SJC-13053

JARRETT McGILLOWAY[1] & another[2] vs. SAFETY INSURANCE COMPANY (and a consolidated case[3]).

Suffolk. May 5, 2021. - October 19, 2021.

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

Motor Vehicle, Insurance. Insurance, Motor vehicle insurance, Construction of policy, Unfair act or practice. Contract, Insurance, Performance and breach. Value. Consumer Protection Act, Unfair act or practice.

Civil actions commenced in the Superior Court Department on June 30 and December 11, 2017.

After consolidation, the cases were heard by Kenneth W. Salinger, J., on motions for summary judgment.

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

Kevin J. McCullough for Jarrett McGilloway & others.
Nelson G. Apjohn for Commerce Insurance Company.

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

[2] Linda Estrella, on behalf of herself and all others similarly situated.

[3] Adam Ercolini vs. Commerce Insurance Company.

Peter L. Bosse for Safety Insurance Company.

The following submitted briefs for amici curiae:

Thomas R. Murphy & Kevin J. Powers for Massachusetts Academy of Trial Attorneys.

John Pagliaro & Martin J. Newhouse for New England Legal Foundation.

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

GEORGES, J. The plaintiffs in these consolidated actions, Jarrett McGilloway, Linda Estrella, and Adam Ercolini, each owned an automobile that was involved in a collision with an automobile owned or operated by a party insured by either Safety Insurance Company (Safety) or Commerce Insurance Company (Commerce) (collectively, defendants). The defendants paid to repair the plaintiffs' automobiles to their precollision condition but declined to compensate the plaintiffs for alleged inherent diminished value (IDV) damages to the vehicles.[4] The issues in these cases are (1) whether, under part 4 of the standard Massachusetts automobile insurance policy, 2008 edition (standard policy), an automobile insurer must pay a claim for the IDV of a car that has been damaged and subsequently repaired, and (2) whether the defendants violated either G. L. c. 93A (consumer protection act) or G. L. c. 176D (statute

[4] As explained by the motion judge, 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."

prohibiting unfair and deceptive insurance practices) in the course of their dealings with the plaintiffs.

We conclude that part 4 of the standard policy requires the defendants, as automobile insurers, to pay claims for IDV to vehicles that are damaged and subsequently repaired, provided that the claimant establishes both (1) that his or her vehicle suffered IDV, and (2) the amount of IDV damages owed to him or her. We further conclude, however, that there was no violation of either G. L. c. 93A or G. L. c. 176D. We remand the cases to the Superior Court for further proceedings consistent with this opinion.[5]

Background. We summarize the relevant facts, which are undisputed, as well as the procedural posture of these cases.

The plaintiffs purchased their vehicles between 2012 and 2016. Each plaintiff's vehicle was involved in a collision, resulting in damage to the vehicle caused by another driver who was insured by a standard policy that either Safety or Commerce

[5] We acknowledge the amicus briefs submitted by the New England Legal Foundation and by the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies in support of the defendants, as well as the amicus letter submitted by the Massachusetts Academy of Trial Attorneys in support of the plaintiffs.

had issued. Part 4 of the standard policy provides, in relevant part:[6]

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

Each plaintiff thereafter sought compensation from one of the defendants for the damage to the plaintiff's automobile as a third-party claimant pursuant to part 4 of the standard policy.[7] In each case, the insurer paid the plaintiff the full cost to repair the automobile to its precollision condition, but declined to compensate the plaintiff for the alleged IDV of the vehicle due to the collision.

In June of 2017, McGilloway filed a class action complaint in the Superior Court against Safety, which he later amended to add Estrella as a plaintiff, seeking a declaration that part 4 of the standard policy provides coverage for IDV damages. In addition to the declaratory relief sought, McGilloway and

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[6] Unless otherwise specified, in discussing the standard policy, we refer solely to the 2008 edition.

[7] For the difference between first-party and third-party insurance claims, see note 11, infra.

Estrella's amended complaint asserted claims for (1) breach of contract based on Safety's failure to pay them IDV damages pursuant to part 4 of the standard policy, (2) unfair business practices in violation of G. L. c. 93A, and (3) unfair claim settlement practices as defined by G. L. c. 176D, § 3 (9). In December 2017, Ercolini commenced an action against Commerce, similarly seeking declaratory relief and making an identical breach of contract claim. Following transfer of Ercolini's case to the business litigation session, the two cases then were consolidated to address whether IDV damages are covered under part 4 of the standard policy.

On the parties' cross motions for summary judgment, which were consolidated into one action for this purpose, the judge allowed the defendants' motions and denied the plaintiffs' motion, concluding that the defendants were not required to pay any IDV damages beyond the cost to fully repair the collision damages to the plaintiffs' vehicles. The judge also concluded that the defendants had not violated G. L. c. 93A or G. L. c. 176D in the course of their dealings with the plaintiffs. The plaintiffs appealed, and we granted their combined request for direct appellate review.

Discussion. 1. Standard of review. "Where the parties have cross-moved for summary judgment, we review a grant of summary judgment de novo to determine whether, viewing the

evidence in the light most favorable to the unsuccessful opposing party and drawing all permissible inferences and resolving any evidentiary conflicts in that party's favor, the successful opposing party is entitled to judgment as a matter of law." Rahim v. District Attorney for the Suffolk Dist., 486 Mass. 544, 546 (2020), quoting Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 448 (2018). "Because our review is de novo, we accord no deference to the decision of the motion judge." Caron v. Horace Mann Ins. Co., 466 Mass. 218, 221 (2013), quoting DeWolfe v. Hingham Ctr., Ltd., 464 Mass. 795, 799 (2013).

2. Inherent diminished value. "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).[8] Given v. Commerce Ins. Co., 440

[8] "[T]he approved wording of the standard policy is controlled by the Commissioner of Insurance [(commissioner)] and not by any insurer." Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 225 (2011), S.C., 466 Mass. 156 (2013), quoting Given v. Commerce Ins. Co., 440 Mass. 207, 210 (2003). See G. L. c. 175, § 113A. An advisory ruling promulgated by the commissioner pursuant to G. L. c. 30A, § 8, interpreting a provision in the standard policy, is entitled to deference as an agency decision. See Given, supra at 214 n.8. However, the defendants do not cite, and we are not aware of, any advisory ruling by the commissioner interpreting part 4 of the standard

Mass. 207, 209 (2003). "A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms" (citation omitted). Clark Sch. for Creative Learning, Inc. v. Philadelphia Indem. Ins. Co., 734 F.3d 51, 55 (1st Cir. 2013). In discerning 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." Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 700 (1990).

The plaintiffs argue that they are entitled to collect IDV damages from the defendants under part 4 of the standard policy because IDV damages are included as part of "the amounts [the claimant] is legally entitled to collect for property damage through a court judgment or settlement." Conversely, the defendants argue that the motion judge did not err in allowing their motions for summary judgment because Massachusetts tort law does not permit IDV recovery. The defendants also contend that even if IDV damages are recoverable, such damages are not covered under the standard policy because Massachusetts regulations governing the claims made pursuant to the standard

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policy. We thus interpret part 4 in accordance with our long-standing principles of contract interpretation.

policy are silent as to how insurers should treat IDV damages. We agree with the plaintiffs.

We previously have held that "the term property damage . . . can include intangible damage such as the diminution in value of tangible property" (citation omitted). Continental Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 148 (1984). See Trinity Church in Boston v. John Hancock Mut. Life Ins. Co., 399 Mass. 43, 48 (1987), citing Hopkins v. American Pneumatic Serv. Co., 194 Mass. 582, 583 (1907) ("The general rule for measuring property damage is diminution in market value"). Here, a plain reading of the phrase "the amounts that 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 has lost." G.E. Lothrop Theatres Co. v. Edison Elec. Illuminating Co. of Boston, 290 Mass. 189, 194 (1935). See Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 199 (2021) (same). See also Rockwood v. Allen, 7 Mass. 254, 256 (1811) ("it is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained"). Because the plain language of part 4 of the standard policy does not limit recovery to merely repair or replacement costs, such recovery must compensate a claimant for any loss of value the claimant incurred as a result of a collision, offset by the

increase in value that may occur from repairs to the vehicle. In short, if a third-party claimant's vehicle suffers IDV even after it is fully repaired, then under part 4 of the standard policy, the insurer may be liable to the claimant for IDV damages so that he or she may be "made whole" once again.[9]

"The purpose of tort damages is to compensate an injured person for a loss suffered and only for that. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his [or her] position before the tort. Recovery is permitted not in order to penalize the tortfeasor, but only to give damages 'precisely commensurate with the injury.'"

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[9] Our decision is in line with those of numerous other jurisdictions that have recognized IDV damages in the context of property damage claims, including damage claims relating to automobiles. See, e.g., American Serv. Ctr. Assocs. v. Helton, 867 A.2d 235, 243 (D.C. 2005) (claim for property damage to motor vehicle caused by collision with another vehicle; "when a plaintiff can prove that the value of an injured chattel after repair is less than the chattel's worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value"); State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 508-509 (2001) (insurer required to pay claimant IDV damages under insurance policy where vehicle suffered IDV following repair); Papenheim v. Lovell, 530 N.W.2d 668, 672 (Iowa 1995) ("If repairing the vehicle does not return the car to its pre-accident condition as measured by its market value, then the owner is not compensated for the detriment caused if only awarded cost of repairs"); Brennen v. Aston, 2003 OK 91, ¶ 12 (property damage claim relating to truck; "[i]nsofar as [Oklahoma Uniform Jury Instruction] 4.14 permits recovery of damages for the post-repair depreciation in value of a damaged item of personal property, it correctly states the law of Oklahoma").

United States v. Ebinger, 386 F.2d 557, 561 (2d Cir. 1967), quoting Harris v. Standard Acc. & Ins. Co., 297 F.2d 627, 631-632 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962). See Restatement (Second) of Torts § 928 (1979) ("When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for . . . the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs . . .").[10]

Contrary to the defendants' assertions, our case law does not foreclose the plaintiffs from recovering IDV damages as third-party claimants under part 4 of the standard policy.[11]

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[10] While we acknowledge that we are not bound by "the views of the American Law Institute as set forth in its various Restatements," Bongaards v. Millen, 440 Mass. 10, 29 (2003), we have often considered the various Restatements of the Law as "prestigious sources of potentially persuasive authority," id. We recently adopted an approach recommended by the Restatement (Third) of Torts, see Doull v. Foster, 487 Mass. 1, 2-3 (2021), and have cited approvingly the views of the Restatement (Second) of Torts numerous times, see, e.g., Jupin v. Kask, 447 Mass. 141, 147-148 & n.6, 151, 158-159 (2006), citing Restatement (Second) of Torts §§ 284, 298 comment b, 302 comment a, 302B, 314 comment b, 318 comment c, 448, 821B comment b (1965); Shafir v. Steele, 431 Mass. 365, 369 (2000) (adopting Restatement [Second] of Torts § 766A [1979]); United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 816 (1990) (adopting Restatement [Second] of Torts §§ 766 and 766B [1979]).

[11] In a first-party insurance claim, the claimant seeks compensation from his or her own insurance provider. In a third-party automobile insurance claim, the type at issue here, the claimant seeks compensation from another person's insurance

Indeed, when we previously considered IDV damages in connection with automobile insurance, we did so in the context of first-party claimants under a different part of an earlier edition of the standard policy.[12] See Given, 440 Mass. at 208. In that case, we considered whether a first-party claimant could recover IDV damages under part 7 of the sixth edition of the standard policy, which provided that the insurer "will pay for any direct and accidental damage to [the claimant's] auto caused by a collision."[13] See id. at 208, 209 ("At issue . . . is whether inherent diminished value is included within the term 'direct and accidental damage to [an] auto caused by a collision,' as that is the 'damage' compensable under part [7] of the standard

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provider -- typically, the insurer of the other party in a collision.

[12] More specifically, in Given, 440 Mass. at 208, the court analyzed part 7 of the sixth edition of the standard policy. Here, we are asked to consider part 4 of the 2008 edition of the standard policy. The language of part 7 of the sixth edition of the standard policy is substantially similar to the language of part 7 of the 2008 edition of the standard policy in all relevant parts.

[13] Part 7 of the sixth edition of the standard policy, which was at issue in Given, provided, in relevant part:

> "[W]e [the insurer] will pay for any direct and accidental damage to your [the insured's] auto caused by a collision. . . . We will pay for each loss up to the actual cash value of the auto or any of its parts at the time of the collision. If the repair of a damaged part will impair the operational safety of the auto, we will replace the part."

Given, 440 Mass. at 208-209.

policy"). In Given, we concluded that the plain language of part 7 did not obligate the insurer to compensate the claimant for IDV damages. Id. at 212.

Given is distinguishable for three reasons. First, unlike part 7, which provides that the insurer "will pay for any direct and accidental damage to your auto caused by a collision," id. at 208, part 4 permits a third-party claimant to recover "the amounts [the claimant] is legally entitled to collect for property damage through a court judgment or settlement."[14] Second, we noted in Given that the plain language of part 7 of the standard policy establishes a binary system of recovery: "Under the express terms of the standard policy, Given was entitled to compensation either for diminution in value caused by the collision (if she chose not to repair her vehicle) or for the cost of repair (if she chose to have repairs performed). She was not entitled to both." Id. at 212. Recovery under part 4, however, contains no such limitation on recovery, let alone any limitation tied to a claimant's decision to have his or her vehicle repaired. Third, our holding in Given relied in part on the eleventh paragraph of the sixth edition of the standard policy's "general provisions and exclusions" section, which bars

[14] The motion judge similarly concluded that Given "does not control here" because "the policy provision at issue in that case is materially different [from] the provisions that govern [the plaintiffs'] claims."

an insurer from "pay[ing] more than what it would cost to repair or replace the damaged property," and thus conflicts with the concept of IDV damages. Id. Paragraph eleven, however, applies only to damages due under "Parts 7, 8 and 9," and thus does not bear on our analysis of part 4 in these cases. For these reasons, Given does not apply here.

Commerce maintains that our holding today will "cause a seismic shift in the insurance marketplace," which in turn will "economically destabilize the insurance marketplace." At oral argument, counsel for Commerce also argued that IDV damages are "very difficult, if not impossible" to calculate with regard to vehicles. However, as the motion judge noted, Safety "admits that IDV may be suffered in some cases" and "concedes that IDV may be quantifiable." Moreover, as discussed supra, numerous other States recognize and permit recovery of IDV damages. Accordingly, we are not persuaded by Commerce's arguments here.

For the foregoing reasons, we conclude that the motion judge's allowance of summary judgment was improper, as IDV damages are indeed recoverable under part 4 of the standard policy, and thus the defendants are not entitled to judgment as a matter of law. Contrast Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991) (summary judgment appropriate where no material facts were at issue). We do not, however, suggest that every automobile that is involved in a collision and is

subsequently repaired has suffered an IDV. Rather, and as other jurisdictions have held, individualized proof is required to demonstrate that a given automobile has sustained some form of diminution in value due to a collision or vehicular accident, even after repairs are made. Specifically, a plaintiff must establish (1) that his or her vehicle has suffered IDV damages, and (2) the amount of IDV damages at issue. Here, a material dispute still exists regarding whether any of the plaintiffs' vehicles have suffered IDV due to a collision and, if so, whether and in what amount such damage can be quantified; as just stated, each plaintiff has the burden of proof on these issues. We thus reverse the motion judge's allowance of summary judgment for the defendants on the plaintiffs' breach of contract claims and remand the cases to the Superior Court for further proceedings on these outstanding issues.

3. Unfair business practices. The plaintiffs also argue that the motion judge erred in allowing the insurers' motion for summary judgment with respect to the claims under G. L. c. 93A and G. L. c. 176D, § 3 (9).

General Laws c. 176D, § 3 (9), "regulates the insurance business and identifies 'unfair claim settlement practices,'" Rawan v. Continental Cas. Co., 483 Mass. 654, 663 (2019), in an effort "to encourage settlement of insurance claims . . . and discourage insurers from forcing claimants into unnecessary

litigation to obtain relief," Morrison v. Toys "R" Us, Inc., Mass., 441 Mass. 451, 454 (2004), quoting Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 567-568 (2001). "A violation of G. L. c. 176D amounts to an unfair or deceptive act or practice for purposes of claims made under G. L. c. 93A." Rawan, supra. A consumer "whose rights are affected by another person violating the provisions of" G. L. c. 176D, § 3 (9), may bring an action in the Superior Court for damages pursuant to G. L. c. 93A, § 9 (1). See Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 594-595 (2010), S.C., 465 Mass. 297 (2013).

Recovery under G. L. c. 93A for a violation of G. L. c. 176D, § 3 (9), is unlikely when "[a]n insurance company . . . in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy." Gulezian v. Lincoln Ins. Co., 399 Mass. 606, 613 (1987). See Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 468 (1995) (same); Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994) ("A plausible, reasoned legal position that may ultimately turn out to be mistaken -- or simply, as here, unsuccessful -- is outside the scope of the punitive aspects of the combined application of [G. L.] c. 93A and c. 176D"). See also Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 675-678 (1983). We note that "a good faith dispute as to

whether money is owed, or performance of some kind is due, is not the stuff of which a c. 93A claim is made." Duclersaint v. Federal Nat'l Mtge. Ass'n, 427 Mass. 809, 814 (1998).

Here, we do not discern any evidence of "bad faith or ulterior motives," Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 14 (1989), in the defendants' rejection of the plaintiffs' claims for IDV damages. The defendants point out that the commissioner has not yet recognized that part 4 of the standard policy covers IDV damages, and this court previously has not considered the issue. Thus, because the insurers relied on a "plausible, although ultimately incorrect, interpretation of its policy," we cannot find anything "immoral, unethical or oppressive in such an action" requiring recovery under G. L. c. 93A. Id. at 15, citing PMP Assocs. v. Globe Newspaper Co., 366 Mass. 593, 595-596 (1975). Accordingly, we affirm the motion judge's grant of summary judgment in favor of the insurers as to these claims.

Conclusion. Because we conclude that IDV damages, if adequately proved, are recoverable under part 4 of the standard policy, we vacate the motion judge's allowance of summary judgment with respect to the plaintiffs' claims of breach of contract. We affirm the motion judge's grant of summary judgment in favor of the defendants on the plaintiffs' unfair business practices claims pursuant to G. L. c. 93A and G. L.

c. 176D, § 3 (9). We remand the cases to the Superior Court for further proceedings consistent with this opinion.

So ordered.