

BAD FAITH BLOG

# Objective Reasonableness is the Standard for Oregon Attorney Fee Awards

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**Summary:** Workmen's Auto Insurance Company concluded it was not required to pay attorney fees because it made a timely tender before the uninsured motorist action was filed. Furthermore, the \$25,000 fee award was contrary to the Oregon fee shifting statute's policy objectives. The trial and appellate courts disagreed.

Jones v. Nava

Jones, the insured, her children and husband, were in a car accident with an uninsured, negligent and intoxicated motorist. Along with Jones' physical injuries, she also suffered emotional distress, pain and suffering. After the accident occurred, Jones submitted an application and proof of loss to Workmen for uninsured motorist benefits.

Eight months later, but before Jones filed the complaint, Workmen offered \$3,000 to settle the claim. Ultimately, Workmen made a \$6,000 offer. Jones did not take the offer which was a fraction of her \$25,000 demand. The trial court sent the parties to arbitration where the arbitrator awarded Jones with \$11,826.99 in damages and \$9,259 in attorney fees. Workmen appealed to the circuit court, where the court did not allow Jones to include evidence of her continuing nightmares about the accident and her fear of driving in the dark. Ultimately, the jury awarded Jones \$856.49 in economic damages, \$5,000 in noneconomic damages and \$25,182 in attorney fees.

On appeal, Jones argued her continued nightmares and fear of driving in the dark was considered emotional distress and therefore the court prejudicially barred this evidence. The Court of Appeals agreed and reversed and remanded the case. Due to the reversal, the Court considered Workmen's challenge to the attorney fees award, contending the trial court erred in awarding Jones attorney fees under ORS 742.061.

Workmen's first contention against the award for attorney fees was it was against the public policy objective behind the fee shifting statutes. Further, the cases requiring the tender within six months of the proof of loss were distinguishable. Workmen claimed its offer was made before the action at issue was filed and for that reason should be considered timely. The Court rejected this theory on attorney fees.

Workmen's alternative argument was that the amount of attorney fees should be zero dollars and the attorney's rate at \$300 per hour was unreasonable. The Court concluded that courts are required to consider the factors laid out in ORS 20.075. Amongst other factors to consider, ORS 20.075(1) states that a court shall consider the conduct of the parties to the transactions that gave rise to the litigation including, but not limited to, any conduct of a party that was reckless, willful, malicious, in bad faith or illegal, and whether an award would deter others from asserting good faith claims or defenses.

Because ORS 742.06 mandated an award of fees, the court was obligated to consider the factors set forth in ORS 20.075's subsections (1) and (2). Although both parties cited to the summary of objective reasonableness in determining attorney fees found in *Erwin V. Tetreault*, 155 Or. App. 205, 214, 964 P.2d 277 (1998), neither party's contention of what constituted "objectively reasonable" was accepted by the Court.

In Oregon cases where attorney fees are required, the court must make its award based on the factors set forth in ORS 20.075, which includes whether actions of the parties that led up to the litigation involved any bad faith conduct by either party. The court then makes a decision based on the totality of the circumstances. Here, the totality of the circumstances included a retrial of the emotional distress claim and Workmen's claim handling in light of that evidence.

By Anthony L. Martin & Lauren Rodriguez

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