STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 9, 2023)

GREGG JOHNSON	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2017-5261**
	:	
STEPHEN EDLUND	:	
Defendant.	:	
	:	*Consolidated with*
STEPHEN W. EDLUND	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2022-05909**
	:	
GREGG JOHNSON and USAA CASUALTY INSURANCE COMPANY	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Plaintiff/Defendant, Stephen Edlund's (Mr. Edlund) Motion for Summary Judgment, Defendant USAA Casualty Insurance Co.'s (USAA) Motion for Summary Judgment, and Defendant/Plaintiff, Gregg Johnson's (Mr. Johnson) Motion for Summary Judgment. USAA objects to Mr. Johnson and Mr. Edlund's motions, and Mr. Johnson and Mr. Edlund object to USAA's motion. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-14, 9-30-1, and Rule 56 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

In this consolidated action, Mr. Edlund seeks coverage under a Personal Umbrella Policy that he holds with USAA for any judgment or settlement above $250,000 in the underlying tort litigation, *Johnson v. Edlund*, PC-2017-5261 (the *Johnson* action). (Edlund Mem. Supp. Mot. for Summ. J. (Edlund Mem.) 1-2.)

The underlying tort litigation arose from a motorcycle accident that occurred on July 4, 2017. (Edlund Mem. Ex. E (Johnson Dep.) 25:1-4, 42:13-14; USAA Mem. Supp. Mot. for Summ. J. (USAA Mem.) Ex. C (Edlund Dep.) 49:21-23,79:14-19.) That evening, Mr. Edlund and Mr. Johnson were riding north together on Boston Neck Road in Narragansett Rhode Island, when they lost control of their motorcycles, causing an accident. (Johnson Dep. 57:1-64:4; 84:1-85:2; Edlund Dep. 69:9-15; 85:12-87:11.) Mr. Edlund and Mr. Johnson were both injured. *See* Johnson Dep. 17:19-18:1; Edlund Dep. 88:1-3.

At the time of the accident, Mr. Edlund maintained a Personal Umbrella Policy (Umbrella Policy) with USAA. (Edlund Dep. 108:8-11; USAA Mem. Ex. A (Umbrella Policy) Declarations at 1.) The Umbrella Policy provides coverage for damages "in excess of the **retained limit**, that an **insured** becomes legally obligated to pay because of **bodily injury** or **property damage** resulting from an **occurrence**." [1] (Umbrella Policy 4.) An occurrence is defined as "an accident . . . which results, during the policy period, in **bodily injury** or **property damage**." *Id.* at 3. Additionally, "retained limit" is defined as the "required minimum limit of liability for the applicable personal lines insurance coverage shown in the Schedule of Underlying Insurance . . ." *Id.* at 4. Mr. Edlund's required minimum limit for Miscellaneous Vehicle Liability is $250,000 for bodily injury. (Umbrella Policy Declarations at 1.)

Nevertheless, coverage is subject to two relevant exclusions:

> "A. [The] insurance does not apply to . . . 3. Punitive or exemplary damages, fines or penalties.
> ". . .
> "G. [The] insurance does not apply to **bodily injury** . . . 2. Arising out of . . . a. The ownership, maintenance, use, loading or unloading of . . . a **motor vehicle**." (Umbrella Policy 5-7.)

[1] Terms that are defined by the definitions section of the Umbrella Policy appear in bold throughout the policy. (Umbrella Policy 2.)

Exclusion G.2 (the Motor Vehicle Exclusion), does *not* apply, however, "to the extent that liability coverage is provided by **underlying insurance** and is not excluded elsewhere in [the] policy." *Id.* at 7. Underlying insurance is defined as the "types of personal lines insurance coverages for which limits are shown in the Schedule of Underlying Insurance[.]" *Id.* at 4. Mr. Edlund's Schedule of Underlying Insurance lists "Miscellaneous Vehicle Liability" as a required type of underlying insurance. (Umbrella Policy Declarations at 1.) Miscellaneous vehicles include motorcycles. (Umbrella Policy 3.)

At the time of the accident, Mr. Edlund's motorcycle insurance, which he had maintained in the amount required by his Umbrella Policy, had lapsed approximately a year or a year and a half prior. (Edlund Dep. 130:12-22.) Significantly, the Umbrella Policy includes a condition that applies in the event that underlying insurance terminates. (Umbrella Policy 9.) Condition G of the Umbrella Policy (Required Underlying Insurance Condition) provides:

> "1. If **underlying insurance** for **bodily injury** or **property damage** has terminated, is uncollectible, or has a limit less than the **retained limit**, this will not void coverage. However, **we** will pay for **bodily injury** or **property damage** only as though the **underlying insurance** was collectible and in force in the amount of the **retained limit**.
> "2. **We** will not pay the difference between the **retained limit** and any lower limit actually in effect." *Id.*

On August 2, 2017, Attorney Thomas L. Moran, counsel for Mr. Johnson, sent a letter to Mr. Edlund informing him that Mr. Johnson had retained his office for representation and advising Mr. Edlund to inform his insurance carrier. *See* USAA Mem. Ex. D (Aug. 2, 2017 Corr.) 1. On November 2, 2017, Mr. Johnson filed the *Johnson* action asserting a negligence claim against Mr. Edlund. (Compl. ¶¶ 1-7, PC-2017-5261, Nov. 2, 2017.)

On January 17, 2019, Mr. Edlund notified USAA of the *Johnson* action. (Edlund Mem. Ex. 2. (Feb. 27, 2019 Corr.) 2.) USAA responded acknowledging Mr. Edlund's request for assistance

with the cost of defense on February 27, 2019. *Id.* at 2. However, USAA stated that coverage for defense cost was unavailable because the defense of the lawsuit was below the retained limits. *Id.* USAA advised Mr. Edlund that "[i]n the event that you tender the retained limit of $250,000, USAA would be willing to address Mr. Johnsons *[sic]* claim. Unless and until that exhaustion occurs, USAA believes that its benefits for both indemnity and defense cost have not been triggered." *Id.* at 2-3.

On February 7, 2019, Attorney Moran also communicated with USAA regarding Mr. Johnson's claim. *See* Edlund Mem. Ex. I (Oct. 3, 2022 Corr. & Acknowledgement of Representation) 4.) USAA acknowledged Attorney Moran's letter of representation and asked that "[t]o assist us with our evaluation of your client's claim, please provide documentation about the case as it becomes available." *Id.* USAA nonetheless advised that:

> "Our insured has an Umbrella policy with a $1,000,000 limit per occurrence. The Umbrella policy only applies to liability above the retained limits of $250,000. In the event that Mr. Edlund tender's *[sic]* the retained limit of $250,000, USAA would be willing to address Mr. Johnsons *[sic]* claim. Unless and until that exhaustion occurs, USAA maintains that its benefits have not been triggered." *Id.*

On July 27, 2022, Mr. Johnson, through his attorney, made a formal demand for Mr. Edlund's USAA Umbrella Policy of $1,000,000. (Edlund Mem. Ex. F (Aug. 16, 2022 Corr.) 2.) USAA responded on August 16, 2022, but it concluded that "[a]fter review and our investigation, Mr. Edlund's Umbrella policy did not provide any coverage for this incident, therefore, we are unable to discuss any settlements for your client." *Id.*

Nevertheless, on October 3, 2022, Mr. Edlund's attorney wrote to Missy Smith, a Casualty Claims Examiner at USAA, advising her that pursuant to USAA's February 27, 2019 letter, Mr. Edlund was "tendering the retained limit of $250,000 to you." (Oct. 3, 2022 Corr. &

Acknowledgement of Representation 1.) Receiving no response, Mr. Edlund's attorney reached out to USAA's attorney on December 8, 2022, asking for them to "[k]indly advise the proper procedure for tendering the retained limit of $250,000." (Edlund Mem. Ex. J. (Dec. 8 Corr.) 1.)

Mr. Johnson filed an Amended Complaint on October 11, 2022, adding a second count for punitive damages based on Mr. Edlund's operation of his motorcycle while intoxicated. *See* Docket PC-2017-5261; Am. Compl. ¶¶ 8-12. On the same day, Mr. Edlund filed the instant complaint for declaratory relief against Mr. Johnson and USAA. *See* Compl. for Declaratory J. (Compl. PC-2022-05909) ¶¶ 1-12, Oct. 11, 2022. The Complaint asks this Court to declare:

> "A. That the Policy of Insurance issued by USAA to Edlund provides coverage to Edlund for any and all sums above $250,000.00 for those matter[s] and things referred to in the action entitled *Gregg Johnson v. Stephen Edlund, C.A. No. PC-2017-5261*.
> "B. Edlund is entitled to full reimbursement for his costs, attorney's fees, and expenses in proceeding with this action.
> "C. Edlund is entitled to damages for the failure of USAA to indemnify and/or defend him and for dealing in "bad faith".
> "D That the Court construe the USAA Policy and determine the rights and liabilities of the parties and for any and other further relief that this Court deems just including but not limited to punitive damages." *Id.* ¶ 12.

On November 16, 2022, Mr. Johnson filed an answer admitting almost all the material allegations of Mr. Edlund's Complaint. *See* Def. and Interested Party Johnson's Answer to Pl.'s Compl. for Declaratory J. ¶¶ 1-12. On January 5, 2023, Mr. Edlund filed a motion to consolidate his declaratory judgment action with the *Johnson* action. *See* Docket PC-2022-05909. USAA subsequently filed its own answer and affirmative defenses, as well as a motion to sever Mr. Edlund's bad faith claims. *See id.* The Court granted USAA's motion to sever and Mr. Edlund's motion to consolidate on February 13, 2023. *See id.*

On March 30, 2023, Mr. Edlund, USAA, and Mr. Johnson filed their respective motions for summary judgment. *See id.* On April 14, 2023, Mr. Edlund and USAA filed their objections,

and on April 17, 2023, Mr. Johnson filed his objection. *Id.* Accordingly, Mr. Edlund, USAA, and Mr. Johnson's cross-motions for summary judgment are now before this Court for disposition.

II

Standard of Review

"Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013) (internal quotation omitted). Under Rule 56 of the Superior Court Rules of Civil Procedure, a court may only grant a motion for summary judgment when the competent evidence, viewed in the light most favorable to the non-moving party, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Super. R. Civ. P. 56(c); *see also Andrade v. Westlo Management LLC*, 276 A.3d 393, 399-400 (R.I. 2022). The Court examines the factual evidence contained in "the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions of file, together with the affidavits," Super. R. Civ. P. 56(c), but the parties may not rest on mere allegations or denials contained in the pleadings. *See Loffredo v. Shapiro*, 274 A.3d 782, 790 (R.I. 2022). Once the movant has alleged the *absence* of material factual issues, the opposing party has an affirmative duty to provide evidence of the existence of material factual disputes. *Id.*

III

Analysis

A

Coverage Under the Umbrella Policy

Mr. Edlund is asking the Court to construe the Umbrella Policy and declare that it requires USAA to: (1) come in and defend Mr. Edlund; and (2) indemnify Mr. Edlund for any judgment or

settlement above $250,000. *See* Edlund Mem. 11 (citing Compl. PC-2022-05909 ¶ 12). Mr. Edlund argues that there is coverage because the policy covers "bodily injury, including bodily harm, physical damage to tangible property, and loss of use of the property, resulting from an occurrence involving a miscellaneous vehicle, such as a motorcycle." *Id.* at 6. He also notes that the definition for retained limit clearly indicates that there is coverage even if the underlying insurance is uncollectable because it clarifies that if "underlying insurance for bodily injury or property damage is uncollectible for an occurrence, the retained limit is the split Bodily Injury/Property Damage limit of $250,000/$500,000." *Id.* Mr. Edlund further contends that this interpretation of the policy was confirmed by USAA's first correspondence on February 27, 2019. *Id.* at 6-7. Alternatively, Mr. Edlund argues that USAA waived its right to refuse coverage when it requested that Mr. Edlund tender the retained limit. *Id.* at 7-9.

Mr. Johnson incorporates and supports Mr. Edlund's arguments, and additionally argues that there is coverage under the Umbrella Policy pursuant to the Required Underlying Insurance Condition. (Def. Johnson's Mem. Supp. Mot. for Summ. J. (Johnson Mem.) 3-4; Johnson's Obj. & Reply to USAA's Mot. (Johnson Obj.) 1-4.) Specifically, Mr. Johnson contends that the Required Underlying Insurance Condition specifically anticipates and accounts for circumstances in which the underlying insurance has terminated and clearly provides that such termination will not void coverage. (Johnson Obj. 4-5.)

In response, USAA argues that there is no coverage under the clear and unambiguous terms of the Umbrella Policy because the Motor Vehicle Exclusion applies and bars coverage in full. (USAA Mem. 10.) Specifically, USAA contends that coverage is excluded under the Motor Vehicle Exclusion because the underlying claim is premised on an accident which was caused by Mr. Edlund's use of a motorcycle and because Mr. Edlund did not have underlying insurance. *Id.*

USAA further argues that Mr. Edlund and Mr. Johnson's interpretation of the Required Underlying Insurance Condition is unreasonable. *Id.* at 12. USAA notes that there is nothing in the language of the Umbrella Policy to indicate that the Required Underlying Insurance Condition was meant to supplant the language of the Motor Vehicle Exclusion. (USAA's Opp'n to Co-Def. and Pl.'s Cross-Mot. (USAA's Opp'n Mem.) 5-6.) Additionally, USAA argues that Mr. Edlund and Mr. Johnson's proposed interpretation of the Required Underlying Insurance Condition should be rejected because it would render the Motor Vehicle Exclusion mere surplusage. (USAA Mem. 14-15.) USAA contends that other courts have rejected this interpretation of similar underlying insurance conditions in conjunction with policy exclusions, citing to *Harleysville Insurance Co. v. Mac's Septic Service*, 225 F. Supp. 2d 595 (D. Md. 2002) and the unpublished opinion, *Safeco Insurance Co. of Illinois v. Kreiman*, No. 1-15-1410, 2016 WL 756952 (Ill. App. Ct. Feb. 24, 2016). *Id.* at 12-13.

1

Duty to Indemnify

The duty to indemnify is an insurer's obligation to "indemnify the insured for any amounts that he becomes liable to pay for damages arising from a covered risk, subject to the insurer's limits of liability and the other terms and conditions of the policy." 1 *New Appleman Law of Liability Insurance* § 1.05 (2d ed. 2013). An insurer's obligation to indemnify depends upon whether the "facts upon which the insured's liability . . . [are] predicated fall within the coverage of the policy."[2] *Employers Mutual Casualty Co. v. PIC Contractors, Inc.*, 24 F. Supp. 2d 212, 217 (D.R.I. 1998).

[2] The facts relevant to coverage in the underlying litigation are not in dispute: Mr. Edlund and Mr. Johnson were involved in a motorcycle accident that resulted in bodily injury during the policy period; Mr. Johnson is seeking damages for those injuries; and Mr. Edlund's motorcycle insurance

Insurance policies are contractual in nature. *Ajax Construction Co., Inc. v. Liberty Mutual Insurance Co.*, 154 A.3d 913, 922 (R.I. 2017). When interpreting an insurance policy, the Court does so in accordance with the rules of contract construction. *See id.* The Court looks to the four corners of the policy and affords the terms of the policy their "'plain, ordinary and usual meaning.'" *Town of Cumberland v. Rhode Island Interlocal Risk Management Trust, Inc.*, 860 A.2d 1210, 1215 (R.I. 2004) (quoting *Casco Indemnity Co. v. Gonsalves*, 839 A.2d 546, 548 (R.I. 2004)). The test is not "what the insurer may have intended the policy to cover or exclude, but rather what an ordinary reader of the policy would have understood the policy's terms to mean if he or she had read them." *American Commerce Insurance Co. v. Porto*, 811 A.2d 1185, 1192 (R.I. 2002). If the terms of the policy are ambiguous, the policy will be strictly construed in favor of the insured. *Koziol v. Peerless Insurance Co.*, 41 A.3d 647, 649-50 (R.I. 2012).

"Whether an ambiguity exists in an insurance policy is a question of law[.]" *Merrimack Mutual Fire Insurance Co. v. Dufault*, 958 A.2d 620, 625 (R.I. 2008). A policy is ambiguous "only when it is reasonably and clearly susceptible of more than one interpretation." *Rotelli v. Catanzaro*, 686 A.2d 91, 94 (R.I. 1996). In making this determination, "the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning." *Samos v. 43 East Realty Corp.*, 811 A.2d 642, 643 (R.I. 2002) (internal quotation omitted). The Court should not engage in "mental gymnastics . . . to read ambiguity into a policy where none is present." *Ajax Construction Co., Inc.*, 154 A.3d at 922 (internal quotation omitted). Each word "of the contract should be given meaning and effect; an interpretation that reduces certain words

lapsed a year to a year and a half prior to the accident. *See* Johnson Dep. 25:1-4, 42:13-14; Edlund Dep. 49:21-23, 79:14-19, 130:12-22.

to the status of surplusage should be rejected." *Andrukiewicz v. Andrukiewicz*, 860 A.2d 235, 239 (R.I. 2004).

Here, the policy provides coverage for "damages, in excess of the **retained limit**, that an **insured** becomes legally obligated to pay because of **bodily injury** or **property damage** resulting from an **occurrence**." (Umbrella Policy 4.) "Occurrence" means "an accident . . . which results, during the policy period, in **bodily injury** or **property damage**." *Id.* at 3. "Bodily Injury" refers to "bodily harm, sickness, disease or death." *Id.* at 2. Therefore, the ordinary reader of the policy would understand the policy to provide coverage for any damages in excess of the retained limit that Mr. Edlund becomes legally obligated to pay in the *Johnson* action because the *Johnson* action arose from a motorcycle accident that resulted in physical injury. *See* Johnson Dep. 17:19-18:1; *American Commerce Insurance Co.*, 811 A.2d at 1192.

However, as USAA points out, coverage is subject to the Motor Vehicle Exclusion which provides that, "[t]his insurance does not apply to **bodily injury**, **property damage** or **personal injury** . . . 2. Arising out of . . . [t]he ownership, maintenance, use, loading or unloading of . . . a **motor vehicle**." (Umbrella Policy 6-7.) The Motor Vehicle Exclusion "does *not* apply to the extent that liability coverage is provided by **underlying insurance** and is not excluded elsewhere in this policy." *Id.* at 6 (emphasis added). Further, the policy defines motor vehicle as "any type of motorized land vehicle . . . whether or not subject to motor vehicle registration . . . includ[ing] . . . [**m]iscellaneous vehicles**," and motorcycles are listed as a type of miscellaneous vehicle. *Id.* at 3. Accordingly, under a plain and ordinary reading of the exclusion, the Umbrella Policy does not apply to bodily injuries arising out of the use of a motorcycle *unless* liability coverage is provided by the underlying insurance and is not otherwise excluded. *See id.* 6-7; *Rhode Island Interlocal Risk Management Trust, Inc.*, 860 A.2d at 1215.

Here, it is undisputed that Mr. Edlund's underlying motorcycle insurance had lapsed approximately a year to a year and a half prior to the accident. *See* Edlund Dep. 130:12-17. Accordingly, if there were no other relevant provisions in the policy, coverage would be excluded. *See* Umbrella Policy 6-7. Nevertheless, when interpreting an insurance policy, the document must be "read . . . in its in entirety." *See Ajax Construction Co., Inc.*, 154 A.3d at 922. Reading the Umbrella Policy in its entirety, it is clear that the Required Underlying Insurance Condition provides some coverage despite the application of the Motor Vehicle Exclusion. *See* Umbrella Policy 9.

The Required Underlying Insurance Condition provides:

> "1. If **underlying insurance** for **bodily injury** or **property damage** has terminated, is uncollectible, or has a limit less than the **retained limit**, this will not void coverage. However, **we** will pay for **bodily injury** or **property damage** only as though the **underlying insurance** was collectible and in force in the amount of the **retained limit**.
> "2. **We** will not pay the difference between the **retained limit** and any lower limit actually in effect." *Id.*

Pursuant to the terms of the condition, the Required Underlying Insurance Condition will apply only "if" the underlying insurance was either terminated, uncollectible, or has a limit less than the retained limit. *See id.*; *Rhode Island Interlocal Risk Management Trust, Inc.*, 860 A.2d at 1215. Accordingly, the Required Underlying Insurance Condition applies here because Mr. Edlund's motorcycle insurance had terminated a year to a year and a half prior to the accident. *See* Edlund Dep. 130:12-17.

Once the condition is triggered, the ordinary reader would understand the condition to mean that USAA agreed to pay for bodily injury "as though" the underlying insurance was collectible and in force in the amount of the retained limit. *See* Umbrella Policy 9; *American Commerce Insurance Co.*, 811 A.2d at 1192. It is undisputed that if the underlying insurance were

collectible and in force, the Motor Vehicle Exclusion would *not* bar recovery.[3] *See* Umbrella Policy 9; USAA Mem. 3. Accordingly, USAA is obligated to provide coverage for bodily injury arising from the use of a motorcycle—including Mr. Johnson's claims—because the Required Underlying Insurance Condition applies and requires coverage "as though" underlying insurance were in force. *See* Umbrella Policy 9.

To accept USAA's interpretation and find that the Motor Vehicle Exclusion bars coverage notwithstanding the application of the Required Underlying Insurance Condition would require this Court to ignore the words "*as though* the underlying insurance was collectible and in force[.]" *See* USAA's Mem. 14; Umbrella Policy 9 (emphasis added). Such an interpretation is impermissible since when "ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect[.]" *See Andrukiewicz*, 860 A.2d at 239. Additionally, contrary to USAA's argument, the application of the Required Underlying Insurance Condition does not render the Motor Vehicle Exclusion mere surplusage because it only applies where the underlying insurance "has terminated, is uncollectible, or has a limit less than the **retained limit[**.]" *Cf.* USAA Mem. 14-15, *with* Umbrella Policy 9. Therefore, when the insured *never* obtained the required underlying insurance, the Motor Vehicle Exclusion would bar recovery for bodily injury arising out of the use of a motor vehicle because the Required Underlying Insurance Condition would not have been triggered. *See* Umbrella Policy 6-7, 9.

[3] USAA acknowledges that under the Motor Vehicle Exclusion, the policy "does not provide coverage for liability arising out of the use of a motor vehicle . . . *unless* there is . . . liability coverage for the use of that vehicle." (USAA Mem. 3) (emphasis added). Although USAA hints that there are other exclusions that may bar coverage, including the "criminal acts" exclusion, *see id.* at 10 n.8, USAA specifically states that it "focuses this Motion on the dispositive Motor Vehicle Exclusion." *Id.* at 3 n.3. Accordingly, this Court will not address whether the "criminal acts" exclusion could also bar coverage.

Furthermore, the persuasive authority upon which USAA relies to support its argument that the Motor Vehicle Exclusion supplants the Required Underlying Insurance Condition is unavailing because in both of USAA's cited cases, the insured *did* maintain the required underlying insurance, so the Required Underlying Insurance Condition was never triggered. *See Harleysville Insurance Co.*, 225 F. Supp. 2d at 599; *Safeco Insurance Co. of Illinois*, 2016 WL 756952, at *5.

Moreover, there is nothing in the policy that prohibits Mr. Edlund from self-insuring. *See generally*, Umbrella Policy. The policy provides coverage for damages "in excess of the **retained limit,** that an **insured** becomes legally obligated to pay because of **bodily injury** or **property damage** resulting from an **occurrence**," and the policy defines retained limit as the "*required minimum limit of liability* for the applicable personal lines insurance coverage shown in the Schedule of Underlying Insurance[.]" *Id.* at 4 (emphasis added). Required minimum limits are represented as *monetary values* on the Schedule of Underlying Insurance. (Umbrella Policy Declarations at 1.) Additionally, the Schedule of Underlying Insurance states that the insured is "require[d] . . . to maintain NO LESS THAN the above REQUIRED MINIMUM LIMITS," rather than that the insured is required to maintain an *insurance policy* in the amount of the required minimum limits. *See id.* Accordingly, there is nothing in the policy that prohibits the insured from personally maintaining the required minimum limit and seeking coverage under the Umbrella Policy when their losses reach that limit. In fact, USAA originally instructed Mr. Edlund to do just that when it advised him that "[i]n the event that you tender the retained limit of $250,000, USAA would be willing to address Mr. Johnsons *[sic]* claim." (Feb. 27, 2019 Corr. 2-3.) As such, there is coverage under the policy for damages arising from the *Johnson* action.

Mr. Edlund requests this Court to find that USAA is required to "indemnify Mr. Edlund for *any* judgment or settlement above $250,000.00." *See* Edlund Mem. 11 (emphasis added).

However, the clear and unambiguous language of the policy provides that USAA will neither pay for punitive damages nor damages exceeding the Umbrella Liability Limit of $1,000,000. *See* Umbrella Policy 5, Umbrella Policy Declarations at 1. Accordingly, provided that Mr. Edlund tenders the retained limit, USAA is required to indemnify Mr. Edlund for damages incurred in the *Johnson* action exceeding $250,000, but less than $1,000,000, not including punitive damages.

2

Duty to Defend

The duty to defend is broader than the duty to indemnify, and an insurer may have a duty to defend regardless of the eventual liability of the indemnitee. *See Mellow v. Medical Malpractice Joint Underwriting Association of Rhode Island*, 567 A.2d 367, 368 (R.I. 1989). Therefore, courts apply the pleadings test to determine whether an insurer has a duty to defend an insured. *Peerless Insurance Co. v. Viegas*, 667 A.2d 785, 787 (R.I. 1995). Under this test, an insurer has a duty to defend "when a complaint contains a statement of facts which bring the case within or *potentially* within the risk coverage of the policy[.]" *Employers' Fire Insurance Co. v. Beals*, 103 R.I. 623, 632, 240 A.2d 397, 403 (1968), *abrogated on other grounds*, *Viegas*, 667 A.2d at 789 (emphasis added). Additionally, "any doubts as to the adequacy of the pleadings to encompass an occurrence within the coverage of the policy are resolved against the insurer and in favor of its insured." *Id.*

Here, the Umbrella Policy specifically provides that:

> "1. If a claim is made or a suit is brought against any **insured** for **bodily injury** or **property damage** arising from an **occurrence** to which this policy applies . . . **we** will provide a defense at **our** expense by counsel of **our** choice, even if the suit is groundless, false or fraudulent.
>
> "However, **we** will not provide a defense . . .
>
> "b. If the **occurrence** or offense is covered by **underlying insurance** or any other liability insurance available to any **insured**." (Umbrella Policy 4.)

As explained *supra*, the policy applies to this occurrence because the Required Underlying Insurance Condition requires that USAA pay above the retained limit where the underlying insurance has terminated. *See* discussion, *supra*, Section III.A.1. Additionally, the occurrence here was not covered by underlying insurance, *see* Edlund Dep. 130:12-22, so the above limitation on the duty to defend does not apply. *See American Commerce Insurance Co.*, 811 A.2d at 1192 (the meaning of an insurance policy is what the ordinary reader of the policy would have understood the policy's terms to mean). Therefore, because the *Johnson* action is a claim brought against the insured, Mr. Edlund, for bodily injury and which arises out of an occurrence to which the Umbrella Policy applies, USAA has a duty to defend under the policy terms, and Mr. Edlund is entitled to summary judgment to that effect.[4] *See* Umbrella Policy 4.

B

Prejudice

USAA next argues that, even if there is coverage, this Court should decline to enforce the Umbrella Policy because Mr. Edlund's delay in providing notice to USAA resulted in prejudice. (USAA Mem. 15.) USAA notes that Mr. Edlund did not notify USAA of Mr. Johnson's suit until January 17, 2019, eighteen months after the accident. *Id.* USAA argues that this delay prejudiced it because: (1) "the scent of factual investigation" had dissipated by that time; (2) Mr. Edlund sold his motorcycle a month after the accident, so USAA was unable to investigate whether the accident occurred due to mechanical failure or negligence; and (3) USAA was deprived of the opportunity to pursue potential subrogation rights against a third-party tortfeasor. *Id.* at 16-17 n.15.

[4] Because this Court finds coverage under the policy, it need not address Mr. Edlund's argument that USAA waived the ability to deny coverage under the policy. *See* Edlund Mem. 7-9.

In response, Mr. Edlund argues that USAA cannot argue that it was prejudiced by Mr. Edlund's late notice because it has not substantiated its argument with evidence. (Edlund Obj. to USAA's Mot. for Summ. J. (Edlund Obj.) 5.) Mr. Edlund further notes that between his January 17, 2019 notice to USAA and USAA's August 16, 2022 correspondence, USAA never indicated that it was conducting an investigation, that an exclusion might apply, that Mr. Edlund had provided late notice, or that USAA was prejudiced. (Edlund Obj. 4.) Therefore, he contends that USAA cannot be prejudiced by its own inaction. *Id.*

Mr. Johnson further argues that USAA was not prejudiced by late notice because at the time that USAA was notified, fact discovery had barely begun. (Johnson Obj. 5.) Mr. Johnson additionally notes that although USAA claims that it was deprived of investigating the mechanical failure of the motorcycle, Mr. Edlund clearly testified that he was merely speculating as to whether there was a mechanical failure. *Id.* at 6 (citing Edlund Dep. 118:5-119:22).

Compliance with the notice provisions of an insurance policy is a condition precedent to an insurer's liability. *See Cinq-Mars v. Travelers Insurance Co.*, 100 R.I. 603, 610, 218 A.2d 467, 471 (1966). A requirement that notice be given to an insurer "as soon as practicable" does not require instantaneous notice. *See Pickering v. American Employers Insurance Co.*, 109 R.I. 143, 158, 282 A.2d 584, 592-93 (1971). The notice condition is satisfied if "'the insured acts diligently and with all reasonable dispatch, having in mind all the circumstances and facts of a particular case.'" *Avco Corp. v. Aetna Casualty & Surety Co.*, 679 A.2d 323, 329 (R.I. 1996) (quoting *Pickering*, 109 R.I. at 158, 282 A.2d at 592-93).

However, an insured's technical breach of an "as soon as practicable" notice provision does not bar recovery unless the insurer can show that it was prejudiced by the insured's lack of diligent notice. *See A & W Artesian Well Co. v. Aetna Casualty & Surety Co.*, 463 A.2d 1381, 1382 (R.I.

1983); *cf. Donahue v. Hartford Fire Insurance Co.*, 110 R.I. 603, 604, 295 A.2d 693, 693 (1972) (refusing to apply the so-called notice-prejudice rule where the insurance contract specifically provided that the insured shall supply the insurer with proof of loss within sixty days). The insurer carries the burden of proving prejudice, which it must demonstrate based on the factual record. *See Pennsylvania General Insurance Co. v. Becton*, 475 A.2d 1032, 1035-36 (R.I. 1984); *Cooley v. John M. Anderson Co.*, 443 A.2d 435, 437 (R.I. 1982) (overturning the trial court's finding of prejudice because when the record was examined in its entirety there was an absence of a showing that the insurer was prejudiced). In determining whether the insurer was prejudiced, the "court should look to the length of delay, the reasons for the delay, and the probable effect of the delay on an insurer[.]" *See A & W Artesian Well Co.*, 463 A.2d at 1383.

Here, the Umbrella Policy requires Mr. Edlund to give USAA notice of an occurrence "as soon as is practical." (Umbrella Policy 8-9.) Mr. Edlund received notice that Mr. Johnson was contemplating legal action as early as August 2, 2017, but he did not notify USAA of Mr. Johnson's claim until January 17, 2019. (Aug. 2, 2017 Corr. 1; Feb. 27, 2019 Corr. 1.) Nevertheless, for the reasons to follow, USAA has failed to provide enough competent evidence of prejudice to avoid the Court's enforcement of the Umbrella Policy based on a lack of prompt notice. *See Pennsylvania General Insurance Co.*, 475 A.2d at 1036.

USAA was notified of the *Johnson* action on January 17, 2019, after Mr. Edlund received Mr. Johnson's interrogatories. *See* Edlund Dep. 108:23-109:5; Feb. 27, 2019 Corr. 1. Accordingly, discovery was ongoing when USAA received notice, and there is no evidence that its ability to join fact discovery and investigate Mr. Johnson's claim was prejudiced by the delay. *See A & W Artesian Well Co.*, 463 A.2d at 1383. Absent other evidence that during the delay, Mr. Edlund settled the *Johnson* action, was adjudged in default, or acted in any other way that prevented USAA

from engaging in an investigation of the accident, the mere passage of time alone is insufficient to create a factual dispute regarding prejudice. *See Pennsylvania General Insurance Co.*, 475 A.2d at 1036; *cf. Avco Corp.*, 679 A.2d at 329 (during the two-and-a-half-year delay, the insured settled several underlying claims, preventing the insurer from investigating the merits of those claims); *Pennsylvania General Insurance Co.*, 475 A.2d at 1036 (prejudice where the insurer would have been required to investigate three-year old injuries); *Harleysville Worcester Insurance Co. v. High Tech Construction, Inc.*, 568 F. Supp. 3d 152, 155 (D.R.I. 2021) (prejudice where during the delay, default was entered against insured, limiting insurer's ability to mount a defense).

Additionally, although interference with an insurer's subrogation rights has been found to be prejudicial, *see Pennsylvania General Insurance Co.*, 475 A.2d at 1036, there is simply no competent evidence supporting USAA's argument that Mr. Edlund selling his motorcycle interfered with its potential subrogation rights. *See Habershaw v. Michaels Stores, Inc.*, 42 A.3d 1273, 1277 (R.I. 2012) In support of its argument, USAA cites Mr. Edlund's testimony saying that during the accident his bike "pitched down to the left" and that the accident may have been caused by mechanical failure. (USAA Mem. 16-17.) However, Mr. Edlund admitted that he was speculating when he said that the accident could have been caused by mechanical failure and clarified that there was no mechanical failure of which he was aware. *See* Edlund Dep. 125:13-24. Conjecture or speculation is not "competent evidence" for the purposes of defeating a motion for summary judgment. *See Habershaw*, 42 A.3d at 1277. As such, USAA has failed to demonstrate the existence of a material factual dispute regarding prejudice, and coverage under the Umbrella Policy is not denied based on Mr. Edlund's delay in providing notice. *See A & W Artesian Well Co.*, 463 A.2d at 1383.

C

Standing

Lastly, USAA argues that Mr. Johnson does not have standing to file a motion for summary judgment against it because he has asserted no cross-claims and because he is not a party to the insurance policy. (USAA Mem. 11-12.) Mr. Johnson filed a Motion for Summary Judgment against USAA, a Memorandum of Law in support of his and Mr. Edlund's Motions for Summary Judgment, and an Objection and Reply to USAA's Motion for Summary Judgment. *See generally,* Def. Johnson's Mot. for Summ. J.; Johnson Mem.; Johnson Obj. Mr. Johnson argued in favor of coverage under the Umbrella Policy. *See* Johnson Mem. 1-4; Johnson Obj. 1-8. Accordingly, all the issues raised in Mr. Johnson's motion and memoranda have been resolved by this Court's grant of Mr. Edlund's motion for summary judgment. Given that the issues raised in Mr. Johnson's motion and memoranda are now moot, the Court need not decide whether he had standing. *See Coventry School Committee v. Richtarik*, 122 R.I. 707, 715, 411 A.2d 912, 916 (1980) (declining to address an issue because it had become moot).

IV

Conclusion

For the foregoing reasons, this Court GRANTS Mr. Edlund's Motion for Summary Judgment and declares that pursuant to the Umbrella Policy, USAA is required to come in and defend Mr. Edlund in the *Johnson* action and to indemnify Mr. Edlund for damages incurred in the *Johnson* action which exceed $250,000, but are less than $1,000,000 and which do not include punitive damages. This Court DENIES USAA's Motion for Summary Judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Gregg Johnson v. Stephen Edlund** ***Consolidated with*** **Stephen Edlund v. Gregg Johnson and USAA Casualty Insurance Company**
CASE NOS:	**PC-2017-5261 and PC-2022-05909**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 9, 2023**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**

ATTORNEYS:

For Gregg Johnson:	**Thomas L. Moran, Esq.**
For Stephen Edlund:	**C. Russell Bengtson, Esq.**
For USAA Casualty Insurance Co.:	**Dana M. Horton, Esq.**