STATE OF MINNESOTA
IN COURT OF APPEALS
A09-506

American International Specialty Lines
Insurance Company,
as subrogee for Rescue Mortgage, Inc.,
Respondent,

vs.

Brookfield Home Loans, Inc.,
Defendant,

Northwest Title and Escrow Corporation,
Appellant.

Filed March 16, 2010
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CV-07-20863

Melissa Dosick Riethof, Jacalyn N. Hansen Chinander, Joel T. Wiegert, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent)

Gary B. Bodelson, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Challenging the district court's denial of posttrial relief, appellant questions the standing of respondent insurer as an alleged subrogee. Because the lateness of appellant's standing objection unjustly prejudiced respondent's ability to respond, and other issues were also untimely raised before the district court, we affirm.

FACTS

Appellant Northwest Title and Escrow Corporation was enlisted to serve as the title-closing company for Larry Kofstad's November 2004 mortgage loan from Rescue Mortgage, Inc. The final loan application contained the terms of Kofstad's HUD-1 settlement, also signed by appellant's agent, that required use of the loan proceeds to satisfy Kofstad's $25,812 outstanding child-support arrearages. But appellant, at Kofstad's request, disbursed the loan proceeds in the form of a $25,000 check to Kofstad and a second $10,000 check to the child-support enforcement agency.

Rescue Mortgage maintained an errors-and-omissions policy with respondent American International Specialty Lines Insurance Company, and respondent provided coverage for Rescue Mortgage's resale of mortgage interests such as the Kofstad loan. On the closing date of the loan transaction, Rescue Mortgage sold its interest in the loan to GMAC-Residential Funding Corporation (GMAC). Defendant Brookfield Home Loans, Inc. (Brookfield) was the mortgage broker that had enlisted appellant's services for Rescue Mortgage.

Kofstad made only two payments before defaulting on the mortgage loan in March 2005, and GMAC consequently initiated foreclosure proceedings and conducted an audit on the loan file. In August 2005, GMAC demanded Rescue Mortgage's repurchase of the Kofstad loan, citing both the failure to satisfy Kofstad's child-support debt and a representation in the loan application that Kofstad, who then received temporary disability benefits, had a permanent right to these payments. As an alternative to Rescue Mortgage's resumption of service on the loan, Rescue Mortgage and respondent insurer decided to reimburse GMAC for the losses it incurred related to the foreclosure of the Kofstad loan. Respondent ultimately paid GMAC $71,066.15 for discharge of Rescue Mortgage's repurchase obligation.

Acting as Rescue Mortgage's subrogee, respondent settled its claim against mortgage broker Brookfield, and also proceeded with its suit on the claim that appellant breached its fiduciary duty to Rescue Mortgage by improperly disbursing funds; respondent asserted a right to damages in the amount it had paid to GMAC. The district court subsequently entered its partial summary judgment that appellant was liable on the claim, but the court reserved the issue of damages for trial.

At the damages trial, before jury selection, appellant attempted to raise several issues for the first time, first contending that respondent insurer lacked standing because it paid a claim not required by Rescue's policy. Appellant also challenged whether Rescue Mortgage was contractually obligated to repurchase the mortgage and asserted that the issue of comparative fault should be presented to the jury. The court concluded that these arguments were untimely and declined to address them. The court observed

that the arguments were determined or should have been decided when the summary judgment was considered and finalized. The jury determined that respondent was entitled to $71,066.15 in damages. Appellant then brought posttrial motions that repeated the claims it stated when the trial began. The motions were denied, and this appeal followed.

D E C I S I O N

1. Standing

As a threshold matter, we generally will not consider matters not timely argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). An exception to this rule exists for challenges to standing, which are not subject to waiver and must be reviewed by this court even if unaddressed by the district court. *In re Horton*, 668 N.W.2d 208, 212 (Minn. App. 2003).

Appellant argues that respondent had no obligation to indemnify Rescue Mortgage under Rescue's errors-and-omissions policy and as a result failed to demonstrate standing.[1] The standing question is determined as a matter of law and reviewed de novo.

[1] Respondent asserts that this argument constitutes a claim that it is not a real party in interest, which, as it asserts, is a fact issue neither properly raised before the district court nor asserted on appeal.

Minn. R. Civ. P. 17.01 requires that any party bringing any claim be a "real party in interest," which is demonstrated by the party having the legal right to bring the claim under the applicable substantive law. *Austin v. Austin*, 481 N.W.2d 884, 886 (Minn. App. 1992). Standing, on the other hand, is "[the] legal requirement that a party ha[s] a sufficient stake in a justiciable controversy." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007). A party satisfies the standing requirement (when not granted by statute) by suffering an injury-in-fact—"a concrete and particularized invasion of a legally protected interest." *Id.* In sum, standing is premised on an injury that underlies its claim and a real party in interest is based on the legal right to bring the claim. Because appellant's contract argument does not fit squarely within either of these definitions, it does not

Rukavina v. Pawlenty, 684 N.W.2d 525, 531 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004). Longstanding Minnesota law allows insurance companies to assume the standing of an insured plaintiff when the rights of the insured plaintiff are subrogated to the insurer. *Blair v. Espeland*, 231 Minn. 444, 446, 43 N.W.2d 274, 276 (1950). Appellant argues that respondent cannot demonstrate an injury—cannot claim standing—because it failed to establish that it is a valid subrogee, either by providing a copy of its policy during the course of the proceedings or otherwise showing its legal obligation to settle or repurchase the Kofstad loan.

Precedent establishes the reluctance of this court to deny standing so as to unfairly prejudice one of the parties. *See Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433 (Minn. App. 1995) (denying a standing challenge, noting policy considerations favoring the conclusion that parties have a sufficient stake in the outcome), *review denied* (Minn. May 31, 1995). Appellant's untimely assertion of the issue leaves the record without a copy of respondent's errors-and-omissions policy or other relevant information on respondent's subrogation interest. And Minn. R. Civ. App. P. 110.01 (confining record to matters presented in district court) precludes any attempt of respondent to provide this information on appeal.

Appellant failed to raise the issue despite one year of discovery and the unfolding of summary judgment proceedings. Even when presented, as the damages trial began, appellant did not provide respondent or the court with any brief on the argument or any

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compel a real-party analysis, as respondent suggests, and we proceed to address appellant's standing claim.

legal authority to support its position. In these circumstances, the district court did not err when concluding that appellant's objection was untimely. Deciding that respondent lacks standing on the basis of its failure to submit documentation that was not material in prior proceedings would constitute unfair prejudice to respondent.

2. Subrogor's Contractual Obligation

As the damages trial began, appellant also asserted that judgment as a matter of law (JMOL) was warranted because respondent failed to prove that Rescue Mortgage had a contractual obligation to repurchase the mortgage from GMAC; this is the conclusion that underlies the claim of damages suffered by Rescue Mortgage or respondent as its subrogee. A JMOL motion should be granted only in rare, unequivocal cases when demanded by evidence in the record or applicable law. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). This court reviews a denial of a JMOL motion de novo, viewing the evidence in the light most favorable to the prevailing party. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

The district court concluded that this argument was not timely raised and implicated issues of liability and causation, which were already determined at summary judgment, and denied the motion. Issues that were not timely raised before the district court are waived, and this court will not consider matters raised for the first time in a posttrial motion. *See Thiele*, 425 N.W.2d at 582; *see also Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) ("[A]n issue first raised in a post-trial motion is not raised in a timely fashion."), *review denied* (Minn. Oct. 15, 2002).

An issue may be raised for the first time in a posttrial motion when an underlying fact was discovered for the first time at trial. *See Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986) (permitting an error made in civil jury instructions raised in a posttrial motion to be argued on appeal); *see also Kitchar v. Kitchar*, 553 N.W.2d 97, 100 (Minn. App. 1996) (allowing an issue first discovered during trial and presented in a posttrial motion to be argued on appeal), *review denied* (Minn. Oct. 29, 1996). But appellant simply failed to address the issue during the summary judgment process and stated the claim only at a trial limited to the issue of damages. Appellant's raising of the question was untimely and appellant is precluded from arguing the issue on appeal. The district court appropriately denied appellant's JMOL motion.

3. New Trial; Comparative Fault

Finally, appellant argues that the district court erred by denying its alternative motion for a new trial pursuant to Minn. R. Civ. P. 59.01. Because the district court has discretion to grant a new trial, we will not disturb the decision absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

Appellant claims that a new trial was warranted because the district court did not allow appellant to present the issue of comparative fault to the jury. But the sole issue to be determined at trial was damages. The district court determined that appellant's motion failed for the same reason as its JMOL motion, that it was untimely.

A party may not raise an issue for the first time as a legal basis for a new trial. *Ellingson v. Burlington N. R.R.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). Appellant first raised the comparative-fault argument before a trial strictly limited to damages but failed to raise the issue when the issues of liability and causation were determined during the summary judgment proceedings. The issue may not be raised at this stage as a basis for a new trial, and the district court did not abuse its discretion in denying appellant's new-trial motion.

Affirmed.