IN THE SUPREME COURT FOR THE STATE OF OREGON

ALEX SPEARMAN,
Plaintiff-Appellant, Petitioner on Review

v.

PROGRESSIVE CLASSIC INSURANCE COMPANY,
A Wisconsin Corporation,
Defendant-Respondent, Respondent on Review

Multnomah County Circuit Court No. 1302-01718
C.A. No. A155674; Supreme Court No. S063995

RESPONDENT'S BRIEF ON THE MERITS

Review of the Court of Appeals *en banc* decision affirming the judgment of the Circuit Court for Multnomah County, The Honorable Nan Waller, Judge

Date of Decision on Review:	January 27, 2016
Author:	Flynn, J., for the Court, *en banc*
Concurrence:	DeVore, J.

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LEGAL QUESTION PRESENTED

Question:

Under ORS 742.061(3), is a plaintiff entitled to attorney fees because a defending insurer asks for a decision on the issue of damages?

Answer to Question Presented:

No. ORS 742.061(3) precludes attorney fee awards when a defending insurer does not raise coverage defenses and asks for a damages decision.

NATURE OF THE ACTION

This is a disagreement about plaintiff's entitlement to attorney fees under ORS 742.061 in connection with his claim for uninsured motorist bodily injury (UM) benefits. Plaintiff's complaint alleged entitlement to $25,000 in UM benefits from defendant as a result of his injuries. (ER 4-7.)[1] Defendant answered by admitting many of plaintiff's allegations. Defendant also made certain, important, admissions in response to Plaintiff's First Request for Admissions. (ER 8-9; 13-15.) After defendant's admissions, the only issue to be decided was the damages due plaintiff. The action proceeded to "court-annexed" arbitration pursuant to ORS 36.425. The arbitrator awarded $5,000 in

[1] References to the Excerpt of Record are to those submitted with Appellant's Opening Brief to the Court of Appeals.

non-economic damages and $1,022.80 in economic damages for medical expenses. (ER 39.)

Plaintiff requested an award of attorney fees under ORS 742.061. Defendant invoked the protection of ORS 742.061(3). The arbitrator denied plaintiff's fee request. Plaintiff took exception to the arbitrator's attorney fee decision and sought review by the circuit court. (ER 16-39.) The circuit court agreed with the arbitrator and denied the attorney fee request. (ER 1-3; Tr. 16.) The Court of Appeals affirmed the judgment of the circuit court. *Spearman v. Progressive Classic Ins. Co.*, 276 Or App 114, 366 P3d 821 (2016). This Court accepted review.

OBJECTION TO ATTEMPTED CHANGE OF SUBJECT

Pursuant to ORAP 9.17 (2)(b)(i), defendant objects to plaintiff's attempt, for the first time, to change the subject of this action. In Petitioner's Brief on the Merits, for the first time, plaintiff claims, falsely, that defendant "denied that an accident with a UM driver had even occurred." (*See, e.g.*, Pl.'s Merits Brief, pp. 3, 5, 6, 10.) To this Court, plaintiff presents the brand new argument that an "occurrence" denial implicates the phrase "accepted coverage" found in ORS 742.061(3)(a). Defendant never made an "occurrence" denial. (See Response to Misstatements of Fact, *infra*.) Plaintiff has never before asserted that defendant

made an "occurrence" denial. In fact, plaintiff-appellant's Opening Brief to the Court of Appeals states, "Progressive admitted the UM motorist was liable[.]" (Pl.'s Opening Brief; p. 9.)[2]

Every previous oral and written submission regarding the fee claim pertained to defendant's intra-litigation admissions and arguments concerning plaintiff's claimed damages and the prayer for relief of defendant's answer. The Court of Appeals stated, "this case requires us to identify the scope of issues of "damages due the insured" and to determine whether defendant stayed within that scope." *Spearman, supra*, 276 Or App at 120.

Plaintiff's attempt to add to or change the subject of this appeal through his brief on the merits to this Court violates ORAP 9.17(2)(b)(i). That rule

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[2] Plaintiff's new (and incorrect) factual assertions in his Brief on the Merits regarding "occurrence" denial directly conflict with plaintiff's own prior assertions.

Compare:

"Progressive conceded that the uninsured motorist was liable[.]" (Pl.'s Opening Brief, p. 3) *and* "Progressive admitted the UM motorist was liable[.]" (Pl.'s Opening Brief, p.9).

to

"[P]rogressive's pleadings denied that an accident with a UM driver had even occurred[.]" (Pl.'s Merits Brief, p. 3) *and* "Progressive's Answer denied that an accident had occurred." (Pl.'s Merits Brief, p. 5).

states, in pertinent part:

> (b) The petitioner's brief on the merits on review shall contain: (I) Concise statements of the legal question or questions presented on review and the rule of law that petitioner proposes be established. . . . The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

(Emphasis supplied.) Through his incorrect assertions about an "occurrence" denial, plaintiff seems to be attempting to add to or change the substance of the question for which review was granted. That attempt should be denied.[3]

Plaintiff's late attempt to add to or change the subject of this appeal also violates ORAP 5.45 (preservation of error). Before the circuit court and before the Court of Appeals, plaintiff cited defendant's prayer for relief along with defendant's answer and ORCP 45 admissions concerning plaintiff's claimed injuries and medical expenses as the bases for his attorney fee argument. Plaintiff never explained to the trial court that he thought that a purported "occurrence" denial in defendant's answer removed defendant from the "safe harbor" of ORS 742.061(3). Thus, plaintiff's argument that a purported "occurrence" denial acted to eliminate "safe harbor" was not preserved. To

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[3] It is noteworthy that neither of the Court of Appeals opinions nor the brief on the merits filed by amicus curiae mention the "occurrence" denial now, erroneously, asserted by plaintiff.

preserve an issue for review, "a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000). The "occurrence" denial issue (and any claimed error regarding that issue) was not preserved and should not be considered. *Id.* at 341.

SUMMARY OF ARGUMENT

In UM benefits actions, ORS 742.061(3) expressly allows a defending UM insurance company to place at issue (i.e., to dispute) the "damages due the insured" and still maintain "safe harbor" from an attorney fee claim. This is an action for UM injury benefits. ORS 742.504(1)(a) defines UM injury benefits as:

> "all sums that the insured . . . is legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle because of bodily injury sustained by the insured caused by accident . . . [.]" [4]

That definition requires that to be entitled to UM injury benefits, the claimant

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[4] As has been recognized by this Court, "general and special damages" are now called "noneconomic" and "economic" damages. ORS 31.710; *Clarke v. Oregon Health Sciences University*, 343 Or 581, 608 n.17, 175 P3d 418 (2007).

must show a legal entitlement to standard tort damages. To resolve an issue of "damages due" the decision-maker must consider and weigh the competing evidence concerning the elements of the claimed damages. Otherwise, the "damages due" would not be at "issue." If the evidence supporting the claimed damages is non-existent or is insufficient, the insured is not "legally entitled" to damages.

A person seeking UM benefits is to be "placed in the same position-no better and no worse-than he or she would have occupied had the responsible party been insured." *Vega v. Farmers Insurance Company of Oregon*, 323 Or 291, 306, 918 P2d 95 (1996). Here, plaintiff attempts to put himself in a much better position than if the responsible party had been insured. Plaintiff asks this Court to hold that, in order to avoid plaintiff's attorney fee claim, defendant should have conceded, at every step, that at least some amount (above zero) was owed for each item of claimed damages. Plaintiff's position is not supported by the law or the facts.

The intent of ORS 742.061(3) is to reduce lawsuits over UM benefits and to encourage binding arbitration of those claims when coverage is not disputed and when only liability and damages need be decided. Plaintiff's proposed rule, requiring UM insurers to admit that some damages are owed in order to avoid

attorney fee exposure, conflicts with the text and intent of ORS 742.061(3).

While there is no evidence that the legislature intended that insurance companies must admit to owing some damages to be safe from an attorney fee award; defendant did so here. From the outset of the action through the arbitration hearing deciding plaintiff's damages, defendant admitted that plaintiff was eligible for the payment of UM benefits.[5] Defendant complied with, and went beyond, the statutory requirements of accepting coverage, agreeing to binding arbitration, and limiting the issues.

If, however, the pleadings and admissions of the parties are interpreted to have created the possibility of a "zero recovery" (if plaintiff failed to sustain his burden of proof on damages); defendant is still safe from plaintiff's attorney fee claim. Damages are at issue when the proponent alleges damages and the opponent asks that the damages be decided based upon the evidence. ORS 742.061(3) allows defending UM insurers to safely ask for a resolution of the issue of damages.

Plaintiff's argument, that to be safe from an attorney fee claim the

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[5] Although not addressed by the Court of Appeals, very early in this action defendant admitted that: "Plaintiff has performed all of the obligations required of him in order to be eligible for the payment of uninsured motorist benefits[.]" (Defendant's Response to Plaintiff's First Request for Admissions, No. 7; ER 15.)

insurance company must always concede that some damages are owed, ignores the fact that when damages are at issue, the proponent of such damages has the burden of proof. Non-existent or insufficient proof of the claimed damages means a zero damages recovery. Non-existent or insufficient proof of claimed damages does not mean that the insurance company denied coverage. To the extent that plaintiff would extend *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 166 P3d 519 ["*Grisby I*"], *adh'd to as modified on recons*, 343 Or 394, 171 P3d 352 (2007) ["*Grisby II*"] beyond PIP benefits claims to require that UM insurers admit to owing some damages in every claim in order stay within the safe issue of "damages due," such extension should be declined.

Grisby was about PIP and subsection (2) of ORS 742.061. 343 Or 394. *Grisby* did not consider subsection (3) of ORS 742.061 and the statutory scheme for UM benefits at issue here. *Grisby* did not consider that UM benefits are intended to place insureds in the same position they would have been in if the at-fault driver was insured. *Vega v. Farmers*, 323 Or 291, 305-06, 918 P2d 95 (1996). When in that position, insureds seeking UM benefits have the burden of proving the legal entitlement to damages. That is, insureds seeking UM benefits via an action against an insurance company must prove the liability of the at-fault driver and the damages that would be owed by the at-fault driver.

That "case within a case" present in this UM benefits action was not present in *Grisby*.

Grisby II held that the insurer lost "safe harbor" under subsection (2) of ORS 742.061 by disputing issues in addition to "the amount of [PIP] benefits due the insured." *Grisby*, 343 Or at 398.[6] *Grisby II* concluded that "safe harbor" was not available to the insurer because it disputed "whether" any of the claimed PIP benefits were due. In contrast, here defendant never disputed anything other than the amount of "damages due the insured." *Grisby* is of no help to plaintiff.

Relying upon *Grisby I*'s comment suggesting that zero is not an "amount," 343 Or at 182, plaintiff pieces together his argument that a defending UM insurer loses "safe harbor" any time the insurer raises any issue that could

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[6]In reaching its conclusion, *Grisby* did not address the legislative intent of ORS 742.061(2) - to reduce lawsuits about PIP and to encourage binding arbitration to resolve such claims. *Grisby I* addressed PIP statutes as context for the "safe harbor" of ORS 742.061(2). 343 Or at 182-183. However, *Grisby* did not reconcile its holding with the legislative prescription that the amount of PIP benefits due for medical expenses is necessarily dependent upon proof of two foundational elements: reasonable and necessary. ORS 742.524(1)(a). Sufficient evidence of both foundational elements is required to determine the "amount of benefits due." While *Grisby* is completely distinguishable from this matter, defendant submits that *Grisby's* holding is inconsistent with the legislative intent of the PIP "safe harbor" provision of ORS 742.061 and is inconsistent with the statutorily prescribed elements for determining PIP medical benefits.

result in a recovery of the amount of zero by a UM benefits claimant. (*See, e.g.*, Pl.'s Opening Brief to Court of Appeals, p.4.) One problem with plaintiff's "zero is not an amount" argument is that *Grisby I* did not reconcile its "zero" analysis with, or even acknowledge, the common use of zero as an amount within Oregon law. Plaintiff presents (as does amicus) further argument relying upon the disavowed definition of "accepted coverage" found in *Grisby I*.

Plaintiff's arguments would have this Court ignore legislatively prescribed definitions of "uninsured motorist benefits" and "damages." Plaintiff's arguments would have this Court ignore the legislative intent of ORS 742.061(3) to reduce lawsuits regarding UM benefit disputes and to encourage binding arbitration of those disputes when the only issues are liability and damages (as opposed to policy interpretation/coverage issues). Plaintiff's arguments ignore that the factual record establishes that, from the outset of this action, the only issue was the damages due plaintiff. Plaintiff's arguments ignore the factual record establishing that, even if defendant's dispute as to the elements of plaintiff's damages could have resulted in zero recovery by plaintiff, those disputes by defendant only concerned the safe issue of damages due.

The decision of the Court of Appeals and the judgment of the trial court

denying plaintiff's attorney fee claim should be affirmed.

SUMMARY OF KEY FACTS

* Defendant timely sent a qualifying "safe harbor" letter. (ER 33.)

* Defendant admitted that plaintiff was an insured person under the terms of defendant's policy. (ER 4-9, 13.)

* Defendant admitted "That Plaintiff has in all tbings conformed to and observed all of the articles, stipulations and conditions which, on Plaintiff's part, were required to be observed and performed according to the policy and the conditions thereto annexed, including the requirements of the policy and ORS 742.504, *et seq.*" (ER 4-9.)

* Defendant admitted tbat plaintiff "duly performed all preconditions to the recovery of benefits under the policy of insurance." (ER 4-9.)[7]

* Defendant admitted "that Plaintiff has performed all of the obligations required of him in order to be eligible for the payment of uninsured motorist benefits according to the policy by

[7] Defendant's Answer includes a comment about an independent medical examination. But, the Answer also expressly states that defendant "is not raising [that examination] as a defense or breach in this lawsuit." (ER 9, ¶ 5.)

Defendant." (ER 13-15.) (Emphasis supplied.)

* Defendant admitted the occurrence of the uninsured motorist accident alleged in plaintiff's complaint. (ER 4-9.)
* Defendant admitted the liability of the uninsured driver. (ER 4-9.)
* Defendant admitted that plaintiff suffered some injury as a result of the accident alleged in plaintiff's complaint. (ER 4-9; 13)
* Defendant admitted that plaintiff incurred some economic damages. (ER 14.)
* Defendant admitted that plaintiff received treatment from medical providers which was made necessary by the injuries plaintiff sustained in the accident alleged in the complaint. (ER 14.)
* Defendant admitted that some medical expenses claimed by the plaintiff were reasonable for the services provided. (ER 14-15.)
* At the arbitration, defendant argued the amount of damages due plaintiff. (ER 31-32.)
* Defendant did not present any evidence; nor make any argument to suggest that the arbitrator award zero damages. (ER 31-32.)
* The only issue presented to and decided by the arbitrator was the damages due the plaintiff. (ER 39.)

Defendant's answer and responses to plaintiff's requested admissions contested the nature and extent of plaintiff's claimed injury and the value of plaintiff's damages. Plaintiff's eligibility for the payment of some amount of UM benefits was admitted from the outset of the action and maintained throughout.[8]

RESPONSE TO MISSTATEMENTS OF FACT

Defendant objects to the following fact misstatements by plaintiff (from briefing to this Court and to the Court of Appeals):

1. Plaintiff erroneously represents to this Court (more than once) that defendant "denied that Plaintiff's accident bad occurred" and that defendant "denied that an accident with a UM driver had even occurred[.]" (*See, e.g.*, Pl.'s Brief on the Merits, pp. 3, 5, 6, 10.)

Response: Paragraph 4 of plaintiff's Complaint alleges the facts of the subject auto accident including an allegation that when plaintiff "stopped his automobile traffic stopped ahead[.] [sic]" (ER 5.)

Paragraph 2 of defendant's Answer states: "Admits the allegations

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[8] Defendant's Answer was filed March 13, 2013. Defendant's Response to Plaintiff's First Request for Admissions was filed March 25, 2013. (ER 15.) The arbitrator's opinion e-mail announcing his decision on the sole issue of damages is dated July 25, 2013. (ER 39.)

contained in paragraph 4, except that Defendant lacks information and knowledge as to whether or not plaintiff was stopped at impact." (ER 8.)

Paragraph 5 of plaintiff's complaint alleges that "the aforesaid accident was caused by an uninsured vehicle and motorist as defined in the policy and at ORS 742.502(2)(a). (ER 5.)

Paragraph 1 of defendant's Answer admits the entirety of paragraph 5 of the Complaint. (ER 8.)

As noted above ("Objection to Attempted Change of Subject"), plaintiff previously represented to the Court of Appeals that defendant "conceded that the uninsured motorist was liable[.]" (Pl's Opening Brief, p. 3) and that "Progressive admitted the UM motorist was liable[.]" (Pl's Opening Brief, p.9.)

2. Plaintiff erroneously represents to this Court that defendant "was allowed to argue at arbitration, and did argue, that plaintiff was entitled to no award at all." (Pl.'s Brief on the Merits, p. 6.)

Response: The Declaration of Janice L. (ER 31-32) was admitted into the trial court's evidentiary record without objection. That Declaration is uncontroverted and is the only competent evidence

in the record showing the defense's evidence and arguments at the arbitration hearing. That evidence is: "At the arbitration Defendant argued the amount of damages due Plaintiff. Defendant did not present any evidence; nor make any argument to suggest that the arbitrator award zero damages." (ER 31-32.)

3. Plaintiff erroneously represented to this Court that defendant "denied during litigation that Plaintiff was injured and instead claimed he'd suffered no damages at all[.]" (Pl.'s Petition for Review, p. 3.)

Response: Paragraph 3 of defendant's Answer states: "Defendant admits that plaintiff sustained 'some' injury[.]" (ER 8.) Number 4 of Defendant's Response to Plaintiff's First Request for Admissions admitted "that plaintiff suffered "some" economic damage in the accident alleged in the Complaint; however, defendant denies the reasonableness, necessity, relatedness, and extent of plaintiff's economic damages." (ER 14.)

4. Plaintiff erroneously represented, to the Court of Appeals, that defendant "failed to admit" that the accident caused plaintiff some injury. (Pl.'s Reply Brief to Court of Appeals, p.7.)

Response: In its answer and in its response to plaintiff's request for

admissions, defendant admitted "that plaintiff sustained 'some' injury" as a result of the accident. (ER 8, ¶ 3; ER 13.)

By repeatedly misrepresenting and omitting facts, plaintiff is seemingly trying to convolute the issues. Despite plaintiff's misrepresentations and omissions, the record demonstrates that the only issue ever raised and decided by the arbitrator was the damages due plaintiff as a result of the accident caused by the uninsured motorist.

ARGUMENT

1. Defendant is safe from plaintiff's attorney fee claim because the only issue was "the damages due" plaintiff.

The result reached by the arbitrator, the trial court, and the court of appeals was correct. That is, plaintiff is not entitled to attorney fees.

When an action is filed in court for UM benefits, the insured is not entitled to attorney fees if, "in writing, not later than six months from the date proof of loss is filed with the insurer: (a) The insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured; and (b) The insurer has consented to submit the case to binding arbitration." ORS 742.061(3). This provision has become known as the "safe harbor" provision/exception.

There is no dispute that the timing and content of defendant's September

4, 2012 letter were sufficient to bring defendant within the "safe harbor" of ORS 742.061(3). (ER 33.) Plaintiff's claim that defendant somehow, during the course of the litigation, lost its protection from owing attorney fees is not supported by the facts or the law.

Defendant admitted that the UM driver's liability caused the accident. Defendant admitted that plaintiff was injured in the accident. Defendant conceded that plaintiff "suffered some economic damage." (ER 14.) Defendant admitted that plaintiff received treatment from medical care providers which was made necessary by injuries sustained in the accident. Defendant admitted the reasonableness of some portion of every medical expense plaintiff alleged as related to the accident. (ER 14-15.) Defendant admitted that plaintiff "performed all of the obligations required of him in order to be eligible for the payment of uninsured motorist benefits[.]" (ER 15.) At the arbitration hearing about plaintiff's damages, defendant argued about the amount of damages due plaintiff. (ER 31-32.) At the arbitration hearing, defendant did not present any evidence, nor make any argument to suggest that the arbitrator award zero damages. (ER 31-32.) Defendant abided by the terms of the "safe harbor" provision and of its "safe harbor" letter. The "only issue" at the arbitration was the "damages due" plaintiff. Accordingly, defendant acted squarely within the

bounds of its ORS 742.061 (3) "safe harbor."

2. By contesting the elements of plaintiff's alleged damages, a defending UM insurer does not lose "safe harbor."

As shown above, defendant never put at issue, never put on evidence of, nor ever argued that plaintiff should be awarded zero damages. Thus, no so-called preliminary issue of "whether" damages were due was ever raised by defendant or considered or decided by the arbitrator. Even if defendant's litigation strategy might be viewed as opening up the possibility of a "zero" award because plaintiff's proof of damages was nonexistent or insufficient, defendant would still be protected from plaintiff's attorney fee claim. The text and context of ORS 742.061(3)[9], demonstrate that the intent of tbat statute is to allow defending UM insurers to "safely" test, and to dispute, damages claims (and the elements of those damages) even if such a dispute could result in no recovery by the insured.[10]

Generally, and subject to certain conditions and prerequisites, ORS

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[9] That the legislative history also supports defendant's position is discussed below.

[10] While Judge DeVore cogently explains why UM/UIM insurers should also be able to "safely" put at issue the subjects of policy limits and the proper application of prior payments of damages, those "mathematical factors" are not relevant to the facts of this matter. *Spearman, supra*, 276 Or App at 128-148 (DeVore, J., concurring.).

742.061(1) provides that, in an action upon an insurance policy, an insured is entitled to reasonable attorney fees in the event of a recovery on that policy by the insured. ORS 742.061(3) sets forth an exception to the general rule of subsection (1).

ORS 742.061(3)(a) states that it applies to "actions to recover uninsured or underinsured motorist benefits." It also states that in such actions, the insurer is not liable for attorney fees if, among other prerequisites, the issues in the action are limited to liability and "damages due the insured."

While it would be helpful to this case, the text ORS 742.061(3) defines neither "actions to recover uninsured or underinsured motorist benefits" nor "damages due the insured." Accordingly, there is an issue of statutory construction. That process of construction is controlled by *State v. Gaines*, 346 Or 160, 165-173, 206 P3d 1042 (2009) and ORS 174.020. Those authorities require starting with the text and context of the language at issue and, if helpful, the legislative history in order to "pursue the intention of the legislature." ORS 174.020(1)(a).

Because the text of 742.061(3) does not define "uninsured or underinsured motorist benefits," both opinions of the Court of Appeals,

properly, referred to relevant provisions of the insurance code for context.[11]

ORS 742.504(1)(a) provides the following definition of UM benefits:

> [A]ll sums that the insured . . . is legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle because of bodily injury sustained by the insured caused by accident[.][12]

ORS 742.504(1)(a) tells us that UM benefits are the "damages" that the insured is "legally entitled to recover" because of "bodily injury" "caused by accident."

That then leads to consideration of the phrase "general and special damages"[13] As noted above (n. 4) "general damages" have become "noneconomic damages" and "special damages" have become "economic damages." Economic damages are defined in ORS 31.710(2)(a). As relevant to the only economic damages claimed by plaintiff here, medical expenses, that statute states:

> 'Economic damages' means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred

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[11] Curiously, both plaintiff and amicus urge this Court to ignore ORS 742.502 and ORS 742.504 as context for ORS 742.061(3).

[12] Amendments to ORS 742.504 made by the 2015 legislature do apply to this dispute arising from a 2012 auto accident.

[13] Again, curiously, amicus urges this Court to look away from the statutes and toward a dictionary for a definition of "damages."

for medical . . . and other healthcare services.

That definition requires that economic damages for medical service charges must be "objectively verifiable"; "reasonable"; and "necessarily incurred." Whether those essential facts exist because of bodily injury caused by accident is the issue to be resolved when damages for medical expenses are claimed as UM benefits.

For noneconomic damages, ORS 31.710(2)(b) states:

> "Noneconomic damages" means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.

The essential facts of noneconomic damages are, necessarily, less rigid than the essential facts of economic damages. Regardless, whether such facts exist because of bodily injury caused by accident is the issue to be resolved when noneconomic damages are claimed as UM benefits.

The proponent (claimant) of damages is obligated to produce evidence on each essential fact of the claimed damages and has the obligation to persuade the fact-finder as to the existence of each essential fact of the claimed damages. ORS 40.105 (OEC 305); ORS 40.115 (OEC 307).

Nothing in ORS 742.061(3) creates (or requires) a presumption of the

existence of any essential damages fact in UM claims in order for the UM insurer to be safe from attorney fees. Nothing in ORS 742.061(3) changes the insured's burden of evidentiary production nor the burden of persuasion in UM benefits actions. To be legally entitled to the claimed damages plaintiff must meet the burdens of production and persuasion on the essential facts of those claimed damages.

Plaintiff seems to argue that if a defending UM insurer contests a foundational, essential fact of the claimed damages, the UM insurer is raising an issue other than the damages due the insured. That is wrong.[14] A contest about the essential facts of the claimed damages is precisely how the issue of damages due is resolved. If plaintiff fails to meet the burden of production or burden of persuasion as to those facts, there are no damages due. That does not mean that there was some issue other than the "safe" issue of damages due.

3. The legislative intent of the "safe harbor" provisions is to discourage lawsuits and encourage binding arbitration.

The result reached by the Court of Appeals is entirely consistent with the legislative history and intent of ORS 742.061(3). The intent of 1999 Senate Bill

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[14] In fact, in his Reply Brief to the Court of appeals, Plaintiff concedes that an insurer defending a UM claim can contest elements of plaintiff's claimed damages without straying from the limited issue prescription of ORS 742.061(3)(a). (Pl.'s Reply Brief, p. 5.)

504, now ORS 742.061(2) and (3), was to eliminate the incentive to file suit when the insurer has made a prompt offer to arbitrate and to limit the issues. The purpose was to encourage resolution of PIP and UM/UIM claims through binding arbitration. *See* Transcript of Work Session on SB 504, Senate Comm. on the Judiciary, May 20, 1999; Transcript of Public Hearing on SB 504, House Comm on Rules, Elections, and Public Affairs, June 14, 1999. When Committee Administrator Keith Putnam introduced the bill during the House Committee's Public Hearing, he said, "It is an attempt to reduce the number of instances in which litigation is deliberately sought."

A joint panel representing the insurance industry and the Oregon Trial Lawyers Association spoke in support of the bill at the June 14, 1999 public hearing on SB 504. (Tom Mortland and John Powell from North Pacific Insurance Company and Mic Alexander of OTLA all appeared together.) In describing SB 504, Tom Mortland said, "This bill is essentially a way of eliminating or reducing the amount of litigation, or lawsuits, that are filed in PIP, UIM and UM benefit claims against insurance companies." Mr. Mortland went on to say:

> This bill would restore the practice of resolving these claims through mediation, arbitration and informally without the necessity of litigation or lawsuits being filed. We see this as a very positive step. Public Hearing on SB 504, House Comm. on Rules,

Elections, and Public Affairs, June 14, 1999.

Thus, the bill that amended ORS 742.061 to allow "safe harbor" was intended to discourage the filing of UM benefits lawsuits and was intended to encourage resolving such claims through processes outside the judicial system, e.g., binding arbitration.

The result of the decision of the Court of Appeals is consistent with that legislative intent. Here, defendant timely offered to arbitrate and to properly limit the issues. Plaintiff rejected that arbitration offer and filed suit. Defendant upheld its commitment to limit the issues - the only issue was damages due. Defendant offered to keep the UM benefits claim out of the judicial system and to limit the issues to be decided. Plaintiff rejected that offer and now, even though defendant abided by its commitment to properly limit the issues, plaintiff seeks an award of attorney fees. An attorney fee award here would only serve to encourage the filing of UM lawsuits - exactly what the "safe harbor" provisions were intended to discourage. To hold that plaintiff is entitled to attorney fees in this situation would be contrary to the legislative purpose and intent of SB 504 and the resulting "safe harbor" provisions.[15]

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[15] Amicus would have this court look to the general purposes and lengthy history of subsection (1) of ORS 742.061 and its predecessors to discern the intent of subsections (2) and (3). That subsections (2) and (3) were enacted for the sole

4. *Grisby* is of no help to plaintiff.

a. *Grisby* is factually and legally distinguishable.

Grisby is a PIP case; therefore, ORS 742.061(2), not ORS 742.061(3), was at issue. *Grisby I*, 343 Or at 178. *Grisby II*, ultimately, held that the insurer did not have "safe harbor" under ORS 742.061(2) because the "amount of benefits due the insured" was not the "only issue" the defending insurer required tbe plaintiff to litigate. 343 Or at 397-98.[16] In contrast, here defendant never disputed anything other than the amount of damages due.

Grisby did not consider the statutory scheme for UM benefits and that such statutes are, necessarily, context for ORS 742.061(3). ORS 742.500 *et seq*. *Grisby* did not consider that UM benefits are intended to place the insured in the same position they would have been in if the at-fault driver was insured. *Vega v. Farmers*, *supra*, 323 Or at 305-306. When in that position, insureds seeking UM benefits have the burden of proving the legal entitlement to tort

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purpose of addressing PIP and UM/UIM benefits claims suggests that the statutory provisions concerning those specific insurance claims provide a better context.

[16] As noted above (n. 6), defendant submits that *Grisby II's* holding - that an insurer's contest as to the "relatedness" or causation of a PIP medical expense claim is not an issue about the "amount of benefits due" - is inconsistent with the legislative prescription that the amount of PIP benefits due for medical expenses is necessarily dependent upon both the reasonableness and the necessity of the claimed expense. ORS 742.524(1)(a).

damages as part of a claim on an insurance policy. ORS 742.504(1)(a) (defining, in part, UM benefits as those sums to which the insured is "legally entitled as damages".) That is, insureds seeking UM benefits must demonstrate the liability of the at-fault driver and the claimed damages. *Vega*, *supra*, 323 Or at 306 (agreeing that to be "legally entitled" a UM claimant must demonstrate not only fault and damages but also that a viable tort claim exists against the at-fault driver). The "case within a case" present in this UM benefits action was not present in *Grisby*.

b. *Grisby's* "amount" analysis is irrelevant and cursory.

Despite the distinguishable facts and law at issue in *Grisby*, plaintiff urges this Court to be persuaded by it. Relying upon *Grisby I*'s comments suggesting that zero is not an "amount," 343 Or at 182, plaintiff pieces together an argument that a defending UM insurer loses "safe harbor" any time the insurer raises any issue that could ultimately result in the payment of zero UM benefits. The word "amount" does not appear in subsection (3) of ORS 742.061.[17] Another problem with plaintiff's "zero is not an amount" argument

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[17] Plaintiff's arguments would seemingly have this court insert words into ORS 742.061(3)(a) that have been omitted. Specifically, plaintiff would insert "raised" and "amount." It appears that plaintiff would prefer that statute to read, in part, "and the only issues {raised} are the liability of the uninsured or underinsured motorist and the {amount} of damages due the insured." Plaintiff's

is that *Grisby* did not reconcile its "zero" and "amount" comments with, or even acknowledge, instances within Oregon law in which zero is recognized or described as an amount.

For example, an Oregon Department of Revenue rule regarding calculating the tax on the sale of intangible assets by companies not primarily involved in that business provides that "if the net gains and losses results in a negative amount, the correct amount for factor purposes is zero." OAR 150-314.665(6)(b) (Emphasis supplied.).

Another example is found in *Jones v. Nava*, 264 Or App 235, 244, 331 P3d 1067 (2014). When describing a court's consideration of the ORS 20.075 factors for determining the amount of an attorney fee award, the Court of Appeals said, "[I]n doing so, the court could negate the command of ORS 742.061(1) . . . by determining that a reasonable amount [of attorney fees] is zero dollars." *Id.*

Described by *Jones v. Nava*, 264 Or App at 244, as specifically rejecting the proposition that "nothing is not an amount," is the Court of Appeals opinion in a criminal reckless burning case. *State v. Nyhuis*, 251 Or App 768, 772, 284

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invitation should be declined. ORS 174.010 (admonishing courts to not insert what has been omitted when construing statutes.).

P3d 1229 (2012). In *Nyhuis*, the value of the burned property could not be reasonably ascertained. *Id.* Because the criminal charge required the destroyed property to be a thing of value, the State argued tbat the court should look to ORS 164.155 (4) and determine that the property's value was for "an amount . . . less than $500." *Id.* Writing for the court, Judge Schuman said:

> We reject that argument. It depends on the premise that, if something is worth an 'amount,' it cannot be worth nothing. That premise, in turn, depends on the assumption that 'zero' or 'nothing' is not an amount. That assumption cannot be reconciled with the English language as it is used, even by lawyers and judges.

Id. (Emphasis supplied.)

In *Gillespie v. Kononen*, 310 Or 272, 274-275, 797 P2d 361 (1990), a landlord-tenant case involving an issue of appellate jurisdiction, this Court quoted the trial court's order granting the defendant tenant's motion for an award of attorney fees. *Id.* The defendant's attorney fees had been waived by her lawyers. *Id.* The trial court order said: "It is hereby ordered that a judgment shall be entered against the Plaintiffs . . . in favor of the Defendant for attorney fees and costs in the amount of $.00." *Id.* (Emphasis supplied.)

A final example of Oregon law and the legal community acknowledging zero as an amount can be found in the Oregon Rules of Civil Procedure. A commentator to those rules has observed, with approval by this Court, that zero

can be a proper amount of damages awarded by jury verdict to a prevailing plaintiff. "The last sentence of ORCP 61 A(2) allows a jury to properly return a verdict in favor of a plaintiff asserting a right to recover damages in the amount of 'zero' damages." Frederic R. Merrill, *Oregon Rules of Civil Procedure: 1984 Handbook* 140 (1984) (quoted with approval by *Kennedy v. Wheeler*, 356 Or 518, 533-34, 341 P3d 728 (2014).).

Rather than reconciling, or even considering, instances within Oregon law where zero has been recognized as an amount, *Grisby I* offered a dictionary definition of "amount" and then concluded that to declare zero as an amount would be inconsistent with that definition. *Grisby I, supra*, 343 at 182. Whether *Grisby I*'s analysis of "amount of benefits due" as it appears in subsection (2) of ORS 742.061 holds up to future scrutiny remains to be seen. In any event, that analysis should have no bearing on this matter pertaining to subsection (3).[18]

c. *Grisby I's* disavowed definition of "accepted coverage" is not precedent and is not relevant.

In addition to relying upon *Grisby I's* discussion of zero and amount, plaintiff urges this Court to use this case to adopt *Grisby I's* definition of

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[18] Note: Three of the four words of the subsection (2) phrase do not appear in subsection (3). *Compare* "amount of benefits due" *to* "damages due."

"accepted coverage" as used in ORS 742.061(2) and (3). That offer should be declined.

Grisby I construed "accepted coverage," in the context of that PIP case, to mean that the insurer had to have agreed that each individual claim for healthcare services submitted by the plaintiff's care providers was included within the scope of the policy. *Grisby I*, *supra*, 343 Or at 180-181. That construction of that phrase was categorically disavowed in *Grisby II*, *supra*, 343 Or at 354 (stating "We agree with defendant that the statements in our earlier opinion regarding the interpretation of the phrase 'accepted coverage' . . . may not have been correct and we disavow them. Similarly, we disavow our statement that defendant did not accept coverage of plaintiff's claim.") Plaintiff's suggestion that such definition should be re-adopted should be declined.

Bergmann v. Hutton, 337 Or 596, 604, 101 P3d 353 (2004) provides the following, perfectly serviceable, definition of "coverage": "the universe of people, vehicles, and events that trigger the insurers obligation to pay under the policy." That definition does not state that "coverage" includes the universe of damages; or, the universe of values; or, the universe of dollar figures that might be owed as a result of the obligation to pay having been triggered.

Once the facts of an incident or loss enters the "universe" described by *Bergmann*, the issue of how much is to be paid remains to be resolved; whether by agreement or by decision-maker. That is the issue of damages; not coverage. The quantity of the payment obligation triggered by entry into the "universe" might be zero. The reason for a zero payment obligation might be because there is insufficient evidence to prove a different quantity; or, perhaps, because of payment from other sources. Under ORS 742.061(3), the insurer is "safe" from fee exposure so long as any asserted reason for a zero payment would not take the claim out of that "universe." For example, an excess insurer may accept coverage (i.e., agree that the facts fit within the "universe") but still never be obligated to pay more than zero. Just because a primary insurer pays all of the proven damages does not mean that the excess insurer denied coverage. Here, defendant has always agreed that the facts of plaintiff's UM benefits claim were within the "universe."

Defendant submits that the precise definition of "coverage" or of "accepted coverage" is, in fact, irrelevant here. Using any definition, the facts in the record establish that defendant accepted coverage in its "safe harbor" letter, in its answer, and, again, in its responses to plaintiff's request for admissions and never wavered from that acceptance. *See*, "Summary of Key

Facts", above.

CONCLUSION

Defendant complied with the requirements of ORS 742.061(3). There is no dispute that defendant's "safe harbor" writing was timely and effective at qualifying defendant to be safe from plaintiff's attorney fee claim. Defendant accepted and never disputed coverage. From the outset of this action through the arbitration, which decided the damages due, defendant admitted the occurrence of a UM accident and the fault of the uninsured motorist, admitted that plaintiff was injured, admitted that plaintiff incurred some reasonable and necessary medical expense damages as a result of the accident and admitted that plaintiff was eligible for the payment of UM benefits. The only issue was the damages due plaintiff.

Defendant more than satisfied the limitations intended by the legislature when it enacted the "safe harbor" provisions of ORS 742.061. Accordingly, defendant is safe from, and plaintiff is not entitled to, an award of attorney fees.

The decision of the Court of Appeals and the judgment of the trial court should be affirmed and defendant awarded his costs and disbursements incurred in connection with this appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that this RESPONDENT'S BRIEF ON THE MERITS complies with the word-count limitation of ORAP 5.05(2)(b) and that the word count of this RESPONDENT'S BRIEF ON THE MERITS (as described in ORAP 5.05(2)(a)) is 6,984 words.

Type Size

I certify that the size of the type in this brief is no smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 29th day of August, 2016, I caused to be electronically filed the foregoing RESPONDENT'S BRIEF ON THE MERITS with the State Court Administrator and by doing so caused a true copy to be served electronically on the interested parties of record shown below:

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