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No Harm, No Foul? Insurance Agents, Negligence, and Damages

By Drew W. Broaddus **February 22, 2023**

Suits against independent insurance agents put a unique spin on the familiar elements of duty, breach, causation, and damages. See *Insurance Coverage Newsline*, August 29, 2023, "Scope of Independent Agents' Duty Continues to be Source of Confusion," by Drew Broaddus. In *Abdelmaguid*, ___ Mich App at ___; slip op at 4, the issue was damages. *Abdelmaguid* arose out of a fatal 2018 semitruck accident. The truck was owned by Pure Transportation, LLC. *Id.* at ___; slip op at 1. Beginning in 2014, Pure Transportation began working with Dimensions Insurance Group ("Dimensions"), an independent insurance agency, to obtain "business automobile, trucking and other insurance" coverage. *Id.* at ___; slip op at 1-2. Dimensions informed Pure Transportation that the maximum amount of liability coverage it could obtain in a primary insurance policy was $1,000,000. *Id.* at ___; slip op at 2. Pure Transportation purchased that coverage. A couple years later, Pure Transportation asked Dimensions about obtaining supplemental insurance coverage, which was referred to as "an Excess Liability Insurance Policy." *Id.* Dimensions secured an excess policy on behalf of Pure Transportation through Hallmark Insurance Company. *Id.* That policy had a limit "of $2,000,000 which provided excess limits beyond the $1,000,000 Primary Policy … bringing the total limits to $3,000,000." *Id.* Dimensions did not tell Pure Transportation of any limitations or exceptions to the excess policy. *Id.* Pure Transportation never actually saw the policy, but expected there to be "full coverage up to the limits of the excess Policy for all motor vehicles, regardless of the client or use of any vehicle." *Id.* Unbeknownst to Pure Transportation, the excess policy had a "Designated Shipper Limitation Endorsement," which barred coverage unless Pure Transportation provided a bill of lading to the designated shipper. *Id.*

A fatal accident on March 8, 2018, involving Pure Transportation's truck, led to a wrongful death action against Pure Transportation. *Abdelmaguid*, ___ Mich App at ___; slip op at 2. Pure Transportation tendered its defense, both to its primary liability carrier (which was not at issue in this appeal) and

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Like any other negligence action, a suit against an insurance agent requires that the plaintiff show damages. *Abdelmaguid v Dimensions Insurance Group, LLC*, ___ Mich App ___; ___ NW2d ___ (2024) (Docket No. 361674).

In *Abdelmaguid*, the panel addressed – in a published decision – whether damages exist when an insured has assigned away its negligence claim against an agent in exchange for not having to pay an underlying judgment.

Finding this to be a question of first impression in Michigan, a divided panel looked to case law from other states and adopted the "majority" approach, holding "that an insured, who has entered into a covenant not to sue or execute on an excess judgment" has a right "against an allegedly negligent insurance agent, which could be assigned to others." *Id.* at ___; slip op at 17-18.

A suit against the agent can be maintained "so long as the assignment contains only a covenant not to sue or to execute on the excess judgment, instead of a full release of rights." *Id.*

to Hallmark as the excess carrier. *Id*. Hallmark "denied coverage under the excess policy on the basis of the designated shipper endorsement." *Id.* Left with no coverage after the first $1,000,000, Pure Transportation entered into a "Release Agreement and Assignment of Rights and Interest of Legal Claims." *Id.* The agreement indicated that, in exchange for a release of decedent's estate's claims against Pure Transportation, Pure Transportation would "unconditionally assign, transfer and convey all rights [it] has or may have under the [excess] Policy and any breach of contract or other legal claims against Hallmark and any insurance agent(s) or broker(s), including but not limited to [defendant]...." *Id*.

As part of this deal, the Estate entered into a consent judgment with Pure Transportation. The consent judgment held Pure Transportation liable to pay $5,000,000 in damages. *Abdelmaguid*, ___ Mich App at ___; slip op at 3. Pure Transportation agreed to pay the primary policy's limit to the Estate, and Pure Transportation was shielded from any further liability. *Id.* The idea was that by way of the assignment, the Estate (standing in the shoes of Pure Transportation) could then bring a negligence action against Dimensions. *Id.*

Upon being sued by the Estate, Dimensions promptly moved for summary disposition under MCR 2.116(C)(8). Dimensions argued that Pure Transportation's deal with the Estate meant that Pure Transportation had no damages – and thus no cause of action to assign. The Estate cited *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220 (2014) for the proposition that Pure Transportation's negligence claim against the insurance agent accrued when coverage under the Hallmark policy was denied. *Abdelmaguid*, ___ Mich App at ___; slip op at 4. The trial court agreed and denied Dimensions' motion, but the Court of Appeals granted Dimensions' leave application.

The Court of Appeals later affirmed in a 2-1 decision. The majority provided a lengthy analysis of the agreement between Pure Transportation and the Estate, the *Stephens* opinion, and case law from other jurisdictions. The majority ultimately determined that *Stephens* was not controlling because – although factually analogous – the legal issue presented here was not decided by *Stephens*. The majority also determined that the agreement between Pure Transportation and the Estate was more appropriately characterized as a covenant not to sue (rather than a release), meaning "the liability of the assignor [Pure Transportation] ha[d] not been extinguished." *Abdelmaguid*, ___ Mich App at ___; slip op at 12, 14. Finding no controlling Michigan precedent, the panel looked at decisions from other states and adopted what it deemed "the majority approach," which is to allow the cause of action to proceed under these circumstances. *Id.* at ___; slip op at 12. Despite the covenant not to sue, Pure Transportation potentially had damages which were capable of being assigned because it "was harmed when Hallmark Insurance denied coverage after the accident resulting in the death of plaintiff's decedent." *Abdelmaguid*, ___ Mich App at ___; slip op at 16. Again, this was a (C)(8) motion (challenging the legal sufficiency of the complaint), not a (C)(10) motion (which challenges the factual support for a claim, typically after discovery), so "[w]hether Pure Transportation suffered damages for the alleged harm purportedly caused by defendant's negligence is an issue still to be litigated." *Abdelmaguid*, ___ Mich App at ___; slip op at 16.

Recognizing that the rule opens the door to potential collusion between insured and third-party claimants, the panel noted that, "in order to protect defendant in the present case from collusion and fraud, the consent judgment between plaintiff and Pure Transportation will not be binding on defendant, as it was not a party to the negotiations." *Id.* at ___; slip op at 13. "Further, should the present case go to trial, plaintiff will be required to bear the burden of proving all of the claims, including damages" *in excess of the primary policy limit*, which had been paid. *Id.*

Judges Stephen Borrello and Colleen O'Brien made up the majority; Judge Thomas Cameron concurred in part and dissented in part. Essentially, Judge Cameron would have adopted the "minority view" – at least as it relates to excess carriers – because he was not persuaded that the "majority view" adequately protects against collusion.

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