IN THE SUPREME COURT OF THE STATE OF OREGON

ALEX SPEARMAN,
Plaintiff-Appellant, Petitioner on Review

vs.

PROGRESSIVE CLASSIC INSURANCE COMPANY,
a Wisconsin corporation,
Defendant-Respondent, Respondent on Review

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

PETITIONER'S BRIEF ON THE MERITS

APPEAL FROM THE GENERAL JUDGMENT OF THE CIRCUIT COURT FOR MULTNOMAH COUNTY, THE HONORABLE NAN WALER, JUDGE

Date of Decision:	January 27, 2016
Author:	Flynn, J., for Court En Banc
Concurring:	DeVore, J.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGAL QUESTION ON REVIEW

Question:

Does an insurer remain eligible for safe harbor protection in UM/UIM cases, under ORS 742.061(3), when the insurer raises a defense that could result in no recovery by the insured?

Proposed Rule:

Safe harbor protection in UM/UIM cases, under ORS 742.061(3), is unavailable when an insurer raises a defense that could result in no recovery by the insured.

Nature of the Action:

Following an August 5, 2012 injury traffic accident in Portland, Plaintiff brought this action in contract seeking uninsured motorist benefits under a policy of automobile insurance he had purchased from Progressive. Plaintiff's Complaint sought economic and noneconomic damages in an amount not exceeding the UM policy limit of $25,000. Plaintiff claimed economic damages, as part of his UM benefits, for that portion of his accident-related medical bills that had not previously been paid under Progressive's PIP coverage. The case was transferred to Court-sponsored arbitration under ORS 36.400, *et seq.* The arbitrator awarded some noneconomic damages and all of the economic damages Plaintiff claimed. The award exceeded any pre-suit tender made by Progressive. Plaintiff applied for ORS 742.061(1) attorney's

fees, but the arbitrator denied a fee award. Plaintiff timely filed ORS 36.425(6) Exceptions.

At the Circuit Court hearing on Plaintiff's Exceptions, Progressive claimed entitlement to safe harbor under ORS 742.061(3). Plaintiff conceded that a safe harbor letter had been timely sent, but contended that Progressive's litigation strategy exceeded the scope of ORS 742.061(3) so that safe harbor was unavailable. The Circuit Court denied the Exceptions and Plaintiff timely filed this appeal.

Summary of Argument:

Safe harbor for UM claims under ORS 742.061(3) requires the insurer to timely write to its insured pledging that it has "accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured." In *Grisby v. Progressive Preferred Insurance Co.*, 343 Or 175, 180-181, 166 P3d 519 (2007), the Court rejected the insurer's position that "coverage" should mean merely that Plaintiff's accident was within the scope of the insurance policy, and held that "accepting" coverage was a concession that at least some amount of policy benefits was owing. While the *Grisby* Court on reconsideration, 343 Or 394, 171 P3d 352 (2007), disavowed its interpretation of "accepted coverage" because it was not consistent with other parts of ORS 742.061(2) (that the PIP insurer must write to its insured within six months from the date proof of loss is filed and

additional bills might be submitted for the PIP insurer's consideration after it had written its safe harbor letter), nonetheless this Court should hold that "accepting" coverage means that at least some amount of benefits is due under the UM policy at the time the safe harbor letter is written.

There is no purpose in requiring the insurer to write its insured to tell him what he already knows: that the insurance he purchased provides coverage for UM claims. If a UM insurer is permitted to retain safe harbor while denying that its insured suffered any damages that require a payment under the policy, the resulting litigation is expanded beyond "the damages due the insured" to *whether* any damages are due the insured. When Progressive's pleadings denied that an accident with a UM driver had even occurred, the insurer reneged on its safe harbor pledge that it had "accepted" coverage and it forfeited safe harbor.

Progressive's pleadings also raised issues that exceeded the scope of "the damages due the insured" prong of the statute. That statutory phrase has a much more narrow definition or scope than the scope of UM/UIM coverage under the insurance code. Under the insurance code at ORS 742.504(1)(a), a UM carrier is permitted to defend a claim brought by its insured for UM benefits by contesting *whether* the insured is entitled to any damage award. In contrast, UM safe harbor at ORS 742.061(3) allows a defense only over "the damages due the insured."

Similarly, ORS 742.504(1)(j) permits an insurer defending its insured's claim for UM policy benefits to raise all defenses the UM tortfeasor might assert, including "all applicable defenses." In contrast, the scope of UM safe harbor at ORS 742.061(3) limits permitted defenses to liability and "the damages due the insured." Had the Legislature intended that safe harbor have the same scope as the UM insurance code, it would have referred to the UM code or tracked its language.

FACTS

Plaintiff was injured in a collision with an uninsured motorist and submitted a claim for UM benefits to his automobile insurer, Progressive. When the parties were unable to resolve the claim, Plaintiff filed this action seeking economic damages for unreimbursed medical expenses and noneconomic damages in an amount not exceeding the UM policy limit of $25,000.

Because the issue on review is limited to whether safe harbor is available to an insurer under ORS 742.061(3) in a UM case when the insurer raises one or more defenses that could result in no recovery, the facts relevant to this appeal are limited to an analysis of Progressive's pleadings, and whether those pleadings raise issues exceeding the scope of ORS 742.061(3):

1. Paragraph 4 of Plaintiff's Complaint alleged the facts of his August 5, 2012 motor vehicle accident. ER 5. Progressive's Answer denied that an accident had occurred. ER 8.

2. Plaintiff's Complaint, at paragraph 6, alleged entitlement to noneconomic damages under the UM coverage of Progressive's policy. ER 5-6. Rather than conceding that at least some UM benefits were owing under the policy in an amount to be determined by the fact finder, Progressive stated:

> "Defendant admits that Plaintiff sustained 'some' injury as a result of the alleged accident; but disputes the nature and extent of Plaintiff's alleged injuries." ER 8.

3. Paragraph 7 of Plaintiff's Complaint alleged that he was entitled to payment of his still outstanding accident-related medical bills as part of his UM benefit. ER 6. Progressive answered:

> "Defendant denies the reasonableness and necessity of some of Plaintiff's accident-related medical expenses." ER 8.

4. The prayer of Progressive's Answer sought "an award of costs and disbursements in favor of the prevailing party." ER 9.

5. In response to Plaintiff's Request for Admission No. 3, which sought Progressive's admission that Plaintiff had sustained at least "some (any) injury in the accident," ER 10, Progressive responded:

> "Admit that Plaintiff sustained 'some' injury as a result of the accident alleged in the Complaint; however Defendant denies the nature and extent of Plaintiff's injuries." ER 13.

6. In response to Plaintiff's Request for Admission No. 5, ER 11, which sought Progressive's admission that Plaintiff's post-accident medical care was necessitated by injuries he had sustained in the accident, Progressive responded:

> "Admit that some of the treatment was necessary; Defendant denies the reasonableness, the necessity, relatedness and extent of some of Plaintiff's treatment." ER 14.

As a result of its pleadings, Progressive was allowed to argue at arbitration, and did argue, that Plaintiff was entitled to no award at all.

ARGUMENT

Safe harbor is afforded UM insurers under ORS 742.061(3) if the insurer timely writes to its insured pledging that the insurer has "accepted coverage" and that the only issues remaining to be decided are "the liability of the uninsured or underinsured motorist and the damages due the insured." When, during litigation, the insurer raises issues exceeding the scope of the statute, safe harbor is unavailable. *Kiryuta v. Country Preferred Insurance Co.*, 360 Or 1, ___ P3d ___ (2016). When Progressive denied that Plaintiff's accident had occurred, it violated the "coverage accepted" prong of the statute and lost safe harbor. When Progressive raised issues which permitted the trier of fact to determine that Plaintiff had no compensable damages under its policy, it violated both the "accepted coverage" and "damages due the insured" prongs of the statute and lost safe harbor.

Coverage Accepted Prong:

The original draft of the Bill that became ORS 742.061(2) and (3) used the same language in subpart (2), for PIP safe harbor, as was used in subpart (3), for UM/UIM safe harbor: that the insurer must write to its insured pledging that it has "accepted coverage," and that the only issues reserved for litigation are "the liability of the uninsured or underinsured motorist and the damages due the insured." *Cardenas v. Farmers Ins. Co.,* 230 Or App 403, 410, 215 P3d 919 (2009). The final version of the Bill had undergone an amendment, described by the *Cardenas* Court as a "housekeeping" amendment, to reflect that liability is never an issue in PIP claims. That amendment accounts for the slightly different language found in each subpart of the statute. The legislative history does not disclose any intent that attorney fees might be payable in denied PIP claims and never in denied UM/UIM claims.

In *Grisby v. Progressive,* 343 Or 175, 180-181, 166 P3d 519 (2007), this Court defined "coverage" as "inclusion within the scope of a protective or beneficial plan." *Grisby* determined that "accepting coverage" for a PIP claim:

> "... is a broader concept than simply the insurer's determination that an accident is within the scope of the policy.
>
> ***
>
> That statutory scheme makes it plain that the Legislature contemplated that an insurer would make a separate determination to accept or deny each 'claim for the services' that a provider renders to an insured and that the provider submits to the insurer.

> It supports Plaintiff's argument that whether an insurer has 'accepted coverage' for purposes of ORS 742.061(2)(a) is not limited to a one-time decision by the insurer that a particular accident is within the scope of the policy that it has issued (and that the insurer now has obligations under that policy), but rather is an ongoing series of decisions 'accepting' or 'denying' coverage of particular claims for services rendered by medical providers." 343 Or at 181.

Upon reconsideration, 343 Or 394, 171 P3d 352 (2007), the *Grisby* Court disavowed that interpretation, but it did not offer a substitute definition because it determined that whether or not the insurer had "accepted coverage," the litigated issues were still beyond the scope of "the only issue is the amount of benefits due the insured." After *Grisby,* PIP insurers are required to acknowledge within six months of "proof of loss" that *some* amount of PIP benefits are owing in order for the insurer to have "accepted coverage."

After *Grisby's* decision on reconsideration, two things are plain:

1. No statutory purpose is served by requiring an insurer to write its insured to tell him what he already knows: that the insurance he purchased was in effect at the time of his accident, or that his policy, by law, requires payment of UM claims under terms that are at least as favorable as the "model insurance policy" set out at ORS 742.504. Doing so does not amount to an acceptance of coverage; and

2. When an insured purchases an automobile insurance policy, coverage exists whether or not the insurer has "accepted coverage." Thus the

Legislature's use of the word "accepted" evinces an intent that safe harbor is available to a UM insurer only if the insurer acknowledges that the claim being presented must be paid, in at least *some* amount. That the policy is in effect at the time of the accident, or that the policy requires at least the coverage mandated by the UM insurance code, are not propositions that need to be "accepted." This Court should hold that an insurer "accepts coverage" only by acknowledging that its insured has presented a claim that is payable in at least some amount.

The *Grisby* Court, on reconsideration, dealt with an issue not presented in this case: the requirement that coverage must be accepted within six months of "proof of loss" and the insurer's concern that the statute requires that it make its "coverage accepted" pledge during the six months following "proof of loss," at a time when it might not yet have received all of the insured's medical bills because they continued to accrue.

The foregoing definition for "accepted coverage," that the insurer must acknowledge that the UM claim it has received requires the payment of at least some benefit under the policy, is the only definition that provides meaning to the statutory clauses that follow, namely, that "the only issues [reserved for litigation] are the liability of the uninsured or underinsured motorist and the damages due the insured." If an insurer is permitted to deny that the insured has suffered damages that require a payment under the policy, then litigation

can never be limited to "the damages due the insured," but instead has been expanded to *whether* any damages are due the insured. In this case Progressive first pledged that it "accepted coverage" in the safe harbor letter it sent to Plaintiff, committing that *some amount* was owing under the policy, but then broke that pledge when it denied in its pleadings that an accident had even occurred. Whether or not Progressive had paid PIP benefits under the policy before litigation was commenced (it had paid no UM benefits), nonetheless it reneged and broke its pledge when it denied that an accident had even occurred, thereby contending that it never owed the previous payments it had made. No benefits or damages are due under the policy that are not the product of an accident – a covered loss. When an insurer raises a defense that could result in no recovery by the insured, i.e., that a covered accident has not occurred, the insurer has not "accepted coverage." The result is that ORS 742.061(3) safe harbor was unavailable to the insurer when Plaintiff prevailed.

"Damages Due the Insured" Prong:

Plaintiff's Brief on the Merits is not intended to be a substitute for the argument previously submitted in Plaintiff's Petition for Review. Plaintiff relies upon that argument.

As used in ORS 742.061(3), the phrase "the damages due the insured" necessarily refers to the *amount* of payable UM benefits under the policy because by law those benefits replicate the damages Plaintiff is *entitled* to

recover against the tortfeasor. See ORS 742.504(1)(a). Nothing is "due" if the insured is not entitled to any UM policy benefit. The stark contrast between the provisions of the UM insurance code and the safe harbor provision at ORS 742.061(3) is evidence that the Legislature did not intend to grant safe harbor to insurers denying that anything at all is owing under the policy. The UM insurance code at ORS 742.504(1)(a) permits the fact finder to determine "*whether* the insured...is legally entitled to recover such damages, and if so, the amount thereof...." (emphasis supplied). The UM safe harbor provision at ORS 742.061(3) does not allow the insurer to maintain safe harbor if it chooses to contest *whether* its insured sustained damages, but authorizes safe harbor only when the litigated issues are limited to liability and "the damages due the insured." Had the 1999 Legislature intended that UM safe harbor have the same scope as the insurance code, it would either have said so or would have provided a reference to the UM code.

The conclusion that UM/UIM safe harbor was very narrowly drawn and is limited to cases in which the insurer concedes that at least some policy benefit must be paid, is also supported by a review of ORS 742.504(1)(j). That statute provides the definition for the phrase "sums that the insured or the heirs or legal representative of the insured is legally entitled to recover as damages," used at ORS 742.504(1)(a). The statute defines that phrase as meaning: "the amount of damages that a claimant could have recovered in a civil action from

the owner or operator at the time of the injury after determination of fault or comparative fault and the resolution of any applicable defenses." ORS 742.504(1)(j) permits a UM insurer to contest, not only whether damages have been suffered, but it may also raise any "applicable defenses." Thus under the insurance code, a UM insurer is allowed to defend its insured's litigated claim for UM benefits with any defense that would be available to the UM/UIM tortfeasor, and not merely defenses based on liability or "the damages due the insured." Had the Legislature intended that UM safe harbor have the same scope, it would have specifically referred to the UM insurance code or tracked its language.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this PETITIONER'S BRIEF ON THE MERITS does not exceed 2,736 words.

Type size

I certify that the size of the type in this PETITIONER'S BRIEF ON THE MERITS is not smaller than 14 point for both the text of the PETITIONER'S BRIEF ON THE MERITS and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 27th day of July, 2016, I served the foregoing PETITIONER'S BRIEF ON THE MERITS (two copies) upon the following counsel of record:

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by mailing to such the above-designated number of true and correct copies thereof, as set forth above, certified by me as such, placed in a sealed envelope addressed to said parties at the address set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.

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CERTIFICATE OF FILING

I certify that on the 27th day of July, 2016, I filed electronically, via the Court's eFiling system, PETITIONER'S BRIEF ON THE MERITS with the Appellate Court Administrator.

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