

FILED: May 14, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ERIC MILLER,
Plaintiff-Respondent,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin corporation,
Defendant-Appellant.

Multnomah County Circuit Court
101014862

A150186

Christopher J. Marshall, Judge.

Argued and submitted on May 20, 2013.

R. Daniel Lindahl argued the cause for appellant. With him on the opening brief were Lindahl Law Firm PC, Mark E. Olmsted, and Mark E. Olmsted, PC. With him on the reply brief were R. Daniel Lindahl, Lindahl Kaempf PC, Mark E. Olmsted, and Mark E. Olmsted, PC.

Willard E. Merkel argued the cause for respondent. With him on the brief was Merkel & Associates.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

General judgment reversed and remanded, with instructions to enter limited judgment on plaintiff's PIP claim for \$8,039.89 and to reconsider award of attorney fees consistently with this opinion.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by Respondent.
 Costs allowed, to abide the outcome on remand, payable by
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1 NAKAMOTO, J.

2 In this breach of insurance contract case, defendant American Family
3 Mutual Insurance Company appeals a general judgment and money award in plaintiff's
4 favor on his claims for personal injury protection (PIP) benefits and uninsured motorist
5 (UIM) benefits. Pursuant to ORCP 54 E, defendant served plaintiff with an offer of
6 judgment on the PIP claim before trial, which plaintiff accepted. On appeal, defendant
7 raises two assignments of error. It first contends that the trial court erred by ruling that
8 defendant's offer of judgment, once accepted, necessarily included an admission of, and
9 precluded defendant from contesting, its obligation to pay for plaintiff's surgery--the key
10 issue that then remained for trial on the UIM claim. Defendant also contests the trial
11 court's award of attorney fees to plaintiff. We reverse and remand.

12 Plaintiff was involved in an automobile accident with an uninsured driver
13 and initiated this suit against defendant, his automobile insurer, to recover PIP and UIM
14 benefits under his insurance policy. Plaintiff's policy provided for a \$15,000 limit on PIP
15 benefits and a \$50,000 limit on UIM benefits. Plaintiff alleged over \$90,000 in medical
16 expenses, approximately \$80,000 of which was attributable to a spinal surgery that
17 plaintiff had undergone several months after the accident. Defendant had paid some of
18 plaintiff's nonsurgical medical expenses related to the accident (\$6,960.11) under
19 plaintiff's PIP coverage, but defendant refused to pay any of plaintiff's surgery-related
20 expenses because defendant contested the necessity of the surgery. In his complaint,
21 plaintiff sought a judgment for the balance of the PIP policy limit and the \$50,000 UIM

1 policy limit, as well as his costs and reasonable attorney fees.

2 Approximately one month before the 2011 trial date, defendant served
3 plaintiff with an offer of judgment pursuant to ORCP 54 E.¹ Under ORCP 54 E(1), "any
4 party against whom a claim is asserted may * * * serve upon any other party asserting the
5 claim an offer to allow judgment to be entered against the party making the offer for the
6 sum, or the property, or to the effect therein specified." If the party asserting the claim
7 accepts the offer, "judgment shall be given accordingly as a stipulated judgment." ORCP
8 54 E(2).

9 Defendant offered to allow judgment on plaintiff's PIP claim for what
10 amounted to the balance of plaintiff's PIP policy limits. That offer of judgment provided:

11 "Pursuant to ORCP 54 E, defendant offers to allow limited judgment
12 on plaintiff's claim for PIP benefits in the amount of \$8,039.89. This offer
13 does not apply to plaintiff's claim for Uninsured Motorist benefits and
14 should plaintiff accept this Offer to Allow Judgment, the Uninsured
15 Motorist benefits claim will remain at issue. If this Offer to Allow
16 [J]udgment is not accepted and filed within the time and manner allowed
17 under ORCP [54 E], it shall be deemed automatically withdrawn."

18 Plaintiff timely accepted defendant's offer of judgment on the PIP benefits claim. No
19 limited judgment was entered.

20 Then, on the day before trial, plaintiff filed a trial memorandum containing
21 a motion *in limine* seeking an order to prevent defendant from offering evidence at trial
22 that plaintiff's surgery was not necessary, the key disputed issue remaining for trial on the

¹ ORCP 54 E was amended by the Council on Court Procedures in 2010. Those amendments, which became effective January 1, 2012, are not relevant to this appeal; we refer to and quote the rule in effect during the litigation in 2011.

1 UIM claim.² The trial court held a hearing on the motion that same day.

2 At the hearing, plaintiff argued that, by offering to allow judgment with

3 regard to at least some of the surgery expenses, defendant had admitted that the surgery

4 was necessary and could not contest that issue in the trial on plaintiff's UIM claim.

5 Plaintiff's argument was based on the fact that only approximately \$10,000 of his medical

6 expenses were unrelated to the surgery, meaning that, when defendant offered to pay the

7 balance of the \$15,000 PIP policy, some portion of the surgery expenses was necessarily

8 included within that payment. According to plaintiff, his acceptance of the offer of

9 judgment effectively meant that a judgment had been entered against defendant on

10 plaintiff's PIP claim, and, as a result, it had the same effect as any other judgment, *i.e.*, it

11 resolved issues that were necessarily concluded by that judgment, including the issue of

12 whether the surgery was necessary. Accordingly, plaintiff argued, defendant was

13 precluded from contesting the necessity of the surgery. Plaintiff explained his position:

14 "Well, you can't have it both ways. You can't pay for surgical bills
15 that are being reasonably and necessarily incurred and then say that surgery
16 wasn't reasonable or necessary, and that's the conundrum that defendant's
17 offer of judgment places defendant in.

18 "One of the reasons we accepted the limited offer of judgment was
19 just so that it would have that effect. We are entitled to that effect. The
20 statute says so, and the rules on judgment[s] are that the findings that are
21 necessarily--necessarily make up the judgment are conclusively
22 determined. That's one of them."

23 The trial court reserved its ruling to allow defendant to file a brief

² Defendant had also contested the reasonableness of the surgery expenses, but at a pretrial hearing, defendant alerted the court that it did not intend to contest the reasonableness of those expenses at trial.

1 concerning the preclusive effect of the accepted offer of judgment on the UIM claim. In
2 its brief, defendant argued, among other things, that the terms of the offer were restricted
3 to the PIP claim and that issue preclusion did not apply because the offer of judgment had
4 not been made in a different action and the issue had not actually been litigated, which
5 are both requirements for issue preclusion.

6 The next day, the trial court reconvened and summarized the issue before it
7 as: "whether * * * the acceptance of [the] offer to allow judgment[] under the terms that
8 are * * * set forth there in that offer have issue preclusion effect on the defendant and the
9 defendant's ability to contest the * * * necessity of the surgery." After hearing further
10 argument, the court granted plaintiff's motion, ruling that issue preclusion barred
11 defendant from further contesting the necessity of surgery:

12 "[T]he ruling is that there is issue preclusion that operates here, and, you
13 know, it's a--obviously a fact specific inquiry here in this particular case * *
14 * as there always is when we get to issues of issue preclusion, and that we *
15 * * can have issue preclusion within a case here when we have a situation
16 where we've got the offer to allow judgment, that given the amounts that
17 we've got here, necessarily includes amounts for the surgery that's at issue
18 here, and so that would mean that once that offer of judgment's accepted,
19 then the defense is precluded from then arguing the necessity.

20 "* * * * *

21 "So * * * to be clear * * * what the Court's ruling is[,] * * * it's issue
22 preclusion as to the necessity of the surgery because of the amounts that
23 we've got here involved, * * * the idea being that once that offer of
24 judgment is * * * accepted, it apparently involves a determination that the
25 surgery was necessary, at least to the extent of the amount set forth in the *
26 * * offer of judgment."

27 Defendant then confirmed that it did not intend to contest the
28 reasonableness of plaintiff's medical expenses, and, because those expenses exceeded

1 plaintiff's UIM policy limit, the parties agreed that there were no issues left to try.
2 Plaintiff submitted a general judgment to the court, and, after briefing and argument on
3 the issue of attorney fees and costs, the court entered a general judgment in favor of
4 plaintiff for \$58,039.89 in policy benefits, (\$8,089.89 from the offer of judgment and
5 \$50,000 for plaintiff's UIM claim), \$22,230 in attorney fees, and \$775 in costs.
6 Defendant now appeals.

7 In its first assignment of error, defendant argues that the trial court erred in
8 holding that the offer of judgment precluded it from litigating the necessity of the surgery
9 in plaintiff's remaining UIM claim. Defendant contends that, under ORCP 54 E, an
10 offering party can define the terms of the offer, and that, in this case, the offer
11 unambiguously limited itself to plaintiff's PIP claim and provided that, if it were
12 accepted, it would have no effect on the UIM claim. Accordingly, defendant argues, the
13 terms of the offer of judgment did not preclude it from litigating the necessity of the
14 surgery in the trial on the UIM claim. Defendant further argues that the doctrine of issue
15 preclusion--the rationale on which the trial court relied--does not apply to the accepted
16 offer of judgment because it neither occurred in a prior action nor represented a final
17 decision on the merits.

18 In response, and citing *State ex rel State Scholarship Com'n v. Magar*, 288
19 Or 635, 607 P2d 167 (1980), plaintiff again argues that an offer of judgment operates to
20 admit the relevant allegations of the complaint. Here, plaintiff's complaint alleged that
21 his medical expenses were causally related to the accident. Thus, according to plaintiff,

1 defendant's offer of judgment on his PIP claim, which included a portion of the surgery
2 expenses, was an admission that the surgery was necessary.³ Therefore, plaintiff argues
3 that the trial court correctly ruled that defendant was precluded from claiming that the
4 surgery was not causally related to the accident for purposes of plaintiff's UIM claim.
5 Plaintiff also argues that defendant's proffered reading of the offer of judgment is
6 incorrect, and that the terms of the offer cannot be understood as preventing the court
7 from giving preclusive effect to the resulting limited judgment.

8 The parties' arguments concerning the effect of the offer of judgment raise
9 two questions. First, was the accepted offer of judgment in this case a binding admission
10 of the allegations in the complaint concerning the necessity of the surgery? Second, to
11 what extent does an accepted offer of judgment have issue-preclusive effect on any
12 remaining claims in the same lawsuit? Those are questions of law, which we review for
13 legal error. *See Delcastillo v. Norris*, 197 Or App 134, 140, 104 P3d 1158, *rev den*, 338
14 Or 488 (2005) (reviewing the trial court's construction of ORCP 54 E for errors of law);
15 *Reid v. Johnson*, 161 Or App 92, 94, 983 P2d 1061, *rev den*, 329 Or 527 (1999)
16 (reviewing a trial court's ruling with respect to issue preclusion for errors of law). We
17 first conclude that, in light of the nature of an offer of judgment under ORCP 54 E, the

³ Defendant also challenged that contention below by arguing that plaintiff sought "past and future loss of wage earning capacity"; plaintiff could have been seeking PIP benefits for such losses; and we suggested in *Wade v. Mahler*, 167 Or App 350, 357, 1 P3d 485, *rev den*, 331 Or 334 (2000), that such losses could be payable as PIP benefits. Defendant does not raise that argument on appeal, and we assume that the PIP benefits included payment for a portion of plaintiff's surgical expenses.

1 accepted offer of judgment did not give rise to an admission concerning the necessity of
2 the surgery that precluded defendant from litigating that issue in the trial on the UIM
3 claim.

4 Again, ORCP 54 E(1) provides, in relevant part, that a party against whom
5 a claim is asserted may offer to allow judgment to be entered against that party "for the
6 sum, or the property, or to the effect therein specified." If the party asserting the claim
7 accepts the offer, "judgment shall be given accordingly as a stipulated judgment." ORCP
8 54 E(2). An offer of judgment under ORCP 54 E is an agreement between the parties and
9 is "in the nature of a contract, approved by the court." *Nieminen v. Pitzer*, 281 Or 53, 57,
10 573 P2d 1227 (1978). The Supreme Court has said that, under ORCP 54 E, "the nature
11 and content of offers of compromise are unrestricted" and that "[t]he words 'for the sum *
12 * * or to the effect therein specified' are broad." *For Counsel, Inc. v. Northwest Web Co.*,
13 329 Or 246, 253, 985 P2d 1277 (1999) (omission in *For Counsel, Inc.*). We too have
14 recognized that the fact that ORCP 54 E allows a defendant to make an offer "to the
15 effect therein specified * * * expressly allows a defendant to define the offer." *For*
16 *Counsel, Inc. v. Northwest Web Co.*, 154 Or App 492, 498, 962 P2d 707 (1998), *aff'd*,
17 329 Or 246, 985 P2d 1277 (1999) (internal quotation marks omitted). When a plaintiff
18 has accepted a defendant's offer of judgment, the trial court's role is purely ministerial in
19 that "the only judgment that can properly be entered is one which is in accordance with
20 the terms of the offer, as accepted." *Magar*, 288 Or at 642.

21 Accordingly, we look first to defendant's offer of judgment to determine its

1 terms and its effect. The offer stated that defendant was proposing "to allow limited
2 judgment on plaintiff's claim for PIP benefits in the amount of \$8,039.89." It expressly
3 stated that the offer "does not apply to plaintiff's claim for Uninsured Motorist benefits."
4 Furthermore, the offer stated its effect: if plaintiff accepted it, "the Uninsured Motorist
5 benefits claim will remain at issue." No terms of the offer constitute express admissions
6 of any of the allegations concerning the UIM benefits claim in plaintiff's complaint.
7 Indeed, when accepting the offer, plaintiff understood from the express limitations on the
8 scope of the offer that defendant considered the UIM benefits claim to be disputed and
9 expected it to be the subject of the upcoming trial, as plaintiff's counsel candidly
10 acknowledged at the pretrial hearing. By its terms, the offer of judgment was directed to
11 a limited judgment on and, thus, a resolution of the PIP claim only, not the UIM claim,
12 which would "remain at issue." By accepting the offer, plaintiff accepted its terms.

13 Plaintiff contends that the offer can be read to permit his "preclusion by
14 operation of law" argument. In that regard, plaintiff contends that the phrase "does not
15 apply to plaintiff's [UIM] claim" refers only to the fact that defendant was not offering
16 entry of a limited judgment on that claim. Because defendant's offer was silent as to the
17 legal effect of entry of a limited judgment on the PIP claim, plaintiff reasons that he was
18 entitled to the preclusive effect of a judgment on the PIP claim to resolve the outstanding
19 UIM claim. Citing *Magar*, plaintiff contends that a party that has made an accepted offer
20 of judgment under ORCP 54 E consents to the entry of a judgment against it and admits
21 relevant allegations of the complaint, including those that may bear on other claims

1 apparently excluded from the offer of judgment. We, however, find no such holding in
2 that case. Instead, *Magar* supports the principle that a trial court must enter judgment in
3 accordance with the terms of the accepted offer of judgment, and, if the offer is for only
4 part of the judgment that the opponent seeks in its complaint, the judgment entered must
5 be limited to that part, in accordance with the terms of the offer. 288 Or at 642. We
6 reject plaintiff's proffered reading of the offer as unreasonable and contrary to law.

7 In *Magar*, the Supreme Court, in stating the principles underlying offers of
8 judgment, quoted the following passage in *Westfall v. Wilson*, 255 Or 428, 431, 467 P2d
9 966 (1970), concerning consent decrees:

10 "* * * As a result, such a decree is so binding as to be absolutely
11 conclusive upon the consenting parties, and it can neither be amended or in
12 any way varied without a like consent, nor can it be reheard, appealed from,
13 or reviewed upon a writ of error. The one only way in which it can be
14 attacked, or impeached, is by an original bill alleging fraud in securing the
15 consent."

16 *Magar*, 288 Or at 641-42 (internal quotation marks omitted).⁴ Plaintiff appears to rely on
17 that passage for the proposition that a "confession of [j]udgment operates to admit the
18 relevant allegations of the [c]omplaint."

19 Plaintiff's argument fails for three reasons. First, plaintiff appears to
20 wrongly assume that defendant's offer of judgment in this case was a "confession of
21 judgment." As the Supreme Court explained in *Russell v. Sheahan*, 324 Or 445, 449-50,

⁴ The court in *Magar*, explained that the entry of a judgment based on an accepted offer of compromise, or offer of judgment, "is, in effect, the entry of a consent decree." 288 Or at 641.

1 927 P2d 591 (1996), a judgment entered pursuant to ORCP 54 E is a stipulated judgment,
2 not a judgment by "confession."⁵ Second, to the extent that plaintiff intended to argue
3 about the effect of a consent judgment and not a confession of judgment, we note that the
4 parties litigated and the trial court ruled on the effect of an accepted offer of judgment
5 under ORCP 54 E on the disputed issue concerning the UIM claim, not a type of
6 judgment. Indeed, the court had not entered any judgment as a result of defendant's offer
7 at the time of its ruling on plaintiff's motion *in limine*.

8 Third, the excerpt from *Westfall* does not support plaintiff's reading of
9 *Magar*. All that excerpt states is that, when an offer of judgment has been accepted, the
10 terms are binding on the parties--whatever they may be. It does not provide that the
11 accepted offer of judgment operates as an admission of the allegations in the plaintiff's
12 complaint, regardless of the terms of the offer. Instead, plaintiff's proposed rule is
13 contrary to the accepted principle that ORCP 54 E permits a defendant to define the terms
14 of an offer of judgment and flies in the face of *Magar*. Because it is instructive, we
15 describe that case in detail.

16 *Magar* involved an action to enforce a promissory note that included a
17 clause providing for attorney fees in the event of default. Before trial, the defendant

⁵ The difference between the two is that a judgment by confession "is a judgment entered pursuant to the voluntary act or agreement of *one* party, *viz.*, a defendant," that "results from the unilateral act or failure to act of a defendant," whereas a stipulated judgment "is a judgment entered with the consent of *both* the party against whom the judgment is entered *and* the party in whose favor the judgment is entered." *Russell*, 324 Or at 449-50 (emphasis in original; footnote omitted).

1 made the plaintiff an "offer to compromise" pursuant to *former* ORS 17.055 (1977),
2 *repealed by* Or Laws 1979, ch 284, § 199, the predecessor to ORCP 54 E.⁶ The
3 defendant offered to allow judgment for the balance due on the note plus interest;
4 however, the offer was silent as to the plaintiff's prayer for attorney fees under the terms
5 of note. After the plaintiff accepted the offer, the trial court entered a judgment in its
6 favor for the balance of the note plus interest. The judgment also stated that neither party
7 was entitled to recover attorney fees.

8 The plaintiff appealed, arguing that it was entitled to recover its fees by
9 operation of law because it was the prevailing party in an action to enforce a contract
10 containing a fee provision. The Supreme Court rejected the plaintiff's argument and
11 affirmed. *Magar*, 288 Or at 641-42. The court explained that "[t]here is no good reason
12 why a defendant in a case such as this should not be permitted to make an 'offer of
13 compromise' under [*former*] ORS 17.055 limited to payment of the amount sought as a
14 judgment for the balance due on the note, without making an offer to also pay the amount
15 sought as a judgment against him for attorney fees." *Id.* at 640 (footnote omitted). Thus,
16 despite the fact that the defendant's offer included full payment on the note, the Supreme
17 Court did not treat the acceptance of that offer of judgment as an admission that the

⁶ *Former* ORS 17.055, although different in some respects from ORCP 54 E, contained the same broad language concerning the terms of an offer stated in the rule:

"[T]he defendant may * * * serve upon the plaintiff an offer to allow judgment * * * to be given against him for the sum, or the property, or to the effect therein specified."

1 defendant had defaulted on the note and that the plaintiff was entitled to attorney fees
2 under the note. To the contrary, the court held that when an offer of judgment "does not
3 include a part of the judgment sought by the complaint * * * the only judgment that can
4 properly be entered is one which is in accordance with the terms of the offer, as
5 accepted." *Id.* at 642.

6 As *Magar* and the other cases explain, an offer of judgment is in the nature
7 of a contract between the parties, and courts must adhere to the terms of the offer and
8 "enter judgment in accordance with the parties' agreement." *Russell*, 324 Or at 454. In
9 this case, given the terms of defendant's offer of judgment, plaintiff was entitled only to a
10 judgment "on plaintiff's claim for PIP benefits in the amount of \$8,039.89." The trial
11 court erred in concluding that defendant had admitted that the surgery was necessary.

12 Additionally, the trial court's ruling that defendant was precluded from
13 litigating the necessity of surgery in the UIM claim lacks support from the doctrine of
14 issue preclusion, which is inapplicable in this case. "Issue preclusion arises in a
15 subsequent proceeding when an issue of ultimate fact has been determined by a valid and
16 final determination in a prior proceeding." *Nelson v. Emerald People's Utility Dist.*, 318
17 Or 99, 103, 862 P2d 1293 (1993). "[I]ssue preclusion does not bar relitigation of an issue
18 common to separate claims when those claims are litigated as part of a single action or
19 lawsuit." *Westwood Construction Co. v. Hallmark Inns*, 182 Or App 624, 631-32, 50 P3d
20 238, *rev den*, 335 Or 42 (2002) (emphasis omitted); *accord Minihan v. Stiglich*, 258 Or
21 App 839, 855, 311 P3d 922 (2013) ("The doctrine of issue preclusion applies to

1 subsequent lawsuits and not to separate claims within the same lawsuit." (Internal
2 quotation marks and emphasis omitted.)).

3 Here, plaintiff's PIP and UIM claims were litigated in a single action. As
4 explained above, defendant's offer of judgment on plaintiff's PIP claim did not act as an
5 admission of the issues or elements underlying that claim. But, even if plaintiff's
6 acceptance of the offer had determined issues common to the PIP and UIM claims, the
7 offer of judgment would still not have issue-preclusive effect because plaintiff's PIP and
8 UIM claims were litigated in a single lawsuit. Accordingly, issue preclusion did not bar
9 relitigation of an issue common to those claims, including the issue of whether plaintiff's
10 surgery was necessary.⁷ We therefore reverse the general judgment and remand, with
11 instructions to enter a limited judgment for \$8,039.89 on plaintiff's PIP claim in
12 accordance with the offer of judgment.

13 We turn to defendant's second assignment of error, in which it challenges
14 the trial court's award of attorney fees on plaintiff's UIM claim. In his fee petition,
15 plaintiff sought attorney fees in relation to both his PIP and UIM claims under ORS
16 742.061(1), a statute that allows a plaintiff in an action against an insurer to recover
17 attorney fees and costs under certain conditions, and ORCP 46 C, a rule of civil
18 procedure allowing a party to recover expenses incurred in proving the truth of a matter

⁷ We note that our analysis on this issue is limited to circumstances in which an offer of judgment was made on fewer than all of the plaintiff's claims in the same lawsuit and the plaintiff urges issue preclusion. We do not address the preclusive effect that a judgment entered pursuant to ORCP 54 E in one case may have in litigation between parties in a subsequent case.

1 denied by the other party in a request for admissions. Plaintiff contended that he was
2 entitled to attorney fees under ORS 742.061(1), because he recovered an amount
3 exceeding any presuit tender by defendant. Plaintiff also argued that he was entitled to
4 attorney fees on the UIM claim under ORCP 46 C, because defendant, through the offer
5 of judgment, accepted responsibility for the surgery and demonstrated that its previous
6 denial of that admission was unreasonable.

7 Over defendant's objections, the trial court awarded plaintiff attorney fees
8 on both of the bases alleged in plaintiff's fee petition. As a result, an attorney fee award
9 of \$22,230 was included in the general judgment, though the court did not specify what
10 portion of that award related to plaintiff's PIP or UIM claims, and did not identify what
11 portion was granted pursuant to ORS 742.061 or ORCP 46 C.

12 On appeal, defendant does not contest the entire fee award, challenging that
13 award only as it relates to the UIM claim. Defendant argues that, if we reverse the
14 judgment as it relates to the UIM claim, then ORS 20.220(3)(a) requires that we also
15 reverse the attorney fee award relating to that claim.⁸ Defendant also argues that the trial
16 court erred in awarding attorney fees under ORCP 46 C because, at the time defendant
17 denied the request for an admission concerning plaintiff's surgery, it reasonably believed
18 that it might prevail on the question whether the surgery was necessary based on two
19 reports from a doctor. Plaintiff does not address those arguments.

⁸ Defendant withdrew an argument that the "safe harbor" provision of ORS 742.061(3) applies in this case.

1 First, we agree with defendant that, under ORS 20.220(3)(a), our reversal
2 as to the UIM claim requires reversal of the portion of the attorney fees associated with
3 that claim. *See* ORS 20.220(3)(a) ("When an appeal is taken from a judgment under ORS
4 19.205 to which an award of attorney fees or costs and disbursements relates[,] * * * [i]f
5 the appellate court reverses the judgment, the award of attorney fees or costs and
6 disbursements shall be deemed reversed[.]"). Here, the record indicates that the trial
7 court awarded plaintiff attorney fees for prevailing on *both* his PIP and UIM claims,
8 pursuant to ORS 742.061(1). Because part of the attorney fees awarded under ORS
9 742.061(1) related to the UIM claim, our reversal of the judgment on that claim
10 necessitates reversal of the attorney fees awarded on that basis.

11 Next, defendant argues that the trial court erred in awarding plaintiff
12 attorney fees on the UIM claim as a sanction under ORCP 46 C. Under ORCP 46 C, if a
13 party

14 "fails to admit * * * the truth of any matter, as requested under [ORCP] 45,
15 and if the party requesting the admissions thereafter proves * * * the truth
16 of the matter, the party requesting the admissions may apply to the court for
17 an order requiring the other party to pay the party requesting the admissions
18 the reasonable expenses incurred in making that proof, including reasonable
19 attorney's fees. The court shall make the order unless it finds that (1) the
20 request was held objectionable pursuant to [ORCP] 45 B or C, or (2) the
21 admission sought was of no substantial importance, or (3) the party failing
22 to admit had reasonable ground to believe that such party might prevail on
23 the matter, or (4) there was other good reason for the failure to admit."

24 We review the trial court's decision to award fees under ORCP 46 C for errors of law and
25 abuse of discretion, *Adams v. Hunter Engineering Co.*, 126 Or App 392, 396, 868 P2d
26 788 (1994), and reverse because our holding on defendant's first assignment of error

1 vitiates an apparent factual basis for the award as to the UIM claim.

2 In this case, the court did not find that defendant met one of the four
3 exceptions to ORCP 46 C and appears to have accepted plaintiff's argument urging an
4 award under the rule. However, a key assumption of plaintiff's argument was that
5 defendant later admitted the necessity of the surgery through its offer of judgment, which
6 demonstrated that defendant lacked a reasonable ground to believe that it would prevail
7 on the matter and lacked a good reason for its earlier response to plaintiff's request for an
8 admission that all treatment he had received was necessary because of the accident. As
9 we explained above, however, the accepted offer of judgment did not constitute an
10 admission that the surgery was necessary, and thus, that assumption was incorrect.
11 Accordingly, we reverse the portion of the attorney fee award granted under ORCP 46 C
12 to the extent it related to plaintiff's UIM claim. And, because it is unclear what amount
13 of the fee award is properly allocated to the PIP claim, we reverse and remand for the
14 trial court to make that determination.

15 General judgment reversed and remanded, with instructions to enter limited
16 judgment on plaintiff's PIP claim for \$8,039.89 and to reconsider award of attorney fees
17 consistently with this opinion.