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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1562

Dewey Hill III Townhomes Association, Inc.,
Appellant,

vs.

Auto-Owners Insurance Company,
Respondent.

Filed July 1, 2019
Affirmed
Rodenberg, Judge
Dissenting, Reyes, Judge

Hennepin County District Court
File No. 27-CV-16-1182

David J. McGee, Christopher P. Renz, Gary K. Luloff, Chestnut Cambronne PA, Minneapolis, Minnesota (for appellant)

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Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Reyes, Judge.

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

RODENBERG, Judge

Following a court trial on stipulated facts, appellant and cross-respondent Dewey Hill III Townhomes Association Inc. argues that the district court erred in determining the date from which preaward interest should be calculated under Minn. Stat. § 549.09 (2018)

and Minnesota caselaw. Respondent and cross-appellant Auto-Owners Insurance Company argues that the district court erred by granting preaward interest based on an appraisal award. We affirm.

FACTS

Dewey Hill owns eight townhome buildings insured by Auto-Owners. A hail and wind storm damaged the buildings on August 6, 2013. An Auto-Owners insurance policy protected against storm loss, and the policy sets forth Dewey Hill's duties in the event of a loss with the following language:

> (a) You must see that the following are done in the event of loss or damage to Covered Property:
>
> . . . .
>
> (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
>
> (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
>
> . . . .
>
> (7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

Dewey Hill notified Auto-Owners of the loss on August 9, 2013. Dewey Hill's insurance agent submitted written property loss notices (one for each building) to Auto-Owners on August 19. On or before August 21, 2013, Auto-Owners assigned a claim number to Dewey Hill's storm-loss claim. On or before August 21, 2013, Auto-Owners

assigned Cunningham Lindsey U.S. Inc. to adjust the claim. Both parties hired companies to inspect and estimate the damages.

Auto-Owners made a first payment of $138,707.34 to Dewey Hill on May 6, 2014, and made a second payment of $103,772.12 on September 9, 2014. Dewey Hill disputed the sufficiency of these payments, while Auto-Owners asserted that it had fulfilled its obligations under the policy. Following considerable back-and-forth between the parties, Auto-Owners demanded an appraisal of the loss on March 26, 2015.

Following a July 7, 2015 appraisal hearing, an "appraisal panel issued an award of $379,437.76 for the replacement cost of the damaged property and $329,437.76 for the actual cash value of the damaged property." Auto-Owners sent a third payment of $76,958.30 to Dewey Hill on July 31, 2015, representing the full and final amount of the appraisal award.[1]

Dewey Hill then sued Auto-Owners in district court, claiming preaward interest under Minn. Stat. § 549.09. Dewey Hill moved for summary judgment. The district court denied Dewey Hill's motion, and determined that Dewey Hill is entitled to preaward

[1] Both parties' briefs recite that these three payments totaled $329,437.76. And in their stipulation to the district court, the parties likewise stipulated that the total of the Auto-Owners payments "equaled $329,437.76, the actual cash value of the Award." In fact, the payments total $319,437.76. The difference appears to be accounted for by the insurance policy having provided for a $10,000 deductible amount. The parties also agreed that the three payments represented full payment "after consideration of the [p]olicy terms and conditions." Our review of the record convinces us that the payments totaling $319,437.76 satisfied Auto-Owners' obligation for the principal amount due on a loss of $329,437.76, because the parties stipulated to the amount of interest owing based on the district court's determination of the date from which Dewey Hill is entitled to interest. The issues on appeal are limited to whether and from what date interest is owed. In the end, this arithmetic problem makes no difference to the issues on appeal.

interest pursuant to Minn. Stat. § 549.09, but also concluded that Dewey Hill failed to meet its burden of proving that it is entitled to preaward interest from the date of August 9, 2013. The district court determined there was an unresolved issue of material fact concerning whether Dewey Hill submitted a written notice of claim on that date. The parties agreed to submit the unresolved issues to the district court on stipulated facts.

Based on these facts, the district court determined that Dewey Hill is entitled to preaward interest from March 26, 2015, the date of the demand for appraisal. The parties agreed to an interest calculation based on the March 26, 2015 date, and the district court entered judgment accordingly.

This appeal followed.

D E C I S I O N

I. The district court did not err in determining that Dewey Hill was entitled to preaward interest under Minn. Stat. § 549.09.

Auto-Owners argues that the district court erred in determining that Dewey Hill is entitled to preaward interest. The availability of preaward interest presents an issue of statutory interpretation which is reviewed de novo. *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 139 (Minn. 2017).

> Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages 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, except as provided herein. The action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim.

Minn. Stat. § 549.09, subd. 1(b).

Auto-Owners argues that Dewey Hill is entitled to no preaward interest because none of the events that trigger preaward interest under section 549.09 occurred. Specifically, Auto-Owners argues that the demand for an appraisal does not trigger preaward interest under section 549.09 because an appraisal is neither an arbitration nor an "action," and a written notice of claim could not trigger preaward interest here because Dewey Hill did not commence an action "within two years of a written notice of claim."

Auto-Owners' argument is contrary to *Poehler*, 899 N.W.2d at 139-41. We considered and rejected in *K & R Landholdings, LLC v. Auto-Owners Ins.* the same argument that Auto-Owners raises here. 907 N.W.2d 658, 664 (Minn. App. 2018). There, we determined that Auto-Owners' argument conflicts with the majority holding in *Poehler* that section 549.09 unambiguously provides for preaward interest on the appraisal award. *Id.* The "supreme court interpreted section 549.09 and held that it 'plainly and unambiguously provides preaward interest on pecuniary damages—including those awarded in insurance appraisals—that are not otherwise excluded by the statute.'"[2] *Oliver v. State Farm Fire & Cas. Co.*, 923 N.W.2d 680, 684-85 (Minn. App. 2019) (quoting *Poehler*, 899 N.W.2d at 140), *review granted* (Minn. Apr. 16, 2019).

Much of Auto-Owners' argument on appeal tracks Justice Anderson's dissent in *Poehler*, wherein Justice Anderson noted that "appraisal" is not included in section 549.09 as one of the events that "trigger" interest under the statute. *Poehler*, 899 N.W.2d at 148-

[2] Parties are free to contract concerning preaward interest, but absent contractual language in the policy explicitly prohibiting preaward interest, an insured may recover preaward interest on appraisal awards. *See Poehler*, 899 N.W.2d at 143. Neither party here contends that the policy affects the availability of preaward interest.

49 (Anderson, J., dissenting). In an exchange of battling footnotes, the *Poehler* majority posited that, because the insurer did not challenge the district court's finding that the "demand for appraisal was . . . a triggering event," the "triggering-event issue . . . is not properly before us." *Id.* at 140 n.2. Justice Anderson's dissent noted that the petition for review, granted without modification, presented the issue: "[u]nder what circumstances does [section 549.09] apply to insurance appraisal awards?" *Id.* at 147 n.2 (Anderson, J., dissenting). Therefore, according to Justice Anderson, the supreme court was necessarily resolving the triggering-event issue by holding that interest under the statute is available after an appraisal. *Id.* And Poehler would not have been entitled to any interest if the statute did not apply to appraisal awards.

Auto-Owners' argument supposes that we are reading section 549.09 without the benefit of the *Poehler* holding. Were that so, Auto-Owners would find some support for its argument in the statutory language, interpreted in light of the cannon *expressio unius est exclusio alterius*, that the statute ought not permit interest to be awarded except when one of the statutorily enumerated triggers is present. But the Minnesota Supreme Court has made it abundantly clear that we are bound by its decisions, *State v. Curtis*, 921 N.W.2d 342, 343 (Minn. 2018), and Auto-Owners' argument here is a naked invitation to disregard the supreme court's holding in *Poehler*. In the words of the supreme court's own syllabus, *Poehler* holds that "[a]bsent contractual language explicitly precluding preaward interest, an insured may recover preaward interest on an appraisal award" in circumstances substantially identical to those present here. 899 N.W.2d at 137. We decline to disregard the supreme court's *Poehler* holding.

The district court did not err in determining that Dewey Hill was entitled to preaward interest. The question remains at what date preaward interest properly began to run.

II. The district court's selection of March 26, 2015, as the date from which interest should be calculated is not erroneous.

Dewey Hill argues that preaward interest began to accrue when it first sent Auto-Owners its written notice of the loss. Section 549.09 provides that interest begins to accrue "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). However, "[t]he action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim." *Id.*

Here, Dewey Hill did not commence an action within two years of the written notice of claim; instead, Dewey Hill requested an appraisal. *See Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646, 650 (Minn. 1987) ("[W]e conclude that 'action' in section 549.09 refers only to a judicial proceeding."). Consequently, preaward interest under section 549.09 cannot accrue from the time of written notice of the claim. [3]

In *Poehler*, preaward interest was computed from the date of the demand for appraisal. 899 N.W.2d at 139. *Poehler* involved no demand for arbitration and no action commenced within two years of a notice of claim. *Id.* The district court in that case found that there was no written notice of claim sufficient to trigger preaward interest. *Id.* at 148 (Anderson, J., dissenting). The supreme court concluded that section 549.09 interest is

[3] While Dewey Hill did commence an action to obtain preaward interest, it did not commence an action on the underlying claim. And the action it did commence came more than two years after the notice of claim.

available on an appraisal. *Id.* at 140. *Poehler* can only be read to hold that a demand for arbitration is the equivalent of a demand for appraisal for purposes of preaward interest. *Oliver*, 923 N.W.2d at 684-85.

The district court properly determined that preaward interest began to accrue on March 26, 2015, the date of the demand for appraisal.

III. Dewey Hill is not entitled to preaward interest under common law.

Dewey Hill also argues that the district court erred by not considering common law as an available alternative to statutory preaward interest. Dewey Hill quotes Minn. Stat. § 549.09, subd. 1(b), as providing for preaward interest "[e]xcept as otherwise provided by contract or allowed by law." Dewey Hill asserts that, because the contract (policy) does not address preaward interest, preaward interest is governed by common law and statute—both of which provide a basis for calculating preaward interest as accruing from September 26, 2013.

Dewey Hill cites to *Hogenson v. Hogenson*, where we stated that section 549.09 was meant to supplement, not supplant, the common law. 852 N.W.2d 266, 273 (Minn. App. 2014). In *Hogenson*, we concluded that the phrase "[e]xcept as otherwise . . . allowed by law" in section 549.09 "requires that preverdict interest be calculated under existing common-law principles whenever possible." *Id.* at 273-74. We determined 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 to the date of the verdict *if* the damages are ascertainable or liquidated." *Id.* at 274. Where damages were not readily ascertainable or where a claim did not allow for preverdict

interest prior to the 1984 amendment,[4] "preverdict interest should be calculated exclusively under" section 549.09. *Id.* All other prejudgment interest "should be calculated under the appropriate subdivision of section 549.09 in every case." *Id.* *Hogenson* provides no help to Dewey Hill here.

Dewey Hill cites no controlling authority for the proposition that preaward interest was allowed for appraisal awards at common law.[5] *See K & R Landholdings, LLC*, 907 N.W.2d at 663 (noting lack of authority to show that preaward interest was allowed for appraisal awards under common law). The district court did not err in declining to locate a common-law basis for an award of interest here. It properly applied section 549.09 as interpreted by *Poehler* and *K & R Landholdings, LLC*.

Affirmed.

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[4] In 1984, the Minnesota Legislature added language to section 549.09, subd. 1, allowing for preverdict interest on pecuniary damages from the time of commencement of an action, where the statute had previously only provided for interest from the time of verdict. 1984 Minn. Laws ch. 339, § 1, at 35-36.

[5] Dewey Hill cites to a Dakota County District Court decision that is neither binding nor persuasive. The insurer in that case refused to participate in the appraisal (despite the fact that appraisal was a right under the policy), refused to honor the appraisal, and—unlike here—the insured was forced to commence an action to recover the principal amount of its claims. *Charleswood Ass'n v. Harleysville Ins. Co.*, No. 19HA-CV-10-7373, 2013 WL 2150892, at *3-7 (Minn. Dist. Ct. Jan. 17, 2013).

REYES, Judge (dissenting)

I respectfully dissent. Cross-appellant and respondent Auto-Owners Insurance Company presents a two-part question on appeal: (1) whether an insured is entitled to preaward interest on an appraisal award under Minn. Stat. § 549.09, subd. 1(b) (2018), and if so, (2) when does that preaward interest begin to accrue? The Minnesota Supreme Court answered the first part of this question in the affirmative in *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 140 (Minn. 2017) while leaving the second unresolved. In *K&R Landholdings, LLC v. Auto-Owners Ins.*, we applied *Poehler*'s broad holding that "section 549.09 'unambiguously provides for preaward interest' on the appraisal award" but we did not substantively analyze *when* preaward interest becomes available. 907 N.W.2d 658, 664 (Minn. App. 2018) (quoting *Poehler*, 899 N.W.2d at 140). I write separately to express my concern that the *Poehler* decision places lower courts in a quandary of applying its broad holding or applying the plain language of section 549.09 as to when preaward interest becomes available. Because appellant and cross-respondent Dewey Hill cannot satisfy any of the triggering events to begin accrual of preaward interest under the plain language of section 549.09, I would reverse.

Dewey Hill suffered a loss as a result of storm damage to eight townhome buildings insured by Auto-Owners and notified Auto-Owners of the loss on August 9, 2013. The parties agreed that the insurance policy covered the damage, but could not agree on the total loss Dewey Hill suffered. After Auto-Owners made two payments, Dewey Hill disputed the sufficiency of both payments, and Auto-Owners demanded an appraisal of the loss pursuant to the policy on March 26, 2015. An appraisal panel issued an award to

Dewey-Hill. Auto-Owners made a third and final payment to Dewey Hill on July 31, 2015, representing full satisfaction of the award.

Dewey Hill sued Auto-Owners in January 2016, claiming that it is entitled to preaward interest on its award under Minn. Stat. § 549.09, subd. 1(b). The district court determined that Dewey Hill is entitled to preaward interest from the date Auto-Owners demanded an appraisal and rejected Dewey Hill's argument that it is entitled to preaward interest from the date it notified Auto-Owners of the loss. I agree with Auto-Owners that none of the events that trigger the accrual of preaward interest set out in section 549.09, subd. 1(b) occurred here. But the statutory language is the start, not the end, of the analysis. *See Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 717 (Minn. 2014) ("Judicial construction of a statute becomes part of the statute as though it were written therein."); *see also Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) ("We are obligated to follow the statutory interpretation of the Minnesota Supreme Court.").

The Minnesota Supreme Court interpreted section 549.09 and concluded that it "plainly and unambiguously provides preaward interest on 'pecuniary damages'—including those awarded in insurance appraisals—that are not otherwise excluded by the statute." *Poehler*, 899 N.W.2d at 140. 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." *Id.* at 142. We are bound by that holding, *State v. Curtis*, 921 N.W.2d 342, 342 (Minn. 2018), and it is now settled that preaward interest is available on appraisal awards. But neither the *Poehler* court nor the *K&R* court

addressed the second question that Auto-Owners now asks us to answer—*when* does that preaward interest become available?

Section 549.09 provides that one of three predicate or triggering events must occur before preaward interest accrues on pecuniary damages. Minn. Stat. § 549.09, subd. 1(b). Specifically, preaward interest on pecuniary damages begins to accrue "from the time of commencement of [an] action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first." *Id.* However, "[t]he action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim." *Id.* In other words, interest is computed from the time of (1) commencement of an action; (2) demand for arbitration; or (3) written notice of claim, provided the party commences an action within two years of that claim. Auto-Owners argues here that none of these "triggering events" occurred, and therefore, preaward interest never began to accrue.

The majority opinion in *Poehler* expressly stated that the triggering-event issue was not properly before the court because the parties did not challenge on appeal the district court's determination that the demand for appraisal was the triggering event. *Id.* at 140 n. 2 ("[T]he district court found that Poehler's demand for appraisal was the triggering event. Notably, Cincinnati never challenged the validity of Poehler's demand for appraisal or argued that the demand was not in writing. Nor has Cincinnati contended that Poehler's demand for appraisal was not a triggering event. Because the parties have not challenged this finding of the district court, the triggering-event issue raised by the dissent is not properly before us."). Consequently, it is an open question as to what event triggers the

accrual of preaward interest on an appraisal award under section 549.09. To resolve this question, we must first determine whether the statutory language is ambiguous. *Staab*, 853 N.W.2d at 716-17. And only if the statute is ambiguous do we look to the legislative intent. *Id.* at 717. Neither party here contends that the statute is ambiguous, and I agree.

Beginning with the first of three possibilities that trigger preaward interest, Dewey Hill's action of filing in district court is not a triggering event to begin accrual of preaward interest for purposes of section 549.09, subd. 1(b). Here, an appraisal panel issued an award to Dewey Hill, and Auto-Owners paid the full amount of the appraisal award in July 2015, before Dewey Hill commenced an action against Auto-Owners in January 2016. As a result, the commencement of the action simply could not serve as the triggering event to accrue preaward interest under section 549.09, subd. 1(b), because it occurred after the award and full payment of the claim.

As to the second possible triggering event, Dewey Hill argues that the demand for appraisal is a triggering event under section 549.09 because a demand for an appraisal is analogous to a demand for arbitration. But "arbitration" and "appraisal" are two very different concepts, with only the former mentioned in section 549.09. *See* Minn. Stat. § 604.18, subd. 4(b) (2018) ("An award of taxable costs under this section is not available in any claim that is resolved or confirmed by *arbitration or appraisal*." (emphasis added)); *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 345-46 (Minn. App. 2007) (acknowledging that while some Minnesota courts have referred to arbitration and appraisal interchangeably, it is well settled that statutorily required appraisal provision is not an agreement to arbitrate governed by the Uniform Arbitration Act), *review denied*

(Minn. Aug. 21, 2007); *Oliver v. State Farm Fire & Cas. Ins. Co.*, 923 N.W.2d 680, 684 (Minn. App. 2019) (noting that "there are important differences between arbitration panels and appraisal panels" such as arbitration panel's ability to make liability and legal determination, in contrast to appraisal panel's limited authority to determining amount of actual value and loss under policy), *review granted* (Minn. Apr. 16, 2019). It is not the proper role of this court to determine that the legislature, by writing "demand for arbitration," intended the phrase to mean "demand for arbitration *or* appraisal." *See Graphic Comm'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 696 n. 10 (Minn. 2014) (explaining that when interpreting statutes, courts will not add words that legislature did not supply). Consequently, under the plain language of section 549.09, subd. 1(b), Auto-Owner's demand for an appraisal is not a triggering event.

As to the last of the three possible triggering events, Dewey Hill argued that preaward interest began to accrue on August 9, 2013, when it provided a written notice of claim, rather than March 26, 2015, the date Auto-Owners demanded an appraisal.[1] A written notice of claim could not trigger the accrual of preaward interest in this case because Dewey Hill commenced an action on January 2016, more than two years after the written notice of claim. Section 549.09 provides that "[t]he action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim."[2] Minn. Stat. § 549.09, subd. 1(b). In other words, the statute

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[1] Dewey Hill argued on appeal that, in the alternative, preaward interest began to accrue on September 26, 2013, when it provided a written notice of claim.

[2] The *Poehler* supreme court did not include or analyze the application of this sentence in section 549.09 to appraisal awards.

requires commencement of an "action" within two years of the written notice of claim to trigger interest accrual. Notably, that sentence contains no reference to a demand for arbitration (or appraisal). *Id*. Thus, even assuming that the supreme court interpreted arbitration and appraisal to be interchangeable, a written notice of claim within two years of an appraisal demand could not serve as the triggering event under a plain reading of the statute. Therefore, under the plain language of section 549.09, Dewey's Hill's written notice of claim could not serve as the triggering event.

Dewey Hill claims that "the sensible reading of this portion of the statute, consistent with *Poehler*, is that the demand for appraisal, which leads to the resolution of the underlying issue in the same manner as commencement of a legal action does, must be within two years of the notice of claim." This reasoning ignores the distinction between *notice* of claim and *demand* for a dispute-resolution process. Appraisal panels do not resolve disputes in the same manner as a lawsuit. The supreme court has "emphasize[d] that the appraisal is a process that is generally intended to take place before suit is filed. It is generally understood to be a condition precedent to suit." *Quade v. Secura Ins.*, 814 N.W.2d 703, 708 (Minn. 2012). The scope of appraisal is limited to damage questions while liability questions are reserved for the courts. *Id.* at 706. And caselaw is clear that a demand for appraisal is not an "action." *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646, 650 (Minn. 1987) ("[W]e conclude that 'action' in section 549.09 refers only to a judicial proceeding."); *Spira v. Am. Standard Ins. Co.*, 361 N.W.2d 454, 457 (Minn. App. 1985) (noting that an "action" is "confined to judicial proceedings."), *review denied* (Minn. Mar. 29, 1985).

The supreme court has explained that courts should not disregard a statute's clear language to pursue the spirit of the law. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007). But even if the language of the statute is ambiguous, the interpretive cannon *expression unius est exclusion alterius* applies when items are expressed as an associated group or series, and justifies the inference that items not mentioned were excluded by deliberate choice. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S. Ct. 748, 760 (2003). The legislature's choice in providing three separate events that trigger the accrual of interest and excluding among them the demand for an appraisal must be regarded as deliberate.

In short, the plain language of section 549.09 requires that one of the three triggering events must occur for preaward interest to accrue. The parties in *Poehler* did not raise, and the supreme court did not address, this issue. None of the triggering events occurred in this case. The result is, in answering the question left open by *Poehler*, that Dewey Hill is not entitled to preaward interest on the appraisal award under the plain language of section 549.09.