SJC-13563

JEFFREY FRANK CUBBERLEY[1] & another[2] vs. THE COMMERCE INSURANCE COMPANY.

Suffolk. October 7, 2024. - January 30, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, & Wolohojian, JJ.

Motor Vehicle, Insurance. Insurance, Motor vehicle insurance, Coverage, Construction of policy. Contract, Insurance, Performance and breach, Damages. Value. Damages, Breach of contract. Practice, Civil, Damages, Standing, Motion to dismiss. Commissioner of Insurance. Insurance, Commissioner of Insurance. Administrative Law, Agency's interpretation of statute. Declaratory Relief.

Civil action commenced in the Superior Court Department on August 29, 2019.

A motion to dismiss was heard by Hélène Kazanjian, J.

The Supreme Judicial Court granted an application for direct appellate review.

[1] On behalf of himself and all others similarly situated.

[2] Philip Chapman Seaver, on behalf of himself and all others similarly situated.

Kevin J. McCullough (Paul F.X. Yasi, Jr., also present) for the plaintiffs.

Nelson G. Apjohn (Eric P. Magnuson also present) for the defendant.

The following submitted briefs for amici curiae:

Ben Robbins & Daniel B. Winslow for New England Legal Foundation.

Wystan M. Ackerman for American Property Casualty Insurance Association & another.

Marc A. Diller, Thomas R. Murphy, Kevin J. Powers, J. Michael Conley, & John T. Ford for Massachusetts Academy of Trial Attorneys.

GEORGES, J. In this case we consider whether part 4 of the 2016 edition of the standard Massachusetts automobile insurance policy (2016 standard policy) excludes coverage for "inherent diminished value" (IDV)[3] damages to a third-party claimant's vehicle. The plaintiffs, Jeffrey Cubberley and Philip Seaver, commenced suit against The Commerce Insurance Company (Commerce), personally and on behalf of a putative class of similarly situated individuals, seeking declaratory relief -- a judgment declaring that Commerce was obligated to cover IDV damages -- and compensation for Commerce's alleged breach of contract for failing to pay these damages. Commerce successfully moved to dismiss the complaint on the ground that

[3] As explained in McGilloway v. Safety Ins. Co., 488 Mass. 610, 611 n.4 (2021), "inherent diminished value (IDV) is the concept that a vehicle's fair market value may be less following a collision and repairs, and that it equals the difference between the resale market value of a motor vehicle immediately before a collision and the vehicle's market value after a collision and subsequent repairs" (quotation omitted).

it had no legal obligation to pay for IDV damages and that the plaintiffs therefore failed to allege facts plausibly suggesting an entitlement to relief. We granted the plaintiffs' application for direct appellate review. For the reasons discussed below, we affirm the dismissal of the plaintiffs' complaint.[4]

Background. 1. Facts. We summarize the allegations in the operative complaint, accepting them as true and drawing every reasonable inference in favor of the plaintiffs. Buffalo-Water 1, LLC v. Fidelity Real Estate Co., 481 Mass. 13, 17 (2018).

Each plaintiff's vehicle was damaged in a collision caused by another driver insured under a policy issued by Commerce. The policy included language consistent with part 4 of the 2016 standard policy, which states, in relevant part:

> "The amount we will pay is the amount the owner of the property is legally entitled to collect through a court judgment or settlement for the damaged property. We will pay only if you, a household member, or someone else using your auto with your consent is legally responsible for the accident. The amount we will pay includes, if any, applicable sales tax and the loss of use of the damaged property. The amount we will pay does not include compensation for physical damage to, or towing or recovery of, your auto or other auto used by you or a household

[4] We acknowledge the amicus briefs submitted by the New England Legal Foundation in support of the defendant; the American Property Casualty Insurance Association and Massachusetts Insurance Federation in support of the defendant; and the Massachusetts Academy of Trial Attorneys in support of the plaintiffs.

> member with the consent of the owner, or any decreased value or intangible loss claimed to result from the property damage unless otherwise required by law." (Emphases omitted.)

Each plaintiff, as a third-party claimant, sought compensation from Commerce for damage to his vehicle. As part of their demands, the plaintiffs provided supporting documentation for IDV damages. Commerce acknowledged liability for the damage caused by its insureds and processed the claims accordingly. However, while Commerce covered the full cost of repairs to restore the vehicles to their precollision condition, it refused to compensate the plaintiffs for any alleged IDV. As a result, each plaintiff's vehicle "is now worth less in the resale market than a comparable vehicle that has not suffered such damage from a collision."

2. Procedural history. The plaintiffs commenced a lawsuit in the Superior Court against Commerce, on behalf of themselves and similarly situated individuals.[5] The case was transferred to

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[5] As defined in the subsequently filed second amended complaint, the class included:

> "All third-party claimants who presented a third-party property damage claim against a Commerce insured under the 2016 [standard policy], and wherein: (a) Commerce determined that its insured (or insured vehicle operator) was/were legally liable for the loss to the claimant's automobile; (b) Commerce adjusted the claimant's third-party property damage claim without including consideration for diminution of value sustained by the automobile; and (c) Commerce and the third-party claimant have not

the business litigation session, and the plaintiffs filed their first amended complaint the following month.

The proceedings were stayed, pending the outcome of McGilloway v. Safety Ins. Co., 488 Mass. 610 (2021). This court then decided McGilloway, holding that IDV damages were recoverable under part 4 of the 2008 edition of the standard Massachusetts automobile policy (2008 standard policy), and the stay was lifted. Id. at 617.

Following the lifting of the stay, the plaintiffs filed a second amended complaint. This complaint -- the operative complaint for present purposes -- alleged breach of contract, asserting Commerce failed to pay for IDV damages under part 4 of the 2016 standard policy. The plaintiffs also sought a judgment declaring that "all [IDV] damages should be, and are required to be, paid and/or tendered to third-party claimants when Commerce's insured has been determined to be liable for the associated third-party property damage."

Commerce moved to dismiss the claims pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). The motion was granted in a written decision in which the motion judge concluded that part 4 of the 2016 standard policy excludes

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presently settled the diminution in value portion of the property damage claim."

coverage for IDV damages to third-party vehicles and, therefore, Commerce had no obligation to pay the plaintiffs.[6] Consequently, the judge did not address whether the plaintiffs lacked standing to pursue their claims due to their failure to secure a final judgment against the insureds before suing Commerce.

The plaintiffs appealed, and we granted their request for direct appellate review.

Discussion. 1. Standard of review. "We review the allowance of a motion to dismiss de novo." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In conducting our review, we accept as true all the facts alleged in the complaint and draw all reasonable inferences in the plaintiffs' favor. Flagg v. AliMed, Inc., 466 Mass. 23, 26 (2013). Well-pleaded facts do not include "[l]egal conclusions cast in the form of factual allegations." Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). "To survive a motion to dismiss for failure to state a claim, the claimant must plausibly allege an entitlement to relief above the speculative level."

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[6] In their complaint, the plaintiffs also alleged unfair and deceptive business practices and additional violations of G. L. c. 93A. These claims, like the breach of contract and declaratory judgment claims, were ultimately dismissed. On appeal, the plaintiffs do not raise any arguments regarding these claims, and thus they are waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) (we "need not pass upon questions or issues not argued in the brief"). See also Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 593 n.42 (2022).

Hornibrook v. Richard, 488 Mass. 74, 78 (2021), citing Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

2. Standing. As an initial matter, Commerce argues that the plaintiffs lack standing to pursue their breach of contract claims because they failed to obtain final judgments against the Commerce insureds. We must resolve this threshold issue, as standing is a prerequisite for a court to adjudicate a dispute. HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 199 (2013) (plaintiff must establish standing in order for court to decide merits of dispute or claim).

Commerce bases its argument that the plaintiffs lack standing on two statutes. First, G. L. c. 175, § 113, provides that "[u]pon the recovery of a final judgment" against an insured person (i.e., the "judgment debtor"), the injured party (i.e., the "judgment creditor") is "entitled to have the insurance money applied to the satisfaction of the judgment as provided in [G. L. c. 214, § 3 (9)]." Second, G. L. c. 214, § 3 (9), grants jurisdiction to this court and the Superior Court over "[a]ctions to reach and apply the obligation of an insurance company to a judgment debtor under a motor vehicle liability policy . . . in satisfaction of a judgment covered by such policy."

Taken together, these statutes establish that obtaining a valid final judgment against the insured judgment debtor is a

prerequisite to initiating an action against the insurer to reach and apply. See Rogan v. Liberty Mut. Ins. Co., 305 Mass. 186, 188 (1940) ("A valid judgment was a prerequisite" to suit against insurer). In simpler terms, a third-party claimant must first secure a final judgment against the insured party before suing the insurer for an alleged failure to pay damages under the policy. See Martins v. Vermont Mut. Ins. Co., 92 F.4th 325, 329 (1st Cir. 2024) (citing Rogan for conclusion that, under Massachusetts law, "obtaining a judgment is a necessary predicate for maintaining a cause of action against" insurer).

"[W]hen an issue involves an area of law governed by a specific statute with a standing requirement, that issue is governed by the standing requirements of the particular statute and not by a general grant of standing." Boston Edison Co. v. Boston Redev. Auth., 374 Mass. 37, 46 (1977). Here, the plaintiffs' breach of contract claim falls under G. L. c. 175, § 113, and G. L. c. 214, § 3 (9), as that claim effectively seeks "to reach and apply the proceeds of a motor vehicle liability policy, issued by [Commerce], in satisfaction of a judgment [as yet] recovered by the plaintiff[s] against the [insureds]." Kiley v. Stanley, 328 Mass. 652, 652-653 (1952). Thus, the question of standing is governed by the requirements of these statutes. See Boston Edison Co., supra.

Rather than obtaining final judgments against the insureds as required, the plaintiffs directly sued Commerce, alleging breach of contract as third-party beneficiaries of the 2016 standard policy. Because the plaintiffs failed to satisfy the statutory prerequisite outlined in G. L. c. 175, § 113, they lack standing to pursue their breach of contract claims.[7] Consequently, while we do not address the merits of their breach of contract claim as the motion judge did, we affirm the dismissal. See Murchison v. Zoning Bd. of Appeals of Sherborn, 485 Mass. 209, 218 (2020) (where plaintiffs "lack standing . . . we order[] dismissal of the appeal without reaching the merits"). See also Feeney v. Dell Inc., 454 Mass. 192, 211 (2009) ("we may consider any ground apparent on the record that supports the result reached in the trial court").[8]

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[7] At oral argument, counsel for the plaintiffs asserted for the first time, without citing any legal authority, that the plaintiffs had standing by virtue of Commerce's "partial performance" on the contract and its acknowledgment of liability. "This does not rise to the level of appellate argument." Wortis v. Trustees of Tufts College, 493 Mass. 648, 671 (2024).

[8] We need not, and therefore do not, decide whether the plaintiffs have standing to pursue their declaratory judgment claim, as they have waived any further challenge to the dismissal. As stated in note 6, supra, appellants must specify all arguments on appeal in their brief, including the reasons for their arguments and citations to relevant authorities. See Mass. R. A. P. 16 (a) (9) (A). An appellate court need not consider issues not argued in the brief. Accordingly, the plaintiffs' failure to address the judge's ruling dismissing their declaratory relief claim waives their right to review on

3. The meaning of the 2016 standard policy. Where a plaintiff lacks standing to bring an action, the court ordinarily lacks jurisdiction of the subject matter and must therefore dismiss the action. HSBC Bank USA, N.A., 464 Mass. at 199. As a matter of discretion, however, we decide that there is "good cause to 'address the substantive question before us: it has been fully briefed and argued, and public policy would benefit from the elimination of any uncertainty'" regarding whether part 4 of the 2016 standard policy provides coverage for IDV damages to a third-party claimant's vehicle. Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257, 263-264 (2022), quoting Middleborough v. Housing Appeals Comm., 449 Mass. 514, 522 (2007).

The plaintiffs argue that part 4 of the 2016 standard policy provides coverage for IDV damages to a third-party claimant's vehicle. "The interpretation of an insurance policy is a question of law . . . ." Massachusetts Insurers Insolvency Fund v. Premier Ins. Co., 449 Mass. 422, 426 (2007). "We interpret the words of the standard policy in light of their plain meaning, giving full effect to the document as a whole" (citation omitted). Given v. Commerce Ins. Co., 440 Mass. 207,

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appeal. See Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 174 (2014) (claim waived where appellant made no appellate argument concerning improper dismissal under Mass. R. Civ. P. 12 [b] [6]).

209 (2003). See id. at 210 n.5 ("determination of what is or is not covered under an automobile policy is driven by the precise language of the policy in question and the statutory and regulatory background governing automobile insurance"). "A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms." McGilloway, 488 Mass. at 613, quoting Clark Sch. for Creative Learning, Inc. v. Philadelphia Indem. Ins. Co., 734 F.3d 51, 55 (1st Cir. 2013). In determining the meaning of the contract provisions, "we are guided by 'what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" McGilloway, supra at 613-614, quoting Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 700 (1990).

Contrary to the plaintiffs' claims, part 4 of the 2016 standard policy excludes coverage of IDV damages to a third-party claimant's vehicle. It states: "The amount we will pay does not include compensation for . . . any decreased value or intangible loss claimed to result from the property damage unless otherwise required by law." Additionally, part 4 limits third-party coverage to "damage or destruction of . . . tangible property," and damage to tangible property does not include IDV. See McGilloway, 488 Mass. at 614, quoting Continental Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 148 (1984) (indicating

"diminution in value of tangible property" is "intangible damage"). Thus, on its face, part 4 of the 2016 standard policy excludes such claims "unless otherwise required by law."[9]

4. "[O]therwise required by law." The plaintiffs next argue that part 4 of the 2016 standard policy provides coverage for their IDV damages under the clause "otherwise required by law."[10] They cite two sources of law as the bases for this requirement: (1) G. L. c. 90, § 34O, and (2) our decision in McGilloway. We address these arguments in turn.

a. General Laws c. 90, § 34O. Pursuant to G. L. c. 90, § 34O, automobile insurers must cover "all sums the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, caused by accident and arising out of the ownership,

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[9] Although not binding on us, Federal court decisions interpreting part 4 of the 2016 standard policy have reached the same conclusion. See Reese vs. Progressive Direct Ins. Co., U.S. Dist. Ct., No. 22-cv-10539-ADB (D. Mass. Feb. 10, 2023), aff'd, U.S. Ct. App., No. 23-1200 (1st Cir. Feb. 9, 2024); Merullo vs. Amica Mut. Ins. Co., U.S. Dist. Ct., No. 22-cv-10410-DJC (D. Mass. Dec. 5, 2022), aff'd, U.S. Ct. App., No. 23-1005 (1st Cir. Sept. 20, 2023).

[10] The plaintiffs interpret the clause "unless otherwise required by law" to mean that coverage for IDV is conditionally preserved in cases where the insured is legally liable for the property damage he or she causes. Based on this interpretation, they assert that Commerce effectively admitted liability by fully paying repair costs, thereby implying that the company is "required by law" to cover third-party IDV claims. However, the plaintiffs fail to provide citations to support this proposition.

maintenance or use . . . of the insured motor vehicle." The plaintiffs contend that "all sums" include IDV damages. Therefore, they argue, G. L. c. 90, § 34O, requires coverage of IDV damages, even if part 4 of the 2016 standard policy excludes such damages, given the "unless otherwise required by law" provision.

However, the statute also defines property damage liability insurance as "insurance containing provisions as prescribed in this section, among such other provisions, including conditions, exclusions, and limitations, as the commissioner of insurance may approve" (emphasis added). G. L. c. 90, § 34O. Accordingly, while insurance policies must comply with G. L. c. 90, § 34O, the law grants the Commissioner of Insurance (commissioner) the authority to approve the terms of the standard policies, including exclusions. Colby v. Metropolitan Prop. & Cas. Ins. Co., 420 Mass. 799, 806 (1995). See G. L. c. 175, § 113A (empowering commissioner to approve motor vehicle liability policies). Because the commissioner exercised this authority when he approved the exclusion of IDV damages from coverage under part 4 of the 2016 standard policy, the statute does not "otherwise require[]" Commerce to cover the plaintiffs' third-party IDV claims. See G. L. c. 90, § 34O; G. L. c. 175, § 113A.

The plaintiffs further argue that the commissioner exceeded his authority in approving the exclusion of third-party IDV damages. "[W]ithin the limits set by statute, the [commissioner] decides what the terms of a standard policy will be, and the commissioner's interpretation of the relevant statutes, although not controlling, is entitled to deference" (citations omitted). Colby, 420 Mass. at 806. However, courts will overturn agency interpretations of statutes or rules when they are "arbitrary or unreasonable." Armstrong v. Secretary of Energy & Envtl. Affairs, 490 Mass. 243, 247 (2022), quoting Moot v. Department of Envtl. Protection, 448 Mass. 340, 346 (2007), S.C., 456 Mass. 309 (2010). Here, the commissioner's approval of the IDV exclusion is reasonable and consistent with statutory authority. The law explicitly allows the commissioner to approve conditions, exclusions, and limitations. See G. L. c. 90, § 34O; G. L. c. 175, § 113A; Colby, supra. Excluding IDV damages from coverage aligns with this authority and does not conflict with the statute's language or policy for at least two reasons.

First, regarding the language of the statute, excluding certain types of damages from coverage does not conflict with its mandate that automobile insurers cover "all sums the insured shall become legally obligated to pay." G. L. c. 90, § 34O. By allowing specific exceptions, the statute inherently

acknowledges that insurers may not be required to cover the full amount that an insured party owes. For instance, since the statute expressly establishes a $5,000 coverage minimum, an insurance policy may validly exclude coverage of damages exceeding that amount. See id. (insurer's obligation to pay is "subject to a limit of not less than five thousand dollars because of injury to or destruction of property of others in any one accident"). Similarly, the exclusions approved by the commissioner are another permissible exception to the general requirement for broad coverage under G. L. c. 90, § 34O, not a contradiction to it.

Second, as to the policy of G. L. c. 90, § 34O, while the exclusion may leave insureds personally liable for IDV damages,[11] the statute's purpose permits that possibility. Indeed, the statute explicitly allows the commissioner to approve exclusions and permits insureds to bear personal responsibility for amounts exceeding policy limits. G. L. c. 90, § 34O. Moreover, the argument that an insured may face personal liability to a third party for IDV damages conflates two discrete issues: the

[11] An insured does not automatically bear personal liability for IDV after an at-fault accident; not every vehicle involved in a collision and subsequently repaired necessarily suffers IDV. For this reason, as stated in McGilloway, 488 Mass. at 617-618, a plaintiff must present "individualized proof" of both the existence and amount of IDV damages.

insurer's obligations under part 4 of the 2016 standard policy, and the scope of recoverable damages in tort. See Skiffington v. Liberty Mut. Ins. Co., 93 Mass. App. Ct. 1, 5 (2018) (rejecting claim that insurer was liable for vehicular fees where plaintiff cited tort law instead of standard policy provisions governing insurer's payment obligation). See also Given, 440 Mass. at 210 n.5 (language of automobile policy, along with statutory and regulatory background of automobile insurance, dictates policy coverage). Thus, the commissioner did not exceed his authority by approving the exclusion of third-party IDV damages in part 4 of the 2016 standard policy.

b. McGilloway. Similarly, McGilloway does not provide an independent legal basis requiring insurers to cover third-party IDV claims under part 4 of the 2016 standard policy. In McGilloway, 488 Mass. at 611, this court determined that part 4 of the 2008 standard policy provided coverage for third-party IDV claims, based on the specific text of the 2008 standard policy.[12] However, our decision in McGilloway does not apply to

[12] Part 4 of the 2008 standard policy provided:

> "Under this Part, we will pay damages to someone else whose auto or other property is damaged in an accident. The damages we will pay are the amounts that person is legally entitled to collect for property damage through a court judgment or settlement. We will pay only if you or a household member is legally responsible for the accident. We will also pay if someone else using your auto with your consent is legally responsible for the accident. Damages

the 2016 standard policy. Indeed, we stated explicitly that, "[u]nless otherwise specified, in discussing the standard policy, we refer solely to the 2008 edition" (emphasis added). Id. at 612 n.6.

The language of the 2008 standard policy required a different outcome from the one we reach here. First, part 4 of the 2008 standard policy expressly covered "property damage," which we interpreted to include intangible damage such as IDV. McGilloway, 488 Mass. at 614. Second, by covering "the amounts that [a third-party claimant] is legally entitled to collect," the 2008 standard policy obligated insurers to make claimants "whole," thereby requiring compensation for "any loss of value," including IDV. Id. at 614-615. Lastly, we explained that part 4 of the 2008 standard policy required coverage for third-party IDV claims because it lacked the same recovery limitations found in other parts of the policy. See id. at 617 (noting that while plain language of part 7 of 2008 standard policy limited compensation to specific types of damages, part 4 of 2008 standard policy "contain[ed] no such limitation on recovery").

> include any applicable sales tax and the costs resulting from the loss of use of the damaged property." (Emphases omitted.)

McGilloway, 488 Mass. at 612.

See also Given, 440 Mass. at 211 (relying on "plain wording of the standard policy" to determine IDV coverage).

In contrast, the 2016 standard policy -- governing this case -- restricts coverage under part 4 to "tangible property" damage. Furthermore, while the 2016 standard policy retains language similar to the 2008 policy in providing coverage for the amounts claimants are "legally entitled to collect," it explicitly excludes "any decreased value or intangible loss" from coverage. Thus, McGilloway does not establish a universal requirement for automobile insurers to cover all third-party IDV claims, irrespective of the policy language. Rather, the holding in McGilloway is narrowly tethered to the specific language in the 2008 standard policy. Accordingly, McGilloway does not constitute "law" that "otherwise require[s]" Commerce to cover third-party IDV claims under the terms of part 4 of the 2016 standard policy. See Given, 440 Mass. at 210 n.5 ("Cases interpreting different policy provisions governed by different regulatory requirements shed little light on what is meant by [a] part . . . of the standard policy . . .").

Conclusion. The plaintiffs lack standing to pursue their breach of contract claim, as they have not obtained a final judgment against Commerce's insureds. Further, the plaintiffs' complaint does not plausibly establish an entitlement to relief, as part 4 of the 2016 standard policy specifically excludes IDV

damages. Accordingly, we affirm the dismissal of the plaintiffs' complaint.

So ordered.