

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13563

JEFFREY FRANK CUBBERLEY & another,
Plaintiffs-Appellants,

v.

COMMERCE INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

**BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF THE DEFENDANT-APPELLEE FOR AFFIRMANCE**

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Ben Robbins
BBO No. 559918
Daniel B. Winslow, President
BBO No. 541972
New England Legal Foundation
333 Washington Street,
Suite 850
Boston, MA 02108
(617) 695-3660
brobbins@newenglandlegal.org

Dated: April 26, 2024

CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... 2

TABLE OF AUTHORITIES..... 4

ISSUE PRESENTED..... 5

INTEREST OF AMICUS CURIAE..... 5

ARGUMENT..... 7

I. THE MASSACHUSETTS 2016 STANDARD AUTO POLICY CLEARLY AND PERMISSIBLY EXCLUDES COVERAGE FOR ANY INHERENT DIMINISHED VALUE (IDV) TO A THIRD PARTY’S VEHICLE THAT IS CAUSED BY A COLLISION WITH THE INSURED’S CAR..... 7

 A. The 2016 Standard Policy’s Exclusion Of “Any Decreased Value Or Intangible Loss” Encompasses The IDV, Which The Court Defines As The Intangible Loss In Value Of A Fully Repaired Vehicle, Due To The Stigma Of Being Involved In An Accident..... 7

 B. The Court Has Already Held That A Standard Auto Insurance Policy Can Exclude IDV Coverage, Because The Legislature Has Authorized The Commissioner Of Insurance To Decide The Issue, By Approving The Terms Of A Standard Policy..... 11

 C. Contrary To The Plaintiffs’ Arguments, The Applicable Massachusetts Insurance Statute Does Not Require The Insurer To Indemnify The Insured For All Tort Damages That The Insured Has Caused To A Third Party’s Vehicle..... 14

CONCLUSION..... 18

CERTIFICATE OF COMPLIANCE..... 19

CERTIFICATE OF SERVICE..... 19

TABLE OF AUTHORITIES

Cases

Colby v. Metro. Prop. & Cas. Ins. Co.,
420 Mass. 799 (1995) 14

Cont'l Cas. Co. v. Gilbane Bldg. Co.,
391 Mass. 143 (1984) 8

Flemings v. Contributory Retirement Appeal Bd.,
431 Mass. 374 (2000) 17

Given v. Commerce Ins. Co.,
440 Mass. 207 (2003) *passim*

Massachusetts Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd.,
466 Mass. 292 (2013) 13

McGilloway v. Safety Insurance Co.,
488 Mass. 610 (2021) 8, 9, 10, 13

Millennium Equity Holdings, LLC v. Mahlowitz,
456 Mass. 627 (2010) 9

Ten Persons of Commonwealth v. Fellsway Dev. LLC,
2015 WL 1603595 (Mass. Super. Jan. 16, 2015),
aff'd, 90 Mass. App. Ct. 1106 (2016),
review denied, 476 Mass. 1106 (2016) 10

Statutes

G. L. c. 90, § 340..... *passim*

ISSUE PRESENTED

Amicus curiae New England Legal Foundation (NELF) addresses the questions presented by this Court in its amicus announcement of February 23, 2024:

Whether the Superior Court erred in allowing the defendant's motion to dismiss, including: whether Part 4 of the Massachusetts 2016 Standard Auto Policy excludes coverage of the "inherent diminished value" (IDV) damages sought by the plaintiffs; and if so, whether this exclusion is legally permissible, or whether, as the plaintiffs argue, the Commissioner of Insurance exceeded his authority in approving the exclusion because coverage of IDV damages is mandated by G. L. c. 90, § 340.

INTEREST OF AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.¹ NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive

¹ Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the defendant-appellee, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the enforcement of commercial contracts according to their terms, in order to protect a business party's legitimate expectations with respect to its potential exposure to liability under those terms. NELF is also committed to upholding the Court's precedent interpreting a statute that authorizes an administrative agency to define the acceptable provisions of an insurance policy.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the legal issues set forth in the Court's amicus announcement.

ARGUMENT

I. THE MASSACHUSETTS 2016 STANDARD AUTO POLICY CLEARLY AND PERMISSIBLY EXCLUDES COVERAGE FOR ANY INHERENT DIMINISHED VALUE (IDV) TO A THIRD PARTY'S VEHICLE THAT IS CAUSED BY A COLLISION WITH THE INSURED'S CAR.

A. The 2016 Standard Policy's Exclusion Of "Any Decreased Value Or Intangible Loss" Encompasses The IDV, Which The Court Defines As The Intangible Loss In Value Of A Fully Repaired Vehicle, Due To The Stigma Of Being Involved In An Accident.

The Massachusetts 2016 Standard Auto Policy, at issue in this case, clearly and permissibly excludes coverage for any inherent diminished value (IDV) to a third party's vehicle that is caused by a collision with the insured's auto. The IDV is "the difference between the market value of [the] automobile immediately before the accident and its market value postcollision *fully repaired*." *Given v. Commerce Ins. Co.*, 440 Mass. 207, 207 (2003) (emphasis added).

The relevant language of the policy provides coverage for any "tangible property" damage to the third party's vehicle but excludes coverage for "any decreased value or intangible loss" resulting from the collision:

[W]e [the insurer] will pay for damage or destruction of the *tangible property* of others The amount we will pay does not include . . . any *decreased value or*

intangible loss claimed to result from the property damage unless otherwise required by law.

Addendum to Appellants' Brief (Add.) 28 (emphasis added). "We interpret the[se] words of the standard policy in light of their plain meaning A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms." *McGilloway v. Safety Insurance Co.*, 488 Mass. 610, 613 (2021) (cleaned up).

The policy's clear distinction between "*tangible property*" damage and any resulting "decreased value or *intangible loss*" to the property is coextensive with the Court's definition of "property damage" as consisting of both tangible and intangible damage. "[T]he term property damage does not require actual physical damage but can include intangible damage such as the diminution in value of tangible property." *Cont'l Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 148 (1984).

Moreover, the policy's clear exclusion of "any decreased value or intangible loss" encompasses the IDV, which is "damage caused by stigma, a form of [intangible] damage that, by definition, defies remedy

by way of repair or replacement.” *Given*, 440 Mass. at 212-13 (cleaned up). See also *id.* at 207-08 (IDV “is premised on the theory that some stigma attaches to the vehicle from its involvement in a prior collision, such that its market value is diminished despite the fact that the vehicle has been restored to its precollision physical condition.”).

By excluding coverage for any IDV, the 2016 standard policy excludes coverage for any intangible “reputational” harm to the third party’s vehicle associated with the stigma of being involved in an accident. See *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 650 (2010) (“Intangible damages . . . include damages for harm to reputation.”) (cleaned up). This excluded intangible harm is categorically distinct from the covered physical harm to the vehicle’s parts, which are generally “remed[iable] by way of repair or replacement.” *Given*, 440 Mass. at 213.

Notably, the 2016 policy’s key distinction between the covered tangible damage and the excluded “decrease in value or intangible loss” is entirely absent in the 2008 standard policy that was in dispute in *McGilloway*, cited above. In contrast to the 2016

standard policy, the 2008 policy broadly covered a third party's loss of any legally cognizable "property damage," thereby covering both tangible and intangible damage, including the IDV. See *McGilloway*, 488 Mass. at 614 ("[A] plain reading of the [2008 policy's] phrase 'the amounts [that a third] person is legally entitled to collect for *property damage* through a court judgment or settlement' entitles a claimant to be made whole and compensated for what he [or she] has lost.") (cleaned up) (emphasis added).

Therefore, *McGilloway* is readily distinguishable from this case because the 2008 standard policy covered all forms of "property damage," while the 2016 standard policy covers only tangible property damage and excludes intangible property damage, such as the IDV. "The approved wording of the standard policy is controlled by the Commissioner of Insurance and not by any insurer." *McGilloway*, 488 Mass. at 613 n.8. See also *Ten Persons of Commonwealth v. Fellsway Dev. LLC*, 2015 WL 1603595, at *6 (Mass. Super. Jan. 16, 2015), *aff'd*, 90 Mass. App. Ct. 1106 (2016), *review denied*, 476 Mass. 1106 (2016) ("Even when an agency changes its mind, the court is still required to give deference to the agency's revised understanding and

interpretation of the statutes it is charged to enforce.”).

B. The Court Has Already Held That A Standard Auto Insurance Policy Can Exclude IDV Coverage, Because The Legislature Has Authorized The Commissioner Of Insurance To Decide The Issue, By Approving The Terms Of A Standard Policy.

The Court has already concluded that a standard auto insurance policy can exclude IDV coverage under Massachusetts law. See *Given*, 440 Mass. at 212 (applicable standard auto policy “expressly exclude[d] payment [to insured] of any amount higher than repair or replacement costs, and thus expressly exclude[d] compensation for inherent diminished value” to insured’s auto) (emphasis added).

In particular, the standard auto policy in *Given* entitled the insured either to repair her vehicle (and recover those costs) or to recover the diminished value of her damaged but *unrepaired* vehicle. See *Given*, 440 Mass. at 212 (discussing same). However, regardless of which remedy the insured elected, the policy barred her from ever recovering more than the cost of physical repairs. “In any event, we [the insurer] will never pay more than *what it would cost*

to repair or replace the damaged property.” *Id.*
(emphasis added).

Put otherwise, the standard auto policy in *Given* excluded recovery for any intangible, stigmatic harm to the vehicle that occurred apart from the physical damage, i.e., the IDV. “We will not torture the plain meaning of the terms ‘repair’ and ‘replace’ to encompass ‘repair’ or ‘replacement’ of damage caused by stigma, a form of damage that, by definition, defies remedy by way of ‘repair’ or ‘replacement.’” *Given*, 440 Mass. at 212-13 (cleaned up).

As the Court in *Given* explained, a standard policy can exclude IDV coverage because the Legislature is altogether silent on the issue. “One searches this vast network of statutory . . . provisions in vain for any reference to the concept of inherent diminished value.” *Given*, 440 Mass. at 213. There is none.

Since Massachusetts insurance law “neither explicitly forbids nor expressly allows the [IDV exclusion] in question,” the Commissioner has the discretion to achieve a “reasonable resolution of the statute’s silence.” *Massachusetts Teachers’ Ret. Sys. v. Contributory Ret. Appeal Bd.*, 466 Mass. 292, 301

(2013) (cleaned up). Accordingly, the Commissioner may exercise his delegated power to fill the statutory gap and decide whether the IDV is covered or excluded, along with deciding many other provisions of the standard auto policy. "Property damage liability insurance is insurance containing provisions as prescribed in this section, among *such other provisions*, including conditions, *exclusions*, and limitations, as the commissioner of insurance may approve." G. L. c. 90, § 340 (1st ¶) (emphasis added). See also *McGilloway*, 488 Mass. at 613 n.8 ("The approved wording of the standard policy is controlled by the Commissioner of Insurance and not by any insurer.").

In sum, Section 340 authorizes the Commissioner to decide many of the provisions that comprise "property damage liability insurance," including whether the standard auto policy will cover or exclude compensation for the IDV. Section 340 requires only that a Massachusetts auto policy conform to the statute's basic requirements and to the various provisions that the Commissioner has approved. As the Court has explained:

[B]eing a standard Massachusetts automobile insurance policy, the policy in question must conform to statute. It is also true, however, that within the limits set by statute, the Commissioner . . . decides what the terms of a standard policy will be, . . . and the [C]ommissioner's interpretation of the relevant statutes, although not controlling, is entitled to deference.

Colby v. Metro. Prop. & Cas. Ins. Co., 420 Mass. 799, 806 (1995).

In the exercise of his statutorily delegated authority, the Commissioner has approved the 2016 Standard Auto Policy at issue, which excludes coverage for "any decreased value or intangible loss" to a third party's vehicle. "By approving the policy in issue here, the [C]ommissioner made clear that, in the [C]ommissioner's opinion," *Colby*, 420 Mass. at 806, the exclusion of IDV coverage for third parties' vehicles is permitted under Massachusetts law. See also *Given*, 440 Mass. at 213-14 (discussing exclusion of IDV coverage for insured's auto).

C. Contrary To The Plaintiffs' Arguments, The Applicable Massachusetts Insurance Statute Does Not Require The Insurer To Indemnify The Insured For All Tort Damages That The Insured Has Caused To A Third Party's Vehicle.

Notwithstanding Section 340's clear language defining "property damage liability insurance" as

"containing . . . such other provisions, including . . . exclusions, . . . as the commissioner of insurance may approve," G. L. c. 90, § 340, the plaintiffs argue that Section 340 nonetheless requires the insurer to indemnify the insured for all proven tort damages that the insured has caused to a third party's vehicle, including the IDV. For support, the plaintiffs rely on language contained in Section 340's second paragraph, which provides, in relevant part:

Every policy of property damage liability insurance shall provide that the insurer will pay on behalf of the insured *all sums the insured shall become legally obligated to pay as damages because of injury to or destruction of property . . . caused by accident and arising out of the ownership . . . of the insured motor vehicle, 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.*

G. L. c. 90, § 340 (2nd ¶) (emphasis added). The plaintiffs also argue that the 2016 standard policy incorporates this italicized statutory language by reference when it excludes "any decreased value or intangible loss claimed to result from the property damage *unless otherwise required by law.*" Add. 28 (emphasis added).

The plaintiffs are in error because they have ignored the operative language in Section 340's first

paragraph, which expressly defines the term "property damage liability insurance" as "containing . . . exclusions . . . as the commissioner of insurance may approve." G. L. c. 90, § 340 (1st ¶) (emphasis added). Accordingly, when Section 340's second paragraph provides that "every policy of *property damage liability insurance*" shall indemnify the insured for tort damages caused to a third party's vehicle, this can only mean that the policy shall also contain the Commissioner's approved exclusions (along with other approved policy provisions), as set forth in the first paragraph. In short, Section 340 provides that the insurer's duty to indemnify the insured is *subject to* the Commissioner's approved exclusions, such as the IDV in this case.²

Only this interpretation of Section 340 preserves the Legislature's express definition of "property damage liability insurance," contained in the first paragraph, and harmonizes it with the language of the

² As the defendant has aptly pointed out, the plaintiffs' argument also ignores this \$5,000 minimum coverage contained in Section 340's second paragraph. Appellee's Brief 27-8. This statutory minimum coverage limit is in addition to the Commissioner's approved exclusions and other provisions, as authorized by the Legislature in its definition of "property damage liability insurance," contained in Section 340's first paragraph.

second paragraph on which the plaintiffs erroneously rely. "If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results." *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375-76 (2000).

To the contrary, the plaintiffs' argument would render that clear statutory definition of "property damage liability insurance" superfluous. In so doing, the plaintiffs' position would also eliminate the Commissioner's expressly delegated power to approve exclusions and other policy provisions. This simply cannot be:

In interpreting statutes, none of the words of a statute is to be regarded as *superfluous*, . . . so that the enactment *considered as a whole* shall constitute a *consistent and harmonious* statutory provision capable of effectuating the presumed intention of the Legislature.

Flemings, 431 Mass. at 375 (cleaned up) (emphasis added).

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court affirm the judgment of the Superior Court.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its counsel

/s/ Ben Robbins

Ben Robbins
BBO No. 559918
Daniel B. Winslow, President
BBO No. 541972
New England Legal Foundation
333 Washington Street, Suite 850
Boston, MA 02108
(617) 695-3660
brobbins@newenglandlegal.org

Dated: April 26, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 12-point Courier New. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of pages to be counted in this brief is 14.

/s/ Ben Robbins

Ben Robbins

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 26th day of April, 2024, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Defendant-Appellee, in *Jeffrey Frank Cubberley, & another v. Commerce Insurance Company*, SJC-13563, by causing it to be delivered by eFileMA.com to counsel for the Plaintiffs-Appellants, Kevin J. McCullough, kjm@helpinginjured.com; and to counsel for the Defendant-Appellee, Nelson G. Apjohn, napjohn@nutter.com. I also certify that on this same day, I served counsel for the Plaintiffs-Appellants, John R. Yasi, at john.yasi@yasiandyasi.com.

Signed under penalties of perjury.

/s/ Ben Robbins

Ben Robbins
brobbins@newenglandlegal.org
BBO No. 559918
New England Legal Foundation
333 Washington Street, Suite 850
Boston, MA 02108
(617) 695-3660