

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0660**

K & R Landholdings, LLC,
d/b/a High Banks Resort,
Appellant,

vs.

Auto-Owners Insurance,
Respondent.

**Filed February 12, 2018
Reversed and remanded
Schellhas, Judge**

Itasca County District Court
File No. 31-CV-15-2426

Alexander M. Jadin, Timothy D. Johnson, Roeder Smith Jadin, PLLC, Bloomington, Minnesota (for appellant)

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

Considered and decided by Kirk, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

S Y L L A B U S

I. Commercial policy insureds are entitled to preaward interest on appraisal awards, “except as otherwise provided by contract or allowed by law” under Minn. Stat. § 549.09, subd. 1(b) (2016).

II. Preaward interest on appraisal awards involving commercial insurance policies is not “otherwise . . . allowed by law” under Minn. Stat. §§ 60A.0811, 334.01 (2016), within the meaning of Minn. Stat. § 549.09, subd. 1(b).

OPINION

SCHELLHAS, Judge

Appellant challenges the district court's order denying preaward interest on its insurance appraisal award, arguing that it is entitled to preaward interest under Minn. Stat. § 549.09, subd. 1(b), and *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135 (Minn. 2017). We agree and therefore reverse and remand for calculation of preaward interest.

FACTS

Appellant K & R Landholdings, LLC d/b/a High Banks Resort (High Banks) is a family-operated resort located in Deer River that sustained significant storm damage on July 2, 2012. On the day of the storm, High Banks notified its insurer, respondent Auto-Owners Insurance, of the loss. In September 2012, Auto-Owners made an initial payment of \$53,239.89 to High Banks for its loss and later made additional payments. By November 17, 2014, Auto-Owners had paid High Banks a total of \$82,142.45, representing Auto-Owners' estimated actual cash value (ACV) of High Banks' loss. But High Banks disputed the amount of its loss and, on December 12, 2014, demanded appraisal under the terms of its policy.

After an appraisal hearing on April 2, 2015, the appraisal panel determined both the replacement cost value (RCV) and the ACV of High Banks' loss, and Auto-Owners made additional payments to High Banks for an approximate total of \$195,000. High Banks then sued Auto-Owners, alleging that Auto-Owners breached the terms of the parties' insurance contract by "fail[ing] to timely and fully compensate [High Banks] for its damages," requesting confirmation of the parties' appraisal award under Minn. Stat. § 572B.22 (2016), and seeking preaward interest under Minn. Stat. § 549.09 (2016).

Both parties moved for summary judgment, and the district court granted summary judgment to Auto-Owners, denied summary judgment to High Banks, and denied High Banks' request for preaward interest under Minn. Stat. § 549.09. The court concluded that High Banks' action was time-barred under the plain language of the policy, requiring that "any legal action against Auto-Owners to be brought within two years of the date on which the covered loss or damage occurred."¹ The court also concluded that "[e]ven if [High Banks'] action were not time-barred, High Banks would not be entitled to an award of pre-judgment interest" under this court's opinion in *Poehler v. Cincinnati Ins. Co.*, 874 N.W.2d 806 (Minn. App. 2016), *rev'd*, 899 N.W.2d 135 (Minn. 2017).

High Banks appealed the district court's order, and this court stayed the appeal "pending resolution of *Poehler*." On July 19, 2017, the supreme court released *Poehler*, reversing this court's decision. 899 N.W.2d 135 (Minn. 2017). This court then dissolved the stay of High Banks' appeal.

ISSUE

Is High Banks entitled to preaward interest under Minn. Stat. § 549.09?

ANALYSIS

High Banks argues that the supreme court's decision in *Poehler* dictates its entitlement to preaward interest under Minn. Stat. § 549.09. In *Poehler*, the supreme court interpreted Minn. Stat. § 549.09 and concluded that it "plainly and unambiguously provides preaward interest on 'pecuniary damages'—*including those awarded in insurance*

¹ On appeal, High Banks does not challenge the district court's ruling that its breach-of-contract claim is time-barred under the policy.

appraisals—that are not otherwise excluded by the statute.” *Id.* at 140 (emphasis added) (footnote omitted). The supreme court held that “absent contractual language explicitly precluding preaward interest, an insured may recover 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. We therefore need not engage in statutory interpretation to determine whether the statute provides preaward interest on appraisal awards. It does. *See id.*

Auto-Owners contends that *Poehler* does not control the availability of preaward interest in this case for two reasons. First, unlike in *Poehler*, the district court here decided that High Banks’ claim is “time-barred” under the “Policy’s two-year limitation on bringing any action against Auto-Owners.” Second, Auto-Owners argues that other statutes govern preaward interest involving commercial insurance policies.

I. Is High Banks’ claim for preaward interest time-barred?

“General principles of contract interpretation apply to insurance policies.” *Lobeck v. State Farm Mut. Auto Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). “When the language of a contract is clear and unambiguous, we enforce the agreement of the parties as expressed in the contract.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). Ambiguities regarding coverage are resolved in favor of the insured, but the reviewing court cannot read an ambiguity into the plain language of the policy. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). The interpretation of an insurance policy is a question of law that appellate courts review de novo. *Stand Up*

Multipositional Advantage MRI, P.A. v. Am. Family Ins. Co., 889 N.W.2d 543, 547 (Minn. 2017).

Auto-Owners' policy provides:

No one may bring a legal action against us under this Coverage Part unless . . .

1. [t]here has been full compliance with all of the terms of this Coverage Part; and
2. [t]he action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Auto-Owners argues that notwithstanding the *Poehler* decision, High Banks' claim for preaward interest is time-barred under the plain language of its policy. High Banks argues that because its entitlement to preaward interest arises from section 549.09, the policy's time limitation for bringing an action is inapplicable. We agree with High Banks.

The Auto-Owners insurance policy provides that "[t]his *Coverage Part* is subject to the following conditions." (Emphasis added.) One of the conditions is that "[n]o one may bring a legal action against us under this *Coverage Part* unless" the action is brought within two years after the date of loss. (Emphasis added.) In the section of the policy entitled "Coverage," the policy provides that Auto-Owners "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause or Loss." The policy does not address preaward interest.

Instead, High Banks' right to recover interest arises from Minn. Stat. § 549.09, subd. 1(b). *See Poehler*, 899 N.W.2d at 141 (holding that "Minn. Stat. § 549.09, subd. 1(b), unambiguously provides for preaward interest on all awards of pecuniary damages that are not specifically excluded by the statute, and does not restrict the recovery of preaward

interest to cases or matters involving wrongdoing or breach of contract”). We note, by way of analogy, that the Minnesota Supreme Court has specifically stated that “[t]he right to recovery of prejudgment interest . . . is statutory, not contractual,” and that “[p]rejudgment interest is governed by Minn. Stat. § 549.09, subd. 1.” *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 88 (Minn. 2004). Like prejudgment interest, preaward interest is governed by Minn. Stat. § 549.09, subd. 1.

Auto-Owners contends that *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007), supports its position that High Banks’ claim for preaward interest is time-barred. In *Johnson*, the insured sued her insurer after it declined to participate in an appraisal that the insured demanded more than two years after the date of loss. 732 N.W.2d at 342. The district court granted the insurer summary judgment, concluding that the insured’s action was barred by the policy’s statutorily mandated two-year limitation period on suits or actions, which began to run from the date of the loss. *Id.* at 343.

This court held that the appraisal clause is not an agreement to arbitrate the insurer’s liability under the policy, and that the insurer’s liability can be determined only by a court action, which the two-year limitations on suits or actions barred. *Id.* at 346. This court therefore affirmed the district court’s dismissal of the insured’s action for recovery under the policy. *Id.* But *Johnson* is distinguishable from this case and therefore inapplicable. *Johnson* involved *liability for a covered loss* under the policy, not a request for preaward interest under section 549.09. *Id.* at 342.

Because section 549.09 unambiguously provides for preaward interest on all awards of pecuniary damages that are not specifically excluded by the statute, and because nothing in the plain language of the policy addresses High Banks' right to receive preaward interest, we conclude that the two-year limitations period in the policy does not bar High Banks' preaward-interest claim.

II. Is High Banks entitled to preaward interest under Minn. Stat. § 549.09?

Auto-Owners argues that even if High Banks' claim for preaward interest is not time-barred under the policy, because the policy at issue in this case is a commercial policy, not a homeowner policy as in *Poehler*, recovery of preaward-interest is not controlled by *Poehler*. Auto-Owners also argues that section 549.09 does not apply because it states that preaward interest is "otherwise . . . allowed by law." Minn. Stat. § 549.09, subd. 1(b).

A. "Otherwise provided by contract or allowed by law"

Minnesota Statutes section 549.09, subdivision 1(b), specifically provides for preaward interest "[e]xcept as otherwise provided by contract or allowed by law." In *Seaway Port Auth. v. Midland Ins. Co.*, this court stated that section 549.09, "was not intended to disturb existing law of prejudgment interest, but to provide for prejudgment interest in situations where prejudgment interest was not already allowed by law." 430 N.W.2d 242, 252 (Minn. App. 1988) (concluding that district court had not erred by calculating prejudgment interest according to common-law principles rather than under section 549.09). And recently, in *Hogenson v. Hogenson*, this court stated that section 549.09 "was meant to supplement, not replace, the existing law on preverdict interest." 852 N.W.2d 266, 273 (Minn. App. 2014).

Auto-Owners argues that section 549.09 is inapplicable because this case involves a commercial policy, and two statutes, Minn. Stat. §§ 334.01, 60A.0811, “otherwise . . . allow[] by law” interest involving commercial policies.

1. Minn. Stat. § 334.01

Relying heavily upon *Hogenson*, Auto-Owners argues that Minnesota Statutes section 334.01 “otherwise” provides for preaward interest. That statute states that the interest rate “for any legal indebtedness” is six percent, “unless a different rate is contracted for in writing.” Minn. Stat. § 334.01, subd. 1. Auto-Owners contends that section 334.01, rather than section 549.09, is applicable because the “question” here involves “the amount owed by [Auto-]Owners under its contract of insurance,” a claim in which damages are established by common law. Accordingly, Auto-Owners argues that “assuming” all of its “other arguments are rejected, and this court reverses the holding of the District Court, it should . . . direct that [High Banks’] claim of pre[award] interest is limited to the amount owed by [Auto-]Owners, at six percent,” under Minn. Stat. § 334.01.

In *Hogenson*, in determining whether the district court correctly awarded and calculated *preverdict* interest under section 549.09 on the plaintiff’s *conversion claims*, this court discussed the “History of the Conflict Between Section 549.09 and Section 334.01.” *Hogenson*, 852 N.W.2d at 272–74. This court concluded that section 549.09 “was meant to supplement, not replace, the existing law on preverdict interest,” and that “the phrase ‘except as otherwise allowed by law’ require[d] that preverdict interest be calculated under existing common-law principles whenever possible.” *Id.* at 273–74. This court held that “[b]ecause preverdict interest was allowed for conversion claims under common law,

preverdict interest should be calculated from the date of conversion at 6% under section 334.01.” *Id.* at 274.

This case, unlike *Hogenson*, involves preaward interest on an appraisal award, and Auto-Owners cites no authority to show that preaward interest was allowed for appraisal awards under common law. Conversely, *Poehler* specifically allows for preaward interest on insurance-appraisal awards under Minn. Stat. § 549.09, subd. 1(b), “except as otherwise provided by contract or allowed by law.” 899 N.W.2d at 141. The supreme court could have acknowledged that section 334.01 may, in some circumstances, “otherwise” provide for preaward interest. But the supreme court in *Poehler* did not mention section 334.01. Although unlike in *Poehler*, this case appears to involve a commercial policy, a circumstance not disputed by the parties, *Poehler* includes no hint that such a distinction is dispositive. 899 N.W.2d at 142 (noting that “Minnesota precedent require[es] strict construction of insurance policies against the insurer”).

Indeed, in explaining its reasoning, *Poehler* includes discussion about two federal district court cases, one of which involved a commercial policy. *Id.* at 142–43; *see also Hous. and Redevelopment Auth. of Redwood Falls v. Hous. Auth. Prop. Ins.*, 864 F.3d 986, 988–89 (8th Cir. 2017) (relying on *Poehler* to hold that insured under commercial policy was entitled to preaward interest from insurer following appraisal award). We therefore conclude that, under *Poehler*, High Banks is entitled to preaward interest pursuant to Minn. Stat. § 549.09.

2. Minn. Stat. § 60A.0811

Minnesota Statutes section 60A.0811, subdivision 2, provides:

(a) An insured who prevails in any claim against an insurer based on the insurer's breach or repudiation of, or failure to fulfill, a duty to provide services or make payments is entitled to recover ten percent per annum interest on monetary amounts due under the insurance policy, calculated from the date the request for payment of those benefits was made to the insurer.

(b) Punitive damages or damages for nonmonetary losses are not recoverable under this section.

Minn. Stat. § 60A.0811, subd. 2. Subdivision 3 provides that “[t]his section *applies* to a *court action or arbitration proceeding*, including an action seeking declaratory judgment.” *Id.*, subd. 3 (emphasis added).

Auto-Owners argues that because the policy involved in this case is a commercial policy, and because section 60A.0811 “otherwise” allows for preaward interest in regard to commercial policies, section 549.09 is inapplicable. But the case before us does not involve an arbitration proceeding. And because appraisal proceedings do not determine liability, High Banks’ action is not a “court action.” *See Johnson*, 732 N.W.2d at 346 (“It is well settled that appraisal does not determine liability under a policy. Liability depends on a judicial determination.”); *see also Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407, 411–12 (Minn. App. 2004) (noting that “action” is “confined to judicial proceedings” (quotation omitted)). Auto-Owners’ argument that section 549.09 is inapplicable because section 60A.0811 “otherwise” provides for preaward interest is unpersuasive.

B. Applicability of the Arbitration Act to appraisal hearings

Auto-Owners argues that because appraisals are not “Arbitrations” under the Arbitration Act, section 549.09 is inapplicable to appraisal hearings. Auto-Owners relies on the dissent in *Poehler* to support its argument that section 549.09 is not applicable to appraisal actions because “the parties’ appraisal proceeding does not trigger a right to preaward interest.” 899 N.W.2d at 147 (Anderson, J., dissenting) (footnote omitted). Describing “a demand for arbitration” as a “predicate event,” the dissent stated that section 549.09, subdivision 1(b), “sets out a specific list of predicate events—one of which must occur—before preaward interest accrues on pecuniary damages.” *Id.* (Anderson, J., dissenting) (footnote omitted). The dissent noted that *Poehler* did not demand arbitration and that his demand for an appraisal did not commence an action. *Id.* at 147–48 (Anderson, J., dissenting). The dissent concluded that because none of the triggering events established in section 549.09 occurred, the statute did not apply. *Id.* at 148–49 (Anderson, J., dissenting). Although Auto-Owners’ argument to the district court may have been precisely consistent with the dissent, it conflicts with the majority’s holding in *Poehler* and therefore is unpersuasive.

As in *Poehler*, High Banks moved for preaward interest after issuance of an appraisal award in its favor. Based on *Poehler*, we conclude that Minnesota Statutes section 549.09 “unambiguously provides for preaward interest” on the appraisal award. *Id.* at 140. Accordingly, we reverse the district court’s denial of preaward interest and remand for a calculation of preaward interest.

DECISION

A claim for preaward interest under Minn. Stat. § 549.09 on an appraisal award is not time-barred under insurance-policy limitation terms when the policy does not address preaward interest. Commercial policy insureds are entitled to preaward interest on appraisal awards under Minn. Stat. § 549.09, subd. 1(b), unless otherwise provided by contract or allowed by law. Preaward interest on appraisal awards is not “otherwise . . . allowed by law” under Minn. Stat. §§ 60A.0811, 334.01, within the meaning of Minn. Stat. § 549.09, subd. 1(b).

Reversed and remanded.