IN THE SUPREME COURT OF THE STATE OF OREGON

Roman KIRYUTA,

Plaintiff-Appellant,
Respondent on Review,

v.

COUNTRY PREFERRED INSURANCE COMPANY,

Defendant-Respondent,
Petitioner on Review.

Supreme Court Case No. S063707

Court of Appeals No. A152618

Multnomah County Circuit Court
Case No. 1301-01380

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT ON REVIEW

Petition for review of the Court of Appeals decision on appeal from the Multnomah County Circuit Court judgment by Honorable Nan Waller.

Opinion Filed:	September 2, 2015
Author of Opinion:	Hon. Paul De Muniz, S.J.
Concurring Judges:	Hon. Erin Lagesen, P.J. and Meagan Flynn, J

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I. PRELIMINARY RECOMMENDATIONS

This case is the first in a series of cases in which UM/UIM insurers are asking the court in effect to renounce the long-understood purpose of awarding a plaintiff's attorney fees under ORS 742.061[1]— to encourage

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[1] ORS 742.061 provides:

> (1) Except as otherwise provided in subsections (2) and (3) of this section, if settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon. * * *
>
> (2) Subsection (1) of this section does not apply to actions to recover personal injury protection benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer:
>
> (a) The insurer has accepted coverage and the only issue is the amount of benefits due the insured; and
>
> (b) The insurer has consented to submit the case to binding arbitration.
>
> (3) Subsection (1) of this section does not apply to actions to recover uninsured or underinsured motorist benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer:
>
> (a) The insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the

reasonable settlement of claims brought against insurers. In so doing, UM/UIM insurers are asking courts to give the safe harbor provision of ORS 742.061(3), the exception to an award of fees, a far more expansive reading than was intended by the legislature.

The Court of Appeals has recently decided three other UM/UIM attorney fee cases under ORS 742.061(3) and other cases are currently pending in the Court of Appeals. *See*, *Spearman v. Progressive Classic Ins. Co.*, 276 Or App 114, ___ P3d ___ (2016); *Kelley v. State Farm Mut. Auto. Ins. Co.*, 276 Or App 553, ___ P3d ___ (2016); and *Robinson v. Tri-County Met. Transp. Dist.*, ___ Or App ___, ___ P3d ___ (March 16, 2016) (slip op). The plaintiffs in two of those cases, *Spearman* and *Kelley*, will be petitioning this Court for review of those decisions (within approximately two weeks of this writing). OTLA intends to appear as *amicus curiae* in both those cases if this Court accepts review.

Because *Spearman* involves a thirty five page *en banc* decision which serves to alter the Court of Appeals' prior interpretation of ORS 742.061(3) following *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 166 P3d

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damages due the insured; and

(b) The insurer has consented to submit the case to binding arbitration.

519 *adh'd to as modified on recons*, 343 Or 394, 171 P3d 352 (2007), OTLA believes that this Court might find review of the *Spearman* decision a beneficial means of addressing this and subsequent cases.[2] In any event, OTLA strongly urges that this Court allow review and consider the issues raised in *Spearman* and *Kelley* when deciding this case. Each of the three cases together present different procedural issues and arguments regarding the application of the UM/UIM safe harbor provision.

II. INTRODUCTION

As determined in prior cases brought under the safe harbor provisions of ORS 742.061, the Court of Appeals in this case correctly understood that (1) ORS 742.061(3) sets forth, among other things, an exception to an insurer's liability for attorney fees; (2) the exception applies expressly when the insurer issues a "safe harbor letter" in which it agrees, among other things, to accept coverage of the claim and to limit its dispute only to the issues of "liability of the uninsured or underinsured motorist and the damages due the insured;" and that (3) to construe those limitations to include all disputes having any effect on the amount of damages, would allow the exception to fees to "swallow the rule." *Kiryuta v. Country Preferred Ins. Co.*, 273 Or App 469, 472-73, 359 P3d 480 (2015), *rev*

[2] Indeed, even though *Spearman* was decided after this case, defendant has supplied this Court with that 35-page opinion as support for its position here.

allowed, 358 Or 529 (2016). Accordingly, the court correctly concluded that a UM/UIM insurer will lose safe harbor protections by choosing litigation strategies, as the defendant did here, that are inconsistent with the limitations set forth in ORS 742.061(3).

III. PROPOSED RULE OF LAW

A UM/UIM insurer will be subject to attorney fees under ORS 742.061(1) if the insurer raises affirmative defenses in its responsive pleading that requires the parties to litigate issues beyond the liability of the uninsured/underinsured driver and/or the damage amounts to which the claimant is entitled, or if it effectively denies coverage by raising the possibility of an award of zero damages. To the extent that the UM/UIM insurer either takes the position that the insured is entitled to zero damages, or requires the determination of any predicate issue or fact before a determination of damage amounts, it has rendered the promises in its safe harbor letter illusory.

IV. THE ROAD TO *KIRYUTA*

Arguably, until the Court of Appeals issued its recent decision in *Spearman*, the following points were well-established under Oregon law:

(1) The primary purpose of ORS 742.061 is to promote the settlement of claims brought to enforce insurance policy provisions without

necessitating costly litigation. *Certain Underwriters at Lloyd's London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co.*, 235 Or App 99, 230 P3d 103 (2010) (ORS 742.061 is driven by public policy encouraging settlement of insurance claims and reimbursement of insureds forced to litigate to recover on their policies); *see, also, Chalmers v. Oregon Auto. Ins. Co.,* 263 Or 449, 452, 502 P.2d 1378 (1972) (*former* ORS 743.114, renumbered ORS 742.061 in 1989 was intended "to encourage the settlement of [insurance] claims without litigation and to reimburse successful plaintiffs reasonably for moneys expended for attorney fees in suits to enforce insurance contracts").

(2) Should an insurance company decline to settle its insured's UIM claim within six months of the provision of proof of loss, that insurer may be liable for the insured's incurred attorney fees and costs after being forced to litigate the claim. *Strawn v. Farmers Ins. Co. of Oregon* 353 Or. 210, 215, 297 P3d 439 (2013) (ORS 742.061(1) "directs trial and appellate courts to award attorney fees against the defendant in an action to recover on an insurance policy, if the plaintiff's recovery exceeds the amount of any tender in the case.").

(3) The UIM insurer may only avoid liability for the plaintiff's fees and costs both by submitting a proper and timely "safe harbor letter" under

subsection (3) *and by* limiting its dispute to the issue(s) of liability and/or damages. *Zimmerman v. Allstate Property and Cas. Ins. Co.*, 354 Or 271, 293, 311 P3d 497 (2013) (so holding).

(4) There is no analytic distinction between the application of subsection (2) in PIP cases and the application of subsection (3) in UIM cases. *Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 412, 215 P3d 919 (2009) (rejecting defendant's argument that the phrases "amount of benefits due the insured" in subsection (2) and "damages due the insured" in subsection (3) reflects any legislative intent to give either provision "a radically different scope" or application).

(5) Regardless of any properly submitted "safe harbor letter," an insurer's conduct in disputing the causation of an injury, neither constitutes "accepting coverage" within the meaning of either "safe harbor" provision, nor does it constitute the requisite limitation of disputes only to damages (or amount of benefits) due the insured. *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 166 P3d 519 (2007) (When PIP insurer refuses to pay medical expenses for an injury it deems as not relating to the subject auto collision, it has neither "accepted coverage" nor limited its dispute to "benefits due the insured" under ORS 742.061(2)); *Cardenas*, 230 Or App at 412 (Other than liability, when jury must decide any preliminary issue

before deciding damages, insurer did not limit its dispute to damages within the meaning of ORS 742.061 (3)).

(6) Once an insurer disputes issues beyond the issue of damages (or PIP benefit amounts), it is no longer entitled to any "safe harbor" protections and it is liable for a prevailing plaintiff's costs and attorney fees under subsection (1). *Grisby, supra; Cardenas, supra; see, also, Grisby v. Progressive Preferred Ins. Co.*, 207 Or App 592, 602-06, 142 P3d 531 (2006) (Schuman, J., dissenting).

Accordingly, the *Kiryuta* court correctly concluded that, by alleging the affirmative defenses of "contractual compliance" and "offset," "defendant's pleadings provided a foundation for defendant to litigate an issue other than the amount of plaintiff's damages or liability of the underinsured driver." *Kiryuta*, 273 Or App at 470.

In making that determination, the court ultimately relied on Judge Schuman's reasoning and analysis in *Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 215 P3d 919 (2009). However, that reasoning first appeared three years earlier in Judge Schuman's dissent in *Grisby v. Progressive Preferred Ins. Co.*, 207 Or App 592, 142 P3d 531 (2006) (hereafter, "*Grisby I*"). This Court next expanded and clarified that reasoning in reversing the *Grisby I* majority opinion in *Grisby, supra,* (hereafter "*Grisby II*"). It was thereafter

that Judge Schuman applied the analysis in the UM/UIM context in *Cardenas*. In each of those cases, the courts took great care in reviewing and incorporating the legislative history of ORS 742.061 to determine the intent and purpose of, not only the attorney fee statute more generally, but of the narrow exceptions to attorney fee liability set forth in the "safe harbor" provisions of subsections (2) and (3), respectively applying to PIP cases and UM/UIM cases.[3] For this Court's convenience, amicus supplies the following brief overview of the pertinent analysis and reasoning of each of those cases.

A. The Dissent in *Grisby I*.

In *Grisby I*, the parties disputed whether the PIP insurer had complied with the safe harbor provisions of ORS 742.061 (2). The PIP insurer there had denied payment for the plaintiff's chiropractic treatment following a motor vehicle collision as "not related to the accident." *Grisby I*, 207 Or App at 594. After Grisby had prevailed at trial, he argued that he was entitled to attorney fees under ORS 742.061 because Progressive had not complied with the statutory safe harbor requirements of ORS 742.061 (2)(a).

[3] The *Spearman* decision appeared to diminish the import of those prior articulations of legislative history and intent, relying primarily on a text and context analysis of ORS 742.016(3) as construed in light of the UM/UIM broader statutory scheme.

Id. at 595. By denying that injuries and subsequent treatment were caused by the collision, Grisby argued that Progressive had functionally denied, rather than "accepted coverage" for those injuries, and had disputed causation, rather than limiting its dispute only to the "amount of benefits due the insured." *Id.* The majority disagreed, and Judge Schuman dissented from that opinion. *Id.* at 595, 601-06 (Schuman, J., dissenting).

Judge Schuman essentially agreed with Grisby's argument by focusing on what Progressive "actually did" rather than merely accepting the "label that either party attached to those actions":

> An insurer cannot avoid liability for attorney fees by the painless expedient of a written statement that it "accept[s] coverage" and "consents to binding arbitration" if it subsequently demonstrates by word or deed that its definition of those terms is more expansive than the legislature's. *Id.* at 603 (Schuman, J., dissenting).

Judge Schuman also remained unconvinced that Progressive's refusal to pay medical expenses on the basis of causation constituted only a dispute about "the amount of benefits due the insured." *Id.* at 605. Judge Schuman opined that such an argument "does not survive scrutiny" because:

> First, it eliminates any distinction between "coverage" and "amount of benefits," thereby rendering part of the statute meaningless; an insurer could reject a claim for any reason, or for no reason, and maintain that the only issue was "amount of benefits" because, had the insurer accepted the claim, the insured would receive more money. Second, the word "amount" refers to quantity and not to any other

> nonquantifiable characteristic. Thus, when an insurer rejects a claim because it fails to meet a precondition established in the policy, then, even if "amount" refers to the ultimate size of the insured's benefit, the ensuing dispute is not "only" about amount; it is also about whether the claim possesses some particular characteristic such as being directly related to a covered accident. *Id.*

In conclusion, Judge Schuman did not accept that Progressive's denial of payment on the basis of causation limited the dispute only to the amount of benefits due within the meaning of ORS 742.061 (2)(a). "It also involved the separate issue of whether those treatments were related to the accident." *Id.* By way of example, Judge Schuman described the parallels between his interpretation of the safe harbor requirements in light of Progressive's conduct, and the "common sense" and "common usage" of terms in the real world of insurance claims. *Id.* Should a homeowner file a claim for fire loss of her home under her insurance policy and be told, on the one hand, that she was covered for that loss, and then, on the other hand, that her insurer would not pay for that loss: "[t]he homeowner would surely be shocked [because t]he insurer's answer cannot be reconciled with how real policyholders and real insurance adjustors talk to each other." *Id.* at 606.

B. The Oregon Supreme Court's Analysis in *Grisby II*.

As mentioned, this Court ultimately reversed the decision in *Grisby I*, providing an analysis of Progressive's conduct in light of the legislative

intent behind the "safe harbor" provisions of ORS 742.061 (2). *Grisby*, 343 Or at 185. The analysis was consistent with Judge Schuman's dissenting opinion in *Grisby I*. This Court determined that, irrespective of Progressive's timely "safe harbor" letter purporting both to "accept coverage" and to dispute only the "benefits due the insured," its denial of payment for treatment for injuries deemed unrelated to the collision did neither of those things. After reviewing the text and context of ORS 742.061 (2), this Court concluded that Progressive's refusal to pay for the treatment of certain injuries meant that Progressive had denied coverage for those injuries. *Id.* at 181.

Neither was this Court persuaded by Progressive's argument that, by disputing the validity of certain medical expenses (as being incurred for unrelated injuries), it was merely disputing the "amount of benefits due the insured" within the meaning of ORS 742.061 (2)(a). *Id.* at 182.

> By that reasoning, * * * *every* dispute about an insurance benefit-including whether a policy was in effect and the relationship between a claimed expense and the insured's accident, as well as disputes about the necessity and reasonableness of the provider's charge-is a dispute about the "amount of benefits." That interpretation * * * would allow an insurer to defeat the attorney fee statute by routinely informing insureds that it "accepted coverage" and then denying every specific request for payment. Moreover, it is inconsistent with the usual definition of amount. *See Webster's* at 72 (providing, as first definition of "amount," "the total number or quantity: AGGREGATE * * * "). *Id.*

It should not be lost on this Court that the above analysis is very similar to Judge Schuman's *Grisby I* analogy to the fire insurer telling a homeowner that a fire loss is "covered," but then refusing to pay for the homeowner's loss.

The *Grisby II* Court went on to point out that defendant's argument fails to give effect to the legislature's insertion of the phrase "the *only issue*" left for dispute being "the amount of benefits:"

> That modifying phrase emphasizes the legislature's apparent intent *to limit the attorney fee exception* of ORS 742.061(2)(a) to disputes over the quantum of benefits and to exclude from the effect of that provision *other* disputes about the "benefits due the insured." *Id.* (emphasis added).

Progressive not only disputed the "amount" of the plaintiff's medical bill, but also whether it should be paid at all because Progressive argued that the injuries treated were unrelated to the auto collision. *Id.* Accordingly this Court concluded that Progressive disputed issues other than those pertaining solely to the plaintiff's benefit "amounts":

> Only after the trier of fact had agreed with plaintiff on *that* preliminary issue [of the causation of plaintiff's injuries] could it turn to the issue of the *amount* of benefits that plaintiff should receive under the policy. *Id.* at 182-83.

C. *Cardenas:* applying the same legislative intent to the UM/UIM context.

In *Cardenas*, Farmers Insurance had argued that it remained shielded

from attorney fee liability because the analysis in *Grisby*, a PIP case, cannot apply to the safe harbor exception applicable to UM/UIM insurers under ORS 742.061(3). *Cardenas*, 230 Or App at 409. Farmers argued, as Country Preferred impliedly does here, that *Grisby*

> came out the way it did because the PIP safe harbor provision refers to "the amount of benefits due the insured," whereas the UM section uses the phrase "the damages due the insured." The difference, defendant contends, is significant: by *excluding* the phrase "amount of" in the UM section, the legislature must have intended to *include* disputes that were concerned about more than just the dollar amount at issue. *Id.*

The *Cardenas* court determined that not to be the case. Indeed, the court echoed the *Grisby II* analysis when it concluded:

> First, if omitting the phrase "amount of" was intended to indicate that a dispute about "damages" can include any dispute that has an impact on the amount of damages, the exception to insurer liability in UM cases nearly swallows the rule; it is difficult to think of any UM claim that is not ultimately about whether the insured is entitled to damages and, if so, how much. Put another way: If "damages" has the meaning that defendant proposes, then the phrase "damages due the insured" is surplusage. The universe of cases in which the only issues are liability and damages would be the same as the universe of cases in which the only issue is liability, because there would not be any cases in which damages are *not* an issue. *Id.* at 410.

More importantly, however, the court determined from legislative history that the difference in wording between the two provisions came from a mere "housekeeping amendment" to the original proposed bill, Senate Bill 504 (1999). *Id.* at 411. The court observed that the original proposed bill

created one single statutory attorney fee exemption applicable to PIP, UM, and UIM insurers, alike, so long as those insurers

> did not dispute coverage and consented to submit the case to binding arbitration and the only issues were "the liability of the uninsured or underinsured motorist and the damages due the insured." *Id.* at 410.

The court recited committee counsel noting that those terms were not appropriate for PIP claims because liability in such claims is not an issue. *Id.* (citing to Tape Recording, Senate Judiciary Committee, SB 504, May 20, 1999, Tape 191, Side B; Tape 192, Side A (statement of Anne Tweedt)). Neither did a PIP insurer pay its insured "damages;" rather, PIP coverage entitles policyholders to "benefits" in the form of payment to medical providers for treatment following injury-causing automobile accidents. *Id.* at 411. Because of further credible testimony from a proponent of the original bill, the court was convinced that there was

> no reason to believe that wording changes to the UM provision were anything more than the "housekeeping" changes that the witness described. And there is nothing in the legislative history to indicate that the changes were intended to work the kind of significant substantive difference that defendant suggests. *Id.*

Accordingly, the court rejected Farmers' argument that the difference in wording between the two safe harbor provisions "reflects the legislature's

intent to give each provision a radically different scope."[4] *Id.* at 412.

The court ultimately applied the analysis set forth in *Grisby II* to the facts in that case, deciding that Farmers would be asking the factfinder to determine preliminary issues before it could determine "damages;" for that reason, the court concluded that Farmers had removed itself from the attorney fee safe harbor set forth in ORS 742.061(3). *Id.*

Under the above-described interpretation of the statute, which is well-grounded in a proper analysis of legislative intent, *Kiryuta* was correctly decided. Nothing in the statute prevents an insurer from litigating, or threatening to litigate, any defense that may result in zero damages or require the determination of a predicate fact or issue before deciding damage amounts. However, under ORS 742.061(3), the insurer will simply run the risk of losing and paying the insured's attorney fees.

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[4] The court in *Grisby I* had arrived to a similar conclusion:

> There is no suggestion that the reference to "amount of benefits" in ORS 742.061(2)(a) was meant to have a more restrictive meaning than the reference to "damages due the insured" in the corresponding UM/UIM provisions of ORS 742.061(3)(a). 207 Or App at 600.

V. PLEADINGS MATTER

The *Kiryuta* court applied the proper analysis of ORS 742.061(3). It additionally correctly determined that

> Through its answer, defendant pursued a litigation strategy that was broader than that contemplated by the legislature in ORS 742.061(3). The fact that defendant may not have followed through with that litigation strategy at the arbitration proceeding makes no difference. Defendant was in control of its own pleadings and was in a position to conform those pleadings to the limitations of the safe-harbor provision, by alleging only ultimate facts that pertained to the liability of the uninsured or underinsured motorist and the damages due plaintiff. Defendant nonetheless opted to include issues in its pleadings other than those issues permitted by the safe-harbor provision[.]

VI. CONCLUSION

Kiryuta was correctly decided. This Court should decline the defendant's invitation to make the "safe harbor" so all-inclusive as to vitiate the legislature's clear intent "to encourage the settlement of [insurance] claims without litigation and to reimburse successful plaintiffs reasonably for moneys expended for attorney fees in suits to enforce an insurance contract." *Chalmers*, *supra*. ORS 742.061(3) is a limited safe harbor from attorney fee liability; it is not an open channel for disputing any issue that may affect damage amounts.

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Respectfully submitted on this 25th day of March, 2016.

/s/ Lisa T. Hunt

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CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 3,740 words.

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CERTIFICATE OF SERVICE AND FILING

I certify that on March 25, 2016 I electronically filed the foregoing **BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCITION IN SUPPORT OF RESPONDENT ON REVIEW** with the State Court Administrator and by so doing caused a true copy to be served electronically on the following parties:

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