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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

CARY LONG,

Plaintiff-Appellant and Petitioner on Review,

v.

FARMERS INSURANCE COMPANY OF OREGON,

Defendant-Respondent and Respondent on Review.

Supreme Court Case No. S063701

Court of Appeals No. A156674

Marion Co. Cir. Ct. Case No. 12C23950

RESPONDENT'S BRIEF ON THE MERITS

Appeal of the decision of the Court of Appeals on Appeal from the Judgment of the Marion County Circuit Court by the Honorable Thomas Hart

Court of Appeals decision filed without opinion on September 23, 2015
Lagesen, J., Nakamoto, J., and Garrett, J.

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ANSWERING BRIEF ON THE MERITS

Respondent on Review, Farmers Insurance Company of Oregon ("Farmers"), requests the Court affirm the judgment in Farmers' favor. A jury properly denied Plaintiff any further recovery under the insurance policy for her water loss, and the trial court correctly denied her an award of attorney fees because she did not prevail in the lawsuit. The Court of Appeals affirmed the jury's decision without opinion. The lower courts did not err.

STATEMENT OF FACTS

A. Dispute as to Statement of Facts

Farmers disagrees with Plaintiff's statement of the facts and construction of the record and urges this Court to scrutinize Plaintiff's factual assertions. For example, Plaintiff suggests that she demanded appraisal and Farmers refused to submit, demanding her examination under oath instead. Plaintiff asserts at page 3 of her Opening Brief:

> 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. Defendant's counsel instead demanded an Examination Under Oath (EUO).

In fact, Farmers invoked its right to an examination under oath on May 4, 2012.[1]

[1] Ex 129 at p. 1.

In response, Plaintiff demanded contractual appraisal one month later on June 8, 2012.[2]

As another example, Plaintiff suggests that she was forced to compel appraisal by trial court order. Plaintiff asserts at page 4 of her Opening Brief:

> Plaintiff moved to compel Defendant to submit to appraisal and the trial court granted that motion.

In fact, the trial court deferred ruling on Plaintiff's motion because the parties had already agreed to submit the matter to appraisal.[3]

As yet another example, Plaintiff suggests that the appraisal panel awarded her the replacement cost of items in dispute. Plaintiff asserts at page 4 of her Opening Brief:

> 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.

In fact, the appraisal panel determined the actual cash value and replacement cost value for each item of loss, but did not award each amount, leaving the coverage disputes open for later resolution.[4] The appraisal panel wrote in its valuation:

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[2] ER 4. Farmers cites to Plaintiff's excerpt of record submitted to the Court of Appeals.

[3] Order Regarding Completion of Appraisal, June 10, 2013. This case was subject to the recent switch from OJIN to OECI. Because the OJIN "event numbers" are no longer available for citation in this brief, Farmers has followed the recommendation of the appellate court's staff and identified events by name and filed date.

[4] ER 23-24.

> The Appraisers have reached agreement of the property value. The Appraisal does not address policy coverage, and all terms and conditions of the insurance policy remain in force. Coverage issues valued but NOT awarded are noted by an asterisk (*).[5]

Farmers sets forth the following detailed statement of facts due to the significant disagreement between the parties concerning the record.[6] Farmers respectfully asks this Court to confirm the accuracy of Plaintiff's factual assertions.

B. Farmers' Corrected Statement of Facts

1. Background

On December 20, 2011, Plaintiff discovered a leak under her kitchen sink. Plaintiff reported the claim to Farmers, her insurer.[7] At the time of inspection, no repairs had occurred and the contractor was in the process of drying out the wall behind the sink drain.[8] Plaintiff retained public adjuster David Griffith.[9]

At a second inspection on January 12, 2012, the parties agreed that the kitchen cabinets were salvageable.[10] However, water leaked down an interior wall

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[5] *Id*.

[6] Farmers does not address a number of the inflammatory statements in the Opening Brief, which assume the bad faith of Farmers and all insurance companies in general, and are made without citation to the record or any other authority. *See*, *e.g.*, Opening Brief at pp. 11, 19. Farmers disputes these allegations.

[7] Complaint, Nov 13, 2013.

[8] Tr 504-05.

[9] Ex 103.

[10] Tr 514-17.

into a downstairs room that was converted from a garage into a rental.[11] The parties discussed possible coverage for repairs necessitated by code enforcement, but Farmers made clear that any such code enforcement would need documentation from the governmental agency enforcing the code.[12] The parties agreed that all repairs should be completed in six weeks.[13]

Farmers prepared an estimate for all repairs that totaled $5,277.23, including profit and overhead.[14] Farmers' adjuster deducted $1,976.78 for the deductible and depreciation.[15] On January 17, 2012—within two months of the leak—Farmers sent Plaintiff a check for $3,300.45, representing the actual cash value of the loss.[16] Shortly after issuing the payment, the adjuster requested an update on the status of repairs only to be informed by Griffith that work was on hold.[17]

On January 31, 2012, Griffith sent Farmers' adjuster two estimates for repairs totaling $14,255.33.[18] Farmers' adjuster responded to Griffith, questioning in detail specific line items in the estimate and inquiring about reasons for

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[11] Tr 508.

[12] Tr 512.

[13] Tr 515.

[14] Tr 519; Ex 107.

[15] *Id*.

[16] *Id*.

[17] Tr 520-24.

[18] Tr 525-27; Ex 113, 114.

amendments that were outside the scope of necessary repairs.[19] Griffith never responded to the adjuster.[20] Instead, Griffith sent a third additional estimate for repairs totaling $6,523.28.[21]

Griffith sent Farmers yet another supplemental estimate on February 21, 2012, totaling $1,338.43.[22] The adjuster responded to Griffith the next day with questions regarding the estimates and the status of the code enforcement claim for the converted garage.[23] On February 24, 2012, coverage for loss of rents expired per the parties' prior agreement on the six-week period of repairs.[24]

In mid-March 2012, Griffith declared an "impasse" over the code enforcement issues and complained to the adjuster's supervisor.[25] Farmers then retained counsel, Daniel Thenell.[26] Farmers determined it would retain an independent contractor to provide an additional repair estimate in an effort to resolve the issues.[27] Thenell contacted Griffith to request access to conduct an

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[19] Tr 526-28; Ex 115.

[20] Tr 528.

[21] Tr 525-26; Ex 112.

[22] Tr 372, 529; Ex 117.

[23] Tr 532-33.

[24] Tr 515.

[25] Tr 172, 534.

[26] Tr 449, 450.

[27] Tr 460.

inspection.[28] Over the next three months, Thenell sent several separate requests for access to the residence.[29] During this period, no repairs were made and Griffith refused an independent contractor inspection.

Due to the unresolved questions about repairs, Plaintiff's failure to provide information, Farmers' rising concerns of possible fraud, and the need for additional investigation, Farmers sent a letter to Plaintiff on May 4, 2012, to invoke its contractual right to conduct Plaintiff's examination under oath (EUO).[30] Farmers scheduled the EUO for June 8, 2012.[31] The day before the EUO was to proceed, Plaintiff coincidentally contacted Thenell to inquire about the status of the claim.[32] Plaintiff indicated she had not received Thenell's letter, and Thenell requested Plaintiff provide alternate dates for the EUO.[33]

In response to Farmers' request for an EUO, Plaintiff retained counsel and, on June 8, 2012, demanded an appraisal pursuant to the insurance policy.[34] Farmers responded that Plaintiff's request for appraisal was premature due to open

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[28] Tr 411-12; Ex 126.

[29] Ex 129.

[30] *Id.*

[31] Tr 428; Ex 129, p. 1-3.

[32] *Id.*, p. 4-6.

[33] *Id*.

[34] ER 3-4.

questions regarding the repairs and because Farmers had not completed its investigation and EUO.[35] Plaintiff's counsel responded that the appraisal trumped the need for an EUO.[36]

Over the next seven months, Thenell requested an EUO on several occasions.[37] All of those efforts were cancelled or rejected by Plaintiff.[38] Unbeknownst to Farmers, Plaintiff filed, but did not serve, this lawsuit in November 2012.[39]

Plaintiff finally agreed to submit to the EUO on January 7, 2013.[40] Two days later, on January 9, 2013, Plaintiff served Farmers with the lawsuit.[41] Farmers had yet to complete its investigation of the claim.[42] Plaintiff's complaint alleged breach of contract for failure to pay benefits owed and breach of the duty of good faith and fair dealing.[43] The complaint also requested a declaratory judgment finding that the insurance claim was subject to the contractual appraisal

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[35] Tr 467-69.

[36] *Id*.

[37] Ex 129.

[38] *Id.*

[39] Complaint, Nov 13, 2012.

[40] Ex 129, p. 21.

[41] Summons, Jan 9, 2013.

[42] Tr 471-73.

[43] Complaint, Nov 13, 2012.

process.[44]

Farmers admitted in its answer that the claim was subject to appraisal.[45] Plaintiff filed a motion for summary judgment on her entitlement to appraisal, but the court deferred ruling on the motion because the matter was not in dispute.[46] The appraisal process continued on a parallel track separate from the litigation.[47]

2. Appraisal

The appraisal occurred on July 9, 2013.[48] Plaintiff claimed $26,445.16 in damages. The appraisal panel determined that the actual cash value of the damaged items was $19,506.43 and the replacement cost value was $14,447.20.[49] The appraisal panel determined the value of damaged items, but specifically stated in its decision that it would not determine disputed questions of coverage.[50]

Farmers paid Plaintiff $7,533.89, representing the actual cash value of the covered portion of the loss.[51] There remained $5,063.23 in replacement costs,

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[44] *Id.*

[45] Answer, Apr 18, 2013.

[46] Order, June 10, 2013.

[47] Ex 1 at p. 12 ("Appraisal").

[48] ER 23-24.

[49] *Id.*

[50] *Id.*

[51] Tr 536-37; Ex 120, 121.

which, under the terms of the policy, were recoverable upon replacement.[52] Farmers denied coverage for the remaining portion of the claim for plumbing repair, dry rot repair, the cost of the engineering report, and lost rents beyond six weeks, and those issues became the source of the litigation.

3. Pre-Trial Motions

Plaintiff filed a motion to "confirm" the appraisal award and for summary judgment. Farmers filed a cross-motion for summary judgment on the coverage issues.[53] In it, Farmers asserted that it had no objection to "affirming" the amounts the appraisal panel awarded that were already accepted and paid by Farmers.[54] Farmers argued there was no coverage for the remaining items valued by the appraisers: replacement cost benefits, plumbing and dry rot repair, the cost of an engineering report, and lost rents beyond six weeks.[55]

Judge Norblad heard argument on the motions and granted Farmers' cross-motion with respect to the claim for dry rot repair, but found questions of fact for trial on all other issues.[56] Judge Norblad granted Plaintiff's motion to confirm the

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[52] ER 23-24; Ex 1 at p. 11 ("Loss Settlement"); *Higgins v. Ins. Co. of N. Am.*, 256 Or 151, 166, 469 P2d 766 (1970).

[53] Opposition and Cross-Motion for Summary Judgment, Sept 3, 2013 (SER 1-14).

[54] *Id.*

[55] *Id.*

[56] P Tr 27; Order, Nov 13, 2013.

appraisal award but withheld ruling on the legal effect of the appraisal on coverage, saying the parties and the court would "work it out at the time of trial."[57]

4. Trial

On Farmers' motion, the trial judge (Judge Hart) reconsidered the denial of summary judgment, agreed there were questions of fact, and ordered the case to trial.[58]

Three working days before trial, for the very first time, Plaintiff provided Farmers with proof of a claim for the replacement cost benefits.[59] Farmers paid that amount to Plaintiff three days after she provided proof of replacement, resolving any amounts owed regarding replacement cost.[60]

At the end of trial, the jury returned a verdict for Farmers.[61] The jury found that Farmers did not breach the insurance policy and Plaintiff was not entitled to any further amount.[62] The jury also found that both parties breached the implied covenant of good faith and fair dealing, but awarded Plaintiff no damages.[63]

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[57] P Tr 30; Order, Nov 13, 2013.

[58] Trial Memorandum, Feb 25, 2014 (SER 15-26); P Tr 33-52.

[59] ER 28; P Tr 52; Tr 712.

[60] ER 28.

[61] ER 45-46.

[62] ER 45.

[63] ER 46. Judge Hart asked the jury to apportion liability of the claim as an advisory opinion should he be required to assess Plaintiff's attorney fees. (Tr 579-

5. Post-Trial Motions

After trial, Plaintiff filed a Motion for Judgment Notwithstanding the Verdict and for New Trial.[64] Farmers, in response, argued that Plaintiff's motion was not supported by the trial record.[65] Judge Hart agreed with Farmers and denied Plaintiff's motion.[66] Judge Hart entered judgment for Farmers.[67]

Although the verdict was for Farmers, Plaintiff filed a petition seeking her attorney fees.[68] Farmers responded that there was no basis for an award of attorney fees.[69] Judge Hart agreed and denied the motion.[70]

Plaintiff timely filed a notice of appeal, and the Court of Appeals affirmed the judgment for Farmers without opinion. This review followed.

C. Summary Timeline

Because Plaintiff's claimed assignments of error depend, in part, on the timing of certain events, below is a timeline summarizing the key dates from the statement of facts above.

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[64] Motion, Mar 7, 2014.

[65] Response, Mar 24, 2014.

[66] Tr 706-09.

[67] General Judgment, Apr 4, 2014.

[68] Statement, Apr 17, 2014.

[69] Response, May 1, 2014 (SER 33-44).

[70] Tr 726-28.

Date	***Event***	***Source***
Dec 20, 2011	Plaintiff discovers the leak and makes a claim with Farmers.	Complaint, Nov 13, 2013
Jan 12, 2012	Farmers prepares an estimate of the loss in the amount of $5,277.23.	Tr 519; Ex 107
Jan 17, 2012	Farmers pays Plaintiff $3,300.45, representing the total actual cash value of the loss less deductible.	Tr 519; Ex 107
Jan 31, 2012	Plaintiff prepares competing estimates of the loss totaling $14,255.33.	Tr 525-27; Ex 113, 114
Feb 2012	Plaintiff prepares additional estimates of the loss in the amounts of $6,523.28 and $1,338.43.	Tr 372, 525-26, 529; Ex 112; Ex 117
Mar 28, 2012	Farmers requests an inspection of the residence.	Tr 411-12; Ex 126
May 4, 2012	Unable to get Plaintiff to agree to an inspection, Farmers requests an EUO and schedules it for June 8, 2012.	Ex 129
June 8, 2012	Plaintiff refuses the scheduled EUO and demands contractual appraisal.	ER 3-4
June to Dec 2012	Farmers requests Plaintiff's EUO no less than ten times.	Ex 129
Nov 9, 2012	Plaintiff files, but does not serve, her lawsuit against Farmers	Complaint, Nov 13, 2012
Jan 7, 2013	Plaintiff submits to an EUO	Ex 129, p. 21
Jan 9, 2013	Plaintiff serves Farmers with the summons and complaint.	Summons, Jan 9, 2013

Apr 18, 2013	Farmers answers the complaint and admits that the claim is subject to contractual appraisal, but denies that Plaintiff has completed the conditions precedent in the policy.	Answer, Apr 18, 2013
June 10, 2013	Trial court defers ruling on Plaintiff's motion for summary judgment regarding appraisal because the parties have already agreed to the appraisal.	Order, June 10, 2013
July 9, 2013	Appraisal panel determines the actual cash value and replacement cost value of the loss.	ER 23-24
July 11, 2013	Pursuant to the Appraisal Award, Farmers pays Plaintiff $2,469.09 for the undisputed actual cash value of the loss.	Tr 536-37; Ex 120
Aug 5, 2013	Appraisal panel issues supplementary determination of the actual cash value and replacement cost value of the loss.	ER 23-24
Aug 14, 2013	Pursuant to the Supplemental Appraisal Award, Farmers pays $5,066.80 for the undisputed actual cash value of the loss.	Tr 536-37; Ex 121
Feb 21 and 23, 2014	Plaintiff for the first time submits proof of loss for replacement cost value of disputed items.	ER 28; P Tr 52; Tr 712
Feb 26, 2014	Farmers pays $4,214.18 for the undisputed replacement cost value of the loss.	ER 28
Feb 26-28, 2014	Trial on disputed portions of the claim.	Trial transcript

RESPONSE TO QUESTIONS PRESENTED

RESPONSE TO QUESTION PRESENTED NO. 1

The trial court properly rejected Plaintiff's attorney fee petition. The trial court followed the Oregon appellate court cases that correctly interpret the attorney fee statute (ORS 742.061(1)) to require that the insured obtain a "recovery" by way of judgment. Plaintiff, here, did not obtain a recovery in the litigation or a judgment in her favor.

The trial court properly rejected Plaintiff's request to expand the definition of "recovery" to include an appraisal award or a settlement after suit is filed. Plaintiff's proposed rule is not supported by the statute or the facts of this case.

ARGUMENT ON QUESTION PRESENTED NO. 1

Plaintiff argues that the trial court erred by denying her an award of attorney fees pursuant to ORS 742.061(1). The statute provides in relevant part:

> [I]f 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.

An award of attorney fees under ORS 742.061(1) "is typically referred to as a 'fee-shifting' award, because the prevailing party's attorney fees are shifted to

the losing party."[71] An award of fees under the statute requires that a "plaintiff's recovery exceed the amount of any tender by the defendant[.]"[72] The Court of Appeals, in *Triangle Holdings v. Stewart Title Guaranty Co*., ruled that a "recovery" under the statute requires a judgment.[73]

Plaintiff proposes that this Court expand the definition of "recovery" under the statute to include an appraisal award or settlement if the insured is forced to file suit. The court, in *Triangle Holdings*, rejected a similar argument.[74] Plaintiff, here, did not request or receive any finding that she was forced to file suit or that her claim was paid as a result of the lawsuit. As discussed below, her argument for fees is not supported by the plain language of the statute, prior Oregon appellate cases, or the facts of this case.

A. Plaintiff failed to request any special findings from the jury or the trial court below and, therefore, has failed to properly preserve her argument for attorney fees.

Plaintiff argues on appeal that she is entitled attorney fees under ORS 742.061(1) because, according to Plaintiff, Farmers delayed payment under the insurance policy and forced her to file suit to recover.[75] At trial, Plaintiff asked the

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[71] *Strawn v. Farmers Ins. Co. of Or.*, 353 Or 210, 216, 297 P3d 439 (2013).

[72] ORS 742.061(1).

[73] 266 Or App 531, 538, 337 P3d 1013 (2014).

[74] *Triangle Holdings*, 266 Or App at 538.

[75] Opening Brief at pp. 8, 12.

jury to find that Farmers had breached the contract by, among other things, delaying payment and forcing her to file suit.[76] The jury unanimously found that Farmers did not breach its contract.[77] Plaintiff did not request any special findings that Farmers, nonetheless, delayed its payment under the policy or forced her to file suit.[78]

Plaintiff requests this Court make these findings on appeal in order to award Plaintiff her fees below. Plaintiff is not entitled to findings of fact on appeal. She is further not entitled to findings of fact that she did not request below.[79]

B. The trial court properly ruled that ORS 742.061(1) does not permit an award of fees in absence of a judgment in Plaintiff's favor.

1. The plain language of the statute requires that Plaintiff recover by way of judgment.

The trial court refused Plaintiff's invitation to expand the interpretation of a "recovery" under ORS 742.061(1) to include (1) an appraisal award or (2) a settlement after suit is filed. This Court reviews the trial court's interpretation of ORS 742.061(1) for legal error.[80] To determine the interpretation of a statute, the Court must "seek to discern the legislature's intention, first evaluating the statutory

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[76] Tr 593, 610, 670-71.

[77] ER 45-46.

[78] *Id*.

[79] ORAP 5.45(1); *See Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

[80] *Triangle Holdings*, 266 Or App at 535 (citations omitted).

text and context as well as any useful legislative history."[81] Plaintiff's proposed interpretation, here, ignores the plain language and purpose of the statute.

(a) The statute does not contemplate a "recovery" by way of an award in contractual appraisal.

Plaintiff asks this Court to remand the case for entry of judgment on the appraisal award.[82] Plaintiff did not ask the trial court to enter the appraisal award as judgment below and cannot argue the failure to enter judgment as error on appeal.[83]

Plaintiff also asks this Court to recognize the appraisal award as a "recovery" under ORS 742.061(1) to permit an award of attorney fees. The plain language of the statute does not support Plaintiff's argument.

The statute requires that "an action be brought in ***any court*** of this state."[84] The statute further refers to the insured as the "plaintiff" and the insurer as the "defendant" in the action, and the statute expressly requires that the attorney fees be awarded "as part of the costs of the action" (i.e., the action brought in "any court").[85] An appraisal is not brought in a court, it does not include a plaintiff or a

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[81] *Id.* (citing *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009)).

[82] Opening Brief at pp. 7-8.

[83] ORAP 5.45(1).

[84] ORS 742.061(1) (emphasis added).

[85] *Id.*

defendant, and it does not involve an award by a court. An appraisal proceeds as a condition of the insurance policy before two appraisers and an umpire.[86] There are no "costs" taxed; the expenses are shared equally by the insured and the insurer.[87]

There is no evidence to suggest that the legislature intended that a "recovery" under the statute include an appraisal award. Rather, the plain language of the statute suggests that a "recovery" does not include an appraisal award.

Plaintiff suggests that the appraisal award, here, was "confirmed" by the trial court and is, therefore, a "decree" that should qualify as a "recovery."[88] The appraisal award set the value of the loss, which the parties agreed pursuant to the policy to use as a damage figure for trial.[89] The trial court agreed to "confirm" the appraisal award upon Plaintiff's motion because Farmers had already paid the undisputed portion pursuant to the appraisal provision in the insurance contract and Farmers agreed that the appraisal would set the value of—but not coverage for—

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[86] Tr 675-76. *See Molodyh v. Truck Ins. Exch.*, 304 Or 290, 298, 744 P2d 992 (1987) ("It is only when one party demands an appraisal that the process becomes mandatory and, to that extent, becomes a condition precedent to sustaining any claim in court.").

[87] Tr 675-76.

[88] Opening Brief at p. 22 n.3.

[89] ER 23-24; Tr 707.

the claimed loss.[90] The trial court did not decide the legal effect of "confirming" the award after the fact.[91]

Plaintiff's act of "confirming" the valuation determined outside the litigation does not convert that amount into a "recovery" in a "court" action under ORS 742.061(1). To hold otherwise would encourage all insureds to file suit prematurely before demanding appraisal so they can later ask a trial court to "confirm" the amount set by the appraisal and recover their fees. Plaintiff's proposed rule is contrary to the purpose of contractual appraisal, which is designed to avoid litigation by resolving valuation disputes privately and with each side bearing its equal share of the expenses.[92]

(b) The statute does not contemplate a "recovery" by way of settlement.

Separate from the appraisal award, Plaintiff asks this Court to recognize Farmers' payment of replacement cost value as a settlement and, therefore, a "recovery" under ORS 742.061(1) to permit an award of attorney fees.[93] Again, Plaintiff's argument is not supported by the plain language of the statute.

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[90] P Tr 14, 30; Farmers' Opposition to Plaintiff's Motion to Confirm Appraisal Award, Sept 3, 2013, at pp. 1-2 (SER 1-2).

[91] *Id.*

[92] Tr 675-76.

[93] Opening Brief at p. 23.

The statute authorizes an award of fees when "the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action[.]"[94] A court, then, must compare "the plaintiff's recovery" to the "amount of any tender." According to this Court, a "tender" is "an unconditional offer to pay money"; that is, an offer of settlement.[95] An offer of settlement will not exceed the amount of the settlement; the two will be equal. The plain language of the statute suggests that the legislature did not intend that a "recovery" should include an ordinary claim settlement.

Moreover, the purpose of the statute suggests that a settlement should not trigger an award of fees. The purpose of the statute is to encourage settlement of valid claims.[96] Plaintiff's proposed interpretation would punish settling insurers. Plaintiff's proposal assumes that all insurance claims are valid and reflect the true value of the loss. A settlement, however, reflects more than just an amount owed. Settlement reflects the risk of loss at trial for both sides. It takes into account the risk that the jury or the court will find that no money is owed to the insured, or that the full amount claimed, plus attorney fees, is owed by the insurer. A settlement

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[94] ORS 742.061(1).

[95] *Dockins v. State Farm Ins. Co.*, 329 Or 20, 33, 985 P2d 796 (1999).

[96] *See Certain Underwriters at Lloyd's London v. Mass. Bonding and Ins. Co.*, 245 Or App 101, 109 n.3, 260 P3d 830 (2011) (citations omitted).

does not reflect any finding that the claim was properly valued, timely made, or paid unreasonably late.

To read ORS 742.061(1) to allow an award of attorney fees after the parties have agreed to compromise would discourage settlement, contrary to the purpose of the statute. Plaintiff's proposed interpretation would actually encourage insureds to refuse all offers of compromise made in the first six months after proof of loss. As long as the insurer increases its offer of settlement by even one dollar, the insured can accept the compromise and still move to recover fees under the statute.

There is no indication that the legislature intended to enact such a scheme. The purpose and plain language of the statute suggests that the legislature intended a "recovery" to require a money judgment, which reflects a finding that the insurer had failed to timely pay a valid claim.

2. The cases interpreting ORS 742.061(1) are consistent with its plain language.

The Court of Appeals relied on the plain language of ORS 742.061(1) when it held, in *Triangle Holdings*, that the statute requires that "a party obtain[ ] a 'recovery' through a judgment."[97] Plaintiff and *Amicus* asks this Court to overrule *Triangle Holdings*, but each fails to articulate how the language of the statute supports that position.

[97] 266 Or App at 536.

To the contrary, the decision in *Triangle Holdings* was well-reasoned. The court recognized that the statute was first enacted in 1919 and, consistent with its current iteration, required the trial court to compare the "plaintiff's recovery" to the "tender" made by the defendant.[98] The court first looked to the dictionary definition of the word "recovery" and sought guidance from the dictionaries in use at the time the statute was enacted.[99] The court found that, "[w]hen the statute was enacted, 'recovery' meant the same thing that it does today: 'The obtaining in a suit at law of a right to something by a verdict, decree, or judgment of court, esp. by the final one deciding the issues involved.'"[100]

Plaintiff, here, offers competing definitions from seven different dictionaries and two thesauri, none of which were in use at the time the statute was enacted.[101] *Amicus* follows suit.[102] Those definitions, offered nearly a century later, cannot be said to have informed legislative intent in 1919.

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[98] *Id.* at 535-36.

[99] *Id.* at 535 ("We may refer to dictionary definitions to assist us in determining the plain meaning of an undefined term, and, in 'interpreting the words of a statute enacted many years ago, we may seek guidance from dictionaries that were in use at the time.'") (citing *State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003)).

[100] *Id.* at 536 (citing *Webster's New Int'l Dictionary* 1785 (Reference History ed. 1910)).

[101] Opening Brief at pp. 21-23.

[102] OTLA *Amicus* Brief at pp. 8-9.

The *Triangle Holdings* court next considered prior interpretations of the statute and found that those prior interpretations supported the court's understanding of the statutory text.[103] The court considered *McGraw v. Gwinner*, an Oregon Supreme Court case in which the insured recovered a declaratory judgment against his insurer and the court found that fees were not available under the statute.[104] This Court, in *McGraw*, "adhere[d] to the proposition that in order to secure attorney fees pursuant to ORS 743.114 [the predecessor to ORS 742.061], the insured must recover a money judgment against the insurer[.]"[105] Contrary to Plaintiff's argument here, the court in *Triangle Holdings* did not "rel[y] heavily on *dicta*"[106] from *McGraw*. The court in *Triangle Holdings* recognized that, because *McGraw* was decided in the context of a declaratory judgment action, it "does not conclusively answer the question whether * * * an insured must obtain a judgment in order to have a 'recovery' under ORS 742.061(1)."[107]

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[103] *Triangle Holdings*, 266 Or App at 536-39.

[104] *Id.* at 536-37 (discussing *McGraw v. Gwinner*, 282 Or 393, 578 P2d 1250 (1978)).

[105] *McGraw*, 282 Or at 400.

[106] Opening Brief at p. 20.

[107] *Triangle Holdings*, 266 Or App at 537.

The court, therefore, considered other prior cases, including *Becker v. DeLeone*, *Certain Underwriters v. Massachusetts Bonding and Insurance Co*., and *Wick v. Viking Insurance Co.*[108] The court found that its prior holdings were consistent with its reading of the statutory text, that a "recovery" requires an entitlement to money through a judgment.[109]

Plaintiff, here, complains that the *Triangle Holdings* court failed to understand the rulings in two prior Oregon Supreme Court cases, *Dolan v. Continental Casualty Co.* and *Dockins v. State Farm Insurance Co*., which Plaintiff argues are "dispositive."[110] Neither *Dolan* nor *Dockins* addressed the meaning of the word "recovery" in ORS 742.061(1).[111] The Court, in both of those cases, addressed the timing of the insurer's payment to determine whether that payment could be considered a valid "tender" under the statute.[112] In each case, the Court held that the payment came too late and could not, therefore, qualify as a "tender" to be compared with the insured's recovery and defeat an award of fees.[113]

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[108] *Id.* at 538-39 (discussing *Becker v. DeLeone*, 78 Or App 530, 717 P2d 1185 (1986) and citing *Certain Underwriters*, 245 Or App at 108 and *Wick v. Viking Ins. Co.*, 105 Or App 33, 38, 803 P2d 1199 (1990)).

[109] *Triangle Holdings*, 266 Or App at 538-39.

[110] Opening Brief at p. 14.

[111] *Dolan v. Continental Cas. Co.*, 133 Or 252, 254-55, 289 P 1057 (1930); *Dockins*, 329 Or at 28-33.

[112] *Dolan*, 133 Or at 254-55; *Dockins*, 329 Or at 31-32.

[113] *Id.*

In *Dockins* and *Dolan*, the insureds recovered by way of judgment.[114] In *Dockins*, the insured and insurer entered into a stipulated judgment.[115] In *Dolan*, the insurer confessed its liability and paid the amount owed into the court; judgment was entered for the insured before trial.[116] Plaintiff and *Amicus* mistakenly represent in their opening briefs that the court in *Dolan* did not enter judgment for the insured.[117] In fact, the insurer in that case moved for judgment on the pleadings and the court noted in its opinion that the appeal arose "from judgment ***for plaintiff*** [the insured] on the pleadings[.]"[118] The court then ruled for the insured and modified the judgment by adding sums ***in her favor***.[119]

Plaintiff, here, raises several other cases that she argues are controlling, but none of those cases addressed the issue on appeal here or in *Triangle Holdings*.[120] For example, Plaintiff argues that the Court of Appeals in *Triangle Holdings* failed

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[114] *Dolan*, 133 Or at 253; *Dockins*, 329 Or at 24. The insureds recovered by way of judgment the other cases relied upon by Plaintiff and *Amicus*. See *Petersen v. Farmers Ins. Co. of Oregon*, 162 Or App 462, 464, 986 P2d 659 (1999) (judgment entered for insured; court did not address the meaning of "recovery"); *Travelers Ins. Co. v. Plummer*, 278 Or 387, 390, 563 P2d 1218 (1977) (judgment entered for insured; court did not address the meaning of "recovery"); *Wilson v. Tri-County Metro. Transp. Dist. of Or.*, 234 Or App 615, 618, 228 P3d 1225 (2010) (judgment entered for insured; court did not address the meaning of "recovery").

[115] *Dockins*, 329 Or at 24.

[116] *Dolan*, 133 Or at 253.

[117] Opening Brief at p. 16; OTLA *Amicus* Brief at p. 5.

[118] *Dolan*, 133 Or at 252-53 (emphasis added).

[119] *Id.* at 256.

[120] *See*, *supra*, n.114.

to recognize its prior ruling in *Wihtol v. Lynn*, which Plaintiff argues had already decided "that a settlement is a 'recovery' under Oregon Law."[121] The court in *Wihtol* did not address ORS 742.061(1) at all, and, instead, interpreted a fee agreement between an attorney and his client.[122] The agreement provided for a contingency fee based on "any recovery collected for the Client by settlement, judgment or compromise[.]"[123] The *Wihtol* court did not decide that a settlement is a "recovery" as a matter of Oregon law. The court addressed a contract that required the parties to consider sums obtained by way of settlement.[124]

Despite the proper reasoning in *Triangle Holdings* and the other cases that came before it, Plaintiff asks this Court to find that a "recovery" may be had through judgment ***or*** settlement to trigger attorney fees. Plaintiff argues that the *Triangle Holdings* rule "encourages strategic nonpayment by insurers."[125] *Amicus* repeats the same argument.[126] Both are wrong. Once suit is filed, an insured can demand a settlement that includes attorney fees. Even if the insurer will not agree, under *Dockins*, an insurer cannot avoid an award of fees when it makes a late

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[121] Opening Brief at p. 21.

[122] *Wihtol v. Lynn*, 209 Or App 56, 58-59, 146 P3d 365 (2006).

[123] *Id.* at 63-64.

[124] *Id.*

[125] Opening Brief at p. 8.

[126] OTLA *Amicus* Brief at p. 9.

payment.[127] So long as the insured enters judgment once the amount is paid, the insured will be entitled to fees. That judgment can come after a jury trial,[128] stipulation,[129] or motion.[130]

Triangle Holdings was correctly decided, and neither Plaintiff nor *Amicus* offer any cogent argument to overrule it.

C. The trial court properly ruled that ORS 742.061(1) does not permit an award of fees in this case in particular because Plaintiff did not recover at trial. Judgment was awarded *against* her.

Plaintiff argues that she was forced to file suit and, as a result, recovered more than Farmers tendered in the first six months of the claim. These are not the facts.

As discussed below, litigation, here, did not result in a recovery to Plaintiff on covered claims that should have been earlier settled. First, the parties disputed the value of the loss and agreed to submit that dispute to a contractual appraisal panel. Farmers paid for the amounts owed on items where coverage was not disputed. The jury found at trial that coverage for the remaining disputed items was not owed at all. Second, Farmers paid the amount owed for replacement cost value two days after Plaintiff finally replaced her property and submitted proof of

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[127] *See Dockins*, 329 Or at 33.

[128] *Petersen*, 162 Or App at 464; *Wilson*, 234 Or App at 618.

[129] *Dockins*, 329 Or at 22.

[130] *Dolan*, 133 Or at 253.

loss. The replacement cost claim was not ripe before that time. Farmers made a timely tender that was accepted by Plaintiff and recognized by the trial court.

1. The jury agreed that Farmers properly paid the actual cash value owed for undisputed items of loss.

Throughout the course of the claim, Plaintiff and Farmers disputed the value of the loss. Farmers repeatedly requested Plaintiff's examination under oath as a part of its investigation to determine coverage and valuation.[131] Two days after Plaintiff agreed to sit for her examination under oath, Plaintiff filed suit.[132] The parties agreed to proceed with appraisal under the insurance policy.[133] The appraisers determined the value of the loss, but did not determine whether disputed items were covered by the insurance policy—a matter for the litigation.[134] The appraisers[135] wrote in their findings:

> The Appraisers have reached agreement of the property value. The Appraisal does not address policy coverage, and all terms and conditions of the insurance policy remain in force. Coverage issues valued but NOT awarded are noted by an asterisk (*).[136]

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[131] Ex 129.

[132] Ex 129 at p. 21; Summons, Jan 9, 2013.

[133] Order, June 10, 2013.

[134] ER 23-24.

[135] The appraisal panel consisted of Roger Howson, David Griffith and Justice William Riggs, ret.

[136] ER 23-24.

The trial court agreed that the appraisal "just fixed a dollar amount for the damage and did nothing to address any of the issues with regard to coverage," which were, instead, "within the jury's bailiwick."[137]

Once the appraisal was finished, Farmers paid the actual cash value of the loss pursuant to the appraisal provision in the policy within two months.[138] The litigation resumed and the matter proceeded to motions and, eventually, trial to determine whether coverage was owed on the disputed claims.

Farmers disputed Plaintiff's right to recover (1) costs to repair dry rot, (2) costs to repair plumbing, and (3) costs to obtain an engineering report for upgrades.[139] Coverage for dry rot was specifically excluded under the policy, and Judge Norblad dismissed that claim on summary judgment.[140] Coverage for plumbing repairs depended on whether the damage was caused by covered water damage.[141] Coverage for the engineering report depended on whether the report was obtained in order to repair covered property.[142] Farmers argued the report was obtained to upgrade the property beyond the cost of repair by adding a window to

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[137] Tr 707.

[138] Ex 120, 121.

[139] Opposition and Cross-Motion for Summary Judgment, Sept 3, 2013 (SER 1-14).

[140] P Tr 27.

[141] Opposition to Farmers' Cross-Motion for Summary Judgment, Oct 8, 2013.

[142] *Id.*

the lower level,[143] and Plaintiff disagreed.[144] Judge Norblad found questions of fact for trial on the issues of whether Farmers owed the cost of plumbing repairs and the engineering report.[145]

At trial, the jury determined that Farmers did not owe any further amount, and judgment was entered for Farmers and against Plaintiff.[146] The jury did not find that Plaintiff was forced to file suit, despite her arguments to the contrary.[147] Plaintiff did not recover any amount in the litigation in excess of the amounts tendered in the first six months after she gave notice of loss. Plaintiff did not recover any amount at all in the litigation.

2. The jury agreed that Farmers properly paid a new claim for replacement cost value made three days before trial.

Plaintiff argues that, because Farmers paid the replacement cost value of her property on the first day of trial, she recovered an amount by way of settlement that was in excess of any tender made within the first six months after proof of loss.[148] Again, these are not the facts.

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[143] Opposition and Cross-Motion for Summary Judgment, Sept 3, 2013 (SER 1-14).

[144] Opposition to Farmers' Cross-Motion for Summary Judgment, Oct 8, 2013.

[145] P Tr 27; Order, Nov 13, 2013.

[146] ER 45-46.

[147] Tr 593, 610, 670-71.

[148] Opening Brief at p. 23.

Plaintiff had not replaced her damaged property at the time she first gave notice of her water loss in December 2011 and, under the policy and Oregon law, costs of replacement are recoverable only after the insured actually repairs or replaces.[149] Prior to repair or replacement, the insured is entitled to only the actual cash value of the loss,[150] which Farmers paid. There was never any dispute that Farmers would pay replacement costs once repairs were completed.[151]

Three working days before trial, Plaintiff finally replaced her property and gave notice to Farmers that repairs were complete.[152] Farmers paid the claim three days later, on the first day of trial.[153] Plaintiff, however, argues that the newly proved claim for replacement cost should relate back to the date she first gave notice of the water loss, even though coverage for replacement cost was not yet owed at that time. She made this argument at trial in an attempt to trigger fees, and Judge Hart refused her invitation to relate the new replacement cost claim back to the original proof of loss prior to replacement:

> THE COURT: [Y]ou did not provide proof of loss until the Thursday before trial, and you got your check a couple days before trial.

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[149] *Higgins*, 256 Or at 166.

[150] *Id.*

[151] Tr 519-23.

[152] ER 28; P Tr 52; Tr 712.

[153] ER 28.

> MR. VANCE: That's not true, Your Honor. Proof of loss was provided well before this case was filed.
>
> THE COURT: No, no, you had the proof of loss and then you got your discounted of monies up front whenever. And the final was - - when you got the work done.[154]

Judge Hart got it right. Before Plaintiff replaced her property, she was not entitled to the cost of replacement—the replacement cost claim was not yet ripe. Once she replaced and submitted proof of replacement, Farmers paid within three working days.[155]

Plaintiff did not obtain a "recovery" of the replacement cost value in excess of an earlier tender. The replacement cost amount was never at issue earlier because she simply had not replaced the damaged property. Plaintiff's proposed rule would allow an insured to give notice of a future loss for which no coverage is yet owed, file suit, wait for coverage to ripen, and recover attorney fees. That is not the purpose of the attorney fee statute. The purpose of the statute is to allow the recovery of fees when the insured is wrongly denied coverage that is owed at the time proof of loss is given. Coverage for replacement cost value, here, was not owed at the time Plaintiff first gave notice of her water loss in December 2011, and that date cannot trigger the running of the clock for statutory attorney fees.

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[154] Tr 712.

[155] ER 28.

The trial court properly denied Plaintiff an award of fees, consistent with the legislative intent of ORS 742.061(1). The Court should affirm the trial court's ruling.[156]

RESPONSE TO QUESTION PRESENTED NO. 2

The trial court did not improperly ask the jury to decide a question of law regarding the interpretation of the insurance policy. The trial court properly submitted questions of fact to the jury regarding causation and damages. Plaintiff's proposed rule is not supported by the facts of this case.

ARGUMENT ON QUESTION PRESENTED NO. 2

Plaintiff argues the trial court erred by instructing the jury to decide a question of law, but Plaintiff fails to identify precisely the "coverage" question she believes was erroneously sent to the jury.[157] Plaintiff asserts only that the question had been previously decided by Judge Norblad.[158]

Plaintiff appears to argue that Judge Norblad ruled on summary judgment that coverage was owed for the cost to repair plumbing and to obtain an engineering report, and, according to Plaintiff, Judge Hart improperly submitted

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[156] Plaintiff argues that Farmers waived any challenge to the amount of attorney fees requested. Farmers specifically challenged the reasonableness of Plaintiff's claimed attorney fees at page 5 of its Response to Plaintiff's Petition for Attorney Fees, filed May 1, 2014 (SER 37).

[157] Opening Brief at p. 29.

[158] *Id.*

the same "coverage" questions to the jury.[159] Plaintiff's question for review is predicated on a fundamental misunderstanding of Judge Norblad's pre-trial rulings.

A. Judge Norblad did not rule that Plaintiff was entitled to coverage.

Judge Norblad did not find that Plaintiff was entitled to coverage for the disputed portions of her claim.[160] Instead, he largely denied the parties' dispositive motions on the issue.[161]

Farmers moved for summary judgment on the issue of whether costs related to dry rot, plumbing, and engineering were covered by the policy.[162] Plaintiff argued, in response, that there were questions of fact for trial.[163] Plaintiff argued that the engineering report fell within coverage for code upgrades because it was required by the city. Plaintiff further argued that the cost to repair the dry rot and plumbing was covered because the costs were related to covered water damage. Plaintiff asked Judge Norblad to set trial:

> The thing of it is Farmers is moving for Summary Judgment. They didn't submit any evidence that they paid nickel one. * * * What they think they've paid doesn't jive with what we think we've received. So I think what needs to happen here Judge is we should have

[159] Opening Brief at p. 9.

[160] P Tr 27; Order, Nov 13, 2013.

[161] Order, Nov 13, 2013.

[162] Farmers' Cross Motion for Summary Judgment, Sept 3, 2013 (SER 1-14).

[163] Opposition, Oct 8, 2013.

> a trial, it'll be a short one. * * * I would ask the Court to deny their Summary Judgment Motion. Let's set this thing for trial.[164]

Judge Norblad agreed with Farmers that the dry rot was excluded, but found a question of fact for trial on all remaining issues:

> All right, I'll agree with you on the dry rot exploded [*sic*]. Other than that I'm going to deny Summary Judgment. Let's set it for trial for a day.[165]

After Judge Hart took over the case, he agreed with Judge Norblad's rulings and deferred the questions of fact for trial:

> THE COURT: I'm on number two on his list of things that we had today.
>
> MR. VANCE: All right.
>
> THE COURT: It's Defendant's Motion for Partial Summary Judgment regarding coverage issues.
>
> MR. VANCE: All right.
>
> THE COURT: It was filed on September the 6th. Actually was dealt with by Judge Norblad, and some of it I'm just doing the same as I'm deferring until after I get the evidence on the record.[166]

Counsel for Plaintiff replied, "Right."[167] Judge Norblad and Judge Hart found that the question of whether the loss was caused by covered water damage created a

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[164] P Tr 22.

[165] P Tr 27.

[166] P Tr 54.

[167] *Id*.

question of fact for the jury. They also found that the question of whether the engineering report was obtained to comply with code upgrades was a question of fact for trial.

Based on these findings of fact, the trial court correctly found that summary judgment was improper, and the court correctly submitted the questions to the jury. The trial court did not err.

B. The trial court did not concede error, as Plaintiff argues.

In her Petition for Review, Plaintiff argued that Judge Hart "conceded that [he] may have committed error."[168] Plaintiff is mistaken. In post-trial motions, Plaintiff argued that Judge Norblad had already granted her coverage for the costs of plumbing and engineering. Plaintiff mistakenly believed that Judge Norblad's decision to deny Farmers' motion for summary judgment necessarily meant that he was granting summary judgment for Plaintiff. Plaintiff, however, had not argued that she was entitled to summary judgment; she argued that there were questions of fact for trial and specifically asked Judge Norblad to set trial, which he did.[169]

Judge Hart did not concede otherwise. Judge Hart heard argument on Plaintiff's post-trial motion and explained that he was repeating Plaintiff's argument as he understood it during the hearing:

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[168] Petition for Review at p. 5.

[169] P Tr 22.

> THE COURT: * * * Yeah, I mean if it was a question of law and you were dealing with the question of law that really wasn't disputed as whether it was covered by the policy of insurance or not. And he had them both in front of him, he picked one and not the other then - - I mean he moved for Summary Judgment that that plumbing was - - was an exclusion in the policy? Correct?
>
> MR. MALONEY: Correct. Your Honor, yes, and he denied the motion, and that's why it came to the jury as a question of fact.
>
> THE COURT: Well, I'm trying to decide if it's a question of law as to whether or not it's included it's no longer - - it should never been a question of fact.
>
> MR. VANCE: Right, Your Honor.
>
> THE COURT: ***I mean I understand where their position is. I mean.***
>
> MR. MALONEY: Yeah.[170]

Judge Hart then reviewed the record and found that the appraisal award "set value not coverage" and Judge Norblad properly found a question of fact for trial.[171] Judge Hart explained that he "did not bypass Judge Norblad's rulings."[172] Instead, Judge Hart agreed that there existed a question of fact for trial and submitted that question to the jury.

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[170] Tr 691 (emphasis added).

[171] Tr 709.

[172] *Id.*

C. The interpretation of a contract was never at issue for trial.

Plaintiff cites a number of cases that each stand for the unremarkable and undisputed proposition that interpretation of an insurance contract is a legal issue for the court.[173]

As discussed above, the interpretation of the insurance policy was never at issue for trial in this case. The question was one of causation. Plaintiff never argued or suggested that the policy was ambiguous or otherwise required interpretation. The jury was never charged with and did not provide a legal interpretation of the policy. That function was properly performed by the trial court in pre-trial motions. The jury made factual determinations regarding causation and the nature of Plaintiff's alleged damages. The jury found that Farmers did not breach the terms of the policy and that Plaintiff was not entitled to any damages. The jury was properly charged with the resolution of factual issues relating to the insurance policy.[174]

RESPONSE TO QUESTION PRESENTED NO. 3

Plaintiff's Petition for Review raised only one issue within Question Presented No. 3—whether the trial court erred by instructing the jury to determine

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[173] *Wilson v. Tri-County Metro. Transp. Dist. of Or.*, 343 Or 1, 11, 161 P3d 933 (2007); *Hoffman Const. Co. of Ak. v. Fred S. James & Co. of Or.*, 313 Or 464, 469, 836 P2d 703 (1992).

[174] *See Employers Ins. of Wausau v. Tektronix*, 211 Or App 485, 519, 156 P3d 105 (2007).

whether Plaintiff acted in bad faith or failed to mitigate her damages. She raises at least six additional issues in her Opening Brief on the Merits, in violation of ORAP 9.17. Farmers requests that the Court decline to address the additional issues raised in violation of ORAP 9.17.

Because each of the issues that Plaintiff raises under Question Presented No. 3 fails on its merits, Farmers will address each in substance.

ARGUMENT ON QUESTION PRESENTED NO. 3(a)

The trial court did not improperly comment on the evidence by endorsing Farmers' position in the jury instructions. This Court reviews whether a jury instruction is a comment on the evidence for legal error.[175]

The trial court did not err by "endorsing" Farmers' position. Rather, Plaintiff and Farmers disputed the evidence at trial. Each party submitted its short summary of the dispute in its proposed jury instructions.[176] The trial court summarized Farmers' position, just as it summarized Plaintiff's position:

> The Plaintiff claims that Farmers refused to submit to an appraisal. Farmers claims that it did not refuse to submit to an appraisal. Rather it asserts it needed to conclude it's coverage investigation which included conducting the Plaintiff's Examination Under Oath before submitting to an appraisal. And that once the investigation was complete Farmers submitted to an appraisal, and has paid

[175] *State v. Blanchard*, 165 Or App 127, 130, 995 P2d 1200 (2000).

[176] Plaintiff's Summary of Claims for Use in Jury Instructions, Feb 24, 2014; Farmers' Requested Jury Instructions, Feb 25, 2014.

> Plaintiff in accordance with that appraisal award.[177]

The trial court used the same summary earlier in the charge and specifically instructed the jury that the statement was merely a summary of the pleadings:

> What I have just read is merely a summary of the pleadings. You are not to take anything in them as true unless it is admitted or proved by the evidence.[178]

The trial court's reading of the summary was consistent with the uniform civil jury instructions and did not amount to an improper comment on the evidence.

ARGUMENT ON QUESTION PRESENTED NO. 3(b)

The trial court did not err by instructing the jury to consider whether Plaintiff breached the implied duty of good faith and fair dealing, and whether Plaintiff failed to mitigate her damages. This Court reviews jury instructions for legal error and "will reverse only if [the Court] can fairly say that, when considering the instructions as a whole, the instruction at issue probably created an erroneous impression of the law in the minds of the jurors that affected the outcome of the case."[179]

As a general rule, the parties in a civil action are entitled to their requested instructions that correctly state the law, are based on current pleadings in the case,

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[177] Tr 674.

[178] Tr 670.

[179] *Watson v. Meltzer*, 247 Or App 558, 564, 270 P3d 289 (2011).

and are supported by the evidence.[180] Plaintiff does not complain that the substance of the jury instructions was erroneous or that Farmers did not produce evidence in support of its defenses. Plaintiff complains only that Farmers did not plead mitigation and breach of the duty of good faith and fair dealing as affirmative defenses in its answer to Plaintiff's complaint. Plaintiff is mistaken.

A. The trial court properly instructed the jury on mitigation.

Farmers pled Plaintiff's failure to mitigate damages as its Eleventh Affirmative Defense:

> FARMERS ELEVENTH DEFENSE
>
> **(Failure to Protect Covered Property)**
>
> 49. The applicable insurance contract provides in part as follows:
>
> > **SECTION I – LOSSES NOT COVERED**
> >
> > * * *
> >
> > 7. Neglect of an insured to use all reasonable means to protect covered property at and after the time of loss[.]
>
> 50. Plaintiff failed to use all reasonable means to protect covered property, including, among other things, kitchen cabinets. Plaintiff is not entitled to additional payment from Farmers.[181]

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[180] *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106, 957 P2d 147 (1998).

[181] Farmers' Answer, Apr 18, 2013.

Farmers pled as a defense Plaintiff's failure to take reasonable means to protect her property at and after the time of loss.[182] Plaintiff does not explain how Farmers' eleventh affirmative defense was inadequate to put her on notice of the defense of failure to mitigate damages.

B. The trial court properly instructed the jury on breach of the duty of good faith and fair dealing.

Farmers also pled Plaintiff's breach of the duty of good faith and fair dealing. Farmers alleged that Plaintiff failed to comply with the express terms of the policy, and Farmers pled Plaintiff's breach in its first, second, sixth, and eighth affirmative defenses.[183] Plaintiff's failure to carry out her contractual obligations in good faith constitutes a breach of those same policy terms. Farmers further pled in its affirmative defenses that Plaintiff failed to comply in good faith causing delay and prejudice to Farmers:

> Plaintiff failed to comply with or so dramatically delayed submission to an examination under oath, production of requested documents and exhibiting the damaged property for inspection that Farmers suffered substantial prejudice, including, among other things, impairing Farmers' ability to ascertain its liability and obligations, if any. As a result, Plaintiff is precluded from any recovery under the policy.[184]

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[182] *Id.*

[183] *Id.*

[184] *Id.*

Plaintiff does not explain how Farmers' affirmative defenses were inadequate to put Plaintiff on notice of the defense of breach of the duty of good faith and fair dealing.

Plaintiff expands her argument on this issue beyond the question raised in her Petition for Review to complain that the trial court limited the inquiry under this claim to whether Farmers failed to submit to appraisal.[185] Plaintiff did not raise this objection in the trial court and cannot claim it as error on appeal.[186] Moreover, Plaintiff is wrong. The trial court instructed the jury to consider any of the "unfair claims settlement practices" listed in ORS 746.238 and read each one verbatim from the statute.[187] The trial court also read the same list earlier in its charge.[188] Plaintiff's untimely objection is based on a misreading of the record.

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[185] Opening Brief at p. 33.

[186] ORAP 5.45. Plaintiff further argues that the trial court endorsed Farmers' position by emphasizing its excuses for not submitting to appraisal. Opening Brief at p.33. Again, Plaintiff did not cite to any support to show that she raised this objection at trial. On appeal, Plaintiff does not articulate the way in which the trial court "emphasized" Farmers' position. Farmers is unable to address the claimed error in the absence of any detail.

[187] Tr 548-49, 674-77.

[188] Tr 670-71.

C. Plaintiff did not suffer any prejudice as a result of the trial court's instructions.

Even if the instructions were erroneously given, reversal is appropriate only if the instructions given, when considered as a whole, cause prejudice to the objecting party.[189] Plaintiff does not—and cannot—complain of prejudice. At the end of the trial, the jury returned a verdict with no damages.[190] The record does not support the conclusion that the jury's decision was impacted at all by the trial court's instructions on the duty to mitigate or the implied covenant of good faith and fair dealing. The question presented by Plaintiff is not supported by the record.

ARGUMENT ON QUESTION PRESENTED NO. 3(c)

The trial court properly rejected Plaintiff's proposed jury instruction regarding antecedent breach of the insurance contract.

Again, this Court reviews jury instructions for legal error and "will reverse only if [the Court] can fairly say that, when considering the instructions as a whole, the instruction at issue probably created an erroneous impression of the law in the minds of the jurors that affected the outcome of the case."[191]

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[189] *Watson*, 247 Or App at 564.

[190] ER 45-46.

[191] *Watson*, 247 Or App at 564.

A. Plaintiff's proposed instruction on antecedent breach was an incorrect statement of the law.

Plaintiff asked the trial court to give the following special instruction regarding "antecedent breach" of the insurance policy:

> Party may not enforce conditions of a contract which it has, itself, breached.
>
> A party to a contract cannot breach its obligations and then enforce the contract against the victim of its breach. If you find that Farmers Insurance breached its contractual obligations to Ms. Long, then you must find that Farmers cannot later enforce conditions of the contract against her.[192]

Judge Hart correctly refused to give the instruction because it is not a clear and correct statement of the law.[193]

This Court will not reverse a trial court's refusal to give a particular instruction unless the proposed instruction was "clear and correct in all respects, both in form and substance, and * * * altogether free from error."[194] A party is entitled to have its "proffered jury instruction given only if that instruction correctly states the law and engages the pleadings and the evidence."[195] The Court

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[192] Plaintiff's Proposed Jury Instructions, Non-Pattern Instruction No. 3, Feb 24, 2014.

[193] Tr 568.

[194] *Beglau v. Albertus*, 272 Or 170, 179, 536 P3d 1251 (1975); *see also Hernandez*, 327 Or at 106 ("there is no error [in refusing to give a proposed instruction] if the requested instruction is not correct in all respects").

[195] *Estate of Schwartz ex rel. Schwartz v. Philip Morris Inc.*, 348 Or 442, 452, 235 P3d 668 (2010).

has recognized that "[i]t is not enough, for example, to offer a proposed instruction that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself."[196]

Plaintiff's statement of the law on "antecedent breach" is not correct. Oregon law does not permit a party to unilaterally decide that the contract was breached and refuse to perform any further obligations. Instead, "[w]hen one party to a contract has repudiated it * * * the other party to the contract has alternate remedies of accepting rescission of the contract and seeking restitution or bringing an action for damages under the contract."[197] Where the party seeks damages under the contract, all of its terms are applicable.[198] Plaintiff cannot "selectively enforce only favorable provisions of the contract."[199]

The trial court properly refused to give Plaintiff's proposed jury instruction that does not reflect Oregon law.

Moreover, Plaintiff never articulated a clear theory of the case that would warrant the trial court providing such an instruction. In particular, Plaintiff never

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[196] *Williams v. Philip Morris, Inc.*, 344 Or 45, 57, 176 P3d 1255 (2008).

[197] *Durflinger v. Statesman Life Ins. Co.*, 100 Or App 581, 584, 787 P2d 892 (1990) (citing *Bollenback v. Continental Cas. Co.*, 243 Or 498, 414 P2d 802 (1966)); *see also Phillips v. Gibson*, 133 Or App 760, 764, 893 P2d 574 (1995).

[198] *Durflinger*, 100 Or App at 584.

[199] *Id.*

clearly identified the supposed antecedent breach that formed the basis for the argument. The trial court properly rejected Plaintiff's proposed instruction.

B. Plaintiff was not prejudiced by the refusal to give the instruction.

This Court will "presume that a jury follows a trial court's instructions."[200] "A jury instruction does not constitute reversible error unless it prejudiced the [party] when the instructions are considered as a whole."[201] In making that determination, this Court considers not only the instructions as a whole, it considers the instructions in the context of the evidence at trial and the parties' theories of the case.[202]

Plaintiff, here, argued to the jury that Farmers breached the contract by delaying payment and refusing to submit to appraisal.[203] On review, Plaintiff argues that, had the jury been given the proposed instruction on antecedent breach, the jury could have found that Farmers' delay and refusal of appraisal prevented Farmers from later enforcing policy conditions against Plaintiff.[204] The jury,

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[200] *Wallach v. Allstate Ins. Co.*, 344 Or 314, 326, 180 P3d 19 (2008).

[201] *Purdy v. Deere and Co.*, 355 Or 204, 227, 324 P3d 455 (2014).

[202] *See State v. Phillips*, 354 Or 598, 613, 317 P3d 236 (2013) (erroneous failure to give jury a proposed instruction did not substantially affect rights because "on the facts in this case, the factual findings necessary to find defendant liable on one theory either subsumed or were the same as the factual findings on the other theory").

[203] Tr 593, 610, 670-71.

[204] Opening Brief at pp.33-34.

however, did not agree that Farmers had breached the contract by delaying payment and refusing to submit to appraisal.[205] Plaintiff's theory of antecedent breach relies on a finding that went against her, not in her favor.

ARGUMENT ON QUESTION PRESENTED NO. 3(d)

The trial court properly refused to enter judgment for Plaintiff and properly rejected Plaintiff's proposed judgment forms.

Plaintiff's Question Presented No. 3(d) fails to precisely identify the challenged ruling. Farmers understands that Plaintiff's argument relies on her belief that Judge Hart refused to recognize the pre-trial rulings of Judge Norblad. As discussed above, Plaintiff's arguments are not supported by the record. Judge Norblad never ruled that Plaintiff was entitled to coverage for the disputed charges for plumbing, the engineering report, and replacement cost.[206] Instead, he reserved those issues for trial.[207] Judge Hart agreed with that ruling and ordered that the case proceed to trial.[208]

Plaintiff submitted to the trial court three separate forms titled General Money Judgment that award Plaintiff various amounts.[209] The judgments were

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[205] ER 45-46.

[206] P Tr 27; Order, Nov 13, 2013.

[207] *Id.*

[208] P Tr 54; Tr 709.

[209] ER 37-42.

never entered because there was no factual or legal basis for entering them: Judge Norblad did not grant Plaintiff's motion for summary judgment[210]; the jury returned a verdict in favor of Farmers[211]; and Judge Hart denied Plaintiff's motions for directed verdict and for judgment notwithstanding the verdict and for new trial.[212] Aside from generally contending that she was entitled to judgment, Plaintiff does not articulate any basis upon which the trial court erred in refusing to enter the judgment(s).

ARGUMENT ON QUESTION PRESENTED NO. 3(e)

The trial court properly refused to grant Plaintiff prejudgment interest. This Court reviews the trial court's award or denial of prejudgment interest for errors of law.[213]

A trial court may only award prejudgment interest on damages that "a jury has awarded when the exact amount is ascertained or easily ascertained."[214] Plaintiff did not recover any judgment in her favor that entitles her to an award of prejudgment interest.[215] Pursuant to the policy, Farmers paid policy benefits after

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[210] P Tr 27; Order, Nov 13, 2013.

[211] ER 45-46.

[212] Tr 706-09.

[213] *Tasaki v. Moriarty*, 233 Or App 51, 55, 225 P3d 88 (2009).

[214] *Spaid v. 4-R Equipment, LLC*, 252 Or App 228, 235, 287 P3d 1138 (2012).

[215] ER 45-46.

the appraisal and on the eve of trial when Plaintiff presented her replacement cost claim.[216] Those payments were made outside the context of litigation and in the ordinary course of claim adjustment, however, and cannot form the basis for an award of prejudgment interest—particularly where, as here, those payments did not arise from a jury award or result in a judgment.

Plaintiff's arguments on appeal reflect her misunderstanding of the law and the record below.

CONCLUSION

Farmers respectfully requests the Court affirm the judgment in Farmers' favor. Farmers further requests the Court award Farmers its costs and disbursements on appeal.

DATED: June 9, 2016

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[216] Ex 1 at p. 12 ("Loss Payment").

CERTIFICATE OF FILING

I hereby certify that I electronically filed the foregoing RESPONDENT'S BRIEF ON THE MERITS with the State Court Administrator for the Court of Appeals of the State of Oregon by using the appellate electronic filing system on June 9, 2016.

CERTIFICATE OF SERVICE

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that (1) RESPONDENT'S BRIEF ON THE MERITS complies with the word-count limitation in ORAP 9.10(3) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10,698 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).

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