IN THE COURT OF APPEALS OF IOWA

No. 3-261 / 12-1295
Filed May 15, 2013

ESAD OSMIC,
Plaintiff-Appellee,

vs.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,
Defendant-Appellant,

and

WESTFIELD NATIONAL INSURANCE COMPANY,
Defendant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Nationwide Agribusiness Insurance Company appeals from the denial of its motion for summary judgment. **AFFIRMED.**

Sharon Soorholtz Greer and Thomas L. Hillers of Cartwright, Druker & Ryden, Marshalltown, for appellant.

James F. Kalkhoff of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

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

DOYLE, J.

Esad Osmic was injured in a motor vehicle collision while riding as a passenger in his brother's SUV. Two years and thirty-one days later, Esad sued Nationwide Agribusiness Insurance Company (Nationwide) seeking recovery for damages under the underinsured motorist (UIM) provisions of his brother's personal auto policy. Nationwide filed a motion for summary judgment asserting Esad's petition was untimely because it was not filed within the policy provision's two-year deadline. The district court denied the motion, holding that as a non-party to the contract, Esad was not bound by the contract's shortened limitations period. Further, the court found Nationwide played "hide the ball" with Esad in failing to timely reveal to him the policy's two-year-filing deadline.

Nationwide's application for interlocutory appeal was granted by our supreme court, and the appeal was then transferred to this court. Upon our review of this question of first impression, we affirm.

I. Scope and Standards of Review.

We review the district court's summary judgment ruling for the correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W .2d 244, 253 (Iowa 2012). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Mueller*, 818 N.W.2d at 253. As this case arises from a denied motion for summary judgment, we view the record in the light most favorable to Esad as the nonmoving party. *See Mueller*, 818 N.W.2d at 253; *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008).

II. Background Facts and Proceedings.

On May 23, 2009, Esad Osmic and his two children were riding in an SUV owned and driven by Esad's brother, Selim, when another vehicle, driven by Rochelle Heasley, collided with the Osmic SUV. The collision caused the Osmic SUV to lose control, leave the roadway, and roll several times on an embankment. As a result, Selim and his family, as well as Esad and his children (hereinafter collectively as "Esad" unless otherwise specified), were injured.

Heasley's vehicle was insured through Progressive Insurance Company. After settling the claims of Selim and his family, the balance of the Progressive policy limits were offered to Esad, however, this was insufficient to fully satisfy Esad's claims.

Selim's SUV was insured under a Nationwide personal auto policy, which included UIM coverage. Esad's counsel contacted a representative of Nationwide by telephone on March 25, 2011, regarding the offer from Progressive to settle Esad's claims. Nationwide requested Esad provide copies of Esad's demand letter to Progressive, medical bills, and medical records, including records from the three preceding years.

On March 28, Esad's counsel followed up by letter to Nationwide. Esad's counsel requested a copy of the Nationwide policy declarations page so he could determine the UIM policy limits. Additionally, Esad's counsel asked if he could proceed with settling with Progressive for the amount offered. The letter concluded: "I look forward to hearing from you to conclude the claim with the tortfeasor as our statute is running." The demand letter to Progressive, Esad's medical bills, and some of Esad's medical records were enclosed.

On April 1, Esad's counsel sent a second letter to Nationwide and enclosed Esad's prior three years medical records. Esad's counsel specifically asked for the policy limits and repeated his request for a copy of the policy's declarations page. He also again asked if he could proceed to settle with Progressive for the balance of Heasley's liability limits.

Nationwide responded by a letter dated April 12. It agreed to waive its subrogation rights for the UIM coverage for Esad on Selim's personal auto policy, and it granted consent for settlement with Progressive for the liability claims against Heasley. Additionally, although it had not sought consent from Selim, Nationwide stated in its letter it did not have Selim's consent to provide his policy's declarations page, and it did not disclose the UIM policy limits. Further, Nationwide opined in the letter that it did not see "an underinsured exposure" for either of Esad's children, stating "it appears the settlement offers presented by Progressive . . . will adequately indemnify them." Nationwide's letter concluded: "I am aware of the fast approaching *statute expiration date* and will be in contact with you regarding the underinsured claim of Esad once I have had the opportunity to review the information you have provided." (Emphasis added.)

On May 4 and 10, additional medical records and bills were provided to Nationwide by Esad's counsel. Then, on May 27, Nationwide sent a letter to Esad's counsel notifying him that the "[UIM] coverage available under [Selim's] policy ha[d] now expired per the contract language which states [UIM] coverage will be barred unless suit filing is commenced within two years after the date of the accident." A copy of the UIM Coverage Endorsement was enclosed "for your review." Further correspondence ensued.

On June 23, 2011, Esad filed suit against Nationwide and his own insurance carrier, seeking UIM benefits. Nationwide answered raising a number of affirmative defenses, including that Esad's claim was "barred by the statute of limitations provided in the applicable policy." Later, Nationwide filed a motion for summary judgment asserting Esad's UIM claim was barred by the two-year contractual limitations period of the policy. Because Esad filed his petition two years and thirty-one days after the accident, Nationwide requested the case be dismissed. Esad resisted, maintaining the contractual limitation was unreasonable and unenforceable as to him because he did not know the extent of his injuries, he was not a party to the contract and lacked knowledge of the policy's time limitation, and Nationwide acted unfairly in not telling him of the policy's time limitation, despite knowing he was going to file a claim, requesting numerous documents from him, and failing to provide him with a copy of the policy.

A hearing on the motion was subsequently held before the district court. Thereafter, the court entered its order denying Nationwide's motion for summary judgment, finding:

> Esad Osmic is not a party to the insurance contract between Nationwide and Selim Osmic. The fact that Esad is not a party to the contract with Nationwide prevents Nationwide from enforcing the terms of the contract against Esad.
>
> Here, Esad is not a party to the contract and as such would not be aware nor should he be aware of any contractual provision entered into by Selim. Esad was aware that the statute provides for a ten-year limitations period on the enforcement of contracts. The court knows of no reason that Esad should be bound by contractual provisions in which he did not participate. . . . It seems counterproductive to allow the insurer and insured to create an invisible moving target. The insured's contract will always be

> invisible to a nonparty and a moving target as any claimant will not be aware of what limitations period exists.
>
> Nationwide's actions do reveal their intent to prevent [Esad] from discovering the previously mentioned invisible moving target of contractual terms negotiated by the insurer and its insured. Nationwide intentionally did not provide [Esad] with a copy of the policy which would have revealed the contractual limitations within the two-year time period. . . . Nationwide opted to refuse [Esad's counsel's] request for information on a technical basis in an attempt to avoid revealing the contractual policy limitations. . . . It is clear to the court that Nationwide was playing "hide the ball" with [Esad] in an attempt to avoid a claim. Nationwide's actions in attempting to prevent from being required to reveal the contractual two-year limitations period for filing suit merely reinforces the court's belief that [Esad] cannot be held to terms that [he] did not negotiate.

The court later denied Nationwide's motion to reconsider.

Nationwide's application for interlocutory appeal, challenging the district court's denial of its motion for summary judgment, was granted by our supreme court. The appeal was transferred to this court for disposition.

III. Discussion.

In Iowa, UIM coverage is required in motor vehicle liability insurance policies unless the coverage is rejected by the insured. *Robinson v. Allied Prop. & Cas. Ins. Co.*, 816 N.W.2d 398, 402 (Iowa 2012) (citing Iowa Code § 516A.1 (2009)). A claim against one's UIM coverage is contractual, and this type of claim, founded upon the written insurance contract, ordinarily enjoys a long and healthy ten-year statute of limitations. *See id.*; *see also* Iowa Code § 614.1(5). However, the Iowa Supreme Court has held that an insurer may, in its insurance contract, limit time for claims to be brought by the insured, "irrespective of a legislative imprimatur on such provisions." *Robinson*, 816 N.W.2d at 402 (discussing *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 334 n.3 (Iowa 2005); *Douglass v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 665, 666-68

(Iowa 1993), *overruled on other grounds by Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 784 (Iowa 2000)).

Nevertheless, the court has also required the contractual time limitation be reasonable to be enforced. *See Faeth*, 707 N.W.2d at 334 (citing *Nicodemus v. Milwaukee Mut. Ins. Co.*, 612 N.W.2d 785, 787 (Iowa 2000)); *see also Robinson*, 816 N.W.2d at 402. In 1993, our supreme court

> upheld a contractual period of limitation which provided that the insurer could not be sued under [UIM] coverage on any claim barred by the tort statute of limitations. [The court] interpreted that clause to refer to the personal-injury statute of limitations contained in Iowa Code section 614.1(2) and, based on the assumption that the claim accrued on the date of the accident, found that limiting the time to sue to a period of two years following the accident was not unreasonable.

See Faeth, 707 N.W.2d at 334 (discussing *Douglass*, 508 N.W.2d at 666-67). However, the court found in *Nicodemus* and again later in *Faeth* that the insurer's contractual two-year period of limitation was not reasonable and therefore invalid and unenforceable where the two-year period ran before or just before the claimant could actually bring their claim. *See Nicodemus*, 612 N.W.2d at 787 (holding limitation was unreasonable because conditions precedent to suit imposed by the policy could force the claimant to delay bringing the underinsured-motorist claim until after the contractual period of limitation had expired); *see also Faeth*, 707 N.W.2d at 334 (holding the "two-year limitation from the date of the accident contained in [insurer's] policy left [claimant] with no time to sue following the accrual of his claim.").

Recently, an insurer's two-year contractual period of limitation was again challenged in *Robinson*. 816 N.W.2d at 398-415. There, a fractured Iowa

Supreme Court, just one month after the district court denied Nationwide's motion for summary judgment at issue here, upheld an insurer's two-year period of limitations. *See id.* In *Robinson*, Robinson argued the two-year contractual deadline in her insurer's policy was unreasonable under the circumstances of her case, because she could not have known the extent of her injuries within that deadline. 816 N.W.2d at 402. The court's majority upheld the contractual limitation period, finding that Robinson's "lack of appreciation of the extent of her injuries" did not limit her legal inability to bring a UIM claim against the insurer within the contractual limitation period, unlike the claimants in *Nicodemus* and *Faeth*. *Id.* at 403-04. Among other things, the majority emphasized courts "should be reluctant to interfere with the freedom of contract under these circumstances," and it echoed an Illinois appellate court's sentiments on the subject, stating: "To declare a contractual deadline for . . . UIM claims unenforceable 'is an extraordinary remedy, and we find it unpalatable.'" *Id.* at 408 (quoting with approval *Vansickle v. Country Mut. Ins. Co.*, 651 N.E.2d 706, 707 (Ill. App. Ct. 1995)). The court further explained that especially in the area of insurance contracts, there "is a certain danger in too freely invalidating private contracts on the basis of public policy." *Id.* (internal quotation marks and citation omitted). The majority concluded: "To do so is to mount a very unruly horse, and when you once get astride it, you never know where it will carry you." *Id.* (internal quotation marks and citations omitted). The court "decline[d] Robinson's invitation to mount the unruly horse." *Id.*

Generally speaking, under *Robinson*, the contractual two-year period of limitation in Selim's Nationwide insurance policy was valid and enforceable as to

Selim.[1] *See id.* at 402-04. However, it is undisputed here that Esad was, by the terms of Selim's insurance policy, an "insured occupant" of Selim's vehicle at the time of his accident and that Esad was not a named party to that insurance contract. Thus, we are faced with a horse of a different color: Whether a third-party beneficiary asserting a claim against another insured's UIM coverage with a contractual two-year limitation period is barred from asserting that claim after two years have passed, where the third-party was not advised of the limitation. We have neither been cited to nor found any reported Iowa decisions addressing contractual time limitations applicability as to third parties. Because this appears to be a matter of first impression in Iowa, we have no answer straight from the horse's mouth. So, saddled with this issue, we mount up and gallop forward.

Our thorough research has revealed only a few cases in the United States that have dealt with this discrete issue.[2] In *Stewart v. Walker*, 597 N.E.2d 368,

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[1] The Iowa Supreme Court has "frequently noted that insurance policies are contracts of adhesion. This is due to the inherently unequal bargaining power between the insurer and insured, which persists throughout the parties' relationship and becomes particularly acute when the insured sustains a physical injury or economic loss for which coverage is sought." *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988) (internal citations omitted).

[2] As a general matter, the issue as to the knowledge of a claimant and whether an insurer has a separate duty to advise a claimant of the applicable period of limitations has arisen in many jurisdictions. *See* 16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 235:71, at 235-75 (3d ed. 2005).

> Some jurisdictions take the view that an insurer has no duty to advise a claimant of such a limitation period, at least when the claimant is a policyholder and the limitation period is embodied in the policy. Other jurisdictions have enacted statutes requiring an insurer to inform a claimant of such a limitation period.

Id. at 235-75 to 235-76 (internal footnotes omitted). Iowa has not enacted a statute or promulgated a regulation requiring such disclosure; however, we note that under Iowa's Insurance Trade Practices Act, Iowa Code chapter 507B (2011), a regulation has been promulgated which requires property and casualty insurers to "fully disclose to first-party claimants all pertinent benefits, coverages or other provisions of a policy or contract under which a claim is presented." Iowa Admin. Code r. 191-15.41(1). "First-party

375 (Ind. Ct. App. 1992), the Indiana Court of Appeals was faced with a similar contractual time limitation in a Nationwide policy. In that case,

> Stewart was a passenger in BeCraft's vehicle when it collided with Walker's vehicle. Walker was an uninsured motorist. Both BeCraft's vehicle and Stewart were covered by BeCraft's uninsured motorist policy issued by Nationwide . . . and Stewart's uninsured motorist policy issued by Hawkeye Security. *Stewart*, 597 N.E.2d at 369-70. Stewart filed suit against Walker, obtained a default judgment, and was awarded damages. *Id.* Stewart then sought satisfaction of judgment from Nationwide and Hawkeye. *Id.* at 370. After both insurers refused to pay, Stewart filed for a declaratory judgment as to their obligations. The trial court denied Stewart summary judgment, finding that the insurers were liable under their respective insurance policies but not bound by the default judgment against Walker. *Id.*

Cain v. Griffin, 849 N.E.2d 507, 511-12 (Ind. 2006) (discussing with approval and distinguishing *Stewart* based upon its holding as limited to a nonparty to the contract); *see also Union Auto. Indem. Ass'n v. Shields*, 79 F.3d 39, 42 (7th Cir. 1996) (discussing and distinguishing *Stewart* on Stewart's nonparty status).

The Indiana Court of Appeals reversed the trial court, finding that because Nationwide was on notice of Stewart's underlying suit and failed to intervene, it was bound by the default judgment and liable for the judgment under the uninsured motorist coverage policy. *See Stewart*, 597 N.E.2d at 376. The *Stewart* court explained:

> An insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared and seldom understood by the insured. The parties are not similarly situated. The company and its representatives are expert in the field; the insured is not. . . . For this reason *we do not hesitate to place the burden of affirmative action upon the insurance company*. When notified of a claim it should investigate with reasonable dispatch; demand arbitration if that is its desire and settlement can't be reached;

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claimants" is not defined. No corresponding regulation has been promulgated for settlement of automobile insurance claims. *See* Iowa Admin. Code r. 191-15.43.

> consent to suit against the uninsured motorist when notified of its pendency; or seek leave to intervene and present its contentions. Multiple litigation is not desirable. In short, the insurance company may not ignore its insured and then seek refuge in the fine print of its policy.

Stewart, 597 N.E.2d at 375 (citations omitted). The court concluded:

> [W]e believe it sound policy to also impose a duty on an insurer faced with an uninsured motorist claim made by an injured passenger of its insured of bearing itself "'with all good faith towards the claimant. . . .'" We cannot but conclude that a duty of good faith dealing certainly must include an obligation to inform such a claimant of conditions precedent in the insurance contract, the more so when the nonparty claimant has asked whether the insurer requires any additional information in order to process the claim.
>
> We cannot condone Nationwide's silence in regard to contractual conditions unknown to Stewart. Silence can amount to waiver where there is a duty to speak. Where an insurer's silence causes prejudice to the insured, the insurer is said to have impliedly waived its rights. As colorfully stated in a leading treatise, [*Appleman's Insurance Law and Practice*,] "modern decisions are not inclined to countenance the playing of games by insurance companies leading to policy defenses, and are prone to require a company to bring to its insured's attention any provision with which compliance is required." We think requiring disclosure of the conditions precedent, in the facts and circumstances of this case, a prerequisite to their enforcement. Accordingly, we conclude that Nationwide waived its three contract conditions by failing to inform Stewart of them.

Id. at 375-76 (internal citations omitted).

The Ohio Court of Appeals was faced with a similar issue in *Wilson v. Ohio Casualty Insurance Co.*, 923 N.E.2d 1187, 1190 (Ohio Ct. App. 2009). In that case, Wilson was driving a vehicle for his employer when he was injured in a collision with another driver. *Wilson*, 923 N.E.2d at 1189. Wilson's employer had a policy with Ohio Casualty Insurance Co. that included UIM coverage. *Id.* Although the insurer had been informed of Wilson's injuries, the insurer never provided Wilson a copy of the employer's insurance policy with the insurer and

did not inform Wilson of any time-limitation clauses in the policy. *Id.* Wilson subsequently filed a declaratory judgment action to determine his coverage under the insurer's policy, and the insurer asserted Wilson's claim was barred by the clause in the policy requiring an insured to assert a claim for UIM coverage within three years of an occurrence. *Id.* The trial court found in favor of the insurer, "stating that there was 'no reason why it should have taken Mr. Wilson nearly six years to determine if his employer had [UIM] insurance.'" *Id.*

The Ohio Court of Appeals disagreed. *See id.* at 1189-91. The court pointed out that a claim based on a written contract in Ohio must generally be asserted within fifteen years, but noted UIM coverage may shorten the limitations period to as little as three years pursuant to statute. *Id.* at 1189 (citing Ohio Rev. Code Ann. §§ 2305.06., 3937.18(H) (2009)). However, it found that where an "insurer simply remains silent about a limitations period in the face of a potential claim," it violates its duty of good faith it owes to its insured. *Id.* at 1190. Additionally, it rejected the insurer's argument that the notice requirement should only apply to the policyholder and not third-party beneficiaries, explaining

> to restrict the notice requirement to the policyholder itself would be to ignore the contractual duty that the insurer owes to insureds other than the policyholder. Moreover, the policyholder, as a signatory to the insurance policy, would in most cases have notice of the limitations period without having to be specifically alerted to the provision by the insurer.
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> And while [the insurer] argues that it would be unduly burdensome to inform every insured of the shortened limitations period, our holding does not reach that far. Only when the insurer is notified that the insured has a claim under the [UIM] provisions of a policy must the insurer inform the insured of the limitations period.

Id. at 1190-91. The court thus held "that where the insurer has been made aware that an insured has a potential claim under a policy providing [UIM]

coverage, the insurer must inform the insured of any applicable limitations period contained in the policy," and it clarified that

> [t]he insurer's duty may be fulfilled by providing the insured with a copy of the policy or by other means reasonably calculated to apprise the insured of his rights under the policy. Unless the insurer fulfills that duty, the contractual limitations period is unenforceable. We emphasize that our holding is limited to the specific factual situation presented in this case.

Id. at 1191.

The Iowa Supreme Court has explained that "the purpose of [UIM] coverage is not to provide a minimum safety net, but to enhance the ability of a claimant in an automobile accident to be made whole for his or her losses." *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 118 (Iowa 2007). To that end, our courts "have adopted a 'broad coverage view' of [UIM] coverage." *Id.* Given the purpose of UIM coverage, we find the reasoning in both *Stewart* and *Wilson* to be sound, and we find those courts' analysis and conclusions to be instructive on the issue before us.[3] We agree with the Indiana Court of Appeals that it is reasonable to impose a duty on an insurer faced with a claim made by a passenger of its insured to inform such a claimant of conditions precedent in the insurance contract, "the more so when the nonparty claimant has asked whether the insurer requires any additional information in order to process the claim." *Stewart*, 597 N.E.2d at 375-76.

Here, Nationwide does not dispute that it knew Esad was preparing to file a claim for UIM coverage under Selim's Nationwide policy. Esad's counsel was in contact with Nationwide before the contractual time limitation ran, and he even

[3] We note that like Iowa, neither Indiana nor Ohio has enacted a statute or promulgated a regulation requiring such disclosure.

requested in his March 28 letter that Nationwide advise him if it needed "anything further." Yet, Nationwide never informed Esad the deadline for filing suit pursuant to the contractual time limitation was fast approaching, and we find Nationwide's reference in its letter to the "statute expiration date" was not sufficient to inform Esad of the contractual time period. Additionally, we find unpersuasive Nationwide's argument that Esad's counsel should have requested or inquired about whether or not Nationwide's policy had a contractual time limitation. Here, it seems unlikely under the specific facts of this case that Nationwide would have provided the information to Esad, given Nationwide's reluctance to even provide the declarations page information to Esad. As one treatise explains:

> Insurers must conduct their business so that securing the benefits provided by an insurance coverage does not become a game of "hide and seek." When an insurer is notified of an occurrence that may be covered by insurance, it is beyond questioning that insurance companies must respond to the notification from an insured by rendering a good faith performance. According to the *Restatement of Contracts*: "Subterfuge and evasions violate the obligation of good faith and performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith . . . may consist of an action, and fair dealing may require more than honesty." [*Restatement of Contracts (Second)* § 205, cmt. d. (1981).]
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> Moreover, judicial opinions in many states have stressed that insurance companies are obligated to fulfill commitments to insured by conduct which constitutes the "utmost" in good faith and fair dealing. The significance of appropriately discharging this duty is amplified by the importance courts have placed on protecting the reasonable expectations of insurance purchasers and the public interest—especially in regard to coverages which are mandating by legislative requirements—in assuring indemnification for losses which are covered by insurance. Insurers are appropriately required to be enterprises that instruct employees and agents handling claims to be more than honest and to assiduously avoid acts of bad faith through inaction.

2 Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 19.13, 207-08 (3d. ed. 2005). Moreover, "[i]f a disclosure might be helpful, an insurer should act. . . . Providing information does not entitle an insured to payment of claims that are excluded by an insurance policy . . . ." *Id.* at 207.

Finally, we must note that in this fact-specific case, extending the time for filing of Esad's suit does not offend our principles concerning statutes of limitation. As the court points out in *Robinson*:

> The purpose of our statutes of limitations is to spare courts the burden of adjudicating stale claims after memories have faded, witnesses have died, and evidence has been lost. This purpose explains why the limitation on an action on a written contract is longer than the limitation on an action in tort; generally, the evidence surrounding a tort claim is more likely to disappear or become less reliable over time than the evidence surrounding a written contract.

816 N.W.2d at 404-05. Here, Nationwide was well aware of Esad's claim prior to the running of the contractual time period, and Esad provided details concerning the accident, as well as medical records and bills documentation to Nationwide, prior to the running of the contractual time period. Esad's suit was filed only a month after the contractual time limitation expired but well before the ten-year statute of limitations for written contracts ran. Allowing Esad's suit to proceed, given the particular facts of this case, is not contrary to the purposes of our statutes of limitations.

Although our reasoning differs somewhat from the district court, *see King v. State*, 818 N.W.2d 1, 11 (Iowa 2012) (citations omitted) ("we will uphold a district court ruling on a ground other than the one upon which the district court

relied provided the ground was urged in that court”), we agree with the court’s ultimate conclusion that the contractual time limitation in Nationwide’s policy was unenforceable as to Esad under the facts of this case. Esad was not a party to the Nationwide policy and had no knowledge of the contractual time limitation for filing suit. Nationwide had knowledge of Esad’s claim within the contractual time limitation, but chose to withhold the information until after the limitations period expired.

Because Nationwide was not entitled to summary judgment as a matter of law in this limited factual situation, we find no error in the district court’s denial of Nationwide’s motion for summary judgment. The ruling of the district court is affirmed.

AFFIRMED.

Potterfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

The majority and I agree Esad Osmic is a third-party beneficiary under the insurance contract between Nationwide and Selim Osmic. However, I respectfully disagree that this thirty-party beneficiary status gives Esad a better bargain than that negotiated by the parties to the contract. The district court stated in its opinion, "The fact that Esad is not a party to the contract with Nationwide prevents Nationwide from enforcing the terms of the contract against Esad." This is an incorrect statement of the law. "A third party beneficiary's rights are subject to any contract defense that the promisor [Nationwide] could assert against the promisee [Selim] if the promisee [Selim] were suing on the contract." 13 Williston on Contracts § 37:55 (4th ed.); *see also Johnson v. Pennsylvania Na'lt. Ins. Cos.*, 594 A.2d 296, 298-99 (Pa. 1991) (holding a third-party beneficiary under an uninsured motorist policy was bound by arbitration clause contained in the contract between the signatories to the insurance contract). "[The third-party beneficiary] has paid neither premiums nor any consideration for the benefits of this insurance policy. As such, it seems inequitable to permit [the third-party beneficiary] to pick and choose those contract provisions [he] prefers while not granting that same latitude to the named insured." *Johnson*, 594 A.2d at 299.

Esad's status as the third-party beneficiary does not permit him to pick and choose which provision of the underinsured motor vehicle policy he has to comply with. The two-year contractual limitation on bringing an underinsured motorist claim has been upheld time and again by our supreme court and it should be upheld again here. *See Robinson*, 816 N.W.2d at 405 ("We hold it is

reasonable, as a matter of law, for an UIM insurer to select the same two-year deadline from the date of the accident to file a UIM claim as the legislature prescribed for filing a personal injury tort action.”).

Despite this clear direction from the supreme court, the majority concludes the contractual limitation inapplicable in this case finding instead that Nationwide waived the provision by failing to provide the policy to Esad. In its factual findings the district court found “Nationwide intentionally did not provide the plaintiff with a copy of the policy which would have revealed the contractual limitations within the two year time period.” The district court failed to mention Esad only requested a copy declaration page and never requested a copy of the policy. The majority takes it one step further and imposes a duty on insurance companies, created out of whole cloth, to provide a copy of an insurance policy to individuals making claims against a policy when they are not signatories to the insurance contract. It creates this duty because it concludes Nationwide somehow acted in bad faith or chose to withhold vital information from Esad in the face of a request. The facts of this case just do not support that conclusion. I believe the “unruly horse” described by Justice Waterman in *Robinson*, has now trampled on the contractual rights of Nationwide and Selim in this case.

The undisputed facts of this case show Nationwide received a representation letter from Esad’s attorney in June of 2010. After receiving that letter, Nationwide attempted to contact the attorney by phone no fewer than ten times between July 2010 and February 2011. In addition, a letter was sent to Esad’s attorney in December requesting copies of medical records. It was not until March 28, 2011, that Esad’s attorney responded to the requests by sending

the demand letter he provided to the tortfeasor's insurer to Nationwide. He requested only the declarations page of the UIM policy "so I know and can confirm for my client what the underinsured limits are." He also requested Nationwide's consent to settle with the tortfeasor's insurance company for the remainder of the limits. He acknowledged the statute of limitations against the tortfeasor was running. Nationwide responded to the request two weeks later, waiving its subrogation interests, providing consent to settle with the tortfeasor, and advising it would not send a copy of the declarations page of its policy without Selim's consent.

At no time did Esad or his attorney request a copy of the UIM policy from Nationwide. The declarations page would not have provided any information regarding the contractual limitations period and would have only provided the policy limits, which is the only part of the contract Esad's attorney was interested is finding out. The district court acknowledged:

> The court finds that Nationwide did not waive its right to an affirmative defense of the contractual limitations period for filing suit. Nationwide did nothing to provide a belief on the part of the plaintiff that Nationwide intended to admit liability. Nationwide left only the impression that it was investigating the potential of a claim, thus, the court finds that Nationwide did not waive its affirmative defense of the contractual provision limiting the time period for filing suit. The court finds no agreement existed in fact or implied that Nationwide had agreed to extend any limitations period.

It is an injured party's duty to undertake a reasonable investigation into the nature and extent of his legal rights to recover for an injury. *Hook v. Lippolt*, 755 N.W.2d 514, 523 (Iowa 2008). Esad knew of his injury and his intent to recover for his injuries as a third-party beneficiary under the UIM contract Selim had with Nationwide. Esad had the duty to investigate his rights and obligations under the

UIM policy. It should not be up to the insurance company to provide confidential information regarding their named insured to third-parties who could potentially make a claim under the policy. As the party seeking to assert his rights under the contract, it was up to Esad to obtain the contract by requesting it from Nationwide or Selim or by filing suit in order to obtain it in discovery. Esad did none of these things.

The majority acknowledges neither the legislature nor the administrative agencies have imposed a duty on UIM insurers to volunteer policy information when faced with a third-party claim. I see no reason to do so in this case. I would therefore reverse the district court and grant Nationwide's motion for summary judgment based on Esad's failure to bring this action within the contractual two-year limitation period.