

STATE OF MICHIGAN
COURT OF APPEALS

Estate of JOSEPH P. ESMER.

CATHERINE BRAINERD, Personal
Representative for the Estate of JOSEPH P.
ESMER,

Petitioner-Appellant,

v

HOME-OWNERS INSURANCE CO.,

Respondent-Appellee.

UNPUBLISHED
February 23, 2012

No. 301675
Saginaw Circuit Court
LC No. 10-009069-NF

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

In this underinsured-benefits case, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant, Home-Owners Insurance Company. Because this case is controlled by the Michigan Supreme Court's decision in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003), we affirm.

This case arises out of a fatal motor-vehicle accident. In January 2009, Joseph Esmer and John Schneider were passengers in a vehicle driven by Louis Giesken. While traveling east on US-2 in Mackinac County, Caitlin Grubb lost control of her vehicle on the icy roads, crossed into oncoming traffic, and collided with Giesken's vehicle. At the same time, Kristy Burt was driving west on US-2 and witnessed the collision. Burt had two passengers in her vehicle. Burt was unable to avoid the accident, and collided with the passenger side of Giesken's vehicle. Schneider, Burt, and the two passengers in Burt's vehicle were injured in the collision. Esmer died at the scene.

Grubb is the underinsured motorist at issue in this case. Grubb's vehicle was owned by Gerald Grubb, Jr. and insured by Michigan Millers Mutual Insurance Company. The liability limits for bodily injury pursuant to the policy on Grubb's vehicle were \$500,000 per person and \$500,000 per occurrence. The \$500,000 per occurrence amount was distributed among the injured parties as follows: \$230,000 to the Estate of Joseph Esmer, \$90,000 to Joshua Burt,

\$80,000 to Kristy Burt, \$50,000 to Giesken, and \$50,000 to Schneider pursuant to a settlement agreement.

Giesken's vehicle was insured by defendant Home-Owners; Giesken's policy included underinsured-motorist coverage that was limited to \$500,000 per person and \$500,000 per occurrence. The policy also contained a provision limiting defendant's liability to the amount by which the underinsured-motorist coverage exceeded the underinsured motorist's coverage limits for bodily injury. The provision also stated that the limits of liability would not be increased because of the number of persons injured.¹

Plaintiff, as the personal representative of Esmer's estate, filed a claim with defendant to recover underinsured-motorist benefits pursuant to Giesken's policy because Esmer was a lawful passenger in the vehicle. Defendant denied the claim on the basis that the policy provision limiting liability provided that the insured is entitled to underinsured-motorist benefits in excess of the "total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile." Defendant explained that the total amount of liability coverage available to Grubb, the underinsured motorist, was \$500,000 per person and per occurrence, and Giesken's policy amount was also \$500,000 per person and per occurrence; accordingly, there was no excess from which plaintiff could receive underinsured-motorist benefits.

¹ The provision in its entirety provides:

4. LIMIT OF LIABILITY

a. Our Limit of Liability for Underinsured Motorist Coverage shall not exceed the lowest of:

(1) the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile; or

(2) the amount by which compensatory damages for bodily injury exceed the total limits of those bodily injury liability bonds and policies.

b. The Limit of Liability is not increased because of the number of:

(1) automobiles shown or premiums charged in the Declarations;

(2) claims made or suits brought;

(3) persons injured; or

(4) automobiles involved in the occurrence

After defendant denied her claim, plaintiff filed a complaint seeking declaratory relief. Defendant moved for summary disposition based on *Wilkie*. A hearing regarding defendant's motion was held on November 29, 2010. During the hearing, defendant argued that *Wilkie* controlled and required summary disposition in its favor. Plaintiff acknowledged that *Wilkie* was controlling, but argued that it was wrongly decided. The trial court found *Wilkie* to be binding precedent and granted summary disposition in favor of defendant.

On appeal, plaintiff argues that summary disposition was improper. First, plaintiff argues that the plain language of the policy does not provide for any setoff of the underinsurance coverage based on the underinsured motorist's policy because the declarations page of the insurance policy provides that underinsured-motorist coverage is \$500,000 per person and \$500,000 per occurrence without stating that the amounts will be reduced by the amount of liability coverage available pursuant to the underinsured motorist's policy. Plaintiff argues that the policy accordingly fails to provide notice of the setoff.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. Summary disposition is proper when "there is no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). The trial court's interpretation of an insurance contract is also reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

"[A]n insurance contract should be read as a whole and meaning should be given to all terms." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). The insurance policy application, the declarations page, and the actual policy all constitute the insurance contract and must be construed together. *Id.* "The contractual language is to be given its ordinary and plain meaning." *Id.* If a contract provision is unambiguous, it must be enforced as written. *Id.* "A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Id.*

Accordingly, we consider the declarations page and the insurance policy together as a whole to determine whether the plain language of the contract provides for the setoff at issue in this case. The declarations page states that Giesken, the insured, elected to have underinsured-motorist coverage by paying a premium. It also indicates that the policy limits for underinsured-motorist coverage are \$500,000 per person and \$500,000 per occurrence. In the body of the insurance policy there is a section entitled "Underinsured Motorist Coverage." Within that section is a "Limit of Liability" provision, which states that the liability for underinsured-motorist coverage is limited to the amount by which the underinsured-motorist coverage limits exceed the total limits of all bodily injury policies available to the owner of the underinsured vehicle. It also states that this limit of liability will not be increased because of the number of persons injured. Accordingly, when properly read together, the declarations page and the provision limiting liability provide notice to plaintiff that the amount of the underinsured-motorist coverage will be offset by the total amount of the policy on the underinsured vehicle.

Thus, when the insurance policy is read in its entirety, plaintiff is provided notice of the limit of liability for underinsured-motorist coverage. Therefore, we conclude that the plain language of the insurance policy properly provides for the setoff relied upon by defendant to deny plaintiff's claim.

Plaintiff also argues that summary disposition was inappropriate because the provision limiting liability in the insurance policy is ambiguous, and must accordingly be construed in favor of coverage. Specially, plaintiff contends that the word "available" is ambiguous because it is unclear if the term is referring to the amount actually available to plaintiff or the amount potentially available to plaintiff. Plaintiff argues that the word "available" should be construed to mean "actually available." Under this interpretation, plaintiff would recover \$270,000.²

Plaintiff's argument is identical to the argument presented by the plaintiff in *Wilkie* and rejected by the Court in that case. *Wilkie*, 469 Mich at 49-51. The insurance policy provision at issue in this case provides that the underinsured-motorist coverage "shall not exceed . . . the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile." The *Wilkie* Court interpreted an identical insurance policy provision and concluded it was unambiguous. *Id.* at 44-51. The Court directly addressed plaintiff's argument that "available" should be interpreted to mean "actually available," holding that the provision could not be "referring to the amount actually received by the claimant because the provision specifically refers to the *total* available to the *owner*." *Id.* at 50 (emphasis in original). We are required to follow binding precedent from our Supreme Court. See *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 353-354; 785 NW2d 45 (2010). Accordingly, plaintiff's argument is without merit.

Lastly, plaintiff argues that the fact that there were multiple persons injured who recovered from the underinsured motor vehicle operator's insurance should have been considered because plaintiff's recovery was drastically reduced. The language of the insurance contract must be read as a whole and given its plain meaning. *Royal Prop Group*, 267 Mich App at 715. Giesken's insurance policy, in section 4(b)(3), specifically states that the liability limits will not be increased because of the number of persons injured. Accordingly, the plain language of the insurance contract forecloses the possibility of considering the number of persons involved in the accident.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

² \$500,000 (underinsured-motorist coverage limits) less \$230,000 (amount of bodily injury liability benefits actually received by plaintiff).