

IN THE SUPREME COURT OF THE STATE OF OREGON

CARY LONG)	
)	
Plaintiff-Appellant,)	Marion County Circuit Court
)	No. 12C23950
vs.)	
)	Court of Appeals No. A156674
FARMERS INSURANCE)	
COMPANY OF OREGON,)	Supreme Court No. S063701
)	
Defendant-Respondent)	
Respondent on Review)	

**OREGON TRIAL LAWYERS ASSOCIATION'S
BRIEF *AMICUS CURIAE* IN SUPPORT
OF PETITION FOR REVIEW**

On Petition for Review of the Decision of the Court of Appeals from the
Judgment of the Marion County Circuit Court
Hon. Thomas Hart, Circuit Court Judge.

Court of Appeals decision filed without opinion: September 23, 2015
Judges Lagesen, Nakamoto and Garrett

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Question Presented for Review and Proposed Rule of Law

Whether an insurance company may avoid responsibility for an insured's attorney fees under ORS 742.061(1) by paying the claim more than six months after receiving the proof of loss and after a lawsuit is filed, but before entry of a judgment.

OTLA proposes that this Court establish a rule of law that a recovery for the purpose of entitlement to attorney fees under ORS 742.061(1) means any type of recovery of benefits, and does not require the entry of a judgment. An insurance company may not avoid liability for the insured's attorney fees by paying a claim before entry of judgment.

The Oregon Trial Lawyers Association (OTLA) has no position on questions 2 and 3 which petitioner Cary Long has asked this Court to review.

Basic Facts of Claim

As OTLA understands the facts of this case, it is a breach of a homeowner's insurance policy for payment of property damage. More than six months after presentation of the proof of loss and the filing of lawsuit, Farmers Insurance Company voluntarily paid the plaintiff \$11,748.07 of her claim. The trial court refused to enter a judgment in favor of the plaintiff, and denied plaintiff's claim for attorney fees under ORS 742.061(1).

Triangle Holdings v. Stewart Title Guaranty Company

The Court of Appeals affirmed the trial court ruling without an opinion, probably based on its decision in *Triangle Holdings II, LLC v. Stewart Title Guaranty Co.*, 266 Or. App. 531, 337 P.3d 1013 (2014), *rev. allowed*, 357 Or. 164, 351 P.3d 52, *rev. dismissed*, 357 Or. 325, 354 P. 3d 697 (2015). *Triangle Holdings* involved the identical question as the present case. Whether an insurance company may avoid responsibility for an insured's attorney fees under ORS 742.061(1) by paying the claim more than six months after proof of loss and after the filing of a lawsuit, but before entry of judgment. In other words, is a judgment for damages, as opposed to a recovery without a judgment, a necessary condition for attorney fees by an insured under ORS 742.061(1)? See App.-1.

The Court of Appeals held that a judgment was necessary to recover attorney fees from the insurer under ORS 742.061(1) in *Triangle Holdings*, and that the word "recovery" required a judgment or decree. The plaintiff successfully petitioned this Court for review, but shortly thereafter, the parties settled the case. This Court granted the motion to dismiss based on the settlement, leaving this issue unsettled.

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Purpose and Policy of ORS 742.061(1)

ORS 742.061(1) allows an insured to recover attorney fees from an insurance company when the company receives proof of a valid claim, it does not tender payment within six months, and the insured has to file a lawsuit to obtain payment. The purpose of this statute is to require insurance companies to evaluate claims thoroughly and promptly after they receive the proof of loss, and pay them within six months if they are valid. If an insurance company delays payment of a valid claim for more than six months and forces its insured to file a lawsuit to obtain the benefits, ORS 742.061(1) requires it to pay the insured's attorney fees. *Dockins v. State Farm Ins. Co.*, 329 Or. 20, 985 P.2d 796 (1999).

Without ORS 742.061(1), insurance companies could deny valid claims, and make it very expensive for their insureds to collect them. For smaller claims, it would be economically impractical ever to collect them.

The Court of Appeals opinion in *Triangle Holdings* and its decision in the present case conflict with the purpose, the operation and the language of ORS 742.061(1). They also conflict with this Court's opinion in *Dolan v. Continental Cas. Co.*, 133 Or. 252, 289 P. 1057 (1930). In *Dolan*, the insurer paid the claim before entry of judgment, and this Court held this did not prevent payment of the insured's attorney fees by the defendant. The Court

of Appeals decisions in *Triangle Holdings* and the present case require review by this Court to correct the misunderstanding and confusion they have created.

Reasons for Supreme Court Review

1. The Court of Appeals opinion in *Triangle Holdings* and its decision in the present case undercut the purpose of ORS 742.061(1), and will result in more denials of valid insurance claims. These decisions will encourage insurance companies to deny claims, particularly smaller value claims, regardless of their validity. Insurers know that many insureds cannot afford to pay a lawyer to litigate a valid smaller value claim.

If an insurer can avoid statutory attorney fees by tendering payment of these claims more than six months after proof of claim, but before judgment, there is an insufficient inducement for lawyers to pursue these claims. Lawyers will not take these cases on a contingent basis. As a consequence, many insureds will not be able economically to pursue valid insurance claims, and others with large claims would have to pay significant attorney fees out of their own pockets to collect them.

The Court of Appeals decisions essentially create a large loophole which encourages the denial of valid insurance claims.

2. The Court of Appeals opinion in *Triangle Holdings* and the decision in the present case create confusion and uncertainty regarding the right of an insured to obtain attorney fees under ORS 742.061(1) because they conflict with this Court's decision in *Dolan v. Continental Cas. Co.*, 133 Or. 252, 289 P. 1057 (1930). *Dolan* was an action to collect the benefits of a life insurance policy. The plaintiff prevailed at trial, but this Court reversed because of an error in the trial. On remand, the insurance company prevented the entry of a money judgment by paying the claim in full, and then sought to deny the plaintiff attorney fees. The trial court denied the attorney fees, but this Court reversed.

This Court held that where the insurer compels its insured to sue to recover the amount due on an insurance policy, the insured is entitled to attorney fees from the insurance company. Any other result, this Court stated, would destroy the benefit of the statute. *Dolan*, 133 Or. at 255-56, 289 P. at 1058.

The Bar and the lower courts will not know how to reconcile *Triangle Holdings*, the present case and *Dolan*. Only this Court can resolve this conflict. If this Court does not grant review, there is a significant risk of more litigation of insurance claims in the trial courts with inconsistent

results. And there will be more appeals to the Court of Appeals and to this Court regarding the allowance of attorney fees under ORS 742.061(1).

3. The Court of Appeals opinion in *Triangle Holdings* and in the present case apply to every conceivable insurance claim in Oregon from auto Personal Injury Protection (PIP) and property damage claims to home, health and life insurance claims. It will have a significant effect on many people in the state. The present case needs Supreme Court review to correct the confusion in the enforcement of valid insurance claims which the Court of Appeals decisions have created.

4. The Court of Appeals opinion in *Triangle Holdings* and its decision in the present case will create particular havoc with the enforcement of PIP claims. Under *Triangle Holdings* and the present case, if a motor vehicle insurer refuses to pay a medical bill and the insured is forced to file a lawsuit, the insurer may then pay the medical provider after six months and request dismissal of the lawsuit without any responsibility for the insured's attorney fees. The medical provider will not reject payment of the bill. But under the logic of *Triangle Holdings* and the present case, the plaintiff will not be entitled to any attorney fees because he or she did not obtain a money judgment. In this situation, it is very possible an insured would have to pay more for his or her own attorney fees than the value of the unpaid bill.

ORS 742.061(2) applies to PIP claims. It specifically allows attorney fees for enforcement of PIP benefits if the insurance company does not accept coverage and does not consent to binding arbitration within six months of the proof of loss. App.-2. However, the Court of Appeals decisions in *Triangle Holdings* and the present case conflict with this statute as well. It would deny attorney fees to an insured where the insurance company pays the claim in full and deprives the insured of a money judgment after the six month window in ORS 742.061(2) has closed.

Unless this Court grants review to correct the decisions in *Triangle Holdings* and the present case, the enforcement of PIP claims, which are usually small amounts, may exist in theory only.

5. This Court should also grant review to clarify its decision in *McGraw v. Gwinner*, 282 Or. 393, 578 P.2d 1250 (1978). *McGraw* was a declaratory judgment action to require the Oregon Insurance Guaranty Association to defend the plaintiff against a liability claim, and pay any claim against him. The plaintiff prevailed, but the trial court denied him attorney fees under ORS 742.061(1) because he did not obtain a money judgment. It held that a money judgment was a necessary requirement for the plaintiff to obtain attorney fees. This was Stewart Title's argument for

denying attorney fees to Triangle Holdings, and Farmers' position in the present case.

If a money judgment is necessary to obtain attorney fees under ORS 742.061(1), how may a plaintiff protect his right to attorney fees where an insurer pays the claim directly to a third party or tenders the full claim to the trial court? This Court needs to answer this as well.

6. ORS 742.061(1) contains the term “recovery,” not “money judgment.” This Court needs to clarify the confusion between the language in the statute and its holding in *McGraw*. The trial court based its denial of attorney fees to Triangle Holdings on *McGraw*, and the *McGraw* decision will continue to cause confusion. Given the tension between this Court's decisions in *Dolan* and *McGraw*, will a trial court follow *Dolan* or *McGraw* when an insurer tenders payment of the full claim more than six months after the filing of the proof of claim and after the filing of a lawsuit?

7. Review is also necessary to explain how ORS 742.061(1) survives after *Triangle Holdings* and the present case. It is difficult to understand the Court of Appeals statement that Triangle Holdings could have rejected the tender and insisted on attorney fees as part of the tender. 266 Or. App. at 540. After Stewart Title's payment without any conditions, Triangle Holdings requested attorney fees. In the present case, after payment

of \$11,748.07, Ms. Long requested entry of a supplemental judgment and an order of attorney fees. What more could a court want from Triangle Holdings, and especially Ms. Long, to protect their right to attorney fees?

8. The parties presented the issue clearly in the trial court and in the Court of Appeals. The plaintiff asked the trial court to enter a supplemental judgment in her favor after payment of \$11,748.07 of her claim, and she filed a motion for attorney fees. The trial court denied both, and the Court of Appeals affirmed without opinion.

The Court of Appeals based its opinion in *Triangle Holdings* and in the present case on incorrect grounds

Another reason this Court should grant Ms. Long's petition for review is the Court of Appeals misapplied statutory construction principles in *Triangle Holdings*, and based its decision on an inapplicable case. ORS 731.008 and 731.016 require a court to liberally interpret insurance laws to favor the insurance buying public.

The Court of Appeals reviewed the language of ORS 742.061(1), and stated that the dictionary definition of "recovery" was "the obtaining in a suit at law a right to something by verdict, decree or judgment of the court, especially by the final one deciding the issues involved." It referred to references in Webster's Dictionary and Black's Law Dictionary as supporting this definition, as if that were the only definition of the word

“recovery.” *Triangle Holdings*, 266 Or. App. at 536, 337 P 3d at 1016. The Court of Appeals then concluded that the plain meaning of ORS 742.061(1) requires a judgment for there to be a recovery.

The Court of Appeals definition of “recovery” is not its exclusive definition. Webster’s also defines “recovery” as the “act, process or instance of recovering.” “Recover” can mean “to gain by legal process,” but it also may mean to make up for, bring back to normal or get back. *Webster’s New Collegiate Dictionary* 966 (1st ed. 1973). Black’s Law Dictionary defines “recover” as “to get or obtain again; to get renewed possession of; to win back.” Only in the one sense does it mean “to be successful in a suit.” *Black’s Law Dictionary* 1440 (1951).

If the Court of Appeals had applied the principles in ORS 731.008 and 731.016 in interpreting ORS 742.061(1), it should have concluded that “recovery” has various meanings, and it should apply the meaning which favors the insurance-buying public, not a version which favors insurance companies.

The Court of Appeals also stated that *Becker v. DeLeone*, 78 Or. App. 530, 717 P.2d 1185 (1986), controlled its decision in *Triangle Holdings*. 266 Or. App at 537. Neither party in *Triangle Holdings* cited *Becker* in their

briefs, and *Becker* was not an applicable precedent for the Court of Appeals decision in *Triangle Holdings*.

Becker involved a claim for damages for failure to pay in part for a construction project. The defendant claimed it was liable for nothing, and it counterclaimed against the plaintiff and its bond for damages for defective work. The trial court found for the plaintiff for about \$8,000, and allowed the third party claim against the bond for \$2,000. Instead of two judgments, one against the defendant for \$8,000, and the other against the insurance bond for \$2,000, the court entered one judgment without objection against the defendant for about \$6,000.

On appeal, the Court of Appeals denied the defendant attorney fees under ORS 742.061(1) because it received no judgment. The defendant was not entitled to attorney fees because it agreed with the form of the judgment in the trial court, and did not preserve its assignment of error. *Becker* is not a precedent to deny attorney fees to plaintiffs like *Triangle Holdings* or *Cary Long*, who requested attorney fees in the trial court and did not acquiesce in its failure to enter a judgment in her favor.

If the Supreme Court allows review, OTLA intends to file a brief on the merits.

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Conclusion

For the foregoing reasons, this Court should allow the petition for review, reverse the Court of Appeals decision and remand to the trial court for further proceedings.

Dated this 9th day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 (2)(d) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 2,682 words. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed electronically the foregoing **OREGON TRIAL LAWYERS ASSOCIATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW** with the Supreme Court Records Section, State Court Administrator, on the following through the e-filing system of the Oregon Court of Appeals.

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