IN THE COURT OF APPEALS OF IOWA

No. 2-1193 / 12-0888
Filed March 13, 2013

KEVIN M. JONES, DEBRA JOHNSON JONES, AND KEVIN M. JONES, as Parent and Next Friend of ABBY JONES and EMMA JONES,
Plaintiffs-Appellees,

vs.

NATHAN WILLIAM LOCKNER,
Defendant,

and

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

An insurance company appeals the denial of its motion for summary judgment. **REVERSED AND REMANDED.**

William B. Serangeli and Joseph M. Borg of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Michael M. Moreland and Heather M. Simplot of Harrison, Moreland, Webber & Simplot, P.C., Ottumwa, for appellee.

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

VOGEL, P.J.

Nationwide Mutual Insurance Company appeals the district court's decision denying its motion for summary judgment against its policy holders, Kevin and Debra Jones and their children (collectively the Joneses). Nationwide argues its two year limitation on underinsured motorists coverage is reasonable and enforceable as a matter of law based on *Robinson v. Allied Prop. & Cas. Ins. Co.*, 816 N.W.2d 398, 404-05, 409 (Iowa 2012). The Joneses argue notwithstanding *Robinson*, the district court's decision should be affirmed on a ground the district court did not expressly rely upon—that they "substantially complied" with the notice provision in Nationwide's policy. Because the Joneses admit they did not add Nationwide as a defendant until after the contractual time limitation, there is no material fact which remains in dispute. We therefore reverse the district court's denial of Nationwide's motion for summary judgment and remand for entry of summary judgment in favor of Nationwide.

I. Background Facts and Proceedings

This case arises from an August 16, 2009, automobile accident in which Kevin Jones alleges he was injured after being rear ended by Nathan Lockner. Kevin and Debra Jones had an automobile insurance policy through Nationwide which provided for underinsured motorists ("UIM") coverage. The UIM contract required the claimant to file the claim within two years from the date of the accident. The UIM endorsement policy states:

> No one may bring a legal action against us under Underinsured Motorists Coverage until there has been full compliance with all the terms of this policy. Further, any suit against us under this Underinsured Motorists Coverage will be barred unless commenced within two years after the date of the accident.

A lawsuit listing only Lockner as a defendant was filed on August 11, 2011. The two year period allowed by the policy for commencement of UIM claims against Nationwide closed on August 16, 2011. The UIM claim was not brought against Nationwide by the Joneses until November 4, 2011, well after the two year period ended. The Joneses claim they did not know the extent of their medical injuries until after the two year time period had run. Additionally, they claim their insurance agent was well aware of the fact that Kevin Jones was suffering from back pain sustained as a result of the car accident. Moreover, the Joneses claimed they "substantially complied" with the notice provision of the UIM policy.

The district court in large part relied on our case of *Robinson v. Allied Prop. & Cas. Ins. Co.*, File No. 10-1721, 2011 WL 2556951 (Iowa Ct. App. June 29, 2011), and found there were genuine issues of material fact remaining concerning whether the Joneses made every effort to determine the extent of injuries within the two-year time period and whether the two-year time limit prevented them from recovering under the UIM provision of the contract. The district court did not make any findings regarding the Joneses' other arguments.

Nationwide filed an application for interlocutory appeal on May 14, 2012, which was granted on June 6. On June 29, 2012, our supreme court reversed our holding in *Robinson*, finding a contractual UIM limitation matching the two-year statute of limitations for personal injury tort claims is per se reasonable. 816 N.W.2d at 404. Nationwide then filed a motion to summarily reverse the district court's decision based on our supreme court's opinion in *Robinson*. It was resisted and denied, which leads us to the issues in this appeal.

II. Standard of Review

We review a district court decision to grant or deny a motion for summary judgment for correction of errors at law. *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685 (Iowa 2010). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Griffin Pipe Products Co., Inc. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010). As this case arises from a denied motion for summary judgment, we view the record in the light most favorable to the Joneses as the nonmoving party. *See Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008).

III. Issue Preservation

The Joneses argue denial of Nationwide's motion for summary judgment should be affirmed as factual questions exist with regard to the Joneses' substantial compliance with the notice provision, and if they did not substantially comply there are factual questions as to whether Nationwide suffered any prejudice.[1] Nationwide responds that the language of the contract required filing of the action, not just notice, and any "substantial compliance" argument is contrary to the principles established in *Robinson*.[2]

---

[1] The Joneses further argue that because the claim against Lockner was brought within two years of the date of the accident and was a public record, the claims brought against Nationwide should "relate back" to the filed action date of August 2, 2011. Nationwide responds that is a new argument, asserted without legal authority, and should not be considered for the first time on appeal. We agree and do not address the issue.

[2] In their brief the Joneses did not argue the nature and extent of their injuries are still material issues of fact. They have therefore waived the argument. *See Genetsky v. Iowa State University*, 480 N.W.2d 858, 861 (Iowa 1992) (finding an issue is waived if no argument is presented).

"As we have indicated many times before, 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." *King v. State*, 818 N.W.2d 1, 11 (Iowa 2012) (citations omitted). Although not ruled on, the Joneses asserted to the district court that they substantially complied with the notice provisions of the UIM policy. That issue is therefore preserved and we can address its merits.

IV. *Robinson* and Substantial Compliance

The threshold question before us then becomes whether an argument of "substantial compliance" can still be meritorious after *Robinson*. The court in *Robinson* was clear when it held the "two-year UIM policy deadline is enforceable as a matter of law because it matches the two-year statute of limitations in Iowa Code section 614.1(2) (2009) for personal injury actions." 816 N.W.2d at 399-400.

When the facts relevant to the limitations issue are undisputed, the enforceability of the contractual limitations period is a question of law for the court. *Id.* at 401. The Joneses put absolutely no facts in dispute as to whether they complied with the filing mandated in the "The Legal Action Against Us" provision of the policy. To the contrary; they admit they did not. This requirement of filing suit within two years is separate and distinct from the provisions of the contract that provide the means of notifying Nationwide of a *possible* suit, such as the "Notification of Underinsurance Claim" sent to Nationwide on August 19, 2011. The Joneses claim multiple times in their brief "notice" was given only three days after the running of the limitation period, this however is an incorrect representation. The provision of the contract regarding

the initiation of legal action would not have been satisfied until the suit was actually filed on November 4, 2011, months after the running of the statute.

We therefore reverse the district court's order denying summary judgment as there are no remaining issues of material fact regarding compliance with the contractual time limitation of filing suit under the UIM endorsement to the policy, and remand for entry of summary judgment in favor of Nationwide.

REVERSED AND REMANDED.