

NO. A11-1520

State of Minnesota
In Court of Appeals

GARLYN, INC., D/B/A POLZIN GLASS,
Respondent,

vs.

AUTO-OWNERS INSURANCE COMPANY,
Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1) Did the arbitrator exceed his authority by determining that Auto-Owners breached its contract of insurance without determining that the amount Auto-Owners paid was not the necessary cost, at local prices, to repair or replace auto glass?

- a) Description of how the issue was raised in the trial court: Appellant raised the issue in trial court by bringing a motion to vacate the arbitration award.
- b) Concise statement of the trial court's ruling: The trial court concluded the arbitrator did not err as a matter of law.
- c) Description of how the issue was preserved for appeal: Appellant preserved the issue for appeal by asserting the issue in its motion to vacate.
- d) Most apposite cases:
 - i) *Glass Service Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849 (Minn. Ct. App. 2000).
 - ii) *Butwin Sportswear Co. v. St. Paul Fire & Marine Ins. Co.*, 534 N.W.2d 565 (Minn. Ct. App. 1995).
 - iii) *Star Windshield Repair, Inc. v. Western Nat. Ins. Co.*, 768 N.W.2d 346, 349 (Minn. 2009).

2) Did the arbitrator exceed his authority by shifting the burden of proof on Respondent's claim that Auto-Owners breached its contract to Auto-Owners?

- a) Description of how the issue was raised in the trial court: Appellant raised the issue in trial court by bringing a motion to vacate the arbitration award.
- b) Concise statement of the trial court's ruling: The trial court concluded the arbitrator did not err as a matter of law.
- c) Description of how the issue was preserved for appeal: Appellant preserved the issue for appeal by asserting the issue in its motion to vacate.
- d) Most apposite cases:
 - i) *D.H. Blattner & Sons, Inc. v. Fireman's Ins. Co. of Newark*, 535 N.W.2d 671 (Minn. Ct. App. 1995).

3) Did the arbitrator exceed his authority by awarding pre-award interest on claims less than the conciliation court jurisdictional limit?

- a) Description of how the issue was raised in the trial court: Appellant raised the issue in trial court by bringing a motion to vacate the arbitration award.
- b) Concise statement of the trial court's ruling: The trial court concluded the arbitrator did not err as a matter of law.
- c) Description of how the issue was preserved for appeal: Appellant preserved the issue for appeal by asserting the issue in its motion to vacate.
- d) Most apposite cases:
 - i) *Illinois Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792 (Minn. 2004).
 - ii) Minn. Stat. § 549.09, Subd. 1(b)(4).
 - iii) Minn. Stat. § 572.15(a).

STATEMENT OF THE CASE

In November of 2009, Garlyn, Inc., d/b/a Polzin Glass (hereinafter "Polzin") initiated a declaratory action in District Court in Hennepin County, seeking to consolidate seventy-six individual claims for allegedly short-paid window glass claims against Auto-Owners Insurance Company (hereinafter "Auto-Owners"). On December 23, 2009, Polzin brought a motion to consolidate its claims, which was granted on April 6, 2010.

Polzin thereafter initiated no-fault arbitration proceedings with AAA, and the parties arbitrated the claim on October 27, 2010. App.14.¹ On November 5, 2010, the arbitrator issued an award in favor of Polzin on nearly all of the claims, and awarded pre-award and postaward interest. Add.1. Auto-Owners brought a motion in District Court in Hennepin County, Judge Tanya M. Bransford, seeking to vacate the arbitration award on the grounds that the arbitration incorrectly applied the burden of proof, incorrectly interpreted Auto-Owners' obligations under the terms of the policy, and incorrectly ordered pre-award interest. App.1. The Court denied Auto-Owners' motion to vacate, and this appeal follows.

¹ Appellant's Appendix is abbreviated App.#; Appellant's Addendum is abbreviated Add.#.

STATEMENT OF THE FACTS

The facts of the case are generally not in dispute. Polzin is in the business of repairing and replacing auto glass. In seventy-six cases that became the subject of this dispute, Polzin repaired or replaced auto glass for insureds of Auto-Owners. *See App.14-15.* The insureds assigned their rights under the policy to Polzin, who sent invoices directly to Auto-Owners. *Add. 4-5.* Auto-Owners, in turn, sent payment to Polzin, but for less than the amount invoiced. *Add. 4-5.* Auto-Owners' method for determining payment varied over time, but each method involved payment based on the price that area competitors charged for the same work. *App.30.* The price charged by Polzin, on average, was twice the amount paid by Auto-Owners, meaning it was twice the amount charged by its competitors. *See App.16-17 (itemizing invoice and payment amounts).*

The parties disputed the proper interpretation of the policy. The policy provides:

4. Limit of Liability

- a. We will pay no more than the lowest of the following:
 - ...(2) the necessary cost, at local prices, to repair or replace the property or damaged parts with material of similar kind and quality[.]

Add.2. Auto-Owners took the position that it met its policy obligations by paying an amount that was reasonable relative to local competitors. Auto-Owners' Memo. In Opp., to Mot. to Consolidate; *App.30.* Polzin argued that Auto-Owners was required under its policy to pay its costs, even if its competitors charged less. The arbitrator sided with Polzin, and held that Polzin billed reasonable amounts for its services and that Auto-Owners failed to prove that Polzin's prices were unreasonable.

ARGUMENT

I. STANDARD OF REVIEW.

Auto-Owners contends that the arbitrator incorrectly interpreted the language in the insurance policy, incorrectly applied the burden of proof, and incorrectly ordered pre-award interest. Unlike in a traditional arbitration, in the No-Fault context arbitrators are limited to determining issues of fact. *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878, 882 (Minn. 2000) ("Arbitration regarding automobile reparations departs from the generally accepted principle that arbitrators are the final judges of both law and fact"). However, "[i]n order to award benefits, arbitrators must apply the law to the facts, and courts review de novo the arbitrators' legal determinations that are necessary to award, suspend, or deny benefits." *W. Nat'l Ins. Co. v. Thompson*, 797 N.W.2d 201, 208 (Minn. 2011). A No-Fault arbitrator exceeds his or her authority by incorrectly applying the law. *Neutgens v. Westfield Group*, 724 N.W.2d 311, 313 (Minn. Ct. App. 2006).

The interpretation and construction of an insurance policy is a question of law which is reviewed de novo. *Metro. Prop. & Cas. Ins. Co. & Affiliates v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999); *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 183 (Minn. Ct. App. 2001) ("Where there is no dispute as to the material facts, this court independently reviews the district court's interpretation of the insurance contract de novo."). Similarly, identification of the applicable burden and standard of proof, as well as the interpretation of statutory interest provisions, present questions of law reviewed de novo. *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008) (burden of proof); *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. Ct. App. 1998) (interest statute).

II. THE AUTO-OWNERS POLICY REQUIRES AUTO-OWNERS TO PAY A PRICE THAT IS REASONABLE AND BASED ON LOCAL PRICES.

"The extent of an insurer's liability is determined by the insurance contract with its insured as long as that insurance policy does not omit coverage required by law and does not violate applicable statutes." *Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. Ct. App. 2007), *review denied* (Minn. Oct. 24, 2007). The policy at issue requires Auto-Owners to "pay no more than ... the necessary cost, at local prices, to repair or replace the property or damaged parts with material of similar kind and quantity." Add.2 (emphasis added).

General principles of contract interpretation apply to insurance policies. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (quoting *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998)). When construing an insurance contract, courts give words their natural and ordinary meaning and resolve any ambiguity in favor of the insured. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). Language in a policy is ambiguous if it is susceptible to two or more reasonable interpretations. *Carlson*, 749 N.W.2d at 45 (citing *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997)). However, "courts should be vigilant against finding ambiguity when none actually exists." *RAM Mut. Ins. Co. v. Meyer*, 768 N.W.2d 399, 403 (Minn. Ct. App. 2009), *review denied* (Oct. 20, 2009) (citing *Marchio v. W. Nat'l Mut. Ins. Co.*, 747 N.W.2d 376, 380 (Minn. Ct. App. 2008)).

A. The Plain, Unambiguous Language of the Policy Requires Auto-Owners to Pay Competitive, Local Prices.

The policy does not define the phrases “necessary cost” or “local prices.” Where a term is not defined, it must be given its plain and ordinary meaning. *Butwin Sportswear Co. v. St. Paul Fire & Marine Ins. Co.*, 534 N.W.2d 565, 567 (Minn. Ct. App. 1995). “Necessary” means “[a]bsolutely essential * * * [n]eeded to achieve a certain result or effect; requisite.” *Id.* (quoting American Heritage Dictionary 1207 (3d ed. 1992)). The plain and ordinary meaning of the phrase “at local prices” refers to prices in the local area. In addition, because “local prices” is plural, the phrase necessarily includes consideration of the price of glass vendors *other than* the vendor doing the work – in other words, the glass vendor’s competitors’ prices.

In addition, the plain language of the policy is in the nature of an indemnity *limiter*. It uses the phrase “pay no more than” under the heading “Limit of Liability.” Add.2. There is no basis in the language of the policy to interpret the “Limit of Liability” section to require Auto-Owners to pay the upper limit of what could be considered reasonable. The unambiguous policy language limits Auto-Owners’s obligation to the payment of a reasonable local price, not local price at the outer limits of reasonableness.

B. *Glass Service Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849 (Minn. Ct. App. 2000) Does Not Require Auto-Owners to Pay More than Local Prices.

The district court relied on *Glass Service Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849, 852 (Minn. Ct. App. 2000) for its holding that “[t]he amount necessary means an amount that is reasonable within the local industry.” Add.7. For multiple reasons, the *Glass Service* case is not controlling.

First, the case was factually distinct because it interpreted policy language that was different than the language in the Auto-Owners policy. The court in *Glass Service* only analyzed how the word "necessary," *by itself*, affected the insurer's payment obligations under the policy. *Glass Service*, 603 N.W.2d at 851 ("[Progressive] argues that the trial court did not give proper meaning to the policy term 'necessary'").

Second, the court in *Glass Service* did not decide, as a legal matter, that the policy required the insurer to pay any amount charged by the glass vendor that was within the range of reasonableness. Rather, it reached its conclusion because it determined that Progressive admitted in its answer that it was required to pay any reasonable charge. *Id.* at 852 ("[Progressive] concedes that its policy obligates it to pay for windshield replacement so long as the price charged falls within a reasonable range[.]") (emphasis added). Auto-Owners has made no such admission.

The additional phrase "at local prices" distinguishes the Auto-Owners policy from the Progressive policy. The distinction is important, and even the *Glass Service* court hinted that additional language would have led to a different result and allowed an insurer to control its costs. The court noted:

We in no way intend to suggest that appellant and other insurers should not be allowed to control costs. But adding "necessary" to the policy language gave appellant no additional tool with which to manage costs, for the concept of reasonableness inherently encompasses the concept of "necessary" as stated in appellant's policy.

Id. at 852. Auto-Owners controlled its liability under the policy by adding the phrase "at local prices" to the "necessary" term. As a result, it has not breached its contractual obligations under the policy unless it fails to pay reasonable, local prices.

C. The Legislative Scheme Addressing Auto Glass Claims Supports the Interpretation of the Policy as Obligating Auto-Owners to Pay Based on Competitive, Local Prices.

The policy interpretation focusing on the insurer's payment based on a competitive price in the local area is supported by the statutes enacted by the legislature to address the relationship between auto glass vendors and insurance companies. *See* Minn. Stat. § 72A.201, Subd. 6 (14). The Minnesota Supreme Court directed in *Star Windshield Repair, Inc. v. Western Nat. Ins. Co.*, 768 N.W.2d 346, 349 (Minn. 2009), that insurance policies in auto glass disputes are to be interpreted in light of the statutory framework in Section 72A.201. The dispute in *Star Windshield* focused on the interpretation and effect of anti-assignment clauses in auto insurance policies. The clauses, if enforceable, would have prevented an assignment from an insured to a glass vendor. In Minnesota, in contexts other than window glass claims, anti-assignment clauses are enforceable. *See Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004). However, the Minnesota Supreme Court in *Star Windshield* required auto glass insurance contracts to be interpreted in light of the “comprehensive scheme covering automobile insurance.” *Star Windshield*, 768 N.W.2d at 348.

The court in *Star Windshield* applied a different rule of contract interpretation to anti-assignment clauses in the glass context “[b]ecause the legislature has spoken so extensively on auto glass insurance policies[.]” *Id.* at 350. In reaching its conclusion, the majority in *Star Windshield* specifically relied on Minnesota's Unfair Claims Settlement Practice Act, Minn. Stat. § 72A.201, Subd. 6 (14), which states that it is an unfair settlement practice “if an automobile policy provides for the adjustment or settlement of

an automobile loss due to damaged window glass, failing to provide payment to the insured's chosen vendor based on a competitive price that is fair and reasonable within the local industry at large.” *Star Windshield*, 768 N.W.2d at 350 (quoting statutory section). The Supreme Court went further, and explicitly noted that “[t]he insurer must pay a competitive price” and the “framework also requires the arbitration of disputes about that competitive price.” *Id.* (emphasis added).

The focus on the amount paid by Auto-Owners, as opposed to the amount charged by the glass vendor, is in line with the overall legislative scheme addressing the relationship between glass vendors and auto insurers. The Minnesota legislature made a policy decision that insurers must offer insureds the option of choosing comprehensive coverage without a deductible. *See* Minn. Stat. § 65B.134. In addition, the statutory framework requires insurers to make a direct payment to the insured's chosen vendor. Minn. Stat. § 72A.201, Subd. 6(14). However, the result of the no-deductible coverage is that an insured is price indifferent when choosing an auto-glass repair vendor - the insured is not paying the price charged by the vendor (and may not even be aware of the price charged) and has no incentive to select a vendor based on price. *See Ill. Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792, 796 (Minn. 2004) (noting statutory scheme "essentially removes the glass customer from the payment process"). The result is an opportunity for a glass vendor to charge an artificially high price. In order to protect against such abuse, the legislature amended Minn. Stat. § 72A.201, Subd. 6 (14) to require insurance companies to only pay a competitive price that is fair and reasonable within the local industry at large. 2002 Minn. Laws, Ch. 283, s.1. At the same time the

legislature amended Minn. Stat. § 325F.783 to remove the ability of glass vendors to give gifts, prizes, and other incentives of any value. 2002 Minn. Laws, Ch. 283, s.2 (previously gifts less than \$35 in value were permitted).

III. THE ARBITRATOR INCORRECTLY APPLIED THE BURDEN OF PROOF BY REQUIRING AUTO-OWNERS TO PROVE IT DID NOT BREACH ITS INSURANCE CONTRACT.

Polzin's claims are predicated on the theory that Auto-Owners breached its insurance policy by failing to pay the full amount of its invoices for glass work. In a breach of contract action against an insurance company, it is well settled that the plaintiff has the burden to prove that the insurer violated the terms of its insurance policy. *D.H. Blattner & Sons, Inc. v. Fireman's Ins. Co. of Newark*, 535 N.W.2d 671, 675 (Minn. Ct. App. 1995).

In support of his award, the arbitrator held out that 1) Polzin proved it had charged a reasonable amount; and 2) Auto-Owners failed to prove that the amount it paid was the reasonable cost, at local prices. The arbitrator's second conclusion was based on the hearsay nature of Auto-Owners' surveys and the "lack of any evidence" regarding "whether the products and installation process used by the other glass vendor was of a 'material of similar kind or quality[.]'" Add.1. As outlined above, Auto-Owners does not breach its policy if it does not pay the amount charged by Polzin, even if that charge is within the range reasonableness. Auto-Owners only breaches its contract if the amount it pays is not reasonable based on local prices. Polzin has the burden to prove that the amounts paid do not meet the standards in the policy. Polzin cannot succeed on its breach of contract claim by simply pointing to the lack of evidence presented by Auto-

Owners. By improperly shifting the burden of proof to Auto-Owners, the arbitrator exceeded his authority, and the arbitration award must be vacated.

IV. THE ARBITRATOR EXCEEDED HIS AUTHORITY BY AWARDING PRE-AWARD INTEREST.

The arbitrator also erred as a matter of law by awarding pre-award interest.

Interest on an arbitration award is generally addressed by two different statutes, Minn. Stat. §§ 572.15 and 549.09. Minn. Stat. §572.15(a) provides that an arbitrator's award "must include interest" except in limited situations that are not applicable to this case. Minn. Stat. § 572.15(a) does not specify whether it addresses pre-award interest, post-award interest, or both.

Minn. Stat. § 549.09, Subd. 1 also specifically addresses interest on arbitration awards, but distinguishes between pre-award and post-award interest. With respect to post-award interest, Minn. Stat. §549.09, Subd. 1(a) provides that interest "from the time of the ...award ...shall be computed by the ... arbitrator."² With respect to pre-award interest, Minn. Stat. §549.09, Subd. 1(b) provides that "except as otherwise provided by contract or allowed by law ...preaward ... interest shall not be awarded on judgments or awards not in excess of the amounts specified in section 491A.01." Minn. Stat. § 549.09, Subd. 1(b)(4) (emphasis added). Minn. Stat. § 491A sets the conciliation court jurisdictional limit, which at present is \$7,500.

Polzin's consolidated arbitration claim is nothing more than a number of smaller claims arbitrated during the same proceeding. *Ill. Farmers Ins. Co. v. Glass Service Co.*,

² Respondent does not contend the arbitrator exceeded his authority to award post-award interest.

683 N.W.2d at 803-04.³ Because Polzin's claim for damages in each case is less than \$7,500, pre-award interest may not be awarded in any of these cases individually under Minn. Stat. § 549.09, Subd. 1(b)(4).

A. Minn. Stat. § 572.15 and Minn. Stat. § 549.09 Do Not Conflict.

“When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both.” Minn. Stat. § 645.26. Minn. Stat. § 572.15 is ambiguous in that it does not describe whether the term “interest” applies to pre-award interest, post-award interest, or both. Minn. Stat. § 549.09, Subd. 1(b)(4) specifically excludes pre-award interest in small dollar arbitration awards, which reflects a legislative policy decision that claims for small dollar amounts should not be subject to pre-verdict or pre-award interest, unless another statute specifically provides for it (such as Minn. Stat. § 65B.54, which applies to no-fault economic loss benefits). The Court may give effect to both statutes by interpreting Minn. Stat. § 572.15 to only require an award of post-judgment interest.

A construction of Minn. Stat. § 572.15 that requires only post-award interest is strengthened by the fact that the law amending Minn. Stat. § 549.09 to make it applicable to arbitrations is the *same law* that added the mandatory award of interest language to Minn. Stat. § 572.15. 1991 Minn. Laws, Ch. 321, s.7 and s.9. If Minn. Stat. § 572.15 made pre-award interest mandatory in all arbitrations, it would have been inherently

³ If otherwise, Polzin would not have had the option of mandatory arbitration under the \$10,000 jurisdictional no-fault limit, because the sum of its claims exceeded \$10,000.

contradictory for the legislature to simultaneously preclude pre-award interest in cases below the conciliation threshold amount.

B. The Unpublished Case Relied Upon by the District Court is Not Controlling.

The district court relied on an unpublished decision in *Ill. Farmers Ins. Co. v. Glass Service Co.*, 2007 WL 1815781 (Minn. Ct. App. 2007) *review denied* (Sep. 18, 2007), in concluding that Minn. Stat. § 572.15(a) requires pre-award interest even in cases below the conciliation threshold. At the outset, *Illinois Farmers* is unpublished, and is not precedential. Minn. Stat. § 480A.08, Subd. 3(c). *Illinois Farmers* is also unpersuasive, because it did not address the conflict between the two statutory provisions. Far from concluding that the Minn. Stat. § 572.15 'won out' in a conflict with the exception in Minn. Stat. § 549.09, Subd. 1(b)(4), the court and the parties apparently overlooked the small claims exception, and mistakenly concluded that none of the exceptions applied. *Id.* at *10 ("The statute [Minn. Stat. § 549.09] further provides instances when pre-award interest shall not be awarded, none of which are applicable here."). The *Illinois Farmers* court then relied on the premise that none of the exceptions applied to conclude that Minn. Stat. § 549.09, Subd. 1(b), like Minn. Stat. § 572.15, *required* pre-award interest. *Id.* The arbitrator erred as a matter of law in awarding pre-award interest. To the extent the entire award is not vacated, the pre-award interest portion of the arbitration award must be vacated.

CONCLUSION

Auto-Owners respectfully requests that the District Court's Order affirming the arbitration award be reversed, the arbitration award be vacated in its entirety, and the

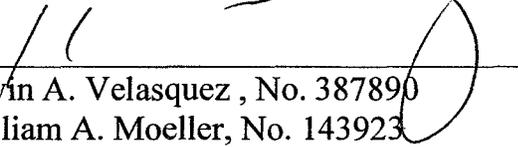
matter remanded for further arbitration proceedings pursuant to Minn. Stat. § 572.19, Subd. 3, with instructions to require Polzin to prove, by a preponderance of the evidence, that the amount Auto-Owners paid was not a competitive, local price.

In the alternative, Auto-Owners requests that the District Court's order affirming the arbitration award of pre-award interest be reversed and that portion of the arbitration awarding vacated.

Dated this 22nd day of September, 2011.

Respectfully submitted,

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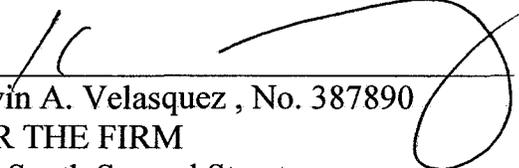
**Attorneys for Auto-Owners Insurance
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. App. P. 132.01, Subd. 3, for a brief produced using proportional serif font, 13 point or larger.

The length of this brief is 3,784 words. This brief was prepared using Microsoft Word 2003.

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