The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
April 18, 2024

2024COA40

No. 23CA1327, *Wenzell v. United Servs. Auto. Ass'n* — Insurance — Motor Vehicles — Automobile Insurance Policies — Uninsured/Underinsured — Improper Denial of Claims — Remedies for Unreasonable Delay or Denial of Benefits — Failure-to-Cooperate Defense

In this underinsured motorist (UIM) insurance claim dispute, the plaintiff appeals the trial court's grant of summary judgment in favor of his primary and secondary insurers on the grounds that he failed to cooperate and that a secondary excess UIM insurer did not have an independent duty to evaluate his claim until the primary insurer's policy limits were exhausted. The trial court also granted summary judgment for the defendants on the plaintiff's claim that the primary UIM insurer violated section 10-3-1115, C.R.S. 2023.

A division of the court of appeals addresses two matters of first impression. First, it concludes that section 10-3-1118, C.R.S.

2023, applies here and requires an insurer's strict compliance before an insurer may raise a failure to cooperate defense against an insured. Second, the division concludes that a secondary excess UIM insurance policy does not require the exhaustion of the primary UIM policy; rather, the secondary insurer has an independent obligation to investigate an insured's claim. The division also concludes that the plaintiff presented material disputed facts that prevented a grant of summary judgment on his statutory claim under section 10-3-1115 for the unreasonable delay or denial of an insurance benefit payment.

COLORADO COURT OF APPEALS **2024COA40**

Court of Appeals No. 23CA1327
El Paso County District Court No. 21CV31587
Honorable Marla Prudek, Judge

Anthony Wenzell,

Plaintiff-Appellant,

v.

United Services Automobile Association and State Farm Mutual Automobile Insurance Company,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Schutz and Moultrie, JJ., concur

Announced April 18, 2024

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¶ 1 Plaintiff, Anthony Wenzell, appeals the trial court's grant of summary judgment in favor of defendants, United Services Automobile Association (USAA) and State Farm Mutual Automobile Insurance Company (State Farm). We reverse and remand the case to the trial court for further proceedings.

I. Factual History

¶ 2 On October 31, 2014, Wenzell was in a serious car crash that caused significant, long-term spinal injuries and persistent pain. To alleviate these symptoms Wenzell elected to undergo an "anterior cervical discectomy and fusion" surgery on the vertebrae of his neck on February 28, 2017. At a follow-up visit, on April 13, 2017, Wenzell's surgeon documented that his symptoms had improved and that he was recovering well. But the day after the follow-up appointment Wenzell was rear-ended in a new accident. After this second accident, Wenzell reported that his pain worsened and his recovery faltered. Wenzell's surgeon, who was originally optimistic about his recovery, believed that Wenzell would likely not be able to make a normal recovery from his surgery and that the resumption of his pain and injuries was the result of the April 14, 2017,

accident. This second accident, and the resulting insurance conflicts surrounding it, are the subject of this appeal.

¶ 3 Wenzell sought monetary compensation from three insurance sources. First, Wenzell settled (after receiving State Farm's and USAA's consent) with the insurance company covering the driver who had rear-ended him for $100,000, exhausting the other driver's liability insurance coverage. Wenzell then made claims with his two insurance providers — State Farm and USAA — seeking uninsured motorist (UIM) benefits.

¶ 4 Wenzell's insurance with State Farm, his primary insurer, included a UIM policy with a coverage limit of $1,000,000 per person. Wenzell was also covered by a secondary excess UIM policy with USAA issued to his brother (with whom Wenzell then lived) with a coverage limit of $300,000 per person. Wenzell's counsel argued that because Wenzell's damages exceeded the limits of all three policies, both State Farm's and USAA's policies would be triggered. Wenzell later sued both companies when they rejected his UIM claims.

II. Procedural History

¶ 5 Wenzell's September 30, 2021, complaint asserted three causes of action: two breach of contract claims against USAA and State Farm, claiming that he was entitled to receive UIM benefits under both companies' policies, and a claim that USAA had violated sections 10-3-1115 and 10-3-1116, C.R.S. 2023, by unreasonably denying or delaying his request for benefits under USAA's UIM policy. On July 20, 2022, Wenzell moved to amend his complaint, alleging that State Farm had completed its UIM claim investigation on July 18, 2022, and determined it owed Wenzell nothing. Asserting State Farm's determination was improper, Wenzell added an unreasonable denial or delay of benefits claim against State Farm under sections 10-3-1115 and -1116. The trial court granted Wenzell's motion for leave to amend.

¶ 6 The parties filed five competing motions for summary judgment.

¶ 7 First, USAA moved for partial summary judgment on Wenzell's unreasonable delay or denial claim against it. USAA argued that its policy had not been triggered because USAA's excess UIM policy was secondary to State Farm's primary UIM policy and Wenzell had

yet to exhaust State Farm's UIM benefits. Because USAA was not yet obligated to pay UIM benefits to Wenzell, USAA maintained that it could not have unreasonably denied or delayed their payment. Wenzell argued that USAA's policy was triggered when Wenzell made a claim for UIM benefits greater than State Farm's policy limits. The trial court agreed with USAA and granted the motion.

¶ 8 Second, State Farm moved for partial summary judgment on Wenzell's other unreasonable denial or delay claim. State Farm argued that it had not acted unreasonably because it could contest the value of Wenzell's claim before providing benefits and — given its concerns regarding whether Wenzell's injuries were attributable to the prior accident, coupled with Wenzell's reluctance to sign its medical release forms — it had reason to investigate Wenzell's claims. Wenzell responded that (1) State Farm's conduct after litigation commenced demonstrated that its denial and delay were unreasonable; (2) State Farm had misconstrued applicable law; and (3) he had presented contested facts through his expert report that merited sending the issue to the jury. The trial court agreed with State Farm, finding that Wenzell's unsworn expert report was insufficient to create a genuine dispute of material fact and that

Wenzell had therefore failed to allege any facts that could establish statutory bad faith violations of sections 10-3-1115 and -1116.

¶ 9 Third, Wenzell requested summary judgment against USAA and State Farm to preclude either company from raising a "defense of failure to cooperate." Wenzell contended that State Farm and USAA had not complied with the notice requirements of section 10-3-1118, C.R.S. 2023, and that their requested medical releases were unreasonable, making the insurance policy contracts requiring Wenzell to provide medical record releases contrary to public policy. Wenzell also argued that State Farm and USAA could not show they were prejudiced by his delay in providing medical record releases.

¶ 10 State Farm argued that (1) Wenzell's failure to cooperate occurred before section 10-3-1118's enactment, so that statute did not apply; (2) it had "substantially" complied with the statute once it became effective; and (3) its requests were reasonable. USAA argued that it had invoked a failure to adhere to contractual conditions precedent defense, which was not covered by section 10-3-1118. The trial court denied this motion without discussion.

¶ 11 Fourth, State Farm filed a cross-motion for summary judgment arguing that, even if it could not assert a failure to

cooperate defense, Wenzell's failure to satisfy a condition precedent (by failing to provide compliant medical record releases) entitled State Farm to summary judgment on the breach of contract claim. The trial court granted State Farm's motion, concluding that State Farm's unanswered requests for medical releases and Wenzell's eventual but unsatisfactory releases supported granting State Farm summary judgment due to Wenzell's failure to cooperate. The trial court rejected Wenzell's arguments that State Farm waived or was estopped from asserting a failure to cooperate or comply with a condition precedent defense, and it found that Wenzell had not provided information necessary for State Farm to investigate the claim.

¶ 12 Fifth, USAA moved for partial summary judgment on the breach of contract claim based on Wenzell's failure to comply with conditions precedent. USAA argued that Wenzell failed to comply with the USAA policy's condition precedent to provide medical release authorizations. USAA also argued that, because the USAA policy was an excess secondary one, Wenzell's failure to provide State Farm with releases also "carries over" and indicates that

Wenzell failed to comply with a condition precedent for the USAA policy.

¶ 13 Wenzell argued in response that (1) USAA had an independent duty to evaluate his UIM claim; (2) USAA had not complied with section 10-3-1118; (3) USAA could not demonstrate prejudice; (4) USAA's policy did not dictate precisely when a release had to be offered; (5) the release request was unreasonable; and (6) USAA waived noncooperation.

¶ 14 The trial court agreed with USAA and granted its motion. The trial court concluded that USAA's excess UIM policy, which was implicated only when Wenzell's UIM claim exceeded State Farm's policy limits, could not be breached when Wenzell had failed to meet a condition precedent in State Farm's policy. It noted,

> USAA admits there is no Colorado case law on point but argues logic and reason require that the Court find [Wenzell's] failure to meet condition precedent with respect to State Farm carries over to a failure to meet condition precedent as to the excess carrier, USAA. The Court agrees with USAA.

¶ 15 Because the court disposed of the breach of contract and unreasonable denial and delay claims by summary judgment, nothing remained to be tried. Wenzell then filed this appeal.

III. Issues Raised

¶ 16 Wenzell raises three main issues on appeal (with some sub-issues). Wenzell's first set of contentions relate to the trial court's granting of State Farm's and USAA's motions for summary judgment for noncooperation. Specifically, Wenzell argues that the trial court erred in four ways:

- by granting summary judgment against him after finding he "failed to cooperate" (the noncooperation defense) despite State Farm's and USAA's noncompliance with section 10-3-1118;[1]
- by finding that State Farm and USAA suffered material and substantial prejudice through his failure to cooperate and delayed submission of medical release authorizations;
- by requiring him to raise with State Farm and USAA the reasonableness of their medical releases; and
- by not finding that State Farm and USAA had waived their failure to cooperate arguments when both defendants allegedly

[1] State Farm disagrees that the issue on appeal concerns a "failure to cooperate," instead characterizing this issue as whether Wenzell failed to "satisfy a condition precedent."

continued to perform their contractual duties despite Wenzell's not providing their requested releases.

¶ 17 Second, Wenzell argues that the trial court erred by concluding that USAA, as Wenzell's secondary excess UIM insurer, did not have an independent duty to evaluate Wenzell's claim despite State Farm's determination that Wenzell's damages did not meet the threshold for UIM compensation.

¶ 18 Third, Wenzell argues that the trial court erred by failing to consider State Farm's conduct in determining whether State Farm violated its ongoing duty of good faith and fair dealing, which Wenzell argues continued even after he sued.

¶ 19 Because these issues were all raised in the parties' competing summary judgment motions — bringing them to the trial court's attention before it ruled — they were preserved for appeal. *See Tubbs v. Farmers Ins. Exch.*, 2015 COA 70, ¶ 6.

IV. Standard of Review

¶ 20 We review a trial court's order granting summary judgment de novo. *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 19. "Summary judgment is appropriate only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting C.R.C.P. 56(c)).

¶ 21 The party that moves for summary judgment bears the burden of demonstrating that there are no genuine issues of material fact. *Id.* at ¶ 20. If the moving party meets this burden, then the nonmoving party must establish that there is a triable issue of fact. *Id.* "All doubts must be resolved against the moving party; at the same time, the nonmoving party 'must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts.'" *Id.* (quoting *Tapley v. Golden Big O Tires*, 676 P.2d 676, 678 (Colo. 1983)). The bar for summary judgment is high — "[e]ven where it is 'extremely doubtful' that a genuine issue of material fact exists, summary judgment is inappropriate." *Id.* at ¶ 21 (quoting *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991)).

V. Analysis

A. Failure to Cooperate

¶ 22 State Farm and USAA moved for summary judgment on the grounds that Wenzell had failed to cooperate, arguing

noncooperation constituted a failure to comply with a condition precedent rather than an affirmative defense.

¶ 23 State Farm and USAA primarily argued that this was the result of Wenzell's failure to provide acceptable medical record release authorizations. State Farm's and USAA's UIM policies both required Wenzell to provide information necessary to investigate his claim. State Farm's policy provided, in part, that a person making a UIM claim must "provide written authorization for [State Farm] to obtain: (a) medical bills; (b) medical records; (c) wage, salary, and employment information; and (d) any other information we deem necessary to substantiate the claim." USAA's policy, in part, required that Wenzell "[c]ooperate with [USAA] in the investigation, settlement, or defense of any claim or suit" and required Wenzell to "authorize [USAA] to obtain medical reports and other pertinent records."

¶ 24 State Farm requested a list of medical providers and medical records release authorizations five times between September 2019 and July 2021. Wenzell, in turn, provided demand letters, which detailed his claims and damages and contained medical records, provider information, and medical records releases different than

those requested by State Farm, four times between October 2019 and July 2021. USAA requested medical records, provider lists, and medical release authorizations three times between October 2017 and May 2021. Wenzell responded to USAA by providing a demand letter and medical records twice in March and May 2021. Wenzell never provided either company with the precise medical releases they requested.

¶ 25 When an insurer asserts a noncooperation defense, the insurer effectively argues that the insured has failed to comply with a contractual policy provision, thus preventing an insurer from investigating the claim. This violation of the insurance contract may allow the insurer to refuse to provide the insured with claimed benefits. *See Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 19.

¶ 26 For an insurer to raise a noncooperation defense, the insured's noncooperation must have violated a specific policy provision in a way that "materially and substantially disadvantaged the insurer." *Id.* "The question of whether an insured failed to cooperate with the insurer is a question of fact." *State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶ 45. *But see Hansen v. Barmore*, 779 P.2d

1360, 1364 (Colo. App. 1989) ("However, if . . . the trial court has made no finding on the matter and the record can produce no other result, we may determine the issue of non-cooperation as a matter of law.").

¶ 27 Colorado courts have analyzed the noncooperation defense as an affirmative defense or a contractual condition precedent. *See Soicher*, ¶¶ 17-30 (discussing the differences and noting that nationally different courts have interpreted noncooperation as an affirmative defense, given that it can defeat an insured's claims for benefits, but declining to decide the issue because the insurance company had failed to properly plead either option). *Compare State Farm Mut. Auto. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo. App. 2001) (describing noncooperation as a breach of a cooperation clause in an insurance contract), *with Jensen v. Am. Fam. Mut. Ins. Co.*, 683 P.2d 1212, 1213-14 (Colo. App. 1984) (compliance with a physical examination is a "condition precedent" for plaintiff's recovery from insurer, and failure to satisfy a condition precedent constituted a breach of contract).

¶ 28 To alleviate some of the uncertainty around noncooperation defenses, the legislature passed H.B. 20-1290, which enacted

section 10-3-1118 and created rules for insurers asserting noncooperation. Section 10-3-1118 went into effect on September 14, 2020, and applies to post-enactment litigation. *See* Ch. 229, secs. 1-2, § 10-3-1118, 2020 Colo. Sess. Laws 1116-17. Under this new statutory regime, it is unnecessary for us to decide whether noncooperation must be asserted as an affirmative defense or a condition precedent.

1. Application of Section 10-3-1118

¶ 29 Section 10-3-1118(1) provides that several conditions must be met before an insurer can assert a failure to cooperate defense against an insured. First, it requires that (1) an insurer inform the insured in writing that the insurer needs information that is unavailable without the insured's assistance and (2) the "request is for information a reasonable person would determine the insurer needs to adjust the claim filed by the insured or to prevent fraud." § 10-3-1118(1)(a), (1)(b), (1)(d).

¶ 30 It also requires that the insurer provide the insured with sixty days to respond to the request for information and provide an "opportunity to cure" that includes "written notice to the insured of the alleged failure to cooperate, describing with particularity the

alleged failure, within sixty days after the alleged failure" and "[a]llow[s] the insured sixty days after receipt of the written notice to cure the alleged failure to cooperate." § 10-3-1118(1)(c), (1)(e)(I)-(II). If these requirements are not met, an insurer may not assert a failure to cooperate defense against an insured in court or in arbitration. § 10-3-1118(1).

¶ 31 As noted, section 10-3-1118 applies to litigation commencing on or after September 14, 2020, 2020 Colo. Sess. Laws at 1117, and Wenzell sued on September 30, 2021. Accordingly, State Farm and USAA must have complied with the statute's requirements to assert a failure to cooperate defense. Neither insurer did so here.

¶ 32 State Farm and USAA had over a year after the statute's enactment to formally request any information needed to investigate Wenzell's claims, such as the medical release authorizations. Yet both State Farm and USAA failed to do so in a manner that complied with section 10-3-1118. Both companies requested medical release authorizations several times, but neither company formally and in writing provided Wenzell sixty days to comply with their specific requests for information, nor did either company give

Wenzell a statutorily compliant opportunity to cure any particularized alleged failures. *See* § 10-3-1118(1)(c), (1)(e)(I)-(II).

¶ 33 Because neither company could assert that Wenzell failed to cooperate, the trial court erred by granting both companies summary judgment on these grounds. *See Westin*, ¶ 19 (summary judgment is appropriate only when the moving party is entitled to it as a matter of law).

¶ 34 State Farm and USAA urge us to instead conclude that Wenzell's failures to provide medical release authorizations constitute failures to comply with conditions precedent, and that such conditions precedent are not within the purview of section 10-3-1118. We are unpersuaded.

¶ 35 State Farm and USAA chiefly rely on nonbinding cases, particularly *Aponte v. Allstate Fire & Casualty Insurance Co.*, Civ. A. No. 1:21-cv-01601-CNS-SKC, 2023 WL 129693 (D. Colo. Jan. 9, 2023) (unpublished opinion). In *Aponte*, a Colorado plaintiff's suit alleged substantially the same claims at issue here and, similarly, the defendant argued that the plaintiff had "failed to cooperate with its investigation and breached the policy" because the plaintiff had failed to provide medical release authorizations, providers lists, or

medical records. *Id.* at *1-2. The plaintiff argued that because the defendant had not complied with section 10-3-1118, it could not assert the failure to cooperate defense. *Id.* But, much like the trial court here, the federal court in *Aponte* did not discuss the impact of section 10-3-1118, simply concluding that the failure to comply with a condition precedent merited summary judgment. *Id.* at *2-3.

¶ 36 State Farm also cites *Nofsinger v. Allstate Fire & Casualty Insurance Co.*, in which a plaintiff failed to provide requested medical documentation despite repeated requests. Civ. A. No. 1:20-cv-01631-CNS-STV, 2022 WL 4536232, at *1-3 (D. Colo. Sept. 28, 2022) (unpublished opinion). The federal court concluded that the insured failed to comply with a condition precedent without discussing section 10-3-1118. *Id.*

¶ 37 These cases improperly ignore section 10-3-1118. Were we to agree with these nonbinding authorities, it would effectively render the statute meaningless because it would simply never apply. *See Soicher*, ¶ 46 ("[A] court should not interpret the statute so as to render any part of it either meaningless or absurd."). Under the reasoning in *Aponte*, for example, insurers could raise noncooperation while labeling it a condition precedent and avoid

the requirements of section 10-3-1118 entirely, thereby enabling insurers to do exactly what section 10-3-1118 seeks to prevent.

¶ 38 Such a result is contrary to the plain language of section 10-3-1118, which explicitly details the applicable requirements for an insurer to allege that an insured did not cooperate or provide requested information. If an insurer wishes to assert that an insured is not entitled to insurance benefits because of a failure to cooperate, then the insurer must comply with section 10-3-1118's procedural requirements before it may raise this defense. *See* § 10-3-1118(4) ("Any language in a first-party policy that conflicts with this section is void as against the public policy of Colorado."); *cf. Dale v. State Farm Mut. Auto. Ins. Co.*, ___ F. Supp. 3d ___, ___, 2023 WL 7003415, at *1-4 (D. Colo. Oct. 23, 2023) (noting that the insurer, despite requesting medical releases and documents several times, was foreclosed from raising noncooperation due to its failure to comply with section 10-3-1118, distinguishing the case from *Aponte* and *Nofsinger* because of material contested facts).

¶ 39 As a result, because neither State Farm nor USAA met the requirements of section 10-3-1118, neither company could raise the

noncooperation defense and the trial court erred by granting summary judgment on these grounds.

2. Substantial Versus Strict Compliance

¶ 40 State Farm also contends that because the aim of section 10-3-1118 is to provide notice, it sufficed that State Farm "substantially complied" with the statutory requirements. We disagree.

¶ 41 "Whether a statute requires strict or substantial compliance is a question of statutory construction, which we review de novo." *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 10 (citation omitted). We may look to the language of the statute and the legislature's intent to discern whether strict or substantial compliance better effectuates the legislature's purpose in enacting section 10-3-1118. *See id.* at ¶¶ 11, 19-37.

¶ 42 Looking to the text, section 10-3-1118(1) makes clear that for an insurer to assert noncooperation, each of the statutory "conditions *must* be met before the defense is asserted in a court of law." (Emphasis added.) Furthermore, the statute lays out clear and precise timeframes for its notice requirements, without exception. *See* § 10-3-1118(1)(a), (1)(b), (1)(d). Such language

indicates that strict compliance is required. But at the same time, we recognize that mandatory language such as "shall" or "must" in a statute is not conclusive when the statute does not specifically provide whether strict or substantial compliance is required. *See Colorow Health Care*, ¶ 20 ("[E]ven when a statute includes the word 'shall,' this court has often read the statute to require only substantial compliance if doing so better furthers the statute's purpose."). Therefore, we must look to the legislature's purpose in enacting section 10-3-1118.

¶ 43 The legislative declaration preceding part eleven of article 3, which houses section 10-3-1118, provides some clarity concerning its purpose. *See* § 10-3-1101(1)-(2), C.R.S. 2023. It provides,

> The purpose of this part 11 is to regulate trade practices in the business of insurance by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined or determined.

§ 10-3-1101(1). Additionally, the General Assembly stated that "[i]t is in the best interests of the citizens of this state to have transparency in the insurance claims process to further the public

policy of encouraging settlement and preventing unnecessary litigation." § 10-3-1101(2).

¶ 44 The legislature's concern with protecting consumers from unfair insurer trade practices reflects a longstanding understanding, recognized by our supreme court, that "insurance contracts are unlike ordinary bilateral contracts." *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414 (Colo. 2004). Indeed, these concerns are why Colorado recognizes common law tort causes of action against insurers that breach their duty of good faith and fair dealing in bad faith: consumers seek insurance to protect against "unforeseen calamities," and there is a "disparity of bargaining power between the insurer and the insured." *Id.*

¶ 45 As a result, it seems clear that the legislature's purpose in enacting section 10-3-1118 — as reflected by its mandatory language and context within the statutory regime — is to regulate and standardize when insurers may raise noncooperation, provide greater transparency for claimants, and simplify potential litigation over noncooperation issues. And this is in line with part 11's purpose in prohibiting unfair practices by insurers to better serve

the interests of transparency for claimants, encourage settlement, and reduce needless litigation. § 10-3-1101(1)-(2).

¶ 46 To this end, a central feature of section 10-3-1118's statutory regime is that insurers must give an insured formal notice that the insurer requires specific information, and if the insurer does not receive the information this may prevent an insured from receiving benefits. The requirement of clear communication requesting particularized information, which must be reasonable and not within the insurer's power to obtain on its own, aids insurers and insureds by clarifying and simplifying insurance claims and disputes. *See* § 10-3-1118(1)(a)-(e). Indeed, clear communication about, and compliance with, this regime could reduce and simplify disputes such as this one. The insurer must clearly identify perceived deficiencies, so the insured is given notice — and a deadline — to provide what is needed to evaluate a claim or risk its denial. By contrast, the "substantial compliance" standard urged by State Farm and USAA would only undermine the transparency and certainty that section 10-3-1118 seeks to implement.

¶ 47 Thus, we conclude that the plain language and purpose of section 10-3-1118 indicate that strict compliance with its provisions is required. State Farm's efforts did not meet that standard.

3. Remaining Noncooperation Contentions

¶ 48 Because we conclude that State Farm and USAA have not complied with section 10-3-1118, and that the trial court erred by granting both companies summary judgment without considering the statute, we decline to address Wenzell's remaining noncooperation contentions because they may not arise on remand. *See Zook v. El Paso County*, 2021 COA 72, ¶ 9 (refusing to consider uncertain, hypothetical, speculative, or contingent injuries that may never occur).

¶ 49 This includes Wenzell's contentions that the trial court erred by (1) finding that State Farm and USAA suffered material and substantial prejudice from Wenzell's noncooperation; (2) ignoring that Wenzell was improperly forced to object to unreasonable requests for information; and (3) not finding that USAA and State Farm waived noncooperation when both companies continued to evaluate Wenzell's claims. In light of our decision that State Farm and USAA cannot raise noncooperation given their failure to comply

with section 10-3-1118, these issues may not recur on remand, so we do not decide them. *See id.*

B. USAA's Independent Duty to Evaluate Wenzell's Claim

¶ 50 Wenzell next contends that the trial court erred by granting USAA's partial motion for summary judgment concerning Wenzell's claim for the unreasonable delay and denial of his UIM benefits under sections 10-3-1115 and -1116. The trial court concluded that USAA cannot have unreasonably delayed or denied UIM benefits to Wenzell when State Farm's UIM benefits had yet to be exhausted, and that Wenzell's noncooperation with State Farm carried over to USAA. Wenzell argues that, regardless of whether State Farm's policy has been exhausted, USAA is obligated to investigate and pay his UIM claim. It is undisputed that USAA's UIM policy is a secondary excess policy to State Farm's primary UIM policy.

¶ 51 UIM insurance is intended to protect insured individuals from losses suffered in a motor vehicle accident with an uninsured or underinsured driver whose liability insurance cannot sufficiently compensate the injured individual. *Apodaca v. Allstate Ins. Co.*, 232 P.3d 253, 259 (Colo. App. 2009), *aff'd*, 255 P.3d 1099 (Colo. 2011).

UIM insurance is a required part of any automobile or motor vehicle liability insurance policy offered in Colorado. § 10-4-609(1)(a)(I), C.R.S. 2023.

¶ 52 As described by section 10-4-609(1)(c), UIM insurance "shall be in addition to any legal liability coverage and shall cover the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained, excluding exemplary damages, up to the maximum amount of the [UIM policy] coverage." "[I]nsurers of all potentially applicable UIM policies . . . are liable for damages, as the policies must be allowed to 'stack' — that is, a second policy's coverage begins where the first policy's coverage leaves off, without reducing the amount of available recovery under the second policy." *Jordan v. Safeco Ins. Co. of Am.*, 2013 COA 47, ¶ 38.

¶ 53 Examining the relationship between liability and UIM insurance, a division of this court in *Tubbs* held that an "exhaustion clause" in an insurance policy, conditioning a claimant's UIM benefits on the claimant receiving the full value of their liability insurance, violated section 10-4-609(1)(c). *Tubbs*, ¶¶ 11-17. The division reasoned that

> whether the insured recovers the full amount or nothing at all from the liable party's insurer has no impact on the UIM insurer's obligation to pay benefits. Regardless of what amount, if any, the insured receives from the liable party, the UIM insurer is only required to pay for damages in excess of the tortfeasor's legal liability coverage limit. This is precisely the coverage that the UIM insurer agreed to provide in exchange for a premium.

Id. at ¶ 16.

¶ 54 In *Ligotti v. Allstate Fire & Casualty Insurance Co.*, a nonbinding federal case with similar facts, the court extended the logic of *Tubbs* in the context of excess insurance payments: "Applying this principle to excess coverage, Farmers' payment does not offset Allstate's liability; Allstate is responsible for damages exceeding the limit of the Farmers Policy no matter what amount Farmers pays." ___ F. Supp. 3d ___, ___, 2023 WL 6216623, at *5 (D. Colo. Sept. 25, 2023). Thus the court held that the tortfeasor would be responsible for damages up to the limit of the liability policy, Farmers would pay damages up to the limit of its UIM policy after that, and Allstate would be required to pay any damages beyond the combined sum of these policies, up to its secondary UIM policy limit. *Id.* But because the plaintiff in *Ligotti* never alleged

that her damages could have exceeded this sum, Allstate's policy was never implicated. *Id.*

¶ 55 Wenzell argues that, like in *Ligotti*, the rationale in *Tubbs* should apply to USAA's policy. Regardless of whether State Farm had paid benefits to Wenzell, he argues that USAA had to investigate and pay for his damages under its policy because he alleged damages that were greater than the sum of State Farm's UIM coverage limit ($1,000,000) and the other driver's liability insurance limit ($100,000). Indeed, Wenzell's demand letter sent to State Farm said that his damages totaled $2,702,395.60, with additional costs added in a later supplement. USAA acknowledged that it also received a similar demand letter.[2]

¶ 56 Wenzell has three separate insurance policies available — the other driver's liability policy for $100,000 (which Wenzell already collected through an approved settlement), State Farm's $1,000,000 primary UIM policy, and USAA's $300,000 excess secondary UIM policy. Wenzell therefore has a total of $1.4 million potentially

[2] The record does not include a copy of the demand letter Wenzell sent to USAA.

available to him in liability and UIM insurance coverage, and these policies are required to stack. *See Jordan*, ¶ 38.

¶ 57 We are persuaded by the reasoning in *Ligotti* extending *Tubbs* and section 10-4-609(1)(c) to excess UIM coverage. After all, when an insured secures an excess UIM insurance policy, he is paying premiums to insure against damages that may occur beyond the limits of other UIM policies. And section 10-4-609 has specific limitations on setoffs to UIM policies, detailing that "[t]he amount of the coverage available pursuant to this section shall not be reduced by a setoff from any other coverage, including, but not limited to, legal liability insurance, medical payments coverage, health insurance, *or other uninsured or underinsured motor vehicle insurance*." § 10-4-609(1)(c) (emphasis added). The rationale behind *Tubbs*' rejection of exhaustion requirements in the liability insurance context applies equally well in the excess UIM insurance context. *See Tubbs*, ¶¶ 11-18.

¶ 58 Therefore, it does not matter how much money Wenzell receives from State Farm under the primary UIM policy; any damages Wenzell is entitled to — as determined by settlement or litigation — in excess of the combined sum of his available liability

insurance coverage and State Farm's UIM policy must be covered by USAA's secondary UIM policy, up to the limit of USAA's policy.

¶ 59 Each UIM policy does not require the exhaustion of Wenzell's liability insurance policy (though this did occur here), nor does USAA's UIM policy require the exhaustion of State Farm's UIM policy. *See Tubbs*, ¶¶ 11-18; *Ligotti*, 2023 WL 6216623, at *5. Therefore, if it is determined that Wenzell is entitled to damages beyond the sum of the other driver's liability insurance and State Farm's UIM insurance (i.e., beyond $1.1 million), USAA will be required to pay the excess of Wenzell's damages up to its policy limit of $300,000.

¶ 60 As a hypothetical example, if Wenzell had settled with State Farm for $500,000, but suffered $2 million in damages as determined by a jury, USAA would still be obligated to honor its policy and pay Wenzell up to the limit of its policy, $300,000, regardless of any settlement with State Farm and the other driver's liability insurance. *See Tubbs*, ¶¶ 11-18; *Ligotti*, 2023 WL 6216623, at *5; § 10-4-609(1)(c). Wenzell would receive less than the total insurance coverage available to him in this hypothetical, but USAA

would be required to honor its UIM policy *if* Wenzell incurred sufficient damages.

¶ 61 As a result, the trial court erred by granting USAA's motion for partial summary judgment on the grounds that USAA could not have unreasonably denied benefits until State Farm's policy had been exhausted. USAA was not entitled to summary judgment as a matter of law. *See Westin*, ¶ 19. Furthermore, because USAA's UIM policy does not require the exhaustion of State Farm's UIM policy, the trial court erred by determining that the acceptance of State Farm's noncooperation defense carried over to USAA. USAA had an independent duty to investigate Wenzell's UIM claim to determine if its coverage might be implicated. *See* § 10-3-1118(3) ("The existence of a duty to cooperate in a policy does not relieve the insurer of its duty to investigate . . . .").

¶ 62 It is a matter for the trier of fact to determine if USAA "delayed or denied authorizing payment of a covered benefit without a reasonable basis." § 10-3-1115(2); *see Zolman v. Pinnacol Assurance*, 261 P.3d 490, 497 (Colo. App. 2011) ("What constitutes reasonableness under the circumstances is ordinarily a question of fact for the jury."). Because the facts relevant to this determination

remain disputed, the trial court improperly granted summary judgment.

C. State Farm's Post-Litigation Conduct and Whether It Acted in Bad Faith

¶ 63 Finally, Wenzell challenges the trial court's partial summary judgment order dismissing his claim of unreasonable delay or denial of benefits against State Farm. Claims under sections 10-3-1115 and -1116 have been referred to as "statutory bad faith." *See Kisselman v. Am. Fam. Mut. Ins. Co.*, 292 P.3d 964, 975 (Colo. App. 2011) (sections 10-3-1115 and -1116 created a new private right of action distinct from common law claims of bad faith against insurers); *see, e.g.*, *Andres Trucking Co. v. United Fire & Cas. Co.*, 2018 COA 144, ¶ 20 ("[T]he insured sued the insurer for breach of insurance contract and *statutory bad faith* under section 10-3-1116(1).") (emphasis added).[3] The trial court reasoned that Wenzell

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[3] State Farm argues that any good faith duty it owed to Wenzell is irrelevant because Wenzell only raised claims for UIM benefits and unreasonable delay or denial of benefits under sections 10-3-1115 and -1116, C.R.S. 2023, and not common law bad faith. To the extent that Wenzell references "bad faith," we construe this to mean that Wenzell is referring to sections 10-3-1115 and -1116, as these provide different causes of action and Wenzell has not raised common law claims against State Farm or USAA.

had failed to identify any post-litigation conduct that raised a genuine dispute of material fact, noting that Wenzell's unsworn expert's affidavit did not suffice.

¶ 64 In essence, Wenzell asserts that there were disputed material facts requiring the trial court to deny summary judgment on this section 10-3-1115 and -1116 claim.

¶ 65 The trial court was correct to note that "an unsworn expert's report does not create a genuine issue of material fact sufficient to defeat summary judgment." *Allen v. Martin*, 203 P.3d 546, 567 (Colo. App. 2008). Affidavits in support of summary judgment must contain evidentiary information that would be admissible as part of an affiant's testimony if they were testifying in court. *See USA Leasing, Inc. v. Montelongo*, 25 P.3d 1277, 1278 (Colo. App. 2001).

¶ 66 However, summary judgment is a high bar, and if there are any genuine disputes of a material fact it is inappropriate. *Westin*, ¶¶ 20-21. Furthermore, the moving party bears the burden of demonstrating that there are no genuine issues of material fact. *Id.* at ¶ 20. Here, State Farm's motion primarily argued that summary judgment was appropriate given that it was reasonable for it to contest the "fairly debatable" valuation of Wenzell's claim. However,

"the only element at issue in the statutory [section 10-3-1115] claim is whether an insurer denied benefits without a reasonable basis." *Vaccaro v. Am. Fam. Ins. Grp.*, 2012 COA 9M, ¶ 44. And when deciding that an insurer was not entitled to judgment notwithstanding the verdict, a division of this court noted that simply because an insurer believed a claim was fairly debatable does not mean that the insurer could not have acted unreasonably as a matter of law:

> [E]very lawsuit over insurance coverage is a valuation dispute to the extent that the parties disagree about how much should be paid under a policy, or whether the policy provides for coverage at all. If every such claim is "fairly debatable" as a matter of law, the exception would swallow the rule, and insurers could refuse to pay any claim where money is at issue.

Id. at ¶ 47.

¶ 67 More importantly, rather than demonstrating that there was no dispute concerning a material fact, State Farm's motion for summary judgment points to facts in the record that indicate the existence of a genuine dispute of material fact.

¶ 68 For example, much of State Farm's combined summary judgment briefing is devoted to Wenzell's alleged failure to provide

the medical releases State Farm demanded, yet State Farm also claims it "reasonably considered all of the medical information submitted taking into consideration the chronological sequence of reported symptoms." This suggests that State Farm had sufficient information concerning Wenzell's pre- and post-accident injuries to reject the UIM claim because Wenzell's damages were insufficient or unrelated to the accident. The record indicates that Wenzell submitted extensive medical information to State Farm during the course of the claim negotiations contesting this. But what was submitted, when it was submitted, and whether that information was sufficient remain disputed issues.

¶ 69 Medical records submitted to the trial court from Wenzell's surgeon show that the surgeon believed the second accident caused Wenzell's injuries. Wenzell highlighted these evidentiary facts in his brief opposing summary judgment. State Farm also contested whether the accident could have been severe enough to cause Wenzell's injuries, highlighting photos of Wenzell's vehicle showing minimal damage. But Wenzell also disputed this conclusion through earlier photographic records filed with the trial court indicating greater levels of damage to the other driver's vehicle. All

this indicates that a fact finder needs to evaluate the parties' competing narratives.

¶ 70 This is not to say that these examples are demonstrative of whether Wenzell's section 10-3-1115 claim for unreasonable delay or denial should succeed. But these conflicting pieces of evidence illustrate material factual disputes concerning the key issue in this claim — whether State Farm unreasonably denied Wenzell UIM benefits in violation of section 10-3-1115, despite Wenzell's allegation that State Farm had sufficient information to resolve the claim and State Farm contending it required more information. *See Zolman*, 261 P.3d at 497; *see also Dale*, 2023 WL 7003415, at *4-5.

¶ 71 As a result, particularly in light of our holding above that State Farm cannot rely on a noncooperation defense, the trial court erred by granting summary judgment in favor of State Farm and dismissing Wenzell's unreasonable delay and denial claim. *See Westin*, ¶¶ 19-21.

VI. Disposition

¶ 72 We reverse the trial court's orders granting summary judgment in favor of USAA and State Farm in accordance with this

opinion. We remand the case to the trial court for further proceedings.

JUDGE SCHUTZ and JUDGE MOULTRIE concur.