

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ANOKA

TENTH JUDICIAL DISTRICT

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Pleasure Creek Townhomes Homeowners'  
Association,

Plaintiff,

v.

American Family Insurance Company,  
Defendant.

**ORDER REGARDING  
PRE- AWARD INTEREST**

File No. 02-CV-17-6025

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The above-entitled matter came before the Honorable Melissa M. Saterbak, Judge of District Court, at the Anoka County Courthouse in Anoka, Minnesota<sup>1</sup>. On October 9, 2020, a hearing was held on Plaintiff's Motion for Pre-Award Interest. Anthony Remick, Attorney at Law, appeared on behalf of Plaintiff Pleasure Creek Townhomes Homeowners' Association. Dennis Anderson, Attorney at Law, appeared on behalf of Defendant American Family Insurance Company.

Based upon the arguments of counsel and all of the files, records, and proceedings herein, the court makes the following:

### **FINDINGS**

#### **Procedural Background**

1. On December 8, 2017, Plaintiff Pleasure Creek Townhomes Homeowners' Association (hereinafter the Association) filed a Summons and Complaint for judicial appointment of a neutral umpire.<sup>2</sup> The parties were able to reach an agreement to appoint a neutral umpire.
2. After the Association reported the damage sustained in the wind and hail storm, American Family acknowledged liability in writing on August 6, 2017 via letter. *Anthony Remick*

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<sup>1</sup> All parties appeared remotely via Zoom due to Covid-19 precautions and in compliance with Chief Justice Gildea's Orders.

<sup>2</sup> In June of 2017 a large wind and hail storm caused damage to buildings owned by Plaintiff, thus facilitating the need for this lawsuit.

*Affidavit, Exhibit 1.* The parties disputed the amount of loss<sup>3</sup> and utilized the appraisal process. An appraisal award was issued on June 7, 2018 in the amount of \$796,138.57. *See the replaced Exhibit 2, filed September 22, 2020.* Prior to the written admission of liability, American Family had already admitted some liability as evidenced by its making a partial payment in July of 2017 to the Association.

3. On September 5, 2018, Defendant American Family Insurance Company (hereinafter American Family) filed a Motion requesting the court modify the appraisal award and grant partial summary judgment for part of the award.
4. On March 1, 2019, the Court granted Defendant's motion for summary judgment, partially granted Defendant's motion to amend the appraisal award and corrected a mathematical error for one of the claims.<sup>4</sup>
5. Plaintiff appealed and on November 25, 2019, the Court of Appeals affirmed this Court's order. The Minnesota Supreme Court denied further review on February 18, 2020.

### **Current Motion**

6. On September 3, 2020, Plaintiff filed this Motion requesting pre-award interest pursuant to Minnesota Statute Section 65A.01 *et seq.* The parties agree that Plaintiff had a mathematical error in the Memorandum in support of its motion. The parties agree the correct total amount of the appraisal award in this underlying matter was \$796,138.57 and the deductible was \$101,563.85, leaving the remaining appraisal award less the deductible at \$694,574.72. Accordingly, Plaintiff seeks a pre-award interest amount of \$58,039.81<sup>5</sup>.

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<sup>3</sup> The disputed loss also included a debate on what was covered. American Family admitted liability on what they deemed the policy covered and ultimately American Family won on this issue in its August 6, 2017 letter.

<sup>4</sup> An Amended Order for Judgment was filed on April 18, 2019 to include language requested by both parties.

<sup>5</sup> See Plaintiff's Rely Memorandum.

7. Defendant requests this Court deny any pre-award interest asserting an endorsement (hereinafter the Endorsement) in the parties' policy precludes pre-award interest. Alternatively, American Family argues that if this Court concludes the endorsement does not preclude pre-award interest, that Plaintiff is entitled to no more than \$24,948.31. *See Defendant's Memorandum of Law.*
8. The Endorsement<sup>6</sup> in dispute provides, in relevant part:

**Appraisal**

This applies after we confirm that the damage due to a loss is covered. If you and we fail to agree on the dollar amount of the damage, either may demand that such amount be set by appraisal. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. Each appraiser will separately set the dollar amount of the damage. Such amounts must be determined according to all terms of this policy including those in Section I – Property E 5 Loss Payment. If both appraisers submit written reports to us of their agreement of the amount, such amount will be the dollar amount of the damage. If they fail to agree within 20 days, they must choose a competent and disinterested umpire. If they cannot agree on the choice within 20 days, you and we must jointly request that the choice of a competent and disinterested umpire be made by a judge of a court having jurisdiction. The appraisers will then submit their differences to the umpire. Written agreement signed by any two of these three will set the dollar amount of the damage.

The appraisal determination of the dollar amount of the damage is binding upon you and us. This appraisal process and authority granted to the appraisers and the umpire can only be expanded and modified by written mutual consent signed by you and us. We will pay our appraiser. You will pay your appraiser. Other expenses and the compensation of the umpire will be paid equally by you and us. Appraisal does not waive our rights.

The appraisers and umpires are not authorized to determine coverage, exclusions, conditions, forfeiture provisions, conditions precedent, or any other contractual issues that may exist between you and us. The appraisal award cannot be used by either you or us in any proceeding concerning coverage, exclusions, forfeiture provisions, conditions precedent, or other contractual issues. However, once contractual liability is admitted or determined independent of the appraisal process, the appraisal award is binding upon you and us. Interest will not accrue on any award or judgment for the recovery of money set by appraisal until that time.

*See Anthony Remick Affidavit, Exhibit 5* (emphasis added on relevant portion of Endorsement)

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<sup>6</sup> This is the endorsement for the Unmatched Property Damage Exclusion Endorsement.

9. The Association argues the Endorsement must be stricken because it is more exclusive and restrictive than what is statutorily required pursuant to Minnesota Statute Section 65A.26, and instead this Court should rely solely on Minnesota Statute Section 549.09 when determining pre-award interest. The Court is not persuaded by this argument. In Plaintiff's initial memorandum of law, they agree that the Endorsement is "substantially similar" to the appraisal clause required by Minnesota Statute Section 65A.26. *Plaintiff's Memorandum*, pg. 6. The Endorsement follows the statute closely while customizing it to meet the needs of American Family and its policy holders.<sup>7</sup> The plain language of the Endorsement affords the necessary rights/protections in an appraisal process for the Association as per legislative intent. *Minn. Stat. § 65A.26*.
10. As such, the Endorsement is valid and binding. Accordingly, the sole issue remaining is to determine when the interest began to accrue. According to the Endorsement it shall not accrue until either contractual liability is admitted or is determined independent of the appraisal process.
11. American Family argues that the Endorsement requires two preconditions: an admission or determination of coverage independent of the appraisal process *and* an appraisal award. The plain meaning of the Endorsement, however, does not state the appraisal award must be made before interest can accrue; rather the Endorsement says interest cannot accrue "until that time," which refers back to the preceding sentence. That sentence makes it clear that "until that time" refers to when contractual liability is admitted or is determined independent of the appraisal process. It is clear that it is separate and distinct from the actual appraisal award. The Endorsement only requires a finding of liability before interest can begin accruing. American

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<sup>7</sup> A difference provided in the Endorsement is that it allows for twenty days rather than only ten days as is in the statute.

Family admitted liability for the non-matching damaged parts of the Association's claim on August 6, 2017 but never admitted (and was never found liable) for the matching part of the Association's claim. American Family admitted liability on August 6, 2017 but was disputing the amount of coverage pursuant to its policy and applicable endorsements. The Endorsement specifically states that the appraisal process is not to determine coverage, exclusions, or any other contractual issues that may exist. Based on the plain meaning provided in the Endorsement it does not make sense then that contractual liability used to determine when interest can accrue be tied to coverage, exclusions, or any other contractual issues in dispute.

12. The date at which pre-award interest began accruing was August 6, 2017.

13. Plaintiff's calculation was accurate. There is no legal authority to support American Family's assertion that payments made prior to the appraisal award should offset the total amount in which pre-award interest is calculated. Accordingly Plaintiff is entitled to a pre-award interest in the amount of \$58,039.81.

### **CONCLUSIONS OF LAW**

#### **Validity of the Endorsement pursuant to Minn. Stat. § 65A.26**

The Association argues the Endorsement must be stricken as void because it is in violation of Minnesota Statute Section 65A.26. American Family argues the Endorsement is valid and further that it precludes any pre-award interest. Both parties agree this Court needs to determine if pre-award interest on an appraisal award is governed by the Endorsement or by Minnesota Statutes Sections 65A.26 and 549.09.

As such, this Court must decide if the Endorsement is a valid and binding contract provision. Interpretation of insurance contracts is a question of law and principles of contract law should be applied. *Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, 857

N.W.2d 290, 293 (Minn. 2014). An insurance policy “must be construed as a whole, beginning with the plain and ordinary meaning of the policy’s terms, as well as ‘what a reasonable person in the position of the insured would have understood the words to mean.’” *Id.* At 294. A statutorily required provision in an insurance policy will not necessarily be construed against the insurer. *Laidlaw v. Commercial Ins. Co. of Newark*, 255 N.W.2d 807, 811 (Minn. 1977) (“The usual rule of construction most favorable to the insured does not apply to a provision required by statute.”) *See also Nathe Bros., Inc. v. Am. Nat’l Fire Ins. Co.*, 615 N.W.2d 341 (Minn. 2000).

The remedial provisions of Chapter 65A may not be omitted, changed, or waived. *Watson v. United Servs, Auto, Ass’n.*, 556 N.W.2d 683, 390 (Minn. 1997). An insurance policy can, however, provide more benefits than the statutory minimums found in Chapter 65A. *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204, 209 (Minn. Ct. App. 1993). The policy simply cannot provide less than Chapter 65A requires. *Id.* A plain reading of the Endorsement in comparison to Minnesota Statute Section 65A.26 expressly shows that the statutory minimum requirements have been met. The parties are arguing over pre-award of interest, not in how the appraisal process was done. The purpose of Minnesota Statute Section 65A.26 is ensure that all hail insurance policies include this appraisal process language. Pre-award interest is not included anywhere in the hail insurance statute. The Endorsement language is reasonably clear and unambiguous.

American Family further argues that the Endorsement precludes pre-award interest. Pursuant to contractual language, parties may explicitly preclude pre-award interest on an appraisal award. *Poehler v. Cincinatti Ins. Co.*, 899 N.W.2d 135 (Minn. 2017). In this case, however, the Endorsement does not explicitly preclude pre-award interest. In fact the word “pre-award” is not found anywhere in the Endorsement. Rather the only reference to interest at all is found in the last

sentence that states, “[i]nterest will not accrue on any award or judgment for the recovery of money set by appraisal until that time.” That sentence certainly does not preclude interest, it defines when interest may attach. In this case, interest may accrue when liability is admitted or determined according to the plain meaning provided by in the contract language.

### **Application of Minn. Stat. § 549.09**

In this case, application of Minnesota Statute Section 549.09 is not necessary as this Court found the Endorsement valid and binding<sup>8</sup>. Minnesota Statute Section 549.09, subdivision (b) expressly states that the recovery of pre-award interest is permitted “[e]xcept as otherwise provided by contract.”

For argument purposes, even if this Court found the Endorsement invalid, and applied Minn. Stat. § 549.09, the Association would still be entitled to pre-award interest. Pursuant to the statute, pre-award interest shall be computed 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. *Minn. Stat. § 549.09, subd. 1 (b)*. The Association reported damage to American Family on June 11, 2017 and American Family acknowledged said damage in writing on August 6, 2017<sup>9</sup>. American Family argues this was not an admission of liability; however, the Court is not persuaded by this argument. American Family had already made a partial payment in July of 2017, thus inferring it

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<sup>8</sup> Minn. Stat. § 549.09 is necessary only as it pertains to calculating pre-award interest and neither party is disputing this. *Minn. Stat. § 549.09, subd. 1 (c)(1)(i) and (c)(2)*. The parties do not dispute that the formula prescribed is the number of days from the date of commencement of the action or demand for arbitration or date of written notice divided by 365 multiplied by the amount of the appraisal award times 10%. [(# of days/365) x (appraisal award x 10%) = pre-award interest] *Id.*

<sup>9</sup> Arguably, a written notice of the claim could be made for June 11, 2017 when the Association first reported the damage; however, the Association has already agreed in its Memorandum of Law to use the August 6, 2017 letter by American Family as the written notice of claim since that is when American Family acknowledged liability in writing.

was well aware that there was liability for the damage incurred. The August 6 letter only further solidifies American Family's acknowledgment of liability<sup>10</sup>.

**No authority to allow for offsets of payments made prior to an appraisal award**

American Family asserts that any pre-award interest, if awarded, should not attach to the amounts paid out prior to August 22, 2017. *See Defendant's Memorandum, pg. 7*. It is well settled that the purpose of pre-award interest is to compensate the prevailing party for the loss of use of money and to promote settlement when liability/damage amounts are fairly certain. *Burniece v. Illinois Farmers Ins. Co.*, 398 N.W.2d 542, 544 (Minn. 1987); *Solid Gold Realty, Inc. v. Mondry*, 399 N.W.2d 681, 683 (Minn. Ct. App. 1987). American Family relies upon footnote 4 in the majority decision in the *Poehler* case for its assertion that any partial payments should be offset for purposes of calculating pre-award interest. *Poehler*, 899 N.W.2d at 145. The *Poehler* court, however, ultimately did not decide this issue as it was not properly before the court on appeal. American Family also relied upon *Casey v. State Farm Mutual Auto Ins. Co.*, 4654 N.W.2d 736 (Minn. Ct. Ap. 1991), which held that the trial court properly allocated a prior settlement agreement as a collateral source when calculating prejudgment interest. Although, American Family's reliance on both cases is persuasive, this Court cannot ignore the plain meaning of the statute.

Minnesota Statute Section 549.09 clearly addresses interest on verdicts, awards, and judgments. A statute is only ambiguous if its language is subject to more than one reasonable

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<sup>10</sup> American Family argues that the pre-award interest start date is not clearly defined in the statute or by case law interpreting the statute and references specifically *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135 (Minn. 2017) and *Dewey Hill III Townhomes Assoc. Inc. v. Auto-Owners Ins. Co.*, A18-1562, 2019 WL 3000691 (unpubl. Minn. Ct. App. July 1, 2019). Each of those cases, however, rests on specific factual circumstances that differ from the case at hand. The appellate courts in those cases have narrowly applied Minn. Stat. § 549.09 as it applied to those unique facts. Accordingly, this Court did not find any Minnesota appellate court cases that were directly on point when applying the facts of this case. This Court need not get into an in-depth analysis of 549.09, though, as a contract (the Endorsement) controls.

interpretation. *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). If a statute is clear and unambiguous, the courts should enforce the language of the statute and not explore the spirit or purpose of the law. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). The *Poehler* case already determined that Section 549.09 plainly and unambiguously provides for pre-award interest on pecuniary damages including those awarded in insurance appraisals. *Poehler*, 899 N.W.2d at 140. Accordingly, Section 549.09, subdivision 1(b), clearly provides for pre-award interest to the judgment or award without any language providing for offsets or partial payments. The Association is correct in pointing out that the plain meaning of the statute as it pertains to pre-award interest is void of any language allowing for a credit on partial payments; whereas, post-award interest expressly addresses partial payments and states, post-award interest accrues only on the unpaid balance of the judgment or award. *Minn. Stat. § 549.09, subd. 2*. Since the statutory language is unambiguous, this Court intends on abiding by the clear direction provided in it. In this case, the pre-award interest shall be computed at the time of a written notice of claim without any offset for payments prior to that date.

### ORDER

1. Plaintiff's Motion for Pre-Award Interest is **GRANTED**.
2. Plaintiff is entitled to pre-award interest in the amount of **\$58,039.81**.
3. A copy of this Order shall be sent to the parties or their attorneys, if any, by U.S. Mail or e-service as appropriate. Such service shall constitute due and proper notice for all purposes.

### LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: 1/04/2021

**BY THE COURT:**

Saterbak, Melissa

(Anoka Judge)

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Melissa M. Saterbak  
Judge of District Court