 53 N.W. 367, 369 (Minn. 1892).

We cited these same authorities in our decision to support our award of prejudgment interest starting 60 days after proof of loss. *Marshall*, 98 N.W.2d at 300 n.7.

awarded prejudgment interest beginning 60 days after proof of loss. *Craigie*, 191 F. Supp. at 714–16. Relying on *Marshall*, Chief Judge Edward Devitt rejected the insurer's argument that, because there had been no "ascertainment of the loss," the insured was not entitled to prejudgment interest under the standard fire policy. 191 F. Supp. at 715–16. The federal court observed that the standard fire policy "does not specifically mention a situation, such as here, where the insurer disclaims all liability," but explained that we had "interpreted the statute" in *Marshall* "to allow interest from the date 60 days after which the defendant insurance companies received the proof of loss." 191 F. Supp. at 716 (citing *Marshall*, 98 N.W.2d at 300). The federal court also noted that we had "on other occasions allowed interest for a period of time prior to judgment." *Id.* (citing cases). After examining the record in *Marshall*, the federal court determined that both parties had "fully briefed" the "interest issue" in *Marshall*. *Craigie*, 191 F. Supp. at 716.[4]

[4] The dissent asserts that we are not bound by the outcome in *Marshall* because the prejudgment interest dispute there involved a different issue—whether the insured's proof of loss was "defective." The dissent's characterization of the dispute is mistaken. Although the insurers in *Marshall* did claim that the insured's proof of loss was defective—noting the "different and varying 'proofs of loss' "—the insurers relied on the different figures as evidence that the amount of loss had not been ascertained as required by the standard fire policy. The statutory ascertainment language was central to the prejudgment interest dispute. The insurers specifically argued that "[t]here is no statutory authority for interest" because interest was not "chargeable to the insurers until 60 days after the amount of the loss is *ascertained*." (Emphasis added.) The insurers' brief quoted the ascertainment language and cited numerous authorities for the proposition that interest did not run until the amount of liability had been ascertained. *See, e.g.*, *Lappinen v. Union Ore Co.*, 29 N.W.2d 8, 20 (Minn. 1947) ("Where the amount of a liability has not been ascertained, there is no liability for interest thereon prior to the time of its ascertainment."). The insurers renewed this argument in their reply brief, stressing that "the statute refer[s] to an ascertained loss." In sum, Chief Judge Devitt accurately determined that "the interest issue" in *Marshall* had been "fully briefed." *Craigie*, 191 F. Supp. at 716.

The federal court correctly applied *Marshall* and correctly articulated the rule of law from *Marshall*—that in the situation "where the insurer disclaims all liability" and there has accordingly been no ascertainment of the loss by agreement or appraisal, interest begins to run 60 days after proof of loss. *Craigie*, 191 F. Supp. at 716. Our interpretation of the standard fire policy in *Marshall* and the rule of law articulated in *Craigie* have stood unchallenged—until now—for the last 60 years.[5]

"Once we have interpreted a statute, that prior interpretation 'guides us in reviewing subsequent disputes over the meaning of the statute.' " *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 174 (Minn. 2021) (quoting *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012)). We have long held that "[w]hen a judicial interpretation of a statute has remained undisturbed, it becomes part of the terms of the statute itself." *Wynkoop v. Carpenter*, 574 N.W.2d 422, 426 (Minn. 1998) (citing *Roos v. City of Mankato*, 271 N.W. 582, 584 (Minn. 1937)). In fact, "[t]he doctrine of stare decisis has *special force* in the area of statutory interpretation because the Legislature is free to alter what we have done." *Koehnen v. Flagship Marine Co.*, 947 N.W.2d 448, 453

---

[5] The dissent summarily states that "we conducted no interpretation of the language of the loss payable provision" in *Marshall*. This assertion is not accurate. The insurers specifically claimed that there was "no statutory authority for interest." The parties' briefs each quoted in full the loss-payable provision of the standard fire policy, which included the "ascertainment" language. *See* Minn. Stat. § 65.011 (1956). We could not have determined the specific date on which prejudgment interest began to accrue—"July 10, 1956," *Marshall*, 98 N.W.2d at 300—without interpreting the standard fire policy. After carefully examining "the record and briefs" in *Marshall*, Chief Judge Devitt correctly determined that we "*interpreted the statute* to allow interest from the date 60 days after which the defendant insurance companies received the proof of loss." *Craigie*, 191 F. Supp. at 716 (emphasis added). The dissent mistakes a failure to show our work with a failure to do the work.

(Minn. 2020) (emphasis added) (citation omitted) (internal quotation marks omitted). The Legislature has amended other provisions of the standard fire policy since our decision in *Marshall*, but the Legislature has notably not amended the loss-payable provision in the last 65 years. *See* Minn. Stat. § 645.17(4) (2020) (stating the presumption that "when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language").[6]

We next apply the standard fire policy to the facts here. Once an insured submits a proof of loss for a fire insurance claim, the standard fire policy contemplates that the insurer can settle the claim if it agrees with the amount of loss, or request appraisal if it disagrees with the amount of loss. *See* Minn. Stat. § 65A.01, subd. 3. Auto-Owners did neither here. Instead, Auto-Owners disclaimed all liability. Else requested an appraisal, but Auto-Owners denied that request. Accordingly, consistent with our past precedent interpreting the standard fire policy, Else is entitled to prejudgment interest beginning 60 days after Auto-Owners received the proof of loss.

The dissent suggests that "[n]o one contests" that "an insured has the right to recover interest on fire insurance claims." But the dissent itself contests that right. The dissent acknowledges that a "likely result" of his interpretation of the standard fire policy "is that

---

[6] The Legislature last amended the loss-payable provision in 1955. Act of Apr. 18, 1955, ch. 482, § 1, 1955 Minn. Laws 751, 756. This amendment preceded our decision in *Marshall* and was the same loss-payable provision we interpreted and applied in *Marshall* in 1959. *See* 98 N.W.2d at 300.

Else would recover no interest" under the policy.[7] The dissent's conclusion that an insured is entitled to interest under the standard fire policy only when the insurer agrees to resolve the dispute by agreement or appraisal, but not when it denies all liability, is inconsistent with the purpose of prejudgment interest. "Prejudgment interest essentially serves a dual purpose: (1) to compensate the plaintiff for the loss of use of his money, and, by implication, to deprive the defendant of any gain resulting from the use of money rightfully belonging to the plaintiff; and (2) to promote settlement." *Burniece v. Ill. Farmers Ins. Co.*, 398 N.W.2d 542, 544 (Minn. 1987). Under the dissent's interpretation of the standard fire policy, Else would be deprived of almost 3 years of prejudgment interest while he successfully challenged the insurer's denial of liability. Moreover, the dissent's

[7] Instead, the dissent posits that prejudgment interest might be available under the prejudgment interest statute, rather than the standard fire policy. Although the dissent suggests that the Legislature intended the statutes to operate in concert to provide prejudgment interest on fire insurance claims under different circumstances, the Legislature did not enact the preverdict, prejudgment interest provision of the prejudgment interest statute until 1984 (*see* Act of Apr. 19, 1984, ch. 399, 1984 Minn. Laws 35-36), nearly 90 years after the Legislature enacted the standard fire policy. The dissent's interpretation would leave a decades-long gap in an insured's right to recover prejudgment interest for a fire loss. Moreover, the standard fire policy "guarantees a minimum level of coverage," *Watson*, 566 N.W.2d at 690, whereas the prejudgment interest statute provides for preverdict, prejudgment interest "[e]xcept as otherwise provided by contract," Minn. Stat. § 549.09, subd. 1(b). Consequently, if an insurance policy purports to eliminate the right to prejudgment interest, the dissent's position would erode the protections afforded to insureds for the last century under the standard fire policy. *See Heim v. Am. All. Ins. Co. of N.Y.*, 180 N.W. 225, 226 (Minn. 1920) (explaining that the standard fire policy was "enacted to do away with the evils arising from the insertion in policies of insurance of conditions ingeniously worded, which restricted the liability of the insurer").

interpretation is unreasonable because the loss would never become payable under the loss-payable provision.[8]

[8] Under the dissent's interpretation of the loss-payable provision in the standard fire policy in section 65A.01, subdivision 3, the loss would not become payable and prejudgment interest would not begin to run until "60 days after *two* conditions are satisfied: (1) proof of loss must be received by the insurance company, and (2) the amount of loss ('ascertainment of the loss') must be determined either by written agreement of the parties or by an [appraisal] award." (Footnote omitted.) As a result, if the insurer denies liability and ascertainment of the loss does not occur either by agreement or appraisal (as is the case here), the loss would not become payable and there would be no prejudgment interest because the conditions precedent would never be satisfied. Even under the Auto-Owners policy provision as interpreted by the dissent, there would be no *pre*judgment interest because the loss would not become payable until *after* the "court judgment," which the dissent treats as the ascertainment event here.

The dissent seems to justify this result by suggesting that Else could have more forcefully pressed his demand for appraisal, which would have triggered the interest provision. That suggestion, however, incorrectly presumes that appraisal can resolve every fire loss dispute. Appraisal is an option only for "disputes over the amount of fire loss." *Oliver*, 939 N.W.2d at 751; *see* Minn. Stat. § 65A.01, subd. 3 (addressing the appraisal procedures that apply when the insured and insurer "fail to agree as to the actual cash value or the amount of loss"). Although an appraisal panel generally has "authority to decide the 'amount of loss,' " an appraisal panel may not interpret the insurance policy or make other legal determinations. *Quade v. Secura Ins.*, 814 N.W.2d 703, 706–07 (Minn. 2012) (but explaining that an appraisal panel may interpret policy language when ascertaining the amount of loss, subject to judicial review, noting that an appraisal panel's "liability determinations are not 'final and conclusive' " (quoting *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425, 427 (Minn. 1928))). Questions of coverage are "reserve[d] to the courts." *Id.* at 708.

Situations like these, when the insurer denies liability, make clear why the appraisal process is not always appropriate. Auto-Owners rejected Else's request for appraisal on the ground that the loss was "total." *See* Minn. Stat. § 65A.01, subd. 3 (stating that the appraisal procedures do not apply "in case of total loss on buildings"). Auto-Owners also stated that appraisal was inappropriate because "*all* the appraisal panel can deal with is the amount of loss," and "[i]t can't decide the arson issue that we've got as one of the principal issues in this case." In fact, it was *because* the issues of liability and damages were too closely "mixed" that Auto-Owners and the district court *rejected* bifurcating the issues of damages and liability. Under the dissent's reading of the standard fire policy, Else would not recover prejudgment interest unless Auto-Owners had decided to sign a written agreement on the amount of damages—an outcome even a cursory review of the record would suggest was well-nigh inconceivable.

In the 125 years the standard fire policy has been in place, we have never interpreted the standard fire policy to deny an insured prejudgment interest when the insurer denies liability. We decline to adopt that interpretation for the first time today.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court to recalculate prejudgment interest consistent with this opinion.

Reversed and remanded.

C O N C U R R E N C E & D I S S E N T

THISSEN, Justice (concurring in part and dissenting in part).

This is a tale of two statutory interest provisions. On the one hand, Minnesota Statutes section 549.09, subdivision 1(b) (2020), provides:

> Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed as provided in paragraph (c) from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first, except as provided herein.[1]

I will refer to this as the prejudgment interest statute. Here, the district court awarded appellant Kyle Wendell Else prejudgment interest under section 549.09, subdivision 1(b), from April 15, 2015, the date the district court identified as the time Else submitted his written notice of claim. I agree with the court that, under our case law, respondent Auto-Owners Insurance Company is not liable to pay Else in excess of the policy limits for prejudgment interest awarded under section 549.09. *See Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 559 (Minn. 1994) (holding that under section 549.09, subdivision 1(b), a damage cap will apply to prejudgment interest unless there is a statutory command stating otherwise); *see also Lienhard v. State*, 431 N.W.2d 861, 865–66 (Minn. 1988) (holding that a party is not entitled to prejudgment interest that exceeded a statutory limit on damages). There is no dispute that Auto-Owners has paid Else in full for prejudgment

[1] Section 549.09, subdivision 1(c), sets forth the interest rate to be imposed for certain classes of cases and places limitations on interest rates in other specified cases. The remainder of section 549.09, subdivision 1(b), prohibits the award of prejudgment interest in certain types of cases unless otherwise provided by contract or allowed by law and also places limits on the accrual of interest when settlement offers have been made.

interest awarded under section 549.09, subdivision 1(b), up to the coverage limits, and Auto-Owners is not seeking to claw back the prejudgment interest it has paid.

The second interest provision is found in the Minnesota Standard Fire Insurance Policy statute codified in Minnesota Statutes sections 65A.01–.50 (2020). Section 65A.01, subdivision 3, sets forth several paragraphs of provisions that must be included in every policy that insures against fire damage in Minnesota. *See Poehler v. Cincinnati Ins. Co*., 899 N.W.2d 135, 144–45 (Minn. 2017). One such provision states:

> The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided. It is moreover understood that there can be no abandonment of the property insured to the company, and 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.[2] I will refer to this provision as the loss payable provision. Notably, this is not a "prejudgment interest" statute like section 549.09, subdivision 1. The

---

[2] The Auto-Owners policy at issue here includes a payment of loss provision that mirrors in many respects the statutory loss payable provision. It states:

> We shall adjust any loss with you, and pay you unless another payee is named in the policy. We shall pay within 60 days after we receive your proof of loss and all other requested documents and the amount of loss is finally determined by an agreement between you and us, a court judgment or an appraisal award.

Notably, the policy payment of loss provision says nothing about interest on an award (indeed, as the court points out, interest is not addressed in the policy). Further, the policy payment of loss provision expands on the ascertainment provision in the statute; under the policy, ascertainment of loss may occur not only after agreement of the parties or an appraisal award, but also after a court judgment.

loss payable provision only provides interest from the time the loss becomes payable. Indeed, section 65A.01, subdivision 3 nowhere uses the words "prejudgment interest."

I agree with the court that the policy Auto-Owners issued to Else is subject to chapter 65A. I also agree that, by its terms, interest awarded under the loss payable provision is not subject to coverage limits set forth in the policy. Minn. Stat. § 65A.01, subd. 3 (stating that the company is not liable for more than the sum insured—the policy limit—"*with interest thereon*" from the time the loss is payable (emphasis added)).

I disagree with the court, however, on the operation of the loss payable provision in section 65A.01, subdivision 3. The court concludes that interest begins to accrue under the loss payable provision 60 days after proof of loss. But that interpretation ignores the plain language of the statute. *Vill. Lofts at St. Anthony Falls Ass'n v. Hous. Partners III-Lofts, LLC*, 937 N.W.2d 430, 435 (Minn. 2020) (stating that we must follow the language of a statute when it is plain); *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019) (stating that statutory language "is not examined in isolation; rather, all provisions in the statute must be read and interpreted as whole"). In my view, interest begins to accrue under the loss payable provision in section 65A.01, subdivision 3, 60 days after two things occur: (1) the insured submits proof of loss and (2) the amount of loss is ascertained.

A.

I will return to my reasons why I disagree with the court's conclusion about how the loss payable provision in section 65A.01, subdivision 3, operates in short order. But first, I want to briefly focus on the odd posture of the appeal. Else's primary argument is simple: he claims that because the insurance policy is governed by chapter 65A and incorporated

into the insurance policy, we should modify section 549.09, subdivision 1(b), with the last sentence of the loss payment provision in section 65A.01, subdivision 3. Essentially, Else wants to take the helpful parts of the two statutes (interest runs from the time of the written notice of the claim under section 549.09, subdivision 1(b), and the coverage limit does not cap prejudgment interest under section 65A.01, subdivision 3) and eliminate the unhelpful parts of the two statutes (prejudgment interest does not begin to run until the insured submits proof of loss and the amount of loss is ascertained under section 65A.01, subdivision 3, and coverage limits cap prejudgment interest under section 549.09, subdivision 1(b)). The court properly rejects that argument. The two statutes are distinct, with different substantive provisions and conditions.

We could end our analysis there and allow Else to keep the prejudgment interest he was already awarded—prejudgment interest that Auto-Owners already paid up to coverage limits and that Auto-Owners is not seeking to claw back. I support that resolution of the case.

Poehler is instructive on this point, even though the dispute in *Poehler* was somewhat different from the dispute in this case. In *Poehler*, the insured insisted that it could recover preaward interest under section 549.09, subdivision 1(b), from the time the insured provided written notice of loss to the insurer. 899 N.W.2d at 139. The insurer asserted that the interest available to the insured was limited by contract or by section 65A.01, subdivision 3, to interest running from the amount of loss that was finally determined under the loss payable provision in the contract or the statute. *Id.* at 141–42. The dispute was about whether section 65A.01 or section 549.09 applied for purposes of

calculating prejudgment interest. *Id.* at 138. Notably, the prejudgment interest awarded in *Poehler* did not exceed the policy limits. In contrast, Else and Auto-Owners seemingly *agree* that section 549.09, subdivision 1(b), applies; their dispute is about whether the typical section 549.09 rule that policy limits cap prejudgment interest for policies governed by chapter 65A also applies.

The contractual loss payment provision in *Poehler* was functionally equivalent to the contractual loss payable provision in the Auto-Owners policy at issue here, with one important exception. In both policies, losses were payable within a certain timeframe after one of three events occurs: (1) the parties agree on the amount of loss; (2) an appraiser files an appraisal award determining the amount of loss; or (3) final judgment is entered on the amount of loss. *See Poehler*, 899 N.W.2d at 142. Neither policy included in the loss payable provision or elsewhere an express provision about or prohibition on preaward interest. The primary difference between the policies is that the policy in *Poehler* required that losses be paid within 5 days of the triggering event, while the Auto-Owners policy required (like section 65A.01) that losses be paid within 60 days after the triggering event.

In *Poehler*, the insurer argued that the contractual loss payable provision limited the period of time when interest accrued: no interest accrued until 5 days after the loss payable triggering event. *See id.* at 141–42. We rejected that argument, holding that, "absent contractual language explicitly precluding preaward interest, an insured may recover [under section 549.09, subdivision 1(b)] preaward interest on an appraisal award for a fire insurance loss, notwithstanding a contractual loss payment provision stating that the loss is payable after the filing of an appraisal award." *Id.* at 142. Consequently, the contractual

loss payable provision in *Poehler* did not preclude the insured from recovering prejudgment interest under section 549.09, subdivision 1(b), from the earliest of "the commencement of the action or a demand for arbitration, or the time of a written notice of claim" as stated in section 549.09, subdivision 1(b). The same result is required here: the contractual language in the Auto-Owners insurance policy does not prohibit Else from recovering interest from the date Else provided a written notice of a claim to Auto-Owners. Indeed, Auto-Owners does not argue otherwise.

Poehler then addressed another argument: Was the insured limited by section 65A.01, subdivision 3, from recovering preaward interest on his appraisal award from the time he provided written notice of his claim? *Id.* at 143. Noting that section 549.09, subdivision 1(b), governs prejudgment interest " '[e]xcept as otherwise . . . allowed by law,' " the insurer argued "that the loss payment provision mandated by section 65A.01 precludes [the insured] from recovering preaward interest on the appraisal award because section 65A.01 states that an insurer does not owe any interest until the loss is payable, which, according to the statute, is 60 days after the filing of the appraisal award." *Id.* at 143–44 (quoting Minn. Stat. § 549.09, subd. 1(b)).

We also rejected that argument. We noted that while the provisions of section 65A.01 may not be omitted, changed, or waived, "insurance companies may include additional or different terms into their policies that offer more coverage than the statutory minimum." *Id.* at 145 (citation omitted) (internal quotation marks omitted). We held that section 65A.01 did not apply at all to, and was not incorporated into, the policy because the policy provision "offered greater benefits and broader coverage to the insured." *Id.*

(noting that the policy provision included a shorter payment schedule than the statutory provision and omitted the interest language in section 65A.01). Accordingly, we concluded that the insured could recover preaward interest under section 549.09, subdivision 1(b), from the time the insured provided the insurer with written notice of its claim. (Of course, any such interest would be capped at policy limits under the usual rule in section 549.09, subdivision 1(b), cases.)

Under one reading of *Poehler*, the same result is compelled in this case. Although Auto-Owners' policy did not benefit Else by shortening the time after which a loss is payable to something less than 60 days, the failure of the Auto-Owners policy language to address accrual of interest arguably benefitted Else by allowing Else to recover prejudgment interest under section 549.09, subdivision 1(b), from an earlier point in time—the time that Else filed his written notice of claim. In this reading, *Poehler* raises a serious problem for the court's approach to expressly read section 65A.01, subdivision 3, into the Auto-Owners policy and apply it.

In its analysis, however, *Poehler* did not wrestle with the sticky issue the parties face in this case: Does a policy provision that allows for recovery of prejudgment interest under section 549.09, subdivision 1(b), from the time an insured provides a written notice of claim to the insurer truly benefit an insured in situations where the amount of prejudgment interest *exceeds* the policy limits; and, if not, how do we deal with that situation? *See Poehler*, 899 N.W.2d at 145 (stating that differences between policy language and section 65A.01 should not be used as a sword for the insurer). In addition, the *Poehler* court expressly disavowed interpreting the effect of the section 65A.01,

subdivision 3, loss payment provision on preaward interest. *Id.* One alternative way to read the loss payable provision in section 65A.01, subdivision 3, is to limit its application to situations where an appraisal is actually completed, or the parties otherwise agree on the amount of loss. Arguably, that leaves statutory space for section 549.09, subdivision 1(b), to apply to accrual of prejudgment interest in other cases involving fire insurance policies where neither an appraisal was completed nor an agreement was reached.

Because both parties seem to agree that Else may recover interest under section 549.09, subdivision 1(b), we need not reach and resolve the issue of whether Else may recover interest under section 549.09, subdivision 1(b). Instead, as I previously stated, we could simply accept the parties' agreement on that point, reject Else's argument that the last sentence of the section 65A.01 loss payable provision is incorporated into section 549.09. subdivision 1(b), in fire insurance policy cases (a conclusion upon which the court and I agree), and affirm the district court's decision to award interest under 549.09, subdivision 1(b), up to policy limits. But because the court insists that Else is entitled to prejudgment interest in excess of coverage limits, it must base its analysis on section 65A.01, subdivision 3. Therefore, I will explain fully my reasons for disagreeing with the court's interpretation of that statute and how it operates.

B.

I start with the text of the statute. The loss payable provision authorizes an insured to recover interest that runs "from the time when the loss shall *become payable*, *as above provided*." Minn. Stat. § 65A.01, subd. 3 (emphasis added). The preceding sentence states that a loss shall become payable—and accordingly interest will begin to run on such a

loss—60 days after *two* conditions are satisfied: (1) proof of loss must be received by the insurance company,[3] and (2) the amount of loss ("ascertainment of the loss") must be determined either by written agreement of the parties or by an award made by two of the appraisers or one appraiser and an umpire appointed under the terms of a different provision of section 65A.01, subdivision 3.[4] According to the record, Else did not submit

---

[3] The phrase "after proof of loss, as herein provided, is received by this company," refers to a different provision in section 65A.01, subdivision 3, which lays out specific requirements to show proof of loss to the company, including giving immediate written notice of the loss and submission to the insurer within 60 days of a signed and sworn statement setting forth, among other things, the value of the property insured. The proof of loss provision reads in relevant part:

> In case of any loss under this policy the insured shall give immediate written notice to this company of any loss, protect the property from further damage, and a statement in writing, signed and sworn to by the insured, shall within 60 days be rendered to the company, setting forth the value of the property insured, except in case of total loss on buildings the value of said buildings need not be stated, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured.

Minn. Stat. § 65A.01, subd. 3.

[4] The appraisal provision in section 65A.01, subdivision 3, states in relevant part:

> In case the insured and this company, except in case of total loss on buildings, shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. In case either fails to select an appraiser within the time provided, then a presiding judge of the district court of the county wherein the loss occurs may appoint such appraiser for such party upon application of the other party in writing by giving five days' notice thereof in writing to the party failing to appoint. The appraisers shall first select a competent and

a proof of loss consistent with the terms of the statute and his insurance policy until June 7, 2016. And it is undisputed that the amount of loss was not ascertained by agreement of the parties or by appraisers. Ultimately, the amount of loss was ascertained under the payment of loss policy provision by court judgment in accordance with the Auto-Owners insurance policy. *See*, *supra*, n.2.

The court does not contest that the words of the loss payable provision plainly set forth the two conditions that must be met before a loss becomes payable and before interest accrues on such a loss. The court does no statutory interpretation at all. Rather, the court contends that we are prevented from applying the plain language of the statute—at least as to the date of interest accrual—because of our decision in *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280 (Minn. 1959). The court asserts that we held in *Marshall* that, in cases where no appraisal is done, interest under the loss payable provision starts to accrue 60 days after proof of loss is filed—the insured need not satisfy the "ascertainment of loss" condition of the policy before interest starts to accrue. I disagree because *Marshall* held no such thing.

> disinterested umpire; and failing for 15 days to agree upon such umpire, then a presiding judge of the above mentioned court may appoint such an umpire upon application of party in writing by giving five days' notice thereof in writing to the other party. The appraisers shall then appraise the loss, stating separately actual value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual value and loss. Each appraiser shall be paid by the selecting party, or the party for whom selected, and the expense of the appraisal and umpire shall be paid by the parties equally.

Minn. Stat. § 65A.01, subd. 3.

In *Marshall*, we were asked to determine whether smoke contamination from a nearby fire was a loss under the insured's policy. *Id.* at 284. The insured owned and operated a plant for the storage of eggs and milk and the processing of the eggs and milk into powder form. *Id.* A house near the plant caught fire and smoke drifted and entered the processing plant, contaminating the eggs, egg powder, and milk powder. *Id.* The processing plant's customer, the United States Army, rejected the egg powder and milk powder because the processing plant violated specific sanitary standards set forth in the contract; specifically, the plant was required to be free from "foul odors, dust, and *smoke-laden air*." *Id.* at 284–85. The insured suffered losses because of the Army's rejection and sought coverage for its losses from its insurer.

Central to the case was whether the insurance policy's language of "loss or damage" included the merchandise's loss in value because of the smoke damage or whether it required physical damage by fire. *Marshall*, 98 N.W.2d at 287. We spent many pages analyzing that question and concluded that the insured property did not have to be physically damaged by fire to recover under the policy. *Id.* at 290–91. Rather, because the smoke contamination was so severe, we determined that the smoke-damage loss was recoverable "as if the goods had been physically destroyed by the fire itself." *Id.* at 292. We held that the policy covered the insured's losses.

At the tail end of the case, we summarized as follows: "We reach the conclusion that the trial court's finding of loss and damage to the shell eggs and egg and milk powder in drums is adequately supported by the evidence *and that plaintiff is entitled to interest thereon from July 10, 1956*." *Id.* at 300 (emphasis added). Those italicized dozen words

and a string cite in an attached footnote at the end of a long opinion is the sole foundation for the court's conclusion that, despite plain language that interest does not accrue until two conditions are satisfied—proof of loss and ascertainment—we have already interpreted the loss payable provision to say that interest accrues solely upon proof of loss.

First, we conducted no interpretation of the language of the loss payable provision contained within the predecessor statute to section 65A.01. *See id.* at 280–301; *see also* Act of May 11, 1967, ch. 395, art. 6, § 27, 1967 Minn. Laws 587, 778 (repealing Minnesota chapter 65 (1965) as part of a recodification of Minnesota insurance laws).

Moreover, *none* of the four cases cited in the footnote string cite after the award of interest interpreted the section 65A.01, subdivision 3, loss payable provision. *Marshall*, 98 N.W.2d at 300 n.7. In *H. F. Shepherdson Co. v. Cent. Fire Ins. Co. of Baltimore*, we held that a mortgagee who was payee under an insurance policy had no obligation to submit a proof of loss and the proof of loss conditions-precedent in the policy did not apply. 19 N.W.2d 772, 776, 778 (Minn. 1945). A separate provision of section 65A.01, subdivision 3, which is not at issue here, addresses the distinct obligations of mortgagees. The fire insurance policy in *Concordia Ins. Co. of Milwaukee v. Sch. Dist. No. 98 of Payne Cnty., Okl.*, 282 U.S. 545 (1931), involved policy language that provided that losses were payable 60 days after proof of loss but included no additional ascertainment requirement like that in the Minnesota statute.

As to the other cases cited in the footnote in *Marshall*, the policy in *Schrepfer v. Rockford Ins. Co*. also did not include an ascertainment condition. 79 N.W. 1005, 1006 (Minn. 1899). Indeed, the court expressly distinguished the policy at issue from policies

that included an ascertainment requirement. *Id.* at 1006–07. But the policy included a provision that stated that, when a dispute arose over the amount of loss, the insurer had a right to arbitrate and ascertain the amount of loss before it was required to pay it. *Id.* at 1007. Most significant here is that in *Schrepfer*, we affirmatively held that such an arbitration provision was a "condition precedent" to recover under the policy; precisely opposite to the conclusion that the court reaches in this case. *See id.* The *Schrepfer* court ultimately concluded that the insurer waived its right to arbitrate under the policy—but we also limited accrual of interest to the date of the waiver, a date that was long *after* proof of loss was submitted.[5] *Id.* Finally, *Perine v. Grand Lodge of A.O.V.W.*, 53 N.W. 367 (Minn. 1892), involved a life insurance policy, not the standard fire policy.

---

[5] Potential waiver issues also make this case messy in many ways. An issue that is not squarely before us but may be relevant to the ultimate resolution of the case on remand is whether Auto-Owners' conduct constitutes a waiver, or estops the insurer, from claiming that Else has failed to satisfy the ascertainment condition. The record is not fully developed, and the district court did not address the issue.

Based on Else's complaint and evidence in the record, it appears that Else first demanded appraisal by email on December 7, 2015. On December 16, 2015, Else sent Auto-Owners a follow-up letter of appraisal demand in which he suggested two separate appraisals—one appraisal for the February 11, 2015, fire, which originated in the garage and was likely linked to a faulty wiring harness in Else's GMC Acadia SUV but the cause of which was left "undetermined" by fire investigators; and a second appraisal for the February 18, 2015, fire, which destroyed Else's home. At the time Else demanded arbitration in December 2015, arson charges against Else relating to the second fire remained pending. They were not resolved until his acquittal on those charges on November 10, 2016.

On December 31, 2015, Auto-Owners responded to Else's appraisal demand. Auto-Owners observed that it had asked Else for a signed, sworn proof of loss several months previously and Else had failed to submit anything. Auto-Owners also noted that, several months earlier, it scheduled Else to submit to an examination under oath as required under the policy and to provide other documents. Else had done neither. Appraisal under the policy was contingent on Else complying with those policy requirements. Auto-Owners

The court acknowledges that these cases did not interpret the text or operation of the loss payable provision in section 65A.01, subdivision 3 (then codified as Minnesota Statutes section 65.011 (1957)). Further, while it is true that the loss payable provision was amended in 1955—just a few years before we decided *Marshall*, the cases cited in the

---

also stated that the February 18 fire appeared to be a total loss, in which event an appraisal was inappropriate. It concluded that an appraisal was either not required or was "at best . . . premature." Else ultimately completed an examination under oath on April 5, 2016, and submitted a Proof of Loss on June 7, 2016. The record is unclear about whether Else subsequently specifically renewed his demand for an appraisal.

In previous cases, we have suggested that an insurer's right under a policy to insist that disputes over an amount of loss be submitted to an arbitrator may be waived. *E.g.*, *Schrepfer*, 79 N.W. at 1007. In *Schrepfer*, we were not interpreting the loss payable clause now found in section 65A.01, but instead a policy provision that gave the insurer a right to arbitrate. *Id.* at 1006–07. In its policy with Else, Auto-Owners agreed that if it would not reach agreement on the actual cash value or amount of loss covered by the policy, "either party can make a written demand for an appraisal," which would set forth the process for appraising the loss. Of course, that language requires a dispute to exist. Further, the party seeking the appraisal must comply with other conditions of the policy. And, as noted, the policy also recognizes that, in addition to an agreement of the parties or a determination by appraisers, ascertainment may occur upon "court judgment."

It is also worth noting that the predecessor to the appraisal provisions in section 65A.01, subdivision 3 (the provision quoted below at C/D-15), that was in effect before 1957, was different from the appraisal provision that exists today. In particular, the former law left an insured whose demand for an appraisal was ignored by the insurer no further remedy. *See Kavli v. Eagle Star Ins. Co.*, 288 N.W. 723, 726 (Minn. 1939) (stating that the updated statute was to remedy the defects in arbitration (like the failure or refusal of the appraisers to act) and was "enacted to enable a party to make the arbitration clause effective"). The current statute fills that gap. It anticipates that a party may deny a request for appraisal, fail to respond to a request for appraisal in a timely matter, or fail to respond at all to an appraisal request. Minn. Stat. § 65A.01, subd. 3. The statute creates a contingency plan at each step when a party fails to take the required action, allowing the appraisal process to move forward, even with a taciturn counterpart. *Id.* Specifically, when a party does not appoint an appraiser within 20 days, then a presiding judge may compel appraisal. *Id.* Here, there is no evidence in the record that Else compelled appraisal as provided for in section 65A.01, subdivision 3.

In part, because it is not clear whether Else argued about a waiver to the district court, I would leave the resolution of all these issues for the district court to determine on remand.

footnote did not address the statutory fire insurance loss payable provision in effect when *Marshall* was decided *or* the predecessor version of the statutory fire insurance loss payable provision. The recency of the amendment does not make citation to the cases in the footnote more compelling. Indeed, the recency of the new language is just further proof that our citation to the older cases was not doing any statutory interpretation work. Moreover, language that is similar to section 65A.01, subdivision 3, was part of the fire insurance chapter dating back to 1895, including the phrase "with interest thereon from the time when the loss shall become payable, as above provided." Act of Apr. 25, 1895, ch. 175, § 53, 1895 Minn. Laws 420. Significantly, however, the language triggering when loss was payable in effect from 1895 to 1955 differs from the language in effect in 1957 until today. From 1895 to 1955, the language provided that:

> [T]he company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided [or replace, rebuild, or repair the property].

Minn. Stat. § 65.01 (1953). This textual difference (which is perhaps ambiguous enough to be more amenable to an interpretation that receipt of the notice of loss begins the 60-day period within which a loss must be paid) makes suspect any reliance on prior cases to understand the meaning of the current statutory loss payable provision.

Further, the "general principles" that the court claims the *Marshall* court drew from the cases cited in footnote 7 of the case are irrelevant to interpreting the statutory language of section 65A.01, subdivision 3. The first principle the court identifies is that an insured has the right to recover interest on fire insurance claims, citing *Schrepfer*, 98 N.W. at 1007,

and *H. F. Shepherdson Co.*, 19 N.W.2d at 778. No one contests that. Once again, Else was paid interest on his fire insurance claim. The second principle that the court identifies is that interest *ordinarily* begins to run under a fire insurance policy 60 days after the insured has furnished proof of loss, citing *Concordia Ins. Co.*, 282 U.S. at 554–55. But as noted, the provision in that case did not include an ascertainment condition like that in section 65A.01, subdivision 3. The accrual of interest under section 65A.01, subdivision 3, is not an "ordinary case." The third principle the court identifies is that interest begins to run from the date the insurer declares that it will not make payment, citing *Perine*, 53 N.W. at 369. But as noted, *Perine* was about life insurance policies and not about fire insurance policies or the interest accrual on the loss payable provision at issue here. Although the principles the court identifies may be interesting standards of insurance law, they have nothing to do with the meaning of the specific text of the loss payable provision of section 65A.01, subdivision 3, or how it operates. All of this supports the conclusion that in *Marshall,* we were not interpreting the text of the fire insurance statute to understand when interest starts to accrue under the statutory loss payable provision.

Indeed, the court does not claim that we explicitly engaged in legal interpretation of the statute in *Marshall*. Rather, the court rests its conclusion solely on the *facts* in *Marshall* and not our *legal reasoning*. Essentially, the court posits that because the relevant insurance policy included the statutory loss payable provision, there was no evidence that the loss had been ascertained, and the court approved an award of interest that accrued

60 days after the proof of loss was filed, it necessarily follows that we held that the statutory ascertainment condition may be ignored in every case.[6]

We rejected precisely such an argument in *Staub v. Myrtle Lake Resort, LLC*, a case about proof of causation in negligence cases. 964 N.W.2d 613, 628–29 (Minn. 2021). In *Staub*, we relied on a prior decision in *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367 (Minn. 2008), and held that a plaintiff claiming negligence need not establish that her theory of causation preponderates over alternative theories when alternative theories of liability are consistent with the plaintiff's theory (i.e., when each theory of causation could be one of the substantial factors causing harm). *Staub*, 964 N.W.2d at 628. We concluded that prior cases, where the facts recited in the opinion suggested that we dismissed negligence claims because the plaintiffs failed to meet their burden to show that their theory preponderated over competing theories even though the theories in each case were not necessarily inconsistent, did not present a roadblock to our holding. *Id.* at 628–29. We stated that, while the analysis of the cases "may be true as a descriptive matter . . . that descriptive fact is not analytically relevant." *Id.* We went on to say that, in "none of those cases did we directly confront and address the legal question of whether the rule that a plaintiff must show that her theory of causation preponderates over alternative theories

---

[6] This conclusion is made more evident by the rule of law the court announces: *where the insurer disclaims all liability*, prejudgment interest begins to accrue under the standard fire policy 60 days after the insurer receives the proof of loss, even absent an agreement of the parties or the filing of an appraisal award. The qualifier "where the insurer disclaims all liability" has no connection to or foundation in the statutory language. It is a judge-imposed gloss on the statutory language.

should apply when each theory could be one of several substantial factors causing the harm." *Id.* at 629.

The court acknowledges that we included absolutely no analysis of the statutory language of section 65A.01, subdivision 3, in *Marshall*. It nonetheless insists that we *must have* analyzed the language but simply neglected to explain ourselves. I am not so sure. Indeed, based on the text of the statute, it is hard to understand what our purported and unstated statutory interpretation analysis possibly could have been. The court offers none.

The best explanation of why we did not analyze the statute is that the meaning of the statute was not, in fact, before us in *Marshall*. A review of the briefs in *Marshall*[7] demonstrates that the insurer did not claim that it was not obligated to pay interest because the amount of the loss had not been ascertained by agreement or by an appraiser (the second loss payable condition in section 65A.01, subdivision 3). Rather, the insurer challenged whether the insured's proof of loss was defective. The district court had awarded interest to start 60 days after service of the proof of loss, on July 10, 1956. The insurer challenged that award, claiming that the insured's proof of loss—which asserted that the amount of loss was $61,762.35—was defective as a proof of loss because, in his complaint, the insured sought $79,241.53 and then at trial sought $86,158.93. It was that defective proof of loss argument that we rejected in those dozen words in *Marshall.* The interpretive question before us today—does the loss payable provision require the insured to satisfy

[7] The briefs in *Marshall*—like the briefs in every case that has been argued before us—are available to the public at the Minnesota State Law Library. Because the court contests what was at issue in the case, I attach as an addendum to this dissent the relevant portions of the briefs in *Marshall* so readers can make up their own minds.

two conditions (proof of loss and ascertainment) before interest begins to run—was simply not the legal question before us in *Marshall*.

"The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *Fletcher v. Scott*, 277 N.W. 270, 272 (Minn. 1938); *see also In re Krogstad*, 958 N.W.2d 331, 337–38 (Minn. 2021) (recognizing the principle articulated in *Fletcher*); *Hanson v. Dep't of Nat. Res.*, 972 N.W.2d 362, 380 (Minn. 2022) (Chutich, J., concurring) (quoting *Fletcher* for this principle). In *Marshall*, we did not apply our "judicial mind" to the question of whether the loss payable provision in section 65A.01, subdivision 3, allows interest to be awarded before both the conditions set forth in the statute are met. Consequently, we are free to apply the undisputed plain language and hold that interest started to accrue under the loss payable provision of section 65A.01, subdivision 3, only after Else submitted his proof of loss and the amount of loss was ascertained.

C.

In this case, one likely result of remand under my plain reading of the statute is that Else would recover no interest *under section 65A.01, subdivision 3*. Under the terms of the *insurance policy*, payment must be made within 60 days after "ascertainment"—here, the time of court judgment—and Auto-Owners paid the judgment within 60 days of the court judgment. The court repeatedly expresses significant concern that, because of that outcome, I am depriving Else of "prejudgment interest." I am not.

First, it is critical to remember that this case is not about whether Else receives prejudgment interest. It is about whether he receives prejudgment interest *in excess of*

policy limits. The district court awarded Else prejudgment interest under section 549.09, subdivision 1(b), in accordance with our longstanding precedent—it was just not as much prejudgment interest as Else wanted. I would not overturn the award of prejudgment interest made in this case.

Moreover, I am not convinced that section 65A.01, subdivision 3, provides for "prejudgment interest" at all. There is nothing in the court's decision to suggest that insureds had a right to "prejudgment interest" at common law. And the purported statutory authority for "prejudgment interest"—section 65A.01, subdivision 3—does not expressly provide for "prejudgment interest." It never uses those words. The only mention of "interest" in section 65A.01, subdivision 3, is the loss payable provision that is at the heart of this case. That provision does not qualify the term "interest" with the adjective "prejudgment." Rather, the loss payable provision states that interest begins to accrue "from the time when the loss shall become payable [once it is ascertained], as above provided." Certainly, the court and I disagree about whether the dozen words in *Marshall* recognized a distinct statutory right to "prejudgment interest" under section 65A.01, subdivision 3. The court thinks *Marshall* recognized such a right, and I do not.[8] In my

[8] Notably, it is not clear that Minnesota insurers or insureds have viewed *Marshall* as creating such a right. Neither the parties nor the amici cited or relied on *Marshall* or *Craigie* in their initial briefs. The entire argument before the district court and the court of appeals was about how prejudgment interest should be awarded *under section 549.09*. That is understandable since interest accrues under section 549.09, subdivision 1, at a moment ("written notice of claim") that is typically earlier—and certainly no later—than the moment interest would accrue even under the court's interpretation of section 65A.01, subdivision 3 ("proof of loss"). Section 549.09, subdivision 1, is usually more favorable to the insured. It is only when damages plus prejudgment insurance exceeds policy limits that section 549.09, subdivision 1, may be less favorable.

view, if Else cannot recover interest *under the section 65A.01 loss payable provision* because Auto-Insurers paid the loss within 60 days (i.e., by the date the loss became payable), Else is being deprived of nothing. And the fact that Else cannot recover interest in this case under section 65A.01 does not render the interpretation of that statute unreasonable; it is simply what the Legislature directed in the text of the statute. If it is unreasonable, recourse should be sought from the Legislature.

At the end of the day, the court's essential policy concern seems to be that an insurer may play games and delay the final ascertainment of the amount of loss unnecessarily. It views prejudgment interest (not post-ascertainment interest) as a tool needed to disincentivize such behavior. And I find the court's policy concerns reasonable. Indeed, such concerns are a reason the Legislature enacted section 549.09. But I disagree that it is our place as a court to impose a unique and distinct "prejudgment interest" regime under section 65A.01, subdivision 3—one that does not include a policy limits cap—as a tool to solve that perceived policy problem. That is for the Legislature to do if it chooses. And my reading of the plain language of section 65A.01, subdivision 3, suggests that the Legislature did not provide for prejudgment interest to serve that policy purpose (unlike in section 549.09, subdivision 1, where the Legislature chose to create a right to prejudgment ("preverdict, preaward, or prereport") interest to serve that policy purpose). The two statutes do not "operate in concert." Rather, they do two different things. My discussion of section 549.09 is to clarify that Else benefits from the existence of section 549.09,

subdivision 1(b), prejudgment interest. This whole dispute arises from his effort to benefit from section 549.09 while avoiding our decisions in *Lessard* and *Leinhard*.

Moreover, the court's concern about the unfairness caused by recalcitrant insurers seems to focus on the precise situation where, as in this case, the insurer refused to agree to an appraisal process. Let's take a counterfactual. Assume that Auto-Owners agreed to an appraisal and the panel determined the amount due rather than a jury after trial. In that case, I do not believe Else would, or even could, argue that he is entitled under the statutory loss payable provision to interest *before* the appraisers made their determination of the amount of loss. Otherwise, important portions of the text of the loss payable provision—"and ascertainment of the loss is made . . . by the filing with this company of an award as herein provided" and "with interest thereon from the time when the loss shall become payable, *as above provided*"—become meaningless. Minn. Stat. § 65A.01, subd. 3 (emphasis added); *see State v. Strobel*, 932 N.W.2d 303, 309 (Minn. 2019) (instructing that we should avoid interpretations that render words in a statute superfluous). Further, we should not read the same statutory text one way when applied in one situation (where an appraisal occurs) and a different way in another situation (where no appraisal occurs). *See Wilbur v. State Farm Mut. Auto. Ins. Co.*, 892 N.W.2d 521, 524 (Minn. 2017) (explaining that we favor interpreting the same word in the same context consistently).

Moreover, in the specific context of an insurer's refusal to engage in an appraisal process (or voluntarily agree to the amount of loss), we have already provided a different kind of protection against an insurer that is dragging its feet. As discussed above in note 5,

Else may claim that Auto-Owners waived, or is estopped from contending, that Else did not satisfy the ascertainment requirement of the loss payable provision along the lines of our decision in *Schrepfer*. *See* 79 N.W. at 1006–07. In short, we need not work so hard to avoid plain statutory language to protect insureds from foot-dragging insurers when protection is already provided under section 549.09 and cases like *Schrepfer*.

D.

In conclusion, my first preference would be to reject Else's argument that the last sentence of the loss payable provision should be incorporated in section 549.09, subdivision 1, and do nothing else. Because Auto-Owners does not argue that Else is not entitled to prejudgment interest up to coverage limits under section 549.09, subdivision 1(b), and because Else seemingly does not contend that he is prohibited from recovering prejudgment interest under section 549.09, subdivision 1(b), we should simply confirm the district court's decision.

If the case is remanded to the district court so that it can apply the loss payable provision in section 65A.01, subdivision 3, I disagree with, and dissent from, the court's directive that the district court should award interest from August 2016—60 days after the date that Else submitted his proof of loss. Instead, in accordance with the plain language of section 65A.01, subdivision 3, I would direct the district court to award interest, if any, accruing no earlier than the date that Else satisfied both the proof of loss and ascertainment conditions set forth in the loss payable provision of section 65A.01, subdivision 3, as enhanced by the payment of loss provision in the Auto-Owners policy.

GILDEA, Chief Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Thissen.

ANDERSON, Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Thissen.

37702 37763

State of Minnesota, In Supreme Court.

MARSHALL PRODUCE COMPANY
Appellant-Respondent

VS.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL.
Respondents-Appellants

RESPONDENTS' BRIEF

NEVILLE, JOHNSON & THOMPSON
654 Midland Bank Building
Minneapolis 1, Minnesota
Attorneys for Respondents

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

INDEX

In addition, defendants presented the testimony of Mr. Edwin I. Peters and Mr. John S. Henten, both experienced fire adjusters, who could find no damage to these products. Mr. William Schneider, in the business of processing eggs, found no smoke damage.

II.

The trial court was in error in amending its findings to permit plaintiff to recover interest.

The contracts all provide as follows:

> "The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided. It is moreover understood that there can be no abandonment of the property insured to the company, and 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."

These are Minnesota Standard Fire Insurance policies.

There is no statutory authority for interest.

The date of July 10, 1956 is apparently computed from May 10, 1956, when plaintiff served on the defendants, what on its face purports to

be a proof of loss, Defendants' Exhibit 16. It was offered in evidence (R. p. 444) to impeach Julius Weiner as to the varying statements made as to the amount of the loss. In Exhibit 16, plaintiff claims $61,762.35 as damages.

When the complaint was served, plaintiff claimed damages of $79,241.53 (R. p. 4, f. 2).

At the opening of the trial, plaintiff, over defendants' objection, moved to increase its claim for damages to $86,158.93 (R. p. 109, f. 2).

In *Lappinen v. Union Ore Co.* (1947), 224 Minn. 395, 29 N. W. 2d 8, the court, in dealing with Workmen's Compensation cases, points out (a) that there is specific compensation for specific injuries, and (b) that the Workmen's Compensation Act should be liberally construed. The court, in denying interest, stated:

> "Where interest is allowed upon Workmen's Compensation, it is awarded *as damages* for default consisting of failure to make payment when due the same as in other cases where there is neither an express promise to pay nor a statutory duty to do so * * * (citing cases) * * *
>
> "It logically follows that there can be no liability for interest where there is a liability to pay money, but no express promise to pay interest thereon, nor statutory obligation to do so, and no default consisting of failure to pay the money when due * * * (citing cases) * * *
>
> "Where the amount of liability has not been ascertained, there is no liability for interest

> thereon prior to the time of its ascertainment * * * (citing cases) * * *."

The court, in making the above statement, cites and relies heavily on the opinion of Mr. Justice Mitchell in *County of Redwood v. Winona & St. P. Land Co.* (1889), 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; affirmed, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247, where Justice Mitchell held that a delinquent taxpayer owing a tax on omitted lands need not pay interest in the absence of a promise or a default of duty for, "*He has never had an opportunity to pay the tax, for the amount of it has never been ascertained.*" (Emphasis supplied by the court in *Lappinen v. Union Ore Co., supra.*)

Volume 154, *A. L. R.*, on page 1375, has this language:

> "In accordance with the view that, as a general proposition, interest upon a loss payable under a fire insurance policy is not recoverable before the payment of the principal is due under the terms of the policy, it has been held that where the proofs of loss furnished by an insured under the terms of his policy are defective, interest cannot begin to run until correct proofs are submitted."

Each of plaintiff's successive amendments are an admission that the prior proofs of loss are defective.

37702 37763

State of Minnesota,
In Supreme Court.

MARSHALL PRODUCE COMPANY, A CORPORATION
Plaintiff-Appellant-Respondent

VS.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, AND FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, A CORPORATION
Defendants-Respondents-Appellants

AND

OHIO FARMERS INSURANCE COMPANY, A CORPORATION; HOME FIRE AND MARINE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION; UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION; THE TRAVELERS FIRE INSURANCE COMPANY, A CORPORATION; FIRE ASSOCIATION OF PHILADELPHIA, A CORPORATION
Defendants-Appellants

PLAINTIFF'S REPLY BRIEF

LORING M. STAPLES
HAYNER N. LARSON
FAEGRE & BENSON
Minneapolis 2, Minnesota
GLENN CATLIN
MEEHL, CATLIN & WILTROUT
Marshall, Minnesota
Attorneys for Marshall Produce Company

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

INDEX

AUTHORITIES CITED

Minnesota Decisions:

4. Plaintiff's right to recover interest.

The trial court allowed plaintiff interest at the statutory rate from July 10, 1956, which was 60 days after service of the proof of loss. In their answer, defendants admitted service of the proof of loss, but denied liability thereon. Under the terms of the policies, the defendants had 60 days within which to either pay or reject the claim. The claim was rejected.

The right to recover interest on fire insurance claims is recognized in *Schrepfer* v. *Rockford Insurance Co.*, 77 Minn. 291, 79 N. W. 1005, and in *H. F. Shepherdson Co.* v. *Central Fire Insurance Company,* 220 Minn. 401, 19 N. W. 2d 772. In the latter case, interest was allowed from the day of the fire. See also *Dunnell's Minnesota* Digest, "Insurance", Sec. 4804.

The defendants' fire insurance policies were Minnesota Standard Fire Insurance Policies, containing the language prescribed by *Minnesota Statutes,* Section 65.011, including the following paragraph:

> "The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided. It is moreover understood that there can be no abandonment of the property insured to the company, and 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."

The general rule, followed in 18 states, as well as in the federal courts, (*Concordia Ins. Co.* v. *School District,* 282 U. S. 545), is stated in Volume 154, A. L. R. on p. 1371 to be as follows:

> "Where it is provided in a fire insurance policy, either affirmatively, that the loss shall be payable a certain number of days (ordinarily sixty) after the insured has furnished proofs of loss, or negatively, that the loss shall not be payable until such a number of days have elapsed, it may be laid down as a general proposition that the principal payable under the policy will not bear interest for any time before the period so provided has expired, *but will bear interest from that time.*" (Emphasis supplied).

In *Perrine v. Grand Lodge,* 51 Minn. 224, 53 N. W. 367, this court affirmed a judgment which included interest on the amount payable under a life insurance policy from the date when defendant declared that it would not make payment, although no specific demand for payment seems to have been made. The court said:

> "Even if it were not the legal duty of the defendant in general to make payment without a specific demand, we think that when it distinctly refused to make payment, and neglected to make provision for payment as contemplated in case of death and proof thereof, for the reason that it denied any liability

> on its part, no other demand than was shown in this case was necessary to charge the defendant with liability to pay interest."

Claim is made that plaintiff's proof of loss was "defective". But certainly a proof of loss is not defective merely because it may underestimate the amount of the loss, since this is always a fact which can be corrected at any time. Nor did the defendant insurance companies at any time reject or criticize the proof of loss as defective.

II.

REPLY TO DEFENDANTS' ARGUMENT ON PLAINTIFF'S APPEAL

Damage to the cans of military egg powder.

1. Damage to the containers.

Plaintiff's evidence on this subject was threefold in nature: (1) evidence of damage to the containers; (2) evidence of damage to the eggs, egg powder, and milk powder; and (3) action by the government officials. For obvious reasons, all witnesses did not testify on all three subjects, although a few of the qualified ones did so. The evidence of damage to the containers is summarized on pp. 28 to 30 of plaintiff's original brief and will not be repeated here. Damage to the containers was advanced as a ground for recovery in arguments made to the trial court, but the court refused to make any specific finding on the subject. There has certainly been no conscious attempt on our

37702 37763

State of Minnesota,
In Supreme Court.

MARSHALL PRODUCE COMPANY, A CORPORATION
Plaintiff-Appellant-Respondent

VS.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, AND FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, A CORPORATION
Defendants-Respondents-Appellants

AND

OHIO FARMERS INSURANCE COMPANY, A CORPORATION; HOME FIRE AND MARINE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION; UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION; THE TRAVELERS FIRE INSURANCE COMPANY, A CORPORATION; FIRE ASSOCIATION OF PHILADELPHIA, A CORPORATION
Defendants-Appellants

DEFENDANTS' REPLY BRIEF

NEVILLE, JOHNSON & THOMPSON
RICHARD W. JOHNSON
854 Midland Bank Building
Minneapolis, Minnesota
Attorneys for Defendants

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

INDEX

AUTHORITIES CITED

of its brief[1] provided that there can be no abandonment of the property insured.

B. The question of interest.

Plaintiff cites (Reply Br. pp. 10, 11) two cases and a statute in support of its claim for interest from July 10, 1956.

Each case and the statute provide that interest shall run from the time the loss—and each case and the statute refer to an ascertained loss—becomes payable.

Plaintiff, by its amendments of its "proofs of loss" right down to the day of trial, cannot now argue that the loss could be ascertained by a "proof of loss" filed nine months previously.

Each of plaintiff's successive amendments admitted that prior proofs of loss were defective.

CONCLUSION

The trial court, found that there was insufficient evidence, if any evidence at all, to justify a finding of damage to the military egg powder in cans. This court is free to determine if sufficient evidence was presented by plaintiff to sustain a finding of damage to the shell eggs and egg and milk powder in drums.

---

[1] Plaintiff (Reply Br. p. 10) quotes *Minn. Stat.* 65.011 for another purpose. We would emphasize that the statute specifically states "* * * It is moreover understood that there can be no abandonment of the property insured to the [insurance] company, * * *".