IN THE SUPREME COURT OF THE STATE OF OREGON

STEPHANIE M. DOWELL, individually and on behalf of others similarly situated, Plaintiff- Appellant and Petitioner on Review, v. OREGON MUTUAL INSURANCE COMPANY, an Oregon corporation, Defendant-Respondent and Respondent on Review.	Supreme Court No. S063079 Court of Appeals No. A153170 Multnomah County Circuit Court No. 1205-06486

PETITIONER'S BRIEF

On Petition for Review of the Decision of the
Court of Appeals from the Judgment of the Multnomah County Circuit Court
Henry C. Breithaupt, Judge Pro Tempore

Opinion Filed: January 28, 2015
Author of Opinion: Tookey, J.
Concurring Judges: Sercombe, P.J., Hadlock, J.

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Question Presented on Review

Whether the costs of transportation to medical providers are "expenses of medical services" under ORS 742.524(1)(a), the Oregon personal injury protection (PIP) law.

Rule of Law Petitioner Proposes

The term "expenses of medical services" in ORS 742.524(1)(a) includes the costs of transportation to medical providers in accordance with the directive in ORS 731.008 and 731.016, requiring a liberal interpretation of insurance laws in favor of the insurance-buying public.

Nature of Action

Plaintiff seeks damages for herself and a proposed class for failure to pay transportation costs to medical providers as personal injury protection benefits under an automobile insurance contract.

Nature of Judgment by Trial Court

The trial court entered a general judgment for the defendant after granting its motion for summary judgment. ER 11-13. The defendant based its motion for summary judgment on the contention that the phrase "expenses of medical services" in ORS 742.524(1)(a) did not include the costs of transportation to medical providers. ER 7-10. The trial court made no decision on class certification.

Facts Material to Determination on Review

The plaintiff Stephanie Dowell was injured in a car crash on April 3, 2008, and filed a claim with the defendant, her automobile insurer, for PIP benefits of $430.67 for her reasonable expenses for transportation to her medical providers. ER 1.

The defendant denied the claim for transportation costs to medical providers on the basis that ORS 742.524(1)(a) does not include these costs as "expenses of medical services." ER 2.

Summary of Argument

The language of ORS 742.524(1)(a), read in light of ORS 731.008 and 731.016 requiring a liberal interpretation in favor of the insurance-buying public, covers the costs of transportation to medical providers as "expenses of medical services." The language in ORS 742.524(1)(a) allowing an insurer up to 60 days to deny a bill by a licensed medical or mental health provider does not exclude the payment of expenses to other providers.

The inclusion of costs of transportation to medical providers as "expenses of medical services" is consistent with the public policy of the personal injury protection law to reduce litigation, ensure prompt payment of claims, and ensure that injured people in car crashes recover their medical losses up to their

insurance limit without regard to fault. By limiting the term to medical charges by licensed providers only, the Court of Appeals decision creates loopholes in the law that will lead to further limitations on the medically-related costs an injured person may recover.

The four other states that have ruled on the issue of whether their PIP statutes allow costs of travel to doctors as medical services have all allowed them. Those four states based their decisions on the liberal interpretation of insurance laws and because people cannot obtain medical services without incurring costs to travel to the medical providers.

Argument

1.

The phrase "expenses of medical services" in ORS 742.524(1)(a) includes the costs of travel to medical providers

There are several reasons why the phrase "expenses of medical services" means the expenses related to the medical services, as the plaintiff contends, not just the costs for the actual medical services themselves, as defendant contends.

The first reason is the language of ORS 742.524(1)(a) supports the plaintiff's interpretation. *See* App.-1. A court must evaluate the language of the statute, its context with other related statutes and legislative history. *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993). The Court of Appeals reviewed

the dictionary definition of the words, "expenses of medical services," and determined that this meant:

> Something that is expended to secure a benefit relating to work that is performed by another, when that work involves the practice of medicine.
>
> *Dowell v. Oregon Mutual Ins. Co.*,
> 268 Or.App. 672, 677, 343 P.3d 283, 286 (2015).

In simpler language, "expenses of medical services" means the cost to obtain medical services. Based on this definition, the Court of Appeals concluded this did not include the costs of transportation to medical providers. *Dowell*, 286 Or. App. at 677, 343 P.3d at 286.

However, a doctor must examine a patient to determine the medical condition and the appropriate treatment. The cost of transportation to the doctor's office or hospital is an expense a patient must incur to obtain the doctor's advice and treatment. Therefore, it is a cost to obtain medical services.

The Court of Appeals also based its decision on another section of ORS 742.524(1)(a), which establishes a procedure for approval of expenses of licensed or certified providers of medical or mental health services. It states that the expenses are presumed reasonable and necessary unless the insurer denies the charges within 60 days after it receives notice of the claim. If the insurer has questions about the charges, it must ask them within 50 days of receiving notice of the claim. The provider must answer the questions within

10 days, or this extends the 60 day period for the insurer to deny the expenses. App.-1.

ORS 743.801(13) defines "provider" as a person licensed, certified or otherwise authorized to administer medical or mental health services in the ordinary course of a business or the practice of a profession. This definition applies to ORS 742.524(1)(a) under ORS 742.518(10). App.-2.

ORS 742.524(1)(a) and 743.801(13) together mean that insurers have a 60 day time limit to deny charges by those who are licensed or certified to provide medical or mental health services. There is nothing that states or suggests that other non-licensed providers who charge or incur expenses relating to medical services are not covered under ORS 742.524(1)(a), as the Court of Appeals held. There is nothing in ORS 742.524(1)(a) or 743.801(13) authorizing this limited interpretation. When persons other than licensed providers of medical or mental health services charge or incur costs, the insurer has more than 60 days to deny the charges without admitting they were reasonable and necessary. This section of ORS 742.524(1)(a) benefits licensed or certified providers of medical or mental health services, but it does not exclude other providers.

The Court of Appeals was wrong in interpreting the second part of the ORS 742.524(1)(a) to deny benefits to the insured for costs to obtain services

by providers who are not licensed or certified to provide medical or mental health services.

2.

The Oregon law requiring courts to liberally interpret insurance laws to protect the insurance-buying public also favors the plaintiff's interpretation of "expenses of medical services"

A second reason why the plaintiff correctly interprets of the term "expenses of medical services" in ORS 742.524(1)(a) is that the Oregon insurance code specifically requires courts to interpret insurance laws liberally to protect the public. ORS 731.008 states:

> The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public.

ORS 731.016 states:

> The Insurance Code shall be liberally construed and shall be administered and enforced by the Director of the Department of Consumer and Business Services to give effect to the policy stated in ORS 731.008.

The Court of Appeals did not consider either statute in its interpretation of ORS 742.524(1)(a). Interpreting the statute to allow the medical transportation costs as a PIP expense protects the insurance-buying public, and is consistent with the policy in ORS 731.008 and 731.016.

The Court of Appeals statement that the language of ORS 742.524(1)(a) combined with the definition of "provider" in ORS 743.801(13) limits "expenses of medical services" to those of licensed or certified medical or mental health providers is a narrow interpretation conflicting with ORS 731.008 and 731.016. It is more plausible that ORS 742.524(1)(a) and ORS 743.801(13) provide a time limit on denial of licensed medical or mental health services, without excluding coverage for expenses of non-licensed providers. This may include, among others, persons who sell or rent medical equipment and medical products such as wheelchairs, vans for handicapped persons and medical supplies, as well as taxis and the cost of private transportation.

Based on ORS 731.008 and 731.016, the Court of Appeals should have interpreted ORS 742.524(1)(a) liberally and in favor of the insurance-buying public. And it should have held that the term "expenses of medical services" includes the reasonable and necessary expenses of transportation to the medical providers.

3.

The Purpose and Policy of the PIP Law Supports the Plaintiff's Interpretation of ORS 742.524(1)(a)

The legislative history of the PIP statute states that the purpose of personal injury protection insurance is to reduce litigation, ensure prompt payment of claims and "ensure that all insured drivers, their families and guests,

and pedestrians injured by them, would recover medical and economic losses subject to the limits purchased without regard to fault." *Monaco v. U.S. Fidelity and Guaranty Co.*, 275 Or. 183, 187-88, 550 P.2d 422 (1976). This policy also supports the plaintiff's interpretation of ORS 742.524(1)(a).

By allowing Stephanie Dowell's PIP carrier to exclude her costs of transportation to her medical providers as a PIP benefit increases her out-of-pocket expenses due to the car crash, it encourages a claim against the other driver, and it delays payment of her costs of transportation until she resolves her claims against the negligent driver.

The legislature intended a liberal interpretation of ORS 742.524(1)(a) to protect the insurance-buying public. ORS 731.008, 731.016. If a court interprets the statute to apply only to the actual medical services themselves, this means that if an injured person requires an artificial lower leg, the services to prepare the leg and fit the prosthetic are covered under ORS 742.524(1)(a). But the cost of the prosthetic itself is not covered because it is not a service. It is a product.

If the terms "medical, hospital, dental, surgical, ambulance and prosthetic services" are limited to those specific services only, it will exclude other costs necessary to obtain these services. It will exclude not only transportation and parking costs, but lodging when this is necessary and reasonable to obtain

medical care. If a patient must travel from rural Oregon to Portland for specialized services or diagnostic tests over several days, and hospitalization is not necessary, the Court of Appeals decision would necessarily exclude the lodging cost as an "expense of medical services."

For some people, medical transportation costs can be very high. For those who have multiple medical appointments, or who must take taxis to their doctors' medical appointments, or those who live outside the Portland or Eugene metropolitan areas and require the care of specialists at Oregon Health Services University or other specialized Portland or Eugene facilities, these costs can be very significant. In many cases, excluding the costs of transportation may result in a denial of treatment or in substantially less treatment. Denying these costs as part of PIP benefits is inconsistent with reducing litigation, ensuring prompt payment of claims and protecting people injured in car crashes.

In addition, a doctor's service in writing a prescription is covered, but the prescription itself is a product related to the medical service, and is not covered under ORS 742.524(1)(a). To avoid restricting ORS 742.524(1)(a) to only the specified services listed in the statute, it is necessary to interpret the phrase "expenses of medical services" liberally in favor of the policyholder, as ORS 731.008 and 731.016 require.

The Court of Appeals decision will also exclude the cost of medical supplies an injured person obtains at a retail store, such as a wheelchair rental, crutches, slings or knee braces. The providers of these products are not licensed or certified health care providers under ORS 743.801(13). The Court of Appeals decision conflicts with the liberal coverage of the PIP statute which ORS 731.008 and 731.016 require.

4.

The Court of Appeals Decision Conflicts with Decisions in Four Other States

Appellate courts in four other states have decided the identical question before this Court of whether "expenses of medical services" in their PIP statutes include the costs of transportation to medical providers. All four courts held their statutes include these costs, and all four based their decisions on state policies interpreting insurance statutes liberally in favor of the insurance-buying public. This should be persuasive authority for this Court to reverse the Court of Appeals decision.

The Florida Supreme Court decided in *Malu v. Security Nat. Ins. Co.*, 898 So. 2d 69 (Fla. 2005), that the Florida PIP statute covering reasonable expenses for medically necessary treatment and services required payment of transportation expenses related to the medical treatment. Like ORS

742.524(1)(a), Florida's PIP statute provides for medical services and emergency transportation, such as ambulances. It states:

> [T]he medical benefits provide reimbursement only for:
>
> 1. Initial services and care that are lawfully provided, supervised, ordered, or prescribed by a physician ... dentist ... or a chiropractic physician ... or that are provided in a hospital or in a facility that owns, or is wholly owned by, a hospital. Initial services and care may also be provided by a person or entity...which provides emergency transportation and treatment.
>
> Fla. Stat. Ann. § 627.736 (1)(a)(1).

The Florida Supreme Court held that the statute required payment for a wide range of services, and it required a liberal interpretation of its PIP statute to cover transportation costs to doctors. *Malu*, 898 So.2d at 74.

The Colorado Supreme Court also held that transportation expenses to doctors were included under Colorado's PIP statute in *Allstate Ins. Co. v. Smith*, 902 P.2d 1386 (Colo. 1995), even though the statute did not explicitly mention it. It stated that the purpose of the law was to avoid inadequate compensation to victims of automobile accidents, and the courts should liberally interpret the statute. Colorado's PIP statute provided coverage for "all reasonable and necessary expenses for medical, chiropractic, optometric, podiatric, hospital, nursing, x-ray, dental, surgical, ambulance, and prosthetic services." The Colorado Supreme Court held that transportation services were an essential

element of medical treatment, as an injured person cannot obtain necessary medical treatment without it. *Smith,* 902 P.2d at 1388.

In addition, the New Jersey Superior Court, Appellate Division, held that the payment of reasonable medical expenses necessarily included transportation costs. *Plemmons v. New Jersey Automobile Full Ins. Underwriting Ass'n By and Through Selective Ins. Co. of America*, 263 N.J. Super. 151, 622 A.2d 275 (N.J. App. 1993). It stated that courts should give the PIP statute the broadest application consistent with the statutory language and that transportation costs were directly related to the medical care as a result of an injury. *Plemmons* 263 N.J. Super. at 159.

Michigan's PIP statute allows for "reasonable charges incurred for... an injured person's care, recovery or rehabilitation." Mich. Comp. Laws Ann. § 500.3107. The Michigan Supreme Court held that a modified van as well as medical mileage were allowable expenses under its PIP statute because the transportation of an injured person is a necessary component of medical treatment. *Davis v. Citizens Ins. Co. of America*, 195 Mich. App. 323, 328, 489 N.W. 2d 214 (1992).

Before the Court of Appeals decision, no state had reached a different result. Moreover, the Oregon Court of Appeals analysis also conflicts with the policy of liberal interpretations of insurance policies in favor of the insurance-

buying public in those states as well as in Oregon. In fact, the Oregon Court of Appeals never discussed the effect of ORS 731.008 and 731.016 on ORS 742.524(1)(a) and the policyholders of this state.

For all of these reasons, Oregon should join Florida, Colorado, New Jersey and Michigan in holding that its PIP statute requires payment of the costs of transportation to medical providers.

Conclusion

For the foregoing reasons, this Court should reverse the decision of Oregon Court of Appeals, vacate the judgment of the trial court, and order it to remand this case to the trial court for further proceedings.

Dated this 19th day of November, 2015.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I filed electronically the foregoing PETITIONER'S BRIEF with the Supreme Court Records Section, State Court Administrator, on November 19, 2015 by using the Appellate E-file electronic filing system on November 19, 2015.

I further certify I served the foregoing document on the following person(s) at the following address(es), by mailing two true copies thereof, contained in a sealed envelope with the postage prepaid, and deposited in the United States Post Office in Portland, Oregon:

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