STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ELAINE RAVEN and THOMAS RAVEN,
Husband and wife,

Plaintiffs,

v

File No. 05-24875-NI
HON. PHILIP E. RODGERS, JR.

HOME OWNERS INSURANCE COMPANY
and AUTO-OWNERS INSURANCE COMPANY
Jointly and severally, and WOLVERINE MUTUAL
INSURANCE COMPANY,

Defendants.
/

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DECISION AND ORDER
AUTO-OWNERS AND WOLVERINE'S MOTIONS FOR SUMMARY DISPOSITION
REGARDING PRIORITY AND AMOUNT OF INSURANCE COVERAGE

Plaintiff Elaine Raven ("Raven") was injured when the automobile in which she was a passenger was struck by an oncoming pick-up truck on October 8, 2004. There is no dispute that the driver of the pick-up truck, Jason Swantek ("Swantek") was at fault. He had insurance through Allstate Insurance with policy limits of $20,000 per person and $40,000 per occurrence. Jerome Swantek, the owner of the at-fault vehicle was uninsured at the time of the accident.

The owner and driver of the automobile in which Raven was riding was Susan Strabel ("Strabel"). Strabel and her automobile were insured by Defendant Wolverine Mutual Insurance Company ("Wolverine"). The Wolverine policy limits are $250,000 per person and $500,000 per occurrence and the policy includes underinsured motorist coverage. Raven also had a personal automobile policy with Defendant Auto-Owners Insurance Company ("Auto-

Owners"). The policy has limits of $500,000 per person and $500,000 per occurrence and includes underinsured motorist coverage.

Plaintiff Raven sued Wolverine and Auto-Owners for underinsured motorist coverage, claiming that the at-fault driver was underinsured for the value of her injuries. Swantek's insurer has already paid policy limits.

Auto-Owners filed a motion for summary disposition pursuant to MCR 2.116(C)(10), claiming that it is entitled to a declaratory judgment as a matter of law that Wolverine's underinsured policy is the primary policy because its policy covered the vehicle involved in the accident and, therefore, the Auto-Owners' policy is excess. And, that the anti-stacking clause in the Auto-Owners' policy reduces its exposure in this case to $250,000 minus any payments received by Raven from Swantek's insurance company.

Wolverine filed a response to Auto-Owners' motion, claiming that Auto-Owners is co-primary with Wolverine and that they both have pro rata liability based on the "other insurance" clauses in their policies.

Raven filed a response to Auto-Owners' motion, claiming she is entitled to a declaratory judgment pursuant to MCR 2.116(I)(2) that Wolverine's insurance policy is primary and that the pro rata clause in Wolverine's policy must be disregarded.

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
>
> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions,

admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

APPLICABLE INSURANCE PROVISIONS

The Wolverine policy contains the following relevant provisions:

If Part D - Uninsured motorists coverage and underinsured motorist coverage is provided as indicated in the Declaration, we will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of bodily injury:

1. Sustained by an **insured**; and
2. Caused by an accident.

* * *

We will pay under this coverage only after the limits of liability under any applicable **bodily injury** liability bonds or policies have been exhausted by payment or judgments or settlements.

"Insured" as used in this coverage means:

1. You or any **family member**;
2. Any other person occupying **your covered auto**.

* * *

OTHER INSURANCE

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears on the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

The Auto-Owners policy contains the following relevant provisions:

2. **COVERAGE**

a. **We** will pay compensatory damages any person is legally entitled to recover:

(1) from the owner or operator of an **underinsured automobile**;

(2) for **bodily injury** sustained while occupying or getting into or out of an **automobile** that is covered by **SECTION II - LIABILITY COVERAGE** of the policy.

* * *

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.

* * *

5. **OTHER INSURANCE**

If there is other Underinsured Motorist Coverage which applies, **we** will pay **our** share of the damages. **Our** share will be the ratio of **our** limit of liability to the total of all limits which apply. Total damages payable for one **occurrence** shall be considered not to exceed the limit of liability of the applicable policy that has the highest limit of liability.

The coverage extended to **automobiles you** do not own will be excess over any other insurance available to you.

6. INDIVIDUAL NAMED INSURED

If the first named insured in the Declarations is an individual, the coverage provided by this endorsement is extended as follows:

a. **We** will pay compensatory damages **you** are legally entitled to recover.
   (a) from the owner or operator of any **underinsured automobile**;
   (b) for **bodily injury you** accidentally sustain and which arises out of the ownership, maintenance or use of the **underinsured automobile** when **you** are a pedestrian or while occupying an **automobile you** do not own which is not covered by **SECTION II - LIABILITY COVERAGE** of this policy.

b. The coverage extended in 6.a. above is also afforded to a **relative** who does not own an automobile.

Under her Auto-Owners policy, Raven would ordinarily be entitled to collect "compensatory damages" she is "legally entitled to recover" from the "owner or operator of an underinsured automobile" up to her policy limits of $500,000. As an occupant of Strabel's vehicle, Raven would ordinarily also be entitled to recover under Strabel's Wolverine policy up to the policy limits of $250,000.

The question presented here is whether the pro rata, anti-stacking, or excess clauses that apply when there is "other insurance" reduce or eliminate either insurer's liability.

Auto-Owners claims that the Wolverine policy is primary because Wolverine insured Strabel's vehicle. Therefore, Wolverine must tender its policy limits before Auto-Owners is liable for any excess. Auto-Owners relies upon *Werner v Travelers Ind Co*, 55 Mich App 390 (1974) and *Shelter Mutual Ins Co v Williams*, 69 Ark App 35; 9 SW 3d 545 (2000); 7A Am Jur 2d Automobile Ins § 543 (1997).

Wolverine, on the other hand, argues that the "other insurance" clause in the Auto-Owners policy makes Auto-Owners co-primary with Wolverine on a pro rata basis. Wolverine relies upon the language of the "other insurance" clauses in both policies and this Court's opinion in *Estate of Larry R Kinney v Auto-Owners Ins Co*, Grand Traverse County Circuit Court File No. 03-22876-CZ. In the *Estate of Kinney* case, this Court held that the "effect of an excess clause is to allocate liability among the primary insurers, not to eradicate the primary nature of the policy when a non-owned or substitute vehicle is involved," citing *Bosco v Bauermeister*, 456 Mich 279; 571 NW2d 509 (1997). This Court also recognized that, when

there is an anti-stacking provision in combination with an excess clause, the "[t]otal damages payable for one occurrence shall be considered not to exceed the limit of liability of the applicable policy that has the highest limit of liability."

The excess clauses are applicable in each policy because Raven was injured while she was a passenger in a vehicle she did not own. The driver of that vehicle was not at fault. In this circumstance, "primary" coverage is that applicable to the at-fault driver and the at-fault vehicle. Both policies at issue here are underinsurance policies and are of the same level of priority. Pursuant to the pro rata clauses, each underinsurance insurer is liable for its share of the damages according to the ratio of its limit of liability to the total of all limits that apply.

The limit of liability under the Wolverine policy is $250,000 per person. The limit of liability under the Auto-Owners policy is $500,000 per person. The total limit of all applicable underinsurance policies is $750,000 per person. The ratio of $250,000 to $750,000 is 1/3. The ratio of $500,000 to $750,000 is 2/3. Therefore, Wolverine is liable for 1/3 of Raven's damages under its policy up to a single limit of $166,667. Auto-Owners is liable for 2/3 of Raven's damages under its policy up to a single limit of $333,333.[1]

The next question the Court must answer is whether either Wolverine or Auto-Owners is entitled to an off set for any amount the other pays. It is undisputed that Swantek's Allstate policy provided $20,000 per person and $40,000 per occurrence limits. Raven was entitled to recover $20,000 under Swantek's policy. Under the Auto-Owners policy, the 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

[1] In reaching this conclusion, it is important to bear in mind that Wolverine is the insurer of the not at-fault driver of the vehicle in which Raven was a passenger. Raven is a defined "insured" under the Wolverine policy and the policy does not contain an anti-stacking provision. Raven is also an insured under her Auto-Owners policy which contains an anti-stacking provision that provides: "Total damages payable for one occurrence shall be considered not to exceed the limit of liability of the applicable policy that has the highest limit of liability." The "policy that has the highest limit of liability" is the Auto-Owners policy. Thus, the anti-stacking provision is meaningless since the amount payable is limited to "the highest limit of liability" and the highest limit of liability is the $500,000 limit provided for under the Auto-Owners policy. The anti-stacking provision is also irrelevant because, as noted above, each underinsurance policy is of the same level of priority and a pro rata distribution is required. Off sets between Wolverine and Auto-Owners would only be relevant if one insurer was primary and the other excess.

underinsured automobile; or (2) the amount by which compensatory damages **for bodily** injury exceed the total limit of those **bodily injury** liability bonds and policies."

The "amount by which the limits stated in the Declarations [$500,000] exceed the total limits of all bodily injury bonds and policies available to the owner or operator of the underinsured automobile [Swantek's Allstate policy or $20,000]" is $480,000. The "amount by which compensatory damages for bodily injury [as yet to be determined but in no event greater than the policy limit of $500,000] exceed the total limits of those bodily injury liability bonds and policies [Swantek's Allstate policy or $20,000]" is at most also $480,000. Therefore, both Wolverine and Auto-Owners are entitled to off set $20,000 against the amounts they must pay because Raven was entitled to $20,000 under Swantek's Allstate policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich. 41, 50-51; 664 NW2d 776 (2003). However, neither of them is entitled to off set the amount paid by the other.

CONCLUSION

As to Plaintiff Raven, Wolverine and Auto-Owners are co-primary providers of underinsurance protection benefits. They are each liable for their pro rata share of damages based on the proportion that their limit of liability bears to the total of all applicable limits. The total of all applicable limits is $750,000. Wolverine's limit of liability is 1/3 of the total of the applicable limits. Auto-Owners' limit of liability is 2/3 of the total of all applicable limits. Therefore, Raven may not recover more than $166,667 from Wolverine or $333,333 from Auto-Owners.[2]

The anti-stacking provision in Auto-Owners' policy is meaningless because it limits Auto-Owners liability to the highest limit of liability under the applicable policies which is the $500,000 limit of liability under the Auto-Owners policy.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/19/06

[2] Raven's recovery may well be less due to *Wilkie* set offs and the fact that multiple claims on each policy may trigger occurrence limits and a further need to share available limits.