

2011 IL App (2d) 100971-U
No. 2—10—0971
Order filed August 22, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CHERYL ANN ALBIN,)	Appeal from the Circuit Court
)	of Kendall County.
Plaintiff and Counterdefendant-)	
Appellant,)	
)	
v.)	No. 09—L—39
)	
COUNTRY MUTUAL INSURANCE)	
COMPANY,)	
)	Honorable
Defendant and Counterplaintiff-)	Timothy J. McCann,
Appellee.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

Held: The trial court properly granted defendant summary judgment on plaintiff's claim for underinsured motorist benefits, as her policy unambiguously required her to bring her claim within two years after the accident regardless of any lack of prejudice to defendant and, in so requiring, did not violate public policy.

ORDER

¶ 1 Plaintiff, Cheryl Ann Albin, appeals a grant of summary judgment (735 ILCS 5/2—1005(c) (West 2008)) to defendant, Country Mutual Insurance Company, on her complaint for breach of contract and on defendant's counterclaim for declaratory judgment (see 735 ILCS 5/2—701(a) (West

2008)). On appeal, plaintiff argues that the trial court erred in holding that her demand for underinsured motorist (UIM) benefits under her policy with defendant was barred by the policy's limitations clause. We affirm.

¶ 2 Plaintiff's complaint alleged as follows. On November 16, 2001, she was riding in a car driven by her husband, George Albin. The Albin car was rear-ended by a car driven by Mary Ann Anderson, injuring plaintiff. Plaintiff and Anderson each had an automobile insurance policy with defendant. On November 10, 2003, the Albins sued Anderson. Defendant retained attorney John Higgins to represent Anderson. Via Higgins, defendant regularly received information about the accident. On June 19, 2008, Anderson settled the Albin suit for \$100,000, the limit of her policy with defendant. On October 22, 2008, defendant paid plaintiff this amount. Plaintiff's actual damages exceeded \$250,000, so she demanded UIM benefits from defendant. On September 21, 2008, defendant denied the claim, relying on plaintiff's policy's limitations clause, which read:

“No suit, action or arbitration proceedings for recovery of any claim may be brought against **us** until the **insured** has fully complied with all the terms of this policy. Further, *any suit, action or arbitration will be barred unless commenced within two years after the date of the accident.* Arbitration proceedings will not commence until **we** receive **your** written demand for arbitration.” (Emphasis added.)

¶ 3 Plaintiff's complaint alleged that the limitations clause conflicted with the policy's exhaustion clause, which stated that defendant would “pay only after all liability bonds or policies have been exhausted by judgments or payments.” According to the complaint, the exhaustion clause meant that plaintiff's cause of action did not accrue until October 23, 2008, yet the limitations clause required her to file her suit before that date. The complaint asserted that the public policy of

requiring the provision of UIM coverage (see 215 ILCS 5/143a—2(4) (West 2008)) made the limitations clause void as applied. Plaintiff's complaint requested judgment for \$150,000 and costs.

¶ 4 Defendant answered the complaint and also counterclaimed for a declaratory judgment that plaintiff's right to recover UIM benefits was barred by the limitations clause, as she had waited until July 2, 2008, to demand arbitration on her UIM benefits claim.

¶ 5 Defendant then moved for summary judgment on both the complaint and the counterclaim, again relying on the limitations clause. It argued that the clause unambiguously gave plaintiff only two years from the date of the accident to file her UIM claim, yet she had not done so until more than six years after the accident. Defendant also argued that case law established that there is no conflict between the type of limitations clause and the type of exhaustion clause in plaintiff's policy and that the two-year limitations period had repeatedly been held valid.

¶ 6 In opposing the motion for summary judgment, plaintiff alleged in part as follows. On October 8, 2003, her attorney advised defendant that he was now representing plaintiff; that he would soon be filing an action against Anderson; and that a specific demand for settling plaintiff's claim could not be formulated, as the extent of plaintiff's injuries and of her need for medical care remained unclear. On December 5, 2005, plaintiff suffered a pseudoaneurysm. She had surgery in February and March 2006. On May 2, 2007, her doctor informed plaintiff's attorney that the pseudoaneurysm could have been caused by the November 16, 2001, accident; only then did plaintiff know, or should she have known, of this possible causal connection. She contended that the limitations clause should not bar her from recovering for the pseudoaneurysm-related expenses.

¶ 7 Plaintiff also argued that the limitations clause should not bar her from recovering UIM benefits, because its purpose was to give defendant prompt notice of the facts that were pertinent to

the claim—and, as defendant had also insured Anderson, it had been steadily and timely informed of these facts. Further, she contended, because, by statute, UIM coverage must be provided (215 ILCS 5/143a—2(4) (West 2008)), the limitations clause violated public policy as applied here.

¶ 9 In reply, defendant contended that Illinois courts have consistently held that the same limitations clause involved here is neither ambiguous nor contrary to public policy; that the discovery rule did not apply to the limitations clause; and that the attorney defendant had hired for the personal injury suit had represented only Anderson on the claims arising under her policy, not plaintiff on any claim that she might have had under her policy.

¶ 10 The trial court granted defendant summary judgment, stating that the limitations clause was clear and did not violate public policy and that, by failing “to commence a suit, action, or arbitration” within two years after the accident, plaintiff forfeited any UIM benefits. Plaintiff timely appealed.

¶ 11 On appeal, plaintiff argues that the judgment is erroneous because the limitations clause should not apply under the circumstances here, because defendant suffered no prejudice from her delay in demanding benefits. Plaintiff also asserts that to enforce the limitations clause in this case would violate the public policy requiring UIM coverage.

¶ 12 Defendant responds that, under settled authority, the limitations clause here is both unambiguous and consistent with public policy. Defendant asserts that prejudice has never been a prerequisite to enforcing a limitations clause. Thus, defendant concludes, the trial court did no more than apply the clause to the undisputed facts, and its judgment should be affirmed.

¶ 13 A grant of summary judgment is reviewed *de novo*. *People ex rel. Director of Corrections v. Booth*, 215 Ill. 2d 416, 423 (2005). Summary judgment is proper when the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show

that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2—1005(c) (West 2008); *People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 204 (2008). This appeal centers on the construction of an insurance policy, an issue appropriate for resolution by summary judgment. See *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399 (2010). If the policy's terms are unambiguous, they must be enforced as written unless doing so would violate public policy. *Id.* at 400.

¶ 14 We note first that, on appeal, plaintiff no longer contends that the limitations clause conflicts with the exhaustion clause or that the discovery rule extends the policy's limitations period. Thus, these arguments are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 15 We turn to the arguments that plaintiff has preserved. The first is that, because defendant, as the agent of both plaintiff and Anderson, suffered no prejudice from plaintiff's failure to adhere to the limitations clause, the clause should not be enforced. We agree with defendant that the limitations clause is unambiguous and does not require a showing of prejudice. The clause plainly states that any suit, action, or arbitration will be barred unless brought within two years after the date of the accident. As defendant observes, courts have held that *this precise clause* is both unambiguous and a valid limitation on defendant's exposure to liability. See *Parish v. Country Mutual Insurance Co.*, 351 Ill. App. 3d 693, 696-97 (2004) (upholding limitations clause, citing numerous other opinions doing so, and noting the absence of authority otherwise).

¶ 16 Plaintiff concedes that she did not meet the two-year limitations period. She argues that, because defendant had represented both plaintiff and Anderson, it "was provided ample opportunity to investigate and defend plaintiff's claim and [defendant's] interest was not prejudiced by [plaintiff's] failure to file suit within two years." However, the limitations clause does not mention

prejudice; it bars *any* suit, action, or arbitration that is commenced more than two years after the accident. We may not rewrite an insurance policy by reading in terms that conflict with the policy's plain language. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 174-75 (2008). Plaintiff cites no authority holding that prejudice is a prerequisite to enforcing the limitations clause in an insurance policy. We reject plaintiff's attempt to nullify the plain meaning of the limitations clause.

¶ 17 We turn to plaintiff's second argument against the judgment: that to enforce the limitations clause under these facts would violate public policy. Plaintiff observes that, by statute, every automobile insurance policy issued in Illinois must provide UIM coverage. See 215 ILCS 5/143a—2(4) (West 2008). She reasons—as best we can tell—that, in this case, the UIM coverage that defendant provided was “illusory” because she could not meet the two-year limitations period and, owing to its dual-agent status, defendant had no need for the limitations clause.

¶ 18 We see no merit to plaintiff's public-policy argument. As noted, courts have repeatedly upheld the limitations clause at issue against arguments that it violates public policy. Plaintiff may be arguing that the clause deprived her of UIM coverage because, given the difficulty of establishing damages against Anderson, she would have had equal difficulty bringing her action against defendant within two years. To the extent that this is plaintiff's argument, it has been rejected. In *Vansickle v. Country Mutual Insurance Co.*, 272 Ill. App. 3d 841 (1995), the court explained that the insured there could have tolled the limitations period by filing a proof of claim or a demand for arbitration (*id.* at 842) and, further, that an insured who has sufficient facts to proceed against the tortfeasor can also allege sufficient facts to proceed against the insurer for UIM benefits (*id.* at 843); see also *Flatt v. Country Mutual Insurance Co.*, 289 Ill. App. 3d 1097, 1102-03 (1997) (adopting reasoning of

Vansickle). Therefore, plaintiff's UIM coverage in this case was not "illusory" merely because she did not take the proper steps to preserve her right to it.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 20 Affirmed.