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2012 IL App (4th) 110965-U

Filed 6/27/12

NO. 4-11-0965

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ELLEN VRABEL-KILBY,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
NATIONWIDE MUTUAL INSURANCE COMPANY;)	No. 08MR458
and AAA CHICAGO MOTOR CLUB, a/k/a)	
MEMBERSELECT,)	Honorable
Defendants-Appellees.)	Patrick W. Kelley,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in granting summary judgment to defendants where plaintiff failed to satisfy the conditions for underinsured motorist coverage.

¶ 2 In October 2011, the trial court awarded summary judgment to defendants, Nationwide Mutual Insurance Company (Nationwide) and AAA Chicago Motor Club, a/k/a Memberselect (AAA), in a declaratory judgment action brought against them by plaintiff, Ellen Vrabel-Kilby, because she did not provide timely notice to AAA of the terms of her proposed settlement with Viking Insurance (Viking), prior to settling with the at-fault driver, Allison Doerfler, who was insured by Viking. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 24, 2006, plaintiff was a passenger in a vehicle driven by her sister, Deanna Vrabel. Deanna's vehicle was struck by a vehicle driven by Doerfler. Doerfler had a

policy liability limit of \$20,000 from Viking. Plaintiff's injuries resulted in medical expenses in excess of the \$20,000 liability limits.

¶ 5 As a result, plaintiff pursued an underinsured motorist claim under the uninsured motorist provisions of her Nationwide policy. At the time of the accident, plaintiff had \$100,000 in underinsured motorist coverage from Nationwide. However, the Nationwide policy contained an "other insurance" exclusion for bodily injuries suffered in situations where, as here, the insured was not occupying her own vehicle. Under that exclusion, the Nationwide coverage was considered coverage in "excess over any collectible insurance."

¶ 6 In addition to Doerfler's Viking policy, plaintiff also had insurance available to her under the terms of her sister's AAA policy, which defined "insured persons" as including the following:

- "1. You or any resident relative.
2. Any other person while occupying YOUR CAR with your permission."

It is undisputed plaintiff qualified as an "insured person" under her sister's policy.

¶ 7 The AAA policy had \$5,000 in medical payments coverage (med-pay coverage) available. On a date unspecified in the record but prior to August 1, 2006, plaintiff filed a claim for medical expenses with AAA under the med-pay provision of the Viking policy. Thereafter, plaintiff recovered the \$5,000 limits of the med-pay coverage under the AAA policy.

¶ 8 The AAA policy also provided underinsured motorist coverage in the amount of \$250,000 per person. However, it is unclear from the record when, if ever, plaintiff filed an underinsured motorist claim with AAA. We note the record on appeal does not contain either

plaintiff's written claim for coverage or AAA's notification to plaintiff denying coverage. At oral argument, counsel for plaintiff informed this court no claim for underinsured motorist coverage was ever made by plaintiff against AAA.

¶ 9 On January 4, 2007, Viking offered to settle plaintiff's bodily-injury claims for \$20,000, *i.e.*, the policy limit.

¶ 10 On January 5, 2007, prior to accepting Viking's settlement offer, plaintiff notified Nationwide of Viking's proposed settlement. On February 1, 2007, Nationwide waived its subrogation rights. Thereafter, plaintiff settled her personal injury claim with Viking for the \$20,000 policy limit. However, it is undisputed plaintiff did not notify AAA of the proposed settlement. The AAA policy's exclusions provision for the uninsured and underinsured motorist coverage provides the following:

"A. We do not provide Uninsured Motorist Coverage or Underinsured Motorist Coverage for any insured persons:

1. If that insured person or their legal representative settles their bodily injury [claim] with the owner or operator of the uninsured motor vehicle without our written consent or with the owner or operator of the underinsured motor vehicle without the statutorily required notice to us."

The "statutorily required notice" under the policy required 30-days written notice in advance of a settlement. See 215 ILCS 5/143(a)-2 (West 2010).

¶ 11 On June 12, 2007, following the settlement, plaintiff sent AAA a check for \$3,333.33 as agreed upon reimbursement for medical payments it had already paid out under the

med-pay provision pursuant to the common fund doctrine.

¶ 12 On June 29, 2007, Nationwide denied plaintiff coverage based the "other insurance" provision of her Nationwide policy.

¶ 13 AAA's denial of coverage does not appear in the record on appeal.

¶ 14 On July 23, 2008, plaintiff filed a complaint for declaratory judgment against defendants, seeking a declaration (1) the "other insurance" provision of the Nationwide policy was ambiguous; (2) Nationwide had an obligation under its underinsured provision to provide plaintiff coverage up to the policy limit of \$100,000 with a \$20,000 setoff for plaintiff's settlement; and (3) AAA has an obligation under its underinsured provision to provide coverage to plaintiff up to the policy limit of \$250,000 with a \$20,000 setoff.

¶ 15 On September 16, 2008, AAA filed its answer to plaintiff's motion for declaratory judgment and asserted as an affirmative defense the fact plaintiff settled with Viking without AAA's notification or consent.

¶ 16 On September 29, 2008, Nationwide filed its answer to plaintiff's declaratory judgment motion, arguing the "other insurance" provision of the Nationwide policy was not ambiguous and it had no obligation under the underinsured provision of the policy to provide plaintiff coverage.

¶ 17 On June 30, 2011, plaintiff filed a motion for summary judgment, arguing (1) AAA had an obligation to provide plaintiff underinsured motorist coverage because—although there was no notice—AAA was not prejudiced by plaintiff's settlement, and (2) Nationwide had an obligation to provide plaintiff underinsured motorist coverage up to the policy limits of \$100,000 with a \$20,000 setoff for her settlement.

¶ 18 On August 1, 2011, AAA filed a motion for summary judgment, arguing (1) no evidence showed plaintiff ever filed a written underinsured motorist claim with AAA, (2) the parties agreed plaintiff failed to obtain written consent from AAA to settle with Viking, and (3) AAA's acceptance of the recovery check under its med-pay policy lien cannot be equated with an intentional relinquishment of AAA's subrogation rights under the underinsured motorist provision of the policy.

¶ 19 On August 4, 2011, Nationwide filed a motion for summary judgment, arguing it did not owe plaintiff underinsured motorist coverage because its "other insurance" provision was clear and unambiguous. Because it was undisputed plaintiff was injured in her sister's vehicle, Nationwide contended its obligation, if any, under that provision would only be in excess of AAA's coverage. Nationwide also argued, however, plaintiff's failure to follow the statutory and contractual provisions of the AAA policy resulted in her total waiver of the primary AAA coverage, *i.e.*, the collectible insurance, and, thus, the excess coverage provided by the Nationwide policy was not triggered.

¶ 20 On September 27, 2011, the trial court called the cause for a hearing on the parties' motions for summary judgment. The record indicates a hearing was held and arguments were heard. However, no report of the proceedings for this hearing is included in the record on appeal. The docket entry for that date indicates the court denied plaintiff's motion for summary judgment and granted defendants' motions.

¶ 21 In its October 18, 2011, written order, the trial court found (1) plaintiff failed to provide AAA notice of her settlement, which prevented AAA from exercising its subrogation rights, (2) "such notice is a condition precedent" to making an underinsured motorist claim

against AAA, and (3) because she failed to give the required notice, plaintiff forfeited her rights to pursue an underinsured motorist claim with regard to AAA.

¶ 22 The trial court also found Nationwide was not required to provide plaintiff coverage because of the policy's "other insurance" provision. The court found the AAA policy was " 'collectible' insurance under the Nationwide policy" and was in excess of the \$100,000 available under the Nationwide policy. The court concluded that because plaintiff's own acts resulted in her forfeiture of a claim under the AAA policy, she had also forfeited her claim under the Nationwide policy.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, plaintiff argues (1) the trial court erred in finding she failed to comply with the requirements of the AAA policy by failing to provide AAA with written notice of her proposed settlement and (2) the court erred in finding plaintiff was not entitled to underinsured motorist coverage under her own policy with Nationwide. We disagree.

¶ 26 A. Standard of Review

¶ 27 Summary judgment is proper only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93, 923 N.E.2d 735, 742 (2010). When parties file cross-motions for summary judgment, they agree only a question of law is involved and the court should decide the issue based on the record. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309, 948 N.E.2d 1, 18 (2010). We review the grant of

a motion for summary judgment under a *de novo* standard of review. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 395, 893 N.E.2d 303, 308 (2008). The construction of an insurance policy is also a question of law, which we review *de novo*. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455, 930 N.E.2d 1011, 1016 (2010).

¶ 28 B. Summary Judgment in Favor of AAA

¶ 29 Plaintiff argues the trial court erred in finding she failed to comply with AAA's policy by not providing it with written notice of her settlement with Viking.

¶ 30 The relevant AAA policy exclusion provision provides the following:

"A. We do not provide Uninsured Motorist Coverage or Underinsured Motorist Coverage for any insured persons:

1. If that insured person or their legal representative settles their bodily injury [claim] with the owner or operator of the uninsured motor vehicle without our written consent or with the owner or operator of the underinsured motor vehicle without the statutorily required notice to us."

¶ 31 Section 143a-2 of the Illinois Insurance Code (Code) (215 ILCS 5/143a-2 (West 2010)) provides the following:

"(6) Subrogation against underinsured motorists. No insurer shall exercise any right of subrogation under a policy providing additional uninsured motorist coverage against an underinsured motorist where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured

motorist and the insurer fails to advance a payment to the insured, in an amount equal to the tentative settlement, within 30 days following receipt of such notice.

(7) *** No such settlement agreement shall be concluded unless: (i) the insured has complied with all other applicable policy terms and conditions; and (ii) before the conclusion of the settlement agreement, the insured has filed suit against the underinsured motor vehicle owner or operator and has not abandoned the suit, or settled the suit without preserving the rights of the insurer providing underinsured motor vehicle coverage in the manner described in paragraph (6) of this Section."

¶ 32 In this case, the parties do not dispute the 30-day notice requirement existed. The parties also agree the "statutorily required notice" is the 30 days' written notice in advance of a settlement. The parties are also in agreement plaintiff settled her case with Viking without notice to AAA.

¶ 33 In *Farmers Automobile Insurance Ass'n v. Burton*, 2012 IL App (4th) 110289, ¶ 16, 2012 WL 982881, at *3, this court stated the following:

"Our supreme court has stated: 'A provision in an insurance liability policy requiring an insured to give the insurer notice of an accident is a reasonable policy requirement, one which affords the insurer an opportunity to make a timely and thorough investigation and to gather and preserve possible evidence.' [Citation]. Notice

provisions in an insurance policy are not merely technical requirements but are *conditions precedent* to an insurer's contractual duties. [Citations]. 'Breaching a policy's notice clause by failing to give reasonable notice *will defeat the right of the insured to recover under the policy.*' [Citation]. 'Whether notice has been given within a reasonable time depends on the facts and circumstances of each case.' [Citation]." (Emphases added.)

¶ 34 The crux of plaintiff's argument on appeal, however, is notice should not matter because AAA was not prejudiced by her settlement with Viking. Specifically, plaintiff contends AAA's subrogation interest was not prejudiced because AAA was aware (1) plaintiff was injured in the accident, (2) plaintiff filed a med-pay claim with AAA, and (3) plaintiff filed an underinsured motorist claim with Nationwide. We disagree.

¶ 35 Whether an insurer is prejudiced by an insured's late notice is a relevant but not determinant factor. *Farmers*, 2012 IL App (4th) 110289, ¶ 16, 2012 WL 982881, at *4. However, "an insurance company does not have to establish it was prejudiced for notice to be unreasonable." *Farmers*, 2012 IL App (4th) 110289, ¶ 16, 2012 WL 982881, at *4, (citing *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 317, 856 N.E.2d 338, 346 (2006)). Here, *no* notice was ever given.

¶ 36 According to plaintiff, AAA was aware as early as August 2006, she had been injured. In support of her argument, plaintiff attached a deposition from Peggy Sledge, a claims representative for AAA. Sledge stated she sent a "Med Start" letter on August 1, 2006, to William Kilby, presumably plaintiff's brother-in-law. Sledge testified a "Med Start" letter

notifies the insured or passenger of med-pay benefits. According to Sledge, AAA would have made inquiries with Viking insurance regarding the accident and injuries. Plaintiff maintains AAA would have known the Viking policy was insufficient because of the nature of plaintiff's injuries and medical expenses. As a result, plaintiff opines, AAA would have been aware plaintiff had a valid underinsured motorist claim against AAA.

¶ 37 However, Sledge's testimony is speculative in that it presents what *could* have taken place. It does not affirmatively establish what actually occurred between plaintiff and AAA with regard to an underinsured motorist claim. Instead, Sledge's testimony involves the med-pay claim and attempts to draw inferences therefrom. Moreover, Sledge's testimony fails to prove AAA had *any* notice of Viking's settlement offer prior to its acceptance by plaintiff.

¶ 38 Plaintiff also argues AAA knew she filed a claim against Nationwide because Sledge's deposition stated Shelly Wilson, a Nationwide claims agent, sent Sledge a letter stating Nationwide had been put on notice of an underinsured motorist claim by plaintiff and requesting information on her sister's vehicle. According to plaintiff, this letter *should* have been enough to protect AAA's subrogation rights. We disagree and note plaintiff never filed an underinsured motorist claim with AAA. Further, even if the Wilson letter put AAA on notice of a potential underinsured claim against AAA, plaintiff still failed to satisfy AAA's notice requirement prior to any settlement.

¶ 39 Finally, plaintiff contends AAA must have been aware of plaintiff's settlement with Viking when it received a June 2007 check from plaintiff to reimburse AAA for its med-pay payment. Following plaintiff's settlement, she sent AAA a check for \$3,333.33 as agreed reimbursement for medical payments AAA had already paid out under the med-pay provision.

However, plaintiff's argument in this regard misses the mark. The purpose of notice is to give AAA the chance to exercise or waive its subrogation rights. Thus, notice after a settlement has already taken place is clearly insufficient. Even if we were to accept plaintiff's argument AAA was generally aware plaintiff was injured and had medical expenses, we cannot say this awareness was tantamount to notice of a \$20,000 settlement offer by Viking releasing the underinsured party from any further liability.

¶ 40 In this case, plaintiff was required to notify AAA prior to settling with the underinsured party. Plaintiff does not argue she was unaware of that requirement. While she notified Nationwide of the settlement, it is undisputed she failed to notify AAA. Accordingly, the trial court did not err in finding plaintiff forfeited her right to pursue an underinsured motorist claim against AAA.

¶ 41 C. Summary Judgment in Favor of Nationwide

¶ 42 Plaintiff argues the trial court erred in finding she was not entitled to underinsured motorist coverage under her own policy. Specifically, plaintiff contends (1) the "other insurance" provision of the underinsured motorist section of the policy is ambiguous and thus should be construed against Nationwide, (2) the "other insurance" provision is void because it is against public policy, and (3) in the event AAA is not required to provide coverage, then Nationwide should be required to provide primary coverage because no other "collectible" insurance exists.

¶ 43 Nationwide argues (1) the "other insurance" provision is unambiguous, (2) the excess provision is consistent with the public policy regarding underinsured motorist coverage in Illinois, and (3) the AAA policy was available and "collectible" but for plaintiff's failure to provide AAA with notice of the settlement.

¶ 44

1. *Plaintiff's Claim the Other-Insurance
Provision Was Ambiguous*

¶ 45 Plaintiff argues paragraphs one, two, and four of the "other insurance" provision of the Nationwide policy conflict so as to render the provision ambiguous. We disagree.

¶ 46 If the words of an insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153, 821 N.E.2d 206, 213 (2004). This is especially true with regard to provisions that limit or exclude coverage. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 119, 607 N.E.2d 1204, 1217 (1992). However, "[a] contract is not rendered ambiguous merely because the parties disagree on its meaning." *Central Illinois Light Co.*, 213 Ill. 2d at 153, 821 N.E.2d at 214. "Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous." *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17, 823 N.E.2d 561, 564 (2005). This court will not strain to find an ambiguity where none exists. See *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 994, 844 N.E.2d 973, 976 (2006).

¶ 47 The "other insurance" provision of the underinsured motorist section of the Nationwide policy provides the following:

"1. If there is other insurance for bodily injury suffered by an insured while occupying a motor vehicle other than your auto, our coverage is excess over any other collectible:

a) insurance,

- b) self insurance,
- c) proceeds from a governmental entity, or
- d) sources of recovery.

However, this insurance will apply only in the amount by which the limit of coverage under this policy exceeds the total amount collectible from all of the above noted recovery sources."

Paragraph two provides:

"2. Except as stated above, if there is other insurance similar to this coverage for bodily injury under any other policy, we will be liable for only our share of the loss. Our share is our proportion of the total insurance limits for the loss."

Paragraph four provides:

"4. In any event, if more than one policy applies, total limits applicable will be considered not to exceed the highest limits of any one of them."

¶ 48 We reject plaintiff's claim the language of the "other insurance" provision creates an ambiguity. Our review of the plain language shows it clearly informs an insured if she is injured in another person's vehicle, she first must recover from other collectible insurance, self insurance, governmental proceeds, or any other sources of recovery before she can collect anything from Nationwide. Nationwide would then cover any remaining loss up to Nationwide's \$100,000 limit, subject to the limits noted in paragraph 4 of the other insurance provisions noted above. We note, under the facts of this case, had AAA paid the \$250,000 coverage limits,

Nationwide would not owe anything because plaintiff would have already received more than the \$100,000 underinsured motorist coverage she had under the Nationwide policy. The trial court did not err in finding the plain language of Nationwide's "other insurance" provision is not ambiguous.

¶ 49

*2. Plaintiff's Claim the Other-Insurance
Provision Violates Public Policy*

¶ 50 Plaintiff argues Nationwide's "other insurance" provision is void because it is against public policy. We disagree.

¶ 51

In construing an insurance policy, the primary objective is to ascertain and give effect to the intentions of the parties as expressed in the policy language. *Illinois Farmers Insurance Co.*, 363 Ill. App. 3d at 993, 844 N.E.2d at 976. When policy language is unambiguous, it will be applied as written, unless it violates public policy. *Illinois Farmers Insurance Co.*, 363 Ill. App. 3d at 993, 844 N.E.2d at 976. In *McElmeel v. Safeco Insurance Co. of America*, 365 Ill. App. 3d 736, 742, 851 N.E.2d 99, 106 (2006), the First District stated:

"An 'other insurance' clause conforms to public policy if: (1) the insured will not be deprived of uninsured motorist protection, and (2) the insured will receive uninsured motorist coverage up to the limits for which he paid. [Citation.] Public policy is maintained where an insured person's coverage selection 'is never undetermined.'

[Citation.] An insured person knows that if the uninsured motorist coverage on a vehicle he does not own is less than the coverage he selected for himself, his insurer will make up the difference.

[Citation]."

¶ 52 Plaintiff, citing *Illinois Farmers Insurance Co. v. Cisco*, 178 Ill. 2d 386, 687 N.E.2d 807 (1997), argues Nationwide's attempt to condition its coverage on the availability of other coverage is against public policy. In *Cisco*, the plaintiffs were driving vehicles owned by their employers when they were injured in accidents with uninsured motorists. *Cisco*, 178 Ill. 2d at 387, 687 N.E.2d at 808. The employers' uninsured motorist coverage was \$20,000 per person and \$40,000 per occurrence, the then-required minimum under the Code. *Cisco*, 178 Ill. 2d at 387, 687 N.E.2d at 808. The plaintiffs also sought coverage under their own insurance policies, which provided coverage in the amounts of \$100,000 per person and \$300,000 per occurrence. *Cisco*, 178 Ill. 2d at 389, 687 N.E.2d at 809. However, the "other insurance" provision in the plaintiffs' policies completely excluded uninsured motorist coverage for a vehicle not owned by the plaintiffs unless the owner of that vehicle had no other applicable insurance. *Cisco*, 178 Ill. 2d at 389, 687 N.E.2d at 809. The supreme court found the exclusion violated public policy because it attempted to condition coverage on the availability of similar coverage on a nonowned vehicle rather than on the uninsured status of the person causing the injury. *Cisco*, 178 Ill. 2d at 393, 687 N.E.2d at 811. The court reasoned the insured should not be limited to the uninsured motorist coverage choices made by a third party over which the insured had no control. *Cisco*, 178 Ill. 2d at 393, 687 N.E.2d at 811. However, the Nationwide provision does not do this.

¶ 53 In this case, regardless of third-party actions, plaintiff had underinsured coverage up to \$100,000 from Nationwide (assuming she met the obligations under her policy). As previously stated, the "other insurance" provision provides excess coverage for losses remaining after application of other insurance proceeds available. Thus, unlike the exclusion in *Cisco*, the Nationwide provision ensures an insured would receive underinsured motorist coverage up to the

¶ 58 For the reasons stated, we affirm the trial court's judgment.

¶ 59 Affirmed.