Published on *The National Law Review* https://natlawreview.com

Oregon Court of Appeals Issues Three Different Defense Opinions

Article By:

Michael Lowry

Oregon's Court of Appeals was busy issuing three different defense opinions on March 19, 2025.

Circuit court errs by awarding attorneys' fees based on a contingency fee.
The first was *Griffith v. Property and Casualty Ins. Co. of Hartford*, where a homeowner submitted a fire loss and alleged the insurer did not pay the benefits owed quickly enough. The insureds filed a complaint, the insurer answered, and then a global settlement occurred. The insureds then filed a motion for summary judgment seeking prejudgment interest per ORS 82.010 as well as attorneys' fees per ORS 742.061(1). They also sought costs as a prevailing party. The circuit court denied interest because no judgment had been entered and costs because there was no prevailing party, but granted $221,179.27 in attorneys' fees. Both sides appealed.

The insureds' appeal about prejudgment interest was rejected for procedural reasons. The circuit court order on costs was affirmed because there was no prevailing party. G*riffith* is noteworthy only for its ruling about attorneys' fees. The insurer did not dispute that ORS 742.061(1) applied or that the insureds were entitled to attorneys' fees. It disputed only how the circuit court calculated the amount of the award. The circuit court determined that amount was a percentage of the insureds' recovery. The Court of Appeals held that this was error.

When an award of attorneys' fees is permitted, ORS 20.075 provides factors to determine the amount to award. Its factors generally align with the lodestar method. Although a percentage of the recovery might be appropriate in some circumstances, *Griffith* concluded the "lodestar method is the prevailing method for determining the reasonableness of a fee award in cases, such as this, involving a statutory fee-shifting award, even when, as here, the insured has retained counsel on a contingency-fee basis." Further, the award "must be reasonable; a windfall award of attorney fees is to be avoided."

The Court of Appeals concluded using a percentage of the recovery was inappropriate in this instance. This is because coverage was never disputed, and the claim was immediately accepted. By the time the complaint was filed, the insurer had made several payments and was still adjusting the loss. There was minimal litigation and the delay paying the full claim "was caused by circumstances outside of the parties' control." The Court of Appeals ultimately concluded that the insureds had not met their burden to demonstrate the fees they sought were reasonable. The case was remanded to

redetermine the fees owed.

No really, the recreational use statute applies to a city park.
In *Laxer v. City of Portland*, the plaintiff entered Mount Tabor Park to "walk its trails" but tripped and fell due to a hole in the pavement. The plaintiff sued the City, but the circuit court granted the City's motion to dismiss based on Oregon's recreational use statute, ORS 105.682.

The plaintiff appealed. Among other arguments, the plaintiff argued the paved road in the park was like a public sidewalk and thus exempt from ORS 105.682. The Court of Appeals concluded that while there are limits to ORS 105.682, "generally available land connected with recreation" is still typically protected. Since Mount Tabor Park is clearly connected with recreation, the dismissal was affirmed.

Defense verdict affirmed in slip-and-fall case.
In *Fisk v. Fred Meyer Stores, Inc.*, where a customer slipped "on a three-foot by five-foot laminated plastic sign, which had fallen from its stand onto the public walkway." The sign belonged to the store and was placed there by store employees. The case was tried and produced a defense verdict.

On appeal, the customer conceded there was no evidence to prove the store (1) placed the sign on the ground, (2) knew the sign was on the ground and did not use reasonable diligence to remove it, or (3) the sign had been on the ground for enough time that the store should have discovered it. The customer instead argued the circuit court erred by not giving a res ipsa loquitur instruction. Although Oregon case law has concluded res ipsa loquitur does not apply to slip and falls, the customer argued this was not a slip and fall because an object caused the fall.

Fisk affirmed the circuit court's refusal to give the res ipsa loquitur instruction. The customer's attempted legal distinction was meaningless. "We agree with defendant that because plaintiff slipped on an object on the ground, plaintiff's claim is correctly characterized as a slip-and-fall claim."

National Law Review, Volume XV, Number 86