IN THE SUPREME COURT OF THE STATE OF OREGON

STEPHANIE M. DOWELL, individually and on behalf of others similarly situated, Plaintiff- Appellant and Petitioner on Review, v. OREGON MUTUAL INSURANCE COMPANY, an Oregon corporation, Defendant-Respondent and Respondent on Review.	Supreme Court No. S063079 Court of Appeals No. A153170 Multnomah County Circuit Court No. 1205-06486

PETITIONER'S REPLY BRIEF

On Petition for Review of the Decision of the
Court of Appeals from the Judgment of the Multnomah County Circuit Court
Henry C. Breithaupt, Judge Pro Tempore

Opinion Filed: January 28, 2015
Author of Opinion: Tookey, J.
Concurring Judges: Sercombe, P.J., Hadlock, J.

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Summary of Reply Argument

A court may interpret the term "expenses of medical services" in ORS 742.524(1)(a) either liberally to include medical transportation costs because a patient cannot obtain medical services without getting to the doctor's office, or narrowly to include only the actual medical services themselves, as the defendant urges.

Because ORS 731.008 and 731.016 require a liberal interpretation of Oregon's insurance laws to protect the insurance-buying public, and not a narrow one to limit insurance premiums, as the defendant urges, this Court should interpret ORS 742.524(1)(a) to include medical transportation costs.

The second sentence of ORS 742.524(1)(a) does not limit the term "expenses of medical services" to those which a licensed or certified provider charges. It restricts only the time period for the insurer to deny the charges for licensed or certified providers.

The defendant's argument that this Court should interpret ORS 731.008 and 731.016 narrowly to reduce premiums incorrectly ignores the legislative mandate for a liberal interpretation of insurance laws.

The four other states, Florida, Colorado, New Jersey and Michigan, that held that their PIP statutes include payment of medical transportation costs provide persuasive authority for this Court to follow.

Reply to Defendant's Argument

1.

The text of ORS 742.524(1)(a) permits the interpretation the plaintiff urges this Court to accept

The defendant's major argument is that ORS 742.524(1)(a) requires payment of the reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services themselves only, and nothing else. And related expenses such as transportation costs to a doctor or medications, supplies and medical equipment that the legislature did not specifically list in ORS 742.524(1)(a), are not covered as personal injury protection (PIP) expenses. As the defendant stated in its brief

> In this case, as will be seen, there is no need for the court to proceed beyond the text-and-context step, because, even at that point, the legislative intent is not in doubt.
>
> Def.'s Br., p. 7.

In fact, ORS 742.524(1)(a) is open to two interpretations. It could mean "expenses related to or complementary to medical services," as the plaintiff contends, or it could mean "expenses solely for the actual medical services themselves," as the defendant contends.

The defendant argues that if the legislature intended to include the cost of transportation to the services in the PIP statute, it would have stated it in "words simple and direct." Def.'s Br., p. 8.

On the other hand, had the legislature intended to limit the costs solely to the actual medical, hospital, dental, surgical, ambulance and prosthetic services themselves, it could have stated this very specifically. The fact that the legislature used a general term "expenses of medical services," means the courts must interpret the language in the context of other statutes in the Insurance Code and in light of what makes sense, as the appellate courts in Florida, Colorado, New Jersey and Michigan did. Pet.'s Op. Br. pp. 10-12.

The defendant's interpretation of the statute would lead to illogical consequences. If the statute means the medical, hospital, dental, surgical, ambulance or prosthetic services themselves only, this would necessarily exclude supplies, equipment and medications. These are supplies or equipment, not services. This narrow interpretation seems unlikely given the legislature's mandate to protect consumers in ORS 731.008 and 731.016.

At the very least, ORS 742.524(1)(a) does not specifically state one way or the other whether it excludes the costs of transportation to medical providers, or the medical supplies or equipment that complement the services.

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The Court of Appeals applied dictionary definitions to the statute, and concluded the term "expenses of medical services"

> …may be construed as something that is expended to secure a benefit relating to work performed by another, when that work involves the practice of medicine.
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> *Dowell v. Oregon Mutual Ins. Co.*, 268 Or.App. 672, 676-77, 343 P.3d 283, 286 (2015).

But this definition did not answer the question of whether this does or does not include medical transportation costs which are reasonable and necessary to obtain treatment. As the Colorado Supreme Court stated, transportation services are an essential element of medical treatment because an injured person cannot obtain necessary medical treatment without it. *Allstate Ins. Co. v. Smith,* 902 P.2d 1386, 1388 (Colo. 1995). In order to secure the medical services, the patient has to incur costs to get to the doctor's office or hospital.

2.

The text of the second sentence of ORS 742.524(1)(a) does not support the defendant's narrow interpretation of the first sentence

The defendant relies on the second sentence of ORS 742.524(1)(a) to support its interpretation. This states that the expenses of the various services in the statute are presumed reasonable and necessary, unless the insurer notifies the provider within 60 days of its receipt of the charges that it is denying them.

Since ORS 743.801(13) defines "provider" as a person licensed, certified or otherwise authorized to administer medical or mental health services in the course of a business or profession, the defendant concludes this limits the term "expenses of medical services" solely to those who are licensed to provide medical or mental health services. Def.'s Br., p. 15. It states:

> This context demonstrates that PIP benefits are *not* required for providers of *non*-health care services. [emphasis in original]
>
> Def.'s Br., p. 15.

The defendant's interpretation of the second sentence in ORS 742.524(1)(a) is too narrow, and is inconsistent with the rest of the statute. This part of ORS 742.524(1)(a) means that if the insurer does not question or deny the medical providers' charges within 60 days, they are presumed reasonable and necessary. This does not apply to the charges for the non-medical providers. It means they do not receive the benefit of a 60 day response to their charges. If the insurer delays a denial beyond 60 days, it must pay the medical providers' charges, but not necessarily the charges of other providers.

If the legislature wanted to go further and state that the PIP statute did not include non-medical providers, it could have done so. That it did not exclude them suggests these expenses are still covered PIP expenses.

3.

The context of ORS 742.524(1)(a) requires that courts interpret Oregon's insurance laws liberally to protect the insurance-buying public

The context the defendant tries to avoid in construing ORS 742.524(1)(a) are the statutes for interpreting the Insurance Code, which includes ORS chapter 742. ORS 731.008 states that the Insurance Code is to protect the insurance-buying public. ORS 731.016 states the Insurance Code shall be liberally construed to give effect to the policy in ORS 731.008. Pet.'s Op. Br., p. 6. The Court of Appeals mentioned ORS 731.008 in stating the plaintiff's argument, but it did not discuss the application of either ORS 731.008 or 731.016 in its opinion.

If the courts construe the Insurance Code narrowly to reduce benefits, the defendant argues this will benefit the insurance-buying public as a whole by lowering their premiums. For the majority of the public who are not hurt in car crashes, it argues this is a substantial benefit. Def.'s Br., pp. 21-23.

Based on defendant's logic, Oregon courts should limit insurance benefits as much as possible under ORS 731.008 and 731.016. That would reduce the cost of insurance and benefit the public the defendant contends never needs insurance. It would also fulfill the defendant's suggested utilitarian approach to ORS 742.008 by interpreting the Insurance Code to "maximize the

well-being of insureds generally," not just the ones who get hurt by cars, and need the benefits. Def.'s Br., p. 22. However, ORS 742.008 does not exist.

If the defendant meant ORS 731.008, not 742.008, it is assuming only a small fraction of the public requires insurance protection. Def.'s Br. pp. 21-22. People buy insurance for security in case they need it. If they knew they would never use car insurance, they would buy the cheapest policy with the most limited coverage. But no one knows whether they will need car insurance. Anyone, even those with perfect driving records, can be injured, or worse, by drunk or distracted drivers. And a narrow restriction of benefits does not benefit them.

Most importantly, the general understanding of a liberal interpretation of an insurance law is to provide for broader, not more restrictive, coverage. *See Allstate Ins. Co. v. Smith*, *supra*, and other cases plaintiff cited at pages 10-12 of her opening brief. The plaintiff is not aware of any courts which liberally interpreted insurance laws to benefit the public by restricting coverage.

Although the legislative history on the PIP statutes is sparse, this Court stated in *Monaco v. U.S. Fidelity & Guar. Co.,* 275 Or. 183, 550 P.2d 422 (1976), that the policy of the PIP statutes is to reduce litigation and ensure that those injured would recover economic losses without regard to fault. The more narrowly courts interpret the PIP statutes, the more this interpretation conflicts

with this legislative policy. And the less the PIP policy pays in benefits, the longer injured persons must wait to recover benefits, and then they must prove fault.

The defendant argues the courts may not interpret the PIP statutes to conflict with its statutory language. But when a court may interpret a statute two different ways, it must interpret it to broaden coverage and benefit the insurance-buying public in accordance with ORS 731.008 and 731.016. This includes not only those who actually use the insurance, but those who might need to use it.

4.

The phrase "other related services" is not required for the PIP statute to include medical transportation costs

Another of defendant's arguments is that transportation costs to doctors are an "other related service," under ORS 656.245(1)(b), the workers' compensation statute. They are not medical services themselves. The legislature specifically included the term "other related service" in ORS 656.245(1)(b) to cover transportation costs to doctors for those injured on the job. The defendant contends the legislative choice not to use this term in the PIP statute reflects a deliberate decision to exclude medical transportation costs in the PIP statute. Def.'s Br., pp. 16-19.

This argument has several logical failings. First, in ORS 656.245 (1)(b) the legislature specifically included the cost of drugs and medicines as compensable medical expenses, but omitted them in the PIP statute. Under defendant's reasoning, drugs and medicines such as pain killers and muscle relaxers are not PIP expenses and a PIP carrier does not have to pay them. To the extent that insurance companies may have been paying for them in the past, they have done so gratuitously, which the statute does not require.

Second, although the term "other related expenses" includes costs of medical transportation, so may the term "expenses of medical services." The Florida, Colorado, New Jersey and Michigan appellate courts all interpreted medical transportation costs as expenses of medical services in their PIP statutes, without the inclusion of any catch-all phrase like "other related services." Pet.'s Op. Br., pp. 10-13. They did this based on their public policies of having to liberally interpret the PIP law in favor of the public.

Third, the legislature specifically included the term "expenses of dental services" in the PIP statute, but omitted dental services in the workers' compensation statute. Adopting defendant's argument that differences between the two statutes reflect legislative policy choices raises the following questions: Does this mean that on-the-job injuries do not include dental services? Or are dental services part of "other related services"? Or may the courts and the

insurance commissioner include dental services on their own under the workers' compensation law?

Finally, most states allow transportation costs to medical providers as a workers' compensation benefit, even if their laws mention only medical and hospital services. Larson, the leading treatise on workers' compensation law, stated

> Transportation costs necessarily incurred in connection with medical treatment are compensable, even if the act speaks only of medical and hospital services…
>
> S. Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §94.03, pp. 94-98 (2012).

Twelve state appellate courts have allowed transportation costs to medical providers as part of the term "medical services" in their workers' compensation statutes, where there was no catch-all phrase like "other related expenses" in the law. *See* cases the petitioner cited on page 14 of her opening brief in the Court of Appeals.

5.

Defendant does not distinguish the decisions allowing medical transportation costs as a PIP medical expense by other state appellate courts

The defendant did not discuss the fact that the only other state appellate courts, besides the Court of Appeals, to rule on the issue of whether their PIP

statutes require payment of medical transportation costs have all ruled in favor of the insureds. The defendant argues that the Florida Supreme Court allowed medical transportation costs as a medical expense in its PIP statute because one of its appellate courts had previously allowed them. It contends that the legislature's amendment of the statute, without reversing the appellate court's decision, necessarily approved the decision. Def.'s Br., p. 25.

However, the defendant did not try to explain why the Florida appellate court in *Hunter v. Allstate Ins. Co.*, 498 So. 2d 514 (Fla. App. 1986), ruled in favor of the plaintiff before the legislative amendment. The defendant also suggests the Florida Supreme Court based its ruling on the state policy of broadly providing for PIP coverage. Def.'s Br., pp. 24-25. But Oregon has the same policy of liberally interpreting its insurance laws to protect the insurance-buying public. ORS 731.008 and 731.016.

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Conclusion

For the foregoing reasons, and those the plaintiff discussed in her opening brief, this Court should reverse the decision of the Oregon Court of Appeals and the judgment of the trial court, and order the Court of Appeals to remand this case to the trial court for further proceedings.

Dated this 14 day of January, 2016.

Respectfully submitted,

s/Charles Robinowitz

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 (2)(d) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 2,336 words. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF FILING AND SERVICE

I certify that I filed electronically the foregoing PETITIONER'S REPLY BRIEF with the Supreme Court Records Section, State Court Administrator, on January 14, 2016 through the Appellate eFiling system of the Oregon Court of Appeals.

I further certify I served the foregoing document on the following person(s) at the following address(es), by mailing a true copy thereof, contained in a sealed envelope with the postage prepaid, and deposited in the United States Post Office in Portland, Oregon:

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