State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 25, 2026 CV-25-1051

MAIN STREET AMERICA
ASSURANCE COMPANY,
Individually and as Subrogee
of CAFE CRISAN, INC.,
Respondent,
v

ANNA C. CALABRIA et al., MEMORANDUM AND ORDER
Appellants,
and

TRAVCO INSURANCE COMPANY,
Now known as TRAVELERS
INSURANCE COMPANY,
Respondent,
et al.,
Defendant.

Calendar Date: October 20, 2026

Before: Garry, P.J., Aarons, Fisher, McShan and Corcoran, JJ.

Rhoades Cunningham & McFadden, PLLC, Latham (*John R. McFadden* of counsel), for Anna C. Calabria, appellant.

Basch Keegan & Spada, *LLP*, Kingston (*Derek J. Spada* of counsel), for Joseph DeCaro, appellant.

Hurwitz Fine PC, Buffalo (*Evan D. Gestwick* of counsel), for Main Street America Assurance Company, respondent.

Rivkin Radler LLP, Uniondale (*Evan H. Krinick* of counsel), for Travco Insurance Company, respondent.

Fisher, J.

Appeal from a judgment of the Supreme Court (Kimberly O'Connor, J.), entered June 5, 2025 in Albany County, which (1) partially granted plaintiff's motion for summary judgment and determined that it had no duty to indemnify or defend defendant Anna C. Calabria, and (2) partially granted a cross-motion by defendant Travco Insurance Company for summary judgment dismissing the complaint against it and determined that it had no duty to indemnify or defend Calabria.

In March 2018, defendant Anna C. Calabria (hereinafter Calabria) was an employee at a bakery owned by her husband, Ignatius Calabria (hereinafter the owner), where their 23-month-old daughter (hereinafter the infant) was injured. On the morning of the incident, the owner picked up the infant from her school program and brought her into the bakery for Calabria to take home, so that he could leave to make a delivery for a large business-related event. While Calabria worked to finish cakes in the decorating room so that they could leave, she provided the infant with fondant to play with at a table. As Calabria was "cleaning up" the cakes, she also answered business phone calls and used her cell phone to message the owner about the cakes. On one occasion, she picked up her phone to send a message and left the decorating room. The infant then went over and turned on the bakery's fondant sheeter – a machine that could roll and flatten fondant for decorating applications – and attempted to place her fondant into the sheeter. In doing so, her hand got caught inside the moving parts of the machine and she sustained significant personal injuries. The incident was recorded on a surveillance camera in the decorating room.

Defendant Joseph DeCaro, as the infant's guardian ad litem, commenced a personal injury action against the bakery and the manufacturer of the fondant sheeter, defendant Somerset Industries, Inc. (hereinafter Somerset). In turn, Somerset commenced a third-party action against Calabria, individually and as a bakery employee, asserting claims for common-law indemnification and contribution. Within the context of those actions, on two occasions this Court has reviewed determinations from Supreme Court, and each time we have concluded that triable issues of fact precluded summary judgment

in the main action or the third-party action (*see DeCaro v Somerset Indus., Inc.*, 249 AD3d 1452 [3d Dept 2026]; *DeCaro v Somerset Indus., Inc.*, 228 AD3d 1107 [3d Dept 2024]).

While those proceedings were ongoing, plaintiff, the bakery's business insurer, commenced this action against Calabria, DeCaro, Somerset and defendant Travco Insurance Company (hereinafter Travelers), seeking a declaration that (1) it has no duty to defend or indemnify Calabria in either underlying action, and (2) Travelers, as Calabria's homeowners' insurer, has an obligation to defend and indemnify Calabria in both underlying actions. Travelers joined issue and interposed a counterclaim seeking a declaration that it has no such obligation, but that plaintiff remained obligated to defend and indemnify Calabria. Following joinder of issue by the remaining defendants, plaintiff and Travelers moved for summary judgment on their respective claims. Supreme Court determined that Calabria was not covered by the bakery's businessowner policy at the time of the underlying incident because it arose from her duties as a mother, not as an employee of the bakery. Supreme Court further determined that Travelers had validly and timely disclaimed coverage based on a policy exclusion for injuries sustained by relatives residing in Calabria's household. Supreme Court accordingly granted that portion of each motion and declared that plaintiff and Travelers had no duty or obligation to defend or indemnify Calabria in the underlying actions. DeCaro and Calabria appeal.[1]

We modify. "An insurer's duty to defend is exceedingly broad, broader than its duty to indemnify, and an insurer will be found to have a duty to defend if the allegations against the insured state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Tonoga, Inc. v New Hampshire Ins. Co.*, 201 AD3d 1091, 1093-1094 [3d Dept 2022] [internal quotation marks and citations omitted]). An insurer seeking to avoid its duty to defend must establish "as a matter of law that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured under any policy provision" (*State of New York v Flora*, 173 AD3d 1402, 1404 [3d Dept 2019] [internal quotation marks, brackets and citations omitted], *lv denied* 34 NY3d 910 [2020]). Therefore, "[i]f anything within the four corners of the complaint suggests a reasonable possibility of coverage, the insurer must defend, even though it

[1] Although DeCaro's appeal must be dismissed because he did not oppose either motion for summary judgment and was not a party aggrieved by Supreme Court's judgment (*see DeCaro v Somerset Indus., Inc.*, 249 AD3d at 1453 n 2; *see also* CPLR 5511), we nevertheless consider his legal arguments which were adopted by Calabria in her brief.

may not ultimately be bound to pay because the insured may not be liable" (*Farm Family Cas. Ins. Co. v Henderson*, 179 AD3d 1193, 1194 [3d Dept 2020] [internal quotation marks, brackets, ellipsis and citation omitted], *lv denied* 35 NY3d 915 [2020]).

When reviewing the provisions of an insurance policy, courts rely on the familiar rules of contract interpretation to construe language in accord with its plain and ordinary meaning, avoiding a construction that renders any provision meaningless or without effect (*see O'Brien v Sagbolt LLC*, 246 AD3d 111, 114 [3d Dept 2025]; *Lok-N-Logs, Inc. v Leatherstocking Coop. Ins. Co.*, 237 AD3d 1295, 1295-1296 [3d Dept 2025]). However, courts must also do so through the additional lens that insurance policies are to be liberally construed in favor of the insured and any ambiguities are construed in favor of finding coverage (*see Dibrino v Rockefeller Ctr. N., Inc.*, 46 NY3d 89, 94 [2025]; *Catskill Barbeque, LLC v Mid-Hudson Co-Op. Ins. Co.*, 237 AD3d 1462, 1463 [3d Dept 2025]; *see also Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]). As relevant here, "[w]hether an employee acted within the scope of employment is a fact-based inquiry, for which we consider, among other factors, the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated (i.e., whether it was foreseeable)" (*C.J. v State of New York*, 253 AD3d 123, 126 [3d Dept 2026] [internal quotation marks and citations omitted]).

Here, the applicable businessowner policy provided that plaintiff had a duty to defend and pay for damages resulting from covered occurrences of bodily injury that the bakery became obligated to pay. The policy, however, also provided that the bakery's employees were insured "only for acts within the scope of their employment by [the bakery] or while performing duties related to the conduct of [the bakery's] business." To demonstrate the applicability of this provision, plaintiff provided the affidavit of Michelle Morelli, a complex claim adjuster in the specialty division of AFICS Inc. According to Morelli, the infant "was injured due to actions taken by the [bakery] employee that were outside of the scope of her employment." Morelli further contended that a separate policy exclusion also provided that no employees were "insured for bodily injury for which they are liable to share damages with or repay damages to another liable party." Based on her review of the claims history, Morelli contended that Calabria was not an "insured" under the policy. Plaintiff also relied on the deposition testimony of the parties, including of Calabria and the owner, and highlighted their concessions that the bakery was not engaged in any childcare or daycare services. Moreover, plaintiff further relied on

deposition testimony stating that Calabria's primary role as an employee was to decorate cakes and that the infant was not customarily brought inside the bakery for a "hand off" like on the day of the incident. Given the foregoing, we are satisfied that plaintiff fulfilled its moving burden that Calabria was acting outside of the scope of her employment with the bakery when the infant sustained bodily injury (*see Webb v United Health Servs., Inc.*, 221 AD3d 1315, 1319 [3d Dept 2023]).

In opposition, Calabria relied on her deposition testimony and contended that the insurance policy does not require that an insured be engaged solely in covered activities for coverage to apply. We agree. Calabria testified that the bakery would control who is allowed in the decorating room and, although "not a regular thing," all four of her children had played with fondant in that room on prior occasions. The owner had not barred this practice and, indeed, on the day of the incident the owner picked up the infant, fed her an early lunch and then brought her into the bakery. Calabria agreed that the owner's intent was to hand off the infant at the bakery, expecting Calabria to finish up her work and then take the infant home. In doing so, as demonstrated by the testimony and the video evidence, Calabria had attempted to watch the infant as she was also taking phone calls for the bakery, exchanging text messages related to cake orders, decorating cakes and helping to clean up the decorating room. It was while she was performing these bakery-related duties that she became distracted from the infant and the incident occurred.

Although plaintiff asserts that watching children is not within the scope of employment for bakery employees, Calabria is correct that the next clause of the policy also covers employees "while performing duties related to the conduct of [the bakery's] business."[2] To hold otherwise would create a redundancy between the two clauses and render the second part meaningless (*see generally O'Brien v Sagbolt LLC*, 246 AD3d at 118; *Yeshiva Gedolah Zichron Moshe v Church Mut. Ins. Co.*, 233 AD3d 1220, 1225 [3d Dept 2024]). At best, this demonstrates that the "insurance policy's meaning is not clear or is subject to different reasonable interpretations . . . [which] must be resolved in favor of the insured" (*Broome County v Travelers Indem. Co.*, 125 AD3d 1241, 1242 [3d Dept 2015] [internal quotation marks and citation omitted], *lv denied* 25 NY3d 908 [2015]). Altogether, when further considering the relevant factors and viewing the facts in the light most favorable to the nonmoving parties (*see Maloney v Night Castle Mgt.*, 249 AD3d 1260, 1261 [3d Dept 2026]), we are satisfied that Calabria has raised an issue of

[2] Noticeably absent from Morelli's affidavit is any application of the second clause to the incident.

fact precluding summary judgment (*see Vermont Mut. Ins. Group v LePore*, 211 AD3d 1217, 1219 [3d Dept 2022]; *Waddy v Genessee Patrons Coop. Ins. Co.*, 164 AD3d 1055, 1058 [3d Dept 2018]). To the further extent that plaintiff contends that the insurance policy also does not cover an employee who is liable to share damages with or repay damages to another liable party, such event has not – and may not – occur, and is therefore premature (*see Farm Family Cas. Ins. Co. v Henderson*, 179 AD3d at 1196). Accordingly, plaintiff remains obligated to defend and potentially indemnify Calabria in the underlying actions.

Next, Calabria contends that Travelers was not entitled to summary judgment because it did not validly and timely disclaim coverage of the incident. Under Insurance Law § 3420 (d) (2), when a liability insurer seeks to "disclaim liability or deny coverage for death or bodily injury arising out of . . . any . . . type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The function of a notice of disclaimer is to "promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" so that the claimant may "assess[ ] whether the insurer will be able to disclaim successfully" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]; *see Bahnuk v Countryway Ins. Co.*, 214 AD3d 1218, 1219 [3d Dept 2023]). Thus, the Legislature created the notice requirement of Insurance Law § 3420 (d) "to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and resources in an ultimately futile attempt to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully" (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 92 [1st Dept 2005]; *see Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 283 [1997]).

Here, Supreme Court correctly determined that the disclaimer issued by Travelers had validly and timely disclaimed coverage. Although the first disclaimer letter relied on a policy provision that had been modified by a separate endorsement, it accurately set forth the factual basis for the insurer's position that coverage was unavailable "for bodily injury for relatives and residents of your household," which was nearly identical to the second disclaimer letter citing the updated provision that "preclude[d] coverage for bodily injury for relatives and residents of the household." This discrepancy was adequately explained by Travelers in the affidavit of the claim professional assigned to the subject claim, who further provided that the first disclaimer notice went out within days of first receiving notice of the claim and, after Calabria's counsel challenged the

basis for the first disclaimer, that a second disclaimer citing the correct provision was sent within four weeks. Nonetheless, he maintained that the basis for the disclaimer remained the same. Under these circumstances, we are satisfied that Travelers appraised Calabria with the requisite "high degree of specificity" of the grounds on which Travelers was disclaiming (*General Acc. Ins. Group v Cirucci*, 46 NY2d at 864; *see Realm Natl. Ins. Co. v Hermitage Ins. Co.*, 8 AD3d 110, 111 [1st Dept 2004]; *Adams v Perry's Place*, 168 AD2d 932, 932 [4th Dept 1990]; *see also Atlantic Cas. Ins. Co. v Coffey*, 548 Fed Appx 661, 664 [2d Cir 2013]).

Once Travelers met its initial burden, it was incumbent on Calabria to raise an issue of fact. In her opposition, Calabria did not address the effectiveness of the disclaimer and her counsel only adopted the position of plaintiff. The crux of plaintiff's contention was that the language cited in the first disclaimer and the second disclaimer were materially different, because only the updated language in the modified policy barred coverage for claims of contribution and indemnity. However, this position does not serve the statutory function of protecting the insured or the injured person against the risks created by an insured's late disclaimer, but rather concerns the applicability of contribution from a coinsurer, which falls outside the concern of Insurance Law § 3420 (d) (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d at 92; *see also Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 488 [1st Dept 2011] *Realm Natl. Ins. Co. v Hermitage Ins. Co.*, 8 AD3d at 111; *Tops Mkts. v Maryland Cas.*, 267 AD2d 999, 1000 [4th Dept 1999]). Accordingly, under the unique circumstances of this case and the record before us, Supreme Court properly declared that Travelers had no duty to defend or obligation to indemnify Calabria. We have examined the parties' remaining contentions and have found them to be academic or without merit.

Garry, P.J., Aarons, McShan and Corcoran, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as granted plaintiff's motion for summary judgment dismissing the complaint against it and declared that it is not obligated to defend or indemnify defendant Anna C. Calabria for the claim arising out of the March 21, 2018 incident; said motion denied; and, as so modified, affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court