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## Our No-Fault Service Provider Spotlight



*Inspire Home Care*

*Serving Southeast Michigan*

Ph: 248-972-5528

<http://inspirehomecare.com>

This month we spotlight Inspire Home Care. Inspire Home Care draws on over 20 years of experience in providing private duty home care and in-home physical, occupational and speech therapy.

Directed by Lorine Beattie, Inspire Home Care works with many spinal cord injury and brain injury clients to maximize their care, recovery, rehabilitation, comfort and safety. It is focused on providing care for individuals with medically complex injuries due to an auto accident or a work related accident.

"Our mission is to surpass expectations and provide the best and brightest caregivers and in-home therapists in Southeast Michigan," says Beattie. She attributes the growth and success of the agency to having a strong and trusted team. "Members of our team are carefully chosen and demonstrate a high level of respect and compassion for our clients," Beattie added.

Inspire Home Care is available 24 hours a day serving in Wayne, Oakland, Macomb, Washtenaw and Genesee Counties. For more information, call Lorine Beattie, Administrator, or Kathy Vitullo, Community Relations Director, toll-free at 877-873-9744 or 248-972-5528.



Lorine Beattie, Anna Leuterio Mix and Kathy Vitullo with Inspire Home Care.

April 2012

### Special points of interest:

- Is non-occupant of automobile entitled to Underinsured Motorist Benefits?
- Does the liability limits increase with the number of people injured in an auto accident?

### Inside this Issue:

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# The Michigan No-Fault Newsletter

## Tow Truck Driver Hit Outside of Truck Not Entitled To Underinsured Motorist Benefits

In *Westfield v. Ken's Service*, \_\_\_ Mich App. \_\_\_, decided March 8, 2012 (Docket No. 300941), the Court upheld the trial court decision denying underinsured motorist benefits to Mark Roberts.

On December 19, 2009, defendant Ken's Service, a tow truck company, dispatched one of its employees, Mark Robbins, to assist a police officer, Roderick Vessey, in removing his vehicle from a ditch on US-131.

When he arrived at the scene, Robbins got out of the tow truck and connected the tow cables to the police vehicle. While he was operating the control levers positioned on the side of the tow truck, another driver, Ashley See, sideswiped the tow truck and collided with Robbins.

Robbins suffered substantial injuries, including a broken right arm and a protruding break of the right tibia/fibula. Robbins represented that he was "crippled for life."

Harold Ingersoll owned the car that Ashley See was driving. Ingersoll's insurance company, Auto-Owners Insurance, agreed to tender the full \$100,000 limits of the liability policy to settle the claim.

However, Robbins sought additional compensation from Westfield Insurance, Ken's Service's insurer, based on underinsured motorist coverage obtained for the tow truck. Ken's Service had un-

derinsured motorist coverage in the amount of \$1,000,000. Underinsured motorist coverage provides additional coverage to an insured over the liability policy limits of the negligent driver and owner of an automobile.

The uninsured/underinsured motorist endorsement to the Westfield Insurance policy provided for underinsured motorist coverage for the "insured," which the policy defined in relevant part to include "[a]nyone [besides the named insured or a family member] 'occupying' a covered 'auto'..." Further, the endorsement defined "occupying" to mean "in, upon, getting in, on, out or off."

Westfield Insurance refused to pay on the claim based on its determination that Robbins was not "occupying" the vehicle at the time of the accident. Westfield Insurance then filed a declaratory judgment action asking the trial court for a determination of its obligations to Robbins under the insurance contract.

Ken's Service and Robbins argued that Robbins was leaning on the tow truck for balance and support when See struck him, and that this occurred while he was operating the towing controls, which were located on the driver's

side of the truck. Ken's Service and Robbins asserted that Westfield Insurance owed Robbins additional compensation because: (1) his injuries greatly exceeded the negligent driver's \$100,000 policy, and (2) Robbins was an "insured" under the terms of the underinsured motorist endorsement to the policy because he was "occupying" the insured vehicle by leaning "upon" the tow truck.

Westfield Insurance responded, arguing that Robbins was not occupying the tow truck when See struck him. Westfield Insurance asserted that Robbins clearly had both feet on the ground and had been outside the truck for several minutes when he was hit and injured. Westfield Insurance claimed that the term "upon" can only be properly interpreted in context of the word "occupying." Westfield Insurance maintained that Robbins' physical contact with the truck needed to be "in the context" of being physically inside the truck, that his actions were not "in the context" of being an occupant, and that he therefore was not insured under the policy.



**Michigan Attorney Daniel L. Buckfire**

Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.

**TOW TRUCK, cont. from Page 1**

The trial court agreed with Westfield, focused on the word “occupying” and determined that coverage should depend on a person’s connectedness with the activity of being a driver or passenger of the vehicle. According to the trial court, if the activity or physical contact was inci-

dental to being a driver or a passenger, then the person would be occupying the vehicle and therefore would be insured. The trial court said that physical contact alone with the vehicle was not relevant.

On appeal, the Court held in favor of Westfield.

The Court held that that the policy’s definition of occupying required that a claimant be “in, upon, getting in, on, out or off” of the vehicle and did not include a person, like Robbins, who was outside of the vehicle operating other equipment.

**Underinsured Benefits Not Available To Family Despite Multiple Plaintiffs**

In *Brainerd v. Home-Owners Ins. Co.*, unpublished per curiam opinion of the Court of Appeals, decided February 23, 2012 (Docket No. 301675), the Court of Appeals upheld the dismissal of the Plaintiff’s underinsured motorist case against Home-Owners Ins. Co.

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 bod-

ily 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 the 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.

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 Giesken’s 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 the plaintiff could receive underinsured-motorist benefits.

After the Defendant denied her claim, plaintiff sued Defendant Home-Owners Insurance. Home-Owners filed a motion to dismiss the case based upon the Michigan Supreme Court decision in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). The trial court

See UNDERINSURED, page 3

**UNDERINSURED, cont. from Page 2**

granted Home-Owners motion and the case was dismissed.

On Appeal, the Court held that the Plaintiff’s argument was identical to the argument presented by the plaintiff in *Wilkie* and rejected by the Supreme Court in that case. The insurance policy provision at issue in this case provided 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 not ambiguous. 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.”

Lastly, the Court rejected plaintiff’s argument 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. In this regard, the Court stated that the insurance policy specifically states that the liability limits will not be increased because of the number of persons injured.

**Buckfire & Buckfire Detroit Tigers Tickets Giveaway**

*“We believe that giving back to the community not only enriches our own lives but also makes us better attorneys for our catastrophically injured clients.”*

*Lawrence J. Buckfire*

*Schedule of Tiger Tickets*

Available for Nomination

**\*Note: All games start at 1:05 P.M.**

- April 5, Red Sox
- April 22, Rangers
- April 25, Mariners
- May 6, White Sox
- May 20, Pirates
- June 3, Yankees
- June 19, Cardinals
- July 5, Twins
- July 8, Royals
- July 22, White Sox
- August 5, Indians
- August 7, Yankees
- August 26, Angels
- September 23, Twins
- September 27, Royals



**Buckfire Announces First Recipient Of Detroit Tigers Tickets Giveaway**

**Nominate your TBI & SCI client today to receive free tickets to a 2012 Detroit Tigers Game!**

Buckfire & Buckfire is proud to announce the first recipient of the Detroit Tigers Tickets Giveaway for the April 5, 2012 game, Dieter Wasserbaech.

Dieter graduated from Eisenhower High School in 1983 in the top 2% of his class of 700 students. During high school, he was active in soccer, weight lifting, football, and numerous clubs and academic functions. At the close of his Senior year, Dieter was injured when he dove into the lake behind his house, leaving him paralyzed from the neck down.



Dieter Wasserbaech at annual Spinal Cord Society golf outing with volunteers.

Though rehabilitation has been unsuccessful to date, Dieter has gone on to achieve a Bachelor’s degree in Finance and graduated first in his class at Walsh College. He has received a Masters degree in Finance from Walsh, graduating fourth in his class, and obtained a Law degree from Wayne State University, successfully passing the Bar Exam.

Dieter is heavily involved with the Spinal Cord Society (SCS), a group dedicated to finding a cure for paralysis, and a recipient of over \$500,000.00 in funds raised by Dieter through an annual golf outing.

If you are a medical provider or nurse case manager involved in the care and treatment of a TBI or SCI survivor, nominate them today! Recipients will receive two excellent seats in the handicapped section of the lower deck in Comerica Park along with a handicapped parking pass.

For more information on the Giveaway and to nominate someone today visit <http://bit.ly/buckfireticketsgiveaway!>