IN THE SUPREME COURT OF THE

STATE OF OREGON

CARY LONG,

Plaintiff-Appellant,
Petitioner on Review,

v.

FARMERS INSURANCE COMPANY OF OREGON,

Defendant-Respondent,
Respondent on Review.

Marion County Circuit Court
Case No. 12C23950

Court of Appeals Case No.
A156674

Supreme Court Case No. S063701

PETITIONER'S OPENING BRIEF ON THE MERITS

Appeal from the Final Judgment of the Circuit Court
for Marion County, Hon. Thomas Hart, Circuit Court Judge.

Court of Appeals decision: September 23, 2015 — Affirmed Without Opinion
Panel - Lagesen, J., Nakamoto, J., and Garrett, J.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASELAW

COURT RULES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. NATURE OF THE ACTION

This is a first party insurance claim for damage resulting from a ruptured plumbing pipe in Plaintiff-Petitioner on Review Cary Long's kitchen wall in December 2011. Following Plaintiff's timely proof of loss, Defendant-Respondent on Review Farmers Insurance Company ("Defendant") refused to pay the full value of the claim, instead paying only demolition costs within the initial six-month period. Eleven months after Plaintiff filed the proof of loss, with the majority of the claim still unpaid, Plaintiff filed suit for breach of contract, breach of the covenant of good faith and fair dealing, and to compel submission of the claim to appraisal, as required in the insurance contract.

In the course of litigation, Plaintiff was successful in compelling Defendant to abide by the terms of its own contract and submit the damages to an appraisal panel. Then, after the panel reached a unanimous appraisal value (well over a year and a half after filing the proof of loss), Defendant provided more partial payments to Plaintiff, including a substantial payment to Plaintiff on the first day of trial. Judge Albin Norblad granted Plaintiff's motion to confirm the appraisal awards, except for one line item ($27.19 for dry rot repairs). Judge Norblad denied Defendant's cross motion for partial summary judgment, seeking a no coverage decision on three items from the appraisal awards. Judge Norblad denied the coverage motion, except for the same dry rot

item.[1]

At trial, the court refused to acknowledge the damages awarded at appraisal and confirmed by the court previously. Instead the court sent the legal issue—the question of coverage—to the jury, and instructed the jury to decide the damage items awarded at appraisal. In instructing the jury, the court commented on the evidence, gave instructions on defenses that were not asserted, and refused to give an anticipatory breach instruction. ER 36. The court sent Plaintiff's claim that Defendant breached the implied covenant of good faith and fair dealing to the jury with the directive that they were to assign percentages of fault for breach of the duty of good faith to ***each*** party, even though Defendant had not asserted any such defense or counterclaim. The jury returned an inconsistent verdict, finding Defendant had breached the covenant by 67 percent, to Plaintiff's 33 percent. The jury awarded no damages, and the trial court refused to enter judgment for Plaintiff for the amounts awarded in the appraisal but remaining unpaid. The court entered a judgment for Defendant, assessed costs against Plaintiff, and denied Plaintiff's attorney fee petition.

B. RELIEF SOUGHT IN TRIAL COURT

Following Defendant's piecemeal payment of most of a contractually

[1] After Judge Norblad's untimely passing, the case was assigned to Judge Thomas Hart for trial.

mandated appraisal decision, over two years from filing the proof of loss, Plaintiff sought a judgment below at trial for the following unpaid items awarded in the appraisal proceedings: an engineer's report ($338.40), plumbing repairs ($478.06), lost rent ($4,900.00), and prejudgment interest ($2,202.82).

C. NATURE OF JUDGMENT ENTERED BY TRIAL COURT

Following the trial court's instructions, objected to by Plaintiff, the jury found no breach and no damages for Plaintiff. The trial court subsequently entered a judgment in Defendant's favor, and later entered a supplemental judgment in favor of Defendant for costs.

D. SUMMARY OF MATERIAL FACTS

In late December of 2011, a pipe in Plaintiff's kitchen ruptured, causing extensive damage to her kitchen and to a downstairs apartment. ER 29. Plaintiff submitted her proof of loss on January 12, 2012. ER 30. Plaintiff's contractor then submitted a complete estimate of the cost of repairs, about $25,000, which was provided to Defendant on February 1, 2012, as further proof of loss on the claim. ER 1, 2, 30. Defendant paid approximately $7,000 for initial demolition, but then refused to pay for further necessary repairs or submit to appraisal to value the claim. ER 6, 30. Defendant's counsel instead demanded an Examination Under Oath (EUO). ER 6-7. Having made no

further progress, Plaintiff filed suit in November 2012 asserting breach of contract, breach of the covenant of good faith and requesting that Defendant be ordered to submit to appraisal. Plaintiff sat for her EUO on January 7, 2013.

Following the EUO, Defendant still refused to provide further payments, and refused to engage in the appraisal required under the contract. Plaintiff moved to compel Defendant to submit to appraisal and the trial court granted that motion. Despite the order, Defendant failed to notify its own designated appraiser of his appointment for weeks, attempted to disqualify Plaintiff's appraiser, and asked the appraisal umpire to delay the appraisal. ER 15, 19-20, 21-22. Defendant's counsel also rejected the idea of staying the litigation pending the appraisal. ER 11-12. Judge Norblad denied the motion to disqualify and, once again ordered Defendant to submit to appraisal within 60 days of May 20, 2013. ER 9-10.

On July 9, 2013, and August 5, 2013 the appraisal panel unanimously issued appraisal awards in Plaintiff's favor, totaling $19,510.43 in replacement cost value (RCV) — of which Defendant had only paid approximately $7,000. ER 23-24. The only issue left for trial after the appraisal was how many months of lost rent should be awarded to Plaintiff. *See* ER 24.[2] This party-

[2] The appraisal award provided: "The Appraisal Panel determines rental loss at $200 per month with six (6) weeks for repairs to be completed, but does NOT rule on when reconstruction should have commenced or been completed; NOR is the Appraisal Panel ruling on the extent or cause of any delays during the

allocated dollar value in lost rent was the only valuation issue left for trial after the appraisal ruling because the panel specifically accepted the monthly amount, but left the issue open as the parties' responsibilities for the amounts.

Plaintiff moved to confirm the appraisal awards and Defendant cross moved to exclude coverage for the plumbing repairs, the engineering expenses and dry rot repairs, Judge Norblad confirmed the appraisal awards on October 31, 2013, with the exception of "dry rot repair," and noted that any "[u]nresolved issues from the appraisal [*i.e.* the amount of lost rent to be paid] will be determined at the time of trial." Tr 27, 30; ER 34-35; Plaintiff's Trial Brief at 3. Defendant's summary judgment motion seeking denial of coverage was denied (except for the same dry rot repairs). This consequently amounted to an affirmative ruling in Plaintiff's favor on the coverage issues. ER 34-35. *See Busch v. Ranger Ins. Co.*, 46 Or App 17, 22 n4, 610 P2d 304 (1980) (all risk homeowner's policy, coverage is presumed unless expressly excluded). Thus, after Judge Norblad's ruling, there were no coverage issues remaining.

From July 11, 2013 (following the first appraisal award) until the first day of trial, February 26, 2014, Defendant paid Plaintiff an additional $11,748.07 — of which $4,214.18 was paid by on the first day of trial. ER 25-28. All of these payments took place 18 months after proof of loss, except for

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claim process. Loss of rental income is accumulating from January 1, 2012 until repairs are completed." ER 24.

ther last payment, which was twenty six months after proof of loss.

Judge Norblad was replaced by Judge Hart for trial. Plaintiff submitted motions in limine to exclude jury re-examination of coverage ruled upon by Judge Norblad, and the amount of damages determined by the appraisal. The jury returned a verdict in Defendant's favor on the breach of contract claim for these three remaining items, the jury then found both parties to have violated the covenant of good faith (67% fault for Defendant, 33% fault for Plaintiff), yet awarded no damages to Plaintiff despite finding Defendant primarily responsible. ER 45-46. The trial judge characterized the verdict as "inconsistent." TR 688. Despite this, the trial court denied Plaintiff's JNOV, refused to enter judgment for Plaintiff in any amount, denied Plaintiff's attorney fee petition and entered judgment in Defendant's favor.

E. QUESTIONS PRESENTED ON REVIEW

(1) Is an insured entitled to attorney fees under ORS 742.061(1) if the insurer pays money owed the insured more than six months after proof of loss, if there is no entry of judgment in the insured's favor?

(2) Did the trial court err by sending the issue of whether certain damages were covered by the insurance policy to the jury as fact questions?

(3) Did the trial court err in instructing the jury on defenses not raised in defendant's answer?

F. PROPOSED RULES OF LAW

(1) An insured is entitled to attorney fees under ORS 742.061(1) if the insured files suit and recovers more from the insurer than was tendered within six months after proof of loss, even where such eleventh-hour tender prevents entry of a money judgment.

(2) Whether or not a claim is covered by an insurance policy is a question of law to be decided by the court, not a jury. In this case, the denial of Defendant's coverage motion and confirmation of the appraisal award were decisions on coverage and damages. The coverage issue and the damages awarded by the unanimous appraisal panel should not have gone to the jury.

(3) Jury instructions must be limited to the law, on those matters actually in controversy, as stated by the pleadings. Jury instructions asserting unpled defenses and commenting on the evidence are improper. Defendant's answer in this case failed to assert a failure to mitigate or allege a breach of the duty of good faith. Yet, the court instructed the jury as if these defenses had been asserted. The comments by the court on the posture of the case amounted to commentary on evidence.

G. RELIEF REQUESTED

Plaintiff seeks a decision reversing the Judgment and Supplemental Judgment entered by the trial court, a remand for entry of judgment on the

appraisal, plus prejudgment interest on Defendant's untimely tenders and instructions to award the attorney fees claimed by Plaintiff, since Defendant did not challenge the amount claimed below.

II. ARGUMENT

A. SUMMARY OF THE ARGUMENTS

1. Plaintiff is Entitled to Her Attorney Fees Following the Piecemeal Payments from Defendant.

ORS 742.061 is not an invitation to gamesmanship. ORS 742.061(1) mandates that fees be awarded in any action brought after six months from the proof of loss, whenever an insured obtains a "recovery" greater than any amount tendered by the insurer. Yet in *Triangle Holdings, II, LLC., v. Stewart Title Guaranty Co*., 266 Or App 531, 337 P3d 1013 (2014), the Court of Appeals defined "recovery" under ORS 742.061(1) to mean "money judgment" based on one of several common definitions of the term and prior caselaw from when the term "judgment" appeared in the statute. However, the word "judgment" no longer appears anywhere in the current version of the statute. *Cf Triangle*, 266 Or App at 535, quoting Or Laws 1919, ch 110.

Allowing an insurer to string out payments up to the day of trial, and then denying attorney fees as a result of their delay, circumvents the statute and encourages strategic nonpayment by insurers. *Triangle Holdings* should be

reversed and ORS 742.061 clarified to encourage prompt and full payment of insurance claims.

2. The Court in this Case Decided the Issues of Coverage and Damages as a Matter of Law When it Confirmed the Appraisal; the Trial Judge Should Not Then Have Submitted the Issue to the Jury.

Whether an insurance policy covers a loss is a question of law for the court. *Wilson v. Tri-County Metro. Transp. Dist.*, 343 Or 1, 11, 161 P3d 933, 939 (2007). After the jointly selected appraisal panel unanimously decided the amount of damages, and the awards were confirmed by the court, the damages issue was decided. Contractually agreed-upon appraisal removes the issues decided in the appraisal from jury review, under the circumstances of this case. *Molodyh v. Truck Ins. Exchange*, 304 Or 290, 293-96, 744 P2d 992 (1987). Furthermore, appraisal awards are also not subject to judicial review, except in the case of fraud or misconduct by the appraisers. *Lincoln Constr. v. Thomas J. Parker & Assoc.*, 289 Or 687, 617 P2d 606 (1980).

The appraisal process here decided the damages issues, except for lost rents. Judge Norblad decided the coverage issue by denying Defendant's summary judgment motion on coverage (with the exception of the dry rot). The judge at trial, erred by sending the already decided question of coverage for the three disputed line items (Tr 55) to the jury.

3. The Trial Judge Erred by Instructing the Jury that Damages Awarded at Appraisal Were Yet Undecided, and in Allowing Unpled Defenses to Factor in the Decison.

The trial judge's instructions to the jury contained numerous prejudicial errors. The trial court commented on the evidence in a partisan way by, *inter alia*, saying that Defendant had paid everything owed following an appraisal. This was both factually inaccurate as well as an improper comment on the evidence. *Rogers v. Meridian Park Hospital*, 307 Or 612, 616, 772 P2d 929 (1989); ORCP 59B. The court also refused to instruct the jury on the doctrine of anticipatory breach. ER 36. That instruction, which is an accurate statement of the law, would have allowed the jury to find that, by virtue of the appraisal awards, Defendant had breached the contract and could not require performance of conditions in the contract by the victim of its breach.

The trial court gave a "failure to mitigate" instruction and instructed the jury that it was to consider both the Defendant's and Plaintiff's bad faith and then compare their relative behavior to determine whether there was a breach of the implied covenant of good faith and fair dealing by either party. These instructions were given despite there being no failure to mitigate defense or bad faith counterclaim pleaded by Defendant.

It is reversible error for the trial court to include in its jury instructions issues outside of the scope of the pleadings. *Blake v. Webster Orchards*, 249 Or 348, 352-53, 437 P2d 757 (1968). Finally, there can be no allocation of the

breach of good faith and fair dealing under Oregon law. Once an insurer breaches its contractual duties, it excuses the insured's compliance with other provisions of the contract. *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co*., 219 Or 110, 116, 341 P2d 110 (1959); *Groce v. Fidelity General Ins. Co*., 252 Or 296, 302, 448 P2d 554 (1968). The trial court erred in all of these instructions to the jury, and in failing to give Plaintiff judgment notwithstanding the verdict.

B. ARGUMENTS ON THE MERITS

1. Plaintiff is Entitled to Attorney Fees Because She Undeniably Recovered More than Defendant Tendered within Six Months of Her Proof of Loss.

Insurance companies have always gamed the system as a means of maximizing profits. Insurance companies regularly refuse to pay valid claims, particularly those brought by the elderly or single women, such as Cary Long, as a matter of tactical profiteering. In those cases where a customer retains counsel and brings suit, they parcel out whatever payments they do make sporadically up to the day of trial, then they say the case is moot. This sort of cynical maneuvering is not what the Oregon Legislature intended when it enacted the Insurance Code, and specifically ORS 742.061(1).

Plaintiff's proof of loss was made no later than January 12, 2012, when Defendant's adjuster visited the site and viewed the damage. ER 30. Defendant paid for the demolition, but refused to pay for repairs. Despite

reasonable, and repeated, demands Defendant refused to submit to appraisal, even though submission was mandatory under the terms of the contract as enforced in Oregon law. *Molodyh v. Truck Ins. Exchange*, 304 Or 290. Because Defendant refused to submit to the appraisal process, Plaintiff was forced to file suit and compel Defendant to do so, in order for her claim to be properly valued.

Litigation here was not undertaken for pleasure. Indeed, by the time of trial, Plaintiff had been forced to endure living with a demolished kitchen for two full years. Nor was litigation fruitless. Plaintiff ***recovered*** an additional $11,748.07 after appraisal, which Defendant had refused to pay for a year and a half to that point (with over two years needed to obtain the last $4,218). Plaintiff recovered this additional money only because she filed suit, at considerable expense, and was willing to see it through. To this day, Defendant still refuses to pay the additional monies awarded in the appraisal for the plumbing repairs and engineer.

This brief will first discusses the code, followed by a summary of cases interpreting the attorney fee provision. Next, Plaintiff examines the recent *Triangle Holdings* case from the Oregon Court of Appeals. Plaintiff then discusses why this Court should overrule that decision on public policy grounds, and concludes by noting that the attorney fee award amounts were unchallenged below, allowing this court to approve Plaintiff's petition as it was

submitted to the trial court.

a. Attorney fees in Insurance Litigation.

The availability of attorney fee awards against insurers was intended as the proverbial stick to facilitate speedy resolution of insurance disputes. Under ORS 742.061(1), if an insurer fails to settle a claim within six months of proof of loss, a policyholder has a right to sue and, if she recovers more that the amount tendered in that six-month period, be reimbursed for her attorney fees. ORS 742.061(1) provides:

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

(Emphasis added). This Court has plainly stated that "the statute was not intended to postpone litigation or defer recovery by an insured but was intended to protect an insured who has suffered a loss from annoying and expensive litigation. In other words, the statute seeks to protect ***insureds*** from the necessity of litigating their valid claims. It has no converse purpose of protecting insurers from litigation." *Dockins v. State Farm Ins. Co.*, 329 Or 20, 29, 985 P2d 796 (1999) (emphasis in original) (citation and internal quotation marks omitted). *See also* ORS 731.008. That is the context in which ORS

742.061 must be interpreted. *See Polacek & Polacek*, 349 Or 278, 284, 243 P3d 1190 (2010) ("context includes other provisions of the same or other related statues, the pre-existing statutory framework within which the statute was enacted, and prior opinions of this court interpreting the pertinent statutory wording"). This brief now turns to what this Court has said in the past.

b. Prior Cases Interpreting ORS 742.061(1).

This Court has provided what would seem to be ample guidance to lower courts in applying the attorney fee statute. In one recent example, *Morgan v. AMEX Assurance Co*., 352 Or 363, 287 P3d 1038 (2012), this Court summarized the history of ORS 742.061(1) and previous versions of the statute with respect to limitations on the state's authority to regulate policies. The two leading cases on the application of ORS 742.061(1) are *Dockins v. State Farm Insurance Company*, 329 Or 20, and *Dolan v. Continental Casualty Co.*, 133 Or 252, 289 P 1057 (1930). *Dockins* and *Dolan* are dispositive in Plaintiff's case, and both rejected the approach that Defendant tries here.

Dockins involved a claim by an insured to its insurer for failure to defend or cover costs of a clean-up action brought by DEQ over contaminated groundwater. 329 Or at 22. The adjuster had initially denied coverage following the discovery and report of the contamination, and the insured brought suit five months later for failure to cover the loss. *Id.* at 23. After the insured provided the insurer with DEQ documentation that indicated some basis

for coverage —approximately six months after the initial report — the insurer again refused coverage. Following more litigation, including unsuccessful motions for summary judgment by the insured, the parties settled — around thirteen months from the initial report to the insurer and about nine months from filing the complaint. *Id.* at 23-24. A judgment was entered on the settlement. *Id.*

This Court held unequivocally that after a proof of loss, only a timely tender under ORS 742.061(1) (within six months of the proof of loss) can defeat a claim for statutory attorney fees. The *Dockins* court stated:

> "Unless and until the legislature decides to provide otherwise, ***only a timely tender (which State Farm's was not) can defeat a prevailing insured's right to attorney fees***. In the context of the present case, in which the filing of the insured's complaint is deemed to be the 'proof of loss,' that means that State Farm had six months from the date of service of the complaint in which to make a tender, i.e., an unconditional offer to pay money. As noted, it did not meet that deadline."

Id. at 33 (emphasis added). This Court also noted that while a tender can come at any point in the litigation timeline, it still must be timely with respect to the proof of loss. *Id.* The *Dockins* court went on to say:

> "As construed by this court, ORS 742.061(1) provides that plaintiffs are entitled to attorney fees if their recovery exceeds the amount of any timely tender made by defendant. State Farm did not make a timely tender in this case. Its offer of settlement, made more than six months after service of the complaint, does not defeat plaintiffs' claim for attorney fees under ORS 742.061(1)."

Id. at 34. Thus under *Dockins*, an insurer's own "investigation" into the matter

does not relieve the insurer from the obligation to pay fully and unconditionally within six months. Significantly, even if one sets aside the result of the trial here, Defendant's own voluntary "tender" (per *Dockins*) was not complete until the last of its unconditional offers to pay — something that happened here on the first day of trial, more than two years after the proof of loss, and well over a year from filing suit. That is not timely tender under ORS 742.061.

Likewise, *Dolan v. Continental* held that fees may be awarded under what *Dockins* called the "substantively identical predecessor" to ORS 742.061, where there is no judgment at all. In *Dolan*, the judgment was vacated on appeal and the case remanded for a new trial, but the insurer paid the claim before a judgment for plaintiff could be entered on remand. 133 Or at 254. This Court expressly rejected such a potential for gamesmanship, holding "[i]f a judgment be reversed … upon some technical error during the progress of the trial and defendant's tender will then defeat a recovery of attorneys' fees, … the benefit of the statute is largely destroyed." *Id.* at 255-56. Although an older case, *Dolan* remains solid law. No judgment is needed to claim fees.

Other cases awarding attorney fees under the statute against this same Defendant are enlightening. In *Petersen v. Farmers Ins. Co.*, 162 Or App 462, 466, 986 P2d 559 (1999), the court expressly rejected the types of policy argument that Defendant made below. The *Petersen* court said that an award of attorney fees to someone in Plaintiff's position is *mandatory* where — as

here — (i) an insured files proof of loss with an insurer, (ii) the insured brings an action for the insurer's failure to settle the claim, (iii) settlement is not made within six months of the proof of loss, and (iv) the insured's ultimate recovery exceeds the amount of any tender of the defendant in the six-month period. *Id*. All of these elements were met in this case, and it was plain legal error to deny Plaintiff her attorney fees in this case because the statute uses the mandatory "shall" in its directive.

In a second case involving Farmers, *Parks v. Farmers*, 347 Or 374, 227 P3d 1127 (2009), this Court ruled that Farmers had an adequate opportunity to conduct an inspection and to investigate a potential claim more than six months prior to Farmers' tender. The tender was; therefore, deemed untimely and the court awarded plaintiffs their attorney fees. Here, whatever else may be said about Defendant's need to "investigate" a broken water pipe via a two and a half hour EUO, its tactical decisions do not excuse its duty to pay within six months of proof of claim.

Reducing every "recovery" to a monetary judgment is legally unnecessary. In *Travelers' Insurance Co. v. Plummer*, 278 Or 387, 563 P2d 1218 (1977), this Court held that a "claimant under an insurance policy is entitled to the statutory attorney fees ***if he establishes a claim*** for more than the tendered amount…." 278 Or at 391 (emphasis added). Obviously, "establishing a claim" does not require entry of judgment. This Court in *Plummer* also

quoted with approval that trial court, where it said: "It is precisely this type of situation the legislature intended to remedy in allowing attorney fees in disputes between insured and insurer ***where the insurer is wrong***." *Id*. at 392 (emphasis added). Proving the insurer is in the wrong is necessary; entry of judgment is not.

There is no reasonable way of disputing that Defendant was "wrong" here in failing to pay Plaintiff. For a year and a half, it denied almost 60% of its total payment without any justification, while its counsel conducted an illusory "investigation" into a ruptured kitchen pipe. Defendant began to make partial payments on the remainder owed only after the appraisal awards proved dispositively how much it had underpaid the claim. Defendant's last payment — nearly a quarter of the total recovery — was made on the first day of trial, over two years after proof of loss. Tellingly, Defendant anticipated that these sharp tactics had exposed it to statutory attorney fees in Plaintiff's case: Defendant preemptively filed a pretrial motion, asking the court to deny an anticipated attorney fee petition. *See* Trial Court File: *Farmer's Motion for Partial Summary Judgment on Statutory Attorney Fees*, filed 9/4/2013. Defendant's failure to timely tender Plaintiff's recovery cannot be excused, and it now must pay Plaintiff's attorney fees in full, having failed to object to the amount claimed below. *See* Subsection e., *infra*.

c. *Triangle Holdings* Was Wrongly Decided.

In the trenches of everyday legal practice, insurers are settling cases without judgments in order to avoid paying attorney fees. So long as there is no judgment entered in the Plaintiff's favor, insurers apparently now believe that they can circumvent the mandate of ORS 742.061 — taking advantage of their own dilatory tactics. Unfortunately, this practice received an undeserved benediction late in 2014 from the Oregon Court of Appeals through the case of *Triangle Holdings*, 266 Or App 531.

In *Triangle*, the Court of Appeals denied fees in a claim under ORS 742.061(1) where settlement payments were made more than six months after proof of loss, because the settlement was not converted to a judgment. This holding was flawed for at least six reasons: (1) it ignored relevant statutory language and context; (2) it relied on inapposite *dicta* from other cases; (3) it failed to apply *Dolan* and *Dockins* properly; (4) it construed the term "recovery" too narrowly; (5) it narrowly construed a remedial statute; and (6) it added language not included by the Legislature.

First, the *Triangle* court ignored the context of the insurance code, beginning with ORS 731.008, which provides that "the Insurance Code is for the protection of the insurance-buying public." *Triangle* also ignored ORS 731.016, which mandates that "[t]he Insurance Code shall be liberally construed" to further that purpose. *Triangle* overlooked these statutory

mandates in interpreting the attorney fee statute. The *Triangle* panel also lost sight of the fact that ORS 742.061(1) was designed by the legislature as a remedial statute. *See Morgan v. AMEX Assurance Co.*, 352 Or at 373. As a remedial statute designed to address predatory insurance practices, the statute must be liberally construed to accomplish its purpose. ORS 731.016; *Newell v. Taylor*, 212 Or 522, 527-28, 321 P2d 294 (1958).

Second, *Triangle* relied heavily on *dicta* from a distinguishable case, *McGraw v. Gwinner*, 282 Or 393, 578 P2d 1250 (1978). *McGraw* was a declaratory judgment case brought solely to decide coverage issues. There was no monetary claim in that case and the *McGraw* court simply held that, by definition, the case did not fall under the statute. It could fairly be said that Justice Denecke, in seeking to distinguish a case for pure declaratory relief from a claim for damages under the statute, spoke somewhat too expansively in suggesting that a judgment was necessary to trigger entitlement to attorney fees under ORS 742.061(1). Like many judges, in reading the statute as conditioning attorney fees on filing suit, he likely presumed that any recovery would most likely be in the form of a judgment. But the issue of whether or not a "recovery" must only be in the form of a judgment was not an issue in that case, so the comment was mere *dicta*. Thus, both the *Triangle* court's and Defendant's reliance on the *McGraw* case is misplaced.

Third, the *Triangle* panel also erred in failing to understand the import of the *Dolan* and *Dockins* decisions, and relied instead upon its own decision in *Becker v. DeLeone*, 78 Or App 530, 717 P2d 1185 (1986), in holding that ORS 742.061(1) requires a money judgment to grant fees. But *Becker*, like *McGraw*, was not a first party insurance claim under ORS 742.061, and should have been distinguished for that very reason. Moreover, the *Becker* court appears to have merely assumed that the statute required a judgment in order to trigger its fee shifting provisions. In short, *Triangle* was wrong to rely so heavily on *McGraw* and *Becker*, because they were not even the type of cases which ORS 742.061(1) was designed to address. On the other hand, *Dolan* and *Dockins* involved factually analogous situations with respect to the lack of a judgment in Plaintiff's favor and the late tendering of payment. *Triangle* further failed to note that in *Wihtol v. Lynn*, 209 Or App 56, 46 P3d 365 (2006), the Court of Appeals itself had said that a litigant had "achieved a recovery by settlement[,]" thus recognizing that a settlement is a "recovery" under Oregon law.

Indeed, fourth, the word "recovery" or "recover" is universally defined in dictionaries and thesauri as including payment of some kind, not just legal judgments. For example, *Black's Law Dictionary*, (9th ed. 2009), defines "recovery" on page 1389 to include:

> "Recovery. 1. The regaining or restoration of something lost or taken away. 2. The obtainment of a right to something (esp.

> damages) by a judgment or a decree. 3. ***An amount awarded in or collected from*** a judgment or a decree." (Emphasis added). [3]

Other dictionaries, while usually recognizing that a judgment is a ***type of*** recovery, also give broader definitions for the term as well.

For example, *Webster's Unabridged Dictionary* (2d ed. 2001), defines "recovery" on page 1613 to include "something that is gained in recovering" again focusing on the amount recovered, not the method of recovery. *Webster's New World College Dictionary* (5th ed. 2014), defines "recover" on page 1214 as including: "2. *To compensate for*; make up for [to recover losses]." *Merriam Webster's Collegiate Dictionary* (11th ed. 2014), defines recover on page 1040 as including: "1. To get back," and 3.b. "to gain by legal process," in addition to the traditional judgment definition. The *Oxford Encyclopedic English Dictionary* (1991), defines "recovery" as "1. Recover or regain (a loss) 2. Compensate . . . for a loss." The *FreeDictionary.com* states, "[t]he term recovery is also used to describe the amount ultimately collected, or the amount of the judgment itself." And the unabridged *Webster's Third New International Dictionary*, the touchstone of this Court, provides that the first definition of "recovery" is "means of restoration", and the second is "obtaining in a suit at law of a right of something by verdict, decree or judgment." *Webster's Third*

[3] Here, Plaintiff recovered two appraisal awards confirmed by an order from Judge Norblad — the equivalent of a "decree."

New Int'l 1898 (Unabridged 2002). "Recovery" is not limited solely to judgments, even in the legal sense.

So too, *Bartlett's Roget's Thesaurus* (1996) at page 1233 equates "recover" with "be compensated." *The Oxford Thesaurus* (American ed. 1992) equates "recovery" on page 889 with "restitution." Both *Roget's* and *Oxford* focus on the remuneration, rather than the mechanism which led to it. Simply put, the term "recovery" means getting money back for a monetary loss. Of course, Plaintiff does not mean to suggest that a judgment is not a ***type of*** recovery. But not every recovery is a judgment.

Here, the recoveries obtained were several: the appraisal panel issued unanimous Appraisal Awards in Plaintiff's favor. Judge Norblad confirmed these appraisal awards on October 31, 2013. Tr 27, 30; ER 34-35. Plaintiff "recovered" $7,533.89 eighteen months after proof of loss when Defendant reluctantly paid portions of the appraisal awards ($ 2,467.09, $ 300.00, and $4,766.80). ER 25-27. Plaintiff furthermore "recovered" an additional payment of $4,214.18 on the first day of trial. ER 28. Here, each check Defendant wrote to Plaintiff after suit was filed was a true "recovery."

Indeed, in any practical, real-world sense of the word, actual payment — money changing hands — is far more of a "recovery" than a mere judgment, which might well go uncollected. To be sure, the purpose of seeking the judgment in the first place is to be paid a sum of money. Not to belabor the

point, but had Cary Long gone to a bank holding a signed, filed form of judgment in one hand and a check in the other, which one would have been accepted for deposit?

Fifth, the *Triangle* decision lost sight of these rules of statutory construction by narrowly construing a remedial statute and by imputing narrow meaning not intended by the legislature. The latter approach was specifically rejected by this court in *Morgan v. Amex Assurance Co*., 352 Or 363. There, the insurer had argued that an insurance policy that was the subject of a suit in Oregon did not allow an attorney fee claim under ORS 742.061(1), because the policy was delivered in Washington. The insurer claimed that ORS 742.001, which was passed after ORS 742.061(1), limited the latter statute to only those policies delivered in Oregon. After considerable analysis, the Oregon Supreme Court held that a court cannot limit a remedial statute, like ORS 742.061(1) in such a way:

> "Considering the text, context, and legislative history of the 1967 Act, we conclude that the legislature did not intend that ORS 742.001 would limit the scope of ORS 742.061(1). For us to hold otherwise, we would have to turn an expansion of the state's authority to impose substantive regulations on insurers transacting business in Oregon into a limitation on the remedial and procedural rules that affect insurers appearing in its courts. We would have to overlook the purposeful omission of the word "only" from the text of ORS 742.001, and ***we would have to read a limitation into the text of that section that the legislature did not include***."

352 Or at 376 (emphasis added).

Triangle violated the rule of statutory interpretation that forbids a court from inserting language the legislature has omitted, or omitting what has been inserted. ORS 174.010*; State v. McFee*, 136 Or App 160 (1995), *rev dismissed* 323 Or 662 (1996). *See also Due-Donohue v. Beal*, 191 Or App 98, 101, 80 P3d 529 (2003) (courts interpret statutes "so as to give meaning to every word"). Yet that is precisely what *Triangle* did. *Triangle* literally substituted the term "judgment" for "recovery." In so doing, it rewrote the statute, effectively nullifying the six-month provision.

Had the legislature intended to condition recovery of attorney fees only upon entry of judgment, it could easily have used the word "judgment" instead of "recovery" — the word actually used in the statute. The 1919 version of ORS 742.061, as cited in *Triangle*, in fact used such "judgment" language. That the Legislature has since adopted the broader term "recovery" shows an understanding that money can be "recovered" from an insurer by means other than a judgment. For instance, aside from judgments, one can recover money by way of a settlement or mediation, through an arbitration award, or in an appraisal award (as occurred here). None of these recoveries requires entry of a judgment. In fact, Judge Norblad's confirmation of the appraisal awards was tantamount to confirming an arbitration award. Judgment should have been entered for Plaintiff.

d. *Triangle Holdings* is Contrary to Public Policy and Undermines ORS 742.061(1).

Ultimately, the holding in *Triangle* is contrary to good public policy. ORS 742.061(1) was designed as a means to compel insurers to settle claims within six months. The *Triangle* decision effectively negates the statute's six-month rule, and eliminates insurers' incentive to promptly settle claims. So long as insurers refuse to agree to entry of a judgment, they can cite *Triangle* to trial judges and try to avoid responsibility for attorney fees with impunity. If *Triangle* is followed instead of *Dockins* and *Dolan*, and insurers have eventually paid enough to make a jury award unlikely or impossible, there is nothing a plaintiff can do about it. This approach undermines the statute as it removes the need to deal fairly and promptly in settling claims — which is precisely what ORS 742.061(1) was designed to accomplish. *Triangle* thwarts that basic and obvious public policy.

e. Defendant Waived any Challenge to the Amount of Attorney Fees.

Defendant did not challenge the *amount* of fees that were requested below. Therefore, it has waived that issue and, on remand, the trial court should award the actual fees claimed. *Dockins v. State Farm Ins. Co.* (*Dockins II*), 330 Or 1, 6, 997 P2d 859 (2000) (court's inquiry into the request generally will be limited to the objections that are filed by the party opposing the petition); *Strawn v. Farmers Ins. Co.*, 233 Or App 401, 226 P3d 86 (2010),

quoting Kahn v. Canfield, 330 Or 10, 13-14, 998 P2d 651 (2000) (same). *See also Haynes v. Adair Homes, Inc.*, 231 Or App 144, 147, 217 P3d 1113 (2009) (awarding full fees absent objection to reasonableness). In short, there is no need for further proceedings on remand to determine how much to award in attorney fees. Since Defendant objected merely to entitlement, not the amount claimed, that issue should not be resurrected on remand and Defendant given a second bite of the proverbial apple.

2. The Issues of Coverage and the Amount of Damages Were Determined in the Course of the Appraisal, and Should Not Have Been Submitted to the Jury.

The appraisal process is not well known by Oregon attorneys, probably because appraisal is an alternative to litigation, so there are not many reported decisions addressing the process itself. However, *Molodyh v. Truck Ins. Exchange*, 304 Or 290, is enlightening on issues concerning appraisal. In *Molodyh*, the question was whether one waives the right to a jury trial by invoking and participating in the appraisal process. The court concluded that a party who invokes appraisal waives the right to jury trial on the issues submitted to appraisal and is bound by the appraisal award. *Id*. at 299. The party against whom the appraisal procedure is invoked is *required* to participate, but is not necessarily bound by the award. Furthermore, appraisal

awards are also not subject to judicial review, except in the case of fraud or misconduct by the appraisers. *Lincoln Constr.*, 289 Or 687.

However, here, Defendant did not object to the appraisal awards. On the contrary, it agreed with the awards, making them unanimous, and started making partial tenders. Defendant did not raise the issue of jury trial on the amount of damages in its trial memorandum or elsewhere. Rather, Defendant paid most of the amounts awarded at appraisal and challenged only coverage on three line items. Because Plaintiff waived a jury on the issues raised in appraisal, and Defendant then consented to and ratified the awards, it was wrong to allow the jury to "revisit" the Appraisal Awards.

Additionally, the trial court's confirmation of the appraisal awards determined the coverage question as a matter of law. In an "all risk" homeowner's policy, coverage is presumed unless expressly excluded. *Busch v. Ranger Ins. Co.,* 46 Or App at 22 n4. Whether an insurance policy covers a loss is a question of law for the court. *Wilson v. Tri-County Metro. Transp. Dist.,* 343 Or at 11, *citing Hoffman Construction Co. v. Fred S. James & Co.,* 313 Or 464, 469, 836 P2d 703 (1992). In fact, most insurers bring coverage cases as declaratory judgment actions for this very reason. To be sure, when Farmers filed a cross motion for summary judgment in September 2013, it portrayed the question of coverage as a legal issue for the court. It did so again in its Trial Memorandum.

After failing to get a "no coverage" ruling as a matter of law a second time, Defendant convinced the trial court to submit the legal issue to the jury as a question of fact. This invited error. At trial, the trial judge refused to respect the prior coverage decision by Judge Norblad. Tr 27, 30. The trial judge instead instructed the jury to make a coverage determination, despite having said earlier that coverage: "[a]ctually was dealt with by Judge Norblad." Tr 55, Tr 672. In addition, the trial judge instructed the jury to decide damages, even though the damages had already been awarded and then confirmed by Judge Norblad. This was prejudicial and reversible error.

3. The Trial Judge Erred by Commenting on the Evidence and Instructing the Jury on Defenses Not Asserted by Defendant.

In instructing the jury, the trial court improperly commented on the evidence, and improperly emphasized policy language favorable to Defendant's arguments against coverage and excuses for resisting appraisal. Tr 672, 674. The trial court also instructed the jury on defenses that were not even pled by Defendant. These errors of law are apparent from the record. Plaintiff preserved the issues by objecting and taking exceptions to the jury instructions. Tr 57, 587.[4] Tr 49, 558, 585-86, 673.

[4] Plaintiff objected to instructions referring to the content of the policy, saying "this is supposed to be an instruction on the law." Tr 572. The court had

a. It was Prejudicial Error for the Trial Court to Comment on the Evidence.

The purpose of all jury instructions is to instruct the jury about ***the law***, not to comment on the evidence or unfairly emphasize one side's arguments over the other's. Oregon law recognizes two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the instructions that actually were given. *Bennett v. Farmers Ins. Co.*, 332 Or 138, 152-53, 26 P3d 785 (2001). Courts review a jury instruction commenting on the evidence for legal error. *See State v. Blanchard*, 165 Or App 127, 130, 995 P2d 1200, *rev. den.*, 331 Or 429, 26 P3d 148 (2000). For its part, ORCP 59B provides:

> "In charging the jury, the court shall state to the jury ***all matters of law*** necessary for its information in giving its verdict.. . ."

ORCP 59B (emphasis added). The purpose of jury instructions is to "reduce the relevant ***law*** to terms readily grasped by the jury without doing violence to the applicable ***legal rule***." *Rogers v. Meridian Park Hospital*, 307 Or at 616 (emphasis added). As such, a trial court is not permitted to comment on the evidence. ORS 136.330(1). *See also State v. Hayward*, 327 Or 397, 410, 963 P2d 667 (1998). A court impermissibly comments on the evidence when it instructs the jury how specific evidence relates to a particular legal issue or that

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announced it would consider objections to instructions to also serve as exceptions. Tr 681.

it can draw an inference that shifts the burden of proof. *Hayward*, 327 Or at 410-11.

Instructions must also be in a neutral form and should avoid giving undue prominence to some aspect of the case. *St. Paul Mercury Ins. Co. v. Baughman*, 61 Or App 534, 537-38, 657 P2d 1254 (1983). Oregon appellate courts have reversed and remanded cases where the language of the jury instruction was not in a neutral form. *See Fickert v. Gallagher*, 274 Or 139, 144, 544 P2d 1032 (1976).

The trial court's comments on the evidence gave certain policy provisions undue prominence over other evidence. In fact, the trial court went even further, instructing the jury in a manner that seemingly endorsed Defendant's position: "[O]nce the investigation was complete, Farmers submitted to an appraisal, and has paid Plaintiff in accordance with the appraisal award." Tr 674. This was not even true. The EUO took place on January 7, 2013, and despite no outward evidence of whether or not Defendant's counsel was still "investigating," the claim remained largely unpaid six months later.[5] By then, Defendant had been in breach of contract for

[5] One wonders what needs "investigating" about a broken water pipe in the kitchen wall in the first place. That there were no payments for months after the EUO shows that the "investigation" was very likely a pretext to justify withholding money for repairs. All the while, Plaintiff had to live with a torn up kitchen for two years. If Plaintiff had not sued to enforce the appraisal provision, Defendant might still be holding out.

eighteen months. Defendant finally paid what it did after appraisal only because Plaintiff had sued to enforce her rights.

The court's instructions glossed over Defendant's "keep away" posture and portrayed the case as if Defendant had acted properly all along. As of the instruction, and in fact to this very day, Defendant still has not fully paid the Appraisal Awards.

b. The Trial Court Erred in Instructing on Issues not Raised in Pleadings.

The trial court issued jury instructions on issues not raised by Defendant's Answer. Specifically, it instructed the jury that, in considering whether Defendant breached the implied covenant of good faith and fair dealing, it should also decide whether Plaintiff also had similarly breached that duty. The trial court then had the jury allocate the amount of bad faith attributable to each party as if this were a comparative negligence case, though that was not an asserted — or even proper — defense. ER 49-50. The court also gave Defendant's "failure to mitigate" instruction, despite Defendant having not asserted that defense either.

A party is entitled to jury instructions on its theory of the case if the instructions correctly state the law, ***are based on the current pleadings***, and are supported by some evidence. *Durnford v. Worden,* 242 Or 536, 540, 410 P2d 1020 (1966). It is reversible error for the trial court to include in its jury

instructions issues outside of the scope of the pleadings. *Blake v. Webster Orchards,* 249 Or at 352-53. Under Oregon law, it is axiomatic that when defenses are not asserted, they are waived. Also, in instructing on the issue of the covenant of good faith and fair dealing, the trial court limited inquiry to whether Defendant failed to submit ***to appraisal***. Tr 674. But Plaintiff had asserted that Defendant breached the duty in a number of ways, not just the appraisal. The court also seemingly endorsed Defendant's position by emphasizing Defendant's excuses for not submitting to appraisal. Tr 674. All of these comments on unraised defenses and perspectives on the evidence prejudiced Plaintiff before the jury.

c. The Antecedent Breach Instruction Should Have Been Given.

On the other hand, the trial court refused to give instructions necessary for Plaintiff's theory of the case. The instructions to the jury should have included Plaintiff's requested instruction on the antecedent breach doctrine. ER 36. Under Oregon law, when an insurer breaches its contractual duties, it excuses its insured's compliance with other provisions of the contract. *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co*., 219 Or at 116; *Groce v. Fidelity General Ins. Co*., 252 Or at 302. By refusing to issue this instruction, the court implicitly misled the jury into assuming that Defendant's refusal to submit to appraisal and non-payment for 18 months was not a breach and held no

consequences, and that Plaintiff could be at fault after that breach. Had the jury been given the antecedent breach instruction, it could have found that its antecedent breach prevented Farmers from enforcing policy conditions against the victim of its breach.

d. The Trial Court Should have Entered Judgment for Plaintiff.

The trial court refused to enter judgment for Plaintiff for any amount and rejected Plaintiff's proposed judgment forms. ER 37-42. However, since an appraisal award is not subject to judicial review in the absence of fraud or misconduct,[6] the trial court did not have jurisdiction to revisit the appraisal awards, or let the jury consider the question which had been taken out of the jury's hands. This is especially true after the Appraisal Awards were confirmed by Judge Norblad. On remand, the trial court should enter judgment for Plaintiff for at least the amounts left unpaid after appraisal: the engineer's report ($338.40) and plumbing repairs ($478.06), plus pre-judgment interest on the untimely tenders ($ 2,202.82).

e. The Judgment Should Have Included Prejudgment Interest for Plaintiff.

Prejudgment interest is awarded in cases where the amount in controversy is readily ascertainable. *See Banister Continental Corp. v.*

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[6] *See Lincoln Constr.*, 289 Or at 693.

Northwest Pipeline Corp., 76 Or App 282, 293, 709 P2d 403 (1985), *vac. on other grounds* 301 Or 763, 724 P2d 822 (1986). In Oregon, prejudgment interest may be awarded even in cases where there is a factual dispute as to liability or amount of damages. *See Hazelwood Water Dist. v. First Union Management*, 78 Or App 226, 231, 715 P2d 498 (1986).

Plaintiff pled entitlement to pre-judgment interest and the evidence showed that the amount Defendant owed was readily ascertainable from the beginning of the claim. To be sure, the contractor's estimate, and the appraisal awards themselves, show that the amount owed was readily ascertainable as of the January 12, 2012 proof of loss. ER 1-2, 23-24. In fact, Plaintiff's contractor testified that his estimate in February 2012 was determined using the same computer program Defendant uses. Tr 201-09. His testimony was undisputed. Plaintiff requested that the Trial Court award prejudgment interest on the payments which were made after the appraisal hearing, including the check delivered the first day of trial. It refused to do so. Plaintiff is entitled to that prejudgment interest.

III. CONCLUSION

Plaintiff requests that the court vacate the Judgment and Supplemental Judgment and direct the trial court to enter judgment for Plaintiff: 1) consistent with the appraisal awards, 2) including prejudgment interest shown on

Plaintiff's proposed Judgment forms, and 3) for the full attorney fees claimed by Plaintiff.

RESPECTFULLY SUBMITTED this 12th day of May, 2016.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word count limitation in ORAP 9.17(2)(c), and (2) the word count of this brief (as described in ORAP 5.05(2)(b)(i), inclusive of footnotes and headers, but exclusive of the cover, table of contents, table of authorities, certificates and signature blocks), is 8,522 words as determined by the Word Count feature of Microsoft Word.

Type Face

I certify that the size of the type in this brief is not smaller than 14 point, Times New Roman font, for both the text of the brief and the footnotes, as required by ORAP 5.05(2)(d)(ii), and (4)(g).

DATED this 12th day of May, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 12, 2016, I filed this **Opening Brief on the Merits** by electronic filing with the State Court Administrator at this address:

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