IN THE SUPREME COURT OF THE STATE OF OREGON

ROMAN KIRYUTA,
Plaintiff-Appellant, Respondent on Review

vs.

COUNTRY PREFERRED INSURANCE COMPANY,
an Illinois corporation,
Defendant-Respondent, Petitioner on Review.

Multnomah County Circuit Court No. 1301-01380
CA No. A156351, Supreme Court No. S063707

APPELLANT'S BRIEF ON THE MERITS

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

Date of Decision:	September 2, 2015
Author:	De Muniz, S.J.
Concurring:	Lagesen, P.J. and Flynn, J.

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INTRODUCTION

Throughout its Brief on the Merits, Country assumes, incorrectly, that there is a relationship in the legislative history between the attorney fee statute at ORS 742.061(1) and the uninsured motorist code at ORS 742.500, *et seq.* Country argues the phrase "damages due the insured" used in ORS 742.061(3) authorizes safe harbor no matter what defenses an insurer might assert. Rather, by its use of the phrase "damages *due* the insured," the Legislature intended to deny safe harbor to insurers contesting that any UM/UIM damages/benefits at all were owing. Just as this Court determined in *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), that the word "amount" used in ORS 742.061(2) refers to the "quantum of the insured's damages," so too does the word "due." Nothing is "due" until an insured first proves during litigation that he suffered damages and the *amount* of those damages. Given the conjoined legislative history of ORS 742.061(2) and (3), that is the only interpretation of ORS 742.061(3) available to this Court that is consistent with *Grisby*.

Country's argument errs by focusing on the statute's use of the word "damages," without giving any meaning at all to the word "due." That interpretation of the statute is error for multiple reasons:

1. Had the Legislature intended to grant safe harbor in *all* UM cases, it easily could have said so plainly. Country asserts that "damages" refers to the

universe of benefits available under the model UM policy found at ORS 742.504 and defined at ORS 742.504(2)(j)(A). If "damages" has that meaning, then the phrase "damages *due the insured*" is surplusage because the universe of cases in which the only issues are liability and damages would be the same universe of cases in which the only issue is liability – there would not be any cases in which damages are not an issue. Country's argument demands that this Court ignore the Legislature's use of the word "due," even though the Court is charged to construe a statute so that no part is meaningless. ORS 174.010.

2. UM benefits available under ORS 742.504(1)(a) are defined at ORS 742.504(2)(j)(A) as those sums that the insured "could have recovered in a civil action from the owner or operator at the time of the injury after determination of fault or comparative negligence *and resolution of any applicable defenses*." No damages/benefits can become "due" until the "resolution of any applicable defenses." If, by its use of the term "damages due the insured," the Legislature intended to refer to the insurance code at ORS 742.504(2)(j)(A), then the Legislature plainly intended to deny safe harbor when "resolution of applicable defenses" is required by the insurer's litigation strategy, such as Country's affirmative defenses in this case.

3. The legislative history of the "safe harbor" exceptions at ORS 742.061(2) and (3) for an insured's PIP and UM benefit claims do not suggest that the Legislature intended to give drastically different meanings to each

subsection. In interpreting ORS 742.061(2) – safe harbor in PIP claims – this Court determined in *Grisby v. Progressive, supra*, that the phrase "amount of benefits due the insured" meant the "quantum" of benefits. The Court concluded that a denial of a bill for medical services otherwise payable under PIP coverage did not present a question over the "amount" of benefits due, and that the Legislature did not intend to grant safe harbor in such cases. Country's argument that the Legislature intended to grant safe harbor under ORS 742.061(3) in any UM/UIM case where the insurer denied that any benefits/damages were owing is inconsistent with the conjoined legislative history for the two safe harbor provisions for PIP and UM/UIM, respectively. In *Cardenas v. Farmers Insurance Co.*, 230 Or App 403, 215 P3d 919 (2009), the Court of Appeals recounted that legislative history:

> "The bill that added paragraphs (2) and (3) to ORS 742.061 was Senate Bill (SB) 504 (1999). An early draft of the bill would have exempted PIP, UM, and underinsured motorist (UIM) claims from attorney fee recovery when the insurer did not dispute coverage and consented to submit the case to binding arbitration and the only issues were 'the liability of the uninsured or underinsured motorist and the damages due the insured.' At a work session of the Senate Judiciary Committee, however, committee counsel noted that the language was not appropriate for PIP claims, because liability in such claims is not an issue. Counsel reported that the bill's proponents had agreed to address that problem in the House. Tape Recording, Senate Judiciary Committee, SB 504, May 20, 1999, Tape 191, Side B; Tape 192, Side A (statement of Anne Tweedt).
>
> Subsequently, in the House, '[a] new subsection was added that included separate treatment for PIP benefits, making the exemption

> applicable in PIP cases when the insurer 'has accepted coverage and the only issue is the amount of benefits due the insured.' Or Laws 1999, ch 790, § 1, *codified as* ORS 742.061(2)(a),' *Grisby,* 207 Or App at 600. One of the proponents, the claims manager for North Pacific Insurance Company, explained:
>
> > 'The amendment to the bill that was just submitted to the committee is an attempt simply to clarify in the case, on one hand, the PIP benefits, *** and, on the other hand, uninsured/underinsured motorist benefits, so that the wording is correct when applying to those respective categories so it's essentially a housekeeping amendment.'
>
> Tape Recording, House Rules, Elections and Public Affairs Committee, SB 504, June 14, 1999, Tape 92, Side A (statement of Tom Mortland)." *Cardena*s, 230 Or App at 410-411.

That history suggests that the Legislature intended that conditions precedent to safe harbor be the same for both PIP and UM cases.

In *Grisby,* this Court determined that the Legislature's use of the word "amount" in ORS 742.061(2) was evidence of its intention that safe harbor be unavailable to insurers who denied claims for PIP benefits. This Court should hold that the Legislature's use of the phrase "damages due the insured" in ORS 742.061(3) evidences its intention to distinguish between those cases where, after the insured proves the uninsured/underinsured tortfeasor's liability, the focus shifts to the quantum of the insured's damages/benefits owing versus cases in which any damages/benefits are denied.

The *Grisby* Court determined that the Legislature used "amount" to exclude from safe harbor those cases in which the insurer denied that any PIP

benefits are due. For UM/UIM cases, this Court should determine that the Legislature used the word "due" to exclude from safe harbor those cases in which the insurer denies that any benefits are owing on account of damages caused by the UM/UIM tortfeasor. In PIP cases, "amount" as used in ORS 742.061(2) refers to the quantity of benefits available under the policy, which benefits are described at ORS 742.520, *et seq.* In UM/UIM cases, the term "damages" is used because the benefits available under the policy are only those which the insured could have recovered from a UM/UIM tortfeasor. It is inconsistent to suggest that the 1999 Legislature intended to grant safe harbor to insurers denying any PIP benefits were owing while at the same time intending to grant safe harbor to insurers denying that any UM/UIM damages/benefits are owing.

In describing the "damages" that an insured is entitled to recover under the UM/UIM coverage, neither ORS 742.504(1)(a) nor ORS 742.504(2)(j)(A) use the term "due." This Court should hold that the Legislature, through its use of the word "due," expressed its intention to deny safe harbor to insurers who battle their insureds in litigation over *whether any* UM/UIM benefits/damages are "due."

COUNTRY'S "FIRST QUESTION PRESENTED"

In its question number 1, Country posits:

"Once a UM/UIM claimant rejects an insurer's 'safe harbor' offer of binding arbitration and files suit in Court, can the insurer be subject to attorney's fees merely for raising affirmative defenses in their Answer?"

Answer: Yes.

Country's proposed rule, that the insurer should be allowed safe harbor while raising any and all available defenses (save a coverage defense) is inconsistent with the legislative history of ORS 742.061(3). ORS 742.061 has been Oregon law for nearly 100 years. The Insurance Code at ORS 742.500, *et seq*, was enacted many years thereafter. Because ORS 742.061(1) applies only to litigated actions in the Circuit Court, UM/UIM insurers escaped its application for many years by including mandatory arbitration clauses in their policies. The landscape changed after *Carrier v. Hicks*, 316 Or 341, 851 P2d 581 (1993). The *Carrier* Court determined that the mandatory arbitration provision of such policies denied insureds their constitutional opportunity to litigate. Litigated cases thereafter became subject to the fee statute. Alarmed, insurers took their complaints to the 1999 Oregon Legislature which enacted the "safe harbor" provisions at ORS 742.061(2) and (3).

Senate Bill 504 that became ORS 742.061(2) and (3) was intended to deny safe harbor equally in both PIP and UM cases unless the issues were

limited to "the liability of uninsured or underinsured motorist and the damages due the insured." It was only a result of a "housekeeping amendment" (because liability issues do not exist in PIP cases) that the language of ORS 742.061(2) and (3) differ. *Cardenas* v. Farmers, *supra,* 230 Or App at 410-411.

Given the common legislative history of the provisions for safe harbor in both PIP and UM cases, this Court's decision in *Grisby v. Progressive, supra,* should control. Giving the same meaning to the PIP and UM safe harbor statutes – that safe harbor is unavailable in disputes over benefit/damage denials -- ensures that the Legislature's intent is carried out. Giving vastly different meanings to ORS 742.061(2) and (3) renders the phrase "the damages due the insured" – as used at ORS 742.061(3) – surplusage, because *all* claims for UM/UIM benefits are claims for damages that an insured would otherwise be entitled to recover from a UM/UIM tortfeasor. No damages can become "due" until the insured first proves during litigation that he suffered damages, that he prove the amount (dollar value) of his damages, and that "any applicable defenses" be resolved in his favor. This interpretation of the statute is consistent with the conjoined legislative history of ORS 742.061(2) and (3) and gives full meaning to the Legislature's use of the word "due."

Country has attempted to draw a parallel between the use of the word "damages" in ORS 742.061(3) and the use of the same term in the UM code at ORS 742.504(1)(a) and ORS 742.504(2)(j)(A), but neither insurance code

section contains the word "due." The UM code requires that the insured first prove the damages that he:

> "...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 resolution of any applicable defenses." See ORS 742.504(2)(j)(A).

If, as the Court of Appeals suggests, the attorney fee statute at ORS 742.061(3) refers to this insurance code section, then the fee statute does not account for the "resolution of any applicable defenses," because ORS 742.061(3) requires the insurer to pledge only that the issues will be limited to liability "and the damages due the insured." "Due" refers to the amount of benefits owing because no amount is "due" until an insured has proved during litigation that some damages were actually suffered and the dollar value of those damages. This Court should apply the rule it announced in *Grisby* that an insurer's argument that an insured "is entitled to an award of zero," is *not* a dispute over the "damages due the insured." Certainly the affirmative defenses raised by Country in this action represent "other" applicable defenses referred to at ORS 742.504(1)(j)(A).

COUNTRY'S "SECOND QUESTION PRESENTED"

In its question 2, Country posits:

"Once a UM/UIM claimant rejects a 'safe harbor' offer of binding arbitration, should the insurer be exposed to attorney's fees under ORS 742.061 if they challenge liability or damages?"

Answer: "No," as to liability contests, but "yes" in cases where the insurer, through its litigation strategy, raises the issue of *whether any* damages/benefits are "due" or owing, or requires "resolution" of any applicable defenses.

Respondent Country would have this Court decide that the Legislature conditioned the availability of UM/UIM safe harbor only on whether the insurer offered binding arbitration. Rather, the statute conditions the availability of safe harbor on both the insurer's pledge to participate in binding arbitration and also that issues to be decided are limited to the UM/UIM tortfeasor's liability and "the damages due the insured." (not including the "resolution of any applicable defenses") An insurer's litigation position that no damages are owing (either because damages are denied or because of affirmative defenses that must be resolved) is a question beyond the scope of its pledge that the issues will be limited to "the damages due the insured."

COUNTRY'S "THIRD QUESTION PRESENTED"

In its question 3, Country posits:

"If a UM/UIM insurer refuses to admit that claimant is entitled to some damages, does that invalidate a previously valid 'safe harbor' offer of binding arbitration?"

Answer: Yes.

As described above, "safe harbor" is conditioned upon an insurer's written pledge that it will engage in binding arbitration and that it will limit disputed issues to the UM/UIM tortfeasor's liability and "the damages due the insured." The insurer forfeits safe harbor by pursuing a litigation strategy that breaks its pledge by raising issues during litigation about *whether any* benefits/damages are owing or "due."

Spearman v. Progressive:

Since this case was decided by the Court of Appeals, that Court has gone on to decide *Spearman v. Progressive*, 276 Or App 114, ___ P3d ___ (2016). The question presented in *Spearman* is also the scope of "the damages due the insured" under ORS 742.061(3). Plaintiff *Spearman* is seeking review by this Court, but this Court has not yet determined whether to grant review. This Court should do so because the question presented is the same – the scope of ORS 742.061(3).

The rationale of the Court of Appeals in *Spearman* is flawed. The Court of Appeals got off on the wrong foot when it began its analysis:

> "Because ORS 742.061(3) applies to 'actions to recover uninsured or underinsured motorist benefits,' we begin by exploring the nature of those benefits. UM/UIM coverage is a mandatory part of every Oregon motor vehicle insurance policy. ORS 742.502. The benefit that must be paid under that coverage is '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 body injury sustained by the insured caused by accident ***.' ORS742.504(1)(a). The purpose of UM/UIM coverage is to 'put the person injured by an uninsured motorist in the same position he would be in had he been injured by an insured motorist.' *Vega v. Farmers Ins. Co.,* 323 Or 291, 306 n 13, 918 P2d 95 (1996) (quoting legislative history of ORS 742.504)."

ORS 742.061(3) is an attorney fee statute and there isn't any need to explore what UM benefits are available under a policy of automobile insurance in order to interpret the fee statute. The Legislature has the authority to provide for attorney's fees in any civil action it might choose.

Having confused ORS 742.061(3) with the UM code found at ORS 742.500, *et seq*, the Court of Appeals wrote:

> "Given the purpose of UM/UIM benefits, defendant argues, the scope of 'damages due the insured' in the UM/UIM safe harbor should be understood as the damages that would be due the insured in a negligence action brought by the insured against the uninsured or underinsured motorist brought by the insured. *See Vega*, 323 Or at 306 n 13 (purpose of UM/UIM coverage is to 'put the person injured by an uninsured motorist in the same position he would be in had he been injured by an insured motorist'). Plaintiff, however, urges us to conclude that 'damages due the insured' means the same thing as 'the amount of the benefits due the insured from the insurance carrier' and that a dispute suggesting that the insurer

> owes no benefit exceeds the scope of the safe harbor. Beyond the fact that the legislature did not use the text Plaintiff proposes, the text that the legislature did use presents at least two obstacles to plaintiff's interpretation.
>
> First, the phrase 'damages due' is otherwise used in the pertinent statutes to refer to what the insured could recover from the uninsured motorist, not from the insurer. ORS 742.061 describes the amount due from the insurer as 'the plaintiff's recovery.' Throughout ORS 742.504, the term 'damages' is used to refer to what the insured could recover in a civil action against the uninsured driver, while what the insurer pays is referred to as 'all sums that the insured' is entitled to recover as damages from the uninsured driver, subject to limitations imposed under the terms of the policy.
>
> Second, if 'damages due the insured' means 'benefits due the insured from the insurer,' then it was redundant for the legislature to specify in ORS 742.061(3) that the insurer also can raise issues related to 'liability of the uninsured or underinsured motorist.' It is redundant because the benefit due already depends upon whether an to what extent the uninsured motorist would be liable for the plaintiff's damages. *See* ORS 742.504(2)(j) (taking into account comparative fault). We are charged to construe statutes so that no party is meaningless if it is possible to do that. *See* ORS 174.010;...."

The Court of Appeals' analysis is wrong because the phrase "damages due," had the same initial legislative history in both PIP and UM cases respectively under ORS 742.061(2) and (3). That is consistent with *Grisby* in which this Court held "the amount of benefits due" meant "the amount of benefits due the insured from the insurance carrier." An analysis of the Court of Appeals' decision reveals the error:

1. The Court of Appeals writes that "the phrase 'damages due' is otherwise used in the pertinent statutes to refer to what the insured could recover from the uninsured motorist, not from the insurer." That's wrong. "Damages due" is not found at ORS 742.504(1) nor ORS 742.504(2)(j)(A). Each of those statutes refer to "damages," and not "damages due." The phrase "damages due" is used at ORS 742.061(3) to refer to the amount of benefits due under the policy because:

(a) ORS 742.061(3) applies only to an action on a policy of insurance – a contract action – see *Vega v. Farmers,* 323 Or 291, 296, 918 P2d 95 (1996), and the attorney fee statute makes no reference to the insurance code.

(b) "Damages due" cannot refer to what the insured could recover from the uninsured motorist because the damages an insured may have suffered at the hands of the UM/UIM motorist may exceed the limits of the UM/UIM coverage under the policy of insurance. In that instance, the damages due would be only those available under the policy within its limits, and not the full award of damages that the insured might be entitled to collect from the uninsured/underinsured tortfeasor.

(c) ORS 742.061(1) is an attorney fee statute. Fees accrue if an insurer doesn't make a timely tender on a UM/UIM claim (within 180 days of proof of loss), litigation ensues, and the insured prevails in an amount

exceeding any "timely tender." It is only in the context of an action on an insurance contract the phrase "damages due" is used in ORS 742.061(3). The Legislature has the authority to draw conditions precedent to the entitlement of attorney's fees as it chooses and no legislative history suggests that "damages due" has any meaning other than that the litigated issue be over the "quantum" of benefits due under the policy.

This Court should assume that the Legislature was intentional in its use of the word "due." Damages are not "due" in the context of a UM/UIM action until the insured has proven, during the litigation, both that he suffered damages, the amount or dollar value of those damages, and has overcome "any applicable defenses" asserted by the insurer. The Court of Appeals erred in concluding that "damages due" refers to what the insured could recover from the uninsured motorist (and not from the insurer).

2. The Court of Appeals also erred in concluding that "damages due the insured" under ORS 742.061(3) means something *other than* "benefits due the insured from the insurer." The Court justified its conclusion by claiming:

> "Second, if 'damages due the insured' means 'benefits due the insured from the insurer,' then it was redundant for the legislature to specify in ORS 742.061(3) that the insurer also can raise issues related to 'liability of the uninsured or underinsured motorist.' It is redundant because the benefit due already depends upon whether an to what extent the uninsured motorist would be liable for the plaintiff's damages. *See* ORS 742.504(2)(j) (taking into account comparative fault). We are charged to construe statutes so that no

> party is meaningless if it is possible to do that. *See* ORS 174.010;...."

It is not redundant because the "benefit due" depends *both* upon whether liability rests with the uninsured motorist *and* whether Plaintiff suffered any damages *and* whether he can prove those damages have a dollar value, *and* whether he can overcome "any applicable defenses" asserted by the insurer. There are no "damages due" if Plaintiff proves only liability. The Legislature fully intended that attorney's fees be available in UM/UIM cases where the insurer contested that no damages whatsoever are due the insured, just as this Court has already determined in the context of PIP litigation.

CONCLUSION

The Legislature intended that ORS 742.061(2) and (3) be interpreted in like fashion. This Court should hold that both subparts of the statute operate to deny safe harbor to insurers contesting whether its insured has suffered any

damages at all, whether those damages be due under the PIP or UM/UIM coverages of the automobile insurance policies they have issued.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this APPELLANT'S BRIEF ON THE MERITS does not exceed 3,679 words.

Type size

I certify that the size of the type in this APPELLANT'S BRIEF ON THE MERITS is not smaller than 14 point for both the text of the APPELLANT'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 ____ day of March, 2016, I served the foregoing APPELLANT'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 22nd day of March, 2016, I filed electronically, via the Court's eFiling system, APPELLANT'S BRIEF ON THE MERITS with the Appellate Court Administrator.

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