COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE , ss.

SUPERIOR COURT
CIVIL ACTION
No. 22CV300

ARBELLA MUTUAL INSURANCE COMPANY

vs.

CHRISTINE HAMMOND-OHLSON

MEMORANDUM DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

This lawsuit arises out of a claim for uninsured motorist benefits by the defendant Christine Hammond-Ohlson ("Ms. Hammond-Ohlson") arising out of an incident that occurred on February 1, 2020. The plaintiff, Arbella Mutual Insurance Company ("Arbella") seeks in his Complaint a declaration that there is no coverage under the applicable policy of insurance for the alleged injuries sustained by Ms. Hammond-Ohlson resulting from the incident. Ms. Hammond-Ohlson filed a counterclaim seeking a declaration that the injuries she suffered arose out of the "ownership maintenance and use" of an unidentified motor vehicle. The parties also dispute whether Ms. Hammond-Ohlson gave timely notice to Arbella of the incident.

Both parties moved for summary judgment on an agreed upon record. The parties briefed the issues and appeared for argument on August 8, 2023. After consideration, the Court enters summary judgment for the defendant Arbella.

The facts are undisputed. Neither party identified any triable facts in the written submission or at oral argument. Arbella issued a standard Massachusetts Automobile Insurance Policy, number HC546958, to the named insured, Ms. Hammond-Ohlson, in effect on February 1, 2020. (the "Policy").

This Uninsured Motorist Claim arises out of Ms. Hammond-Ohlson's slip and fall on a banana peel in the parking lot of Shaw's Super Market in Hyannis Massachusetts, on February 1, 2020.

A surveillance videotape was provided to the parties by Shaw's and depicts a silver four-door vehicle which stopped in front of Shaw's at 3:33 p.m. on February 1, 2020, the front passenger side door opened slightly, and a banana peel was dropped out of said door onto the parking lot landing onto a large painted letter "F". The vehicle then drove away. The video tape documents that the banana peel remained on the painted letter "F" until 3:43 p.m. (more than 9 minutes after it was dropped), at which point Ms. Hammond-Ohlson slipped and fell on the banana peel as she was walking into Shaw's.

Ms. Hammond-Ohlson first notified Arbella of her claim for Uninsured Motorist Benefits because of her slip and fall incident by way of correspondence from Attorney Charlotte Tilden dated May 11, 2021. On September 9, 2021, Ms. Hammond-Ohlson by her attorney sent a letter in which she made a demand for arbitration. In response Arbella maintained that that Ms. Hammond-Ohlson's claim did not "arise out of the ownership, maintenance, or use of an auto" and on the grounds that Ms. Hammond-Ohlson did not give Arbella "prompt notice" of her claim.

RELEVANT POLICY PROVISIONS AT ISSUE

The Standard Massachusetts Automobile Policy states:

> "Sometimes an owner or operator of an auto legally responsible for an accident is uninsured. Some accidents involve unidentified hit-and-run autos. Under this Part, we will pay damages for bodily injury to people injured or killed in certain accidents caused by uninsured or hit-and-run autos." Standard Massachusetts Automobile Policy, Part 3.

The policy further provides, under the Definitions section:

> "3. Accident – means an unexpected, unintended event that causes bodily injury or property damage arising out of the ownership, maintenance, or use of an auto."

Page 34 of the Massachusetts Automobile Insurance Policy states:

> "We do not know about accidents or losses until you or someone else notifies us. We, or our agent, must be notified promptly of the accident or loss by you or someone on your behalf. The notification should include as many details as possible, including names and addresses of drivers, injured persons and witnesses. If you or any person seeking payment under this policy fail to notify us promptly of any accident or claim under parts 2, 3, 6, or 12 of this policy, we may not be required to pay claims under any of these parts."

DISCUSSION

Summary judgment is a "device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." *Cassesso* v. *Comm'r of Corr.*, 390 Mass. 419, 422 (1983), quoting *Cmty. Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). Summary judgment is granted when there is no genuine issue of material fact and that the summary judgment record entitles "the moving party to judgment as a matter of law." Mass. R. Civ. P. 56 (c); *Cassesso*, 390 Mass. at 422. The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element. *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 715-716 (1991). Once the moving party makes this showing, the

burden shifts to the opposing party to show, via admissible evidence, the existence of a dispute as to an issue of material fact relevant to the asserted claim. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989); Mass. R. Civ. P. 56 (e).

"When facing cross-motions for summary judgment, a court must rule on each motion independently, deciding in each instance whether the moving party has met its burden under Rule 56." *Dan Barclay, Inc.* v. *Stewart & Stevenson Servs., Inc.*, 761 F. Supp. 194, 197-98 (D. Mass. 1991). The material facts in this case are undisputed, and it is therefore appropriate to resolve such claims as can be resolved on summary judgment.

"[T]he rules governing the interpretation of insurance contracts are the same as those governing the interpretation of any other contract." *Money Store/Mass., Inc.* v. *Hingham Mut. Fire Ins. Co.*, 430 Mass. 298, 300 (1999), quoting *Cardin* v. *Royal Ins. Co.*, 394 Mass. 450, 453 (1985). The interpretation of an insurance policy is not a question of fact for a jury; it is a question of law for the judge. *Cody* v. *Connecticut Gen. Life Ins. Co.*, 387 Mass. 142, 146 (1982). The plain meaning of the terms of the policy are construed in their usual and ordinary sense. *Hakim* v. *Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 280 (1997). See also *Ruggerio Ambulance Serv., Inc.* v. *Nat'l Grange Mut. Ins. Co.*, 430 Mass. 794, 798 (2000) (courts consider "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered" [quotations omitted]). To the extent the policy reflects statutory conditions, the policy will be construed in harmony with the governing statutes. *Aguiar* v. *Generali Assicurazioni Ins. Co.*, 47 Mass. App. Ct. 687, 690 (1999).

Here I am convinced that Arbella has the better argument. To trigger coverage Ms. Hammond-Ohlson must demonstrate that the incident at issue was "caused by the ownership, operation, maintenance, control or use" of a motor vehicle. The Supreme Judicial Court has

found that "(t)here must be a causal relationship between the use and the injury." *Sabatinelli v. Travelers Ins. Co.* 369 Mass. 674, 677 (1976).

The expression "arising out of" indicates a wider range of causation than the concept of proximate causation in tort law. However, the expression does not refer to all circumstances in which the injury would not have occurred "but for" the involvement of a motor vehicle. See *Perry v. Chipouras*, 319 Mass. 473, 474-475 (1946) (no liability coverage when plaintiff tripped on rope that fell off truck). See *Liberty Mut. Ins. Co. Agrippino*, 375 Mass. 108, 114 (1978) (causal connection, not too casual and remote, must exist between use of automobile and accident); *Travelers Ins. Co. v. Safeguard Ins. Co.,* 346 Mass. 622, 624 (1964) (loading groceries into automobile was not use of motor vehicle for coverage purposes).

The case of *Asseta v. Safety Ins. Co.* 43 Mass. App. Ct. 317 (1997) found:

> "that a sufficient causal connection exists between the plaintiffs' injuries and the use of the underinsured automobile. It is undisputed that Richardson tossed the bottle while the vehicle was accelerating. Although there is no indication of the exact speed at which the vehicle was traveling at the time of the incident, it is reasonable to assume that its movement affected both the trajectory of the bottle and the force with which it struck Phyllis's face. In these circumstances, the judge was warranted in concluding that the plaintiffs' injuries arose from the use of the underinsured automobile. Accordingly, we conclude that summary judgment was properly granted." Id. at 319.

A bottle tossed from a moving vehicle is different in kind and nature from a banana peel tossed from a vehicle in the roadway, and minutes later stumbled over by a pedestrian causing injury. In *Asseta,* the Appeals Court impliedly focused on the flight, direction and velocity of the bottle as being necessarily and logically affected by the operation of the vehicle. In *Asseta*, there

is a tight causal connection between the airborne bottle and its connection to the actual operation of the vehicle and the injury, all arising out of the operation of the vehicle.

In the present case the fact that the banana peel came from an unknown vehicle is purely incidental to the slip and fall accident and injury. The peel just happened to originate in a vehicle but there is nothing about the incident itself (the slip and fall) that has anything to do with the vehicle. The banana peel could just have easily come from a sidewalk, pedestrian, a shopper, or a small child in a stroller. In a sense the origin of the banana peel from the vehicle is too "casual or remote". *Liberty Mut. Ins. Co. Agrippino*, 375 Mass. at 114. The mechanism of the injury was not affected by the operation of the motor vehicle.

There is nothing intrinsically characteristic of a banana peel that lends itself as having originated or been a part of the operation of the vehicle. It is unlike for instance a slick of oil left by a vehicle causing a slip and fall. *Mullen v Hartford Accident & Indemnity Co.*, 287 Mass. 262 (1934); or ruts left by the tires of a vehicle leading to a fall. *Leone v. Schwartz*, 26 Mass. L. Rptr. 185 (2009). Mere connection to a vehicle is not enough and the courts deciding this over the years have placed common sense logical limits on its coverage. This relatively straightforward situation is just too attenuated and remote to trigger coverage.

I also agree with Arbella that notice of the loss was not prompt. However, I find that by the plain terms of the statute the Legislature intended that the provisions of G.L. c. 175, section 112 apply to this situation. Here it is not meaningfully undisputed that no prejudice resulted from the failure to provide prompt notice. The entire sequence of events from the dropping of the banana peel -to its lying-in wait in plain sight for approximately nine minutes - to the actual slip and fall were captured in color detail by a security camera perfectly placed to record the entire sequence of events. It is difficult to imagine what else would be necessary for Arbella to confirm

the accident and provide it with a head start toward a prompt investigation. There is nothing more Ms. Hammond-Ohlson could have provided to Arbella that was not captured din full detail by the camera.

ORDER

For all of the foregoing reasons:

1. Arbella Mutual Insurance Company's Motion for Summary Judgment is **ALLOWED,** and it is **ORDERED** and **DECLARED** that Ms. Hammond-Ohlson has no right to uninsured motorist coverage from Arbella Mutual Insurance Co. for her claim for injuries sustained on February 1, 2020;

2. Ms. Hammond Ohlson's Motion for Summary Judgment is **DENIED** to the extent she seeks coverage for Uninsured Motorist Benefits for the February 1, 2020 slip and fall;

3. It is further **ORDERED** and **DECLARED** that Ms. Hammond-Ohlson violated the material terms of the subject policy when she failed to provide Arbella Mutual Insurance Company with prompt notice of the claim, but that Arbella Mutual Insurance Company cannot demonstrate material prejudice as a matter of law.

4. Judgment shall enter in favor of Arbella Mutual Insurance Company as set forth above without costs.

MICHAEL K. CALLAN
Justice of the Superior Court

DATE: 8/16/23

A true copy. Attest.
Christine Hippenhammer
Asst. Clerk