IN THE SUPREME COURT OF THE STATE OF OREGON

STEPHANIE M. DOWELL,
individually, and on behalf of others similarly-situated,

Plaintiff – Appellant – Petitioner on Review,

v.

OREGON MUTUAL INSURANCE COMPANY,
an Oregon Corporation,

Defendant – Respondent – Respondent on Review.

TC No. 1205-06486; CA No. A153170; SC No. S063079

Respondent Oregon Mutual Insurance Company's Brief on the Merits

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On Review of a Decision of the Court of Appeals
on Appeal from the General Judgment of the Multnomah County Circuit Court,
by the Henry S. Breithaupt, Judge Pro Tempore

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Concurring:	Sercombe, P.J., and Hadlock, J.

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I. INTRODUCTION

Plaintiff seeks personal injury protection (PIP) benefits under her auto policy with defendant for the cost of travel to doctors and pharmacies to obtain treatment or medication for injuries she suffered in a car accident. The trial court held that the PIP statutes, ORS 742.518 to 742.542, don't require coverage for those costs. The Court of Appeals agreed, *Dowell v. Oregon Mutual Ins. Co.*, 268 Or App 309, 343 P3d 283 (2014), and, for the reasons that follow, this court should agree too.

II. QUESTIONS PRESENTED

Do the PIP statutes require benefits for the cost of travel to the doctor or pharmacy to receive treatment or medication for an auto-related injury?

III. PROPOSED ANSWER

The PIP statutes don't require benefits for the cost of travel to the doctor or the pharmacy to receive treatment or medication for an auto-related injury.

IV. MATERIAL FACTS AND PROCEEDINGS

The material facts are short, simple, and undisputed. In the summary judgment proceedings, defendant accepted as true the following allegations in plaintiff's complaint. *See* Def's Mot for Summ J (8/08/2012), pp 2-3.

Plaintiff was injured in an auto accident in 2008. At the time, she was insured by defendant under an auto policy that, as required by statute, includes PIP coverage, which is Oregon's version of "no fault" insurance. *See* ORS 742.520(1) (requiring every policy issued in Oregon to provide the coverage described in ORS 742.518 to 742.542). Under that coverage, the insurer must pay benefits to an insured for injuries suffered in an auto accident, no matter whether the insured caused the accident. *See* ORS 742.520(1)[1] and (5).[2]

Under the statute, PIP benefits are required for certain injury-related expenses, as follows:

> "(1) Personal injury protection benefits as required by ORS 742.520 shall consist of the following payments for the injury or death of each person:
>
> "(a) All reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person's injury, but not more than

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[1] ORS 742.520(1) provides:

> "Every motor vehicle liability policy issued for delivery in this state that covers any private passenger motor vehicle shall provide personal injury protection benefits to the person insured thereunder, members of that person's family residing in the same household, children not related to the insured by blood, marriage or adoption who are residing in the same household as the insured and being reared as the insured's own, passengers occupying the insured motor vehicle and pedestrians struck by the insured motor vehicle."

[2] ORS 742.520(5) provides: "The potential existence of a cause of action in tort does not relieve an insurer from the duty to pay personal injury protection benefits."

> $15,000 in the aggregate for all such expenses of the person. Expenses of medical, hospital, dental, surgical, ambulance and prosthetic services shall be presumed to be reasonable and necessary unless the provider is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services. At any time during the first 50 calendar days after the insurer receives notice of claim, the provider shall, within 10 business days, answer in writing questions from the insurer regarding the claim. For purposes of determining when the 60-day period provided by this paragraph has elapsed, counting of days shall be suspended if the provider does not supply written answers to the insurer within 10 days and may not resume until the answers are supplied."

ORS 742.524(1)(a).[3]

As a result of her accident, plaintiff incurred medical and hospital expenses, which defendant paid. She also incurred $430.67 in un-itemized expenses for "transportation to necessary medical appointments and to obtain necessary medication." She asked defendant to pay benefits for those costs too, but it declined. Plaintiff then brought this action, alleging that defendant's failure to pay PIP benefits for her transportation expenses was a breach of the policy. She joined that claim with one for certification of a class of other persons who might be

[3] ORS 742.524(1)(a) was amended in 2009, but the amendments apply only to policies issued or renewed after their effective date, which was January 1, 2010. Or Laws 2009, ch 66, §§ 1 and 3. Accordingly, the amendments do not apply to this case, which involves an accident covered by a pre-2010 policy. The statute was amended again in 2015, but those amendments apply to policies issued or renewed after their effective date, which is January 1, 2016. Or Laws 2015, ch 5, §§ 4 and 7. So those amendments, too, don't apply here. In this brief, all citations are to the 2007 version of the relevant statutes, except where otherwise noted.

similarly situated – that is, for other insureds who were denied PIP benefits for travel expenses for medical services.

Defendant moved for summary judgment, arguing that its policy provided the coverage required by the PIP statutes and that those statutes do not require benefits for transportation expenses. ER 7. The trial court agreed with defendant and granted the motion. ER 11. It also denied plaintiff's request for class certification, because the members of the class, as described by plaintiff, were entitled to no more relief than plaintiff herself. Tr 23. The court then entered a judgment in favor of defendant. ER 12.

The Court of Appeals affirmed. After reviewing the text and context of the relevant statutes, it concluded "that ORS 742.524(1)(a) does not require defendant to pay plaintiff's expenses for transportation to attend medical appointments and to obtain medication." *Dowell*, 268 Or App at 678.

V. SUMMARY OF ARGUMENT

ORS 742.524(1)(a) requires benefits for the cost of certain "services" – namely, "medical, hospital, dental, surgical, ambulance and prosthetic services." It does not require benefits for the cost of *transportation to* those services, not all of which require transportation.

That conclusion is supported by the fact that the covered services include – expressly – one form of transportation: transport by ambulance. If the legislature meant to cover other forms of transportation, it would have mentioned them as well, or else referred to transportation in general.

The conclusion is also supported by the statutory presumption that the cost of a covered service is "reasonable and necessary" and, hence, payable unless the insurer gives the "provider" of the service prompt notice of denial of the charge. ORS 742.524(1)(a). As used here, "provider" refers to a licensed *health care* provider, *see* ORS 742.518(10) and ORS 743.801(13), which means PIP benefits are *not* required for providers of *non*-health care services, such as cabbies, bus companies, and shuttle services, or friends and relatives who drive the insured to the doctor or pharmacy for some form of remuneration. Nor are benefits required for services for which there is no "provider," as when the insured drives herself to the doctor's office.

VI. ARGUMENT

The question presented is whether ORS 742.524(1)(a) requires defendant to pay PIP benefits to plaintiff for the cost of transportation to the doctor or the

pharmacy to receive treatment or medication for a covered injury. The answer, then, is one of statutory interpretation.[4]

In the interpretation of a statute, this court follows the three-step approach announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), and refined in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (explaining *PGE*). At the first step, the court considers the statutory text – not in isolation, but in context. *Gaines*, 346 Or at 171. It then considers whatever legislative history the parties may proffer, *id.* at 172, giving it such weight as "the

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[4] The language of the policy varies minutely from the language of the statute. The policy refers to the "reasonable and necessary expenses *for* medical, hospital, dental, surgical, ambulance and prosthetic services," while the statute refers to the "reasonable and necessary expenses *of*" those services. But plaintiff did not argue below that the policy requires more coverage than the statute. So the parties and the trial court treated the case as one of statutory, not contractual, interpretation.

> "THE COURT: * * * [T]his is not a case where the insurance company has , by contract, extended itself beyond where it's required to go. Instead, it's – it's in sync with the – its policy is in sync with the statute, and the question becomes, does the statute obligate the company to pay."
>
> "[PLAINTIFF'S COUNSEL]: I think, Your Honor, that's a correct recitation of the facts in dispute. * * *"

Tr 1-2.

On appeal, the parties continued to "agree that defendant's obligation to plaintiff is controlled by ORS 742.524(1)(a)." *Dowell*, 268 Or App at 672 n 2. Accordingly, the Court of Appeals, like the trial court, conclude that "the resolution of this case depends on the proper interpretation of" the statutes, not the policy. *Id.*

court considers appropriate," *id.* at 168 (quoting ORS 174.020(3)), which isn't much when the text is "truly capable of only one meaning." *Id.* at 172-73. If the meaning is still unclear after all of that, the court resorts to various maxims of construction. *Id.* at 172.

In this case, as will be seen, there is no need for the court to proceed beyond the text-and-context step, because, even at that point, the legislative intent is not in doubt. There is no need, then, to delve into the legislative history. In any event, neither party has offered any history, not in the trial court, nor on appeal.

A. Text

ORS 742.524(1)(a), quoted earlier, reads, again, as follows:

> "(1) Personal injury protection benefits as required by ORS 742.520 shall consist of the following payments for the injury or death of each person:
>
> "(a) All reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person's injury, but not more than $15,000 in the aggregate for all such expenses of the person. Expenses of medical, hospital, dental, surgical, ambulance and prosthetic services shall be presumed to be reasonable and necessary unless the provider is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services. At any time during the first 50 calendar days after the insurer receives notice of claim, the provider shall, within 10 business days, answer in writing questions from the insurer regarding the claim. For purposes of determining when the 60-day period provided by this paragraph has elapsed, counting of days shall be suspended if the provider does not supply written

> answers to the insurer within 10 days and may not resume until the answers are supplied."

This language is clear enough. It lists the expenses for which PIP benefits are required. The list includes the cost of certain "services" – namely, "medical, hospital, dental, surgical, ambulance and prosthetic services." It does not include the cost of *transportation* services. Nor does it include the cost of *transportation to* the described services, not all of which require transportation, of course. Nowadays, some services can be, and increasingly are, provided at home via the phone or internet. And, in a welcome return to a traditional practice, doctors are starting to make house calls again. Meanwhile, medications, too, can be ordered from home, by phone, mail, or email, and delivered there as well.

If the legislature intended to require PIP benefits for the occasional cost of transportation to the described services, it would have said so in words just that simple and direct. It would have referred to transportation – or some comparable term, like travel or transit or transport. Its failure to do so is meaningful, because, at the first level of analysis, courts follow the judge-made rule, now codified in ORS 174.010, that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted * * *." *See PGE*, 317 Or at 611. This court would be inserting what has been omitted, if it were to hold that PIP benefits are required for the cost of transportation to medical services, not just for the cost of

the services themselves – for the cost of getting to the doctor's office, not just the cost of the treatment while there. The court should thus hold that the legislature did not intend to require PIP benefits for traveling expenses.

Another indication of that intent is the fact that ORS 742.524(1)(a) expressly covers a particular form of travel – namely, travel by ambulance. There would be no need to mention that form in particular, if the statute applied to *all* forms – to travel in general. At the first level of analysis, the court should follow another rule, also found in ORS 174.010: "[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." *See PGE,* 317 Or at 611. The statute's reference to a particular form of transportation, by ambulance, would have no effect – would be superfluous – if, as plaintiff contends, PIP benefits are required for all forms. The only way to give effect to the express statutory language is to rule that PIP benefits are not required for the cost of transportation by means *other than* ambulance – by, for example, car, bus, cab, or light rail.

In the proceedings below, plaintiff focused her argument on the part of ORS 742.524(1)(a) that refers to "reasonable and necessary" expenses, as if the statute required benefits for whatever expenses were reasonable in amount and necessary in consequence of a covered injury. What that argument overlooks, of course, is that the expenses must not only be reasonable and necessary, but also must be

expenses *of* certain types of services – namely, medical, hospital, dental, surgical, ambulance and prosthetic services. Various expenses might be reasonable and necessary in relation to an injury. But if they are not also expenses for services of the described type, they are not included within the required PIP coverage.

The cost of travel to a doctor or pharmacy is one of the "expenses of" those "services," if those terms are given their plain and ordinary meanings, as the Court of Appeals explained, using relevant definitions in this court's preferred dictionary:

> "To resolve the parties' dispute, we first focus on four statutory terms: 'expenses,' 'of,' 'medical,' and 'services.' ORS 742.524(1)(a). None of those terms are statutorily defined, so we look to the dictionary. 'Expense' may be defined as 'something that is expended in order to secure a benefit or bring about a result[.]' *Webster's Third New Int'l Dictionary* 800 (unabridged ed 2002). 'Of' may be defined as 'relating to **:** with reference to **:** as regards **:** ABOUT[.]' *Id.* at 1565 (boldface in original). 'Medical' may be defined as 'of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery[,]' and 'medicine' may be defined as 'the science and art dealing with the maintenance of health, and the prevention, alleviation, or cure of disease[.]' *Id.* at 1402. 'Service' may be defined as 'the performance of work commanded or paid for by another[.]' *Id.* at 2075. Thus, the plain meaning of 'expenses of medical * * * services' may be construed as something that is expended to secure a benefit relating to work that is performed by another, when that work involves the practice of medicine (the maintenance of health, and the prevention, alleviation, or cure of disease). That construction suggests that ORS 742.524(1)(a) does not require defendant to pay plaintiff's expenses for transportation to attend medical appointments and to obtain medication."

Dowell, 268 Or App at 676-77.

Plaintiff ignored the services-related limitation on covered expenses, because her argument below was, for the most part, less argument than lobbying – less a brief to a court than a pitch to the legislature, which can, of course, amend the PIP statutes, or to the Insurance Division, which the legislature has empowered to make rules to implement the statutes. *See* ORS 742.540 (authorizing rulemaking by Division). Plaintiff argued that, as a matter of public policy, PIP benefits *should* cover trips to the doctor, and thus save insureds from that expense, because such trips are sometimes necessary after an auto-related injury. But the issue for this court is what the law is, not what it should be. The court is construing a statute, not drafting one, and not promulgating a rule.

To be sure, the legislature or Insurance Division could, by law or rule, respectively, decide to protect injured motorists from doctor-related transportation expenses, just as the legislature and another agency, the Workers' Compensation Board, have, by statute and rule, protected injured *workers* from those expenses (more on that below). But, for whatever reason, the legislature and Division haven't done the same thing for injured motorists. Not yet anyway. And it's not for this court to wonder why, or to do it for them in the guise of "construing" a

statute that, by its plain terms, does not cover the cost of transportation to medical services other than by ambulance.[5]

On appeal, plaintiff contends that her interpretation of ORS 742.524(1)(a) is consistent with the purpose of PIP coverage, and that defendant's is not. In support of that argument, she cites *Monaco v. U. S. Fidelity & Guaranty Co.*, 275 Or 183, 550 P2d 422 (1976), which said that "the two main reasons for mandating PIP was [sic] to provide quick payment of claims and to ensure that all insured

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[5] If the court is, in fact, wondering why that is so, it might be because the legislature is trying to hold down the cost of auto insurance, which Oregon motorists are required by law to carry. Coverage isn't free. Expanding it raises premiums. The cost is passed on to the end user. Higher premiums are a burden in themselves, but they also lead to more people driving without insurance, which, in turn, drives rates even higher, because policies are required to include coverage against accidents caused by uninsured motorists.

It might also be that the legislature was trying to avoid disputes over what transportation expenses are reasonable. Is it reasonable for an insured to choose Doctor A when Doctor B's office is closer? Is it reasonable for an insured to schedule appointments with different doctors at different times and locations rather than consult just one doctor once, thus avoiding multiple trips? Is it reasonable for the insured to take a taxi to a pharmacy to fill a prescription rather than order it by phone or online? The uncertainty created by these disputes, and the cost of resolving them in court, would likewise lead to higher premiums. As discussed later in this brief, the workers' compensation law, unlike the PIP law, provides expressly for reimbursement of travel expenses to medical appointments. But that doesn't avoid litigation in workers' comp cases over whether a particular travel expense is reasonable under the circumstances. *See, e.g., Safeway Stores, Inc. v. Cornell*, 148 Or App 107, 939 P2d 99 (1997) (cost of travel by taxi); *State Acc. Ins. Fund Corp. v. Holston*, 63 Or App 348, 663 P2d 795 (1983) (travel to another town for treatment).

drivers, their families and guests, and pedestrians injured by them, would recover medical and economic losses * * *." 275 Or at 188. But those goals were achieved primarily by making PIP coverage fault-free. *See Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 300, 613 P2d 32 (1980) (explaining that the "obvious purpose" of PIP is "to provide, promptly and without regard to fault, reimbursement for some out-of-pocket losses resulting from motor vehicle accidents"). Insureds can recover without regard to fault and thus without the delay that proving fault requires.

It might be that the legislative goals would be further served by requiring benefits for transportation expenses. But, again, the legislature chose, for whatever reason, perhaps concern for insurance premiums, *see* note 5 above, not to go that far. Plaintiff can't override that choice simply by asserting that, in her view, it doesn't fully realize one statutory goal. *Monaco* itself rejected the argument that an insurer can't deduct PIP benefits from uninsured motorist benefits because that would defeat one of the legislature's reasons for enacting the PIP statutes. The court said: "Whatever the legislative history of an act may indicate, it is for the legislature to translate its intent into operational language. This court cannot correct clear and unambiguous language for the legislature so as to better serve

what the court feels was, or should have been, the legislature's intent." 275 Or at 188.[6]

B. Context

PGE recognizes that context can be important in determining the meaning of the text. That's true here. As noted, ORS 742.524(1)(a) says that PIP benefits are required for all "reasonable and necessary" expenses incurred by the insured for "medical, hospital, dental, surgical, ambulance and prosthetic services." It then sets up a procedure to determine whether an expense is reasonable and necessary:

> "Expenses of medical, hospital, dental, surgical, ambulance and prosthetic services shall be presumed to be reasonable and necessary unless *the provider* is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services. At any time during the first 50 calendar days after the insurer receives notice of claim, *the provider* shall, within 10 business days, answer in writing questions from the insurer regarding the claim. For purposes of determining when the 60-day period provided by this paragraph has elapsed, counting of days shall be suspended if *the provider* does not supply written answers to the insurer within 10 days and may not resume until the answers are supplied."

(Emphasis added.)

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[6] Plaintiff suggests denying PIP benefits for travel expenses will encourage claims against at-fault drivers. Pltf's Br 8. But the PIP statutes were not designed to forestall tort claims. To do that, the statutes would have to provide benefits for all of the usual tort damages, including, most importantly, pain and suffering. The statutes were designed to expedite the recovery of certain types of damages, notably, medical bills and lost wages, but not discourage claims for other types.

The statute contemplates that the services for which benefits are required will be provided by a "provider," which, ORS 742.518(10) says, "has the meaning given that term in ORS 743.801." That statute, in turn, defines "provider" as "a person licensed, certified or otherwise authorized or permitted by the laws of this state to administer medical or mental health services in the ordinary course of business or practice of a profession." ORS 743.801(13). In other words, "provider" means a licensed *health care* provider. ORS 742.525 supports that conclusion. It says that a provider cannot charge more than the amount set in the "fee schedules for *medical* services" published by the Workers Compensation Board "for expenses of medical, hospital, dental, surgical, ambulance, and prosthetic services." *See* ORS 742.525(1)(b) (emphasis added).[7]

This context demonstrates that PIP benefits are *not* required for providers of *non*-health care services – such as cabbies, bus companies, and shuttle services, as well as friends and relatives who might drive the insured to the doctor or pharmacy in return for some remuneration. Nor are benefits required for services for which there is no "provider" – that is, for services the insured performs for herself, such as driving herself to the doctor's office.

[7] In 2011, after the events at issue in this case, the legislature deleted the word "ambulance" in the statute. Or Laws 2011, ch 701, § 1.

C. More Context

The PIP law provides no-fault insurance for medical bills and lost wages from *auto*-related injuries. Meanwhile, the workers' compensation law, ORS chapter 656, provides no-fault insurance for medical bills and lost wages from *work*-related injuries. Because the two laws address similar problems by similar means, it is useful to contrast the different ways they deal with the coverage-for-travel question at issue in this case.

As explained above, the PIP statutes cover "medical, hospital, dental, surgical, ambulance and prosthetic services." ORS 742.524(1)(a). The workers' compensation statutes, on the other hand, cover most of those services – medical, hospital, surgical, ambulance, and prosthetics, but not, strangely, dental – and also "other related services":

> "(1)(a) For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires * * *.
>
> "(b) Compensable medical services shall include medical, surgical, hospital, nursing, ambulances *and other related services* and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. * * *"

ORS 656.245(1)(b) (emphasis added).

In this context, "other related services" means, obviously, services other than, but related to, the described services – medical, surgical, *etc.* Accordingly,

the Workers' Compensation Board has held, by rule, that workers' comp benefits are required for the cost of "public transportation and use of a private vehicle" in getting to and from medical services. OAR 436-009-0025(4).[8]

In 1971, when the legislature enacted the part of ORS 742.524(1)(a) at issue in this case, ORS 656.245 was already on the books, including the part that required coverage for "medical, surgical, hospital, nursing, ambulances *and other related services.*" *See* ORS 656.245(1) (1971).[9] So was the predecessor to the

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[8] The rule reads in part:

"**Reimbursement of Related Services Costs**

"* * * * *

"(2) Reimbursement of the costs of meals, lodging, *public transportation and use of a private vehicle* shall be reimbursed as provided in this section. * * *

"* * * * *

"(c) Mileage when using a personal vehicle based on the beginning and ending addresses. Reimbursement may exceed the maximum if special transportation is required. Public transportation will be reimbursed based on actual cost."

(Emphasis added.)

[9] The 1971 law required that every auto policy provide various benefits to injured insureds, including "[a]ll reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the accident, in the amount of $3,000 per person." Or Laws 1971, ch 523, § 2 (originally codified at *former* ORS 743.800(1)).

part of OAR 436-009-0025 that construed "other related services" in ORS 656.245 to include transportation expenses. *See* WCB 6-1969. Even so, the legislature, in drafting what is now ORS 742.524(1)(a), decided not to include the "other related services" provision. That omission is meaningful, because "[o]rdinarily, when the legislature includes an express provision in one statute but omits such a provision in another statute, it may be inferred that such an omission was deliberate." *Oregon Business Planning Council v. LCDC*, 290 Or 741, 749, 626 P2d 350 (1981). This court should thus conclude that, for whatever reason, the legislature chose not to require PIP benefits for expenses "related to" medical services, including the cost of transportation to those services, but only for the expense of the services themselves.

Not long after the PIP statutes were enacted, the Court of Appeals concluded, albeit in *dictum*, that the "other related services" language in ORS 656.245 is broad enough to include the cost of transportation for medical care in addition to the cost of the care itself. *See Stritt v. SAIF*, 37 Or App 893, 896, 588 P2d 136 (1978).[10] The Workers' Compensation Board reached the same

[10] The actual issue in *Stritt* was moving expenses, not transportation expenses: an injured worker sought compensation for the cost of relocating to a healthier environment on advice of a doctor – one without Douglas fir trees, the apparent source of his allergic dermatitis. The court said that while the cost of transportation to a doctor falls within "other related services," the cost of relocation on advice of the doctor does not. *Dowell*, 37 Or App at 897.

conclusion in *In the Matter of the Compensation of Ina Finley*, WCB Case No. 77-961, 24 Van Natta 262 (1978). Since *Stritt* and *Finley*, the legislature has amended the PIP statutes many times, including a substantial revision in 1981. *See* Or Laws 1981, ch 414.[11] But it didn't see fit, even during the revision, to add to ORS 742.524(1)(a) the related-services language in ORS 656.245 that, according to *Stritt* and *Finley*, authorizes reimbursement for the cost of travel to medical services. Those omissions are, again, meaningful, at least as concerns current, post-revision statutes. They are some evidence the legislature does not intend to require benefits for travel expenses. *See Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) ("[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.").

In sum, the workers' compensation law demonstrates *how* to cover travel expenses, and thus proves, by comparison, that the PIP law *doesn't* cover them.

D. Non-Text

Plaintiff raises a couple of non-textual arguments – that is, arguments unrelated to the text of the relevant PIP statute. One argument is based on the fact

[11] Among other changes, the 1981 legislation deleted the phrase *all reasonable and necessary expenses of medical, dental, etc.* in *former* ORS 743.800 (now ORS 742.520) and added the same language to *former* ORS 743.805 (now ORS 742.524). *See* Or Laws, ch 414, §§ 1 and 2.

that, before this dispute arose, defendant reimbursed plaintiff for the cost of a foam roll and an exercise band that she purchased for home exercise on advice of her physical therapist. Aff of Pltf Stephanie M. Dowell (9/14/2012) at 1. Those expenses, she says, are unrelated to any "medical" service, and defendant's decision to pay them anyway means that it was required by ORS 742.524(1)(a) to reimburse her for other non-medical expenses, such as the cost of travel to doctor appointments. That argument, however, doesn't lead anywhere. The fact that defendant chose, for whatever reason, to pay for one uncovered expenses does not meant that it must pay for all others. An insurer doesn't have to pay one uncovered bill just because it paid another. Meanwhile, the insured shouldn't be heard to complain that a first gratuitous payment didn't lead to a second. The meaning of ORS 742.524(1)(a) – what that statute requires – depends on its terms, not on the past practices of this insurer.

Or others. In the lower courts, plaintiff claimed that other insurers often reimburse PIP claimants for the cost of travel to an "independent medical exams," or IMEs – at least, that's been the experience of her attorney. Aff of Charles Robinowitz (9/14/2012) at 1-2. But, again, that doesn't mean that the PIP statutes *require* payment of travel expenses to IMEs, only that some insurers have chosen, for whatever reason, not to dispute that particular expense.

E. Construing Insurance Statutes

ORS 731.008 "declares that the Insurance Code is for the protection of the insurance-buying public," and ORS 731.016 directs that the Code "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." Plaintiff cites those statutes repeatedly – on 8 of the 13 pages of her brief. She argues that ORS 731.016 requires the courts to construe the Code, including the PIP statutes, in a way that serves the policy identified in ORS 731.008: protecting the insurance-buying public. *See* Pltf's Merits Br 6-7. Actually, that statute doesn't tell the courts how to construe the Code – nor could it without running afoul of separation of powers principles.[12] Instead, it tells *the Director* how to *administer* and *enforce* the Code. In any event, it doesn't follow that construing the PIP statutes to require benefits for travel expenses would serve the interests of the insurance-buying public.

To be sure, plaintiff is a member of the insurance-buying public, and *she* would benefit from that construction of the statutes. So would other insureds that, like her, get into accidents, suffer injuries, and receive treatment that requires substantial travel expenses. But she and they form just a small fraction of the

[12] That's because "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803) (*per* Marshall, C.J.). The legislature can draft statutes, but it can't tell the courts how to construe them.

insurance-buying public. Most insureds won't ever get into an accident, so they won't get injured and won't incur expenses for travel to doctors and pharmacies. For them, the ruling plaintiff seeks wouldn't be helpful. It wouldn't benefit them. On the other hand, it would undoubtedly drive up their insurance premiums.

Clearly, not all insureds benefit from rulings that expand insurance coverage. Some do, some don't. The ones that need the coverage do. The ones that don't need it, but still have to pay for it, don't. And there are more of the latter than of the former. Plaintiff's argument is based, then, on the common misunderstanding that construing the insurance statutes to provide more coverage is always better for the insurance-buying public. That's not necessarily true, which is why the legislature itself didn't mandate more coverage when it drafted the statutes in the first place.

This court should take a utilitarian approach to ORS 742.008. All else being equal, it should construe the Insurance Code in a way that maximizes the well-being of insureds generally, not just the insured in the case before it.[13] If the court construes the PIP statutes that way, it should hold that travel expenses aren't

[13] Jeremy Bentham, regarded as the founder of modern utilitarianism, said the "fundamental axiom" of his philosophy is that "it is the greatest happiness of the greatest number that is the measure of right and wrong." *A Comment on the Commentaries and A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart, in *The Collected Works of Jeremy Bentham* 393 (1977).

covered. At the least, the court should reject plaintiff's contention that ORS 731.008 requires a contrary holding.

This is, by the way, a question for the court. In the proceedings below, plaintiff argued that whether ORS 742.524(1)(a) requires PIP benefits for travel expenses is a question for juries to decide, case by case. That is clearly wrong. The statute is a law. And, in this country, judges, not jurors, determine the law. This court has said just that: "Determination of the meaning of a statute is one of law for the court." *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993); *see also Springfield Education Assoc. v. Sch. Dist.*, 290 Or 217, 224, 621 P2d 547 (1980) ("The determination of the meaning of a statute is one of law, ultimately for the court."). The Court of Appeals made the same point, a little more emphatically, in *Karjalainen v. Curtis Johnston & Pennywise, Inc.*, 208 Or App 674, 681, 146 P3d 336 (2006), *rev den*, 342 Or 473 (2007):

> "In no event is the *meaning* of a statutory term determined as a question of fact. That is because statutes are – by definition – law, and their interpretation always is a question of law. * * * It is also because the *ad hoc*, case-by-case interpretation of statutes – possibly resulting in the same statutory term being construed to mean different things in different cases – would run afoul of constitutional obligations of equal treatment [under law]. * * *"

(Emphasis in original; citations omitted).

This court, then, should decide what ORS 742.524(1)(a) requires – and, in particular, whether it requires PIP benefits for the cost of travel to the doctor.

expenses. That is not something to be left for juries case by case. To hold otherwise would lead to different outcomes in similar cases and from there to unequal protection under law.

F. Out of State Authorities

Plaintiff cites four out-of-state decisions, only two by state supreme courts, involving claims for reimbursement of travel expenses under no-fault insurance laws. This court should find those decisions unhelpful, because of differences in the relevant statutes and case law.

Take, for example, the Florida Supreme Court's decision in *Malu v. Security Nat. Ins. Co.*, 898 So2d 69 (Fla 2005). At the time of that decision, Florida's no-fault law, like Oregon's, required benefits for "all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services." 898 So2d at 74. But the Florida law included a statement of purpose not found in the Oregon law: "to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state[.]" *Id.* And the Florida Supreme Court had previously held that "the language of the PIP statute should be interpreted liberally to effectuate the

legislative purpose of providing broad PIP coverage for Florida motorists." *Id.* (citations omitted). There is no similar holding in this court's opinions on the PIP statutes. This court has not ever said that our legislature's intent was to provide "broad" PIP coverage. The intent was, instead, to cover what the statutes *say* they cover, no more or less.

On top of all that, the Florida legislature had "reenacted" its no-fault law in 2001, fifteen years after an appeals court had construed that law, in a case called *Hunter*, to cover travel expenses. The enabled Florida's high court to conclude that the legislature had "tacitly approved" of that construction: "Since the revised statute does not explicitly or implicitly reject *Hunter*'s inclusion of medical transportation expenses as a covered benefit under the statute, we must assume legislative approval * * * until the Legislature acts otherwise." *Id.* at 75 (footnote omitted). It's not possible for this court to draw the same conclusion about the Oregon legislature's numerous "reenactments" of our PIP law from 1971 through 2015, because there was no intervening Court of Appeals decision construing the law to cover travel expenses. If anything, our legislature tacitly *rejected* PIP benefits for travel expenses when it repeatedly failed to add an "other related services" provision to ORS 742.524(1)(a), even after *Stritt* construed that provision in the analogous workers' compensation statute to cover such expenses. It could also be said, using *Malu*'s logic, that the Oregon legislature has tacitly approved of

the *denial* of PIP benefits for travel expenses, because it amended ORS 742.524(1)(a) *after* the Court of Appeals issued its decision in this case and didn't make changes to overturn that ruling. *See* Or Laws 2015, ch 5, § 4 (expanding coverage for described services from one year post-accident to two years).[14]

[14] The amendment came within months of the decision. But the legislature often reacts that quickly. *See, e.g.*, Or Laws 2001, ch 534, § 1 (overturning *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 427, 9 P3d 710 (2000), and *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000)) and Or Laws 2003, ch 768, § 1 (overturning *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 50 P3d 1163 (2002)).

VII. CONCLUSION

The court should conclude, based on the statutory text and context, that the PIP statutes do no cover the cost of transportation to doctors and pharmacies. Accordingly, the court should affirm both the trial court's judgment and the Court of Appeals's decision.

Dated this 31st day of December, 2015.

Respectfully submitted,

/s/ Thomas M. Christ

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Certificate of Compliance with ORAP 5.02(2)(d)

Brief length

I certify that this brief complies with the 14,000 word-count limitation in ORAP 5.05(2)(b)(i) and that the word count of this brief, as described in ORAP 5.05(2)(a), is 6,551 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)(f).

/s/ Thomas M. Christ

Thomas M. Christ

Certificate of Filing and Service

I certify that I filed the foregoing brief by causing it to be electronically filed with the Appellate Court Administrator on December 31, 2015, through the appellate eFiling system.

I further certify that on the same date, through the use of the electronic service function of the appellate eFiling system, I served the foregoing document on the following party:

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I further certify that on the same date, I conventionally served the foregoing document by causing a copy thereof to be mailed by first-class mail, with postage prepaid, addressed as follows:

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