

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NANCY CONGDON,
Plaintiff-Respondent,

v.

MATTHIAS BERG,
Defendant,

and

FARMERS INSURANCE COMPANY OF OREGON, an Oregon corporation,
Defendant-Appellant.

Multnomah County Circuit Court
090405686

A147139

Jerome E. LaBarre, Judge.

Argued and submitted on August 23, 2012.

Thomas M. Christ argued the cause for appellant. With him on the briefs was Cosgrave Vergeer Kester LLP.

Maureen Leonard argued the cause for respondent. With her on the brief was David Paul.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed and remanded.

1 NAKAMOTO, J.

2 In this action to recover uninsured motorist benefits, arising out of
3 plaintiff's injury in an automobile accident with an uninsured driver, defendant Farmers
4 Insurance Company appeals from a general judgment entered after a jury's verdict on
5 damages. The judgment awarded plaintiff \$48,122.87 in economic damages and
6 \$275,000.00 in noneconomic damages. Defendant also appeals from a supplemental
7 judgment awarding plaintiff attorney fees under ORS 742.061. We conclude that, as
8 defendant asserts, the trial court erred in rejecting its request to poll the jurors
9 individually to determine whether the same nine jurors agreed on economic and
10 noneconomic damages, as required in this case for a valid verdict. As a result, we reverse
11 and remand for a new trial. We also reverse the award of attorney fees and, because the
12 issue is likely to arise on remand, hold that an award of fees was not authorized because
13 defendant met the requirements to come within the safe harbor of ORS 742.061(3).

14 We address first the jury polling issue and set forth the material facts
15 related to that issue. Plaintiff was injured in an automobile accident with an uninsured
16 driver. She filed a claim with her own insurer, defendant, alleging that the uninsured
17 driver was at fault and that defendant was liable for her damages. Defendant admitted
18 that the uninsured driver was at fault and that defendant was liable for plaintiff's
19 damages. The case went to trial only on the issue of damages.

20 As noted, the jury returned a verdict for plaintiff, finding that she had
21 suffered economic damages of \$48,122.87 and noneconomic damages of \$275,000.00.

1 However, the foreperson of the jury stated that the findings were not unanimous. Under
2 the Oregon Constitution, in civil cases, "three-fourths of the jury may render a verdict."
3 Or Const, Art VII (Amended), § 5(7); ORCP 59 G. When there is a twelve-person jury,
4 that means that the same nine or more jurors must agree, in full, on every interdependent
5 element of a particular claim against a particular defendant. *Sandford v. Chev. Div. Gen.*
6 *Motors*, 292 Or 590, 613, 642 P2d 624 (1982) ("[T]he same jurors must constitute the
7 three-fourths majority that finds every separate element required for the verdict."). As we
8 noted in *Verberes v. Knappton Corporation*, 92 Or App 378, 383, 759 P2d 279, *rev den*,
9 307 Or 78 (1988), "at least nine jurors" is not the same as "at least the same nine jurors."
10 The same nine jurors must agree on every interdependent element of a claim. *Id.* at 381-
11 82; *see Clark v. Strain, et al.*, 212 Or 357, 364, 319 P2d 940 (1958) (noting with approval
12 other cases that hold that the "minimum legal number of jurors required for a valid
13 verdict must be the same jurors voting similarly on each separate issue" that is required to
14 be resolved).

15 In civil cases, each party has an absolute privilege to request a poll of the
16 jury to ensure that the verdict is correct. ORCP 59 G(3); *Eisele v. Rood*, 275 Or 461,
17 468, 551 P2d 441 (1976). In light of its uncertainty that the same nine jurors had agreed
18 on both economic and noneconomic damages, defendant asked the court to poll the jury.
19 The court polled the jurors collectively on each type of damages. First the court asked
20 for a show of hands in support of the finding of economic damages. By raising their
21 hands, nine jurors indicated that they had agreed with the finding on economic damages,

1 and three jurors indicated that they had voted no. The court then asked the jurors about
2 the finding of noneconomic damages. By a show of hands, eight jurors indicated that
3 they had agreed with the findings and four indicated that they had disagreed. Counting
4 only eight jurors in support of the finding on noneconomic damages, the court announced
5 that the verdict was not legal and that it intended to send the jury back to deliberate
6 further. At that point, plaintiff requested that the judge poll the jury again. The court
7 agreed to do so and once again asked the jurors for a show of hands on each type of
8 damages. That time, the court counted nine votes in favor of the economic damages
9 verdict and nine votes in favor of the noneconomic damages verdict.

10 The court did not discharge the jurors, but sent them back to the jury room
11 and asked the parties whether they objected to receiving the verdict and discharging the
12 jury. Defendant's counsel expressed the concern that, even though nine jurors had
13 supported each type of damages, they were not the same nine jurors: "[J]uror number
14 two was yes on the economic, no on the non-economic. Juror number eleven was
15 reversed the same way." Plaintiff's counsel disagreed, stating that he thought he had seen
16 the same nine jurors vote "yes" on economic and noneconomic damages. Defense
17 counsel then stated:

18 "What I would recommend is have them come in and ask each
19 individually yes or no, and then we know for the record who is saying.

20 "Polling them this way, where they just raise their hand without
21 anything in the record indicating jurors number one, two, three, eight, nine
22 or whoever has their hand up, there is no way from the record, itself, to
23 verify or resolve this."

1 The court rejected defense counsel's request and declined to individually poll the jurors.
2 The court explained that it was not certain that the same nine jurors needed to agree on
3 the different types of damages. In any event, the court said that, because there was
4 nothing on the verdict form itself that indicated that the *same nine jurors* had to agree on
5 both types of damages, there was "an issue of waiver." The court entered judgment on
6 the verdict.

7 On appeal, defendant argues that, as it requested and as a matter of right,
8 defendant was entitled under ORCP 59 G(3) to have the jurors polled individually to
9 ensure that the same nine jurors agreed that plaintiff was entitled to both economic and
10 noneconomic damages and that the verdict therefore was proper. Under ORCP 59 G(3),

11 "[w]hen the verdict is given, and before it is filed, the jury may be polled on
12 the request of a party, for which purpose each juror shall be asked whether
13 the verdict is the juror's verdict. If fewer jurors answer in the affirmative
14 than the number required to render a verdict, the jury shall be sent out for
15 further deliberations."

16 Although the rule's statement that "the jury may be polled" suggests that whether or not
17 to poll the jury is a matter within the trial court's discretion, in fact, this court and the
18 Supreme Court have said that, unless waived, a party's right upon request to have the jury
19 polled in a civil case is absolute. In *Freeman v. Wentworth & Irwin, Inc.*, 139 Or 1, 7
20 P2d 796 (1932), the Supreme Court considered whether Oregon Code, title II, ch 3, § 2-
21 319 (1930), which is similar to ORCP 59 G(3) and which stated in part that "[w]hen a
22 verdict is given, and before it is filed, the jury may be polled on the request of either
23 party," provided a right to polling, *id.* at 20, and whether the right had been waived, *id.* at

1 20-24. The court held that "our statute does not make the polling of the jury discretionary
2 with the judge but, in harmony with the general rule * * *, grants this privilege as an
3 absolute right." *Id.* at 20 (citations omitted); *accord Eisele*, 275 Or at 468 (citing
4 *Freeman*); *Brummett v. Parson*, 49 Or App 588, 588-a, 619 P2d 1355 (1980) (citing
5 *Eisele*).

6 Plaintiff does not dispute that general rule but offers three responses, the
7 first two of which avoid the question of the sufficiency of the jury poll: (1) defendant
8 waived the right to a verdict in which the same nine jurors agreed on economic and
9 noneconomic damages;¹ (2) as a matter of law, there was no requirement that the same
10 nine jurors agree on economic and noneconomic damages; and (3) the court *did* poll the
11 jury, twice. We consider and reject each response in turn.

12 Plaintiff first contends that, by failing either to include a requirement in the
13 verdict form or to request an instruction that the same nine jurors must agree as to each
14 component of damages, defendant waived the right to have the same nine jurors decide
15 both types of damages. Because of the constitutional implications of the failure to
16 receive a three-fourths verdict, Or Const, Art VII (Amended), § 5(7), it is not by any
17 means clear that a party waives the right to have the same nine jurors agree on all parts of
18 the verdict when a jury instruction concerning the verdict or the verdict form may lack

¹ We note the distinction between a waiver of the right to have the jury polled, *Eisele*, 275 Or at 468, and a waiver of the right to have the same nine jurors agree on both types of damages. Plaintiff's waiver argument relates to the latter point; there is no contention that defendant waived the right to have the jury polled.

1 specificity regarding the requirements for a valid verdict. *See Shultz v. Monterey*, 232 Or
2 421, 425, 375 P2d 829 (1962) ("A verdict concurred in by less than three-fourths of the
3 jury is invalid, and the failure to object thereto before the verdict is received and filed
4 does not constitute a waiver of such invalidity."); *Clark*, 212 Or at 368 (when faced with
5 a verdict of less than the constitutionally required number, the court must send the jury
6 out for further deliberation). In any event, we reject plaintiff's contention as a factual
7 matter and conclude that there was no waiver in this case, because the trial court ended
8 up instructing the jury that the same nine jurors must agree on damages.

9 The verdict form, which defendant prepared, had only one question:

10 "1. What are the plaintiff's damages?

11 "ANSWER: Economic Damages: \$_____

12 Noneconomic Damages: \$_____

13 "At least nine of you must agree on the answer to question 1."

14 (Emphasis in original.) Although there was only one question, there were two parts to be
15 answered: the amount of economic damages and the amount of noneconomic damages.

16 And, although the verdict form specified that at least nine jurors must agree on "the
17 answer to question 1," it did not specifically state that *the same nine* jurors must agree on
18 each of the two parts of the answer.

19 The court and the parties spent a few minutes discussing the verdict form in
20 the jury's presence. The court then gave the jury this instruction regarding the verdict
21 form:

1 "[The verdict form] says at least nine of you must agree on the
2 answer. So, you know, that's what I told you. It can be unanimous. It can
3 be something between nine and twelve agreeing. It can be ten or eleven
4 agreeing, but it must be at least nine who agree."

5 That part of the instruction told the jury that nine must agree on "the answer," but it did
6 not specifically tell the jury that the *same nine* must agree on both types of damages.
7 However, the court instructed the jury further: "Nine or more of you must agree on the
8 verdict. * * * If the verdict is for the plaintiff, *at least the same nine jurors must also*
9 *agree on the amount of damages.*" (Emphasis added.) Indeed, two times further, the jury
10 heard the court say that at least the *same nine jurors* who said that plaintiff was entitled to
11 a verdict must agree on the amount of damages.²

² The court orally instructed the jury:

 "As I just indicated, this is a civil case. Nine or more of you must agree on the verdict. If your verdict is for the plaintiff--uhm, well, I had standard language, counsel. I don't know if it does any harm. It states--most of the cases we have involve disputes on liability; for instance two drivers, did somebody run a red light? So that's liability. This case is different because of agreements. This case is about damages.

 "This says *at least the same nine jurors* who agree that the verdict should be for plaintiff must also agree on the amount of damages. Should I cross out that the verdict should be for plaintiff?

 "[PLAINTIFF'S COUNSEL]: Yes, Your Honor.

 "[DEFENSE COUNSEL]: Doesn't matter to me. It's just nine have to agree to that.

 "[THE COURT]: And you said yes, that you want me to cross it out?

 "[PLAINTIFF'S COUNSEL]: Yes, *at least the same nine* must also agree--must agree.

1 Thus, not only did the court instruct the jurors that nine of them had to
2 agree on "the answer," which had two components; the jurors also heard from the court
3 that the *same nine jurors* who agreed that plaintiff was entitled to a verdict must also
4 agree as to the *amount of damages*. The "amount of damages" necessarily encompassed
5 both types of damages--economic and noneconomic. That is, the same nine jurors who
6 agreed that plaintiff was entitled to a verdict had to agree as to both economic damages
7 and noneconomic damages. In light of the trial court's instructions to the jury and the
8 parties' agreement with those instructions, we reject plaintiff's argument that defendant
9 waived the right to have the same nine jurors who found that plaintiff should have the
10 verdict agree as to both types of damages.

11 (Emphasis added.)

12 Second, plaintiff contends that defendant was not legally entitled to a
13 verdict with the same nine jurors agreeing on both economic and noneconomic damages,

"[THE COURT]: The *same nine jurors* must agree. Okay. Initial. So it reads, 'Nine or more of you must agree on the verdict. If your verdict is for the plaintiff'--well.

"[DEFENSE COUNSEL]: You can just stop there.

"[PLAINTIFF'S COUNSEL]: That would be fine, Your Honor.

"[THE COURT]: If the verdict is for the plaintiff, *at least the same nine jurors* must also agree on the amount of damages. Is that okay?

"[DEFENSE COUNSEL]: Fine with me.

"[PLAINTIFF'S COUNSEL]: No objection. Thank you.

"[THE COURT]: Okay."

1 because the two types of damages are not interrelated. *See Verberes*, 92 Or App at 381
2 (the same nine jurors do not need to agree on separate and independent questions
3 involving separate claims); *Davis v. Dumont*, 52 Or App 73, 627 P2d 907, *rev den*, 291
4 Or 309 (1981) (same nine jurors need not agree on questions relating to separate
5 defendants). Defendant asserts three arguments in reply, contending first that economic
6 and noneconomic damages are indeed interrelated questions on which the jurors must
7 agree, because, despite the verdict form's separation of damages into different types,
8 juries tend to view the amount of the verdict as a unit. Defendant notes further that in
9 *Shultz*, 232 Or at 425, the Supreme Court implicitly determined that the types of damages
10 awarded in a personal injury action--such as economic or noneconomic--are "elements of
11 damages" on which the same nine jurors must agree.³ *See also Clark*, 212 Or at 365
12 (issues of compensatory and punitive damages are interdependent). Lastly, defendant
13 replies that, whether or not agreement of the same nine jurors on economic and
14 noneconomic damages is generally required, such agreement was required in this
15 particular case because of the way the court instructed the jury, and that instruction
16 became the law of the case.

17 We agree with defendant's last argument and do not reach the first two.
18 Whether or not, as a general rule, the agreement of the same nine jurors would be
19 required on both economic and noneconomic damages, in this case, the court instructed

³ In *Shultz*, the same nine jurors did not agree to "special" and "general" damages, now referred to as economic and noneconomic damages.

1 the jurors, without objection, that at least the same nine of them who had agreed that the
2 verdict was for plaintiff must agree on the amount of damages. As we have explained,
3 that required that at least the same nine jurors agree on the amount of both types of
4 damages. Because the judge's instructions to the jury became the law of the case, *Fulton*
5 *Ins. v. White Motor Corp.*, 261 Or 206, 223 n 5, 493 P2d 138 (1972); *Columbia Co. v.*
6 *Ross Island Co.*, 145 Or 96, 108-09, 25 P2d 911 (1933); *Mays v. Vejo*, 224 Or App 426,
7 198 P3d 943 (2008), *rev den*, 346 Or 213 (2009), we conclude that the same nine jurors
8 were required to agree on both elements of damages in this case.

9 That leads us to the primary issue that defendant raises on appeal--whether
10 the jury poll was inadequate. In plaintiff's view, the court satisfied the requirement to
11 poll the jury by twice asking jurors for a show of hands on the different components of
12 damages. Plaintiff, however, does not assert that it is patent on the record that the same
13 nine jurors agreed on both economic and noneconomic damages. We agree with plaintiff
14 that the trial court has some discretion in determining how the jury is polled. *See, e.g.*,
15 *Aronson v. Fagan*, 278 Or 135, 138, 502 P2d 974 (1974) (holding that court's explanation
16 to jury that "of course, those of you that say 'yes' have to *agree with each* of the answers
17 in the several questions," was clear and unequivocal and plaintiff was not prejudiced by
18 the court's remark (emphasis in original)). In this case, though, the trial court's request
19 for a collective show of hands does not meet the requirement of ORCP 59 G(3) that "each
20 juror shall be asked whether the verdict is the juror's verdict." *Sandford v. Chev. Div.*
21 *Gen. Motors*, 52 Or App 579, 586-87, 629 P2d 407 (1981), *aff'd*, 292 Or 590, 642 P2d

1 624 (1982).

2 As both this court and the Supreme Court explained in *Sandford*, the rule
3 requires an individual poll of each juror in a manner that demonstrates whether each juror
4 agreed with the entire verdict. In that case, after the jury had been deadlocked "eight-
5 four" for hours, the foreperson told the court that the jury had reached a verdict with nine
6 jurors. Yet, when the court polled the jury, all twelve jurors answered "yes" to the
7 question, "Is this your verdict?" 52 Or App at 586-87. Thus, it appeared that some jurors
8 had construed the question as asking whether there was a nine-to-three split vote. The
9 trial court denied the defendants' request for a poll to determine whether at least nine
10 jurors had voted similarly on the questions required for the verdict. *Id.* at 587.

11 We described the purpose and requirements of a jury poll under ORCP 59
12 G(3) in *Sandford*:

13 "Because of the importance of receiving a valid jury verdict, we take
14 this opportunity to express what we believe to be the parameters of the
15 inquiry under former ORS 17.355 and present ORCP 59 G(3). Specifically,
16 the jury poll is not a device for delving into the deliberative process of the
17 jury. Its purpose is to determine if three-fourths of the jurors 'agree on all
18 issues determined by the verdict,' *Shultz* [232 Or at 424,] whether it be
19 general or special. A general verdict returned in favor of a plaintiff (or a
20 defendant on a counter claim) determines two issues: liability and the
21 amount of total damages. The number of issues determined by a special
22 verdict will correspond to the number of interrogatories asked. *Once the*
23 *verdict is read, the poll, on request, can be conducted in two ways: (1) the*
24 *jurors can be polled individually on each issue decided, or (2) the jurors*
25 *can be asked to respond affirmatively or negatively to the question, 'Is the*
26 *verdict just read your individual verdict?'*, with an instruction that those
27 *who say 'yes' must agree with the entire verdict."*

28 52 Or App at 587-88 (emphasis added). The Supreme Court generally agreed with this

1 court's description, but clarified further:

2 "This need not involve reading each separate question to each juror. If each
3 juror is asked whether he or she agrees with each part of the verdict as
4 stated by the foreman or read by the clerk, only a juror who indicates
5 otherwise needs to be asked with what part he or she disagrees."

6 *Sandford*, 292 Or at 613 n 22. In sum, *Sandford* required the trial court to determine
7 whether the same nine jurors agreed with each part of the verdict upon a request for a
8 jury poll.

9 In this case, the trial court's failure to poll the jurors individually after the
10 showing of hands, as defendant requested, was not harmless and is reversible error
11 because the trial court's chosen method for polling the jury failed to establish
12 conclusively whether the same nine jurors agreed with each part of the damages verdict.
13 The record reflects that there was confusion regarding whether the same nine jurors
14 agreed on both economic and noneconomic damages in the two showings of hands. If
15 defendant is correct that the nine who agreed on economic damages were not the same
16 nine who agreed on noneconomic damages, then the verdict is invalid. *See Clark*, 212 Or
17 at 364, 367 (holding verdict was invalid when same nine jurors failed to agree on both
18 liability and damages). As the Supreme Court explained in *Sandford*, the right to have
19 the jury polled "is designed to demonstrate that the announced result represents a valid
20 verdict." 292 Or at 614. As in *Sandford*, under the circumstances, not knowing the
21 outcome of an individualized poll, it is impossible to say that the absence of a correct poll
22 of the divided jury was harmless error. *See id.*

23 The remaining question on this issue is whether the trial court's error

1 requires a remand for retrial on all damages or only on one type of damages but not both.
2 Plaintiff contends that any retrial should concern only economic damages. However,
3 having concluded that the same nine jurors were required to agree on both types of
4 damages in this case, we conclude, further, that the verdict was invalid and that the case
5 must be retried on both types of damages.

6 We turn to the question of whether plaintiff is authorized to receive an
7 award of attorney fees under ORS 742.061, which is likely to arise on remand. That
8 statute governs recovery of attorney fees in actions on insurance policies like this one and
9 provides, in part:

10 "(1) Except as otherwise provided in subsections (2) and (3) of this
11 section, if settlement is not made within six months from the date proof of
12 loss is filed with an insurer and an action is brought in any court of this
13 state upon any policy of insurance of any kind or nature, and the plaintiff's
14 recovery exceeds the amount of any tender made by the defendant in such
15 action, a reasonable amount to be fixed by the court as attorney fees shall
16 be taxed as part of the costs of the action and any appeal thereon. * * *

17 * * * * *

18 "(3) Subsection (1) of this section does not apply to actions to
19 recover uninsured or underinsured motorist benefits if, in writing, not later
20 than six months from the date proof of loss is filed with the insurer:

21 "(a) The insurer has accepted coverage and the only issues are the
22 liability of the uninsured or underinsured motorist and the damages due the
23 insured; and

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

26 ORS 742.061. Under the statute, a plaintiff who prevails in an action on an insurance
27 policy is entitled to an award of attorney fees in certain circumstances set forth in

1 subsection (1). In the context of uninsured or underinsured motorist benefits, an
2 exception is set out in ORS 742.061(3), also known as the "safe harbor" provision. No
3 attorney fees are due if, within six months after proof of loss, the insurer notifies the
4 insured that (1) it accepts coverage; (2) the only issues are liability of the uninsured or
5 underinsured motorist and damages due the insured; and (3) the insurer consents to
6 submit those issues to binding arbitration if the parties are unable to agree on damages
7 and liability. The parties' dispute centers on whether defendant met the safe harbor
8 requirements.

9 In this case, it is undisputed that, within six months of plaintiff's submission
10 of a proof of loss form, defendant's adjuster sent plaintiff's attorney a letter in which
11 defendant accepted coverage generally by acknowledging that plaintiff had a policy in
12 force and consented to submit the issues of liability and damages to binding arbitration.
13 The letter stated, in part:

14 "This will confirm that the policy is in force for this loss. If we are
15 unable to reach an agreement on the liability of the uninsured motorist or
16 the amount of damages owed, our company consents to submit this matter
17 to binding arbitration.

18 "Enclosed please find UIM proof of loss forms.

19 "Please provide me with a copy of all medical bills, which reference
20 all CPT and ICD 9 Codes and reports relating to the treatment of your
21 client's injury, as well as any records for related treatment prior to the
22 accident. If your client is making a claim for lost wages, please provide
23 verification of wages from the employer and a medical report from the
24 treating physician stating your client's inability to work.

25 "If your client is still undergoing treatment, we would appreciate a
26 monthly status that includes a current diagnosis, the approximate cost of
27 treatment incurred, and a prognosis with the anticipated release date."

1 Plaintiff conceded that the letter, on its face, satisfied the "safe harbor" exception in ORS
2 742.061(3), which defendant asserted required the trial court to deny plaintiff's fee
3 petition. Plaintiff, though, took issue with the proof of loss form enclosed with the letter.

4 The proof of loss form called for plaintiff to provide information
5 concerning all of her claimed injuries, medical treatments and expenses, wage loss and
6 loss of earning capacity, and other claimed damages. The first paragraph of that form
7 stated:

8 "The information provided below will be relied upon by the insurer in
9 determining the amount of benefits which may be payable pursuant to the
10 insurance policy referenced below. **THIS FORM WILL NOT BE**
11 **ACCEPTED AS PROOF OF LOSS UNTIL ALL AMOUNTS YOU**
12 **INTEND TO CLAIM ARE STATED."**

13 (Capitalization and bold face in original.)

14 Plaintiff contended in the trial court that, although the letter itself was
15 sufficient to invoke the exception in ORS 742.061(3), the statement in the first paragraph
16 of the proof of loss form--that the form would not be accepted as proof of loss until all
17 amounts she intended to claim were stated--nullified the effect of the letter by placing
18 plaintiff's proof of loss in dispute. Plaintiff noted that she had been receiving treatment in
19 the weeks before trial and argued that defendant reserved the right to take the position
20 that, as plaintiff repeatedly amended her proof of loss form due to additional medical bills
21 for ongoing treatment, plaintiff had not yet submitted her proof of loss. Plaintiff, though,
22 did not establish or argue that defendant had ever denied that she had provided it with
23 proof of loss. According to plaintiff, defendant was precluded from relying on the safe

1 harbor exception because the possibility of such a denial placed an additional issue in
2 question besides the issues of damages and liability permitted in ORS 742.061(3)(a).

3 The trial court overruled defendant's objection to plaintiff's fee petition
4 based on the safe harbor exception. In a supplemental judgment, the court awarded
5 plaintiff all of her requested fees. Defendant's challenge on appeal is directed to whether
6 plaintiff was entitled to fees at all and not to the reasonableness of the dollar amount of
7 the fees requested and awarded.

8 On appeal, defendant contends that the trial court erred in awarding
9 attorney fees, because defendant's letter complied with ORS 742.061(3) and the statement
10 at the top of the proof of loss form had no bearing on defendant's acceptance of coverage
11 and offer to arbitrate or on what issues were in dispute. We review the question of
12 whether defendant was entitled to the protection of ORS 742.061(3), including the
13 significance of the statement at the top of the proof of loss form, as a legal matter. *See*
14 *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 166 P3d 519, *adh'd to as modified*
15 *on recons*, 343 Or 394, 171 P3d 352 (2007) (applying standard); *Badrick v. Farmers Ins.*
16 *Co.*, 238 Or App 320, 242 P3d 685 (2010) (same).

17 Defendant asserts that, by including on its proof of loss form a requirement
18 that plaintiff state all the amounts she intended to claim, defendant was simply restating
19 the requirement of ORS 742.504(5) that an insured seeking uninsured motorist benefits
20 "give to the insurer written proof of claim * * * including full particulars of the nature
21 and extent of the injuries, treatment and other details entering into the determination of

1 the amount payable[.]” Plaintiff replies that defendant was surely entitled to require
2 specificity on the proof of loss form, but that, by stating that the proof of loss “will not be
3 accepted” until all amounts were claimed, defendant left open the possibility of disputing
4 the sufficiency of the proof of loss. Relying on *Grisby* and two cases following it,
5 *Badrick and Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 215 P3d 919 (2009),
6 plaintiff contends that, by reserving for itself the opportunity to reject plaintiff’s proof of
7 loss, defendant acted inconsistently with the requirement in ORS 742.061(3)(a) that the
8 *only* issues in dispute must be liability and the damages due the insured.

9 We conclude that defendant has the better argument. As noted, plaintiff
10 concedes that the letter by itself is sufficient to satisfy the requirement of ORS
11 742.061(3). We recognize, as plaintiff points out, that the proof of loss form could be a
12 method by which an insured provides “proof of loss” as that term is used in ORS
13 742.061, *i.e.*, sufficient information for the insurer to investigate and estimate its rights
14 and obligations under the policy. *Scott v. State Farm Mutual Auto Ins.*, 345 Or 146, 151-
15 53, 190 P3d 372 (2008). But, at the same time, the form in this case is “written proof of
16 claim” as required of an insured under ORS 742.504(5)(a),⁴ that is, a method by which

⁴ ORS 742.504(5)(a) provides:

“As soon as practicable, the insured or other person making claim shall give to the insurer written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment and other details entering into the determination of the amount payable hereunder. The insured and every other person making claim hereunder shall submit to examinations under oath by any person named by the insurer and subscribe the same, as often as may reasonably be required.

1 defendant may determine the amount of damages claimed under a policy providing
2 uninsured motorist coverage. Reading the letter and the proof of loss form together, in a
3 common sense manner, *see Totten v. New York Life Ins. Co.*, 298 Or 765, 770-71, 696
4 P2d 1082 (1985) ("The terms of a writing are presumed to have been used in their
5 primary and general acceptance. ORS 42.250. We interpret the terms of an insurance
6 policy according to what we perceive to be the understanding of the ordinary purchaser of
7 insurance."), we conclude that the statement on the proof of loss form did not place in
8 dispute anything in addition to damages due plaintiff or alter the letter's acceptance of
9 coverage and agreement to arbitrate the amount of damages due plaintiff. Plaintiff could
10 not reasonably have understood that, by requiring that plaintiff state all the amounts she
11 intended to claim as a loss, defendant was revoking the letter's statement that "the policy
12 is in force for this loss" or doing anything more than determining the amount of damages
13 claimed.

14 This case is unlike the *Grisby* line of cases that plaintiff cites for its
15 contention that defendant left more than the "damages due the insured" at issue as a result
16 of its proof of loss form. In *Grisby*, the insured was injured in a motor vehicle accident,
17 and his insurer sent him a letter stating that it had "accepted coverage for [personal injury
18 protection (PIP)] benefits" and that, in case of a dispute regarding the amount of benefits
19 due, the insurer was willing to arbitrate. 343 Or at 177. However, the letter also said that

Proof of claim shall be made upon forms furnished by the insurer unless the insurer fails to furnish the forms within 15 days after receiving notice of claim."

1 "we may deny, limit or terminate benefits" if the insured incurred medical expenses that
2 were not in accordance with its coverage, which required "reasonable and necessary
3 medical expenses directly related to the accident." *Id.* The insurer then refused to pay
4 the insured's chiropractic bills as part of PIP coverage because it maintained that the
5 treatment was not related to the accident. *Id.* The insured prevailed on his claim that the
6 insurer had to pay for the chiropractic treatment, but the trial court concluded that the
7 insurer had met the "safe harbor" requirements applicable to PIP benefits in ORS
8 742.061(2)(a), which requires the insurer to have "accepted coverage," also a requirement
9 for underinsured and uninsured benefits in ORS 742.061(3)(a). 343 Or at 177-78.

10 The Supreme Court in *Grisby* noted that the issue was not whether the
11 words in the letter indicated a statutorily required acceptance of coverage; rather, the
12 question "is whether [the insurer's] acknowledgment that [the insured's] accident came
13 within the scope of the policy means that [the insurer] 'accepted coverage' as that term is
14 used in ORS 742.061(2)(a)." 343 Or at 180. The court held that an initial written
15 acknowledgment of coverage generally for an accident is insufficient to come within the
16 safe harbor provision for PIP benefits when followed by a dispute over a claim for
17 payment of particular medical treatment, because the legislature contemplated that the
18 insurer would make "an ongoing series of decisions 'accepting' or 'denying' coverage of
19 particular claims for services rendered by medical providers." *Id.* at 181. By denying the
20 claim for PIP benefits for the chiropractic treatment, the insurer in *Grisby* disputed not
21 the dollar amount of PIP benefits due but, instead, its PIP coverage for the claim for

1 medical services. *Id.* at 181-84.

2 In *Badrick*, a PIP benefits case like *Grisby*, the insurer wrote to the insured
3 and advised that "[t]he policy is in force for this loss." 238 Or App at 323. However,
4 similar to what the insurer in *Grisby* wrote, it stated that it reserved the right to "deny,
5 limit or terminate benefits if we determine the medical and hospital services are not
6 reasonable or necessary, or not related to the accident." *Id.* Then the insurer failed to pay
7 all of the insured's claims for PIP benefits. *Id.* Following *Grisby*, we held in *Badrick* that
8 the insurer's letter left open the possibility that a claim for benefits might be denied
9 outright and did not allow the insurer to claim the protection of the safe harbor provision.
10 *Id.* at 327-28.

11 In our decision in *Cardenas*, we applied the rule in *Grisby* in an uninsured
12 motorist case. In that case, the insurer paid the insured, who was unrepresented by
13 counsel and who did not speak, write, or read English, \$800 in exchange for a release of
14 claims related to her injuries in a hit-and-run accident. 230 Or App at 405-06. She
15 eventually retained counsel and demanded payment of an additional amount of damages
16 from the insurer. The insurer objected to the insured's further recovery of uninsured
17 motorist benefits based on the release but then sent the insured a letter in which it noted
18 that there were "no issues as to the existence of [uninsured motorist] coverage" and
19 offered to arbitrate. *Id.* After the parties litigated the validity of the release, the insured
20 recovered additional amounts due to her injuries and, ultimately, obtained an attorney fee
21 award under ORS 742.061. *Id.* at 406-07.

1 Upon the insurer's appeal, we held in *Cardenas* that the "safe harbor"
2 requirement in ORS 742.061(3)(a) for uninsured motorist cases--that the only issues in
3 dispute "are the liability of the uninsured or underinsured motorist and the damages due
4 the insured"--is parallel to the requirement in ORS 742.061(2)(a) for PIP cases. We
5 explained that the provision regarding PIP coverage does not refer to liability or
6 "damages due" and instead refers to "benefits due" as the sole disputed issue, as a result
7 of the nature of PIP coverage. 230 Or App at 411-12. Because the insurer in *Cardenas*
8 had contested its obligation to make any payment of further benefits, like the insurer in
9 *Grisby*, it was not entitled to immunity from liability for its insured's attorney fees. *Id.* at
10 412.

11 Here, in contrast, defendant's letter expressly accepted coverage and did not
12 reserve the right to deny coverage, as occurred in *Grisby* and *Badrick*, or contest the
13 obligation to pay the damages of the insured, as occurred in *Cardenas*. As noted,
14 plaintiff has conceded that the letter satisfied the provisions of ORS 742.061(3), and we
15 conclude that the statement on the proof of loss form requiring a complete statement of
16 amounts to be claimed ("ALL AMOUNTS YOU INTEND TO CLAIM") for acceptance
17 did not place coverage issues in dispute or negate the effect of the letter. Although
18 plaintiff suggests that she was unable to provide a complete statement of amounts she
19 would claim given her ongoing treatment, nothing in the proof of loss form would
20 prohibit an insured from describing the nature of her injuries and the necessity of
21 continuing treatments of various kinds for projected periods of time recommended by

1 health care providers, and defendant accepted coverage after receiving plaintiff's initial
2 proof of loss form.⁵ Although defendant's form should more accurately state that it is a
3 "proof of claim" form, we agree with defendant that a reasonable reading of the proof of
4 loss form is that it requires the insured to comply with his or her obligations under ORS
5 742.504(5)(a) to "give to the insurer written proof of claim * * * including full particulars
6 of the nature and extent of the injuries, treatment and other details entering into the
7 determination of the amount payable." Accordingly, we conclude that defendant was
8 entitled to invoke the safe harbor provision of ORS 742.061(3).

9 Reversed and remanded.

⁵ In fact, the proof of loss form asked plaintiff to state her "[f]uture medical expenses expected" and to "attach a copy of any professional medical opinion relied on regarding the need for future medical expenses." Furthermore, plaintiff ignores that the insurer must timely acknowledge coverage. If the insured and the insurer disagree regarding whether the insured has provided appropriate proof of loss under ORS 742.061 or an insurer wrongly rejects the return of the kind of form supplied to plaintiff in this case by insisting on more information, despite sufficient information on the form submitted for the insurer to investigate and intelligently estimate its obligations, the insurer risks falling outside the safe harbor. *See, e.g., Zimmerman v. Allstate Property and Casualty Ins. Co.*, 246 Or App 680, 267 P3d 203 (2011), *rev allowed*, 352 Or 25 (2012).