IN THE SUPREME COURT OF THE STATE OF OREGON

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

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

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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OTLA's Statement of the Case Regarding Denial of Attorney Fees to Plaintiff

This is a homeowner's insurance claim for payment of property damage due to a ruptured water pipe in the kitchen wall. More than six months after presentation of the proof of loss and after plaintiff filed a lawsuit, Farmers Insurance Company paid the plaintiff $11,748.07. ER 25-28.

The plaintiff sought an additional amount, but did not prevail. The trial court did not enter a money judgment in favor of the plaintiff for the amounts Farmers had paid, and it denied the plaintiff an award of attorney fees under ORS 742.061(1).

The plaintiff appealed to the Court of Appeals, which affirmed without opinion the trial court judgment, including its ruling denying attorney fees. *Long v. Farmers Ins. Co. of Oregon*, 273 Or. App. 821, 362 P.3d 1215 (2015). This Court allowed review on March 24, 2016. 358 Or. 833 (2016).

Question Presented Regarding Attorney Fee Issue

Whether the payment of an insurance claim by the insurer more than six months after the filing of a proof of loss and after the filing of a lawsuit, but without entry of a judgment, entitles the plaintiff to an award of attorney fees under ORS 742.061(1).

OTLA's Proposed Rule of Law

Where an insurer pays an insurance claim more than six months after the filing of a proof of loss and after the filing of a lawsuit, the plaintiff is entitled to attorney fees under ORS 742.061(1), and a judgment is not necessary.

The term "recovery" in ORS 742.061(1) means any type of recovery of benefits, and does not require the entry of a judgment. An insurer may not avoid liability for the insured's attorney fees under ORS 742.061(1) by paying a claim more than six months after receiving the proof of loss but before entry of judgment.

Summary of Argument

The purpose of ORS 742.061(1) is to require insurers to evaluate claims promptly, and pay valid ones within six months without litigation. This is to prevent the diminishment or elimination of the recovery by the amount of the insured's attorney fees. If the plaintiff has to file a lawsuit to obtain recovery of her claim after the expiration of the statutory six month period, she is entitled to attorney fees under ORS 742.061(1). A money judgment is not necessary under ORS 742.061(1) to obtain an award of attorney fees against the insurer. *Dolan v. Continental Cas. Co.*, 133 Or. 252, 289 P. 1057 (1930).

The Court of Appeals incorrectly denied attorney fees in the present case and in its prior decision in *Triangle Holdings II, LLC v. Stewart Title Guar. Co.*, 266 Or. App. 531, 337 P.3d 1013 (2014), *rev. allowed*, 357 Or. 164, 351 P.3d 52, *rev. dismissed pursuant to settlement*, 357 Or. 325, 354 P.3d 697 (2015), requiring a money judgment as a prerequisite for attorney fees under ORS 742.061(1). Those Court of Appeals decisions conflict with this Court's decision in *Dolan v. Continental Cas. Co.*, *supra*, as well as the text, the purpose and the policy of ORS 742.061(1).

Argument

The Purpose and Policy of ORS 742.061(1) Do Not Require a Money Judgment to Recover Attorney Fees

ORS 742.061(1) requires an order of attorney fees against an insurance company when it receives proof of a valid claim, it does not tender payment within six months, and the insured has to file a lawsuit to obtain a recovery. App-1. The purpose of this statute is to require insurance companies to evaluate claims 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 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 to pursue them in court.

The Court of Appeals Decision in *Triangle Holdings* Was Wrong

The Court of Appeals held in *Triangle Holdings, supra*, that the payment of an insurance claim more than six months after filing the proof of loss and after the filing of a lawsuit, but without a judgment, deprived the plaintiff of a right to attorney fees under ORS 742.061(1). It held that the term, "recovery" in ORS 742.061(1) meant a judgment, not a payment without a judgment. The Court of Appeals affirmed the trial court without opinion in the present case, following its decision in *Triangle Holdings*.

The Court of Appeals decisions in the present case and in *Triangle Holdings* conflict with this Court's decision in *Dolan v. Continental Cas. Co., supra*. In *Dolan*, the plaintiff prevailed in the trial court and on appeal in an action for life insurance proceeds. But on a petition for rehearing, this Court granted the defendant's motion for a new trial. On remand, the insurer tendered the amount of the claim to the trial court, and argued that the plaintiff's recovery did not exceed the tender. The trial court held the plaintiff was not entitled to attorney fees.

This Court reversed the trial court and held the plaintiff was entitled to attorney fees, even though she obtained no money judgment. This Court rejected the concept of paying the claim to avoid entry of judgment and liability for the insured's attorney fees, stating

> The purpose of the enactment of said section 6355, as amended by Gen. Laws, 1927, c. 184, was to discourage expensive and lengthy litigation. Oftentimes insurance companies have contested their obligation to pay a loss with such persistence and vigor that the benefit of an insurance policy is either largely diminished or entirely lost....
>
> 133 Or. at 255, 289 P. at 1057.

The essence of this Court's decision in *Dolan* is that a recovery of the insurance claim more than six months after the proof of loss and as part of the litigation is sufficient to entitle the insured to attorney fees under ORS 742.061(1). A money judgment is not necessary as well.

There Were No Valid Precedents for the Court of Appeals Decision in *Triangle Holdings*

One of the grounds for the Court of Appeals decision in *Triangle Holdings* is this Court's decision in *McGraw v. Gwinner*, 282 Or. 393, 578 P.2d 1250 (1979). In *McGraw*, the plaintiff sought a declaratory judgment to require the Oregon Insurance Guaranty Association to defend him against a liability claim and pay any judgment. The plaintiff prevailed, but the trial court denied attorney fees under what is now ORS 742.061(1) because he had not obtained a money judgment. Nor did the plaintiff seek a money

judgment. This Court affirmed the trial court holding that a money judgment was a necessary requirement for the plaintiff to obtain attorney fees under ORS 742.061(1).

There is no conflict between *McGraw* and a decision by this Court in favor of Cary Long. This Court may hold in favor of Cary Long without overruling *McGraw* because Ms. Long, unlike the plaintiff in *McGraw*, sought and obtained a money recovery.

Another precedent the Court of Appeals relied on to deny the plaintiff attorney fees in *Triangle Holdings* is *Becker v. DeLeone*, 78 Or. App 530, 717 P.2d 1185 (1986). Neither party in *Triangle Holdings* discussed *Becker* in its briefs, but the Court of Appeals nevertheless relied on it.

Becker involved a claim by a contractor for damages for failure to pay for part of a construction project. The defendant claimed it was liable for nothing more, and it counterclaimed against the contractor and its bond for damages for defective work. The trial court found for the contractor for about $8,000, but allowed the third party claim against his bond for $2,000. Instead of two judgments, one against the defendant for about $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 he received no judgment against the insurance bond. The defendant was not entitled to attorney fees because he agreed with the form of the judgment in the trial court, and did not preserve the assignment of error. *Becker, id.,* 78 Or. App. at 533, 717 P.2d at 1187. *Becker* is not a precedent to deny attorney fees to plaintiffs like Cary Long, who requested attorney fees in the trial court and did not agree with its failure to enter a judgment in her favor.

One case the Court of Appeals could have considered in *Triangle Holdings* is *Wilson v. Tri-County Metropolitan Transp. Dist. of Oregon*, 234 Or. App. 615, 228 P3d. 1225 (2010). In *Wilson* the plaintiff, a bus passenger, filed an uninsured motorist claim against the bus company. The bus company was self-insured and denied the claim. The plaintiff filed a lawsuit, and shortly before a second trial, the defendant made an offer of judgment under ORCP 54 E. The plaintiff rejected the offer, went to trial, and obtained a judgment. There was a dispute whether the plaintiff's judgment exceeded the offer of judgment, and whether the plaintiff was entitled to attorney fees under ORS 742.061(1). The Court of Appeals followed *Dockins, supra,* and held that only an unconditional tender within six months of the proof of loss and before the filing of a lawsuit can defeat the plaintiff's right to attorney fees under ORS 742.061(1).

The Court of Appeals Should Have Interpreted the Word "Recovery" in ORS 742.061(1) Liberally and In Favor of the Insurance-Buying Public

In ruling for the insurer in *Triangle Holdings*, the Court of Appeals defined the term "recovery" in ORS 742.061(1), to mean "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 Webster's Dictionary and Black's Law Dictionary to support this definition, as if this were the only possible 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 of attorney fees by the insured.

However, in construing a statute, this Court stated very recently that courts should not simply consult dictionaries and interpret words in a vacuum. It said

> Dictionaries, after all, do not tell us what words mean; only what words *can* mean, depending on their context and the particular manner in which they are used.... [emphasis in original]
>
> *Alfieri v. Solomon*, 358 Or. 383, 393, 365 P.3d 99, 105 (2015), quoting from *State v. Cloutier*, 351 Or. 68, 96, 261 P.3d 1234 (2011).

The Court of Appeals definition of "recovery" is not the exclusive definition of the term. Webster's also defines "recovery" as the "act, process or instance of recovering." "Recover" can mean "to gain by legal process,"

and 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 one sense does it mean "to be successful in a suit." *Black's Law Dictionary* 1440 (1951).

In deciding which interpretation of the term "recovery" to apply in ORS 742.061(1), the Court of Appeals should have followed the principles of statutory interpretation in ORS 731.008 and 731.016. These statutes require courts to interpret insurance laws liberally in favor of the insurance-buying public. *See Carrigan v. State Farm Mut. Auto Ins. Co.*, 326 Or. 97, 104-05, 949 P.2d 705, 709 (1997). This means the trial court and the Court of Appeals should have interpreted the term "recovery" in a broader sense to protect the public so that the plaintiff would be entitled to attorney fees, without the necessity of obtaining a money judgment.

This interpretation is also the only one consistent with the purpose and policy of ORS 742.061(1). Otherwise, an insurance company could pay a claim more than six months after the proof of loss and after the filing of a lawsuit, but before entry of judgment, and avoid responsibility for the plaintiff's attorney fees. It could even pay the claim after a jury verdict, but before entry of judgment, and avoid payment of a plaintiff's attorney fees.

A situation requiring the insured to pay his own attorney fees if he did not obtain a money judgment would discourage the payment of insurance claims promptly, and would significantly diminish, if not eliminate, the plaintiff's recovery. It would also enable the insurance companies to utilize their greater financial leverage to discourage the pursuit of valid claims and force insureds into substantial compromises. This would undercut the policy and purpose of ORS 742.061(1), and, in fact, nullify it.

The Court of Appeals should have evaluated the purpose and policy of ORS 742.061(1) and applied the principles of ORS 731.008 and 731.016 in deciding the definition of the term "recovery," and should not have selected a definition from the dictionary in a vacuum that negates them.

While *McGraw* Does Not Govern the Result in the Present Case, This Court Wrongly Decided It

Although this Court may decide this case consistent with *McGraw v, Gwinner, supra*, it should decide whether its decision in *McGraw* is still good law in light of the text and purpose of ORS 742.061(1). In *McGraw*, the plaintiff achieved his purpose in filing the lawsuit. He forced the insurer to defend the claim against him and pay any damages. In that sense, the plaintiff obtained a "recovery" by "gaining something by the legal process." He also "restored, made up for or brought the situation back to normal."

If the plaintiff in *McGraw* had previously paid legal fees to defend

himself or a monetary settlement or judgment to the party suing him, he would have been entitled to a money judgment instead of only a declaratory judgment. In that circumstance, he would have been entitled to attorney fees under ORS 742.061(1). *See Williams v. Stockman's Life Ins. Co.*, 250 Or. 160, 441 P.2d 608 (1968). But the entitlement to attorney fees under ORS 742.061(1) should not require a plaintiff to pay a claim instead of obtaining a declaratory judgment only and allowing the insurer to more efficiently defend and negotiate the claim.

This Court may hold in favor of the plaintiff consistent with *McGraw*, but OTLA requests this Court to re-examine its holding in *McGraw* and consider overruling it. OTLA believes *McGraw* is not consistent with a liberal interpretation of the term, "recovery" in ORS 742.061(1) that favors the insurance-buying public or with the purpose of the statute.

This Court should hold that where an insured gains something by the legal process, this satisfies the definition of "recovery" under ORS 742.061(1), and entitles the insured to obtain attorney fees for prevailing. A money recovery or money judgment should not be a prerequisite to obtain attorney fees under ORS 742.061(1), and the statute does not contain the term "money recovery" or "money judgment."

The statute uses the term "recovery." If a declaratory judgment avoids

a monetary loss to the plaintiff and represents a "gain through the legal process," this should satisfy the concept of a "recovery" under ORS 742.061(1), and is consistent with its purpose and policy.

Conclusion

For the foregoing reasons, OTLA urges this Court to reverse the decision of the Court of Appeals denying the plaintiff, Cary Long, attorney fees, and remand this case to the trial court to enter a judgment for attorney fees for her.

Dated this 12th day of May, 2016.

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 2,629 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 *AMICUS CURIAE* BRIEF** 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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