IN THE SUPREME COURT OF THE STATE OF OREGON

Roman KIRYUTA,

Plaintiff-Appellant, Respondent on Review,

v.

COUNTRY PREFERRED INSURANCE COMPANY,

Defendant-Respondent, Petitioner on Review.

Multnomah County Circuit Court Case No. 130101380
Court of Appeals Case No. A156351; Supreme Court No. S063707

Appeal from the General Judgment of the Multnomah County Circuit Court,
By the Honorable Nan G. Waller, Judge

RESPONDENT COUNTRY PREFERRED INSURANCE COMPANY'S BRIEF ON THE MERITS

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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal seeks reconciliation of inconsistent lower court decisions, and guidance regarding the effect of ORS 742.061(3) "safe harbor" letters in Uninsured Motorist/Underinsured Motorist ("UM/UIM") claims. Without guidance from this Court, insurers will be prohibited from raising legislatively authorized affirmative defenses without being exposed to many thousands of dollars in attorney fees. More importantly, claimants will be less inclined to resolve UM/UIM claims through arbitration, contrary to the legislature's intent.

Unlike contractual claims for no-fault Personal Injury Protection ("PIP") benefits, UM/UIM claims are intended to place the policyholder in the same position they would have been in if the tortfeasor had liability coverage equal to the amount of the UM/UIM coverage. *Vega v. Farmers Ins. Co. of Oregon*, 323 Or 291, 305-06, 918 P2d 95 (1996); *Peterson v. State Farm Mut. Auto. Ins. Co.*, 238 Or 106, 111-12, 393 P2d 651 (1964). In order to determine liability and damages, the UM/UIM insurer steps into the shoes of the tortfeasor to determine the nature and extent of the bodily injuries, and the amount that the insured would have recovered "after the determination of fault or comparative fault and resolution of any applicable defenses." ORS 742.504(2)(j)(A).[1] By

[1]ORS 742.504(2)(j)(A): "Sums that the insured, the heirs or the legal representative of the insured is legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle" means the amount of damages that ***A claimant could have recovered in a civil action

necessity, this involves considering which medical treatment or bills were or were not made necessary by the accident, whether there are future medical expenses, the extent of any lost wages, and the extent of any pain and suffering sustained. It also includes resolution of the mathematical reductions and limitations to determine the amount of UM/UIM benefits that are ultimately due the insured. ORS 742.504(2)(j)(C).

Recent confusion over the legislature's intent behind the "safe harbor" letter in UM/UIM claims has impaired insurers' ability to raise affirmative defenses otherwise available to the tortfeasor, without risking extra-contractual attorney fee liability. Specifically, some claimants and courts are applying language from the PIP decision in *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 182, 166 P3d 519, *adh'd to as modified on* recons, 343 Or 394, 171 P3d 352 (2007), to suggest that UM/UIM insurers cannot contest injuries, reasonableness or necessity of treatment, affirmatively plead statutorily authorized offsets, or even require a claimant to meet their burden of proving damages in the same manner allowed by any tortfeasor. As a result, insurers are not being allowed to obtain an accurate determination of economic and non-

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from the owner or operator at the time of the injury after determination of fault or comparative fault and resolution of any applicable defenses ***." They are calculated without regard to tort claim limitations [ORS 742.504(2)(j)(B)], and are no larger than benefits payable under the times of the policy as provided in ORS 742.504(7) [ORS 742.504(2)(j)(C)].

economic[2] damages that would have been awarded against the tortfeasor, which is the express intent of ORS 742.504(1)(a). Since this Court granted review in this case, the Court of Appeals also issued an *en banc* decision in *Spearman v. Progressive Classic Ins. Co.*, 276 Or App 114, ___ P3d ___ (2016), that suggests one approach to resolve some, but not all of the issues. APP-1-35. Indeed, the concurring opinion by Judge Joel DeVore identifies a clearer path that is more consistent with the legislative intent behind ORS 742.061 and ORS 742.504, but is constrained by this Court's decision in *Grisby v. Progressive Preferred Ins. Co.*, *supra*. *See Spearman v, Progressive Classic Ins. Co.*, *supra*, 276 Or App at 138 n 5 and APP-25. *Also see Kelley v. State Farm Mut. Auto. Ins. Co.*, ___ P3d ___, 2016 WL 641122 (February 18, 2016) and APP-36-39. Reconciliation of the conflicting statutory and court opinions is necessary to provide guidance to the lower courts and litigants.

The Court of Appeals' decision in this case specifically precluded UM/UIM insurers from raising affirmative defenses unless the insurer is willing to be subjected to attorney fees. The decision is inconsistent with the legislature's intent, will encourage rather than discourage filed UM/UIM claims, and will prevent insurers from defending claims in the manner allowed by Oregon law, without creating a profound windfall to claimants. This Court

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[2] Although ORS 742.504(1)(a) uses the terms "general" and "special" damages, those terms are more correctly identified as "non-economic" and economic

should reverse the Court of Appeals and hold that (1) Once a claimant rejects an insurer's "safe harbor" letter by filing suit, the insurer should be allowed to defend the lawsuit and raise any affirmative defenses in the same manner that would have been available to the tortfeasor in a liability lawsuit; (2) Once a UM/UIM claimant rejects a "safe harbor" offer of binding arbitration, the insurer will not be exposed to attorney fees under ORS 742.061 if they challenge liability or damages by raising legislatively authorized offsets or limits; and (3) Once an insurer issues a timely and valid "safe harbor" letter, and remains willing to submit the claim to binding arbitration, a claimant's choice to pursue the claim in court will not entitle them to attorney fees, absent an outright coverage denial by the insurer that is based on a policy exclusion.

II. PROCEDURAL HISTORY AND FACTS MATERIAL TO DETERMINATION OF REVIEW

This case results from a personal injury claim for Underinsured Motorist benefits arising from an August 29, 2009 automobile accident. ER-4.[3] Plaintiff, Roman Kiryuta, recovered personal injury damages from the at-fault motorist, and UIM benefits from the UIM insurer of the vehicle he was occupying. ER-5. He then recovered PIP benefits from Country, and sought additional UIM benefits in a lawsuit filed against Country on January 28, 2013.

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damages.

[3] As used herein, "ER" refers to the Excerpt of Record attached to Appellant's Opening Brief, as submitted to the Court of Appeals.

ER-2-6, 15. Because there were only $50,000 in UIM policy limits remaining, the case proceeded to non-binding arbitration, where Country stipulated that plaintiff was entitled to all economic damages he claimed, and that the only issue for the arbitration was the amount of plaintiff's non-economic damages. ER-16. Plaintiff ultimately recovered less than offered by Country in an ORCP 54E Offer to Allow Judgment ("OAJ").[4]

There was no dispute that Country timely issued an ORS 742.061(3) "safe harbor" letter confirming coverage, that the only issues were liability and damages, and consenting to resolve those issues through binding arbitration. Nevertheless, plaintiff argued that Country "sailed out of the safe harbor" by raising affirmative defenses in its answer, even though those issues were necessary for determining the amount of, or if, any ultimate recovery was due to plaintiff.[5] The arbitrator awarded attorney fees to plaintiff, and Country timely filed exceptions to that award. ER-14-21. Judge Edward Jones granted

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[4] ER-15-17. In briefing before the trial court, Country argued that the OAJ should have cut off plaintiff's entitlement to attorney fees and costs. That argument was not pursued further. Nevertheless, Country submits that allowing an OAJ to cut off a claimant's entitlement to costs, and attorney fees under ORS 742.061, would be more consistent with the intent of that statute to encourage reasonable settlement of lawsuits.

[5] Country's Answer included two affirmative defenses. One asserted that, to the extent any UM/UIM benefits are found owing, they were subject to offsets set forth in the policy and statutes for sums paid or payable by the at-fault motorist, and PIP payments made by Country. The second alleged that any UM/UIM benefits were subject to terms and conditions of the policy, the UM/UIM limits, and other clauses. ER 7-9.

Country's exceptions, holding that the two affirmative defenses did not dispute coverage, injury, or liability, and merely addressed the "size of the check." ER-30-31.

On September 2, 2015, the Court of Appeals reversed and remanded the trial court's decision. *Kiryuta v. Country Preferred Ins. Co.*, 273 Or App 469, 475 n1, 359 P3d 480 (2015), *rev allowed*, 358 Or 529 (2016). Based on a misguided extension of this Court's decision in *Grisby v. Progressive Preferred Ins. Co.*, *supra*, and the Court of Appeals' decision in *Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 215 P3d 919 (2009), the Court of Appeals held that the affirmative defenses alleged by Country raised issues other than liability and damages, and therefore invalidated Country's "safe harbor" letter under ORS 742.061(3). *Id*.

III. FIRST QUESTION PRESENTED

A. Question

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 fees merely for raising affirmative defenses in their answer?

B. Proposed Rule

Once a claimant rejects an insurer's "safe harbor" letter by filing suit, the insurer should be allowed to defend the lawsuit and raise any affirmative

defenses in the same manner that would have been available to the tortfeasor in a liability lawsuit. Since the claimant bears the burden of proving liability and damages just as they would in a claim against the tortfeasor, the burden cannot be shifted by forcing the insurer to choose between stepping into the shoes of the tortfeasor to defend the action, and avoiding exposure for attorney fees. Similarly, a UM/UIM insurer should be allowed to enforce the statutorily authorized PIP and liability offsets following a determination of damages, to calculate the amount of UM/UIM benefits, if any, to which a claimant may be entitled. Any other rule would be inconsistent with the purpose of UM/UIM coverage, the intent behind ORS 742.061(3), and interfere with the insurer's statutorily authorized right to raise affirmative defenses for a determination of damages. *See* ORS 742.504(2)(j).

C. Discussion

1. Insurers Step Into the Shoes of the At-Fault Motorist when Defending UM/UIM Claims.

The function of UM/UIM insurance is to place the claimant "in the same position—no better and no worse—than he or she would have occupied had the responsible party been insured." *Vega v. Farmers Ins. Co.*, *supra*. For that reason, ORS 742.504(1)(a) provides that the insurer will pay all sums that the insured is legally entitled to recover as general and special damages from the

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uninsured (or through application of ORS 742.502(4) underinsured) motorist.[6] The legislature then defined the phrase "sums that the insured, the heirs or the legal representative of the insured is legally entitled to recover as general and special damages from the owner or operator of an uninsured motor vehicle" to mean "the amount of damages that:

> "(A) 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 resolution of any applicable defenses*;
>
> (B) Are calculated without regard to the tort claims limitations of ORS 30.260 to 30.300; and
>
> (C) *Are no larger than benefits payable under the terms of the policy as provided in subsection (7) of this section*." ORS 742.504(2)(j) (emphasis supplied).

ORS 742.504(7), in turn, limits the exposure of UM/UIM insurers through several legislatively authorized restrictions on an insured's recovery after the determination of damages. They include:

1) The limits of liability stated in the declarations of the policy that are applicable to "each person" and, in the aggregate, as to "each accident." ORS 742.504(7)(a);
2) All sums paid on account of the bodily injury by the owner or operator of the uninsured or underinsured motor vehicle, any other person or

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[6] 742.502(4) Underinsurance coverage is subject to ORS 742.504 and 742.542.

organization jointly or severally liable, as well as any sums paid under the liability coverage of the policy. ORS 742.504(7)(c)(A); and,

3) The amount paid, and present value of amounts payable in the future, for the bodily injury under any workers compensation law, disability benefits law, or any similar law. ORS 742.504(7)(c)(B).

Each of the above restrictions are legislatively intended calculations that must be applied to determine the ultimate "sums that the insured * * * is entitled to recover" from the insurer in UM/UIM benefits. In addition to placing a practical cap at the policy limits, they provide mathematical formulas necessarily applied to place the insured in the same position they would have been in if the at-fault motorist had matching liability limits. If they are not applied, then an insured would be in a better position. Yet, under the Court of Appeals' decision below, Country was made subject to attorney fees simply for raising affirmative defenses that are completely consistent with ORS 742.504(2)(j).

2. The "Safe Harbor" of ORS 742.061(3) Must Allow UM/UIM Insurers to Preserve the Affirmative Defenses Allowed by ORS 742.504(2)(j).

Courts are charged to construe statutes so that no part is meaningless if it is possible to do so. ORS 174.010; *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 510, 98 P3d 1116 (2004). Indeed, ORS 742.504(2)(j) provides direction that specifically requires application of available affirmative defenses, policy

terms and conditions relating to limits, and mathematical offsets or reductions to determine what an insured will be entitled to recover, if anything, from the UM/UIM insurer. They represent exactly the same issues of liability and damages intended by the legislature as permissible issues under the "Safe Harbor" of ORS 742.061(3).

ORS 742.061(3) provides to insurers a "safe harbor" from attorney fees if:

> " * * * in writing, not later than six months from the date proof of loss is filed with the insurer:
>
> (a) the insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured; and
>
> (b) the insurer has consented to submit the case to binding arbitration." ORS 742.061(3).

While the "safe harbor" provisions of ORS 742.061(2) [PIP] and (3) [UM/UIM] have similar requirements for confirmation of coverage and consent to binding arbitration, they cannot apply in the same manner because of the difference between PIP and UM/UIM claims. By their very nature, claims for UM/UIM benefits require an insurer to step into the shoes of the at-fault tortfeasor, such that the claimant bears the burden of proof, and the insurer is only liable to the extent that claimant is found to be entitled to economic and non-economic damages above amounts already recovered. *See* ORS 742.504(1)(a) [legally entitled sums], 742.504(2)(j) [availability of affirmative

defenses, caps, and offsets], 742.504(7)(c) [liability and workers' compensation offsets], and 742.542 [PIP offsets]. UM/UIM claims differ fundamentally from no-fault PIP, in which the only questions are reasonableness of the charges, and whether they are related to the accident. *See* ORS 742.521(4) and (5). That fundamental difference compels a different application for issues of "liability and damages" in ORS 742.061(3), than "benefits" in ORS 742.061(2).

In *Grisby v. Progressive Preferred Ins. Co., supra*, this Court decided that an insurer's refusal to pay any further chiropractic bills was a dispute over something other than the "amount of benefits due the insured," invalidating the "safe harbor" letter and entitling the claimant to attorney fees under ORS 742.061. *Grisby*, *supra*, 343 Or at 398.[7] Unfortunately, language from *Grisby* was subsequently seized upon by the Court of Appeals in *Cardenas v. Farmers Ins. Co., supra*, to suggest that a UM/UIM insurer also could not dispute whether it should pay for a claim without invalidating the previously valid "safe harbor" letter. *Id* at 412.[8] Subsequently, many claimants sought to invalidate "safe harbor" letters issued for UM/UIM claims by arguing that

[7] Country submits that *Grisby* was inconsistent with the legislative intent behind the amendment that created ORS 742.061(2) and (3), which was to discourage lawsuits and encourage binding arbitration of such claims. That intent would be better accomplished by not allowing attorney fees once a claimant rejects a valid and timely safe harbor letter, unless the insurer denies coverage based on some exclusion.

issues of causation or reasonableness are outside the realm of liability or damages.

The Court of Appeals' recent decision in *Spearman v. Progressive Classic Ins. Co., supra,* clarifies that a UM/UIM insurer is permitted to enforce a claimant's burden of proof by denying entitlement to damages, or reasonableness of expenses. However, the majority opinion leaves undecided whether an insurer is free to raise affirmative defenses preserving the legislatively authorized offsets or other conditions to determine the amount of benefits, if any, to which a claimant may ultimately be entitled. *Also see Kelley v. State Farm Mut. Auto. Ins. Co*., *supra*.

The Court of Appeals still has cases pending to determine the effects of everything from an insurer denying a Request for Admission of injury, to denial of economic damages, or denying that a claimant was injured.[9] Unlike in the PIP context, each case involves issues that a claimant would be required to prove in a case against the tortfeasor, thereby placing them in the same position as they would have been in if the tortfeasor had matching limits.

Based on the Court of Appeals' decision in this case, many more

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[8] It should be noted that the insurer in *Cardenas* attempted to defeat the UM/UIM claim based on the claimant's previous execution of a release. As a result, that decision went beyond what was necessary.

[9] *See, Matveyev v. State Farm Mut. Auto. Ins. Co.*, Jackson County Circuit Court Case No. 14CV20593, CA A160217 and *Robinson v. Tri-County Met. Transp. Dist*., Multnomah County Circuit Court Case No. 130913689, CA A156910.

claimants can be expected to file lawsuits as a means to obtain attorney fees that would not have been available in a lawsuit against the tortfeasor, or to preclude insurers from raising defenses they would otherwise be entitled to raise in arbitration, or by operation of ORS 742.504(2)(j). In the Court of Appeals' decision in this case, the court left undecided whether an insurer who amended their answer to withdraw affirmative defenses of PIP or liability offsets could be subject to attorney fees under ORS 742.061(3). *See Kiryuta v. Country Preferred Ins. Co.*, *supra* 273 Or App at 475 n1. At the same time, many claimants have suggested that an insurer should not be entitled to offsets allowed in ORS 742.504(7)(c) or 742.542 unless they are affirmatively raised.[10] As a result, insurers are forced to decide between forgoing the legislatively authorized offsets and reductions of liability, or expose themselves to potentially more expensive attorney fees, with the result of either choice being a windfall to the claimant that allows them to recover more than they would have if the at-fault party had liability insurance with similar limits. Such a choice should be avoided by either allowing affirmative defenses authorized by ORS 742.504(2)(j), or holding that offsets need not be affirmatively raised to be applied following a determination of *gross* damages to determine the amount of *net* benefits to be paid by the insurer.

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[10] *See, e.g., Schroeder v. State Farm Mut. Auto. Ins. Co*., Jackson County Circuit Court Case No., 15CV19114.

3. ORS 742.061(3) was Enacted to Encourage Alternative Dispute Resolution Through Binding Arbitration.

The decisions of the Court of Appeals in *Cardenas* and this case are at direct odds with the legislative history and intent behind the statutory changes to ORS 742.061. The intent of 1999 Senate Bill 504, now ORS 742.061(2) and (3), was to eliminate the incentive to litigate, when the insurer has made a prompt offer to arbitrate. The *purpose* was to encourage resolution of PIP and UM/UIM claims in *arbitration*. *See* Transcript of Work Session on SB 504, Senate Comm on the Judiciary, May 20, 1999; Transcript of Public Hearing on SB 504, House Comm on Rules, Elections, and Public Affairs, June 14, 1999. Indeed, when Administrator Keith Putnam introduced the bill, he said, "It is an attempt to reduce the number of instances where litigation is deliberately sought."

Tom Mortland and John Powell from North Pacific Insurance Company spoke, as did Mic Alexander, legislative director for OTLA. They were all in agreement regarding the bill. Tom Mortland said, "This bill is essentially a way of eliminating or reducing the amount of litigation, or lawsuits, that are filed in PIP, UIM and UM benefit claims against insurance companies." He briefly discussed how recent Oregon Court of Appeals cases had created "an opportunity, and incentive" to file and seek fees in court.

> "This bill would restore the practice of resolving these claims through mediation, arbitration and informally without the necessity of litigation, or lawsuits being filed.

> We see this as a very positive step." Public Hearing on SB 504, House Comm on Rules, Elections, and Public Affairs, June 14, 1999.

Thus, ORS 742.061 was specifically amended to incentivize resolution of such claims through arbitration, rather than litigation in court. The decisions of the Court of Appeals in this case, *Cardenas*, and *Spearman* are at odds with that purpose *by encouraging* claimants to pursue such claims in court as a means to get attorney fees or limit the defenses available to UM/UIM insurers. By forcing insurers to choose between raising affirmative defenses and having attorney fee liability, the decision in this case will actually increase the number of lawsuits involving UM/UIM claims.

A rule much more consistent with the legislative intent behind ORS 742.061(3), as well as the language in the statute itself, would be to eliminate availability of attorney fees once an insurer timely and properly issues a "safe harbor" letter in UM/UIM claims. A claimant can still choose whether to reject the offer of binding arbitration, but should not receive an additional benefit of presumed damages, absence of offsets, or attorney fees if they choose to reject the procedure intended by the legislature. Conversely, unless the insurer denies that there is any UIM insurance coverage under the policy—distinguished from unavailability of damages[11]—the claimant should have to

[11] Unlike no-fault PIP, UM/UIM claims can be fully covered while still resulting in no award of damages or benefits. The insured could fail to meet their burden of proving liability, or could be found to have more fault than the uninsured or

decide between arbitration of their claim, or litigating it in court without the added bonus of attorney fees that would not have been available in their original claim against the tortfeasor. Such a rule would remove the incentive to file UM/UIM claims in court, and allow insurers to raise any appropriate affirmative defenses to the claim.

Whether based on the purpose behind UM/UIM claims, to place the claimant in the same position they would have been if the tortfeasor had liability limits matching the UM/UIM limits, the express language of ORS 742.504(2)(j) allowing all affirmative defenses, offsets and limits, or the legislative intent behind the creation of ORS 742.061(3), this Court should make it clear that "safe harbor" letters will not be nullified by an insurer raising affirmative defenses otherwise available to the at-fault party, or enforcing the legislatively authorized offsets to determine the *net* amount of benefits to which a claimant may be entitled.

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underinsured motorist. They could also fail to meet their burden of proving damages. Moreover, because claimants are subject to offsets and reductions authorized by ORS 742.504(7)(c), 742.502, and 742.542, an arbitration or jury award of damages could properly result in no benefits being payable to the claimant while still only considering issues of "liability and damages" intended by the legislature as exempt from attorney fee exposure.

IV. SECOND QUESTION PRESENTED

A. Question

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

B. Proposed Rule

Because a UM/UIM insurer steps into the shoes of the uninsured or underinsured motorist, they are entitled to deny liability and damages in the same manner as any other tortfeasor defendant. In order for the insurer to only be liable for "sums that the insured * * * is legally entitled to recover as general and special damages" from the tortfeasor, the UM/UIM insurer must be allowed to defend the case in the same manner without exposure for attorney fees. That means disputing liability or damages, raising affirmative defenses, and defending the case as though they were the tortfeasor. *See* ORS 742.504(2)(j).

C. Discussion

1. Affirmative Defenses Based on Enforcement of Policy Terms relating to Limits and Offsets are Consistent with the Determination of Damages Intended by the Legislature.

One of the arguments made by plaintiff in this case was that Country needed to admit some damage or it would forfeit the "safe harbor" relief from fees in ORS 742.061(3). Appellant's Opening Brief, p. 9. However, such a

strict approach ignores the purpose behind UM/UIM coverage, and would unfairly subject insurers to attorney fee exposure for simply defending the case in the same manner as the uninsured or underinsured motorist would have been entitled to do. As observed in *Zimmerman v. Allstate Property and Cas. Ins. Co.*, 354 Or 271, 281, 311 P3d 497 (2013), "this court's cases arising under ORS 742.061 and its predecessors have taken a pragmatic and functional, as opposed to strict and formalistic, approach" to its application. Such a pragmatic and functional approach is necessary here as well.

ORS 742.504(1)(a) specifically limits UM/UIM benefits to sums that the insured would be entitled to recover in general and special damages from the tortfeasor. *See also Bergmann v. Hutton*, 337 Or 596, 605, 101 P3d 353 (2004). ORS 742.504(2)(j)(A) further explains the intent behind the phrase to mean 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 resolution of any applicable defenses*" (Emphasis supplied).

Thus, the legislature made it clear that a claimant can only recover UM/UIM benefits to the same extent that they would have been able to prove such damages in an action against the tortfeasor. The only way to accomplish that intent is for a UM/UIM insurer to be entitled to deny liability or damages, and

force claimants to bear the same burden of proof they would have in a civil action against the tortfeasor.

Likewise, ORS 742.504(7)(c) and ORS 742.542 prevent a claimant from obtaining a double recovery by allowing offsets from any award of damages for amounts already received by the claimant from the liability insurer, tortfeasor, or PIP insurer. As a result, UM/UIM litigation, unlike PIP disputes, always has the possibility that a claimant will have already been fully compensated and not be entitled to any net UM/UIM benefits. Precluding a UM/UIM insurer from denying liability or damages at the cost of attorney fee exposure would be inconsistent with the fundamental purpose of UM/UIM coverage, and the intent behind ORS 742.061(3).

Moreover, the decision in this case and *Cardenas* confuses coverage with issues of damages. As this Court observed in *Bergmann v. Hutton, supra,* limits of liability are not coverage issues, but rather issues of *damages under the policy*. *Id*. at 605-608. "Coverage" refers to "the universe of people, vehicles, and events that trigger the insurer's obligation to pay under the policy[,]" and does not include limits on the insurer's liability. *Id*. at 604; *Mid-Century Ins. Co. v. Perkins,* 344 Or 196, 210, 179 P3d 633, *opin mod on recon,* 345 Or 373, 195 P3d 59 (2008). It necessarily follows that raising issues of the limits or offsets cannot be issues of coverage that would invalidate a "safe harbor" letter in a UM/UIM claim.

2. The Affirmative Defenses Raised by Country Only Relate to Damages or "the Size of the Check."

In its answer, Country raised two affirmative defenses. The first affirmative defense of "Offset" provided:

> "To the extent that any UIM/UM benefits are found owing the UIM/UM benefits are subject to offsets set forth in the policy of insurance and Oregon statutes, including offsets for all sums paid or payable for anyone who is legally responsible for plaintiffs injuries, if any. Country is further entitled to offset the amount of any UIM/UM benefits for any amount of PIP payments made by Country." ER-8.

The "offsets" alleged in the first affirmative defense deal exclusively with mathematical application of the legislatively authorized offsets and reductions to determine the *net* amount, if any, payable to plaintiff. By virtue of there being a UM/UIM claim, an insurer must be allowed to place the plaintiff, as well as the arbitrator or court, on notice that any ultimate recovery will be subject to the offsets and reductions necessary to determine the *net* amount of damages. That affirmative defense, by definition, must be an issue of damages. Moreover, where ORS 742.504(2)(j)(B) specifically includes such offsets within its determination of benefits, precluding an insurer from raising that affirmative defense without exposure to attorney fees would be inconsistent with both the intent and purpose of UM/UIM insurance in the first place.

The second affirmative defense raised by Country was for contractual compliance. It provided:

> "To the extent any UIM/UM benefits are found owning [sic], the UIM/UM benefits are subject to all terms and conditions of the policy of insurance, including UIM/UM limits and "other clauses."" ER-9.

While arguably duplicative of the first affirmative defense as to offsets, the second affirmative defense also confirms that the ultimate payment may not exceed the UM/UIM limits, and must be calculated consistently with the policy terms and conditions. As observed by the trial judge in his written ruling:

> "Neither disputes coverage, injury or liability, and both address only the size of the check." ER-30.

Country did not dispute plaintiff's entitlement to UM/UIM coverage, and even conceded that plaintiff was entitled to the economic damages amounts claimed by plaintiff. Any argument that Country litigated more than liability or damages is patently inconsistent with its position at arbitration, that the only issue was the amount of non-economic damages to which plaintiff was entitled.

This Court should reverse the Court of Appeals and hold that the affirmative defenses raised by Country related only to issues of liability and damages that were not inconsistent with ORS 742.061(3). To apply the legislature's express intent, UM/UIM insurers must be allowed to raise any affirmative defenses available to the tortfeasor, as well as those contemplated by ORS 742.504(2)(j), without invalidating the "safe harbor" of ORS 742.061(3).

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V. THIRD QUESTION PRESENTED

A. Question

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

B. Proposed Rule

Once an insurer issues a timely and valid "safe harbor" letter, and remains willing to submit the claim to binding arbitration, a claimant's choice to pursue the claim in court will not entitle them to attorney fees, absent an outright coverage denial based on a policy exclusion by the insurer.

C. Discussion

1. Absent Reliance on a Policy Exclusion to Dispute UM/UIM Coverage, a "Safe Harbor" Letter should not be Invalidated.

As noted above, the legislative history confirms that ORS 742.061(3) was enacted to encourage resolution of UM/UIM claims through binding arbitration, rather than litigation in court. The legislature did not seek to prevent UM/UIM claimants from litigating their claims in court, but *specifically intended that they not receive a windfall of attorney fees* if the insurer was willing to confirm coverage and submit to binding arbitration of the claim. That intent is sabotaged, however, if a claimant can avoid the offset or limits provisions of the statute and policy, or obtain attorney fees, simply by filing in court. The ruling

from the Court of Appeals in this case would force a UM/UIM insurer to choose between forgoing statutorily authorized affirmative defenses, offsets or evidence, and invalidating a previously effective "safe harbor" letter to expose the insurer to attorney fees for simply defending the case.

Confusion over the language in *Grisby* has created an unworkable incentive for claimants to pursue litigation of UM/UIM claims, contrary to the legislature's intent. Because the issues of liability and damages in UM/UIM claims necessarily involve questions of causation, reasonableness, and the net amount of damages after offsets, a different rule is necessary to achieve the intent of the legislature.

The better rule, which is more consistent with the legislative intent, allows for application of ORS 742.504(2)(j), and reconciles it with ORS 742.061(3), is to only invalidate a properly invoked "safe harbor" letter in UM/UIM claims if the insurer subsequently denies entitlement to UM/UIM coverage based on an actual exclusion in the policy or ORS 742.504.

2. The Concurring Opinion in *Spearman* Identifies the Correct Rule to be Adopted by the Supreme Court.

In his concurring opinion in *Spearman v. Progressive Classic Ins. Co.*, *supra*, Judge Joel DeVore meticulously examines the statutory and case law to reconcile the intended purpose of UM/UIM coverage, the "safe harbor" of ORS 742.061(3), and the practicalities of defending such claims. He applies the

correct statutory interpretation, identifies the similarities and differences between PIP and UM/UIM claims, and cogently explains why insurers must be allowed to raise affirmative defenses of offset, limits, and other terms or conditions that do not dispute coverage, without invalidating a previously valid "safe harbor" letter. *See Spearman*, *supra*, 276 Or App at 128-48; and *Id*. at 135 n 3.

Judge DeVore correctly observes the problem with the current interpretation of ORS 742.061(3) as follows:

> "If our interpretation of these statutes does not permit an insurer, without jeopardy of attorney fees, to plead what is due from the insurer in the way that payable damages are defined in ORS 742.504(1)(a) and ORS 742.504(2)(j), then logically an arbitrator and court cannot calculate the dollar figure needed for an arbitration award or money judgment. If, without jeopardy of attorney fees, an insurer cannot make reference to undisputed policy limits or to proper application of prior payments of damages, then, in many cases, we have frustrated the ability of an arbitrator or a court to arrive at the number needed to make an arbitration award or enter a money judgment. If this is true, then something is wrong with our interpretation of these statutes." *Id*. at 148.

This Court should reverse the Court of Appeals decision in this case and hold that the affirmative defenses raised by Country were appropriate defenses relating to damages that did not invalidate the "safe harbor" letter.

VI. CONCLUSION

This appeal presents issues that are frequently being considered throughout Oregon and could have a significant impact on claimants, their

insurers, and the court system, by increasing the number of UM/UIM lawsuits. For all of the aforementioned reasons, this Court should reverse the Court of Appeals' decision in *Kiryuta v. Country Preferred Ins. Co., supra.*

Dated this 25th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that this petition complies with the 14,000 word limit for Supreme Court briefs in ORAP 9.17 (2)(c) and that the word count of this brief as described in ORAP 5.05 (2)(b)(i), is 5,749 words.

Type size

I further 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)(g).

DATED: February 25, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the date shown below, I **electronically filed** the attached BRIEF ON THE MERITS by using the Oregon eFiling System.

I further certify that I **electronically served** the attached BRIEF ON THE MERITS on the following person(s) by using the Oregon Appellate eFiling system:

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