IN THE SUPREME COURT OF THE STATE OF OREGON

ALEX SPEARMAN,

Plaintiff–Appellant,
Petitioner on Review
v.

PROGRESSIVE CLASSIC INSURANCE COMPANY, a Wisconsin corporation,

Defendant–Respondent,
Respondent on Review.

Supreme Court No. S063995

Court of Appeals No. A155674

Multnomah County Circuit Court No. 130201718

BRIEF ON THE MERITS BY AMICUS CURIAE FOR OREGON TRIAL LAWYERS ASSOCIATION

Review of the January 27, 2016 Court of Appeals *per curiam* decision by Honorable Meagan Flynn and concurrence by Honorable Joel DeVore. On appeal from the Multnomah County Circuit Court judgment by Honorable Nan G. Waller.

Lisa T. Hunt, OSB # 023306
Law Office of Lisa T. Hunt, LLC
16869 SW 65th Ave., STE 424
Lake Oswego, OR 97035
lthunt@lthuntlaw.com
(503) 517-0851

Attorney for Amicus Curiae
Oregon Trial Lawyers Association

August 2016

Willard E. Merkel, OSB # 790852
Merkel & Associates
One SW Columbia St, Ste 520
Portland, OR 97201
wmerkel@merkelassoc.com
(503) 222-0056

Attorney for Plaintiff-Appellant, Petitioner on Review

James B Rich, OSB #973789
Harris Wyatt & Amala LLC
5778 Commercial St SE
Salem OR 97306
jrich@salemattorneys.com
(503) 378-7744

Attorney for Defendant-Respondent, Respondent on Review

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I. INTRODUCTION

The court of appeals decision in *Spearman* has expanded the permissible disputes under ORS 742.061 (3) to effectively unanchor UM/UIM insurers from the limitations set forth in that safe harbor provision. Under the court's interpretation of the statute, insurers may now sail fearlessly into a sea of litigation by satisfying the meaningless formality of timely sending and nominally adhering to a properly worded letter. This contravenes the well-established intent of a century-old attorney fee statute: to encourage settlement and decrease litigation *caused by insurers' failure to timely settle their insureds' claims.* By construing the "scope of issues" limited by the legislature in the attorney fee statute under the insurance statutes mandating the UM/UIM coverage and policy terms insurers must provide to their insureds, the court of appeals simply let the tail wag the dog. Such construction is contrary to the purpose and history of the attorney fee statute, contrary to the legislature's intent when enacting limited exceptions to attorney fee liability, and contrary to prior statutory interpretations of this Court.

Because ORS 742.061 has always functioned to level the playing field for plaintiffs forced to litigate claims against their insurers—claims often arising from insurers withholding the full payment of benefits due under policies bought and paid for by those plaintiffs—the court's decision has erroneously given a home field advantage to insurers that the legislature never intended.

II. PERTINENT SUMMARY OF *SPEARMAN* AND ARGUMENT

In *Spearman*, the court of appeals ultimately determined that the defendant's allegations and presumed litigation strategy, disputing "the nature and extent of plaintiff's injuries" and "the reasonableness and necessity of some of plaintiff's accident-related medical expenses," and the defendant's response to plaintiff's requests for admissions, denying "the reasonableness, necessity, relatedness and extent of some of Plaintiff's treatment," were sufficiently limited "only [to] the amount of plaintiff's damages" such that the trial court properly denied plaintiff's attorney fees under ORS 741.061(3). *Spearman v. Progressive Classic Ins. Co.*, 276 Or App 114, , 117, 128, 366 P3d 821 (2016).

First, a proper reading of the statutory exception required the court to determine whether the defendant insurer had limited its dispute only to the issues of liability and damages when disputing the benefits due the insured. Second, the defendant had disputed both the reasonableness and the necessity of the plaintiff's "unreimbursed medical expenses."[1] Because it is well-established that "reasonableness" refers to the amounts charged by the medical provider, and

[1] It is unclear from the court's opinion how the other medical expenses were reimbursed. This author presumes from the usual sequence of events, that those expenses were paid for under plaintiff's PIP benefits. This author further presumes that the PIP insurer and UM/UIM insurer are one and the same. Based on the defendant's allegations, then, it would appear that either this same insurer first rejected additional payments under PIP on the basis that they were neither "reasonable" nor "necessary," or that the plaintiff had exhausted the limits of his PIP coverage when pursuing this action.

"necessity" and "relatedness" (of the injury and subsequent treatment to the accident)" refer to the causation of plaintiff's injuries, both of those disputes were not limited "only [to] the amount of plaintiff's damages." [2] *Spearman*, 276 Or App at 16.

The court first determined that "this case require[d the court] to identify the scope of 'the damages due the insured' [within the meaning of ORS 742.061(3)] and to determine whether defendant stayed within that scope." *Id.* at 119-20. The court next erroneously relied on dissimilar terms and phrases under ORS 742.502 and ORS 742.504 to construe the exception to attorney fees in ORS 742.061(3) even though those statutes govern mandatory UM/UIM coverage and policy terms. *Id.* at 120. The court erroneously and unnecessarily distinguished this Court's decision in *Grisby v. Progressive Preferred Ins. Co.,* 343 Or 175, 182–83, 166 P3d 519, *adh'd to as modified on recons.,* 343 Or 394, 171 P3d 352 (2007); disavowed portions of *Cardenas v. Farmers Ins. Co.*, 230 OrApp 403, 215 P3d 919 (2009), which applied *Grisby*'s analysis in a UM/UIM case; and construed the safe harbor limitation of "damages due the insured" under definitions set forth in ORS 742.504 (2)(j), a provision that did not exist at the time the legislature enacted the

[2] *See, Strawn v. Farmers Ins. Co.*, 350 Or. 336, 258 P.3d 1199 (2011) (insurer fraudulently reduced PIP reimbursement amounts as not reasonable as charged); *Ivanoff v. Farmers Ins. Co.*, 344 Or 421, 185 P3d 417 (2008) (claims alleging insurer withheld payment of PIP benefits on basis of treatment not being medically necessary).

safe harbor provision of ORS 742.061(3). *Spearman*, 276 Or App at 120-21, 137-38; 2007 Or Laws ch. 782 § ("sums that the insured * * * is legally entitled to recover as * * * damages from the owner or operator of an uninsured vehicle" is "the amount of damages that [a] claimant could have recovered in a civil action from the owner or operator at the time of the injury after determination of fault or comparative fault and resolution of any applicable defenses.")

The court ultimately concluded from its erroneous analysis of the "statutory text and context, that the issues that are within the scope of ORS 742.061(3) are the issues of liability and damages that an insured would have to establish in an action against the uninsured or underinsured[, and that d]efendant's pleadings * * * disputed only the amount of damages plaintiff sustained[.]" *Spearman*, 276 Or App at 116.

The *Spearman* court's analysis simply did not comport with the well-established principles of statutory construction. The court did not construe the attorney fee exceptions under the text, context, purpose, and history of the procedural and remedial attorney fee statute in which the legislature set forth those provisions. It relied, instead, on the purpose, definitions, and mandatory coverage and policy terms, set forth in the regulatory provisions of Oregon's Insurance Code. And it disregarded prior statutory interpretations of this Court, the legislature's intent in enacting parallel exceptions to an award of a prevailing

plaintiff's fees, and the plain and well-established meanings of the terms used in those exceptions.

III. THE ATTORNEY FEE STATUTE

The *Spearman* court commenced its decision with a short nod to the historical origins of ORS 742.061 (1); *Spearman*, 276 Or App at 118; thereafter, the court simply failed to incorporate any principles derived from that history in its textual and contextual analysis of the statue. The persistent and unwavering purpose to protect plaintiffs in insurance disputes, must govern any interpretation of the attorney fee statute, including provisions enacted as limited exceptions to attorney fee awards.

A. Since 1919 the attorney fee statute has protected plaintiffs.

The legislature originally enacted what is now ORS 742.061(1) in 1919, providing in relevant part:

> "Whenever any suit or action is brought in any of the courts of this state upon any policy of insurance of any kind or nature whatsoever, the plaintiff, in addition to the amount which he may recover, shall also be allowed and shall recover as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorney's fees in said suit or action; * * * provided, * * * that if a tender be made by a defendant in any such suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney's fees." Or Laws 1919, ch. 110, §§ 1, 2.

The terms of that statute expressly compelled an award of attorney fees in "any action" brought in "any court" under "any insurance policy" of "any kind."

An insurer could avoid fees only by tendering an offer in an amount greater than that recovered by plaintiff after pursuing that action.

Subsequent amendments to the statute required a plaintiff to provide an insurer with "proof of loss," and required an insurer's "tender" or "settlement" to be offered within six months of the plaintiff's "proof of loss" submission:

> "Whenever any suit or action is brought in any courts of this state upon any policy of insurance of any kind or nature whatsoever, the plaintiff, in addition to the amount which he may recover, shall also be allowed and shall recover as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorney's fees in said suit or action; provided, that settlement is not made within six months from date proof of loss is filed with the company; provided further, that if a tender be made by a defendant in any such suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney's fees." Or. L. § 6355, as amended by Gen. Laws of 1927, c. 184.

In 1930, this Court articulated the purpose and effect of that attorney fee statute under no uncertain terms:

> "The purpose of the enactment of said section 6355, as amended by Gen. Laws, 1927, c. 184, was to discourage expensive and lengthy litigation. Oftentimes insurance companies have contested their obligation to pay a loss with such persistence and vigor that the benefit of an insurance policy is either largely diminished or entirely lost. * * * *That the contest of insurance losses on doubtful and technical defenses has often caused distress and unnecessary loss to the insurance beneficiaries cannot be denied.* * * * [I]nsurance companies are required to pay reasonable attorneys' fees, where they have wrongfully defended an action to recover or refused to pay the loss within a reasonable time. That purpose would be largely destroyed if defendant's position in the instant case can be sustained. Instead of the statute discouraging litigation, it might tend to encourage appeals. * * * When plaintiff was compelled to institute an

> action against defendant in order to recover the amount due on the policy, she became entitled to an attorney's fee."

Dolan v. Continental Casualty Co., 133 Or 252, 255, 289 P 1057 (1930) (emphasis added). Importantly, the "expensive and lengthy" litigation the legislature sought to discourage was not attributable to plaintiffs unnecessarily litigating claims, but to insurance companies that routinely "contested their obligation to pay a loss with such persistence and vigor that the benefit of an insurance policy [was] either largely diminished or entirely lost." *Id.*

This Court also clarified in *Murray v. Fireman's Ins. Co.*, 121 Or 165, 172, 254 P 817 (1927) that the attorney fee statute "was not intended to postpone litigation or defer recovery by an insured but was intended to protect an insured who has suffered a loss from annoying and expensive litigation." In other words, the fee statute operated to motivate insurers to reasonably settle their insureds' claims lest their persistent refusal to do so resulted in an attorney fee award in addition to a judgment requiring the full payment of a compensable and covered loss.

ORS 743.114 which was renumbered as ORS 742.061 in 1989, as well as ORS 742.061 prior to being amended in 1999, provided, in relevant part:

> "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."

As may be apparent from the above-cited versions of the attorney fee statute, very little of its substance changed over those 80 years following its enactment. Other than requiring the plaintiff to submit "proof of loss" to the insurer, the onus consistently has been on the insurer to timely tender a reasonable amount to settle the plaintiff's claim or to risk exposure to an attorney fee award. Indeed, this Court determined in 1999, the year insurers sought to exempt themselves from fees in PIP and UM/UIM actions, that "the statute seeks to protect *insureds* from the necessity of litigating their valid claims. It has no converse purpose of protecting *insurers* from litigation." *Dockins v. State Farm Ins. Co.*, 329 Or 20, 29, 985 P2d 796 (1999). The insurers' "protection" always has been within its power and control: timely settle the claim reasonably.

> "[A]lthough there have been modest revisions to the statute since *Dolan*, none of those revisions has affected its theoretical approach. * * * [O]nly a timely tender * * * can defeat a prevailing insured's right to attorney fees."

Dockins, 329 Or at 33.

The importance of this is significant. As a remedial statute drafted to protect insureds from needless litigation caused by insurers, its provisions are construed in light of that purpose. In *Dockins*, for example, this Court concluded that the plaintiff's burden in submitting "proof of loss" within the meaning of the statute

was simply "to afford the insurer an adequate opportunity for investigation, to prevent fraud and imposition upon it, and to enable it to form an intelligent estimate of its rights and liabilities before it is obliged to pay." *Id.* at 28. That notice did not have to follow the more "formal proof of loss requirements in the insurance policy itself." *Id.* In fact, the Court observed that the burden may even be lighter because earlier decisions appeared to shift the burden to defendant to "make a reasonable effort to resolve [any] ambiguity" that may arise from a plaintiff's attempts to report a loss. *Id.*

B. The Insurance Code also operates to protect insureds.

As expressly stated by statute, the purpose of the Insurance Code "is for the protection of the insurance-buying public." ORS 731.008. The Code, "shall regulate the business of insurance and every person engaged therein" and "no person shall transact insurance in this state * * * without complying with [its applicable provisions." ORS 731.012; ORS 731.022. Toward that end, its provisions "shall be liberally construed and shall be administered and enforced by the Director of the Department of Consumer and Business Services to give effect to the policy stated in ORS 731.008." ORS 731.016.

As described by this Court in *Vogelin v. American Family Mut. Ins. Co.*, 346 Or 490, 501, 213 P 3d 1216 (2009), "the legislature first required that every automobile insurance policy in Oregon provide UM coverage" in 1967. Or. Laws

1967, ch 482, §§ 1, 2[.]"

> In that same enactment, the legislature set out the terms of UM coverage in the form of a "model" policy and required that insurers provide UM coverage *no less favorable to the insured* than those set forth in its statutory "model." *Vega v. Farmers Ins. Co.*, 323 Or. 291, 301–02, 918 P.2d 95 (1996); see also Or Laws 1967, ch 482, § 3.

Id.

The UM statutes functioned to ensure coverage with "limits equal to or greater than the amounts required by the Financial Responsibility Law, ORS chapter 806." *Vogelin*, 346 Or at 501 (citing to, Or Laws 1967, ch 482, §§ 1, 3.) The legislature subsequently required comparable UIM coverage in 1981. *Id.* at 502 (citing Or Laws 1981, ch 586). In both instances, the purpose of those statutes was to protect the "injured policyholder" in the event of a collision with either an uninsured or underinsured motorist. *Id.* at 503; *see, also, Peterson v. State Farm Ins. Co.,* 238 Or 106, 111-12, 393 P2d 651 (1964). (legislature's purpose in creating compulsory uninsured motorist coverage was to "provide[ ] protection for the automobile insurance policyholder against the risk of inadequate compensation for injuries or death caused by the negligence of financially irresponsible motorists.").

Accordingly, insurance law, generally, and motor vehicle insurance, specifically, must be liberally construed to serve the above-described purpose: (1) to regulate the business of insurance in Oregon, and (2) to protect Oregon's

insureds. Conversely, to construe those provisions to favor the insurer and restrain the remedial rights of the insured, would be improper.

C. The Insurance Code Cannot Trump the Fee Award Statute

Early in the *Spearman* decision, the court of appeals cited briefly to this Court's decision to *Morgan v. Amex Assur. Co.*, 352 Or 363, 287 P3d 1038 (2012). *Spearman*, 276 Or App at 118. However, it went on to neglect its wisdom. In *Morgan*, this Court considered the effect of the legislature's enactment of a statutory provision under the Insurance Code on a plaintiff's entitlement to fees under ORS 742.061. *Morgan*, 352 Or at 367. This Court first contrasted the historical origins of laws enacted to regulate the insurance industry in Oregon to the historical bases for enacting a separate and independent attorney fee statute protecting plaintiffs:

> Oregon has regulated the business of insurance for over 120 years. In 1887, the legislature first prescribed the terms on which domestic and foreign insurers could engage in the business of insurance in this state. *See* Or. Laws 1887, pp. 118–25. Thirty years later, in 1917, the legislature enacted the first comprehensive insurance code. *See* Or. Laws 1917, ch. 203; *Lovejoy v. Portland,* 95 Or. 459, 460–61, 188 P. 207 (1920). As the court explained in *Lovejoy,* the 1917 Act:
>
> "regulate[d] the conditions under which [the] business [of insurance] may be commenced and the manner in which it may be conducted. It regulate[d] the organization of the insurance department, and it prescribe[d] the jurisdiction and define[d] the powers of the state insurance commissioner. It deal[t] with the mode of organizing local companies, the admission of foreign companies, the nature of the investments of local and foreign companies, and examinations and reports of companies. It contain[ed] various provisions to insure the

> solvency of insurance companies, and it afford[ed] means for excluding companies of impaired or doubtful solvency. * * * It specifie[d] the kinds of insurance which various companies may write, and it designate[d] the form and manner in which policies may be written. * * * It furnishe[d] safeguards against excessive or unjust premium rates, and it contain[ed] prohibitions against combinations between companies or agents for any purpose detrimental to the public welfare." 95 Or. at 461, 188 P. 207.

In contrast, this Court emphasized that the subsequent 1919 enactment of the attorney fee statute was neither part of the Insurance Code nor meant to function as part of that regulatory scheme. *Morgan*, 352 Or at 368. Rather, the attorney fee statute was a remedial statute, procedural in nature, "authoriz[ing] Oregon courts to award attorney fees as an incident of a plaintiff's remedy in any action brought on any insurance policy in any Oregon court." *Id.* at 368-69. This Court necessarily concluded, then, that subsequent enactments of regulatory provisions of the Insurance Code *could not be construed to limit the remedial scope of the attorney fee statute*. *Id.* at 373.

Those same principles must be applied in this case, regardless of the 1999 legislature's enactment of two exceptions to the award of fees. A definition or phrase taken from regulatory provisions (mandating the terms to be included in every automobile liability policy issued in Oregon) cannot provide context or supply the meaning of dissimilar terms used in a remedial statute that is procedural in nature. *See, e.g., Gadda v. Gadda,* 341 Or 1, 10, 136 P3d 1099 (2006) (court considers jurisdictional statutes rather than procedural rules when determining

whether notice sufficiently invoked appellate court jurisdiction).

The *Spearman* court, here, simply misconstrued ORS 742.061(3) when it relied on insurance statutes governing mandatory UM/UIM coverage and policy provisions to discern the legislature's intent in enacting an exception to the remedial provisions of the attorney fee statute. *Spearman*, 276 Or App at 120-21. In his concurrence, Judge DeVore takes this error one step further when he suggests that courts should construe the attorney fee safe harbor provision by simply "look[ing] beyond [the attorney fee safe harbor] for context and embrace ORS 742.504(2)(j)" which (since 2007) further defines statutorily mandated provisions of UM/UIM insurance. *Spearman* at 135-36 (Devore, J., concurring).

IV. THE "SAFE HARBOR" EXCEPTIONS

As is oft-cited in Oregon appellate decisions, both safe harbor provisions of ORS 742.061, respectively applicable to PIP and UM/UIM actions, were the result of a compromise between the insurance industry and the Oregon Trial Lawyers Association. *Grisby v. Progressive Preferred Ins. Co.*, 207 Or App 592, 599, 142 P3d 531 (2006), *rev'd on other grounds*, 343 Or 175, 166 P3d 519, *adh'd to as modified on recons*, 343 Or 394, 171 P3d 352 (2007). That compromise resulted in a limited *exception* to fees, not an unlimited *exemption*. The substance of the opposing positions supports that conclusion.

A. Seeking Protection for Insurers, Rather than Plaintiffs

In his "Statement in Support of Senate Bill 504," insurance industry representative, Tom Mortland, advocated for amending ORS 742.061 to provide a complete and unlimited exemption from attorney fees for PIP and UM/UIM insurers. App-3, SB 504, Exh. B, Mortland Statement. The reason given was "an increase in the number of lawsuits filed" because recent appellate court decisions had (1) recognized the insured's right to a jury trial such that arbitration could not be compelled either by statute or by terms of the insurance policy; and (2) concluded that actions to recover PIP and UM/UIM insurance benefits constitute "an action brought in any court * * * upon any policy of insurance of any kind or nature" within the meaning of ORS 742.061 and were subject to an award of fees under its terms. Id., pp. 1-2. In other words, no longer could PIP and UM/UIM insurers rely on claimants accepting settlement payments (rather than full payment of their benefits claim). Mr. Mortland further complained that statutorily authorized fee awards meant that attorneys would no longer be restricted to taking a one third contingent fee out of their client's recovery of benefits, benefits that were due and payable under their insurance policies. Id. By exempting PIP and UM/UIM from attorney fee liability altogether, Mr. Mortland proposed that the amendment would be "*consistent* with the purpose of ORS 742.061." Id., p. 3 (emphasis added). For that proposition, he provided an incomplete citation to *Dolan*: "The purpose of the statute is to discourage expensive and lengthy

litigation." Id.

Conversely, in OTLA's Comments on SB 504, J. Michael Alexander submitted the complete *Dolan* holding in reference to Oregon's attorney fee statute:

> ORS 742.061 has been part of the insurance code, essentially unchanged, since at least 1927. See *Dolan v. Continental Casualty,* 133 Or 252, 289 P 1057 (1930). The legislature over 70 years ago recognized that "*** the contest of insurance losses on doubtful and technical defenses has often caused distress and unnecessary loss to the insurance beneficiaries***." *Dolan, supra,* at 255. The same holds true now, only amplified by the fact that litigation for insureds is increasingly expensive.

App. 4, SB 504, Exh. D, Alexander Comments-OTLA.

Where Mr. Mortland argued that eliminating plaintiffs' rights to fees would restore "a more efficient form of resolution" that is more "expeditious and equitable," Mr. Alexander argued that the proposed change would result in "an insured seeking what is due under his contract [and being] assured of less than a complete recovery because he must bear the cost of litigation." App-2 and 3, SB 504, Exh. B, Mortland Statement; App. 4, SB 504, Exh. D, Alexander Comments-OTLA.

Rather than encouraging either a more "expeditious" or "equitable" resolution of claims, Mr. Alexander argued that a complete exemption from fees for PIP and UM/UIM insurers would return insured's to the very condition the *Dolan* Court addressed: small value claims "being routinely denied by insurers,"

"the insured * * * trying to litigate over a small sum [often] representing purely economic losses," the insured having difficulty finding representation "and [being] foreclosed from fully recovering [] economic damages [by having] to bear the cost of litigation."[3] Id. And, speaking to the realities of the insurance industry, Mr. Alexander lastly pointed out that an insured "in fact must bear such [litigation] cost twice, since his premiums have already paid for the insurer's fees, which are simply included in the overall rate structure." Id.

1. The Compromise.

Based on the forgoing, any "compromise" struck between the two opposing positions of the insurance industry and trial lawyers did not result in (1) a full and complete bar to fees for all PIP and UM/UIM insurers, or (2) a full and complete bar to fees for all PIP and UM/UIM insurers after complying with the empty formality of sending a letter accepting coverage and consenting to arbitration. Neither can the "compromise" safe harbor language be construed as restoring PIP and UM/UIM insurers to any pre-*Dolan* practices of "contest[ing] their obligation

[3] These statements constituted more than mere trial lawyers' propaganda. Such insurance industry practices are well-documented, particularly in the PIP arena. *See, e.g., Strawn, supra* (Class action in which jury awarded compensatory damages of $1.5 million and punitive damages of $8 million against Farmers for arbitrarily and fraudulently reducing PIP benefit payments to their insureds on the basis of incurred medical expenses not being "reasonable" under the PIP statutes.); *Ivanoff, supra* (trial court erroneously dismissed plaintiffs' claims on insurer's argument that plaintiffs bore burden to prove incurred expenses were medically necessary before being able to prevail on claims that Farmers breached insurance contract and violated PIP statutes by denying their payment).

to pay a loss with such persistence and vigor that the benefit of an insurance policy is either largely diminished or entirely lost." *Dolan*, 133 Or 255.

Rather, the legislature's enactment ORS 742.061 (2) and (3) consisted of limited exceptions to a (now) century-old Oregon policy favoring the protection of insureds from "recalcitrant insurers" that resist paying the full amount of benefits that are mandatorily required in Oregon. *Morgan*, 352 Or at 368.

B. The Statute

As amended in 1999, the legislature added the following bolded terms to ORS 742.061, providing, in relevant part:

> (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 damages due the insured; and**
>
> **(b) The insurer has consented to submit the case to binding arbitration.**

App-5, SB 504-B Engrossed.

Importantly, when inserting the terms "liability" and "damages" in ORS 742.061(3)(a), the legislature could have, but did not, provide that the "only issues are":

(1) "the benefits due;"

(2) "the amount of benefits due;" or

(3) "all sums that the insured * * * is legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle because of bodily injury sustained by the insured caused by accident * * * ." *Spearman*, 276 Or App at 120 (citing to ORS 742.504(1)(a)).

Most importantly, the legislature did not expressly provide that the only issues are "the amount of damages that * * * [a] claimant could have recovered in a civil action from the owner or operator at the time of the injury after determination of fault or comparative fault and resolution of any applicable

defenses." *Id*. at 120-21 (citing to ORS 742.504(2)(j)). That is so, because that policy term definition (defining "sums that the insured * * * is legally entitled to recover as damages") did not exist until 2007—eight years after the legislature had enacted ORS 742.061(3). Or Laws 2007 ch. 782 §2 (adding ORS 742.504(2)(j)).

In other words, the absence of the above-described references that might indicate a legislative intent to link the attorney fee safe harbor to the insurance statutes, rendered the UM/UIM coverage and policy term statutes *unrelated* to the attorney fee statute for purposes of textual or contextual analysis. *See*, *State v. Betts,* 235 Or 127, 136–138, 384 P2d 198 (1963) (considering statutes as related that directly or indirectly refer to each other or use similar terms to indicate the same subject). The court of appeals improperly and disproportionately relied on those insurance provisions when construing the terms ORS 742.061(3).

C. Applicable Interpretations of Both Safe Harbor Provisions

In Oregon, this Court's prior interpretations of a statute that are necessary to its determinations become "part of the statute as if written into it at the time of enactment." *Walther v. SAIF Corp.,* 312 Or 147, 149, 817 P2d 292 (1991); *Mastriano v. Bd. of Parole & Post-Prison Supervision,* 342 Or 684, 692, 159 P3d 1151 (2007) (applies to determinations that were "necessary to [the court's] holding" and based on an inquiry into legislative intent). Accordingly, this Court's prior construction of the following safe harbor terms, facilitate a court's further

interpretation of the scope of ORS 742.061(3)(a).

1. "Coverage"

This Court has determined that, although "the legislature did not provide a definition of the word 'coverage' for purposes of [the safe harbor provisions,]" the plain meaning of the term "when used with respect to insurance, [i]s 'inclusion within the scope of a protective or beneficial plan.'" *Grisby* 343 Or at 180.[4]

The phrase "accepting coverage" also has a plain and discernible meaning. The dictionary definitions most applicable here for "accept" include: "agree to," "to undertake the responsibility of," and "to regard and hold as true." *Webster's Third New Int'l Dictionary* 11 (unabridged ed. 1993). Accordingly, in terms of PIP or UM/UIM claims, the insurer "accepts coverage" when the insurer undertakes responsibility for the insured's claim by agreeing (or acknowledging as true) that the claim is included within the scope of the claimant's insurance plan.

It stands to reason, then, that "denying coverage" would include allegations or litigation conduct that effectively refutes responsibility for the claim or refutes

[4] It may be argued that this definition is no longer "necessary to the court's holding." The *Grisby* Court had initially concluded, among other things, that the insurer had denied coverage of the plaintiff's claim when it refused to pay medical expenses for injuries the insurer argued were not caused by the automobile collision. *Grisby*, 343 Or at 181 (*Grisby I*). Because much of this Court's analysis of the insured's coverage denial had relied on the nature of the PIP payment process, this Court disavowed that portion of the decision on reconsideration. *Grisby*, 343 Or at 397 (*Grisby II*). While the court's definition of "coverage" was no longer necessary to the court's ultimate holding, that doesn't mean that the dictionary definition of the term "coverage" is of no use.

that the claim is included within the scope of the insurance plan. *See, e.g., Kiryuta v. Country Preferred Ins. Co.*, 360 Or 1, 4, ___ P3d ___ (2016) (insurer's affirmative defense extended "boundaries of relevancy in the arbitration proceeding to any 'terms and conditions' of the policy that could defeat plaintiff's claim for benefits, including those that could potentially result in denial of coverage for plaintiff's losses.")

2. The required limitation of disputes.

The legislature expressly limited all actions to recover benefits from PIP and UM/UIM insurers by inserting the phrase "the only issue" before the subject of that limitation. *Grisby I*, 343 Or at 182-83; *Grisby II*, 343 Or at 397-98. As used in ORS 742.061(2)(a), for example, this Court concluded that

> "the limiting words 'the only issue' that precede the words 'is the amount of benefits' * * * 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." * * *

Grisby I, 343 Or at 182-83.

That same intent to limit the attorney fee exception of ORS 742.061(3)(a) has been recognized by this Court and the court of appeals in *Kiryuta* and *Cardenas*, respectively. *Kiryuta,* 360 Or at 1, 4 (so doing); *Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 408, 215 P3d 919 (2009) (applying the analysis in *Grisby*).

In this Court's recent decision in *Kiryuta*, the insurer had alleged a "contractual compliance" defense with benefits payable "subject to 'all terms and conditions' of the policy." 360 Or at 3. This Court next determined that the insurer had (1) "opened the arbitration to issues beyond motorist liability and damages due;" and (2) "extended the boundaries of relevancy in the * * * proceeding to any 'terms and conditions' of the policy that could defeat plaintiff's claim for benefits[.]"[5] *Id.* Accordingly, this Court concluded that the insurer's affirmative defense as alleged was "not sufficiently limited to entitle defendant to the protections of ORS 742.061(3)." *Id.* at 4.

In *Cardenas*, the court of appeals simply applied the rationale of *Grisby* when it concluded that, by requiring the trier of fact to determine a preliminary issue *before* it could reach the issue of damages, the defendant had exceeded the required limitation set forth in ORS 742.061(3). 230 Or App at 412.

In other words, the court of appeals in this case should have construed ORS 742.061(3) to give effect to and apply the limiting phrase "the only issues are" preceding the phrases "the liability of the uninsured or underinsured motorist" and "the damages due the insured." To conclude that the scope of the phrase "damages due the insured" includes "the amount of damages that * * * [a] claimant could have recovered in a civil action from the owner or operator at the time of the injury

[5] This Court determined that this latter issue might also have constituted a denial of coverage. *Id.*

after determination of fault or comparative fault and resolution of any applicable defenses," reasons away that limitation. *Spearman*, 276 Or App at 120-21. Since almost every legal and factual issue can affect the calculation of "damages due," this construction effectively converts the limited exception to fees to an absolute exemption from fees. That is not what the legislature intended when inserting the phrase "the only issues are" before the two issues "the liability of the uninsured or underinsured motorist" and "the damages due the insured." *See*, *Grisby I*, 343 Or at 182-83.

3. The PIP and UM/UIM Safe Harbors Are Parallel Provisions.

The *Spearman* majority and concurrence both recognize that ORS 742.061 (2) and (3) set forth "parallel" exceptions to fees. *Spearman*, 276 Or App at 118, 131. That is consistent with Judge Schuman's determination in *Cardenas* that the legislative history of the provisions indicated that the added PIP safe harbor provision, using terms more consistent with PIP coverage, was just a "housekeeping amendment." 230 Or App at 410-11. Indeed, Judge Schuman concluded that the legislature's enactment of the two provisions, addressing the specific benefits "due the insured," was not "intended to work the kind of significant substantive difference that defendant [had] suggest[ed]." *Id.* at 411.

In his concurring opinion in this case, then, Judge DeVore correctly observes that "the phrase 'due the insured' [as used in both safe harbor provisions]

ultimately refers to the money the *insurer* will pay [or] what the insurer owes the insured." *Spearman*, 276 Or App at 132. Accordingly, Judge DeVore would "recognize the words that are similar and * * * accept, not reject, [appellate court] case law that finds those words to be similar." *Id.*

In describing what is "due the insured," however, and throughout the lengthy concurrence, Judge DeVore often refers to the insurer's respective obligations as the payment of PIP "benefits" and the payment of UM/UIM "damages." That is incorrect. As used in both safe harbor provisions, the respective exceptions apply to "actions to recover" either "personal injury protection *benefits*" or "uninsured or underinsured motorist *benefits*." ORS 742.061 (2) and (3) (emphasis added). The "action" in both cases is a breach of contract action filed against the plaintiff's insurer. *Vogelin*, 346 Or at 492; *Dockins,* 329 Or at 23. The recovery in both cases, is contract damages ultimately consisting of the benefits due and owing under the insurance policy.[6] In other words, whether initiated for non-payment of PIP expenses or for non-payment of UM/UIM losses, both actions seek the insurer's payment of "benefits," not "damages," that are due.

Accordingly, Judge DeVore is correct to the extent that he recognizes the legislature's intent to enact PIP and UM/UIM safe harbor exceptions that are

[6] Expect interest damages for a breach of contract claim is an amount that puts the injured party in the position that he or she would have been in had the contract not been breached. *Sullivan v. Oregon Landmark-One, Ltd*., 122 Or App 1, 5, 856 P2d 1043 (1993).

"parallel" provisions, intended to function similarly: "[W]hether for PIP benefits or UM/UIM [benefits], it is only an insurer who *pays* what is *due*." *Spearman*, 276 Or App at 131-32.

With respect to how those parallel provisions operate, this Court's determinations in *Grisby* apply. Just as Progressive denied Grisby full payment of his PIP benefits on the basis of injuries not being caused by the accident, Progressive does the same in this case respecting Spearman's full payment of UM benefits that were denied for the same reason. *Spearman*, 276 Or at 122, 128 (citations omitted).[7] The *Spearman* court acknowledged *Grisby*'s conclusion that, by withholding benefits under an argument that the injuries were not caused by the accident, the

> Defendant, like the Court of Appeals, * * * ignores the limiting words "the *only issue* " that precede the words "is the amount of benefits." * * * Even if we were to agree with defendant that the dispute here concerns the "amount of benefits," it nevertheless would be inaccurate to say that the dispute is "only" about the amount of benefits. Defendant here disputed not only the "amount" of the claim for the services provided by the chiropractor; it *also* disputed whether it should pay for those services *at all,* arguing that they were unrelated to plaintiff's accident. Only after the trier of fact had agreed with [defendant] on *that* preliminary issue could it turn to the issue of the *amount* of benefits that plaintiff should receive under the policy.

Spearman, 276 Or at 123 (citing to *Grisby I*, 343 at 182).

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[7] In his concurrence, Judge DeVore also cites to *Grisby*. However, he primarily cites to that portion of the *Grisby* opinion addressing the insurer's denial of coverage, a disavowed holding as modified on reconsideration. *Id.* at 137-38 (so discussing); *Grisby II*, 343 Or at 397 (so disavowing).

That same analysis applies to Progressive's identical argument here: By withholding Spearman's benefits by arguing that his injuries "were unrelated to his accident," Progressive is requiring the trier of fact first to agree with Progressive on *that* preliminary issue of causation, before turning to the issue of the damage amounts and the benefits due under the policy.

As parallel provisions, both ORS 742.061 (2) and (3) limit the insurer's dispute concerning the benefits "due the insured." Under the plain terms of the UM/UIM exception, the benefit amount "due the insured" is further limited to the issues of "liability" (of the negligent driver) and "damages." The court needn't resort to the insurance statutes to define those terms. They have a well-understood meaning in civil litigation.

4. Defining "liability" and "damages" is uncomplicated.

"Liability" and "damages" have a plain and ordinary meaning even in "actions to recover uninsured or underinsured motorist benefits." ORS 742.061(3). The plain meaning of "liability" in the litigation context is "the quality or state of being liable." *Webster's Third New Int'l Dictionary* 1303 (unabridged ed. 1993). Being "liable," in turn, means to be "bound or obligated according to law or equity: responsible, answerable."

The definition of "damages" is "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a

wrong or injury caused by a violation of a legal right." *Webster's Third New Int'l Dictionary* 571 (unabridged ed. 1993). "Damages" must be proven to a reasonable degree of probability with evidence presenting objectively verifiable amounts. *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 161, 20 P3d 837, *rev den*, 332 Or 518 (2001).

In any "action to recover * * * benefits" due the insured, those definitions do not change. ORS 742.061(2) and (3). Accordingly, under the UM/UIM safe harbor provision the insurer may only dispute (1) the extent to which an underinsured or uninsured driver may be held responsible for the insured's injuries, and (2) the proven amounts sought for reparation or compensation for the insured's injuries. As so understood, the express limitation and identification of those two distinct issues necessarily excludes from dispute any other factual or legal issues that a plaintiff also "would have to establish in an action against an uninsured or underinsured motorist," including any other elements of the negligence claim the plaintiff has the burden to prove. *Spearman*, 276 Or App at 116. It further excludes disputes arising from affirmative defenses or any other predicate factual or legal issue that requires the fact-finder's resolution before determining the damage plaintiff proved.

V. *SPEARMAN* GOES AWRY

Judge DeVore accuses the *Spearman* majority of "drift[ing] to the fog line at

the outset," and taking a "nervous swerve" to avoid *Grisby* even though "*Grisby* is not in [the court's] lane of travel." *Spearman*, 276 Or App at 129, 147. There is some truth and much to appreciate in these creative metaphors. However, the rest of Judge DeVore's concurring opinion is not quite where the rubber meets the road.

A. Attorney Fee Provisions Construed Under Insurance Statutes

As framed in this brief, the *Spearman* majority's first "drift to the fog line" occurs when it commences its analysis of the text and context of the attorney fee safe harbor by analyzing the purpose of UM/UIM coverage under the insurance statutes. *Id.* at 120. It did so without any plain text analysis of the terms as this Court did in *Grisby*. *Grisby I*, 343 Or at 180 (citing to *Webster's Third New Int'l Dictionary* 525 (unabridged ed. 2002) when defining the term "coverage"). And it did so without further reference to the purpose of the attorney fee statute itself. *See, e.g., Stull v. Hoke,* 326 Or 72, 79–80, 948 P2d 722 (1997) (context includes other provisions of *the same statute*, as long as legislature enacted those provisions at same time or before provision being construed).

Continuing down that road, the majority relied exclusively on definitions governing the statutorily mandated policy terms of UM/UIM coverage. And the court remained beholden to those definitions in disregard of well-established principles of statutory interpretation.

First, as argued above, statutes enacted to regulate insurers do not control the meaning of the attorney fee statute, which was enacted independently of those statutes as a remedial and procedural provision. As a remedial statute, the attorney fee safe harbor provisions should have been construed in light of the purpose of the attorney fee statute, not the purpose of a statute governing mandatory terms of insurance policies. And the purpose of the attorney statute, again, is to protect insureds from unnecessarily being forced to litigate claims insurers refuse to reasonably settle. *Dockins*, 329 Or at 29. There is "no converse purpose to protect *insurers* from litigation." *Id.* And there is especially no converse purpose to protect insurers from attorney fees once they refuse to settle an insured's claim in a reasonable amount that *the plaintiff likely could not exceed at trial*. ORS 742.061(1) (fees awardable only if plaintiff's recovery exceeds insurer's tender).

Second, the safe harbor provisions, by their express terms, do not compel an analysis under the insurance statutes. Neither is there any compelling textual evidence that the provisions were susceptible to any contextual analysis under the insurance statutes as *related statutes*. This Court has determined that statutes will be considered related to the statue being construed only if they:

(1) were enacted at the same time; *Tharp v. Psychiatric Sec. Review Bd.,* 338 Or 413, 422, 110 P3d 103 (2005) (analyzing two statutes as related because, among other things, both statutes were enacted as part of 1971 criminal code

revisions);

(2) have the same underlying policies or purpose; *see, General Electric Credit Corp. v. Oregon State Tax Com.,* 231 Or 570, 591, 373 P2d 974 (1962) (determining usery laws and tax laws were not related because underlying policies of those laws differ); *Gadda*, 341 Or at 10 (courts may discern legislative intent from statutes strongly related in purpose to the purpose of statute being construed); or if they

(3) have the same subject matter; *see, e.g., Chevron U.S.A., Inc. v. Motor Vehicles Div.,* 49 Or App 1099, 1103–1104, 621 P2d 668 (1980) (two distinct statutes were both related to payments and reports to state agency); *see also Bauer v. Poppen,* 13 Or App 474, 478, 510 P2d 1346 (1973) (analyzing statutes enacted at same time and related to photocopying for preservation of public records).

None of those considerations of "relatedness" are present here. The insurance statutes defining mandatory coverage and policy provisions (ORS 742.502 and ORS 742.504) were neither enacted nor contemporaneously amended when the 1999 legislature amended ORS 742.061. Neither can it be said that the remedial and procedural purpose of the attorney fee statute (in which the legislature enacted the safe harbor provisions) has the same underlying policies or purpose of any of the regulatory provisions of the Insurance Code. And the subject matter of the statutes also is not the same: the attorney fee statute is a remedial

provision setting procedures governing the award of a plaintiff's fees; the insurance statutes regulate the insurance industry and mandate the coverage and policy terms Oregon's insurers must provide to their insureds. Any limited exception to an award of attorney fees within the attorney fee statute cannot be defined by mandatory policy terms set forth in the Insurance Code.

B. Defining the Scope of the Fee Limitation Under Insurance Law

The court of appeals' text and context analysis of ORS 742.0691(3)(a) simply went too far afield. The concurrence, arguing for an even greater reliance on the insurance code to the exclusion of considering the attorney fee statute at all, simply left the ballpark. *Spearman*, 276 Or App at 130, 135-36 (arguing to rely solely on insurance statues for text and context and to "look beyond ORS 742.061 for context").

The *Spearman* majority attempted to grapple with the two limited dispute issues in ORS 742.061(3)(a): "the liability of the uninsured or underinsured motorist," on the one hand, and "damages due the insured," on the other. *Id.* at 121-22. Yet it erroneously determined that ORS 742.504(1)(a) together with the 2007 enactment of ORS 742.504(2)(j) sufficiently defined "damages due the insurer" as

> "all sums that the insured is legally entitled to recover as * * * damages * * * from the [uninsured driver]" [which is further defined as] "the amount of damages that * * * [a] claimant could have recovered in a civil action from the owner or operator at the time of

> the injury after determination of fault or comparative fault and resolution of any applicable defenses." *Id.* at 120, 121 (citations omitted).

First, most legal or factual issues amenable to dispute can arguably affect damage amounts. The attorney fee safe harbor cannot be read as blithely limiting issues to "liability and everything else that also affects damage amounts in a civil action filed against the uninsured or underinsured driver." That simply reasons away any limitation of the issues. Under that construction, the insurer would be permitted to dispute what was always in dispute: the total amount of benefits due under the mandatory policy provisions in ORS 742.504 (1)(a).

Second, the legislature specified two issues to be limited—liability and damages. If the legislature had intended to permit disputes over all issues affecting damage amounts, there would have been no reason to specify the first limited issue of "the liability of the uninsured or underinsured motorist." Oregon law provides that recoverable damages, or "damages due," are to be reduced by the percentage fault (i.e. liability) of others, including the plaintiff. ORS 31.600. As defined by the court of appeals, however, the legislature simply could have articulated the limitation (somewhat ridiculously) as "the only issue is the damages due the insured" (or what was already at issue anyway).

Importantly, the court of appeals' broad interpretation of what may be disputed renders the legislature's insertion of the phrase "the liability of the

uninsured or underinsured motorist" an impermissible redundancy or nullity. ORS 174.010 ("where there are several provisions or particulars [in a statute] such construction is, if possible, to be adopted as will give effect to all."); *see, also, See, e.g., Pac. Coast Recovery Serv. v. Johnston,* 219 Or App 570, 576–577, 184 P3d 1127 (2008) (refusing to adopt interpretation that would render sentence within statutory provision a nullity). The court's construction of the limited dispute, thus, cannot be squared with its obligation to give effect to all provisions of a statute.

The legislature expressly limited disputes respecting "benefits due the insured" to both the issues of liability and the issue of damage amounts. Any construction of ORS 742.061(3)(a) must recognize that distinction. An interpretation giving effect to a limitation to "liability" and a limitation to "damages amounts" avoids any redundancy, harmonizes the parallel function of the two safe harbor provisions, and remains consistent with the remedial purpose of the attorney fee statute.

C. *Grisby* and *Cardenas* – Final Words

The *Spearman* court construed the two safe harbor provisions, not as parallel provisions applying to "actions to recover * * * benefits," but as distinguishable on the basis of the payment processes described in the insurance code. *Id.* at 123. It is on that basis that the court concluded that *Grisby*'s analysis is applicable only to actions involving PIP claims. Yet Progressive in this case, just as it did in *Grisby*,

disputed, among other things, whether Spearman's "unreimbursed medical expenses"[8] arose from injuries caused by the accident. *Id*. at 128. Progressive necessarily, then, seeks to have the trier of fact "agree with [Progressive] on *that* preliminary issue [before turning] to the issue of the amount of benefits that plaintiff should receive under the policy." *Grisby I,* 343 or at 183; *Cardenas*, 230 Or App at 412. The fact that the legislature used different terminology in the two safe harbor provisions solely to conform to the realities of the respective benefits, does not alter legislature's intent to have the express limitations of each apply to determinations of the "benefits due the insured."

Both the reasoning and analysis in this Court's decision in *Grisby*, and Judge Schuman's application of that reasoning in *Cardenas* apply to this case.[9] Together those decisions provide a proper interpretation of the safe harbor provisions, a thorough review of the legislative history of the safe harbor provisions, and provide a proper constructions of those provisions in light of the purpose of the

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[8] Presumably those expenses either were in excess of Spearman's PIP limits, or similarly not paid by the PIP insurer as attributable to injuries not caused by the accident.

[9] As this Court may well be aware, Judge Schuman authored the dissent in the court of appeals' erroneous decision in *Grisby*. Following this court's validation of his reasoning, he next applied this Court's *Grisby* rationale to the UM/UIM decision in *Cardenas*. Judge Schuman likely would have authored another dissent in *Spearman* had he not retired from the court in 2014. The tracking of this "Road to *Grisby*" and the summarized reasoning and analysis in those opinions is contained both in the Court of Appeals brief submitted by this author in *Kelley v. State Farm*, a case being held by this Court presumably pending a decision in this case, and in the amicus brief submitted in *Kiryuta*.

attorney fee statute: to protect insureds from needless litigation caused by insurers' failure to reasonably settle claims.

All is not lost for insurers when striking this balance. It is not that insurers have no choice. Avoiding attorney fees has always been within their control: insurers can reasonably settle the claim in amounts closer to the full benefit amounts due. Should a UM/UIM insurer truly believe that it has meritorious defenses or disputes beyond the scope of the limitations set forth in ORS 742.061(3), nothing prevents it from pursuing them. The risk to the insurer is miscalculating that merit and losing. Nonetheless, if the insurer made a reasonable offer in the first place, any recovery by the plaintiff still might not exceed that tender and entitle her to fees. ORS 742.061(1).

VI. CONCLUSION

Based on the forgoing, this court (1) must clarify for the bench and bar the applicable scope of the limitation of issues set forth in ORS 742.061(3), and (2) should reverse the decision of the court of appeals and remand the case to the trial court for further proceedings.

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Respectfully submitted on this 1st day of August, 2016.

/s/ Lisa T. Hunt

Lisa T. Hunt, OSB # 023306
Law Office of Lisa T. Hunt, LLC
16869 SW 65th Ave., STE 424
Lake Oswego, Oregon 97035
lthunt@lthuntlaw.com
(503) 517-0851

Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

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I certify that on August 1, 2016 I electronically filed the foregoing **BRIEF ON THE MERITS BY AMICUS CURIAE FOR OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator and by so doing caused a true copy to be served electronically on the following parties:

Willard Merkel
Attorney for Plaintiff-Appellant, Respondent on Review

James B. Rich
Of Attorneys for Defendant-Respondent, Petitioners on Review

/s/ Lisa T. Hunt