IN THE COURT OF APPEALS OF IOWA

No. 1-226 / 10-1721
Filed June 29, 2011

KAREN ROBINSON,
Plaintiff-Appellant,

vs.

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Karen Robinson appeals the district court's grant of summary judgment in favor of Allied Property and Casualty Insurance Company. **REVERSED AND REMANDED.**

Randall J. Shanks of Shanks Law Firm, Council Bluffs, for appellant.

Joseph D. Thornton of Smith Peterson Law Firm, Council Bluffs, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

In this appeal, we must decide whether an insurance-contract provision that required an injured party to sue her insurance company for underinsured motorist benefits (UIM) within two years of an accident is reasonable. We conclude the contractual limitations period is unreasonable and, therefore, unenforceable because under the circumstances of this case the two-year period required the plaintiff to bring her lawsuit for UIM benefits before she was able to ascertain her damages, despite a diligent effort on her part.

I. Background Facts and Proceedings

On June 15, 2004, Karen Robinson sustained an injury to her neck when her car collided with another vehicle. At the time of the accident, Robinson had UIM coverage through her insurance policy provided by Allied Property and Casualty Insurance Company (Allied). On July 7, 2004, Robinson followed up with Dr. Mark Johnson who noted she had been receiving physical therapy, diagnosed her injury as "sprains and strains" to her neck, and advised that she continue anti-inflammatories and follow up as needed. Robinson's brief indicated she then had several follow up appointments with Dr. Johnson, continued physical therapy, underwent two "nerve conduction" studies, and was prescribed medications. Allied acknowledged that "[f]rom the very beginning, the Plaintiff went through extensive care and treatment on an ongoing basis . . . [and that] she continually had pain in her neck."

On March 15, 2005, Dr. Johnson indicated that Robinson's "prognosis [was] good" and that her "soft tissue injury [would] gradually repair itself." In a letter to Robinson's attorney, Dr. Johnson provided:

> It is my belief that there are no possible complications or negative secondary effects. I do not foresee any additional procedures or treatments. . . . It is my opinion that there will be no restrictions placed upon Ms. Robinson and it is my opinion that this will gradually improve with time although it will probably be a long time.

On August 1, 2005, in light of Dr. Johnson's report and Robinson's medical expenses of $5111.87, Robinson extended her first settlement offer of $40,000 to the tortfeasor's insurer, State Farm Mutual Automobile Insurance Company (State Farm). In October 2005, after Robinson and State Farm were unable to negotiate a settlement, Robinson sued the tortfeasor and State Farm.

Robinson then met with Dr. Michael Prescher, who performed two "cervical facet injection[s]"—once in November 2005 and a second time in December 2005—and "[i]n both instances . . . she had [a] 50% reduction [in pain] for a week or two . . . with the pain returning." At some point thereafter, she met with Dr. Ric Jensen.

In February 2007, Dr. Jensen discussed the option of surgery and in April 2007, he performed a cervical spinal interbody discectomy on Robinson. She had a post-operative followup in April 2007 where she reported "significant improvement in her pre-operative symptoms." She was released from Dr. Jensen's care on July 3, 2007.

On July 30, 2007, Dr. Jensen provided Robinson's attorney a narrative report in which he noted that since the motor vehicle accident, Robinson had

been "plagued with recurrent paracervical pain which ha[d] failed to respond to an extensive course of conservative treatment measures." He stated that her "pre-operative diagnosis . . . indicat[ed] a probable whiplash injury." He believed "within a reasonable degree of medical certainty that [Robinson's] discogenic disease/injury and whiplash syndrome [were] the result of her involvement in said motor vehicle accident of June 15, 2004." He stated that his "current prognosis for [Robinson] [was] guarded" for the following reasons:

> She may well harbor a permanent degree of paracervical pain as a result of her injury. Surgical therapy has provided significant benefit for Karen although she remains with a restricted range of motion within her cervical spine (as well as mild post-operative paracervical pain). Said reduction in range of motion within [Robinson's] cervical spine will likely be permanent in nature. Additional treatments will likely require out-patient physical therapy on an intermittent basis.

Dr. Jensen estimated that the cost of future care would range from $5000 to $10,000. He also stated that Robinson "will have permanent activity restrictions placed upon her in the post-operative phase." In her affidavit, Robinson testified that she was unable to ascertain the nature and extent of her injuries until after she was released from Dr. Jensen's care and he authored the post-operative report.

On June 25, 2008, Robinson sent a letter to her insurance company, Allied, stating that she anticipated the tortfeasor's insurance company would settle the claim against it for the tortfeasor's policy limit of $100,000, requesting Allied send written authorization to settle, and advising Allied that Robinson was asserting a UIM claim against Allied. The letter indicated that Robinson's current

medical bills totaled $60,572.80.[1] On July 30, 2008, State Farm offered to settle for the tortfeasor's $100,000 policy limit and they settled the claim on August 28, 2010.

On August 1, 2008, Robinson sent a letter to Allied offering to settle her UIM claim against Allied for her UIM policy limit of $50,000. On August 13, 2008, Allied declined to settle, asserting the two-year period of limitations in the policy barred Robinson's claim.

On May 13, 2010, Robinson commenced an action against Allied to recover UIM benefits as a result of the collision that occurred on June 15, 2004. Allied filed a motion for summary judgment in July 2010, arguing the two-year period of limitations provided in the insurance policy was reasonable and barred Robinson's suit against them because she filed her lawsuit more than two years after the accident. Robinson resisted Allied's motion, arguing the two-year period was unreasonable because she was not able to ascertain her damages within the two-year time frame. She also contended a genuine issue of material fact existed regarding whether she received a copy of the Allied policy and that if she did not, she could not be bound by its terms and conditions. On October 1, 2010, the district court granted Allied's motion for summary judgment.

Robinson appeals.

II. Scope and Standard of Review

We review the district court's grant of summary judgment for the correction of errors at law. Iowa R. Civ. P. 6.907; *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d

[1] We note that Allied does not contest on appeal that Robinson's damages exceed $100,000.

775, 777 (Iowa 2000). In doing so, we view the evidence in the light most favorable to the nonmoving party. *Baratta v. Polk Cnty. Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Nicodemus v. Milwaukee Mut. Ins. Co.*, 612 N.W.2d 785, 787 (Iowa 2000). An issue of fact is material when it may affect the outcome of a case. *Id.*

III. Merits

"'The goal of underinsured motorist coverage . . . is *full compensation* to the victim to the extent of the injuries suffered.'" *Hamm*, 612 N.W.2d at 779 (citation omitted). In light of this goal, our courts have "adopted a 'broad coverage' view of underinsured motorist coverage," which means that when "examining a case involving a claim for UIM benefits, we consider whether the victim will be fully compensated." *Id.* (citation omitted); *Waits v. United Fire & Cas. Co*., 572 N.W.2d 565, 573 (Iowa 1997) ("The purpose of Iowa's UIM statute 'is to provide compensation to an insured who is the victim of an underinsured motorist's negligence to the same extent as if the underinsured motorist were adequately insured.' We interpret the statute, and hence UIM coverage, liberally to accomplish this objective." (citations omitted)).

UIM claims are contractual in nature and the statute of limitations provides parties ten years within which to bring their claims. Iowa Code § 614.1(5)(2009); *Hamm*, 612 N.W.2d at 779. But insurers may limit the time within which an insured may bring suit against them by "clearly articulat[ing] the applicable

limitations period for claims against the tortfeasor and the insurer, and the event upon which the limitations period begins to run." *Hamm*, 612 N.W.2d at 784.

We will enforce contractual limitation periods if they provide an insured a reasonable amount of time within which to bring a lawsuit to recover UIM benefits under the insurance contract; but unreasonable limitations on the time for bringing suit are invalid and unenforceable. *Nicodemus*, 612 N.W.2d at 787. We decide whether a provision is reasonable by analyzing it in "'light of the provisions of the contract and the circumstances of its performance and enforcement.'" *Id.* (citation omitted). "'[T]he question of what constitutes a reasonable time usually depends upon the circumstances of the particular case.'" *Douglass v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 665, 666 (Iowa 1993) *overruled on other grounds by Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000) (citation omitted). Limitation periods that are so abbreviated that, as a practical matter, they abrogate the insureds' rights to bring a lawsuit, or require the insureds to bring a lawsuit before they can ascertain their loss or damage are per se unreasonable. *Nicodemus*, 612 N.W.2d at 787; *Douglass*, 508 N.W.2d at 666.

The provision at issue in this case provides a party two years from the date of the accident to sue Allied to recover UIM benefits.[2] In light of the circumstances of this case, wherein the two-year period required Robinson to

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[2] The policy provides as follows:

> No one may bring a legal action against us under this Coverage form until there has been full compliance with all the terms of this Coverage Form. Further, any suit against us under this Coverage Form will be barred unless commenced within two years after the date of the accident.

bring her lawsuit for UIM benefits before she was able to ascertain her loss or damages despite a diligent effort on her part, we conclude the two-year period is unreasonable and therefore, unenforceable.

Allied contends the shortened limitations period is reasonable and enforceable. In support of its position, the company relies on unpublished cases from this court upholding contractual limitations periods despite the plaintiffs' uncertainty or inability to establish a tortfeasor's policy limits. But the present case turns on the plaintiff's inability, despite diligent effort, to ascertain the severity and extent of her physical injuries and her attendant damages.

We perceive an important distinction between those situations. Notably, our supreme court has articulated a relaxed burden when it comes to proving a tortfeasor's insured status but has not done so in the context of proving the damages sustained as a result of an injury. *See Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880, 889 (Iowa 1996). The monetary policy limits, unlike latent physical injuries, are readily discoverable—they are generally written in the parties' insurance policies. And, to the extent a plaintiff is unable to identify with certainty the insured status of another, the lower burden of proof required in that context allows a plaintiff to bring suit for UIM benefits even though the plaintiff cannot definitively establish the tortfeasor's coverage. Under that standard, so long as the plaintiff shows he or she used "'all reasonable efforts' to ascertain the existence of any applicable liability insurance and was unsuccessful [in that effort] . . . an inference may be drawn that the other vehicle or vehicles were uninsured," and the plaintiff may state a claim for benefits. *Id*.

Although we provide a relaxed standard in the context of determining a tortfeasor's insurance coverage, our courts have not articulated a similar diminished burden in the context of determining a plaintiff's injuries for purposes of bringing a UIM claim. Without a similar presumption in this context—that the plaintiff's injuries exceed the policy limits—the plaintiff would not be able to similarly sustain a claim for UIM benefits. Allied argues that Robinson "easily could have sued Allied at the same time that she filed a suit against the tort feasor." But had Robinson done so, Allied likely would have been entitled to summary judgment. Robinson's medical expenses were well below the tortfeasor's $100,000 policy limit at that time and her doctor stated "there [were] no possible complications or negative secondary effects" and that he did not "foresee any additional procedures or treatments . . . [or] restrictions." *Cf. Wilber v. Owens-Corning Fiberglas Corp.*, 476 N.W.2d 74, 77 (Iowa 1991) ("[I]t must be remembered that Wilber could not have recovered for increased risk of developing cancer had he sued immediately upon learning of his asbestosis. It is well known that a showing of reasonable medical certainty is a predicate for recovery for future physical consequences.").

Robinson was unable to determine the extent of her damages within two years of the accident. It is undisputed that she diligently pursued medical care for the neck injuries she suffered in the car accident. Her participation in physical therapy and follow-up appointments with doctors does not demonstrate that Robinson "knew that her injuries were not resolving during the course of treatment" as Allied suggests. Rather, her actions were consistent with a patient

following her doctor's orders to obtain the quickest recovery and a belief that her neck was healing over time, as her doctor indicated it would. Robinson tried several treatments and met with different doctors. There is no indication that her initial prognosis—that her neck would fully heal on its own—changed within the two-year period following the accident.

Robinson actively pursued her legal claims in light of her prognosis and medical expenses, by commencing settlement negotiations with the tortfeasor's insurance company and filing suit against them when the negotiations failed. She actively pursued the claims available to her.

Despite her persistent efforts to uncover the extent of her injuries and to treat them, neither Robison nor the medical personnel (including multiple doctors) she met with over the next few years uncovered the severity of her injuries until more than two years had elapsed from the date of the accident. It was not until she met with Dr. Jensen in February of 2007 that the necessity of neck surgery was even discussed. And, it was more than three years after the collision that Dr. Jensen released his post-operative report that indicated, for the first time, that Robinson would experience sustained pain and permanent restrictions as a result of the injuries she sustained in the accident. In light of these circumstances, we agree with Robinson that she was unable to ascertain her damages until more than two years after the car accident.

Our supreme court's decision in *Faeth v. State Farm Mutual Automobile Insurance Company*, 707 N.W.2d 328 (Iowa 2005), which allowed a plaintiff to bring suit to recover uninsured motorist benefits outside of the contractual period

of limitations, supports our conclusion. In that case, the court concluded the plaintiff should be allowed to bring her claim against a self-insured motorist that later became insolvent, or uninsured. Similarly, here, the plaintiff should be able to bring her claim for underinsured motorist benefits when later occurrences rendered the tortfeasor underinsured.

Analyzing the two-year policy provision provided in Allied's contract in light of these circumstances, we conclude the limitation period is unreasonable and the district court erred in granting Allied summary judgment. *See Douglass*, 508 N.W.2d at 666 (indicating that we determine the reasonableness of limitation provision in light of the circumstances of particular cases). In this case, the two-year limitation period would have required Robinson to bring a lawsuit against Allied for UIM benefits before she was able to ascertain her damages. *See Nicodemus*, 612 N.W.2d at 787; *see also Wetherbee v. Econ. Fire & Cas. Co.*, 508 N.W.2d 657, 661 (Iowa 1993) ("A majority of jurisdictions have defined 'legally entitled to recover' to mean simply that the plaintiff must be able to establish fault on the part of the uninsured or underinsured motorist which gives rise to damages and to *prove the extent of those damages*." (emphasis added)).

Because the policy's period of limitations was unreasonable under these circumstances, the ten-year statute of limitation period governs. Iowa Code § 614.1(5); *Nicodemus*, 612 N.W.2d at 789. The limitation period began when Allied breached its contract with Robinson by denying her benefits in its letter dated August 13, 2008. *Hamm*, 612 N.W.2d at 784–85; *Nicodemus*, 612 N.W.2d at 788.

In light of our conclusion that the two-year limitations period is unreasonable, it is not necessary to address Robinson's alternative argument for not enforcing the policy. We reverse the grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.