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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

MARTHA L. WRIGHT, Petitioner on Review, v. JOHN A. TURNER, FREIDA TURNER, and SHERRI L. OLIVER, Defendants, and MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent on Review.	TC No.: 060403958 CA No.: A144126 SC No.: S060960

Respondent Mutual of Enumclaw's Brief on the Merits

Review of a Decision of the Court of Appeals,
on Appeal from the Judgment of the Multnomah County Circuit Court,
by the Honorable Kristena A. LaMar, Judge

Date of Decision:	October 24, 2012
Author:	Haselton, C.J.
Concurring:	Armstrong, P.J., and Duncan, J.

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I. INTRODUCTION

This insurance dispute arose out of a three-car accident. Plaintiff was a passenger in one of the vehicles, which was struck by the second and, a short while later, by the third. The drivers of the second and third vehicles did not have enough insurance, plaintiff concluded. So she sought underinsured motorist (UIM) benefits under her policy with defendant, which had a $500,000 per-"accident" limit of liability, although defendant's original answer admitted that the limit was $1 million, a mistake it later caught and corrected in an amended answer. The jurors found that plaintiff had suffered $979,540 in damages, which they did not apportion between the two collisions, because they were not asked to, despite defendant's request. The trial court then entered a judgment for plaintiff for the full verdict, less offsets, saying defendant was precluded by the admission in its original pleading from arguing that its liability was limited to $500,000.

On appeal, defendant argued that it was not bound by its original answer, because it had re-pled. It also argued that the two collisions constituted one "accident" for limit-of-liability purposes. Accordingly, defendant sought reversal and remand for entry of a new judgment – one for $500,000 less offsets.

The Court of Appeals granted that relief. *Wright v. Turner*, 253 Or App 18, 289 P3d 309 (2012). It held, first, that defendant was not bound by the mistake in its original answer, because that pleading had been superseded by the amended

answer. 253 Or App at 28-29. It then held that whether the two collisions constituted one "accident," for which just one limit was available, or two "accidents," for which two limits were available, was a question of fact on which plaintiff had the burden of "presentation and proof," as she conceded, *id.* at 36 n 11, and that she had failed to carry the burden, because she had not caused the one-accident-or-two question to be presented to the jury and, in any event, had not adduced evidence sufficient to support a finding in her favor. *Id.* at 37. The court also held that, in the "idiosyncratic posture of this case," it would not be appropriate to remand for presentation of the one-accident-or-two question or for receipt of further evidence, because plaintiff had "explicitly disavowed such disposition." *Id.* Accordingly, the court remanded the case for entry of a judgment based on a single-accident limit of liability. *Id.* at 38.

Plaintiff filed a petition for review, which this court allowed. *Wright v. Turner*, 353 Or 445, 300 P3d 168 (2013).

II. FACTS

The material facts are undisputed, and are accurately recited in the Court of Appeals opinion, which, for convenience, is reproduced here in relevant part:

> "On April 16, 2004, plaintiff and her friend were traveling together northbound on Interstate 5 from California. As the women entered into Oregon, they encountered a hailstorm on Siskiyou Pass. The hail turned to rain as they descended a steep downgrade. Suddenly,

a sedan, driven by Turner, lost control, spun, and collided with the front end of plaintiff's truck. The two vehicles separated momentarily – and then collided again – before both cars came to rest against a center barrier on the highway median, with both vehicles facing downhill and Turner's sedan 'a few feet' in front of plaintiff's truck.

"After the vehicles came to a stop, and plaintiff checked on each other. Then who had been driving, attempted to exit the truck; however, she could not open the driver's door because the truck was positioned against the barrier. pulled herself out of the truck through the driver's window and walked ahead to Turner's sedan to check on its occupants while plaintiff remained in the truck. observed that Turner and his passenger appeared to need medical attention, so she returned to the truck to retrieve her cell phone to call 9-1-1. While standing outside of the truck, implored plaintiff not to exit on the passenger's side because feared that plaintiff would be struck by passing traffic. then leaned her head and shoulders into the driver's window and saw her purse on the floorboard, which she asked plaintiff to reach. Plaintiff unbuckled her seatbelt and, as she leaned over to reach the purse, a sports utility vehicle, driven by Oliver, struck the back of the truck. The rear-end impact pushed the truck into the sedan, causing to be dragged forward and knocking plaintiff about the cab of the truck. * * *

"As pertinent to this dispute, the UIM policy provides that defendant 'will pay damages which the covered person is entitled to recover from the owner or operator of an uninsured motor vehicle because of [bodily injury and property damage] sustained by the covered person and caused by an accident.' (Boldface omitted.) The limit of liability provides:

> "'LIMIT OF LIABILITY
>
> "'A. Single Limit
>
> "'1. If the Declarations Page shows a single limit of liability for Part C—Uninsured Motorist Coverage, this limit is our maximum limit of liability for all damages for bodily injury and property damage *resulting from any*

> *one automobile accident*. This is the most we will pay regardless of the number of:
>
> "'a. Covered persons;
>
> "'b. Claims made;
>
> "'c. Vehicles or premiums shown on the Declarations Page;
>
> "'d. Premiums paid; or
>
> "'e. *Vehicles involved in the accident.*'
>
> "* * * The declarations page, in turn, provides, under the heading 'COVERAGES AND LIMITS OF LIABILITY':
>
> "'UNINSURED MOTORISTS BODILY INJURY
>
> "'UNINSURED MOTORISTS PROPERTY DAMAGE
>
> "'SINGLE LIMIT EACH ACCIDENT $500,000[.]"

253 Or App at 20-21 (italics and capitalization in original).[1]

[1] The quoted provision refers to an "uninsured motor vehicle," but that term is defined to include an *under*insured motor vehicle, meaning a vehicle that has some liability coverage, just not as much as the insured's uninsured motorist (UM) coverage. In that regard, the policy's UM coverage includes UIM coverage, consistent with ORS 742.502(2)(a), which provides in part: "Uninsured motorist coverage shall include underinsurance coverage for bodily injury or death caused by accident and 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." For a discussion of the interaction of UM and UIM coverage, and how UIM coverage fills the "gap" between the limit of the tortfeasor's liability coverage and the limit of the insured's UM coverage, see *Vogelin v. American Family Mut. Ins. Co.*, 346 Or 490, 501-06, 213 P3d 1216 (2009).

III. PROCEEDINGS

A. Pre-Trial

In April 2006, plaintiff brought this action against Turner, Oliver, and defendant. In her original complaint, she alleged that Turner and Oliver were negligent in causing her injuries, ER 1-5; that they didn't have enough liability insurance to cover all of the damages she sustained in "the accident" (singular), ER 6 (¶ 16); and, therefore, that plaintiff was entitled to recover the difference from defendant up to "the full amount" (an amount she did not specify) of the UIM coverage of her policy. ER 6 (¶ 18). Shortly thereafter, plaintiff settled with Turner and Oliver. OJIN 10.

The case went into abeyance for a couple of years while plaintiff waited for her medical condition to become stationary. OJIN 22, 24, 38. When the stay was lifted in early 2009, plaintiff filed an amended complaint against defendant. ER 8. In paragraph 3 of that pleading, plaintiff asserted that "[t]he insurance contract provides for a limit of $1,000,000 of coverage for damage or injury caused by an underinsured motorist." ER 9. And, in paragraph 10, she alleged that "as a proximate result of both collisions," she "has been injured in the full amount of the [UIM] coverage available to her" under the policy. ER 11. Defendant filed an answer that admitted the allegations of paragraph 3, but went on to assert that "there is a disagreement over the amount of benefits to which plaintiff is entitled."

ER 13-14 (¶¶ 1-3). The answer also admitted that plaintiff was a passenger in a vehicle that was "struck" twice, and that she was entitled to UIM benefits "as a result of that accident," ER 13-14, using the singular form of the noun.

B. Trial

Before trial, defendant caught the mistake in its pleading regarding the limit of liability. And so, at the outset of the trial, it tendered an amended answer that admitted paragraph 3 of the amended complaint "except that sentence of paragraph 3 alleging that the insurance contract provides for a limit of $1 million of coverage for damages or injury caused by an underinsured motorist." ER 17 (¶ 1). The amended answer went on to say that the policy provides only "$500,000 of coverage." *Id.* Plaintiff did not oppose the amendment and the trial court allowed it. *See* ER 15-16 (agreed narrative statement).

Despite the amendment, the parties did not agree on whether the case involved one accident or two accidents for coverage purposes and, therefore, whether plaintiff could recover up to one policy limit or two – in other words, whether defendant was liable for up to $500,000 in damages, or up to $1 million. The court and counsel discussed those issues in-chambers and off-record. Later, on the record, the court reported that the parties had agreed "not to make any mention of policy limits." Tr 166. The court also said that the parties had agreed

that "because it's unclear whether under her insurance policy, there will be one coverage, or two; one policy limit, or two policy limits; * * * one accident, or two accidents; that we will wait until we see what the verdict looks like, and then we'll try and sort those issues out." Tr 166-67.

In fact, there was no agreement to wait on the verdict. Defendant's attorney said that he planned to offer a verdict form that asked the jurors to determine which of plaintiff's damages were caused by which collision, the one with Turner's vehicle or the one with Oliver's, in case plaintiff wanted to argue that there were two accidents and, hence, that two limits were available to her:

> "I will advise the Court that I'm actually revising * * * my verdict form * * * to have the jury determine what the damages are from each of the impacts. * * * [I]f plaintiff is going to contend there are two policies available, then there will have to be some determination of whether one policy was under-insured, and how much, and whether the other one was under-insured, how much, if he intends to split those in order to make two $500,000 claims.
>
> "So I will be submitting a verdict form which will ask the jury to determine what the damages are relating to each of the two impacts."

Tr 168.

In response to a question from the court, defense counsel denied that he was "conceding there are two accidents." Tr 169. He then repeated: "I'm just going to ask [the jurors] to assess damages attributable to the first accident involving Mr.

Turner, and damages attributable to the second accident, involving Ms. Oliver." *Id.*

Plaintiff objected to the allocation-of-damages approach, arguing that defendant had waived the right to ask the jury to apportion the damage because it had not given notice of that intent in its pleading or otherwise alert plaintiff to the issue earlier in the case. Tr 172. In response, defendant pointed out that plaintiff had the burden of proof and, therefore, had the burden to prove that two accidents had occurred and what damages were attributable to each accident, if she wanted to avail herself of two policy limits. Tr 173. Defendant also argued that plaintiff had raised the apportionment issue, implicitly, if not explicitly, by alleging that defendant was liable for up to $1 million, the sum of two $500,000 policy limits. Tr 175-76.

The court rejected defendant's request to submit a verdict form that asked the jurors to apportion damages between the collisions. It indicated, instead, that it would defer the one-accident-or-two-accidents issue for post-verdict determination, because the verdict could render that issue moot, if, for example, the jury found damages less than one limit:

> "I'm not inclined to make the jury assess which damages are attributable to which injury. And, again, we may be crossing bridges we don't even have to worry about crossing.
>
> "So, for now, * * * it's a one-answer question on the verdict form."

Tr 174-75, 178.

At the close of evidence, the court told the jury that the "sole issue that you are to decide in this case is the amount of the damages that have been incurred by the plaintiff." Tr 885. The court then provided the jury with a verdict form that asked them to fill in dollar amounts for plaintiff's economic and noneconomic damages. ER 22. Defendant objected to the verdict form, reprising the which-collision-caused-which-damages argument it had raised earlier.

> "[DEFENSE COUNSEL]: * * * I do except to the verdict form * * * in view of this argument about whether there are two impacts, and therefore two policy limits.
>
> "And if we have come to a juncture where that becomes an issue, I wanted to submit [a verdict form that asks] the jury to assess the economic, and non-economic damages, resulting from the impact involving Mr. Turner, and the impact involving Ms. Oliver, because it may be that one of those [persons is] not under-insured.
>
> "And so, as a consequence of that, if [the jury] had answered that question, * * * there may be only a minimal amount that would be owing on one policy as opposed to a larger amount on the other.
>
> "But, as the Court knows, the benefits to which the plaintiff is entitled to is limited by the policy limitation amount.
>
> "THE COURT: Yeah. And we haven't even crossed that bridge.
>
> "[DEFENSE COUNSEL]: And we haven't crossed that bridge yet, but I believe that that was the plaintiff's responsibility to establish that circumstance by testimony, and by submitting it to the jury in that fashion, in order to obtain the answer that, in order to make the two-policy argument. And I know the Court said that you weren't going to

> do that, and I [except to] the Court's ruling, and I think that's on the record, * * *[.]
>
> "[THE COURT]: I think so, too."

Tr 889-90.

The court overruled the objection, concluding, again, that defendant had somehow waived the only-one-accident argument by not pleading it, even though the court acknowledged that plaintiff bore the burden of proof on the issue. Tr 891-92.

The court then sent the case to the jury, which returned a verdict awarding plaintiff $229,540.00 in economic damages and $750,000 in noneconomic damages, or $979,540 in total damages. ER 22.

C. Post-Trial

Plaintiff submitted a proposed judgment that awarded plaintiff the full amount of damages awarded by the jury, less the payments received from the insurers of Turner and Oliver. Defendant objected to the proposed judgment, pointing out that the court had yet to decide whether there was one accident or two accidents for limit-of-liability purposes and that, even if it decided there were two, the jury had not been asked to decide "what damages were attributable to each accident." OJIN 54 (Def's Objections to Pltf's Proposed General Jdmt etc.) at 1; *see also* Tr 919-20. "Those findings," defendant added, "are absolutely necessary

* * * before any determination can be made of the total amount of *covered damages* for which [defendant] could be held liable under the pertinent UIM policy," because any damages above $500,000 in either accident would exceed the limit and not be recoverable. *Id.* at 1-2 (emphasis in original). Defendant went on to argue that, based on the facts and the policy language, the court should conclude that there was only one accident under the policy and, therefore, should enter a judgment of $325,000 – which equals the amount of a single limit minus $175,000 in offsets for the payments by Oliver and Turner. *Id.* at 2-5. Defendant also argued that, if the court concluded that there were two accidents, the case would have to be retried, because the jury had not been asked to apportion the damages between the accidents. *Id.* at 5-6. Finally, defendant argued that, if the number of accidents was a question of fact, not law, then plaintiff had waived the right to have the jury find that there were two accidents, because she has not taken steps to present that issue to the jury, no doubt for tactical reasons. *See* OJIN 57 (Reply in Support of Def's Objections etc) at 1-2.

The court rejected all of those arguments and then declined to decide the one-accident-or-two issue. It concluded, instead, that the issue was moot, because defendant was precluded by its original answer from contending that the limit was not $1 million. "I find," the court said, "defendant's Answer to First Amended Complaint, filed April 9, 2009, either expressly admitted that the plaintiff had

$1,000,000 in coverage or, alternatively, that defendant was estopped from challenging that amount of coverage on the first day of trial." ER 29. In effect, the court held that, because of the mistake in defendant's original pleading, the limit should be treated as twice what it actual is. The court then entered plaintiff's proposed judgment, which, as noted, awards damages based on the amount of the verdict, less offsets for payments made by the insurers of Turner and Oliver, plus attorney fees and costs. ER 31-33.

D. Appeal

Defendant appealed and assigned error to the entry of the above-limit judgment. In support of that assignment, defendant argued that it was not bound by its original answer because that pleading was superseded by the amended answer, *see* Blue Br at 12, and that it was not otherwise estopped from challenging the amount of coverage, because "neither the insurer nor the insured can ever be estopped from relying on the terms of the policy to prove or disprove coverage." *Id.* at 15. It also argued that a single policy limit applied because, as a matter of law, there was only one accident, and plaintiff had failed to plead or prove otherwise, or even to submit the issue to the jury. *Id.* at 17-23. If the court agreed, defendant said, it should reverse the judgment and remand the case for entry of a new judgment that awards plaintiff $500,000 – the one-accident limit – minus

offsets. On the other hand, if court concluded that two accidents had occurred, it should also conclude that the trial court erred in failing to submit a verdict form that apportioned plaintiff's damages between the accidents, which would require a remand for a new trial and an apportionment. *Id.* at 24-28.

In response, plaintiff argued that defendant had not preserved the alleged error. Alternatively, she argued that there were two accidents as a matter of law. She did not contend that the number of accidents was a question of fact or, if it was, that the case should be remanded for further fact finding. *See* 253 Or App at 26 n 4. Indeed, she "explicitly disavowed such a disposition." *See id.* at 37.

The Court of Appeals concluded that defendant's original answer, which mistakenly admitted that the policy's limit was $1 million per accident, did not preclude defendant from arguing otherwise, because that answer had been superseded by the amended answer. 253 Or App at 28. It also concluded "that defendant's contentions pertaining to the number of accidents – and the sufficiency of plaintiff's proof in that regard – were preserved for [the court's] consideration." *Id.* at 29. In fact, the court said, "[p]reservation is patent." *Id.*

The court then proceeded to determine the meaning of "accident," following the "analytical framework" this court described in *Holloway v. Republic Indemnity Co. of America*, 341 Or 642, 649-50, 147 P3d 329 (2006), and guided by out-of-state decisions involving the same policy language, including a case that both

parties relied on and that the court found "persuasive": *United Servs. Automobile Ass'n v. Baggett*, 209 Cal App 3d 1387, 258 Cal Rptr 52 (1989). *Baggett* held that whether two collisions constitute one accident for insurance purposes does not depend on the number of vehicles, claims, or injuries, but on whether the collisions "are so simultaneous or so closely related in time and space as to be considered by the average person as one event." 209 Cal App 3d at 1394. The Court of Appeals endorsed this "proximate cause-driven construct of 'any one accident,' * * * specifically including its proviso as to the spatial and temporal proximity of the initial and subsequent impacts involving separate vehicles." 253 Or App at 34. In doing so, the court noted that plaintiff herself did not "dispute the abstract correctness of it," but instead took the position that "the proper *application* of that construct here compels the conclusion that plaintiff was injured as the result of two accidents, not one." *Id.* (emphasis in original).

On the application issue, the court disagreed with plaintiff. The court found – correctly – that "the record is completely devoid of any evidence of the cause of the second collision" in this case, the one involving Oliver's vehicle. 253 Or App at 37. As the court explained, "[n]o evidence reveals what caused the second vehicle to collide with plaintiff's truck." *Id.* The court also found a lack of evidence on the temporal and spatial proximity of the two collisions. "[T]he record," the court said, "does not disclose the distance between the points of

impact." *Id.* Accordingly, "any inference as to the causal dynamics of the second collision would be impermissibly speculative." *Id.*

All that remained, then, was the disposition of the case. Remand was not appropriate, because, as noted, plaintiff had disavowed that result. The court thus concluded that, because the record was insufficient to decide whether there was one accident or two, and because plaintiff had the burden of "presentation and persuasion" on that issue, as she admitted, *id.* at 36, the proper disposition was to remand the case with instructions to enter a new judgment based on one accident and one limit, less offsets. *Id.* at 38.

IV. QUESTIONS PRESENTED

Defendant does not agree with plaintiff's statement of the questions presented on review. In defendant's view, the actual questions are:

1. Did defendant preserve the alleged error in the trial court's entry of a judgment for more than the $500,000-per-accident policy limit?

2. If so, did the trial court err in entering the judgment?

3. If so, what is the proper disposition of this appeal?

V. SUMMARY OF ARGUMENT

1. Defendant preserved the alleged error in entry of a judgment for more than the $500,000-per-accident policy limit, because it objected to that ruling in a timely manner and for good reason. Before entry of the judgment, defendant argued that it couldn't be held liable for more than $500,000 without findings that the jurors did not make because they were not asked – namely, that there were two accidents for insurance purposes and that the damages for each did not exceed the per-accident limit. To preserve the error in the judgment, defendant did not have to file a motion for directed verdict, or otherwise test the sufficiency of the evidence to support those unsought findings.

2. The trial court erred in entering the judgment, because it awards more damages than the $500,000-per-accident policy limit. There was only one accident here, even though there were three vehicles and two collisions, because all of plaintiff's injuries were proximately related to both collisions. That is what plaintiff alleged, and what the evidence showed as a matter of law. Even if the number of accidents was a question of fact, the trial court still erred in entering the judgment, because, as noted, the jurors did not find that there were two accidents or that the damages were $500,000 or less for each of them.

3. The judgment should be reversed and the case remanded for entry of a judgment for $500,000, the per-accident limit, less offsets, just as the Court of

Appeals ordered. That's the proper disposition, if this court agrees that there was only one accident, based on the admissions in plaintiff's pleadings or the evidence or both. The same result should obtain if the court concludes that the number of accidents is a question of fact, because plaintiff waived the right to findings on that question. She did not ask the trial court to submit that question to the jury, or the corollary question about the damages per accident, and didn't except to the court's failure to do so. Then, on appeal, she "explicitly disavowed" a remand for the necessary fact finding to support the recovery of two policy limits. Even if this court were to conclude that there were two accidents as a matter of law, it should still reverse the judgment, because the jurors did not apportion the damages between the collisions, despite defendant's request, leaving no way to determine whether some of the damages exceeded the per-accident limit. In that event, there must be a new trial and an apportionment of damages.

VI. ARGUMENT

The jury found that plaintiff had $979,540 in damages, substantially more than defendant's limit of liability under the policy's UIM coverage, which is $500,000 per accident. Even so, the trial court entered a judgment for the full amount of the verdict, less offsets for payments by the underinsured motorists, Turner and Oliver, which works out to $804,540 in damages. The court reasoned

that, for purposes of this case, the limit of liability is $1 million per accident, not $500,000, because plaintiff alleged that in her amended complaint and defendant mistakenly admitted it in its original answer. According to the court, defendant was bound by that admission, even though defendant had caught and corrected the mistake in an amended answer, filed with the court's permission and without objection by plaintiff. The court thus held that defendant was liable for all of the damages from the two collisions, even if the collisions constituted a single accident under the policy. ER 29.

The trial court's admission-by-pleading ruling was so clearly erroneous that plaintiff did not even bother to defend it in the Court of Appeals.[2] Instead, she argued that defendant didn't preserve the alleged error and, in any event, that there was no error, because, in her view, the collisions constituted separate accidents as a matter of law and, therefore, two limits, totaling $1 million, are available to her. Neither argument is well-taken.

[2] "An admission of fact in a pleading is a judicial admission and, as such, is normally conclusive on the party making such an admission." *Yates v. Large*, 284 Or 217, 223, 585 P2d 697 (1978). The same is not true for admissions of fact in a pleading that is superseded by amendment. "Upon the filing of an amended answer, * * * any admission of fact in the superseded answer is no longer a judicial admission[.]" *Id.*

A. Defendant Preserved the Alleged Error

The alleged error was the entry of plaintiff's proposed judgment for the full amount of her damages – $979,540 (less offsets). There is no dispute that plaintiff cannot recover that amount, which is more than the $500,000-per-accident policy limit, unless there were two accidents and each accident resulted in $500,000 or less in damages.[3] There is also no dispute that, over defendant's objections, the jury wasn't asked to decide the number of accidents or the amount of damages per accident, so there are no findings to support an above-limit judgment.

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[3] It is necessary to apportion the damages between the two accidents – assuming there were two – because defendant would not be liable for any damages that exceeded $500,000, the per-accident limit, in either accident. Just knowing the total damages doesn't solve the limit problem. Suppose, for example, that plaintiff sustained minor injuries in the first accident but was severely injured in the second, so that just $10,000 of the nearly $980,000 in total damages were compensation for the first-accident injuries and $970,000 in damages were compensation for the second-accident injuries. In that event, plaintiff could recover all of the damages from the first accident (not counting offsets), but just $500,000 in damages from the second (again, not counting offsets). Offsets aside, her total recovery would be $510,000.

On the other hand, it could be that $300,000 of plaintiff's total damages was for injuries in one accident and $680,000 for injuries in the other. In that event, plaintiff would be entitled to recover $300,000 – before offsets – for the one accident and $500,000 – before offsets – for the other, for a total of $700,000 in pre-offset damages.

There are, of course, an infinite number of other possible divisions of the total damages between the two accidents, each resulting in a different aggregate recovery, when any above-limit damages are subtracted. For that reason, a verdict that does not determine the number of accidents and the damages per accident does not provide enough guidance for determining the amount of defendant's liability.

Defendant objected to the proposed judgment, on those very grounds. It argued that there was only one accident as a matter of law; that even if there were two accidents as a matter of law, there was no finding of how much of the damages were attributable to each and thus no way to determine whether some of the damages exceeded the per-accident limit; and that if the number of accidents was a question of fact, not law, then plaintiff had waived a finding of two accidents by failing to ask that that issue be submitted to the jury. *See* OJIN 54 (Def's Objections to Pltf's Proposed Gen Jdmt etc.) at 1; OJIN 57 (Reply in Support of Def's Objections etc) at 1-2; *see also* Tr 919-20. Any one of these arguments should have persuaded the court to reject the proposed judgment. Nothing more was required to preserve defendant's right to challenge it on appeal. Objecting to a request for a ruling is all that is required to preserve the error in it.

Plaintiff argues that defendant cannot assign error to the judgment because it didn't move for a directed verdict or otherwise challenge the sufficiency of the evidence to support a finding of two accidents and $500,000 or less in damages for each. This argument makes no sense. Defendant didn't move for a directed verdict on those issues because those issues weren't submitted to the jury, in large part because plaintiff opposed it. There is no point to testing the sufficiency of the evidence to support findings that the jury isn't asked to make. And it makes no

sense to direct the jurors to return a verdict for one party or the other on issues not before them.

The Court of Appeals observed correctly that, in this case, "[p]reservation is patent." 253 Or App at 29. Defendant repeatedly raised the issue whether there was more than one accident and, if so, whether the damages for either of them exceeded the per-accident limit. *See id.* But, over defendant's objections, the trial court declined to submit those issues to the jury for the necessary fact finding. Even so, and again over defendant's objections, the court entered a judgment that could only stand if the jury had found that there were two accidents, each with $500,000 or less in damages. To preserve the error in that ruling, defendant only had to argue that there were no such findings because none were sought. It was not necessary, as plaintiff contends, to have challenged the sufficiency of the evidence to support the unsought findings. In these circumstances, plaintiff's no-preservation argument doesn't go anywhere.

In fact, the argument backfires. It illustrates *her* failings in the trial court proceedings – what *she* neglected to do. She was the party with the burden of proof on the one-accident-or-two issue. As she admitted below, she had to prove two accidents in order to recover more than one per-accident policy limit. *See* 253 Or App at 37. And part of the burden of proving something is making sure that it gets presented to the decision-maker, either the judge or the jury. If the number of

accidents is a question of fact – in the Court of Appeals, plaintiff argued that it is a question of law, *see* 253 Or App at 26 n 4 – then plaintiff had the burden to make sure that issue was submitted to the jury, along with the damages-per-accident issue. But she dropped that ball. Or, more likely, she decided for tactical reasons not to go that route. In any event, she didn't present a verdict form that asked the jurors whether there were two accidents and, if so, what damages are attributable to each. Nor did she propose instructions on those issues. To make matters worse, she objected to defendant's request for a verdict form that called for an apportionment of damages. Tr 172. And when the trial court rejected that form and instead gave what it called a "one-answer" verdict form, a form that didn't apportion the damages, plaintiff did not except, as defendant did. Tr 889.

In due course, the jurors determined the damages – $979,540. But, thanks to plaintiff, they did not also determine the number of accidents or the damages per accident, making it impossible to determine whether all of the damages were recoverable – which is just what defendant argued in opposition to plaintiff's proposed judgment. Recognizing that problem, plaintiff quickly filed a declaratory relief action in which she proposed to decide the issues not decided in this one – the number of accidents and the amount of damages incurred in each. *See Wright v. Mutual of Enumclaw Ins. Co.*, Mult Co Case No. 0909-13663. She hoped to combine those findings with the findings of total damages in this case to justify her

request for a judgment for all of the damages. *See* OJIN 56 (Pltf's Resp to Def's Objections on Proposed Gen Jdmt etc) at 2 and 3 (explaining the other action). But, without waiting for the other action to finish, or even to get started, she asked the trial court to give her that judgment, and the trial court complied. Defendant objected, as noted above, and that was all that was required to preserve the error. [4]

In sum, this court should agree with the one below: preservation is patent in this case.

B. The Trial Court Erred in Entering Judgment for More Than One Limit

The policy provides that "[i]f the Declarations Page shows a single limit of liability," that limit is the most defendant owes "for all damages for bodily injury or property damage resulting from any one automobile accident." ER 24 (bold

[4] Plaintiff eventually – and wisely – abandoned the declaratory relief action. The law is clear that, in cases where the verdict is based on multiple interrogatories, for example, fault, comparative fault, and damages, at least nine jurors must agree on the answer to every question. *See Sandford v. Chev. Div. Gen Motors*, 292 Or 590, 613, 642 P2d 624 (1982) ("[T]he same jurors must constitute the three-fourths majority that finds every separate element required for the verdict."); *Clark v. Strain*, 212 Or 357, 364, 319 P2d 940 (1958) ("(T)he minimum legal number of jurors required for a valid verdict must be the same jurors voting similarly on each separate issue demanding resolution"). You can't have one group of nine agreeing on the answer to one question and a different group of nine agreeing on the answer to another. It follows that you can't have two different juries in two different cases answering the relevant questions, especially when they would not all be looking at the same evidence (even if you called the same witnesses in both trials, they would not testify just the same).

omitted). The declarations do in fact show a single limit of liability in the amount of $500,000. ER 26. It follows that plaintiff was entitled to no more than $500,000 in damages (less offsets), without pleading and proving that her injuries resulted from more than one accident. And, as explained below, she didn't plead or prove two accidents and, in the "idiosyncratic posture of this case," as Court of Appeals put it, 253 Or App at 37, she is not entitled to try again.

(1) The meaning of "one automobile accident"

As noted, the policy provides that the $500,000 policy limit is defendant's "maximum limit of liability for all damages because of bodily injury or property damage resulting from *any one automobile accident*." ER 24 (bold omitted; italics added). The policy does not define "one automobile accident," but its meaning is plain, especially when taken in context, which is how policy provisions should be taken. *See Holloway v. Republic Indemnity Co. of America*, 341 Or 642, 147 P3d 329 (2006).[5] In common parlance, an "accident" is a "sudden event or change

[5] In *Holloway*, this court explained that "[i]nterpretation of an insurance policy is a question of law, and our task is to ascertain the intention of the parties * * * based on the terms and conditions of the insurance policy." 341 Or at 649. The court went on to say:

> "If an insurance policy explicitly defines the phrase in question, we apply that definition. If the policy does not define the phrase in question, we resort to various aids of interpretation to discern the parties' intended meaning. Under that interpretive framework, we first

occurring without intent or volition through carelessness, unawareness, ignorance or combination of causes and producing an unfortunate result < a traffic ~ in which several persons were injured >." *Webster's Third New Int'l Dictionary* 11 (unabridged ed 2002). It follows that an "automobile accident" is a sudden and unintended event, caused by negligence, and involving a motor vehicle.

Or, in the case of defendant's policy, multiple vehicles. As noted, the policy provides that the single limit is the most defendant will pay "regardless of the number of * * * [v]ehicles involved in the accident." The policy contemplates, then, that a single accident can involve, as here, three or more vehicles. By implication, it also contemplates that a single accident can involve two or more collisions, because it is all but impossible for one car to collide with two others simultaneously. The two others can't occupy the same space at the same time.

> consider whether the phrase in question has a plain meaning, *i.e.*, whether it is susceptible to only one plausible interpretation. If the phrase in question has a plain meaning, we will apply that meaning and conduct no further analysis. If the phrase in question has more than one plausible interpretation, we will proceed to the second interpretive aid. That is, we examine the phrase in light of the particular context in which that phrase is used in the policy and the broader context of the policy as a whole. If the ambiguity remains after the court has engaged in those analytical exercises, then any reasonable doubt as to the intended meaning of such a term will be resolved against the insurance company. However, as this court has stated consistently, a term is ambiguous *only* if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continue to be reasonable, despite our resort to the interpretive aids outlined above."

Id. at 649-50.

Thus, under defendant's policy, it's possible to have a three-car, two collision accident.

Other courts agree. They generally hold that, no matter the number of vehicles involved, two collisions constitute a single "accident" for insurance purposes if the first collision proximately caused the second, taking into account the distance between them in space and time. *See* Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence*, 64 ALR 4th 668, § 2[a] (2007) ("The majority of courts have adopted the general view that to determine whether there is a single or multiple occurrence or accident within the meaning of the policy limits clause of a liability policy one must look to the cause or causes of the accident or occurrence."). If the first impact is a proximate cause of the second, then there is just one accident for limit-of-liability purposes. *Id.* at § 3; *see also 12 Couch on Insurance* § 172:12 (3d ed 2008).

United Servs. Auto. Ass'n v. Baggett, 209 Cal App 3d 1387, 1392-93, 258 Cal Rptr 52 (1989), illustrates this approach under similar facts. In that case, one car struck another. Immediately afterwards, both drivers drove a short distance, parked their cars in the center lane, and got out to discuss the incident. A third vehicle struck one of the cars from behind, causing it to strike and kill one of the

drivers. *Id.* at 1390. Applying the proximate-cause analysis described above, the court said that the two collisions were caused by one initial negligent act, which led to additional and foreseeable negligence, all of which combined to produce the injury for which coverage was sought. *Id.* at 1394-96. Therefore, the court said, the two collisions constituted "one automobile accident" within the meaning of the policy's per-accident limit of liability. *Id.* at 1396.

In the proceedings below, plaintiff correctly described the proximate-cause test as the majority rule in successive-impact cases, and she urged the court to follow it. *See* Red Br at 15-19. She even cited *Baggett* in support of the test, although she criticized the result *Baggett* reached in applying it. *Id.* at 20-21; *see Wright*, 253 Or App at 34 ("We do not understand plaintiff here to ultimately dispute the abstract correctness of the proximate cause-driven construct of 'any one accident' as expressed in *Baggett* * * *. Rather, plaintiff contends that the proper *application* of that construct here compels the conclusion that plaintiff was injured as the result of two accidents, not one.") (emphasis in original).

In this court, however, plaintiff tries a different approach. Here, she argues that "one automobile accident" is ambiguous, and that the Court of Appeals should have said so and then stopped. According to plaintiff, instead of trying to resolve the ambiguity, the court should have simply concluded that defendant, the insurer,

loses, because ambiguity in an insurance policy is construed against the insurer. End of case. *See* Pltf's Merits Br at 20.

Plaintiff is confused. Determining that a policy provision is ambiguous – that it is reasonably susceptible to two or more plausible interpretations – is the first step in the interpretive process, not the last. The next step is to try to resolve the ambiguity by, among other things, examining the provision in the context of the policy as a whole and, where appropriate, considering the opinions of other courts addressing the same issue.[6] It's only when the ambiguity can't be resolved that the court construes the provision against the insurer. *Holloway*, 341 Or at 649-50.

In *Hoffman Const. Co. v. Fred S. James & Co.*, 313 Or 464, 836 P2d 703 (1992), this court considered and rejected the same argument plaintiff presents

[6] The Oregon Trial Lawyers Association (OTLA), as *amicus curiae*, argues that Oregon courts should not even consider the opinions of other courts when construing an insurance policy. To be sure, out-of-state insurance cases are not binding here. But they can be persuasive, if well-reasoned and on point, just like out-of-state cases on other topics. This court has, in fact, considered the views of other courts on the meaning of standard policy language. *See, e.g.*, *Joseph v. Utah Home Fire Ins. Co.*, 313 Or 323, 329, 835 P2d 885 (1992) (construing a term in a UM policy, the court said: "Other jurisdictions, when faced with similar situations, have employed a definition of 'foster child' much like the one stated in the preceding paragraph."); *ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co.*, 349 Or 117, 131 n 13, 241 P3d 710 (2010), *adh'd to as modified on recon*, 349 Or 657 (2011) ("We note that the jurisdictions that have considered this issue have split on it.").

here: that the construe-against-the-drafter rule applies just as soon as ambiguity appears. The court in *Hoffman* said:

> "For a term to be ambiguous in a sense that justifies resort to the [construe-against-the-drafter] rule, however, there needs to be more than a showing of two plausible interpretations; given the breadth and flexibility of the English language, the task of suggesting plausible alternative meanings is no challenge to capable counsel. Competing plausible interpretations simply establish ambiguity that will require some interpretive act by the court. This triggers a series of analytical steps, any one of which may resolve the ambiguity. The rule on which plaintiffs rely is the last of these steps. In other words, a term is ambiguous in a sense that justifies application of the rule of construction against the insurer only if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continues to be reasonable, after the interpretations are examined in the light of, among other things, the particular context in which that term is used in the policy and the broader context of the policy as a whole. * * * Ambiguity requires resort ultimately to the rule that plaintiffs invoke because, when two or more competing, plausible interpretations survive the kind of scrutiny described, the term still must reasonably be given a broader or a narrower meaning, depending upon the intention of the parties in the context in which such words are used by them. * * * That is, when two or more competing, plausible interpretations prove to be reasonable after all other methods for resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable, because the ambiguity cannot be permitted to survive. It must be resolved."

313 Or at 470-71 (citations and internal quotation marks omitted).

Even at the last stage of the process – the construe-against-the-drafter stage – the insurer does not necessarily lose, as plaintiff seems to believe. Construe against the drafter means just that: in the event of irreducible ambiguity in a policy provision, the court will choose, from among the competing interpretations, the

one most favorable to the insured. But that won't end the case. The court still has to apply the provision *thus chosen*. It still has to determine whether the insured is entitled to prevail under the more-favorable interpretation of the provision in question. It is not enough, then, to demonstrate an unresolved ambiguity. *Motor vehicle*, for example, might be ambiguous in a particular case; depending on the context, it could mean *car* or *boat* or *plane*, or maybe all three. But that doesn't mean that an insured *on bike* is entitled to coverage. Even when construed as broadly as possible, *motor vehicle* does not include non-motorized vehicles.

In this case, the Court of Appeals did not ever say that "one automobile accident" is ambiguous, as plaintiff now contends. But, even if it had, that would not have ended the analysis, for reason just explained. The irreducible ambiguity would have lead only to the court choosing, from among competing, plausible alternatives, the construction most favorable to plaintiff. In the proceedings below, plaintiff argued for a construction based on the proximate-cause test endorsed by most out-of-state cases, including, in particular, *Baggett*,. As noted, she urged the Court of Appeals to follow those cases and adopt that test, although she now complains that the court did exactly that.

For its part, defendant argued for the same test, likewise citing *Baggett*. *See* Blue Br at 22-23. And, in the end, the Court of Appeals accommodated both

parties. It found "the reasoning" of *Baggett* "to be persuasive" and thus "adopt[ed] that construction." 253 Or App at 32. This court should do the same.[7]

(2) As a matter of law, plaintiff's injuries result from one accident

In this case, there were three cars and, hence, two successive collisions – one involving plaintiff's truck and Turner's sedan, and the other, following fast on, involving plaintiff's truck and Oliver's SUV. According to her complaint, all of plaintiff's injuries were *proximately* caused by *both* collisions. She alleged, presumably for strategic purposes, that "[a]s a proximate result of both collisions * * *, [plaintiff] has been injured in the full amount of the underinsured motorist coverage." ER 11 (¶ 10); *see also* ER 10 (¶ 7) ("Plaintiff sustained numerous injuries in both collisions[.]"). Thus, in her pleadings, plaintiff admitted that all of her injuries resulted from what would be deemed one accident under the proximate-cause test. She is bound by that admission, which was not retracted in a subsequent pleading, unlike defendant's mistaken admission of a $1 million limit of liability.

[7] A minority of courts follow the "effect" test or theory, which holds that, for insurance purposes, the number of accidents depends on the number of claimants. *See Nicor, Inc. v. Associated Elec. and Gas Ins. Services, Ltd.*, 223 Ill2d 407, 418-19, 860 NE2d 280 (2006); *see generally* Annot., 64 ALR4th at § 4. Yet another minority view is that a "per accident" limitation refers to the events that trigger liability, that is, to the number of negligent acts. *Id.* at § 5.

Kerry v. Quicehuatl, 213 Or App 589, 162 P3d 1033, *rev den*, 343 Or 690 (2007), is persuasive. That case, like this one, involved two successive collisions. The plaintiff's vehicle was struck from behind by a pickup; a second pickup then struck the first, causing it to re-strike the plaintiff's vehicle. The plaintiff there, like the plaintiff here, brought claims against the other two drivers, as well as a UIM claim against her own insurer. On summary judgment, the trial court concluded that the insurer was entitled to an offset for the payment by the driver of the second pickup.

The Court of Appeals agreed, based on the UIM statute, ORS 742.504, which provides in part that any amount payable by a UIM insurer shall be reduced by any amounts paid by persons who are liable for the insured's injury. *See* ORS 742.504(7)(c)(A). The court rejected the plaintiff's contention that the driver of the second pickup was not liable for the same injuries as the driver of the first, making the statutory offset inapplicable to the second driver's payment. The court explained that the plaintiff was precluded by her pleadings from arguing that the two collisions caused separate and divisible injuries:

> "In her claim against Hulse, plaintiff alleges the same injuries that she alleges were sustained as a result of the negligence by Quicehuatl. 'A statement of fact in a pleading that has not been superseded is a judicial admission that the fact as stated exists.' * * * At no point did plaintiff ever amend her pleading in that regard or offer evidence that the injuries suffered as a result of the two separate impacts were in fact separate or divisible. Based on the uncontradicted admissions in plaintiff's complaint regarding the

> nature of her injuries – admissions that were never superseded or contradicted by other evidence – the trial court correctly concluded that there was no genuine issue of material fact as to whether Hulse was 'severally liable together with' Quicehuatl for the injuries suffered by plaintiff for purposes of ORS 742.504."

Kerry, 213 Or App at 595-96.

So, too, here. Plaintiff is bound by the admissions in her un-amended pleading that all of her injuries are the "proximate result" of "both" collisions, the one with Turner, and the other with Oliver. In light of that admission, which was not contradicted by the evidence, as plaintiff' concedes in her brief in this court, *see* Pltf's Merits Br at 7 and 16-17, the courts below should have concluded, as a matter of law, that all of plaintiff's injures resulted from a single accident, albeit one that involved two collisions, and thus should have held that defendant's liability for those injuries is limited to $500,000, the "maximum limit for bodily injury * * * resulting from any one automobile accident."

Admissions aside, the evidence establishes that all of plaintiff's injuries did in fact result from both collisions, in the sense that, without the first collision, there would not have been a second. The first collision put plaintiff in harm's way. It left her sitting in a disabled vehicle on a busy roadway in a hailstorm, creating the very risk that soon befell her – the risk that a second vehicle, coming from behind, at freeway speed, would be unable to avoid a follow-on collision. That risk continued uninterrupted from the first collision to the second. Plaintiff was always

exposed to it. After the first collision, she was not ever un-imperiled. She did not ever obtain a position of safety from which she was removed by the second driver's negligence. In that respect, the first collision was, indeed, the proximate cause of the second,[8] and both collisions were the proximate cause of all of plaintiff's injuries, just as she alleges.

Plaintiff disagrees, of course. She argues that her injuries were the result of two accidents, each collision being a separate accident, "separated by space and time" from one another. But, as noted above, that argument contradicts plaintiff's pleadings, which alleges, no doubt for tactical reasons, that all of her injuries were

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[8] That is why, in "successive-impact" cases, the driver who causes the first impact is held liable for the injuries in the second. *See Wallach v. Allstate Ins. Co.*, 344 Or 314, 180 P3d 19 (2008). The plaintiff in *Wallach* was injured in three separate accidents – one in 1997, one in 1999, and one in 2002. This court said:

> "This case is a relatively common successive accident case in which the two accidents are not causally related. As explained above, in such cases, the first tortfeasor ordinarily will be responsible for the damages that the first accident causes, and the second tortfeasor will be responsible for the damages that the second accident causes (including damages for aggravating a preexisting injury). When there is a disputed issue of fact, the jury will have to determine which injuries each accident caused. When, in the less frequent successive accident case, the second accident is a foreseeable consequence of the first, the first tortfeasor will be responsible for all the damages that both accidents cause (not just aggravation damages), subject to whatever statutory or common-law rights of contribution the first tortfeasor might have against the second tortfeasor. *See* Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 4 *Harper, James and Gray on Torts* § 20.3, 138 (3d ed 2007) (stating general rule)."

Wallach, 344 Or at 321 n 8.

the "proximate result of both" collisions, ER 11, no matter how far the collisions were removed from each other spatially or temporally.

In any event, this case does not fit neatly into plaintiff's separate-space-and-time construct. The two collisions here were not separated by space, only by time, and not much time at that. When the second collision occurred, plaintiff was sitting in the same place in the same vehicle as she was at the time of the first collision, and that vehicle, in turn, was just where the first collision left it – pushed up against the barrier in the freeway median. Plaintiff and the vehicle were in substantially the same space in both collisions. The car was not in motion when the second collision happened, and the driver, was not even in it. She got out after the first collision to check on the occupants of Turner's vehicle.

This situation is easy to distinguish from the two-"accident" cases discussed in plaintiff's briefs – *Liberty Mutual Insurance Co. v. Rawls*, 404 F2d 880 (5th Cir1968), and *Illinois National Insurance Co. v. Szczepkowicz*, 185 Ill App 3d 1091, 134 Ill Dec 90, 542 NE2d 90 (1989). In those cases, unlike this one, the insured was the tortfeasor. And, in each case, the insured, driving carelessly, collided with one car, and then, continuing to drive carelessly, collided with another car, at a different point in time and space, resulting not just in successive collisions, but in separate injuries to separate occupants of separate vehicles. In those cases, the injuries in the second collision would have happened even without

the first collision. Not so here. As explained above, if not for the first collision, there would not have been the second – which, again, is doubtless why plaintiff alleged that all of her injuries were "a proximate result of both collisions," ER 11, and why she did not try to prove that some related to one collision and others to the other.

In sum, based on the pleadings and the evidence, plaintiff's injuries resulted from one accident within the meaning of the policy's limit of liability. The trial court erred, therefore, in entering and above-limit judgment. The case should be remanded for entry of a new judgment based on one accident and one limit, which is just what the Court of Appeals held.

(3) The judgment was erroneous even if the number of accidents is a question of fact

As discussed above, the trial court should have held, as a matter of law, that all of plaintiff's injuries resulted from one accident and, hence, that a single limit of liability applies to all of them, as defendant argued in the post-trial proceedings. Accordingly, the court should have entered a judgment based on one policy limit, not two. The result would be the same even if the number of accidents and the apportionment of injuries and damages between the accidents were questions of fact, not law, despite the contrary pleadings and proof. That's because plaintiff had the burden of proof on these questions, as she admitted below, *see* 253 Or App

at 36 n 11,[9] and she failed to carry it. As already explained, she did not allege that there were two accidents for coverage purposes. Perhaps more importantly, she did not ask the jury to determine whether there were two and, if so, to apportion her injuries between them. In fact, she objected when defendant proposed a verdict form that would have done just that. And when the trial court rejected defendant's proposal for an apportion-the-damages form and instead gave a one-question,

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[9] OTLA urges this court to conclude that defendant had the burden to prove that there were *not* two accidents and, therefore, that it was *not* exposed to $1 million in damages. OTLA acknowledges that plaintiff admitted below that she had the burden, and that she hasn't argued otherwise to this court. But, OTLA says, this is an important issue that the court should "clarify" for the benefit of future litigants in "policy disputes." OTLA Br at 8. The problems with this argument are not simply that plaintiff conceded it and that this court does not address issues not raised by the parties, no matter how much an *amicus curiae* might want a ruling. *See Walsh Construction Co. v. Mutual of Enumclaw*, 338 Or 1, 11, 104 P3d 1146 (2005). The bigger problem is the well-settled rule that the insured has the burden to prove coverage, while the insurer has the burden to prove an exclusion from coverage. *ZRZ*, 349 Or at 127. The limit of liability – the amount of coverage available – is usually part of the coverage, not part of the exclusions from coverage, except when a sub-limit is actually written into an exclusion, as in the policy at issue in *North Pacific Ins. Co. v. Hamilton*, 332 Or 20, 29, 22 P3d 739 (2001) (construing an exclusion which read: "We do not provide Liability Coverage * * * [f]or bodily injury or property damage to you or any family member to the extent that the limits of liability for this coverage exceed the limits of liability required by the Oregon financial responsibility law.") (boldface type omitted). In this case, the UIM coverage is described in the "insuring agreement," which provides that defendant will pay the damages that an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of "[b]odily injury or property damages caused by *an* accident." ER 23 (boldface type omitted; italics added). Under this provision, the insured has the burden to prove that her injuries were caused by an accident. And if some were caused by one accident, and some by another, she has the burden to prove that too, if she wants to recover for all of the injuries.

damages-only form, plaintiff took no exception. In short, plaintiff made no attempt to obtain the two-accident findings that are necessary for a two-limit judgment. She thus waived any right to those findings and that judgment. *See* ORCP 61 B.[10]

The waiver continued on appeal. Plaintiff didn't ask the Court of Appeals to remand the case for a new trial and verdict if it concluded that the one-accident-or-two issue was question of fact. To the contrary, she "explicitly disavowed such a disposition." 253 Or App at 37. She staked everything on a ruling in her favor as a matter of law. If she is not entitled to that ruling – and she is not, for reasons previously given – then neither is she entitled to a remand to the trial court for the fact finding that she didn't seek the first time around. Thus, even if the number of accidents is a fact question, the judgment was erroneous and the case should be remanded for entry of a new judgment based on a single policy limit.

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[10] Rule 61 B reads in relevant part:

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires such party demands its submission to the jury. * * *"

(4) Even if there were two accidents, the judgment was still erroneous and the case must be retried

For reasons set forth above, this court should conclude, as a matter of law, that there was just one accident, albeit one with three vehicles and two collisions, and for that reason should reverse the trial court's judgment for more than the per-accident limit. The court should also reverse the judgment – and, again, for reasons set forth above – if it were to court were to conclude that the number of accidents is a question of fact, not law. Even if the court were to conclude that there were two accidents as a matter of law, it should still reverse the judgment, because there is no finding of which damages resulted from which accident and thus no way to determine whether some of the damages exceeded the per-accident limit. As explained earlier, it could be that more than $500,000 of the damages was caused by one accident or the other, in which case not all of the damages would be recoverable.

This problem could have been solved with a verdict form that asked the jurors to determine how much of the damages related to each collision, assuming two collisions had been pled and proved. But the trial court didn't give them a form like that, despite defendant's requests. On appeal, defendant assigned error to that ruling and, in response, plaintiff did not argue that the trial court got it right – that it correctly overruled defendant's request to have the jurors apportion the

damages. Instead, she argued that, if the trial court erred, the error was not preserved. *See* Red Br at 22 *et seq.*

Plaintiff is mistaken. Defendant did all that is required to preserve this issue for appeal. During the pre-trial proceedings, defense counsel told the court that he would be "submitting a verdict form which will ask the jury to determine what the damages are relating to each of the two impacts." Tr 169. "I mean," he said, "how do we figure that out? What – what damage is related to which accident. And, so I'm going to ask the jury to determine that." *Id.* Plaintiff objected, Tr 172, and the trial court sided with plaintiff. Tr 1740-75, 178-79. Accordingly, the court provided the jury with a verdict form that asked the jurors to determine plaintiff's economic and noneconomic damages in the aggregate. ER 22. After the court instructed the jury, defendant excepted to the verdict form, reprising its earlier argument that the damages had to be apportioned between the accidents in order to "eliminate the one policy, two policy argument," meaning, of course, the one limit, two limit argument. Tr 889-90. The court overruled the objection again. Tr 891. After the jury returned a verdict that found $979,540 in total, but unapportioned, damages, plaintiff submitted a proposed judgment that awarded those damages in full, less certain offsets. Defendant objected once more, pointing out, for the third time in the case, that the court had failed to ask the jurors to apportion the damages between the collisions and thus could not enter a judgment for all of the damages,

even if each collision qualified as an accident for limit-of-liability purposes. Yet again, the court overruled the objection.

In sum, defendant objected not just once but three times to the un-apportioned verdict form. That was more than enough to preserve the error in the use of that form.

It doesn't matter that the form the court used was actually presented by defendant at the start of the trial, because defendant withdrew its reliance on that form before it was submitted. *See DeLaschmitt v. Journal Pub. Co.*, 166 Or 650, 656-57, 114 P2d 1018 (1941) (party did not invite error in giving incorrect instruction that it proposed but then withdrew). Nor does it matter that defendant did not actually provide the court with an alternative form. To preserve the error in failing to instruct on a particular issue, a party usually "must formulate a correct instruction and request that the trial court give it." *Backer v. Infratech Corp.*, 174 Or App 452, 463, 26 P3d 835 (2001), *rev den*, 333 Or 655 (2002). But that's not required for verdict forms. ORCP 61 B provides that if the court omits from the verdict any issue of fact raised by the pleadings or the evidence, a party "waives the right to a trial by jury of the issue so omitted unless before the jury retires such party demands its submission to the jury." Under this rule, to preserve error in the form of verdict, a party need only object to the form before the jurors retire. *State ex rel. Sam's Texaco & Towing, Inc. v. Gallagher*, 314 Or 652, 663, 842 P2d 383

(1992); *compare Vale v. State Ind. Acc. Com.*, 160 Or 569, 578, 86 P2d 959 (1939) (failure to take exception at trial to submission of special verdict precluded plaintiff from raising the issue on appeal). Defendant complied with that requirement. As noted above, defense counsel excepted to the verdict form just after it was submitted to the jury in the course of the instructions. "I do except to the verdict form," he said. Tr 889. He then proceeded to describe the grounds for his objection. Tr 889-90. That was sufficient to preserve the error in failing to submit a form that apportioned the damages between the collisions. Defendant was not required to go further and actually draft a form that the court had just said – for the second time – it would not submit. Which further illustrates the flaw in plaintiff's preservation argument. It would have served no purpose for defendant to offer an alternative form. The "requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *State v. George*, 337 Or 329, 339, 97 P3d 656 (2004).

The defendant in *George* raised an insanity defense, which required the trial court to instruct the jury on consequences of a verdict of guilty but for insanity. ORS 161.313. The defendant objected to the uniform instruction on that point and urged the court to give an alternative. The trial court concluded, instead, that the jury should not be advised *at all* about the consequences of a guilty-but-insane verdict. It thus refused to give *any* instruction on the point.

On review, this court agreed that the defendant's requested instruction was inaccurate. *George*, 337 Or at 336-37. That court ruled, however, that the issue raised by the defendant was a broader one, and that the defendant had adequately preserved the related question of whether the trial court failed in its obligation to give *some* instruction that comported with ORS 161.313. *Id.* In reaching that conclusion, the court rejected the state's argument that the defendant's failure to submit to the court a specific instruction that accurately stated the law precluded the defendant's challenge. The state's argument, the court explained, ignores the fact that the trial court had already announced that it would not give *any* variation of the instruction. *Id.* at 339. "In view of that announcement," the court explained, the defendant "reasonably could assume that attempting to formulate a revised instruction that comported with the requirement in ORS 161.313 would have been an exercise in futility." *Id*.

The same is true here. Defendant preserved its objection to the verdict form by asking the court to submit a form that presented the allocation-of-damages issue. Under *George*, it should not matter that defendant did not submit the form it wanted, because the trial court had already made clear that it would not give it anyway.

The issue, as framed by the parties, posed an all or nothing proposition. Plaintiff's position was that the jurors should not be asked to allocate damages

between the two collisions. Defendant's position was that they should. The trial court sided with plaintiff. As in *George*, any effort by defendant to formulate an alternative verdict form would have been an exercise in futility, which the preservation rules did not require.

Nor did they require an objection to the filled-out verdict form when it was returned, as plaintiff argued in the Court of Appeals. There was nothing wrong with the jury's answers to the questions on the form – namely, what are plaintiff's economic and noneconomic damages (from both collisions). The problem was with the questions, not the answers. That problem couldn't be solved without a different form, one that asked the jurors to apportion the damages. And, as noted, the trial court had already said it would not provide a form of that sort.

In sum, defendant raised the apportionment issue in the pre-trial proceedings, and when it objected to the un-apportioned verdict form before the jury began its deliberations. That was enough to preserve the error in the use of that form –which was, in fact, error, if the two collisions constituted two accidents within the meaning of the policy. Again, plaintiff does not contend otherwise. Thus, if this court were to conclude that there were two accidents as a matter of law, the judgment should be reversed and the case remanded for a new trial and a verdict that apportions the damages.

VII. CONCLUSION

Defendant preserved the error in the entry of plaintiff's proposed judgment, which was based on findings the jurors weren't asked to make – that each collision was a separate accident for limit-of-liability purposes, and that the damages for each did not exceed $500,000. Defendant objected to the judgment when proposed, and nothing more was required to preserve the error. There was no need, in particular, for a pre-verdict challenge to the sufficiency of the evidence to support the findings that plaintiff didn't seek and the trial court didn't allow.

As for the judgment, it was in fact erroneous. Plaintiff did not allege that her injuries resulted from two accidents. She alleged, instead, that all of her injuries were the "proximate result of both collisions," admitting, in effect, that there was a single, two-collision accident. Plaintiff is bound by her choices, including her pleadings and evidence, and, therefore, the trial court erred in entering a judgment that was based on two accidents and two per-accident limits. The judgment should be reversed and the case remanded with instructions to enter a new judgment for a single limit less offsets.

Even if plaintiff were not bound by her pleadings, there was just one accident here – albeit one involving three vehicles and two collisions – based on the evidence presented. The court should so hold as a matter of law – which

means, again, that the judgment should be reversed and the case remanded with instructions to enter a new judgment for a single limit less offsets.

If the number of accidents is a question of fact, not law, plaintiff waived the right to a finding of two accidents, because she didn't ask the trial court to submit that issue to the jury, or the follow-up issue: If there were two accidents, what were the damages for each? Then, on appeal, she disavowed a remand for such fact finding. So, yet again, the judgment should be reversed and the case remanded with instructions to enter a new judgment for a single limit less offsets.

If this court were to conclude, in the end, that there were two accidents as a matter of law, the judgment still must be reversed, because the jury did not apportion the damages between the accidents, leaving no way to determine whether the damages in either accident exceed the per-accident limit. In that event, the case must be retried in full, because the same jury that determines the damages must also apportion them.

Respectfully submitted,

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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 limit for petitions for review in ORAP 5.05(2)(b)(i), and that the word count of this brief as described in ORAP 5.05(2)(a) is 12,349 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

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Certificate of Service

I certify that I electronically filed the foregoing Brief with the Clerk of the Court for the Oregon Supreme Court by using the appellate CM/ECF system on July 31, 2013. I further certify that I mailed a copy of the attached Brief to the following lawyers, at the address indicated below, by first-class mail, with postage pre-paid, on July 31, 2013:

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