IN THE COURT OF APPEALS OF IOWA

No. 0-549 / 09-1562
Filed December 8, 2010

RICHARD A. HESSELING and JEAN M. HESSELING,
Plaintiffs-Appellees,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

State Farm appeals the district court's denial of its motion for summary judgment. **REVERSED AND REMANDED.**

Douglas Henry, Dubuque, for appellant.

Werner Hellmer of Day & Hellmer, P.C., Dubuque, for appellees.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Plaintiffs Richard and Jean Hesseling suffered injuries in a two-car accident. They were insured at the time of the accident under a State Farm policy, that included uninsured motorist coverage and required them to bring suit against State Farm within two years from the date of the accident. This appeal requires us to determine whether a contractual two-year limitation period for bringing an uninsured motorist claim against an insurer is reasonable when the tortfeasors' insured status cannot be readily determined. Because an inference arises that a tortfeasor is uninsured when plaintiffs demonstrate they used all reasonable efforts in an unsuccessful attempt to ascertain a tortfeasor's liability coverage, and because the Hesselings were not required to satisfy any preconditions before bringing suit against State Farm, we conclude the provision is reasonable and State Farm was entitled to summary judgment.

I. Background Facts and Procedures

On March 13, 2005, Richard and Jean Hesseling sustained injuries in a motor vehicle accident when they collided with a vehicle owned by Gregory Shumake and driven by Tyran B. Dumas. At the time of the accident, the Hesselings were insured under a State Farm insurance policy, which included uninsured motorist coverage.

Recovery under the uninsured motorist provision was subject to limitations and requirements set out in the policy. Section III detailed the process for obtaining benefits under the policy's uninsured motor vehicle provision. It provided first, State Farm and the Hesselings could reach a mutual agreement

regarding the amount of damages to which the Hesselings were entitled; second, if the parties did not reach an agreement, they could consent to arbitrate the dispute; third, if the parties did not reach an agreement nor consent to arbitration, the policy provided the Hesselings shall "file a lawsuit . . . against the owner or driver of the uninsured motor vehicle . . . and [State Farm]." The policy further established a two-year time frame within which the Hesselings were required to file suit against State Farm: "There is no right of action against [State Farm] . . . under uninsured motor vehicle coverage unless such action is commenced within two years after the date of the accident."

The Hesselings filed suit against Shumake and Dumas, both from Cook County, Illinois, on March 9, 2007, and obtained a default judgment, including money damages, against the two defendants. On that same date, the Hesselings' counsel sent a letter to State Farm, explaining they were filing suit against the driver and owner of the vehicle and further stating: "As a precautionary matter, we are also asserting our clients' rights under the underinsured/uninsured policy provisions of their automobile insurance policy with your company. It is our belief that the Defendants will likely be uninsured . . . ."

On October 3, 2007, State Farm notified the Hesselings they could no longer assert a claim under their uninsured motorist coverage for the injuries sustained in the accident because they had not filed suit against State Farm within the two-year contractual limitations period. The Hesselings responded, on April 10, 2008, indicating they did not concur with State Farm's assessment and

reasserted their claim. They stated, "[s]ince the named defendants appear to be judgment proof, we intend to pursue any and all administrative and judicial remedies against State Farm to seek monetary recovery under the uninsured motor vehicle provision of our client's policy." On October 3, 2008, the Hesselings sent a demand letter indicating the defendants "appear to be 'judgment proof'" and demanding State Farm pay damages "pursuant to the Underinsured Motorist Coverage" provided in the policy. State Farm responded in an October 9, 2008 letter denying the Hesselings' claim and stating:

> [T]here was no agreement between State Farm and the Hesselings on the entitlement to collect damages or on the amount, the Hesselings failed to meet the policy term requiring them to file suit against State Farm, and the two year time period in which to commence that suit has elapsed. Therefore, your clients' claim against State Farm is barred by the contractual period of limitations, and they may no longer assert a claim for uninsured motorist coverage.

The Hesselings filed suit against State Farm on May 20, 2009, arguing the vehicle owned by Shumake and operated by Dumas was an uninsured vehicle, and contending they were entitled to benefits pursuant to the uninsured motorist provision of their insurance policy.

State Farm moved for summary judgment, contending the Hesselings' action was barred by the two-year contractual period of limitations established in the policy. The Hesselings resisted, arguing the two-year period was unreasonable and unenforceable under the facts and circumstances of this case and the motion was premature because discovery had not been completed. The district court denied State Farm's motion for summary judgment, concluding a factual dispute exited regarding whether the insurance contract's two-year

limitation was unreasonable. The court further stated an action for uninsured motorist coverage was not ripe because the Hesselings did not know the tortfeasors' financial status.

On October 16, 2009, State Farm requested interlocutory review of the summary judgment ruling. Our supreme court granted State Farm's application and transferred the case to us. The sole issue on appeal is whether the contractual two-year limitations period for bringing an uninsured motorist claim against State Farm is reasonable.

III. Standard of Review

We review the district court's denial of summary judgment for the correction of errors at law. Iowa R. App. P. 6.907; *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 777 (Iowa 2000). 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 the litigation. *Id.*

IV. Analysis

Uninsured motorist coverage ensures that victims receive minimum compensation when injured by uninsured motorists. *Hamm*, 612 N.W.2d at 779. Claims for uninsured motorist benefits are contractual in nature and the applicable statute of limitations normally provides ten years within which to bring such claims. *Id.*; Iowa Code § 614.1(5) (2009) (requiring actions founded upon written contracts to be brought within ten years). Parties to an insurance policy

may contractually limit the time for bringing suit against the insurer. *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 334 (Iowa 2005). We recognize insurance companies may "clearly articulate 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 these provisions only if they are reasonable—that is, if they provide "a reasonable period of time for filing actions to recover under the insurance contract." *Nicodemus*, 612 N.W.2d at 787; *see also Faeth*, 707 N.W.2d at 334. Conversely, unreasonable limitations on the time for bringing suit are invalid and unenforceable. *Nicodemus*, 612 N.W.2d at 787. We determine the reasonableness in "'light of the provisions of the contract and the circumstances of its performance and enforcement.'" *Id.* (citation omitted). A provision that is so short it amounts to a practical abrogation of the right of action, or that requires a plaintiff to bring an action before the loss or damage can be ascertained is per se unreasonable. *Id.*

Here, the policy clearly articulates the two-year limitation period and the "event upon which the limitations period begins to run"—the date of the accident.[1] *Hamm*, 612 N.W.2d at 784. The remaining question we must resolve

[1] The provisions at issue appear in Section III and Section V of the policy. Section III details the steps a party must take to recover benefits as follows:

> Two questions must be decided by agreement between the [Hesselings] and [State Farm]:
> 1. Is the insured legally entitled to collect damages from the owner or driver of the uninsured motor vehicle; and
> 2. If so, in what amount?
>
> If there is no agreement, then:
>
> 1. If both parties consent, these questions shall be decided by arbitration . . . .

is whether the policy provision requiring the Hesselings to bring suit within two years of the accident is reasonable. We conclude the two-year period is reasonable and because the Hesselings filed suit more than two years after the accident, the district court should have granted State Farm's motion for summary judgment.

The Hesselings contend the two-year limitation provision is unreasonable because it did not afford them sufficient time to determine the tortfeasors' insured status and they could not bring suit against State Farm until they ascertained this information. The Hesselings argue they were unable to determine whether the tortfeasors were insured because the tortfeasors were non-responsive as evidenced by the fact they did not file an appearance or answer in the Hesselings' initial suit against them.[2] They explain "formal discovery was not initiated to independently confirm the financial status of the out-of-state tortfeasors" because doing so "would have been an effort in futility."

We do not find the Hesselings' argument persuasive because it ignores the fact we do not require plaintiffs to affirmatively establish a tortfeasors' uninsured status and seeks to excuse the Hesselings from their duty to

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. . . .

2. If either party does not consent to arbitrate . . . the [Hesselings] shall:
    a. File a lawsuit . . . against the owner or driver of the uninsured motor vehicle . . . and [State Farm] . . . .

Section V provides:

> There is no right of action against [State Farm] . . . under uninsured motor vehicle coverage unless such action is commenced within two years after the date of the accident.

[2] But we note that when the Hesselings did eventually bring suit against State Farm, it was with no greater knowledge of the tortfeasors' insured status than the knowledge they possessed, but thought was insufficient, within the two-year limitations period: that the tortfeasors were "likely . . . uninsured."

undertake a reasonably diligent investigation of their legal rights. Because we recognize "it is often difficult for a claimant to prove a negative fact, such as the uninsured status of a motor vehicle," we impose a lower burden of proof in this context. *Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880, 888 (Iowa 1996). Our supreme court explained the diminished burden of proof as follows:

> The [uninsured motorist] claimant . . . can discharge his or her burden either by showing that the tortfeasor against whom he or she is claiming was uninsured . . . or by showing that the claimant used "*all reasonable efforts*" to ascertain the existence of any applicable liability insurance and was unsuccessful in this effort.

Id. at 889 (citation omitted). Under our relaxed standard of proof, then, so long as the plaintiff demonstrates he or she employed "all reasonable efforts" to determine the tortfeasors' insured status but was unsuccessful in ascertaining applicable liability insurance, "an inference may be drawn that the other vehicle or vehicles were uninsured." *Id.* The burden of presenting affirmative evidence to the contrary then shifts to the defendant insurer. *Id.*

This standard allows plaintiffs, like the Hesselings, to bring suit for uninsured motorist benefits even though they cannot definitively establish the tortfeasor's insured status. *See id.* (recognizing "proof problem[s] [are] inherent in many [uninsured motorist claims]" and explaining various courts have, therefore, relaxed the burden of proving the uninsured status of a motor vehicle). If the Hesselings would have demonstrated they used all reasonable efforts in an unsuccessful attempt to ascertain the tortfeasors' liability coverage, an inference of uninsured status would have arisen, which would have been sufficient to allow them to proceed against their insurance company for uninsured motorist benefits.

Id. Their efforts would not have been futile, as they claim. Rather, those efforts, under these circumstances, were required of them by law if they wanted to bring suit against State Farm. We are not persuaded two years was an unreasonably short period of time for the Hesselings to engage in reasonable efforts to ascertain the tortfeasors' insured status. Their choice not to do so does not render the two-year period unreasonable.

Further, speculating that an investigation would prove futile disregards the injured party's duty to "undertake a reasonably diligent investigation of the nature and extent of [the party's] legal rights to recover for an injury." *Hook v. Lippolt*, 755 N.W.2d 514, 523 (Iowa 2008). In addition, we note that our supreme court struck down a similar argument in *Douglass* where a plaintiff contended a two-year limitation period should not bar her uninsured motorist claim when "she was not aware that the tortfeasors were judgment proof until the two years had passed." *Douglass v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 665, 667 (Iowa 1993) *overruled on other grounds by Hamm*, 612 N.W.2d 775.

In light of the inference of uninsured status that arises when plaintiffs demonstrate they used all reasonable efforts in an unsuccessful attempt to ascertain a tortfeasor's liability coverage, the Hesselings' argument that they could not affirmatively ascertain the tortfeasors' insured status in two years does not demonstrate the two-year period was unreasonable.

We further note the policy did not require the Hesselings to exhaust remedies against the tortfeasors before filing an action against State Farm; the Hesselings' contention that it required them to do so is incorrect. *See*

Nicodemus, 612 N.W.2d at 787–88 (holding a two-year period, which began running on the date of the accident, unreasonable when the policy required a plaintiff to exhaust remedies against the tortfeasor before commencing an action against the insurer).

The Hesselings contend the policy language indicating State Farm will "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle" suggests they must first obtain a judgment against the tortfeasor before bringing an action against State Farm. They argue that, "[b]y definition, the insured has no legal entitlement to collect from the uninsured tortfeasor until [the] claim has been reduced to judgment" and, therefore, they had no entitlement to collect from State Farm until they obtained judgment against the tortfeasors. The Hesselings' argument does not persuade us the provision was unreasonable. Our supreme court rejected a nearly identical argument, concluding a judgment against an underinsured motorist was not required to establish the insured was "legally entitled to recover" damages. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co*., 461 N.W.2d 291, 294 (Iowa 1990). We are bound by that interpretation today.

Contrary to the Hesselings' contention, the policy here did not require them to exhaust their remedies against the tortfeasors nor to satisfy any other preconditions before filing suit against State Farm. Rather, the policy directed the Hesselings to bring a contemporaneous suit against both the tortfeasors and State Farm. Our supreme court recognized an insured could comply with a two-year limitation provision by commencing an action against the insurer

concurrently with a suit against the uninsured motorist so long as the policy did not foreclose that option. *Nicodemus*, 612 N.W.2d at 788 (noting that filing contemporaneous suits against the insurer and the underinsured motorist is "certainly permissible under the UIM statute" but that the option was foreclosed in that case by the language in the policy at issue). Here, the policy did not preclude that opportunity, but expressly encouraged that course of conduct in the event the Hesselings chose to litigate their claim against State Farm. Neither the policy nor the circumstances created temporal obstacles that would deprive diligent insureds of coverage or that would amount to a practical abrogation of the right of action by causing the period of limitations to run before the Hesselings were able to file suit against State Farm. *See id.*; *see also Kuhner v. Erie Ins. Co.*, 649 N.E.2d 844, 848 (Ohio Ct. App. 1994) (explaining that a provision nearly identical to that in *Nicodemus*, "as a practical matter," deprived the insureds of coverage).

Moreover, our supreme court recognized the validity, and upheld as reasonable, a two-year limitations provision that began running on the date of the accident where the policy permitted plaintiffs to bring suit against their insurer at the plaintiffs' earliest convenience. *Douglass*, 508 N.W.2d at 667 (overruled on other grounds); *see Faeth*, 707 N.W.2d at 334 n.3 (explaining that "[o]ur decision in *Hamm* [overruling a portion of *Douglass*] did not affect our holding in *Douglass* that an insurer may reasonably reduce the ten-year statutory limitations period for contractual claims to a two-year period for filing suit against the insurer").

Because we conclude the two-year period of limitations provision in this case is reasonable, we reverse the district court's denial of State Farm's motion for summary judgment and remand the case for entry of an order granting State Farm summary judgment.

REVERSED AND REMANDED.