

IN THE SUPREME COURT OF THE STATE OF OREGON

Alex SPEARMAN,
Plaintiff–Appellant, Petitioner
on Review
v.

PROGRESSIVE CLASSIC
INSURANCE COMPANY, a
Wisconsin corporation,

Defendant–Respondent,
Respondent on Review.

Supreme Court
No. _____

Court of Appeals
No. A155674

Multnomah County Circuit
Court
No. 130201718

**BRIEF IN SUPPORT OF PLAINTIFF’S PETITION FOR
REVIEW BY AMICUS CURIAE FOR
OREGON TRIAL LAWYERS ASSOCIATION**

Review of the January 27, 2016 Court of Appeals *en banc* decision by
Honorable Meagan Flynn and concurrence by Honorable Joel DeVore.
On appeal from the Multnomah County Circuit Court judgment by
Honorable Nan G. Waller.

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April 2016

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I. INTRODUCTION

This case is the second in a recent series of cases involving the attorney fee “safe harbor” provision of ORS 742.061(3), the exception to an award of a plaintiff’s attorney fees after being forced to sue its insurer for payment of its uninsured or underinsured motorist claim. This Court has allowed review in *Kiryuta v. Country Preferred Ins. Co.*, 273 Or App 469, 472-73, 359 P3d 480 (2015), *rev allowed*, 358 Or 529 (2016), and will hear argument on that case on May 10, 2016. Subsequent to its decision in *Kiryuta*, the court of appeals issued a much more extensive *en banc* decision and concurrence in this case, arguably suggesting a far more expansive reading of the statute than was intended by the legislature. *Spearman v. Progressive Classic Ins. Co.*, 276 Or App 114, ___ P3d ___ (2016). Following the decision in this case, two more cases were decided under *Spearman*’s reasoning, respectively resulting in either a reversal of a plaintiff’s award of attorney fees, or an affirmance of the denial of such fees. *Kelley v. State Farm Mut. Auto. Ins. Co.*, 276 Or App 553, ___ P3d ___ (2016); *Robinson v. Tri-County Met. Transp. Dist.*, 277 Or App 60, ___ P3d ___ (2016).

Each of the plaintiffs in the cases subsequent to *Kiryuta*, either have sought or will be seeking review of those respective Court of Appeals

decisions. OTLA intends to appear and file a brief on the merits as *amicus curiae* in each of these cases, if this Court accepts review.

Because this case involves a thirty five page *en banc* decision which serves to alter the Court of Appeals' prior interpretation of ORS 742.061(3) following *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 166 P3d 519 *adh'd to as modified on recons*, 343 Or 394, 171 P3d 352 (2007), OTLA believes that review of this decision by this Court is critical to the above-referenced cases, and cases which will inevitably follow.

II. REASONS FOR GRANTING REVIEW

1. The *Spearman* case involves significant issue of state law and statutory interpretation, and has served to modify prior interpretations of the "safe harbor" provisions of ORS 742.061 by this Court and the Court of Appeals, leaving the law inconsistent. ORAP 9.07(1)(b), (4), and (9).

2. Because the purpose of ORS 742.061, particularly in the UM/UIM context is to facilitate settlement and to ensure that attorneys are willing to take clients with low value cases, this decision will arise often, affect many people, and is important to the public. ORAP 9.07 (2) and (3).

3. The issue is one of first impression, and the same or related issues involving the same statutory provision are currently pending before this court. ORAP 9.07 (5) and (6).

4. The Court of Appeals published a written *en banc* opinion in *Spearman* with a mildly contentious concurrence. ORAP 9.07 (11), (12), (13).

5. The decision appears to be wrong and/or misapplies well-established Oregon law, leaving plaintiff with no other remedy or recourse. ORAP 9.07(14).

6. *Amicus Curiae* for OTLA will file a brief on the merits.

Respectfully submitted on this 25th day of March, 2016.

/s/ Lisa T. Hunt

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CERTIFICATE OF SERVICE AND FILING

I certify that on April 15, 2016 I electronically filed the foregoing **BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR REVIEW BY AMICUS CURIAE FOR OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator and by so doing caused a true copy to be served electronically on the following parties:

Willard Merkel

Attorney for Plaintiff-Appellant, Respondent on Review

James B. Rich

Of Attorneys for Defendant-Respondent, Petitioners on Review

/s/ Lisa T. Hunt