IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTINE MOODY, individually, and in her capacity as the Personal Representative of the Estate of Steven "Troy" Moody, Deceased,
Plaintiff-Appellant,
Respondent on Review,

v.

OREGON COMMUNITY CREDIT UNION, aka OCCU, an Oregon entity, association, union, or corporation et al.,
Defendants,

and

FEDERAL INSURANCE COMPANY, an Indiana corporation,
Defendant-Respondent,
Petitioner on Review.

Court of Appeals No. A172844

Supreme Court No. S069409

BRIEF ON THE MERITS OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND OREGON BUSINESS & INDUSTRY IN SUPPORT OF PETITIONER ON REVIEW

On Review of a Decision of the Court of Appeals, on Appeal from a Judgment of the Lane County Circuit Court, by the Honorable Bradley A. Cascagnette

Opinion filed January 26, 2022
Author: Senior Judge Landau
Concurring: Presiding Judge Powers
and Judge Egan

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community. This is such a case.

Oregon Business & Industry ("OBI") is the state's largest and most comprehensive business association. With over 1,600 members who employ over 250,000 people in every corner of the state, OBI represents the diversity of Oregon's business community. OBI's members range from very small businesses to the state's largest employers. OBI advocates on behalf of a strong and healthy business climate for Oregon. OBI is also the Oregon Retail Council and the state affiliate of the National Association of Manufacturers.

The Chamber's and OBI's membership each includes a wide range of companies that rely upon certainty in the contractual rights and expectations that govern their relationship to their customers and other businesses. *Amici* have a strong interest in ensuring that the legal environment in which their members operate is consistent and fair. *Amici* are therefore well-suited to offer a perspective on the impact of extra-contractual damages on businesses in general and in particular on insurance companies that are their members.

Insurance is a contractual means for managing risk. The value of insurance contracts and the stability of insurance markets depend upon the certainty and predictability created by specified contract terms and obligations. The imposition of a new extra-contractual cause of action like the one allowed by the Court of Appeals (Landau, J.) here upends the expectations of insurers in issuing insurance policies and setting premiums for those policies. Such disruption threatens to cause grave adverse practical consequences for insurers and policyholders alike. Accordingly, the Chamber has previously filed amicus briefs in cases relating to extra-contractual claims in the insurance context, and writes here together with OBI on the merits to respectfully request that this Court reverse the Court of Appeals' decision.

INTRODUCTION

The decision below threatens to upend the time-honored precedent under which Oregon has generally limited insurance policyholders to contract and not tort claims for violations of a contractual duty to pay a valid insurance claim. Unlike other States that have recognized “bad faith” tort claims against insurers in the first-party context, Oregon has historically allowed tort claims against insurers for breach of contractual obligations only in the narrow set of instances where the insurer and the insured are in a “special relationship” that imposes common-law duties irrespective of the contract, such as where a liability insurer assumes a duty to defend an insured against a third-party lawsuit. That settled distinction between contract and tort law has served Oregon well, ensuring that its citizens are not subject to unnecessarily inflated insurance premiums.

The decision of the Court of Appeals here, however, dramatically departs from that settled jurisprudence. The Court of Appeals ruled that an insured may bring a negligence *per se* action for an insurer’s violation of any of the numerous and detailed statutory claims-handling provisions set forth in ORS 746.230. The Court of Appeals thus allowed the insured in this case to convert a breach-of-contract claim with maximum damages of $3000 into a tort claim for negligent infliction of emotional distress allegedly worth $47,000—more than ***fifteen times as much*** as the policy limit the parties had bargained for in their insurance contract.

The Court of Appeals' decision warrants reversal because it makes new law that sharply departs from this Court's prior precedent, most notably *Deckard v. Bunch*, 358 Or 754 (2016); *Shahtout v. Emco Garbage Company*, 298 Or 598 (1985); and *Farris v. U. S. Fidelity & Guaranty Company*, 284 Or 453 (1978). In *Deckard* and *Shahtout*, this Court explained that negligence *per se* merely describes an otherwise viable negligence claim where the standard of care is reflected in a statute or regulation. *Deckard*, 358 Or at 761 n. 6; *Shahtout*, 298 Or at 601. In *Farris*, this Court specifically held that ORS 746.230 was not intended to create a private right of action sounding in tort or to permit tort damages. 284 Or at 458, 467-68. Consistent with this precedent, this Court has rejected attempts to permit tort causes of action based on an insurer's failure to pay a claim to its insured. *Amici* respectfully urge the Court to reaffirm that precedent here.

Oregon businesses and consumers will face countless adverse consequences if the decision below is allowed to stand. The Court of Appeals' decision, by greatly expanding the reach of the negligence *per se* doctrine, has already unleashed an avalanche of new tort litigation against insurers who do business in Oregon. The decision invites enterprising plaintiffs' counsel to pursue new damages claims in eye-popping amounts many times greater than contracted-for insurance policy limits. These tort claims impose new and intrusive forms of litigation discovery on insurers and their claims-handling employees. Such litigation impairs the contractual terms upon which insurers and policyholders have long relied to set the metes and bounds of their relationships. And far from yielding fair results that improve insurance coverage in Oregon, the Court of Appeals' decision will lead inexorably to disproportionate windfalls to insureds who choose to litigate this newly-permitted negligence *per se* cause of action.

Absent reversal, the decision below will not only harm the business of insurance; it will harm the interests of the Oregon public by driving up the cost of insurance premiums for all. To avoid such consequences, *Amici* respectfully request that this Court reverse the Court of Appeals' decision and hold that an insurer's violation of ORS 746.230 does not subject it to negligence *per se* claims by its insured.

ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED SETTLED OREGON LAW ON NEGLIGENCE *PER SE* IN THE CONTEXT OF STATUTORY DUTIES

The Court of Appeals misapplied decades of prior jurisprudence in reaching the conclusion that ORS 746.230 provides the basis for negligence *per se* claims by insureds against their insurers even when they have no independent basis for a common-law negligence claim. The Court of Appeals made three fundamental errors. *First*, it incorrectly held that negligence *per se* can arise in what is otherwise a breach-of-contract action, despite this Court's prior decisions holding that negligence *per se* requires the elements of a common-law negligence claim even where a statute sets a standard of care. *Second*, the Court of Appeals failed to recognize that permitting tort claims based on ORS 746.230 would require applying the elements of statutory liability, not negligence *per se*. *Third*, the Court of Appeals disregarded this Court's prior determination that violation of ORS 746.230 does not give rise to a tort claim.

A. The Court Of Appeals Failed To Recognize That Negligence *Per Se* Requires A Viable Negligence Claim

The Court of Appeals' foundational error was its holding that the statutory requirements of ORS 746.230 establish liability for negligence *per* *se* regardless of whether plaintiff has otherwise ***pled a claim for negligence***. *See Moody v. Oregon Cmty. Credit Union*, 317 Or App 233, 238, 241-43 (2022). That erroneous holding is based on *Abraham v. T. Henry Construction, Inc*., 230 Or App 564 (2009) ("*Abraham I*"), where the Court of Appeals similarly held that a standard of care expressed in a statute or rule may establish tort liability between parties to a contract. *Id.* at 572. This Court correctly declined to endorse *Abraham I*'s expansive view of tort liability, which does not accurately reflect Oregon law. *See Abraham v. T. Henry Const., Inc*., 350 Or 29 (2011) ("*Abraham II*") (affirming *Abraham I* on different grounds).

To the contrary, this Court has held in *Abraham II* and other prior precedents that negligence *per se* arises *only* for a claim that otherwise meets the elements of common-law negligence. "[N]egligence per se is not a separate claim for relief, but is simply shorthand for a negligence claim in which the standard of care is expressed by a statute or rule." *Id*. at 36, n. 5 (citing *Shahtout*, 298 Or at 601). "The phrase 'negligence per se' can apply only to cases brought on a theory of liability for negligence rather than liability grounded in obligations created by statute." *Shahtout*, 298 Or at 601. "When courts . . . adopt the statutory standard [of care] for a cause of action that would be common law negligence, the violation of the statute is said to be negligence per se." *Miller v. City of Portland*, 288 Or 271, 277–78 (1980), *abrogated on other grounds by Fulmer v. Timber Inn Rest. & Lounge, Inc.*, 330 Or 413 (2000). As this Court explained just six years ago, "a statute that sets a standard of care addresses only one element of a negligence claim; other elements remain unaffected and must be established." *Deckard*, 358 Or at 761 n. 6.

Here, Respondent's claim is premised on a breach of contract, not common-law negligence. Her claim therefore does not meet the elements of negligence *per se* under Oregon law. This Court should reverse the Court of Appeals' holding that a plaintiff may state a claim for negligence *per se* following a breach of contract any time a statute or rule imposes a standard of care.

B. The Court Of Appeals Applied The Wrong Elements From The Wrong Cause Of Action

The Court of Appeals' disregard of this Court's prior decisions on negligence *per se* was exacerbated by its failure to identify the correct elements that plaintiff must meet to impose tort liability in this circumstance. The Court of Appeals erroneously ruled that negligence *per se* has the following four elements:

> (1) defendants violated a statute; (2) that plaintiff was injured as a result of that violation; (3) that plaintiff was a member of the class of persons meant to be protected by the statute; and (4) that the injury plaintiff suffered is of a type that the statute was enacted to prevent.

Moody, 317 Or App at 233 (quoting *McAlpine v. Multnomah County*, 131 Or App 136, 144 (1994), *rev. den.*, 320 Or 507 (1995)).

But *McAlpine*, the principal case that the Court of Appeals relied on, confused the doctrines of negligence *per se* and statutory liability. *See McAlpine*, 131 Or App at 144 ("The elements required to state a claim for both [negligence *per se* and statutory liability] are the same."). As this Court has previously explained, statutory liability is distinct from negligence *per se* and they are applied in different circumstances.

Specifically, "an initial distinction must be made between (1) cases in which liability would be based upon violation of a statutory duty when there is also an underlying common law cause of action, and (2) cases in which liability would be based upon violation of a statute when there is no underlying common law cause of action." *Bob Godfrey Pontiac, Inc. v. Roloff*, 291 Or 318, 325–26 (1981); *see also Miller*, 288 Or at 277–78 (explaining the differences between negligence *per se* and statutory liability). Negligence *per se* applies only to instances of common-law negligence, including instances of common-law negligence where the standard of care is expressed in a statute or regulation. *See Abraham II*, 350 Or at 36, n. 5; *Shahtout*, 298 Or at 601. By contrast, statutory liability "arises when a statute either expressly or impliedly creates a private right of action for the violation of a statutory duty." *Deckard*, 358 Or at 759 (quoting *Doyle v. City of Medford*, 356 Or 336, 344 (2014)).

Here, because the underlying cause of action is not negligence but rather breach of contract, the Court of Appeals erred in assessing the claim based on the elements of negligence *per se*.[1] The Court of Appeals instead should have examined plaintiff's claim under the doctrine of statutory liability, which has the following elements:

> (1) a statute imposed a duty on the defendant; (2) the legislature expressly or impliedly intended to create a private right of action for violation of the duty; (3) the defendant violated the duty; (4) the plaintiff is a member of the group that the legislature intended to protect by imposing the duty; and (5) the plaintiff suffered an injury that the legislature intended to prevent by creating the duty.

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[1] Near the end of its decision, the Court of Appeals acknowledged that "there is an important distinction between the role of a statute in negligence per se cases and statutory liability cases." *Moody*, 317 Or App at 244. Yet it failed to honor this distinction when it determined that a negligence *per se* action may lie where, as here, there is no underlying claim for negligence.

Deckard, 358 Or at 759–60.

By applying the wrong elements for the wrong cause of action, the Court of Appeals improperly limited the scope of its inquiry and therefore reached the wrong result. The Court of Appeals' failure warrants reversal.

C. The Court Of Appeals Improperly Disregarded This Court's Prior Holding That ORS 746.230 Does Not Create Tort Liability For Insurers

The Court of Appeals' final error was its total disregard of this Court's prior decisions on the exact issue presented here—*i.e.*, whether ORS 746.230 creates a tort cause of action for an insured against its insurer. Nearly 45 years ago, this Court addressed this issue squarely and determined that the legislature did ***not*** intend ORS 746.230 to provide a basis for tort liability or emotional distress damages:

> There is nothing to indicate that the legislature intended, when it prohibited certain claims settlement practices in ORS 746.230, that actions for breach of insurance contracts would be transformed, in all of the covered instances, into tort actions with a resulting change in the measure of damages. The statutes express no public policy which would promote damages for emotional distress. Concern about the insured's peace of mind does not appear to be the gravamen of the statutory policy.

Farris, 284 Or at 458; *see also id*. at 467-68 (concluding that because the legislature did not intend to provide for punitive damages when it enacted

ORS 746.230 and 731.988, it would be inappropriate for the Court to permit civil tort claims based on these statutes).

The Court of Appeals dismissed the above language as mere "*dictum*," *Moody*, 317 Or App at 244, but this Court described *Farris* as binding precedent on this exact issue. "[I]n *Farris v. United States Fidelity and Guaranty Company*, 284 Or. 453, 587 P.2d 1015 (1978), this court held that violation of provisions of the Insurance Code prohibiting certain conduct did not give rise to a tort action. The primary reason for so holding was that other provisions of the code provided for civil penalties payable to the state for code violations and that this was an indication that the legislature did not intend a private cause of action." *Bob Godfrey*, 291 Or at 328. This Court should follow its "practice of giving a prior interpretation of a statute the effect of stare decisis" and reiterate its prior interpretation of ORS 746.230. *Hawkins v. Conklin*, 307 Or 262, 265 (1988) (reversing Court of Appeals' holding that plaintiff stated a claim of negligence *per se*).

The Court of Appeals' disregard of *Farris* was in error, and this Court should reverse.

II. REVERSAL WILL AVOID ADVERSE PRACTICAL CONSEQUENCES TO OREGON BUSINESSES AND CONSUMERS

In addition to the above arguments for reversal based on settled precedent, *Amici* respectfully submit that reversal is warranted to avoid profound adverse practical consequences to Oregon businesses and consumers.

A. The Business Of Insurance Depends Upon Contractual Certainty And Predictability

As the many insurers represented by *Amici* can well attest, insurance is at its core simply a contractual means of managing risk. A policyholder pays a specified premium to transfer to an insurer a specified risk (such as the risk of accidental death within a specified time period), and the insurer in exchange promises to compensate for that risk up to specified policy limits. The premiums an insurer collects from policyholders under such contracts create a pool of money that the insurer must manage prudently in order to make sure that it has enough resources to pay claims on the risks that policyholders have paid to transfer to the insurer.

When courts change the settled rules under which insurers and their customers have long operated and alter the terms of prior bargains, however, they upend such prudent management. Here, the Court of Appeals did just that by recognizing an unanticipated cause of action outside the terms and expectations embodied in the parties' insurance contracts.

The inevitable consequence is that Oregon policyholders will foot the bill. That is because new and unexpected claims that exceed the premiums insurers have already collected can be offset only through collecting new or higher premiums from other policyholders. Insurers set premiums based on their estimates of the likelihood and amount of future losses that may be covered by their policies when covered events occur. Calculating the appropriate premiums for insurance policies requires determining the nature, probability, and magnitude of any assumed risk. *See* 1 Steven Plitt et al., COUCH ON INSURANCE § 1:2 (3d rev. ed. 2010). To calculate premiums, an insurer thus relies on various factors, including the probability and amount of potential loss, policy limits, and the insurer's operational costs. *Id*. at §§ 1:2, 1:6. Insurers must also accurately calculate and set aside reserves that enable them to continue operations while being able to pay out policyholders' future valid covered claims.

Adding new extra-contractual obligations to an insurance policy, as the Court of Appeals did below, however, necessarily undermines the insurer's ability to prudently manage its resources. It disrupts the insurer's ability to maintain predictable and cost-effective premiums for its insureds. If an insurer does not receive premiums adequate to cover the risk and expenses it has undertaken, it could be left with inadequate funds to pay valid claims—thus jeopardizing not only the insurer's business but also the valid expectations of its insureds. And the only way to offset such increased costs is to charge higher premiums to other policyholders, whose increased payments for their own insurance policies can replenish the risk pool.

Reversal of the decision below would avoid these adverse practical consequences, as explained further below.

B. The New Extra-Contractual Liability Created By The Court Of Appeals Will Adversely Affect Businesses In Oregon

The outcome of this case is critical to the insurance industry in Oregon, since the Court of Appeals' new and expanded theory of tort liability will open the floodgates of litigation by enterprising plaintiffs' lawyers representing policyholders. The Court of Appeals' decision, if allowed to stand, will lead the plaintiffs' insurance bar to attempt to hold any Oregon insurance provider liable for negligence damages far exceeding policy limits, based solely on alleged statutory violations. Moreover, it will lead plaintiffs to seek damages that are exponentially higher than the maximum expectation damages available under their insurance contracts. Here, for example, the plaintiff sought damages ***fifteen times*** greater than the policy limits set forth in the insurance contract. One can easily imagine future plaintiffs seeking damages that are fifty times or one hundred times greater based on this newly expanded negligence *per se* doctrine.[2]

A review of Oregon's dockets shows that plaintiffs have ***already*** begun pursuing negligence *per se* claims against insurers based on the Court of Appeals' erroneous decision. *See, e.g.*, *Anne Root v. The Hanover Ins. Co*., No. 1:22-CV-01104 (D. Or.) (alleging a negligence *per se* claim based on violations of ORS 746.230); *Kerry Sama Rubio v. Safeco Ins. Co. of Illinois*, No. 3:22-CV-00794-AR (D. Or.) (alleging a negligence *per se* claim based on violations of ORS 746.230 and seeking punitive damages of $1 million); *Elizabeth Martin v. Liberty Mut. Ins*., No. 22CV17503 (Marion County Circuit Court) (alleging a negligence *per se* claim based on

[2] While the Court of Appeals' decision did not address the issue of whether, contrary to existing Oregon law, a plaintiff may recover emotional distress damages in the absence of physical injury, plaintiffs' counsel have already begun citing the decision in favor of such damages theories. *See, e.g., Bryant v. Allstate Indem. Co*., No. 3:22-CV-00201-YY, 2022 WL 1910128 (D. Or. June 3, 2022) (dismissing claim for negligence *per se* where plaintiff sought emotional distress damages for insurer's failure to pay a claim).

violations of ORS 746.230); *Pacific NW Marble & Granite, Inc. v. The Cincinnati Ins.* Co., No. 6:22-CV-00095-AA (D. Or.) (alleging a negligence *per se* claim based on violations of ORS 746.230 and seeking punitive damages); *Welch v. Safeco of Oregon Ins. Co*., No 22CV08406 (Multnomah County Circuit Court) (alleging a negligence *per se* claim based on violations of ORS 746.230); *Anthony Torsu v. Safeco Ins. Co. of Oregon*, No. 22CV24076 (Multnomah County Circuit Court) (alleging a negligence *per se* claim based on violations of ORS 746.230).

This tide of litigation will necessarily impose profound costs on insurers. To begin with, insurance companies will need to price the risk of potentially ***unlimited*** damage awards into their contracts, and will be required to raise premiums as a result in order to stay in business. Moreover, this tide of new tort litigation against insurers will impose massive litigation costs and burdens on insurers and the employees in their claims departments. Depositions, document discovery, and trial in the Court of Appeals' newly-licensed negligence *per se* cases would inevitably be far more far-ranging, fact-specific, time-consuming, and complex than any dispute merely over the terms and limits of an insurance contract. And such incremental litigation costs will exponentially increase the pressure on

Oregon insurers to enter into extortionate settlements in cases where tort damages would otherwise not be warranted.

The reasons for such settlements—even when a tort claim against an insurer is wholly without merit—have been noted by other commentators and are aptly explained as follows:

> Choosing to litigate an insurance claim is a costly undertaking for an insurer, regardless of the economies of scale an insurer might possess. There are attorneys' fees and other unavoidable costs, and the outcome is uncertain. Insurers are also not blind to the poor public perception of their industry; a perception that contributed to the creation of tort liability in insurance contracts where it does not exist in other contexts. The prospect of paying extra-contractual damages, especially punitive damages, is itself daunting; this daunting prospect is enhanced by the insurer's position as an unpopular defendant and the belief of many juries that insurers have deep pockets and can afford it. In addition, any plaintiff verdict could lead to negative press, which could cause existing policyholders to change insurers or could deter future customers. A particularly high damage award could also provide harmful precedential value and inflate other award amounts. For these reasons, insurers are poised to settle claims they reasonably believe they will lose, as well as some they believe they should win. Settlement simply becomes the better option.

Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1520-21 (2009) ("Schwartz & Appel") (footnotes omitted).

Moreover, there is no guaranty that such litigation will be limited to claimed violations of ORS 746.230 or even the Insurance Code. The Court of Appeals' decision rests largely on its holding that a statute or regulation that establishes a noncontractual standard of care is sufficient to turn a breach-of-contract claim into a negligence *per se* claim. Enterprising plaintiffs' counsel will undoubtedly scour Oregon's statutes for relevant statutory duties in order to turn a whole host of breach claims into negligence claims—even where, as here, the statute does *not* provide for a private right of action.

To allow insureds to pursue negligence *per se* claims against insurers for statutory violations despite the lack of any common-law negligence could open up *all* Oregon businesses, not just insurance businesses, to massive, widespread, and uncertain liability. Such an end-run around contractual agreements creates the kind of uncertainty that is anathema to all businesses, and especially to insurance companies whose entire business model is based on reliably predicting both risk and loss.

For all these practical reasons as well as the doctrinal reasons set forth above, this Court should reverse the Court of Appeals' decision, which, if left to stand, would gravely unsettle well-established contract and tort law in this State.

C. The New Extra-Contractual Liability Created By The Court Of Appeals Will Adversely Affect Oregon Consumers

Oregon insurers and other businesses would not be the only ones to suffer from affirmance, for it is consumers who would ultimately bear the increased costs resulting from litigation and settlement of the new negligence *per se* claims the Court of Appeals erroneously purported to authorize. That is because, as litigation costs resulting from such claims increase, "[i]nsurers internalize the systemic risks of bad-faith litigation and raise premiums accordingly. Because this happens, in part, on an industry-wide level, the increase in cost occurs independent of a specific insurer's risks of bad-faith litigation . . . ." Schwartz & Appel, *supra*, 58 Am. U. L. Rev. at 1529. Such concerns are not merely theoretical; one study concluded that a California court ruling permitting a private right of action for bad faith against insurers raised average California insurance premiums by up to 19%. *See* Angela Hawken, et al., *The Effects of Third-Party, Bad Faith Doctrine on Automobile Insurance Costs and Compensation* (RAND Institute for Civil Justice 2001).

Any similar effects from the decision here would be profoundly harmful to the citizens of Oregon, for whom the cost of insurance is a perennial concern. Increased premiums resulting from exposure to new potential tort liability would render certain types of insurance prohibitively expensive for low-income or even middle-income individuals. It could even force some insurers out of the market altogether, reducing competition, harming Oregon's business climate, and further increasing premiums paid by consumers. These grave consequences for Oregon consumers underscore the importance of this Court's reversal of the Court of Appeals' decision.

CONCLUSION

This Court should reverse the Court of Appeals' decision and hold that an insured may not bring an action for negligence *per se* against an insurer based on a violation of ORS 746.230.

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Respectfully submitted,

Dated: August 4, 2022

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