Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

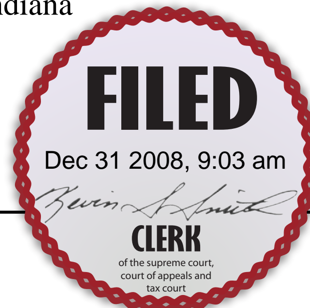
ATTORNEYS FOR APPELLANT:

DAVID W. STONE IV
Stone Law Office and Legal Research
Anderson, Indiana

TROY RIVERA
Nunn Law Office
Bloomington, Indiana

ATTORNEY FOR APPELLEES:

ROBERT R. FOOS, JR.
Lewis Wagner, LLP
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

EZRA BRADSHAW, Appellant-Plaintiff, vs. GARY CHANDLER and AFFIRMATIVE INSURANCE COMPANY, Appellees-Defendants.	)	No. 49A05-0806-CV-363

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David A. Shaheed, Judge
Cause No. 49D01-0402-CT-219

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Ezra Bradshaw appeals the trial court's grant of summary judgment in favor of Affirmative Insurance Company, Bradshaw's insurer, disposing of Bradshaw's claim for uninsured motorist benefits. On appeal, Bradshaw raises one issue, which we restate as whether the trial court properly concluded Bradshaw's claim was time-barred pursuant to the two-year limitation period of the parties' auto insurance policy. We affirm, concluding that the trial court properly found Bradshaw's claim was time-barred because it was filed more than two years after the date of the accident, and neither the discovery rule nor Indiana Trial Rule 15(C) control the policy's limitation period.

Facts and Procedural History

On July 19, 2003, Gary Chandler was driving a vehicle and struck another vehicle in which Bradshaw was a passenger. On February 2, 2004, Bradshaw filed a complaint against Chandler for damages and against Affirmative for underinsured motorist benefits. In August 2005, Bradshaw's counsel received notice from Chandler's counsel that Chandler was listed as an excluded driver on the vehicle he was driving.[1] That vehicle was owned by Ali Ahmed and insured by American Service Insurance Company.

Concerned this development might foreclose recovering damages from Chandler,[2] on May 10, 2006, Bradshaw amended his complaint to add a claim for uninsured motorist

[1] We discuss Bradshaw's counsel's receipt of this notice in further detail in Part II.A. below.

[2] American eventually moved for, and was granted, a declaratory judgment stating that "[n]o coverage exists under [American's] policy for the claim brought by [] Bradshaw as a result of the vehicular accident of July [1]9, 2003 and [American] has no duty to defend the action brought by [] Bradshaw against [] Chandler." Appellant's Appendix at 138.

benefits against Affirmative. On August 14, 2007, however, Affirmative filed a motion for summary judgment, arguing that Bradshaw's uninsured motorist claim was time-barred by the policy's two-year limitation period. On January 14, 2008, the trial court granted Affirmative's motion. Bradshaw now appeals.

Discussion and Decision

I. Standard of Review

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing the propriety of the trial court's grant of summary judgment, we construe the designated evidence in favor of the non-moving party and resolve all doubts in favor of that party. Citizens Ins. Co. v. Ganschow, 859 N.E.2d 786, 789 (Ind. Ct. App. 2007), trans. denied. Generally, whether a claim is time-barred by an insurance policy's limitation period is an issue that is appropriate for disposal at the summary judgment stage. See United Techs. Auto. Sys., Inc. v. Affiliated FM Ins. Co., 725 N.E.2d 871, 874-75 (Ind. Ct. App. 2000), trans. denied; Lumpkins v. Grange Mut. Companies, 553 N.E.2d 871, 873-74 (Ind. Ct. App. 1990); but see Clevenger v. Progressive Northwestern Ins. Co., 838 N.E.2d 1111, 1118 (Ind. Ct. App. 2005) (reversing trial court's grant of summary judgment in favor of insurer where policy was ambiguous regarding when limitation period began to run).

II. Propriety of Summary Judgment

We start our analysis by noting the designated evidence establishes that the accident occurred on July 19, 2003, and that Bradshaw filed his claim for uninsured motorist benefits

on May 10, 2006, more than two years after the date of the accident. With this undisputed fact in mind, the propriety of the trial court's grant of summary judgment turns on whether the following policy provision applies:

> This policy does not apply under Part II:[3]
> . . .
> 6. to any suit action or arbitration proceedings recovery under this section unless commencing within two (2) years after the date of the accident;

Appellant's App. at 33. In its summary judgment motion, Affirmative argued this provision unambiguously states that a claim for uninsured motorist benefits must be filed within two years of the date of the accident to trigger Affirmative's obligation to provide such benefits.[4] Bradshaw did not challenge this interpretation at the trial level, see id. at 121 (Bradshaw's motion in opposition to summary judgment stating that "[a] plain reading of Affirmative's insurance policy would seem to exclude the . . . claim [for uninsured motorist benefits] because [it] was not commenced within two years of the accident"), nor does he do so on appeal. Instead, Bradshaw argues the two-year limitation period is "invalid as applied to this case" because either the discovery rule or Indiana Trial Rule 15(C) apply to render his claim for uninsured motorist benefits timely. Appellant's Brief at 4. We will analyze the applicability of these rules in turn, but note initially that two principles guide our analysis. First, if an insurance policy provision is clear and unambiguous, it should be given its plain

---

[3] "Part II" pertains to uninsured motorist coverage.

[4] Affirmative also argues on appeal that it is entitled to summary judgment because Chandler's vehicle was not an "uninsured automobile" as defined by the policy, which, if true, also would relieve Affirmative of its obligation to provide uninsured motorist benefits. Affirmative did not, however, make this argument to the trial court, and therefore we decline to address it. Cf. Patrick v. Miresso, 848 N.E.2d 1083, 1085 n.4 (Ind. 2006) (declining to address appellant's argument "because it was not asserted in the trial court nor was it a

and ordinary meaning, see Tate v. Secura Ins., 587 N.E.2d 665, 668 (Ind. 1992), and second, if an insurance policy provision limits the time in which a suit may be commenced, the provision is valid unless it contravenes a statute or public policy, Buress v. Ind. Farmers Mut. Ins. Group, 626 N.E.2d 501, 503 (Ind. Ct. App. 1993), trans. denied. To state these principles more generally, "we must leave to the individual parties the right to make the terms of their agreements as they deem fit and proper, and, as long as those terms are clear and unambiguous and are not unlawful, we can only enforce them as agreed upon." C.A. Enters., Inc. v. Employers Commercial Union Ins. Co. of Am., 176 Ind. App. 551, 554, 376 N.E.2d 534, 536 (1978).

A. Discovery Rule

The discovery rule provides that a limitation period begins to run from the earlier of when a claimant knows of the existence of a claim or in the reasonable exercise of ordinary diligence would have discovered it. See Pflanz v. Foster, 888 N.E.2d 756, 759 (Ind. 2008). Consistent with the two principles expressed above, however, that rule must yield to the policy's two-year limitation period. In New Welton Homes v. Eckman, 830 N.E.2d 32, 35 (Ind. 2005), our supreme court rejected applying the discovery rule to a breach of contract claim where the contract contained a provision requiring the non-breaching party to commence such a claim within one year of the date of the breach. In rejecting application of the discovery rule, the court reasoned the discovery rule is generally considered a creature of tort law, not contract law. See Eckman, 830 N.E.2d at 35 ("The basic theory underlying the distinction between contract and tort is that tort liability is imposed by law and that contract

---

basis for the denial of summary judgment").

liability is the product of an agreement of the parties." (quoting Greg Allen Constr. Co. v. Estelle, 798 N.E.2d 171, 173 (Ind. 2003)). The court also reasoned that "allowing the discovery rule to super[s]ede the contractual limitations in insurance cases would 'burden [parties] with obligations they did not anticipate or undertake . . . .,'" id. (quoting Burress, 626 N.E.2d at 504-05), and undermine the well-established preference of enforcing the plain language of unambiguous contractual provisions, id.

Although our supreme court in Eckman rejected application of the discovery rule in favor of the plain language of the contractual limitation period, it reiterated the exception that a contractual limitation period may be unenforceable if it contravenes a statute or public policy. Id. More specifically, the court stated that "contractual provisions may sometimes be avoided if the claimant can prove fraud, duress, misrepresentation, adhesion, or illusory contract . . . ." Id. Seizing on this language, Bradshaw advances four reasons to recognize an exception to the policy's two-year limitation period.

First, Bradshaw makes passing mention to the policy as an "adhesion" contract. Appellant's Br. at 9. Although the policy is arguably consistent with one definition of an adhesion contract, see Pigman v. Ameritech Pub., Inc., 641 N.E.2d 1026, 1035 (Ind. Ct. App. 1994) (defining an adhesion contract as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it") (quoting 17 C.J.S. Contracts § 10), overruled on other grounds by, Trimble v. Ameritech Pub., Inc., 700 N.E.2d 1128, 1130 (Ind. 1998), we interpret our supreme court's statement in Eckman that an adhesion contract "may

sometimes be avoided," 830 N.E.2d at 35, as requiring such a contract to rise to the level of unconscionability, cf. Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004) (recognizing that an adhesion contract "is not per se unconscionable"). Nothing in the designated evidence, however, establishes that the policy is an unconscionable adhesion contract, let alone creates a genuine issue of material fact in that regard.

Second, Bradshaw argues the policy's two-year limitation period undermines public policy requiring auto insurers to offer uninsured motorist coverage. Although auto insurers are statutorily obligated to offer such coverage, see Ind. Code § 27-7-5-2, nothing in the statute states they must discharge this obligation in a manner that is consistent with either the discovery rule or Trial Rule 15(C). Moreover, Bradshaw overlooks that adopting his argument undermines the public policy of enforcing lawful agreements between private parties. Bradshaw offers no way to reconcile these competing policies, and we therefore decline his invitation to conclude the policy's two-year limitation period contravenes public policy requiring auto insurers to offer uninsured motorist coverage.

Third, Bradshaw argues that enforcement of the policy's two-year limitation period contravenes public policy because it "encourage[s] insurers to help their fellow insurance companies by not denying coverage until it was ostensibly too late for uninsured or underinsured claims to be filed." Appellant's Reply Brief at 5. To understand this argument, some additional background is in order. Near the outset of the litigation, Chandler's counsel sent Bradshaw's counsel a letter dated March 22, 2005, stating

> that [] Chandler was operating a vehicle owned by Ali Ahmed at the time of the accident. The coverage which was in force at the time of the accident was

> a commercial lines policy with a $100,000.00 policy limit as opposed to a $25,000.00 policy limit set forth in your March 9, 2004 correspondence.[5] Presumably, this would make the underinsured motorist claim against Affirmative [] moot.

Appellant's App. at 133. To the extent this statement indicated Chandler was covered under Ahmed's policy with American, such was not the case because Bradshaw's counsel sent a letter to Chandler's counsel dated September 6, 2005, that stated in relevant part as follows:

> This will acknowledge receipt of your letter of August 31, 2005, enclosing the Declaration Sheet for the vehicle that [] Chandler was driving on the date of incident. Pursuant to the Renewal sheet attached [] Chandler is an "EXCLUDED" driver and states [sic] there is no coverage afforded for excluded drivers. Are you know stating that after 18 months of defending this case there is no coverage under the American [] policy?

Id. at 134. Based on these letters, which were included in the designated evidence, Bradshaw argues we should disregard the policy's two-year limitation period because "[i]t would be a poor policy to say that an insurance company can provide a defense in a case for over one and a half years and then suddenly claim that the person it had been defending was not covered by the policy." Appellant's Br. at 5.

Our supreme court has held that an attorney has the right to rely upon a material misrepresentation made by opposing counsel as a matter of law. Fire Ins. Exchange v. Bell by Bell, 643 N.E.2d 310, 313 (Ind. 1994). The problem for Bradshaw, however, is that even assuming the statements quoted above constitute proof that a misrepresentation was made, it was Chandler's counsel, not Affirmative's, who made it.[6] Absent evidence that Affirmative's counsel was involved in the misrepresentation, we fail to see how this case falls within Bell's

[5] This letter has not been included in the record.

holding.

Finally, Bradshaw argues the policy's two-year limitation period contravenes public policy because applying it "would mean that a claim for uninsured motorist benefits would be bar[r]ed before a claim even exi[s]ted." Appellant's Br. at 4. Implicit in this argument is that Bradshaw's claim for uninsured motorist benefits accrued in August 2005 when Chandler's counsel gave notice that Chandler was an excluded driver, which simply presupposes that the discovery rule applies. See Pflanz, 888 N.E.2d at 759 (stating that the earlier of when a claimant knows of the existence of a claim or in the reasonable exercise of ordinary diligence would have discovered it is the date the claim "accrues" for purposes of the discovery rule).

Bradshaw's arguments, coupled with the designated evidence, do not convince us that the exceptions to following the plain language of the contract as stated by our supreme court in Eckman apply here. Thus, consistent with Eckman, we reject Bradshaw's claim that the discovery rule applies.

B. Indiana Trial Rule 15(C)

Indiana Trial Rule 15(C) permits an amended pleading to "relate[] back to the date of the original pleading" if "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Although our supreme court in Eckman did not address Trial Rule 15(C) specifically, we think the same emphasis of adhering to the plain language of the policy and enforcing contractual limitation periods unless contravened by statute or public policy also require that we reject applying Trial Rule 15(C). Put simply, if the parties had intended

---

[6] We express no opinion as to whether Chandler's counsel's conduct creates any cause of action.

either the discovery rule or Trial Rule 15(C) to be a rule of interpretation, the policy would have said so, and any decision to the contrary is tantamount to engrafting a provision onto the policy that the parties never anticipated, let alone intended. Cf. Eckman, 830 N.E.2d at 35 (observing that application of the discovery rule would result in a "windfall" (quoting Burress, 626 N.E.2d at 505)); id. at 36 ("[T]here are policy reasons why the limitation provisions in insurance policies should be strictly adhered to," which include providing "'carriers with a basis for forming business judgments concerning claim reserves and premium rates.'" (Rucker, J., dissenting) (quoting Summers v. Auto-Owners Ins. Co., 719 N.E.2d 412, 414 (Ind. Ct. App. 1999))).

Having rejected Bradshaw's invitation to apply either the discovery rule or Trial Rule 15(C), we are left with designated evidence establishing that the policy requires a claim for uninsured motorist benefits to be filed within two years from the date of the accident, that the date of the accident was July 13, 2003, and that the date of the filing of the claim for uninsured motorist benefits was May 10, 2006. This evidence establishes that Bradshaw's claim for uninsured motorist benefits was untimely, and it therefore follows that the trial court properly granted Affirmative summary judgment on this issue.

Conclusion

The trial court properly found Bradshaw's claim for uninsured motorist benefits was time-barred and therefore properly granted Affirmative summary judgment.

Affirmed.

NAJAM, J., and MAY, J. concur.