

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 REPLY BRIEF

BLETHEN, GAGE & KRAUSE, PLLP
William A. Moeller (#143923)
Kevin A. Velasquez (#387890)
127 South Second Street
P.O. Box 3049
Mankato, MN 56001
(507) 345-1166

Attorneys for Appellant

LIVGARD & RABUSE, PLLP
Charles J. Lloyd (#174257)
2520 University Avenue S.E.
Suite 202
Minneapolis, MN 55414
(612) 825-7777

Attorneys for Respondent

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ARGUMENT

Respondent Garlyn, Inc., d/b/a Polzin Glass (“Polzin”) asserts two new arguments in its Response Brief, neither of which was asserted in the district court. First, Polzin argues that, contrary to long standing Minnesota law, *de novo* review of legal determinations by No-Fault Arbitrators is unnecessary and inappropriate. Second, in an effort to avoid the exclusion of pre-award interest in Minn. Stat. § 549.09, Subd. 1(b) for awards less than \$7,500, Polzin argues that an award in a consolidated auto-glass claim loses its consolidated character and is simply one “award.” Polzin has waived both arguments by failing to raise them in the district court, and even if the arguments are considered on their merits, they do not withstand scrutiny. In addition, Polzin raises several fact arguments that are not at issue in the appeal.

I. THE *DE NOVO* STANDARD OF REVIEW OF NO-FAULT ARBITRATORS' LEGAL CONCLUSIONS IS SETTLED LAW AND SHOULD NOT BE CHANGED.

Polzin argues in its Response Brief that the court should discard the currently applicable *de novo* standard of review applied to the legal decisions of no-fault arbitrators in favor of the 'traditional' rule that the legal decisions of arbitrators are final, absent agreement of the parties. *See* Resp. Brief at 7 (recognizing that the "current state of the law is that no-fault arbitrator ... legal determinations are subject to *de novo* review"). Polzin is correct in its statement that the current state of the law permits *de novo* review of no-fault arbitrators' legal determinations. *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878, 882 (Minn. 2000).

Polzin did not argue in its memorandum of law in the district court that the court should overturn controlling law regarding the *de novo* standard of review. Rather, Polzin simply argued that the finality of arbitration decisions was favored and that the policy interpretation was based on facts (the same argument Respondent makes separately on appeal). See Garlyn's Mem. in Opp. to Auto-Owners' Motion to Vacate, March 11, 2011, p. 2-5. Generally, arguments not raised in district court are not considered on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

As an initial matter, the decision to overrule Supreme Court precedent should be left to the Supreme Court. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 483 (Minn. Ct. App. 2006) ("this court has no authority to overrule decisions of the supreme court"). Further, based on the principle of stare decisis, the Supreme Court is 'extremely reluctant to overrule our precedent ...' and 'require[s] a compelling reason' to do so." *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 862 (Minn. 2011) (internal quotations omitted). Polzin fails to point to any compelling reason to overrule current precedent.

It is important to point out that an arbitration of a comprehensive vehicle claim is different than a 'traditional' arbitration. Arbitration of auto-glass claims is mandated by statute, whereas a traditional arbitration is a result of a voluntary agreement of the parties. See Minn. Stat. § 65B.525, Subd. 1 (providing for "mandatory submission to binding arbitration of all cases at issue where the claim at the commencement of arbitration is in an amount of \$10,000 or less against any insured's reparation obligor for ... comprehensive or collision damage coverage."); see also, *Ill. Farmers Ins. Co. v. Glass*

Service Co., 683 N.W.2d 792, 800 (Minn. 2004) (arbitration requirement cannot be waived, and deprives courts of subject matter jurisdiction over no-fault claims of \$10,000 or less). Many of the concepts and legal maxims based on the concept of a voluntary agreement to arbitration are not applicable to statutorily mandated arbitration. For example, Minnesota Courts frequently point out that in a traditional arbitration, "an arbitrator, in the absence of any agreement limiting his authority, is the final judge of both law and fact[.]" *State v. Berthiaume*, 259 N.W.2d 904, 909-10 (Minn. 1977); *Ortega v. Farmers Ins. Group*, 474 N.W.2d 7, 9 (Minn. Ct. App. 1991) (same). There is no similar ability to agree to limit the scope of an arbitrations review in the no-fault context.

A. The Constitutionality of Mandatory No-Fault Arbitration Relies on *De Novo* Review of Arbitrators' Legal Decisions.

The mandatory nature of arbitration has significant constitutional implications. The very nature of arbitration limits or deprives the participating parties of important rights protected by the Minnesota and United States Constitutions, including the right to a jury, U.S. Const. amend. VII, Minn. Const. art. I, §4, and the right to due process, including the right to judicial review. U.S. Const. amend XIV, §2, Minn. Const. art. I, §7. Traditional analysis of the limitation of these rights in the arbitration context depends upon some concept of waiver. *See, e.g., Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 358-59 (Minn. 2003) (Anderson, P, concurring) ("our courts must carefully scrutinize a waiver of the right of trial by jury to ascertain that it was done knowingly, voluntarily, and intelligently" when analyzing arbitration contracts).

The Court of Appeals upheld the constitutionality of mandatory no-fault arbitration in *Neal v. State Farm Ins. Co.*, but only because the arbitrator's legal determinations were reviewable *de novo*. 509 N.W.2d 173, 178-79 (Minn. Ct. App. 1993) rev'd on other grounds by *Neal v. State Farm Mut. Ins. Co.*, 529 N.W.2d 330 (Minn. 1995). In *Neal*, State Farm argued that it was deprived of its right under Article I, Section 4 of the Minnesota Constitution, to a jury trial for "all cases at law without regard to the amount in controversy." *Id.* at 178. The court in *Neal* relied on *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co.*, 233 N.W. 310 (Minn. 1930), *aff'd*, 284 U.S. 151, (1931), noting that *Glidden* "held that because the *liability* of the insurer remained a question for the court and arbitration determined only the amount of the loss, the statute was constitutional." *Neal*, 509 N.W.2d at 178 (emphasis in original). In analogizing to *Glidden*, the court concluded that:

In no-fault arbitration, pure legal questions are determined by the court, not the arbitrator. Whether an insurer is liable on a contract for insurance is a legal question. In section 65B.525 arbitration, the arbitrator is deciding the amount of loss, not the liability of the insurer on the contract. The requirement of mandatory arbitration pursuant to Minn.Stat. § 65B.525, subd. 1 does not violate the Minnesota Constitution.

Id. at 179 (internal citations omitted). As *Neal* recognized, without *de novo* review of legal questions, mandatory arbitration of no-fault claims is unconstitutional.

B. Consistent Interpretation of Minnesota Laws is Valuable In Any Context.

There is no dispute that auto glass cases are different than economic loss benefits cases. However, the different legal questions in no way compel a different standard of review. Consolidated auto glass claims are themselves different in many ways than an

economic loss benefits case or even an individual claim - they are larger, involve multiple claimants, and separate fact issues. Despite these differences, the need for consistent interpretations on legal issues is no less great.

There is a great deal of irony in Polzin's latest argument that there is no need to obtain consistency in legal determinations that do not involve economic loss benefits. Polzin and other glass vendors are the flag-bearers for consistency when they perceive it will help them. Polzin argued resolutely that a consolidated arbitration was necessary to avoid potentially inconsistent results in arbitration. Polzin argued, in this very case, that "there is clearly a danger that individual arbitrations will yield inconsistent results" and that "both parties would benefit from a uniform determination." Polzin's Mem. of Law in Support of Plaintiff's Mot. to Consolidate Invoices for Arbitration, p.9. Yet Polzin has no interest in an appellate resolution of a legal issue that will inform many subsequent claims and provide consistency in claim determinations.

Similarly, the *de novo* review of no-fault arbitrators' legal conclusion was essential to a glass vendor's claim that orders to consolidate glass claims are not immediately appealable. In a 2008 appeal following an order consolidating several glass claims, another glass vendor, represented by the same attorney, argued that a district court decision to compel a consolidated arbitration in no-fault cases is not reviewable prior to arbitration, because there is no final judgment. The 8th Circuit distinguished appeals from orders compelling arbitration in 'traditional' (non-No Fault) cases, which are immediately appealable, because the arbitrator's legal decisions are reviewed *de novo*, noting:

the critical difference between this case and [cases holding that an order compelling arbitration is a final decision and appealable under 9 U.S.C. § 16(a)(3)] is that the district court will have more to do than simply "execute the judgment" following the No-Fault arbitration. Under the No-Fault Act, "an arbitrator's decision on a legal question is subject to *de novo* review by the district court."

Alpine Glass, Inc. v. Ill. Farmers Ins. Co., 531 F.3d 679, 682-683 (8th Cir. 2008). If the consolidation motions are no longer subject to *de novo* review, orders compelling arbitration become immediately appealable.

C. The Policy Interpretation Is Not Converted Into A Factual Issue by Pointing to Factual Findings.

Respondent argues, based on the court of appeals decision in *Glass Service v. Ill. Farmers Ins. Co.*, A06-1074, 2007 WL 1815781 (Minn. Ct. App. June 26, 2007), that an interpretation of a contract of insurance is not a legal decision, but a factual decision. Resp. Br. at 11, quoting *Glass Service v. Ill. Farmers* ("the nature of the dispute fell within the arbitrators' authority to resolve."). The 2007 *Glass Service* case is not precedential. It does not stand for the proposition that contractual interpretation is a factual issue for the arbitrator, and even if it did, it should not be followed.

The 2007 *Glass Service* opinion described the policy interpretation as "within the arbitrators' authority to resolve." Polzin implicitly argues that, if the arbitrator has the authority to resolve the issue, the issue must be factual, because no-fault arbitrators' authority is limited to deciding questions of fact. An arbitrator's authority to address an issue, however, in no way determines the standard of review of the decision. No-Fault arbitrators undoubtedly may apply the law in reaching their decisions. *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988) (an arbitrator is

limited to deciding issues of fact, but is not prevented from applying the law to the facts). Those decisions are simply subject to *de novo* review. *Id.* Indeed, the district court must review *de novo* not only pure questions of law, but the arbitrator's application of the law to the facts. *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 531 F.3d 679, 683 (8th Cir. 2008) (citing *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804, 807 (Minn. Ct. App. 2003)).

To the extent the 2007 *Glass Service v. Ill. Farmers* decision is read for the conclusion that questions of policy interpretations are non-reviewable fact questions, the decision is simply inconsistent with Minnesota law. As Judge Schiltz noted in a case interpreting Minnesota law:

The problem, though, is that *Glass Service Company* simply cannot be reconciled with a long line of decisions by the Minnesota Supreme Court (and the Minnesota Court of Appeals) that make it clear that, under the No-Fault Act, questions about the existence and scope of coverage are legal questions that must be determined by a court, not factual questions that must be determined by the arbitrator.

Alpine Glass, Inc. v. Ill. Farmers Ins. Co., 695 F. Supp. 2d 909, 918-19 (D. Minn. 2010) (Schiltz, J.) *aff'd*, 643 F.3d 659 (8th Cir. 2011). The interpretation of the Auto-Owners policy remains a legal question subject to *de novo* review, despite Polzin's best efforts to classify it as a factual question.

II. THE CONSOLIDATED AWARDS ARE JUDGED INDIVIDUALLY IN DETERMINING WHETHER PRE-AWARD INTEREST IS AVAILABLE.

Respondent argues, for the first time on appeal, that the arbitration award must be treated as a single award, rather than a combination of several awards based on the consolidated underlying claims, and therefore pre-award interest is not excluded under

Minn. Stat. § 549.09, Subd. 1(b) (pre-award interest is not available on awards less than \$7,500). As noted earlier, arguments not raised in the court below are generally not considered on appeal. *Thiele*, 425 N.W.2d at 582.

Even if the argument is considered, it is not compelling. Polzin's argument ignores the big picture and the legislative scheme addressing auto glass claims. The No-Fault Act only mandates the arbitration of comprehensive glass claims under \$10,000. *See* Minn. Stat. § 65B.525. Individual auto-glass claims do not lose their individual status when they are consolidated. *See Simon v. Carroll*, 62 N.W.2d 822 (Minn. 1954) (consolidated claims retain their separate identity). As a necessary corollary, no individual claimant increases or decreases its fundamental rights by virtue of consolidation. *Ill. Farmers v. Glass Services*, 683 N.W.2d at 803 (an auto glass shop which takes an assignment of a claim from an insured has the "same legal rights as the [insured] had before assignment.").

If the claims lost their individual character, they could not be consolidated for arbitration to the extent they exceeded \$10,000. Similarly, if the claimant with a windshield claim for \$2,000 is able to obtain pre-award interest only by consolidating his or her claim with several other claims, the claimant obtains a new right to pre-award interest by virtue of the assignment and consolidation. The fact that Polzin was able to obtain assignments of multiple claims, and consolidate its claims into a single proceeding, does not transform Polzin into a single claimant with a single award. *Id.* at 804. No Minnesota case has addressed the issue; however, in a federal case interpreting Minnesota law, the District Court agreed, noting:

American Family argues that each consolidated claim remains an individual claim, and no claim meets the threshold value of § 549.09. The court agrees. Alpine Glass, as assignee of each claim, acquires only those rights possessed by each consumer. This consolidated arbitration addressed 2,500 individual claims in a single proceeding. As a result, no claim meets the required minimum of § 549.09, subdiv. (1)(b)(4).

Alpine Glass, Inc. v. Am. Family Ins. Co., CIV. 06-4213 DSD SRN, 2010 WL 5088188

(D. Minn. Dec. 7, 2010) (Doty, J).

Polzin separately argues that Minn. Stat. § 572.15(a) "lays waste" to Auto-Owners's interest argument. Polzin makes absolutely no attempt to argue or explain how the "must include interest" language in Minn. Stat. § 572.15(a) interacts with the contemporaneously-enacted language in Minn. Stat. §549.09, Subd. 1(b) excluding pre-award interest.¹

III. AUTO-OWNERS'S CLAIMS PAYMENT HISTORY FOR CLAIMS NOT IN DISPUTE ARE IRRELEVANT TO THIS APPEAL.

Far from "laying waste" to Auto-Owners's legal arguments concerning policy interpretation, Polzin's argument that Auto-Owners's payment of similar claims in full at a rate different than it paid on disputed claims is irrelevant. The district court did not rely in any way on the invoices Auto-Owners paid that were not part of the arbitration, *see* Add 3-10, and with good reason. The information is completely irrelevant to the policy interpretation. Auto-Owners's settlement of one insurance claim does not bind it to settle other claims, nor is it an admission of liability. *See* Minn. R. Ev. 406. The evidence of

¹ Going forward, Polzin's argument lacks teeth because Minn. Stat. § 572.15(a) is replaced by the Revised Uniform Arbitration Act, Ch. 572B, which does not contain any comparable "must include interest" language, while Minn. Stat. §549.09, Subd. 1(b) remains in effect.

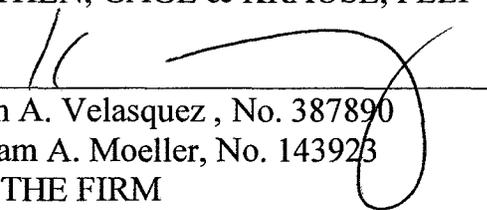
settlement of claims not part of the litigation, even if they were probative of the reasonableness of the amount charged by Polzin, would say nothing about the reasonableness of the amount paid by Auto-Owners and whether the payment amount reflected local prices. Polzin simply cherry-picks some facts from the arbitration, which purportedly supported the arbitrator's analysis of the incorrect legal standard, in an effort to avoid the legal question.

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 in front of a new arbitrator 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. Auto-Owners additionally requests that the District Court's order affirming the arbitration award of pre-award interest be reversed.

Dated this 4th day of November, 2011. Respectfully submitted,

BLETHEN, GAGE & KRAUSE, PLLP

By: 

Kevin A. Velasquez, No. 387890

William A. Moeller, No. 143923

FOR THE FIRM

127 South Second Street

Mankato, MN 56002-3049

Telephone: (507) 345-1166

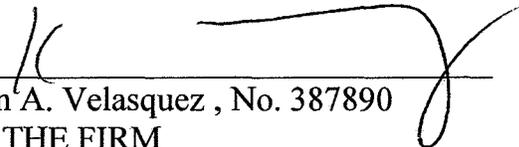
**Attorneys for Auto-Owners Insurance
Company.**

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 2840 words. This brief was prepared using Microsoft Word 2003.

BLETHEN, GAGE & KRAUSE, PLLP

By: 

Kevin A. Velasquez , No. 387890

FOR THE FIRM

127 South Second Street

P. O. Box 3049

Mankato, MN 56002-3049

Telephone: (507) 345-1166

**Attorneys for Auto-Owners Insurance
Company**