IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Precy CONRY,
*Plaintiff-Appellant,*
*v.*
THE STANDARD FIRE INSURANCE COMPANY,
a Connecticut corporation,
*Defendant-Respondent.*

Multnomah County Circuit Court
23CV05149; A186391

Celia A. Howes, Judge.

Argued and submitted on September 22, 2026.

Nadia H. Dahab argued the cause for appellant. Also on the briefs were Sugerman Dahab; Judson Wesnousky and Berkshire Ginsberg LLC; and, Christopher T. Hill and Christopher T. Hill, PC.

Jacqueline Tokiko Mitchson argued the cause for respondent. Also on the brief was Wilson Elser Moskowitz Edelman & Dicker LLP.

Before Aoyagi, Presiding Judge, Kamins, Judge, and Pagán, Judge.

AOYAGI, P. J.

Reversed and remanded.

**AOYAGI, P. J.**

This appeal pertains to attorney fees. Plaintiff sued defendant insurance company for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence *per se*. The parties reached a settlement that resolved the claims themselves but left it to the trial court to decide attorney fees. The trial court awarded fees to plaintiff under ORS 742.061(1), but the amount was significantly less than she requested. In making its award, the trial court treated the breach-of-contract claim as the only fee-bearing claim. Plaintiff appeals, challenging the fee award. We agree with plaintiff that the good-faith-and-fair-dealing claim is fee bearing and that the trial court therefore must reconsider its fee award. Accordingly, we reverse and remand.

The relevant facts are few. Plaintiff was injured in a car accident. She was a passenger in a vehicle insured by defendant and covered as such by the driver's policy. When defendant refused to cover all her medical expenses, plaintiff sued, alleging $5,015 in damages for breach of contract and breach of the implied covenant of good faith and fair dealing and another $52,000 in damages for negligence *per se* (the *Moody* claim[1]). After more than a year of litigation, the parties agreed to settle all three claims for $36,500, exclusive of fees and costs. The parties left it to the trial court to decide attorney fees.[2]

Plaintiff requested $162,694.50 in attorney fees. The trial court awarded $40,000. In doing so, the court viewed the breach-of-contract claim as the only fee-bearing claim under ORS 742.061(1). It did not award any fees on the other two claims, reasoning that "[t]he issues raised by plaintiff's good faith and negligence claims do not share

[1] Under *Moody v. Oregon Community Credit Union*, 371 Or 772, 542 P3d 24 (2023), a person may bring a negligence claim against an insurer seeking to recover damages for emotional distress caused by the insurer's unreasonable handling or denial of a claim in violation of the insurer's obligations under ORS 746.230. *See Moody*, 371 Or at 805 ("[W]e conclude that the insurance claim practices that ORS 746.230 requires and the emotional harm that foreseeably may occur if that statute is violated are sufficiently weighty to merit imposition of liability for common-law negligence and recovery of emotional distress damages.").

[2] The parties also left it to the trial court to decide costs. The cost award is not challenged on appeal, so we limit our discussion to attorney fees.

common issues with her fee-bearing claim." *See Freedland v. Trebes*, 162 Or App 374, 378-79, 986 P2d 630 (1999) (discussing principles of apportionment and "common issues" among claims). The court then explained how it had arrived at $40,000 as a reasonable attorney fee for litigating the breach-of-contract claim.

On appeal, plaintiff contends that the court erred in two regards: first, by not recognizing the good-faith-and-fair-dealing claim as fee bearing under ORS 742.061(1) and, second, by excluding all of attorney Hill's fees from the ultimate award. Both issues are preserved. We begin with the first issue, which proves dispositive.

As relevant here, ORS 742.061(1) requires an award of attorney fees to the plaintiff when "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." Plaintiff argues that her claim against defendant for breach of the covenant of good faith and fair dealing is an action "upon" an insurance policy within the meaning of ORS 742.061(1). Defendant disagrees. The question presented is one of law that we review for legal error. *Makarios-Oregon, LLC v. Ross Dress-for-Less, Inc.*, 293 Or App 732, 739, 430 P3d 142, *adh'd to as modified on recons*, 295 Or App 449, 430 P3d 1125 (2018) ("[w]hether a party is entitled to attorney fees presents a question of law," whereas "whether fees are reasonable is a factual determination that we review for abuse of discretion").

It is undisputed that, generally speaking, a claim for breach of an insurance contract is an action "upon" the policy within the meaning of ORS 742.061(1). However, whether a particular breach-of-contract claim is "upon" the policy depends on the claim, specifically its source. *Masood v. Safeco Ins. Co. of Oregon*, 360 Or 638, 643, 386 P3d 646 (2016) ("The determinative question is *** the source of the insured's claim."). For example, in *Travelers Insurance Co. v. Plummer*, 278 Or 387, 392, 563 P2d 1218 (1977), the court held that an insured's entitlement to keep $296.08 advanced by his insurer pending third-party litigation—an issue litigated and resolved in his favor—was an action "upon" the

policy, because "the source of [his] claim to the full $888.26, including the disputed $296.08, [was] the insurance policy[.]" And, in *Masood*, the court held that an insured's claim for breach of contract based on an oral agreement with his insurer's adjuster regarding performance of the insurance contract was an action "upon" the policy, because "the source" of the insured's claim for extended dwelling coverage was "unmistakably" the insurance policy. 360 Or at 643. Although there was a "separate oral agreement" with the adjustor, the action was still ultimately "upon" the policy, because "the very terms of that oral agreement referred to, incorporated, and were predicated on the underlying policy." *Id*. "The subject of that agreement was the policy, and the agreement [could not] fairly be understood without reference to that policy." *Id*.

Here, of course, the claim at issue is not a "breach of contract" claim but, instead, a claim for breach of the implied covenant of good faith and fair dealing. The question is whether such a claim is a claim "upon" the policy.

It is a longstanding common-law principle that every contract imposes upon the parties a duty of good faith and fair dealing in its performance. *Restatement (Second) of Contracts* § 205 (1981); *see, e.g.*, *Zygar v. Johnson*, 169 Or App 638, 645, 10 P3d 326 (2000), *rev den*, 331 Or 584 (2001) ("Every contract contains an implied covenant of good faith and fair dealing[.]"). That includes insurance contracts. *Brockway v. Allstate Property and Casualty Ins. Co.*, 284 Or App 83, 95, 391 P3d 871 (2017).

Oregon courts have routinely described the implied covenant of good faith and fair dealing as part of the contract itself. *See, e.g.*, *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 333 Or 304, 312, 39 P3d 846 (2002) ("the obligation of good faith is implied in every contract in Oregon"); *Uptown Heights Associates v. Seafirst Corp.*, 320 Or 638, 645, 891 P2d 639 (1995) ("every contract contains an implied duty of good faith"); *Vukanovich v. Kine*, 268 Or App 623, 637 n 6, 342 P3d 1075, *adh'd to as modified on recons*, 271 Or App 133, 349 P3d 567 (2015) ("Breach of the covenant is a breach of the contract."); *Morrow v. Red Shield Ins. Co.*, 212 Or App 653, 661, 159 P3d 384 (2007) ("All contracts include an implied

covenant of good faith and fair dealing."). Most notably, in *Brockway*, which involved a dispute between an insured and insurer under a home insurance policy, we stated:

> "We begin by observing that plaintiffs' claim for breach of the duty of good faith and fair dealing in this case 'sounds in contract.' *Employers' Fire Ins. v. Love It Ice Cream*, 64 Or App 784, 791, 670 P2d 160 (1983) (insurance first party bad faith claim sounds in contract). In other words, plaintiffs' claim for breach of the duty of good faith is a claim for breach of the insurance contracts."

284 Or App at 95.

The only case to address a claim for breach of the implied covenant of good faith and fair dealing in the specific context of ORS 742.061(1) is *Strawn v. Farmers Ins. Co.*, 353 Or 210, 297 P3d 439 (2013). *Strawn* involved a class action by insureds against their insurer for breach of contract, breach of the covenant of good faith and fair dealing, and fraud in connection with the payment of personal injury protection (PIP) benefits under automobile policies. *Id.* at 213. The insureds prevailed on all three claims at trial and were awarded compensatory and punitive damages, as well as attorney fees. *Id.* The insurer's appeal was heard by us and the Supreme Court and was ultimately unsuccessful. *Id.* at 214-15. The insureds sought attorney fees for the appellate litigation, and the Supreme Court issued an opinion on the fee petition, explaining how it arrived at the particular fee award it was making. *Id.* at 212. As relevant here, the court explained that "ORS 742.061(1) authorizes a fee-shifting award against [the insurer] for the work done only on the contractual claims (breach of contract and breach of implied covenant of good faith and fair dealing)." *Id.* at 215-16; *see also id.* at 222 ("As we have already described, for the contract claims, Strawn's attorneys are entitled to a fee-shifting award to be paid by Farmers."). Although the court did not engage in statutory construction in the opinion, it clearly and necessarily concluded that the good-faith-and-fair-dealing claim was an action "upon" the insurance policy within the meaning of ORS 742.061(1).

Given *Strawn*, *Brockway*, and the larger body of case law recognizing the covenant of good faith and fair dealing

as something implied into the contract itself, we hold that a claim for breach of the implied covenant of good faith and fair dealing in an insurance contract is an action "upon" the policy within the meaning of ORS 742.061(1).

Defendant relies on *Rice v. State Farm Mutual Automobile Ins. Co.*, 307 Or App 238, 476 P3d 983 (2020), *rev den*, 367 Or 826 (2021), in arguing for a different result, but that case does not help defendant. The issue in *Rice* was whether the safe harbor in ORS 742.061(3) applied on the facts of that case, which turned on "whether the legislature intended trial courts to engage in factual determinations about why parties were unable to settle [uninsured motorist] claims within six months, including whether the insurer acted reasonably and in good faith in settlement negotiations, as part of determining whether an insurer qualifies for the safe harbor created by ORS 742.061(3)." *Rice*, 307 Or App at 244. We noted in the opinion that the insured's attorney-fee claim was based solely on ORS 742.061 and that if she "had proceeded to trial on her claim for breach of the implied covenant of good faith and fair dealing, she would have had no *independent* right to attorney fees on that claim." *Id*. (emphasis added). We do not read that statement—which, in the end, is *dicta* in any event—to mean that the insured would not have had a right to fees on that claim under ORS 742.061 itself.

Having concluded that plaintiff's good-faith-and-fair-dealing claim is fee bearing under ORS 742.061(1), we reverse and remand the judgment on attorney fees. Although the trial court had discretion in deciding the amount of fees to award, that discretion had to be exercised with a correct understanding of the law as to which claims were subject to a fee award. *See State v. C. J. W.*, 345 Or App 531, 536, 583 P3d 1074 (2025), *rev den*, 375 Or 109 (2026) ("[I]f a trial court's purported exercise of discretion flows from a mistaken legal premise, its decision does not fall within the range of legally correct choices and does not produce a permissible, legally correct outcome." (Internal quotation marks omitted.)). Here, the trial court awarded fees only on the breach-of-contract claim, whereas it should have awarded fees on both that claim and the good-faith-and-fair-dealing

claim.[3] We therefore reverse and remand for the trial court to reconsider its fee award with a correct understanding of which claims are fee bearing.

In doing so, we express no opinion on the amount of fees previously awarded. Defendant argues that $40,000 is a reasonable fee award regardless of which specific claims are fee bearing, but that argument is better directed to the trial court, given its discretion in deciding the amount of a fee award. *See Bennett v. Baugh*, 164 Or App 243, 247, 990 P2d 917 (1999), *rev den*, 330 Or 252 (2000) (recognizing discretion). The parties disagree regarding whether and how fees should be apportioned between the contract claims and the tort claim, as well as disagreeing on what constitutes a "reasonable" fee under the circumstances. *See* ORS 742.061(1) (providing for an award of "reasonable" attorney fees). The trial court should decide those issues in the first instance, as it did previously, except with a correct understanding of which claims are fee bearing.[4]

Finally, given our conclusion that the good-faith-and-fair-dealing claim is fee bearing under ORS 742.061(1) and that remand is therefore necessary, we do not address plaintiff's argument regarding the exclusion of Hill's fees from the fee award. The trial court previously rejected plaintiff's argument that those fees were incurred on issues common to all claims. The trial court will necessarily address

[3] It is undisputed that the negligence *per se* claim (*Moody* claim) is not fee bearing under ORS 742.061(1).

[4] In the trial court, plaintiff described her good-faith-and-fair-dealing claim as being "based on the same violations of the Unfair Claim Settlement Practices Act as the *Moody* claim" and suggested an "almost total overlap" between the work done on the two claims. Defendant is understandably concerned that fees that would only be reasonable to incur to litigate the tort claim (which carried the potential to recover damages different from the contract claims) could get shoehorned into the fee award through the good-faith-and-fair-dealing claim. We emphasize that a good-faith-and-fair-dealing claim necessarily must be based on violation of the covenant implied into the contract itself:

> "The duty of good faith and fair dealing is to be applied in a manner that will effectuate the objectively reasonable expectations of the parties to the contract. In particular, because the rights and duties of the parties to an insurance policy are contractual, the duties of each are limited to those derived from the policy. An implied duty of good faith and fair dealing cannot be construed in a way that changes or inserts terms into a contract."

*Brockway*, 284 Or App at 95 (internal quotation marks, citations, and brackets omitted).

that issue again on remand, and it may expand upon or otherwise modify its reasoning, even if it again excludes Hill's fees. Plaintiff agreed at oral argument that we need not address the Hill issue if we reverse on the fee-bearing issue. We therefore express no opinion on that issue, and nothing in this opinion precludes plaintiff from raising it again in a future appeal. The same is true as to any other reasons that the trial court may have given for its fee award, as the only issues raised and briefed in this appeal were the fee-bearing issue (which we have decided) and the Hill issue (which we have not).

Reversed and remanded.