IN THE SUPREME COURT OF THE STATE OF OREGON

MARTHA L. WRIGHT, Petitioner on Review, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, a foreign corporation; Respondent on Review, and JOHN A. TURNER, an individual; FREIDA TURNER, an individual; and SHERRI L. OLIVER, an individual, Defendants.	)	Multnomah County Circuit Court No. 0604-03958 CA A1444126 SC S060960

BRIEF ON THE MERITS OF MARTHA WRIGHT

On Review of the decision of the Court of Appeals, October 24, 2012

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge
Opinion by Haselton, Chief Judge

In an Appeal from the Judgment of the Circuit Court of Oregon of the State of Oregon for Multnomah County
Honorable Kristena A. LaMar, Senior Judge

Attorney for Plaintiffs-Appellants, Petitioners on Review:
Rick J. Glantz, OSB No. 083386
James D. Vick, OSB No. 722732
201 Ferry Street SE, Suite 200
Salem, OR 97301
(503) 581-6333
rglantz@vickandglantz.com
jvick@vickandglantz.com

Attorney for Defendant-Respondent, Respondent on Review:
Thomas M. Christ, OSB No. 834064
Julie A. Smith, OSB No. 983450
888 SW 5th Avenue, Suite 500
Portland, OR 97204
(503) 323-9000
tchrist@cosgravelaw.com
jsmith@cosgravelaw.com

June, 2013

INDEX

AUTHORITIES CITED

Cases

I. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. Question Presented No. 1

When plaintiff alleged that she was involved in two separate collisions that triggered two policy limits under her UIM policy, the jury returned a verdict awarding plaintiff damages for injuries sustained in both collisions just shy of an amount equal to two policy limits under plaintiff's UIM policy, and defendant did not move for a directed verdict, submit jury instructions or a verdict form in support of its claim that plaintiff was involved in only one accident, has defendant preserved that issue for appellate review?

B. Proposed Rule of Law No. 1

A defendant does not preserve for appeal the issue of whether plaintiff was involved in "one accident or two" when defendant does not move for a directed verdict, obtain a court ruling regarding the sufficiency of plaintiff's evidence regarding which collision caused her injuries, or obtain a ruling on the terms of an insurance policy governing "one accident versus two."

C. Question Presented No. 2

When a jury has returned a verdict awarding plaintiff damages for injuries sustained in two accidents, and defendant did not move for a directed verdict, submit jury instructions, or a verdict form in support of its claim that plaintiff was involved in only one accident, did the Court of Appeals err in concluding as a matter of law that plaintiff was involved in only one accident

under the provisions of defendant's insurance policy rather than construing the insurance contract against the drafter after determining the term “accident” as used in a UIM policy was ambiguous?

D. Proposed Rule of Law No. 2

When an appellate court utilizes the *Holloway v. Republic Indemnity Co.* framework for interpreting insurance contract terms, and the court turns to outside authority after finding that the term at issue is not defined and the insurance policy as a whole does not provide context for defining the term, if outside authorities are on point but in conflict with each other, the insurance contract term in question must be deemed ambiguous and thus construed against the drafter of the contract.

E. Question Presented No. 3

Whether a motor vehicle collision caused by one negligent driver that is followed by another collision some minutes later caused by a different negligent driver constitutes “one accident” or “two accidents” under a UIM policy that does not define the term “accident”?

F. Proposed Rule of Law No. 3

When determining whether “one accident” or “two accidents” has occurred within the meaning of a UIM insurance policy, Oregon courts follow the “cause” theory which determines the number of accidents by referring to the cause or causes of the damage. A single accident occurs if the cause and result

are so simultaneous or so closely linked in time and space as to be considered by the average person as one event. Conversely, two accidents occur if the cause and result of each collision are not so simultaneous or so closely linked in time and space such that the average person would consider them as two events. Alternatively, Plaintiff also proposes the rule established in *United Servs. Auto Ass'n v. Baggett* "a single uninterrupted course of conduct which gives rise to a number of injuries or incidents of property damage is one 'accident' or 'occurrence[' and o]n the other hand, if the original cause is interrupted or replaced by another cause, there is more than one 'accident' or 'occurrence." Plaintiff also contends the *Baggett* court misapplied their own rule to the facts of that case. 209 Cal. App. 3d 1387 (1989).

II. NATURE OF ACTION

Following two motor vehicle collisions that occurred on April 16, 2004, Plaintiff Wright sought compensation pursuant to the underinsured motorist clause of her automobile insurance policy purchased from defendant Mutual of Enumclaw Insurance Company. On the first day of trial, Defendant amended its answer to allege that only one policy limit of $500,000 was available as opposed to the two $500,000 policy limits that Plaintiff alleged in her complaint and Defendant previously admitted were available. A jury awarded Plaintiff $979,540.06. Defendant objected to the general judgment Plaintiff submitted, arguing that "one accident" occurred and thus only one $500,000

policy was available to Plaintiff. The trial court rejected Defendant's arguments, and entered a general judgment that reflected the amount the jury awarded minus the offsets reflecting settlements with the underlying defendant drivers. Defendant appealed to the Court of Appeals, and that court reduced Plaintiff's verdict to $500,000 less offsets. Plaintiff seeks to overturn the Court of Appeals decision and reinstate the jury's verdict.

III. STATEMENT OF MATERIAL FACTS

On April 16, 2004, Plaintiff was a passenger in a vehicle driven by her friend, TR 77–78. Plaintiff's vehicle was traveling northbound on Interstate 5 and it was raining heavily and hailing. *Id.* at 78. A vehicle traveling in front of Plaintiff's vehicle lost control and struck another vehicle. *Id.* at 77–79. That vehicle then spun around and collided with Plaintiff's vehicle. *Id.* at 79. The vehicle and Plaintiff's vehicle came to a rest on the highway's median and up against a "Jersey Barrier."[1] *Id.*

Plaintiff and checked each other for injuries. *Id.* checked her dog for injuries, and then got out of the vehicle by crawling out of the driver's side window. *Id.* at 80. then walked to the other vehicle to check on its occupants and had a conversation with the vehicle's driver, Turner. *Id.* at 81. As she was checking on Turner, multiple vehicles passed by the scene

[1] Merriem-Webster Online defines "Jersey barrier" as follows: "a concrete slab 32 inches high with slanted sides that is used in tandem with others to block or reroute traffic or to divide highways."

of the accident. *Id.* When returned to her vehicle after checking on Turner and his passenger, told Plaintiff to remain in the vehicle because she did not want either one of them to be struck by a passing vehicle. *Id.* at 82. then decided to retrieve her cell phone to call for emergency aid. *Id.* at 82. She conversed with Plaintiff regarding the location of the cell phone, and told Plaintiff to retrieve her purse as it was likely the phone was inside it. *Id.* While Plaintiff was retrieving the purse, another vehicle negligently operated by Oliver struck the rear of vehicle. *Id.*

Plaintiff brought an action against Defendant for UIM benefits to have Defendant step into the shoes of both underlying defendants. In her Amended Complaint, Plaintiff alleged that Defendant's policy provided $1 million of UIM coverage as she had been injured in two separate accidents and that she sustained damages from those accidents of $1 million. Def's. ER 1–7, 9–11. Defendant's original answer to Plaintiff's Amended Complaint admitted the amount of coverage available, but denied the extent of Plaintiff's damages, and "request[ed] a jury trial to determine the monetary value of Plaintiff's claims." *Id.* at 13–14. Defendant's pre-trial memorandum and motions in limine requested that the trial court bar Plaintiff's counsel from making any arguments regarding the contract terms, including breach of contract issues or policy limits. Defendant stated the jury was tasked with determining "the amount of

damages as opposed to simply determining what amount of benefits or coverage was purchased in the contract of insurance." Plf's. ER 3–6.

Defendant submitted a proposed jury verdict form that instructed the jury only to enter monetary amounts for Plaintiff's damages. TR 889–90; Def's. ER 22. Defendant's proposed jury instructions included no special instructions requiring the jury to apportion Plaintiff's damages between the two accidents. Plf's. ER 7–8.

On the first day of trial, Defendant filed an amended answer, alleging that only one policy limit of $500,000 was available rather than two policies totaling $1 million. Def's. ER 15. That answer continued to request that the jury only determine the monetary value of Plaintiff's claims. *Id.* Defendant did not request that the jury determine the number of accidents or the amount of coverage. *Id.*

On the second day of trial, the trial court summarized a prior, in-chambers discussion that occurred between the court and counsel. The court stated that it was agreed that a determination as to whether one or two policy limits were available would occur after trial and depending upon the jury's verdict. TR 166. Plaintiff's counsel also stated, with defense counsel's agreement, that the jury would not receive any instructions regarding a limitation on their damages determination save for the Amended Complaint. *Id.* at 167–68. At this point, defense counsel raised the issue of the jury

apportioning Plaintiff's damages between the two accidents when defense counsel stated his intent to submit a modified jury verdict form asking that the jury perform such an apportionment. *Id.* at 168–69. The trial court stated that this needed to be resolved at that time. Defense counsel agreed, stating that, depending on the jury's verdict, it may not even become an issue. *Id.* at 170. Defense counsel further stated that he was not going to ask the jury to decide whether one or two accidents occurred under the wording of the policy. *Id.* at 168.

During her case-in-chief, Plaintiff submitted evidence that given the nature of the collisions, the temporal proximity, and the kinds of injuries involved, it was not possible to apportion Plaintiff's injuries between the two accidents. TR 613–14, 616 (testimony of Plaintiff's expert, Michael Freeman). That testimony was not rebutted or countered by any evidence the defendant submitted. *See generally* TR 719–810 (testimony of defendant's expert, William Smith).

After the jury was instructed that the only issue for them to determine was the amount of Plaintiff's damages, defense counsel's only exception was to the verdict form. Defense counsel had previously stated that he intended to submit a verdict form asking the jury to apportion Plaintiff's damages between

the two accidents; however, he never submitted this verdict form. [2] TR 883, 885, 888–91. Defense counsel mentioned *for the first time* that he believed Plaintiff had the burden of proving how much of her injuries were caused by each of the accidents, while acknowledging that apportionment of Plaintiff's injuries might not even become an issue in the case. *Id.* at 888–91.

The jury initially returned with a verdict in excess of Plaintiff's prayer; after defense counsel's objection and request that the jury be reinstructed and continue deliberations, the jury returned a verdict totaling $979,504.06. *Id.* at 906–909, 915. Defense counsel did not object or raise for discussion the apportionment, nor the one policy versus two policy issues. *See Id.* at 906–909, 915. Following the verdict, the trial court discharged the jury without objection from either party. *Id.* at 915–16.

IV. SUMMARY OF ARGUMENT

A. Preservation

Defendant did not preserve for appeal the issue of one policy limit versus two policy limits—and by extension the jury apportioning Plaintiff's damages. Defendant's challenge to the verdict actually is a sufficiency of the evidence argument that Oregon case law and appellate procedure require be preserved by a directed verdict motion or other challenge to the sufficiency of Plaintiff's evidence. Defendant made no such motion or other challenge; none of the four

[2] It is important to note that after multiple days of trial and ample opportunity to proffer the intended form, defense counsel never did so.

instances identified by the Court of Appeals as "patent" preservation of the error in fact preserve defendant's appellate arguments. Based on the evidence in the record, Defendant's argument was moot. The Court of Appeals wrongly heard, considered, and decided defendant's assignments of error.

B. "Accident" Ambiguity

Holloway v. Republic Indemnity Co. succinctly states the paradigm for interpreting and applying insurance contract terms. 341 Or 642 (2006). The Court of Appeals failed to follow the paradigm. The term "accident" is undefined in the insurance policy at issue in this case. Rather than stopping its analysis and construing the "accident" language against the drafter of the policy when it acknowledged that Oregon case law had previously found that an "all-encompassing definition" of "accident" is impossible, the Court of Appeals turned to outside authorities that it itself deemed as "highly variable." *See Botts v. Hartford Acc. & Indem. Co.*, 284 Or 95, 103 (1978); *Wright v. Turner*, 253 Or App 18, 30 (2012). The outside authorities the Court of Appeals considered were themselves in conflict on the issue of "one accident" or "two accidents." Rather than stopping at the correct point in the *Holloway* paradigm, the Court of Appeals went on to incorrectly apply the outside authorities to the facts of this case. In doing so, the Court of Appeals erred. The term "accident" is ambiguous, should be construed against Defendant, and the jury's verdict reinstated.

C. Insurance Policy Interpretation

State courts across the country have struggled with this question, and have come up with two different approaches. The "cause theory" determines the number of accidents by referring to the cause or causes of the damage. The "effect theory" determines the number of accidents by referring to the number of individual claims or injuries. The majority of states that have considered this issue have adopted the "cause theory." Oregon should follow this trend and adopt the following standard for determining "one accident" versus "two accidents": A single accident occurs if the cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event. Conversely, two accidents occur if the cause and result of each collision are not so simultaneous or so closely linked in time and space such that the average person would consider them as two events. Under either of these theories, Plaintiff was involved in two accidents and the Court of Appeals erred in finding otherwise.

V. ARGUMENT

A. Preservation

The crux of Defendant's arguments to the Court of Appeals was that Plaintiff did not present sufficient evidence to the jury that she was involved in

two accidents as opposed to one accident with two collisions.[3] However, defendant made no such argument to the trial court. Thus, it failed to preserve this issue for appeal.

Oregon case law is clear regarding what is required to preserve sufficiency of the evidence errors for appeal. In *Verret Const. Co. v. Jelco Inc.*, the Oregon Supreme Court addressed this issue in two paragraphs, the first of which described the nature of the defendant's appeal. 280 Or 793, 793 (1977). In its second paragraph, the Court simply stated: "Defendant made no motion for a non-suit or for a directed verdict. In the absence of having tested the sufficiency of the evidence to sustain the verdict in the trial court, defendant *cannot raise the issue on appeal*." *Id.* (emphasis supplied; internal citations omitted). In support of this simple proposition, the Court cited two cases, one

---

[3] *See, e.g.*, *Appellant's Opening Brief* at 4 ("In any case, plaintiff *failed to prove* that all of her damages did not result from the first collision. . . . Whatever the status of plaintiff's pleadings and *proof*, it's clear from the record that all of the plaintiff's injuries 'resulted from' the first collision[.]" (emphasis added)); 20 ("[P]laintiff *failed to prove* that all of her damages did *not* result from the first collision. That was her burden, of course. . . . In other words, the insured has the *burden of proving* that a loss for which she seeks to recover under the policy is in fact covered and, if so, to what extent . . . . She did not *offer any evidence* to divide the injuries or damages between the collisions." (first, third, fourth emphases added); 23 ("This court should . . . hold plaintiff to her pleadings and to her *failure of proof*." (emphasis added)); 26 ("As noted above, plaintiff had the *burden of proving* – and thus the burden of also pleading – that not all of her damages resulted from the first collision, or not all from the second, if she wanted to hold defendant liable for more than $500,000. (emphasis added)); 27 ("In sum, plaintiff was required *to prove* which of her total damages resulted from the first collision and which from the second, if she wanted to recover damages above $500,000." (emphasis added)).

of which dates from 1895. As early as 1895, Oregon appellate courts refused to consider alleged sufficiency of the evidence errors if they were not preserved at the trial court level.[4]

In *Schmidt v. Dick*, the plaintiff alleged that defendant was negligent when his vehicle swerved into oncoming traffic, causing a head-on collision between the parties. 277 Or 759, 761 (1977). Plaintiff moved to strike the testimony defendant presented regarding a flat tire that defendant argued caused his vehicle to lose control and swerve into oncoming traffic. *Id.* at 762. Plaintiff moved to strike testimony on the basis that it was speculative and should be removed from the jury's consideration. *Id.* The trial court denied this motion, and following a defense verdict, plaintiff appealed on the basis that because defendants were statutorily prohibited from operating their vehicle on the wrong side of the highway, defendant was negligent as a matter of law because the jury could not find defendant's evidence regarding his tire as sufficient for

---

[4] "It is contended that the evidence totally fails to show that the defendants were negligent in the performance of any duty they owed the plaintiff's minor son, but that, on the contrary, it clearly shows that the boy was injured in consequence of his own negligence. No motion for a nonsuit, nor any request for an instruction to the jury to find for the defendants, having been made in the court below, the question is presented whether this court has authority to review the evidence. . . . *An objection must be appropriately made in the trial court to the ruling or decision deemed to be erroneous, and when not so made the right to object will be regarded as waived on appeal to this court*, (Elliott's Appellate Procedure, §§ 674, 675,) for it is safe to say that the general rule, and one of very comprehensive scope, is that *where there is no ruling, or no sufficient request to rule, there is no available error*: Elliott's Appellate Procedure, § 726." *Shmit v. Day*, 27 Or 110, 116–17 (1895) (emphasis added).

establishing defendant had exercised reasonable care. *Id.* at 762–63. The Supreme Court stated, "[t]he proper way to raise this question is to move for a directed verdict on the issues of negligence and causation." *Id.* at 763. The motion to strike was not well taken and the Court went on to opine that:

> [w]hen there is insufficient evidence to justify a verdict but the issue is not raised by a motion for a directed verdict or by a request for instructions directing a verdict, the error is waived and is not subject to review. *The only contention which plaintiff can make is that she did call the issue to the trial court's attention by her motion to strike the evidence. However, that motion was neither well taken nor sufficient to require the trial court on its own motion to take the issues of defendant's negligence and causation from the jury. Id.* (emphasis added) (citing *Erwin v. Thomas*, 267 Or 311, 311–14 (1973); *Paul v. McCudden*, 256 Or 143, 144 (1970)).

The Supreme Court stated this preservation rule even more bluntly in *R.J. Frank Realty, Inc. v. Heuvel*. Because this was a jury trial, the contention that the verdict was not supported by the evidence

> can only be preserved for appeal by a motion for a directed verdict during trial. *See, e.g., Columbia Truck Sales, Inc. v. Humphrey*, 281 Or 705, 707, 576 O2d 373 (1978), and cases therein cited. Defendant did not move for a directed verdict and therefore we do not consider these assignments of error. . . . We point out that the rule requiring a motion for directed verdict at trial in order to preserve the "sufficiency of evidence" objection for appeal has been the law since *Davis v. Emmons*, 32 Or 389, 395, 51 P 652 (1898). 284 Or 301, 311–12 (1978).

The Supreme Court outlined the rationale for this preservation rule in *Falk v. Amsberry*:

> Our imposition of this requirement in jury-tried cases was a specific application of the general rule of appellate procedure that an appellate court will not consider a question on appeal unless it has been first

> presented to and ruled upon by the lower court. The rule reflects the function of appellate review to correct errors of the trial court. *Under this general rule no error has occurred where no ruling has been made by the court or requested by the litigant.* 290 Or 839, 843 (1980) (emphasis added).

This rule further underscores the principles behind preservations rules as a whole, *i.e.* judicial economy, procedural fairness to the parties (and the trial court), and full development of the record. *State v. Parkins*, 346 Or 333, 340 (2009).

Applying this rule here, it is very clear that Defendant did not, in fact, preserve this issue for appellate review. The record reflects: 1) both parties and the trial court understood that the *only* issue before the jury was the amount of Plaintiff's damages; 2) Defendant amended its answer on the first day of trial requesting "a jury trial to determine the monetary value of Plaintiff's claims"; 3) the trial memorandum Defendant submitted to Plaintiff's counsel and the trial court on the Friday before trial stated that the only issue for the jury to decide was the amount of Plaintiff's monetary damages; 4) the defendant's requested verdict form, which was submitted to the jury and is the only one contained in the court file, asked the jury to determine the amount of Plaintiff's economic and non-economic damages only; and 5) defendant arguably had the burden of proving only one accident caused plaintiff's injuries based on their amended answer filed on the first day of trial.

Each of these actions, stated limitations of the jury's role, and court submissions cement the fact Defendant failed to preserve the arguments it made on appeal to the Court of Appeals. That the Court of Appeals was able to enumerate four instances during the trial court proceedings when Defendant *discussed* the issue regarding the number of accidents does not overcome the clearly established preservation requirements established almost 110 years ago. Raising the question of "one versus two accidents" on the first day of trial; the trial court's deferred decision on the issue and rejection of Defendant's theoretical second proposed jury verdict form which was never proffered; and Defendant's argument *after* the jury returned one verdict over the combined policy limits and another just shy of the combined policy limits does not "patently" preserve this issue for appeal. *Wright*, 253 Or App at 29.

Although the trial court was *aware* of Defendant's last minute "one accident versus two" issue does not mean that Defendant met its burden of preserving the issue for appellate review. Although the Court of Appeals was correct about the fact that the trial court was afforded a reasonable opportunity to address Defendant's post-verdict objections regarding what the jury had/had not done, the bulk of Defendant's arguments on appeal were not presented to the trial court in such a manner that it was afforded a reasonable opportunity to consider the issue as contemplated by preservation principles. *See, e.g.*, *Peeples v. Lambert*, 345 Or 209, 219–23 (2008). Not only did Defendant wait until the

day of trial to bring the issue of "one versus two accidents" to the trial court and Plaintiff counsel's attention and agreed that this new-found issue may not even become an issue in the case, but it never even proffered a proposed jury verdict form asking the jury to apportion Plaintiff's injuries for the trial court to refuse or agree to submit to the jury. The trial transcript, as outlined above, is filled with numerous examples of the parties' and trial court's understanding that the issue of whether one or two policy limits were available might not even come to a head depending on the jury's verdict. Given this understanding, the trial court cannot be said to have been afforded a reasonable opportunity to address the issue of whether "one versus two accidents" occurred, much less whether the evidence Plaintiff presented at trial was sufficient to sustain the jury's verdict. The Court of Appeals itself even admitted that the sufficiency of the evidence issue Defendant now raises on appeal would be "for the trial court's initial consideration" if the case was remanded as the trial court failed "to entertain the merits of the 'one accident versus two' issue[.]" *Wright*, 253 Or App at 37. That the Court of Appeals states that "[p]reservation is patent" in one breath—that the trial court was afforded a reasonable opportunity to address—yet in the next states that the trial court did not reach the merits of the issue is contradictory to say the least.

Further, if this Court finds the error preserved, Plaintiff met her burden on the apportionment issue. Plaintiff offered testimony of Michael Freeman,

Ph.D., M.P.H., D.C., who testified "there's no way to make a causal differentiation between the two crashes." TR at 616. Dr. Freeman went further, stating that any determination was "impossible." *Id.* Defendant did nothing to refute this testimony in the cross examination of Dr. Freeman nor did it offer any evidence on its own to refute Dr. Freeman's testimony. And based on the amount of the jury's verdicts—the first one that was over the amount of the prayer and the second one just shy of the prayer—it can reasonably be inferred that the jury awarded Plaintiff damages for injuries sustained in both accidents. Thus, even if Defendant can be said to have preserved the issue of "one accident versus two," the record establishes that Plaintiff's injuries *could not* be apportioned between the two accidents. As such, with Defendant stepping in to the shoes of the underlying tortfeasors from both collisions, Defendant's argument in this regard is moot and the jury's verdict should be reinstated.

Lastly, Defendant's arguments on appeal can also be categorized as a "we can't tell" challenge to the jury's verdict. Before it was overturned, this rule said that when the appellate court cannot determine whether the jury based its verdict on a defective specification of negligence or another valid, specification. *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 168 (2003). *Shoup* severely restricted this rule, stating that when an appellate court cannot determine whether a general jury verdict is based on a specification of negligence that is unsupported by the evidence and/or invalid specification of

negligence under Oregon law, the party who moved for a new trial and/or a judgment notwithstanding the verdict is not entitled to a new trial. *Id.* at 176. *Shoup* is analogous to this case. Here, Defendant's proposed jury verdict requested a general verdict by simply asking the jury to determine Plaintiff's economic and non-economic damages and there is undisputed evidence that Plaintiff's injuries cannot be apportioned, the "we can't tell" challenge does not result in a new trial here as Defendant cannot show an error substantially affecting its rights as it cannot demonstrate that the jury had insufficient evidence upon which to award two policy limits worth of damages. *Id.* ("[A]ppellate courts, to act within statutory limitations, may not apply the 'we can't tell' rule to order a new trial in a case involving a judgment on a general verdict based on multiple specifications, one of which is invalid, if there is evidence to support another, valid specification.").

Defendant did not preserve the argument of "one accident versus two" at the trial court level. In ruling that it did and deciding Defendant's claims on their merits, the Court of Appeals erred by failing to follow clearly established preservation rules that should have barred Defendant's arguments from the outset. This Court should reverse the Court of Appeals' decision on this ground, and reinstate the jury's verdict as reflected in the General Judgment entered by the trial court below.

////

B. "Accident" Ambiguity

Should this Court conclude that Defendant preserved the issues it now asserts on appeal, the predominant issue is the definition and application of the term "accident." Because Plaintiff's argument and the Court of Appeals' holdings are based on interpreting the insurance policy, this Court reviews that question for errors of law. *Holloway*, 341 Or at 649.

Oregon courts have established a procedure for interpreting and applying insurance policy terms to the facts before them. Courts are tasked with determining the intention of the parties to the insurance policy, which is done "based on the terms and conditions of the insurance policy." *Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or 464, 469 (1992). Under *Holloway*, which succinctly summarized prior cases such as *Hoffman*, courts are instructed:

> If an insurance policy explicitly defines the phrase in question, we apply that definition. If the policy does not define the phrase in question, we resort to various aids of interpretation to discern the parties' intended meaning. Under that interpretive framework, we first consider whether the phrase in question has a plain meaning, *i.e.*, whether it is susceptible to only one plausible interpretation. If the phrase in question has a plain meaning, we will apply that meaning and conduct no further analysis. If the phrase in question has more than one plausible interpretation, we will proceed to the second interpretive aid. That is, we examine the phrase in light of the particular context in which that phrase is used in the policy and the broader context of the policy as a whole. *If the ambiguity remains after the court has engaged in those analytical exercises, then any reasonable doubt as to the intended meaning of such a term will be resolved against the insurance company. However, as this court has stated consistently, a term is ambiguous* only *if two or more plausible interpretations of that term withstand scrutiny, i.e., continue to be*

> *reasonable, despite our resort to the interpretive aids outlined above.* 341 Or at 650 (internal citations omitted) (emphasis added).

"Accident" is not defined in the policy at issue here, and the Court of Appeals noted that the term does not lend itself to a plain meaning. *Wright*, 253 Or App at 30–31. The Court of Appeals then considered the term "accident" within the context of the policy as a whole. Although noting that "it is patent that the parties contemplated and understood that 'any one automobile accident' *could* involve multiple other vehicles," the Court of Appeals determined that the "policy's text in context offers *no further guidance on resolving the question—viz.*, in what circumstances do incidents involving multiple vehicles colliding with the insured's vehicle constitute multiple accidents rather than 'any one accident'?—on which the coverage determination depends." *Id.* at 32 (emphasis added).

At this point in the analysis, *Holloway* dictates that the Court of Appeals should have determined that the term "accident" was ambiguous and construed it against Defendant—concluding that two such "accidents" occurred. That conclusion is supported by Oregon case law: "There are probably not many words which have caused courts as much trouble as 'accident' or 'accidental.' They are not words which lend themselves to specific or exact meanings, yet everyone thinks he knows an accident when he sees one." *Botts v. Hartford Acc. & Indem. Co.*, 284 Or 95, 101 (1978) (internal citations omitted). The

Botts court further explained that insurance companies "may, of course insert in its policy any definition of 'accident' it chooses but, in the absence of doing so, it must accept the common understanding of the term by the ordinary member of the purchasing public." *Id.*

Instead of finding the term ambiguous, the Court of Appeals turned "finally and unavoidably" to outside authority it had previously deemed "highly variable." 253 Or App at 30, 32. The Court of Appeals examined and adopted the rationale of *United Servs. Auto Ass'n v. Baggett*, which followed the majority "causation" theory approach for determining "one accident versus two." 209 Cal. App. 3d 1387 (1989). The Court of Appeals discussed and summarily dismissed *two* other cases that addressed this same issue. *See Wright*, 253 Or App at 34–36; *Liberty Mutual Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1968); and *Illinois Nat'l Ins. Co. v. Szczepkowicz*, 185 Ill App 3d 1091 (1989). The court instead followed and adopted *Baggett*. 209 Cal. App. 3d. Although each of these cases applies the "causation" theory (discussed in more detail below), the *Baggett* court reached the conclusion that the facts before it contained only one accident while *Rawls* and *Szczepkowicz* reached the opposite conclusion.

In light of the contradictory results applying the same legal theory, the Court of Appeals once again failed to follow *Holloway* and construe "accident" against Defendant. When examining the three cases the Court of Appeals

considered, it becomes clear that *Baggett* is the outlier in terms of the facts involved and the conclusion the court reached. In *Baggett*, the California Court of Appeals determined that one accident occurred within the meaning of a liability insurance policy when the plaintiff's decedent was killed by a third vehicle ("second collision") after decedent and the insured driver had already driven a short distance and parked in the median to discuss their accident ("first collision"). *See* 209 Cal. App. 3d 1387 (1989). The *Baggett* court, while stating that "a single uninterrupted course of conduct which gives rise to a number of injuries or incidents of property damage is one 'accident' or 'occurrence[' and o]n the other hand, if the original cause is interrupted or replaced by another cause, there is more than one 'accident' or 'occurrence[,]'" concluded that the liability policy "unambiguously contemplated two consecutive collisions as occurred here to be one accident." *Id.* at 1393, 1396.

In *Szczepkowicz*, a truck driver stopped his tractor-trailer in the middle of a state highway, blocking both northbound lanes. 134 Ill App 3d at 1093. An oncoming vehicle struck the tractor-trailer, and the driver then moved his vehicle forward enough to free up most of one lane, but failed to completely remove the vehicle from the highway. *Id.* Five minutes later, a second car traveling northbound smashed into the tractor-trailer. *Id.* The Illinois Court of Appeals determined that "two separate, distinct collisions occurred five minutes apart" and was unlike other cases where "one vehicle immediate 'ricochets' off

the other and within seconds collides with a third." *Id.* at 1096. The court continued by stating, "[m]ore importantly, the conditions resulting in each collision were not 'substantially the same.' . . . [T]he second collision did not result from continuous or repeated exposure to either to the same or to substantially the same conditions" even though the defendant's tractor-trailer remained in almost the exact same spot at the time of the second accident as it occupied during the first accident. *Id.* at 1096–97.

In *Rawls*, the negligent driver was being pursued by law enforcement officials and collided with the rear end of a northbound car in front of it. 404 F.2d at 880. The negligent driver continued northbound, veered across the centerline, and struck a southbound vehicle head-on. *Id.* The Fifth Circuit Court of Appeals determined that two accidents occurred as "two distinct collisions" occurred and there was "no evidence that the [negligent driver's] automobile went out of control after striking the rear end of the [northbound vehicle]. On the contrary, the only reasonable inference is that the [negligent driver] had control of his vehicle after the initial collision [despite the short period of time between the collisions]." *Id.*

Only *Baggett* found that one accident occurred. The *Baggett* court wrongly failed to consider the fact that the decedent and insured had already traveled further down the road, pulled over, stopped, and exited their vehicles to exchange information before the second collision even occurred. These facts

are the antithesis of what an average person would view as one event. 209 Cal. App. 3d at 1394 ("If cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event, courts adopting the cause analysis uniformly find a single occurrence or accident.").

Moreover, *Baggett* differs factually from *Szczepkowicz*, *Rawls*, and Plaintiff's case. In *Baggett*, the deceased's estate sought to recover two policy limits from the driver who caused the "first collision" under the theory that the first insured defendant was negligent in not only striking decedent's vehicle, but also for "guiding decedent to a position of danger." 209 Cal. App. 3d at 1390. Thus, decedent's estate tried to argue that both collisions imposed liability and thus a basis for recovery for each accident on *one* of the defendant drivers when two defendant drivers were involved. Conversely, in both *Szczepkowicz* and *Rawls*, one defendant driver was the cause of multiple collisions and the respective courts found that the single defendant drivers had caused those multiple collisions. *See generally* 134 Ill App 3d; 404 F.2d. Here, Plaintiff sought and received compensation from both defendant drivers, whose policies were insufficient to cover the total amount of her damages after each of them tendered their limits to Plaintiff. Thereafter, Plaintiff turned to her own

insurance company pursuant to her UIM coverage to step into the shoes of each negligent driver and to be made as whole as possible for each accident.[5]

Yet, *Baggett* is the case the Court of Appeals decided to adopt even though the two collisions at issue here can also be likened to—and are arguably more similar to—*Szczepkowicz* and *Rawls*. The collisions in *Szczepkowicz* occurred in almost the same spot and the collisions in *Rawls* occurred very close in time. Given the vastly different and conflicting conclusions of the three cases even when using the same "causation" theory approach to analyze the factual scenarios, the Court of Appeals should have returned to *Holloway*'s requirement and determined that the term "accident" was ambiguous and

---

[5] At this point, Plaintiff wishes to point out the purpose of UIM/UM coverage: "In general, the purpose of UM coverage was to place the injured policyholder in the same position as if the tortfeasor had had liability insurance." *Vogelin v. Am. Family Mut. Ins. Co.*, 346 Or 490, 501 (2009) (citing *Peterson v. State Farm Ins. Co.*, 238 Or. 106, 111–12(1964)). Oregon courts have further stated that

> *UIM coverage is intended to place a policy holder in the same position that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage. See Peterson v. State Farm Ins. Co.*, 238 Or 106, 111-12, 393 P2d 651 (1964) (the basic purpose of UM is to protect policy holder against risk of inadequate compensation for injuries caused by financially irresponsible tortfeasor, i.e., to place policy holder in same position as if tortfeasor had liability insurance); *see also Yokum v. Farmers Ins. Co.*, 117 Or App 546, 548, 844 P2d 937, rev den 317 Or 272 (1993) (to the extent UM limit exceeds tortfeasor's coverage, it is considered UIM). *Mutual of Enumclaw Ins. Co. v. Key*, 131 Or App 130, 134 (1994) (emphasis added).

construed it against Defendant. That the Court of Appeals decided to follow *Baggett* is error that this Court should correct and reverse.

C. Insurance Policy Interpretation

Should this Court find Defendant preserved the errors it raises on appeal and that the term "accident" is not ambiguous, it should determine that the Court of Appeals incorrectly determined that only one accident occurred. Courts across the country have struggled with how to handle multiple vehicle collisions that occur in a short period of time in terms of applying insurance policy terms such as "accident" and "occurrence." Two different approaches have developed. A majority of courts have adopted the "causation" theory, which determines the number of accidents or occurrences by examining the cause or causes of the damage. Under the "causation" theory, a single accident occurs "if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event." *Szczepkowicz*, 185 Ill App 3d at 1095 (quoting *Welter v. Singer*, 376 N.W.2d 84, 87 (1985)). *State Farm Fire & Cas. Co. v. Kohl* stated this theory this way:

> In determining whether, under a particular set of circumstances, there was one accident or occurrence, the so-called "causation" theory is applied. Hence a single uninterrupted course of conduct which gives rise to a number of injuries or incidents of property damage is one "accident" or "occurrence." On the other hand, if the original cause is interrupted or replaced by another cause, then there is more than one "accident" or "occurrence." 131 Cal. App. 1031, 1035 (1982).

Applying the majority "causation" theory to the facts at issue here, the Court of Appeals reached the wrong conclusion. Here, the two collisions were separated by time and space: the driver of the vehicle Plaintiff occupied had time crawl out the window of the vehicle; walk along the median to the other vehicle; converse with the driver who caused the first collision; question whether the other vehicle's passenger was alive (waited until she saw that passenger breathing); suggest to the driver that he "keep talking to the passenger" while she went to call for help; walk back along the median to her vehicle to return to Plaintiff who was still in the vehicle; request that Plaintiff retrieve her cell phone in order to call for aid; look for the cell phone and wait for Plaintiff to retrieve the cell phone once it was determined it might be in her purse, all before the second collision occurred. TR at 80–83. Importantly, all this happened as vehicles "were flying by." *Id.* The final resting spot of Plaintiff's vehicle was a different location from where the first collision occurred. After the dust from the first accident settled, vehicles were passing by before the second act of negligence occurred.

These facts establish what the average person would consider as two accidents. Both of these impacts have a beginning, middle, and an end. The first collision had "concluded" – the cars were at rest, contact between the drivers occurred, steps were taken to contact emergency personnel, the dust had settled and other vehicles had passed the scene. It was not until after all of this

had transpired that the second collision occurred. This temporal and physical separation between the two events establishes what an average person would consider these events to be, *i.e.* two accidents rather than one. That cars were passing and "flying by" establishes an important inference here as there were numerous people passing by the aftermath of the first accident all of whom were engaging in separate, non-negligent acts. They were all able to avoid hitting Plaintiff's vehicle. It was only when defendant Oliver came along and committed a new, separate and distinct act of negligence that Plaintiff was struck again and the second accident began.

A minority of courts have adopted the "effect theory," which determines the number of accidents or occurrences by referring to the number of individual claims or injuries. *See, e.g., Anchor Casualty Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949). This view also leads to the determination that two accidents occurred. Plaintiff had a claim against each driver who collided with her vehicle – thus two accidents occurred.

All of the above facts were in the record before the Court of Appeals. Thus, applying either theory leads to the conclusion that two accidents occurred. The Court of Appeals' conclusion that there was one accident rather than two, should be reversed, and the jury's verdict reinstated.

////

////

VI. CONCLUSION

The Court of Appeals erred in each of the following ways: finding that Defendant preserved the errors it alleges on appeal; failing to construe the term "accident" against Defendant as it is ambiguous; and concluding that only one "accident" occurred.

Plaintiff requests that this Court reverse the Court of Appeals decision on any and all of the above enumerated errors and reinstate the jury's verdict of $979,504.06 less applicable offsets.

Respectfully Submitted,

/s/ Rick J. Glantz
Rick J. Glantz, OSB No. 083386
VICK & GLANTZ, LLP
201 Ferry Street SE, Suite 200
Salem, Oregon 97301
Telephone: (503) 591-6333
Email: rglantz@vickandglantz.com
Of Attorneys for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,418 words.

Type size

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).

/s/ Rick J. Glantz
Rick J. Glantz, OSB No. 083386
Of Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I, Rick J. Glantz, hereby certify that I filed this date, June 5, 2013 by Efile the original of the foregoing Brief on the Merits of Martha Wright and further that I served it this date, June 5, 2013 by Efile on the other parties listed in this case, as listed in the records of the Court and no party is served by other means.

VICK & GLANTZ, LLP

/s/ Rick J. Glantz
Rick J. Glantz, OSB No. 083386
Of Attorneys for Plaintiff/Appellant