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 OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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

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

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OTLA'S FIRST PROPOSED RULE OF LAW

The undefined policy term "one accident" is ambiguous and could reasonable be construed by the insured to mean that separate impacts by separate vehicles are each one accident. The ambiguity that must be resolved against the insurer.

OTLA'S SECOND PROPOSED RULE OF LAW

When an insurer seeks to limit its liability for a covered claim based on a dollar limit specified in the policy, the insurer bears the burden of presentation and persuasion as to the applicable limit.

INTRODUCTION

OTLA writes to assist this Court in navigating the broad legal issues that are raised by this case. It is not necessarily OTLA's intent to urge this Court to decide the case on grounds other than those raised by the parties but to advise the Court of relevant legal issues that arise from the manner in which the Court of Appeals resolved the case.

ARGUMENT

I. <u>The ambiguity as to the meaning of the term "one accident" that remains following contextual analysis of the policy must be resolved in favor of the insured, without resort to foreign decisional authority.</u>

The Court of Appeals did not follow the applicable tenets of policy construction necessary to resolve this case properly. Insurance policies are

"contractual in nature" and are subject to the same legal principles of any other business contract. *Employers Insurance of Wausau v. Tektronix, Inc.*, 211 Or App 485, 502–03, 156 P3d 105, *rev den*, 343 Or 363(2007) (citations omitted). The required Oregon analysis for construing insurance contracts is well established. *See, e.g. Holloway v. Republic Indem. Co. of America*, 341 Or 642, 650, 147 P3d 329 (2006); *North Pacific Ins. Co. v. Hamilton*, 332 Or 20, 25, 22 P3d 739 (2001); *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or 464, 470, 836 P2d 703 (1992). Although OTLA questions the role of that analytical framework for a term taken from a model, comprehensive policy,[1] the Court of Appeals purported to apply that framework. And in doing so, the Court of Appeals mistakenly used out-of-state decisional law to resolve the meaning of the undefined contract term "one accident." While the court's approach may have

[1] As this Court held in *Bonds v. Farmers' Ins. Co.*: "Insurers must include, in their UM/UIM policies, coverage no less favorable to the insured than that set forth in the provisions of the statutory comprehensive model policy. Insurers may include terms that vary from the model policy only by excluding or softening terms that disfavor insureds or by adding extraneous terms that are neutral or that favor insureds. *Bonds v. Farmers Ins. Co. of Oregon*, 349 Or 152, 156, 240 P.3d 1086, 1088 (2010) (citing ORS 742.504 and *Vega v. Farmers Ins. Co. of Oregon*, 323 Or 291, 301–02, 918 P2d 95 (1996)). Because the insurer in *Bonds* incorporated time limitations from the statutory model policy, this Court held that "it is the terms of the model policy that are operative here. Of course, when we interpret such statutorily imposed terms, we are seeking to identify the legislative policy choice that is represented in the statute." 349 Or at 156 (internal citations omitted). The "one accident" basis for setting liability limits also comes from the model policy. ORS 742.504(7)(a).

been directed by the positions of the parties, it remains necessary for this Court to clarify that interpretation of insurance policies in Oregon does not depend upon decisional law.

To resolve the meaning of an Oregon insurance policy, the first step is to see whether the policy "explicitly defines the phrase in question." *Holloway*, 341 Or at 650. As the Court of Appeals observed, the policy at issue in this case specifically defines neither the term "accident" nor the phrase "any one automobile accident" as it is used in the Uninsured Motorist provisions of this policy. *Wright v. Turner*, 253 Or App 18, 30, 289 P3d 309 (2013).

Once a court determines that an insurance policy does not explicitly define the relevant phrase, then the intent of the contracting parties is discerned through the following interpretive framework, recently summarized by the Oregon Supreme Court in *Holloway*:

> [W]e 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 * * *.'"

341 Or at 650 (internal citations omitted).

Purporting to apply *Holloway*'s framework for interpreting undefined terms, the court turned "finally and unavoidably" to decisional law to construe the meaning of "one accident." 253 Or App at 32. But this Court has specifically cautioned that the meaning of an insurance policy "does not depend on the existence or scope of doctrines of Oregon tort law, unless the wording of a particular policy specifically or by clear inference implicates such doctrines." *Interstate Fire & Cas. Co. v. Archdiocese of Portland*, 318 Or 110, 118, 864 P2d 346 (1993).

The Court of Appeals should have examined 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.'" 341 Or at 650. And if ambiguity remained following that examination, then the ambiguity should have been resolved against Mutual of Enumclaw. *Id.* In construing the phrase "an accident" within the context of the policy, the Court of Appeals summarized the following pertinent provisions of the insurance contract:

(1) Defendant agreed to "pay damages which [plaintiff] is entitled to recover from the owner or operator of an uninsured motor vehicle because of [bodily injury and property damage] sustained by [plaintiff] and caused by an accident;"

(2) The liability limitation provision provides that a single $500,000 limit is defendant's "maximum limit of liability for all damages for bodily injury and property damage resulting from any one automobile accident" and the policy's declarations page provides that the "COVERAGE[ ] AND

> LIABILITY LIMIT[ ]" for the UIM policy is a "SINGLE LIMIT" for "EACH ACCIDENT" of $500,000; and, lastly,
>
> (3) The liability limitation provision continues with the following qualification: "This is the most we will pay regardless of the number of * * * [v]ehicles involved in the accident."

Id. at 31.

The declarations page lends itself to a determination that the policy contemplates coverage for multi-vehicle strikes: it provides a policy limit of $500,000 for "each accident." Necessarily then, the drafter of the policy contemplated paying that policy limit for more than one accident, whether or not those accidents occur within close temporal proximity to each another. The term "each" would not be necessary unless the drafter of the policy sought to distinguish one accident from another.

Similarly, under the liability limit provision, the maximum payout amount only is reached once it covers "all damages for bodily injury and property damage resulting from *any one* automobile accident." (Emphasis added). Again, the reference to "any one" accident demonstrates contemplation of more than one accident. In other words, there is nothing *in the policy* so far that operates unambiguously to characterize the collisions in this case as "one accident."

The policy further provides that the insured is entitled to recover for bodily injuries incurred in an accident against "*the* owner or operator" driving "*an* uninsured motor vehicle" causing that accident. Essentially, the insurer's

obligation to pay proceeds does not arise until the one owner has failed to insure, or has underinsured, a single motor vehicle involved in the accident at issue. As there are multiple owners who may be operating and underinsuring multiple vehicles colliding with the insured's vehicle, this phrase in the policy also plausibly indicates that the insurer's liability can be triggered for *each* negligent owner who so under-insures.

None of those provisions, taken together and applied to the facts of this case, serve to define what a single accident might be. Only one provision might bolster the conclusion that the terms of the policy limits the insurer's liability in this case to the single $500,000 policy limit: that "[t]his is the most we will pay regardless of the number of * * * [v]ehicles involved in the accident." That single phrase, without more, is not enough. Because multiple provisions of the policy conflict and are susceptible to more than one reasonable interpretation, the Court of Appeals should have determined at this point in the analysis that the ambiguous terms must be construed against the insurer. However, it did not. Instead it observed:

> [I]t is patent that the parties contemplated and understood that "any one automobile accident" *could* involve multiple other vehicles (besides the insured's vehicle)—and, hence, could involve multiple potentially tortious impacts. Bluntly, "any one automobile accident," implicating only a single limit of liability, can involve multiple vehicles, multiple collisions, and (again, potentially) multiple underinsured motorist tortfeasors. That abstract, contextually compelled premise is, however,

> hardly conclusive. The mere fact that "one automobile accident" *can* involve multiple vehicles and multiple collisions—that is, that *some* single accidents can involve such circumstances—does not mean, logically or practically, that *all* events involving multiple vehicles colliding with the insured's vehicle constitute only "one automobile accident" (triggering only one coverage limit).

Thus, rather than concluding the contextual analysis with a finding of ambiguity, the court appears to harmonize the potentially conflicting terms. Where one provision can be interpreted to set the insurer's liability to a single policy limit when multiple vehicles are involved in a collision, several others indicate a liability trigger for each separate owner/operator who owns an underinsured vehicle involved in a multi-strike collision. Although the court concludes that the terms "an accident" or "any one accident" remain ambiguous, it appears to disregard that conflict and the necessary next step of the *Holloway* analysis. Rather than construing that ambiguity against the insurer, the court launches an effort simply to resolve it.

The court's resort to case law from other jurisdictions is an interpretive foray that reaches outside of the terms of *this* Oregon insurance policy. The policy terms must delineate the conditions in which coverage amounts are triggered, for that is the contract to which the parties agreed. Once those terms are deemed susceptible to more than one plausible meaning, then *Holloway* compels the conclusion that they are to be construed against the insurer. The undefined policy term "one

accident" is ambiguous and could reasonably be construed by the insured to mean that separate impacts by separate vehicles are each one accident. That ambiguity must be resolved against the insurer. No further inquiry or rule applicable to similar fact patterns is required.

II. An insurer that seeks to limit its liability for covered damages must bear the burden to prove that a liability limit in the policy is applicable.

The Court of Appeals' decision announces that the insured's burden to prove coverage includes the burden to prove the dollar limits of the coverage available to her. 253 Or App 36. Although OTLA recognizes that this statement reflects a concession by plaintiff's counsel, *id.* at 36 n11, this Court has said that "[d]eciding questions of law is the province of the court" and not necessarily controlled by concessions of the parties. *See State v. Miller*, 345 Or 176, 186, n7, 191 P3d 651 (2008) ("a 'concession' to such a question means only that the party agrees with (and chooses not to contest) a particular legal conclusion. Consequently, this court is not obliged to accept such concessions at face value.")

The question of which party bears a burden of proof is a question of law. *Brewer v. Allstate Ins. Co.*, 248 Or 558, 561, 436 P2d 547 (1968). Because the Court of Appeals' resolution of the burden question in this case is likely to have significant impact on future insurance litigation, OTLA urges this Court to take this opportunity to clarify the allocation of burdens between an insured and insurer in policy disputes. At a minimum, OTLA urges this Court to decide the case

without repeating the Court of Appeals' mistaken description of the insured's burden.

It is well established that while an insured bears the initial burden of proving coverage, "insurers have the burden to prove exclusions from coverage." *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 349 Or 117, 129, 241 P3d 710 (2010), *adh'd to as modified on recon,* 349 Or 657 (2011). In this claim for UIM benefits, the elements of coverage are set out in ORS 742.502, which mandates UM and UIM coverage for every Oregon motor vehicle liability policy:

"Uninsured motorist coverage shall include underinsurance coverage for [1] bodily injury or death [2] caused by accident and [3] arising out of the ownership, maintenance or use of a motor vehicle with motor vehicle liability insurance that provides recovery in an amount that is less than the insured's uninsured motorist coverage." ORS 742.502(2)(a) (numbering inserted).

Here, there has been no challenge to plaintiff's proof of those three elements of coverage. Rather, the case turned on which party bore the burden to prove the additional issue of whether Mutual of Enumclaw's liability for plaintiff's covered bodily injury was limited to $500,000. Faced with a record that "is what it is," the court's allocation of the burden of presentation and persuasion to plaintiff meant that Mutual of Enumclaw prevailed in its effort to limit liability to $500,000. 253

Or App at 37. But that issue of liability limits is the kind of exclusion or limitation on coverage that the insurer must prove.

Although this Court has never addressed whether proof of the dollar limit on available coverage is an element of the insured's proof of coverage, it has generally equated policy limits with policy exclusions and distinguished and distinguished the matter of liability limits from the matter of coverage. In *North Pacific v. Hamilton*, in which the insurer's policy attempted to set a lower limit of liability with respect to family members, this Court seemingly equated the liability limitation with exclusions when it emphasized, "It is the insurer's burden to draft exclusions and limitations that are clear." *North Pacific Ins. Co. v. Hamilton*, 332 Or 20, 29, 22 P3d 739 (2001).

In *Bergmann v. Hutton*, this Court said that the term "coverage" is a "broad term" that encompasses "the universe of people, vehicles, and events that trigger the insurer's obligation to pay under the policy," and that, while "[t]he terms of a *policy* include limits on the insurer's liability; the terms of the *coverage* do not." *Bergmann v. Hutton*, 337 Or 596, 604, 101 P3d 353 (2004). (Emphasis in original.) Although this Court later distinguished the legislature's used the phrase "the insured's uninsured motorist coverage" in ORS 742.502(2)(a) as meaning the more narrow sense of "coverage" under the particular policy and its liability

limits,[2] the rule describing allocation of the burden to prove "coverage" depends upon "coverage" in the broad and universal sense of the word – that described in *Bergmann*.

There is one other decision that should be considered. In *ZRZ,* this Court emphasized that certain limitations – there a limitation on unexpected and unintended damages – may logically "be stated either as a grant of limited coverage or separately as an exclusion from a broad grant of coverage," depending on the particular policy language. 349 Or at 129. Whether a dollar limit on liability could ever, conceptually, be an element of the granted coverage seems doubtful. But certainly in the Mutual of Enumclaw policy at issue in this case, likely in most policies, the Insuring Agreement for the grant of uninsured motorist coverage make no reference to liability limit. *See* ER 23.

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[2] That was the decision of the Court in *Mid-Century Ins. Co. v. Perkins,* 344 Or 196, 213-14, 179 P3d 633 *modified on recon,* 345 Or 373 (2008).

CONCLUSION

This Court should hold that "one accident" is an ambiguous term to be construed against the insurer and that it is the insurer's burden to prove applicable liability limits.

DATED: June 6, 2013.

Respectfully submitted,

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Dated: June 6, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I served the forgoing Brief of Amicus Curiae on June 6, 2013, by electronic mail via the court's electronic filing system on all counsel listed on the court's service list.

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