GARRETT, J., dissenting.

Forty-five years ago, this court held that an insurer's bad-faith denial of an insurance claim constitutes only a breach of contract and, therefore, cannot support an action in tort to recover damages for emotional distress. *Farris v. U.S. Fid. and Guar. Co.*, 284 Or 453, 587 P2d 1015 (1978) (*Farris II*). That decision followed settled common-law principles: where parties have a contractual relationship, a breach of obligations resulting in damages will, ordinarily, support only a breach of contract claim, not a tort claim.

In this case, defendant insurer failed to pay out under the terms of a $3,000 life insurance policy after plaintiff's husband died. Plaintiff sued defendant for breach of the insurance contract. In addition, plaintiff's complaint purported to allege a tort claim for negligence -- specifically, "negligent performance of an insurance contract" -- and sought damages of over $45,000 for emotional distress. The trial court dismissed that tort claim, as it should have under *Farris II*.

Today, the majority announces that an insurer's denial of coverage *can* support liability in tort -- the proposition that *Farris II* rejected. As a result of today's decision, Oregon not only ceases to be among the jurisdictions that do not recognize tort claims for bad-faith denial of insurance benefits; Oregon joins the minority of jurisdictions that recognize the broadest version of such claims -- premised only on an insurer's negligence. The majority avoids expressly overruling *Farris II* (which no one has asked us to do) by reasoning that that case did not address the issue raised here. I disagree. This court in *Farris II* was asked to recognize tort liability based on an insurer's

bad-faith denial of coverage. It declined to do so, following an extensive discussion that is irreconcilable with the analysis that the majority adopts today. The considerations that the majority relies on to create tort liability for negligent denial of an insurance claim are the same considerations that the court in *Farris II* rejected when it held that the insurer's bad-faith denial "could only have been a breach of contract." 284 Or at 465. In effect, *Farris II* has been abrogated in the absence of any request that we do so and without undertaking the analysis that applies when this court is asked to overrule one of its precedents.

A. *For plaintiff to win, this court must recognize a new basis for tort liability.*

The first obstacle that we encounter in assessing plaintiff's tort claim is that the claim is based, in part, on defendant's failure to perform *contractual* obligations. We have said that a tort claim cannot be predicated on a defendant's failure to perform contractual obligations unless the defendant's conduct in breaching the contract also breached an independent standard of care that exists separate from the contract terms. *See Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992) (party may bring a tort claim in addition to or in lieu of a contract claim "if the other party is subject to a standard of care independent of the terms of the contract").

For example, in *Abraham v. T. Henry Construction, Inc.*, 350 Or 29, 33, 249 P3d 534 (2011) (*Abraham II*), the defendants contracted to build a home "in a workmanship like manner and in compliance with all building codes and other applicable laws." (Internal quotation marks omitted). The plaintiffs alleged that the defendants had been negligent, causing water damage to the property. *Id.* The plaintiffs asserted both

contract and tort claims. *Id.* The defendants argued that there could be no tort liability because the contract already covered the alleged conduct. *Id.* at 36. This court disagreed, noting that the defendants' alleged conduct breached the common-law tort obligation that imposes liability for negligently caused and foreseeable physical injuries. *Id.* at 37-38. Although the conduct underlying the contract and tort claims was the same, the tort obligation existed under the common law independent of the contract. *Id.* at 38.

In this case, plaintiff argues that the Insurance Code -- specifically, ORS 746.230 -- provides a standard of care independent of the terms of the contract. As the majority correctly explains, however, not all statutes that govern private conduct can support private tort actions if violated. A court must conclude either that the legislature intended to create a so-called statutory tort or that the common law nevertheless recognizes a tort claim under the circumstances. Here, citing ORS 746.230 as an "independent standard of care" assumes what must be established as a threshold matter, which is that a tort cause of action exists for which that statute *supplies* the applicable standard of care. If the underlying conduct that ORS 746.230 addresses is not actionable in tort law, then the statute does not provide an independent standard of care capable of supporting such a tort claim.

To overcome that obstacle, plaintiff argues that a violation of the statutory standard of care imposed by ORS 746.230 should establish negligence *per se*. But, as the majority opinion recognizes, negligence *per se* applies only when there is an underlying negligence claim that imposes the usual reasonableness standard of care. As we have said, negligence *per se* may apply "[w]hen a negligence claim otherwise exists, and a

statute or rule defines the standard of care expected of a reasonably prudent person under the circumstances[.]" *Deckard v. Bunch*, 358 Or 754, 761 n 6, 370 P3d 478 (2016). Negligence *per se* replaces the reasonableness standard of care with a statutory standard of care -- or, at least, a violation of the statutory standard of care creates a presumption of unreasonableness. *Id.* Such a claim thus assumes that, without the statute, tort law would still recognize a negligence claim based on the reasonableness standard of care. *See Gattman v. Favro*, 306 Or 11, 15 n 3, 757 P2d 402 (1988) ("Strictly speaking, the doctrine of 'negligence per se' does not create a cause of action. Rather, it refers to a standard of care that a law imposes within a cause of action for negligence."). If there is no reasonableness standard of care imposed by tort law under the circumstances alleged by a plaintiff, then there is nothing for the statutory standard of care to replace.

That brings us to the question whether the negligence claim that plaintiff advances here "otherwise exists," *i.e.*, whether Oregon tort law would recognize plaintiff's claim for negligence in these circumstances under the reasonableness standard of care. The answer, until today, was no. Plaintiff asserts a claim for a purely emotional injury allegedly resulting from defendant's negligence. As the majority notes, negligently caused emotional injuries are not generally actionable in tort law. __ Or at __ (slip op at 12:20-21). Unlike physical injuries, which are generally actionable whenever the defendant unreasonably created a risk of physical harm and the risk of the plaintiff's physical injury was foreseeable, negligently caused emotional injuries are actionable only in certain circumstances. *See Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 558, 652 P2d 318 (1982) ("Oregon has few precedents for liability for negligent

injury to solely psychic interests."). This court decides, as a matter of law, those narrow circumstances in which negligently caused emotional injuries are actionable, as in *Philibert v. Kluser*, 360 Or 698, 385 P3d 1038 (2016) (recognizing common-law claim for negligently inflicted emotional distress suffered by family members who witnessed the victim being struck and killed by a vehicle).

Plaintiff's argument, properly understood, asks this court to recognize another new circumstance in which a negligently caused emotional injury is actionable in tort -- specifically, that an insurer may be liable to an insured (or insured's beneficiary) for an emotional injury that results from the insurer's failure to exercise reasonable care in handling a claim for benefits.

Although plaintiff's theory requires recognizing a new basis for tort liability, that is not how plaintiff has framed her argument; in fact, she expressly disavows any need for this court to recognize something new. That failure to properly frame the argument likely stems from the confusing language that this court has used to discuss the existence and scope of obligations that, if breached, are actionable in tort. An obligation actionable in tort has traditionally been called a "duty." Courts properly use "duty" to identify what types of facts give rise to what types of tort obligations. This court has, at times, been hesitant to frame tort issues in terms of "duty" because of its uncertain status following *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 734 P2d 1326 (1987). But defining the existence and scope of obligations is a logically necessary component of tort law. When the court fails to use "duty" to describe the existence or scope of an obligation actionable in tort law, then the court must find other terms to do

that work.

The court has not always been consistent in the terminology that it has used to replace the duty element. The majority opinion uses the concept of "legally protected interest" to describe its conclusion that, under the facts alleged, defendant may be liable for plaintiff's emotional distress damages. A more straightforward way to state that conclusion would be to say that defendant, because of its relationship to the insured, had an obligation (or duty) to avoid negligently creating a foreseeable risk of emotional injury to plaintiff. To say that a defendant is liable for negligently causing a type of injury is to say that the defendant had an obligation to avoid negligently causing a type of injury.[1]

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[1] The majority opinion cites *Fazzolari* as prompting a move away from "duty." That is a common reading, but one that, in my view, overstates what *Fazzolari* did. The purpose of this court's extensive discussion in *Fazzolari* was to correct a misapplication of "duty" -- an element that properly raises a question of law -- to describe fact questions about reasonableness or foreseeability. But that does not mean that there are no cases in which duty plays a role. In *Fazzolari* itself, the court first defined, and identified the facts giving rise to, the defendant's "duty" before concluding that the defendant's liability turned on fact questions for the jury. *See* 303 Or at 19 (describing the "duty of supervision" that a school owes to its students as "a special duty arising from the relationship between educators and children entrusted to their care apart from any general responsibility not unreasonably to expose people to a foreseeable risk of harm"); *id.* at 20 ("The scope of this obligation does not exclude precautions against risks of crime or torts merely because a third person inflicts the injury.").

While "duty" plays no independent role in cases involving physical injuries caused by a risk of harm that the defendant created, "duty" continues to play an affirmative role in other cases, such as cases involving purely economic injuries, purely emotional injuries, and affirmative duties of care. *See Fazzolari*, 303 Or at 7 ("[B]ecause common-law negligence traditionally has excluded some categories of quite predictable injuries and claimants (familiar illustrations include solely economic or psychic injuries, injuries due to a bystander's failure to rescue and injuries to trespassers), courts still find lack of a 'duty' a convenient label for these categorical rulings."); *see, e.g.*, *Onita Pacific*

B. *In* Farris II*, this court decided that an insurer's bad-faith denial of coverage is not actionable in tort.*

The majority concludes that the relationship between an insurance provider and an insured gives rise to an obligation, actionable in tort law, to avoid wrongfully denying an insured's claim. This court considered and rejected that idea in 1978, when it decided *Farris II*.

In *Farris II*, the plaintiffs purchased a liability insurance policy from the defendant. 284 Or at 455. After being sued, the plaintiffs tendered the case to the defendant, which denied coverage. *Id.* The plaintiffs defended the case themselves and subsequently sued the defendant, seeking damages for emotional distress. *Id.* The plaintiffs alleged two causes of action. The first claim alleged a breach of the insurance contract, asserted that the breach had not been in good faith, and sought damages for emotional distress. The second cause of action was not denominated as either a tort or a contract claim, and it alleged that the "[d]efendant's rejection of coverage and refusal to defend plaintiffs was not made in good faith and was made with the knowledge that such

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Corp. v. Trustees of Bronson, 315 Or 149, 159, 843 P2d 890 (1992) ("[W]here the recovery of economic losses is sought on a theory of negligence, the concept of duty as a limiting principle takes on a greater importance than it does with regard to the recovery of damages for personal injury or property damage."); *Hale v. Groce*, 304 Or 281, 283-84, 744 P2d 1289 (1987) (opinion of the court by Linde, J.) ("[W]ithout a duty to plaintiff derived from defendant's contractual undertaking, plaintiff's tort claim would confront the rule that one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property."); *Nearing v. Weaver*, 295 Or 702, 708, 670 P2d 137 (1983) (opinion of the court by Linde, J.) ("[T]here is no cause of action for negligent infliction of purely psychic or emotional injury as such, unsupported by a violation of some more specific duty toward the plaintiff.").

action would inflict mental distress and anguish upon plaintiffs." In addition to seeking damages for emotional distress, that second claim added a demand for punitive damages.

The plaintiffs demonstrated at trial that the defendant had denied their claim for benefits in bad faith: "At the time of final rejection of coverage, [the] defendant was aware that there was coverage but, nevertheless, chose to deny it." *See id.* The defendant's claim manager indicated an intent to "bluff it out[.] [W]e can always buy out at a later date." *Id.* (internal quotation marks omitted). A jury entered a verdict for the plaintiffs and awarded damages for emotional distress. *Id.*

In assessing whether emotional distress damages were available on those facts, this court recognized the importance of determining "whether [the] plaintiffs' action for damages is one of contract or one of tort." *Id.* at 456. We noted the general rule that a plaintiff may not recover for emotional distress caused by pecuniary loss resulting from breach of contract. *Id.* However, the plaintiffs had contended that the defendant was "guilty of a tort as well as a breach of contract." *Id.* at 455. The plaintiffs premised that claim on the fact that the defendant had "exercised 'bad faith' in its decision to deny coverage and to refuse a defense." *Id.* at 456. The court explained that, "if the facts justify an action of tort, courts are inclined to allow recovery for emotional distress as part of the damages flowing from a tort cause of action." *Id.* As a result, the court's analysis that followed addressed whether the facts established at trial justified an action in tort.

The court first considered whether a violation of the Insurance Code was actionable as a statutory tort, specifically the provision prohibiting insurers from "'[n]ot

attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear.'" *Id.* (quoting ORS 746.230(1)(f)). We noted that an insurer may be subject to civil penalties payable to the state for violations of the Insurance Code. *Id.* at 457. We concluded from the legislature's specific inclusion of a system of regulatory sanctions that the legislature did not implicitly intend for violations also to be a basis for civil tort claims:

> "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."

Id. at 458.

After concluding that the legislature did not intend for the defendant's violation of the statute to be a tort, we went on to consider the plaintiffs' separate argument that "the common law of the construction of insurance contracts dictates that defendant was guilty of the kind of 'bad faith' conduct *which gives rise to tort liability* and that damages for emotional distress are, therefore, recoverable along with [the] plaintiffs' other damages." *Id.* at 458-59 (emphasis added). The plaintiffs drew on cases recognizing that, upon accepting an insured's tendered claim for defense, a liability insurer must carry out that defense with due care. In those situations, "courts have held the insurer to a duty of 'good faith' in investigating the facts and in attempting to settle within the policy limits." *Id.* at 459. The plaintiffs in *Farris II* alleged a similar duty of good faith. As we described it, the plaintiffs sought emotional distress damages "arising

out of a tort action for failure to exercise good faith in denying coverage." *Id.* (emphasis added).

At that time, this court had not clarified whether the failure-to-settle cases that the plaintiffs cited recognized an action in contract or in tort. We assumed, without deciding, that the failure-to-settle cases were based in tort but declined to extend them to the plaintiffs' claim, explaining, "it is our opinion that the rationale of such [a failure-to-settle] action has no application to the present situation and that the present action is not one in tort." *Id.* at 460.

The court in *Farris II* identified the key distinction as being that the insurer takes on a fiduciary obligation in the failure-to-settle context but not in the denial-of-benefits context. We explained that, "[i]n an action for failure to settle within the policy limits, the insurance company is charged with acting in a fiduciary capacity as an attorney in fact representing the insured's interest in litigation." *Id.* That fiduciary relationship is never created when the insurer simply denies coverage. *See id.* ("In the present case, [the] defendant did not undertake this fiduciary duty to represent the insured's interest in the litigation -- it refused it.").

The court in *Farris II* then quoted at length from a previous case making the same distinction between failure to settle and bad-faith denial, *Santilli v. State Farm*, 278 Or 53, 562 P2d 965 (1977). *Santilli* involved, like this case, an alleged bad-faith denial of life insurance benefits. *Id.* at 55-56. The plaintiff there sought to have this court "recognize a cause of action for tortious breach of an insurer's duty of 'good faith and fair dealing' when dealing with its insured." *Id.* at 61. The court in *Santilli*

ultimately did not resolve the issue of whether to recognize a tort, but noted that,

> "[i]n cases involving the insurer's duty to pay under policies for theft, fire, health, disability or life insurance, the unique relationship which gives rise to the special duty of liability insurers to attempt to settle within their policy limits does not arise. The insured, or his beneficiary, is not subject to the imposition of excess liability, and his rights and responsibilities are limited to those set forth in his contract."

Id. at 62, quoted in *Farris II*, 284 Or at 463.[2]

The court in *Farris II* acknowledged that the plaintiff in *Santilli* had asserted a first-party claim for life insurance benefits, while the plaintiffs in *Farris II* sought relief from the insurer's failure to tender a defense on a third party's claim. *Farris II*, 284 Or at 463. But the court noted that, like *Santilli*, the plaintiffs' claim in *Farris II* "does not involve a failure to settle within the policy limits and the rationale expressed in *Santilli* is equally applicable." *Id.*

Similarly, the court in *Farris II* cited two cases involving the bad-faith denial of first-party claims for medical and fire insurance in which the Supreme Court of California had allowed recovery for emotional distress damages based on tortious breach of an insurance contract. *Id.* (citing *Silberg v. California Life Ins. Co.*, 11 Cal 3d 452, 521 P2d 1103 (1974); *Gruenberg v. Aetna Ins. Co.*, 9 Cal 3d 566, 510 P2d 1032 (1973)). The court in *Farris II* described those California cases as "sufficiently similar to this case

[2] The court did not resolve whether bad-faith denial of insurance benefits may establish a claim for tortious breach of an insurance contract because the court concluded that, even if the insurer had been wrong to deny the life insurance benefits, the parties' stipulated facts provided the insurer with "just cause for contesting liability," which would be sufficient to defeat a claim for tortious breach of an insurance contract. *Santilli*, 278 Or at 63.

that they are not able to be distinguished." *Id.* But, "for the reasons given in *Santilli*," the court in *Farris II* declined to follow those California cases in recognizing bad-faith denial of an insurance claim as actionable in tort. *Id.* at 464-65.[3]

The court then addressed the plaintiffs' policy arguments offered in support of their contention that the court should permit emotional distress damages. The plaintiffs had argued that "one who enters into a contract of insurance does so to guarantee himself peace of mind * * * and, therefore, he should receive reimbursement for that for which he has bargained and not received." *Id.* at 465. In support of that argument, the plaintiffs cited two other California cases allowing emotional distress damages based on an insurer's tortious breach of contract. *Id.* (citing *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 66 Cal 2d 425, 426 P2d 173 (1967); *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal App 3d 376, 89 Cal Rptr 78 (Cal Ct App 1970)). This court rejected that argument, stating that it "does not furnish a logical basis for recovery for emotional distress because many contracts for services, materials or financial assistance, as well as insurance contracts, are similarly made for economic and financial peace of mind." *Id.*

Plaintiffs also appealed to the public interests involved in the insurance business, arguing that "public policy dictates that full responsibility for the results of failure to perform should be imposed" without respect to the traditional rule concerning

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[3] The majority references one of those California cases, *Gruenberg*, as being in accord with the negligence claim that the majority is creating. __ Or at __ (slip op at 37 n 16). This court in *Farris II*, however, expressly rejected *Gruenberg*. *Farris II*, 284 Or at 464-65.

contract damages. *Id.* at 466. This court responded that the plaintiffs

> "point[ed] out no reasons why such public interest should change the measure of damages which has resulted in the rule against recovery for mental distress brought about by an intentional breach of a contract. Any idea of punishment or warning to others is within the province of punitive damages and has no place in consideration of the propriety of a recovery for emotional distress."

Id.

As those passages show, this court in *Farris II* determined that the bad-faith claim denial by the insurer in that case was not actionable in tort. The court held that an insurer's decision whether to allow or deny a claim for insurance benefits does not trigger the kind of fiduciary relationship with the insured needed to implicate tort law. Rather than sounding in tort, the insurer's bad-faith denial "could only have been a breach of contract, and, in cases of breach, the law is clear that no recovery for mental distress because of threat of pecuniary loss is recoverable." *Id.* at 465.

This court has repeatedly characterized *Farris II* as declining to recognize a tort. *See Goddard v. Farmers Ins. Co.*, 344 Or 232, 263-64, 179 P3d 645 (2008) (characterizing *Farris II* as rejecting an insured's argument that "the insurer's denial of liability insurance coverage sounded in tort, so that the insured could recover for emotional distress caused by that denial"); *Georgetown Realty*, 313 Or at 108 n 5 ("This court [in *Farris II*] held that damages in tort were not recoverable because performance was never undertaken.").

The Court of Appeals has understood *Farris II* the same way. *See Shin v. Sunriver Preparatory School, Inc.*, 199 Or App 352, 366, 111 P3d 762, *rev den*, 339 Or

406 (2005) ("[W]here the insurer does not undertake the defense of the insured, the carrier does not assume the fiduciary duty that would result from having done so, and its responsibilities are confined to the contract terms." (Citing *Farris II*, 284 Or at 460.)); *Warren v. Farmers Ins. Co. of Oregon*, 115 Or App 319, 324, 838 P2d 620 (1992), *rev den*, 316 Or 529 (1993) ("In [*Farris II*], the Supreme Court held that an insurer's failure to exercise good faith in denying coverage is a breach of contract, not a tort."); *Employers' Fire Ins. v. Love It Ice Cream*, 64 Or App 784, 790, 670 P2d 160 (1983) ("In [*Farris II*], the court held that an insurer's bad faith refusal to defend its insured under a liability policy gives rise only to a breach of contract claim, for which punitive and emotional distress damages cannot be recovered, rather than a tort claim."). Federal courts are in accord.[4]

[4] Federal courts have read *Farris II* to preclude treating an insurer's bad-faith denial of insurance benefits as a tort claim. *See, e.g.*, *Vail v. Country Mut. Ins. Co.*, No 2:13-CV-02029-SU, 2015 WL 2207952, at *7 (D Or May 11, 2015) (holding that "recovery for emotional distress is typically not allowed" for bad-faith denial of insurance benefits (citing *Farris II*, 284 Or at 464)); *Russell v. Liberty Mut. Ins. Co.*, No 3:13-cv-00163-SU, 2013 WL 3994678, at *3 (D Or Aug 2, 2013) (holding that "a special relationship [giving rise to a tort claim] does not exist because defendant merely refused to defend plaintiff against the underlying CERCLA action" (citing *Farris II*, 284 Or at 462-65)); *Malbco Holdings, LLC v. AMCO Ins. Co.*, No CV-08-585-ST, 2008 WL 5205202, at *5 (D Or Dec 11, 2008) (relying on *Farris II* to hold "the type of breach of duty of good faith and fair dealing claim alleged here [bad-faith denial and failure to investigate] to be a contractual claim, not a tort claim").

Federal courts have also refused to apply the Court of Appeals' decision in this case, holding that recognizing a violation of the Insurance Code as negligence *per se* conflicts with this court's refusal in *Farris II* to recognize bad-faith denial of benefits as a tort. *See Koa v. Allstate Indem. Co.*, No 1:22-cv-00658-CL, 2023 WL 3066268, at *2 (D Or Mar 23, 2023) ("This Court recently declined to follow *Moody* in a nearly identical

C. Farris II *disposes of this case.*

Farris II answered the question whether an insurer's bad-faith denial of coverage can support liability in tort. The majority's contrary conclusion is based on a strained reading of that decision.

At the outset, the majority distinguishes *Farris II* on the ground that that case arose in the third-party context. __ Or at __ (slip op at 22:20-21). That is true but irrelevant to the rule of law announced in *Farris II*, which applies with equal force here. In *Farris II*, as discussed above, we held that the relationship between an insurer and insured imposes no obligation on the insurer to act in the interest of the insured unless an insurer accepts an insured's claim for liability coverage. Thus, when an insurer denies a claim altogether, the insurer is not subject to an obligation actionable in tort to act in good faith. We rejected the plaintiffs' argument that the nature of an insurance contract is one for which a breach should give rise to such tort liability. *See Farris II*, 284 Or at 465 (concluding that protecting an insured's "peace of mind" in the denial-of-coverage context "does not furnish a logical basis for recovery for emotional distress because many contracts for services, materials or financial assistance, as well as insurance contracts, are similarly made for economic and financial peace of mind").

Nothing about that reasoning is specific to a third-party liability insurer

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case, ruling that the Oregon Court of Appeals decision blatantly contradicts over 40 years of Oregon Supreme Court precedent."); *but see Butters v. Travelers Indem. Co.*, No 3:22-cv-726-SB, 2023 WL 3559472, at *2 (D Or May 18, 2023) (agreeing with magistrate judge's conclusion that "*Moody* and *Farris* do not clash").

refusing a tender of coverage in bad faith. The court's analysis demonstrates that the reasoning applies equally to the bad-faith denial of first-party claims. In considering the plaintiff's argument in that case, we relied on *Santilli*, a first-party coverage case like this one. *Farris II*, 284 Or at 463. And we rejected the reasoning of first-party cases from California that we described as so similar that "they are not able to be distinguished." *Id.* While some of the facts in this case are different than in *Farris II*, the salient facts are the same: as in *Farris II*, plaintiff seeks to impose tort liability for a *denial of coverage*, as opposed to the breach of obligations that might arise after coverage is accepted.

The majority appears to view *Farris II* as declining only to award tort "damages" for a breach of contract "claim," without making a policy judgment about whether the underlying facts should be actionable in tort. __ Or at __ (slip op at 24:25-28). That reading is problematic for several reasons. First, although the majority opinion takes pains to suggest that the plaintiffs in *Farris II* had only alleged contract claims, it is far from clear that that is true. Second, it does not matter whether that is true: Regardless of what the plaintiffs called their claims in their pleading, this court understood that the plaintiffs were asking the court *to recognize a tort*. We said so repeatedly.

As noted earlier, the plaintiffs in *Farris II* alleged two claims, but it is not clear how the claims were denominated. According to the abstract of record, the first claim was alleged in terms of breach of contract. The second claim was more ambiguous. It incorporated the earlier contract allegations by reference, but it emphasized the "bad faith" denial of coverage, requested damages for emotional distress, and, significantly, added a demand for punitive damages that the first claim omitted.

Thus, although the second claim was not expressly denominated as a tort claim, the context suggests that the plaintiffs asserted a tort cause of action. That interpretation is consistent with what had happened earlier in that case. The plaintiffs had initially made a demand for emotional distress damages as part of their contract claim, but the trial court struck that demand, and this court affirmed that ruling. *Farris v. U.S. Fidelity & Guaranty*, 273 Or 628, 638, 542 P2d 1031 (1975) (*Farris I*). In that case, we held that, "when there is an unaggravated breach, such as alleged in the complaint, damages are not awarded for mental anguish. We do not decide what the result would be if there was evidence of an aggravated breach; that is, one, for example, made in bad faith or otherwise." *Id.* Because we had warned that a breach of contract claim might not support emotional distress even *with* an allegation of bad faith, it is logical to interpret the plaintiffs' amended pleading as asserting a *non*contract claim. That explanation is more plausible than the majority's suggestion that the plaintiffs tried to cure the deficiency in *Farris I* by stating two duplicative contract claims. __ Or at __ (slip op at 23 n 8, 26 n 10).[5]

[5] The majority also relies on *Abraham II* to assert that the plaintiffs in *Farris II* failed to allege the breach of a tort obligation that was distinct from the insurance contract. __ Or at __ (slip op at 27 n 11). It is unclear what the majority means. *Abraham II* was decided more than 30 years after *Farris II*, states that tort obligations and contract obligations may sometimes overlap, and explains that courts decide the existence of tort obligations under their common-law authority. *See Abraham II*, 350 Or at 36. *Farris II* is merely an example of the court exercising that authority in deciding not to recognize a tort obligation. In any event, it is unclear how plaintiff's negligence claim in this case is any more distinct from the insurance contract than the plaintiffs' claim in *Farris II*. Both claims assert that the insurer denied benefits owed under the insurance contract without a reasonable basis for doing so.

More important than how the plaintiffs' claims were denominated in their pleading is how they were argued and understood by this court. The idea that the court's analysis in *Farris II* was driven solely by the plaintiffs' pleading is undermined by the fact that the case had been tried to a jury, and the opinion never references the complaint or pleading standards. Instead, in *Farris II*, we noted that emotional distress would not normally be available for a breach of contract but observed that the plaintiffs were arguing that the insurer was "*guilty of a tort* as well as a breach of contract." 284 Or at 455 (emphasis added). The court further explained that, "*if the facts justify an action of tort*, courts are inclined to allow recovery for emotional distress as part of the damages flowing from a tort cause of action." *Id.* at 456 (emphasis added). The plaintiffs contended that their case was analogous to cases in which this court had recognized an insurer's liability for duty of good faith in defending and settling claims against an insured. *Id.* at 459. At that time, it was unsettled whether those claims sounded in contract or tort. *Id.* at 459-60. That explains why this court in *Farris II* found it necessary to address how those cases should be understood. We assumed that they sounded in tort, then explained that the denial-of-coverage context in *Farris II* was different than the failure-to-settle cases. *Id.* Further, the dissent in *Farris II* characterized the majority opinion as refusing to recognize a common-law tort claim because an insurer's bad-faith denial of a claim did not raise the same policy implications as an insurer's failure to settle, a policy judgment with which the dissent disagreed. *Id.* at 473, 476 (Lent, J., dissenting). Although the distinction between an insurer's failure to settle and an insurer's denial of coverage was the central point of the court's opinion in

Farris II, that aspect of this court's reasoning is overlooked by the majority in this case.

In characterizing *Farris II* as holding that the plaintiffs' claim "was one for breach of contract," __ Or at __ (slip op at 25:4-5), the majority seems to view that as merely a descriptive statement about what the plaintiffs had alleged. On the contrary, this court was making a prescriptive statement: when we said that the plaintiffs' claim "*could only have been* a breach of contract," we were holding that the facts of that case *could not* support a claim sounding in tort, which the plaintiffs needed in order to win emotional distress damages. *See Farris II*, 284 Or at 464-65 (emphasis added). The court was stating a legal conclusion about the facts that the plaintiffs had established at trial, not describing the legal theory that the plaintiffs had alleged in their complaint.

The majority also stresses that the plaintiffs in *Farris II* did not style their tort theory as a "negligence claim," but it is unclear what significance the majority thinks can be drawn from that. It is true that the court in *Farris II* did not explicitly address the standard of care that the plaintiffs were asking the court to impose. The court, however, noted that the defendant's denial of insurance benefits was intentional. *See id.* at 458 (referring to the defendant's conduct as an example of insurance providers "intentionally breaching their contract to settle their insureds' claims"). If the court was unwilling to recognize tort liability even for the intentional conduct proven in that case, it necessarily follows that the court implicitly rejected such liability for mere negligence.[6]

[6] Further, the plaintiffs in *Farris II* relied on negligence case law. The plaintiffs argued for the creation of tort liability by drawing on case law recognizing an

In the end, the majority acknowledges that *Farris II* makes repeated references to whether to recognize a tort. The majority explains away those references by proposing that *Farris II* was considering only whether to allow tort "damages" for a breach of contract "claim." __ Or at __ (slip op at 26 n 10). But the court described its task in *Farris II* more broadly than that, and its analysis admits of no such parsing. The court was deciding whether a set of facts should permit an award of damages for emotional distress as a matter of policy that turned on substantive considerations, not the fortuity of what labels the plaintiffs happened to attach to their legal theories. The court in *Farris II* could hardly have been clearer that it was grappling with those policy questions:

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insured's claim for a liability insurer's bad-faith failure to settle. As noted above, this court had not resolved at that time whether such claims sounded in tort or contract. Nevertheless, both before and after *Farris II*, this court described the tort theory of recovery in those cases as a negligence claim.

In the leading case addressing the issue before *Farris II* -- a case cited in *Farris II* -- this court had repeatedly framed the tort theory of recovery as a "negligence" theory. *See Radcliffe v. Franklin Nat'l Ins. Co.*, 208 Or 1, 26-27, 298 P2d 1002 (1956) ("Some courts employ the negligence or due care theory in determining whether or not the insurer rendered itself liable to the insured when it dealt with a settlement matter."); *id.* at 29 ("The foregoing New Hampshire decisions are good representatives of those which employ the negligence theory."); *id.* at 31-32 ("It will be observed that in the decision just reviewed the court held that actions based upon a negligently conducted defense may employ both the contract and the negligence theory.").

And, when this court did finally resolve that issue, concluding that a liability insurer's bad-faith failure to settle sounds in tort, this court recognized that claim as a negligence claim. *See Georgetown Realty*, 313 Or at 111 ("[P]laintiff's excess claim can be brought as a claim for negligence."). Thus, the plaintiffs' reliance on that line of cases in *Farris II* does not appear to be grounds for distinguishing the majority's opinion in this case.

> "It may logically be asked what difference it makes whether the action is considered one of contract or of tort. In a case like the present where plaintiffs received no injury or fright resulting in serious physical manifestations, why should it be of moment, when considering whether to allow recovery for the emotional distress, whether a plaintiff's concern about his financial plight arose out of *a breach of contract or of a breach of contract which is also a tort*? In reality, there probably isn't any reason for a distinction. Either people should be able to recover for their fear of financial disaster as the result of the other party's intentional breach of a contract or they should not. Calling an intentional breach of contract a tort has no magical consequences which change anything. Neither is there anything inherent in a contract of insurance which makes the suffering any greater, any less, or any more certain than in numerous other business contracts which are generally breached intentionally and for which no recovery for emotional distress is allowed."

284 Or at 465 n 3 (emphasis added). *Farris II* rejects the availability of emotional distress damages for an insurer's bad-faith denial of coverage, full stop. It did not leave the door open for the next plaintiff to give the same claim a different name.[7]

The majority's analysis is contrary to *Farris II* in other respects. The majority relies heavily on the relationship between the parties as support for recognition of a common-law negligence claim. The majority explains that the parties here are in a relationship of "mutual expectation of service and reliance," and that defendant "undertook to provide [] services that, absent the exercise of reasonable care, may foreseeably create a risk of emotional harm." __ Or at __ (slip op at 35:14-17). This

[7] The majority's analysis creates uncertainty about the remaining precedential effect of *Farris II*. If the majority means to distinguish *Farris II* on its facts, then courts may still rely on *Farris II* as rejecting tort liability for third-party insurers that have denied coverage in bad faith, which were the facts presented in that case. On the other hand, if the majority is distinguishing *Farris II* based on the pleadings or based on the legal theory that the plaintiffs asserted in that case, then *Farris II* might have no precedential effect in any case styled as a negligence claim.

court in *Farris II*, however, took full measure of the nature of the relationship in the simple denial-of-coverage context. Contrasting it to the fiduciary obligations that are triggered once an insurer accepts the defense of a liability claim, the court concluded that, when coverage is denied altogether, an insurer does not "undert[ake] any fiduciary duty by purporting to act in the interests of the insured." *Farris II*, 284 Or at 460. That lack of additional responsibility led the *Farris II* court to conclude that, when an insurer denies coverage in bad faith, the insured's action sounds only in contract. Without using the term "fiduciary relationship," the majority has in effect recognized a new special relationship between an insurer and insured, which *Farris II* refused to do outside the defense-of-liability context.

Separate from the special relationship issue, the *Farris II* court also considered and rejected the same policy arguments that the majority advances today as reasons to recognize a common-law negligence claim. The majority reasons, for example, that the prohibitions set forth in ORS 746.230(1) are "evidently designed" to protect policyholders' "peace of mind." __ Or at __ (slip op at 29:3-7). The court in *Farris II* expressly rejected that proposition: "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." 284 Or at 458.

The majority also opines that the claimed harm here -- emotional distress resulting from an insurer's bad-faith denial of an insurance claim -- is "of sufficient importance to merit protection," supporting recognition of a common-law negligence claim. __ Or at __ (slip op at 37:13-15). That is not a new idea, either, and *Farris II*

rejected it, finding "no reason[] why such public interest should change the measure of damages which has resulted in the rule against recovery for mental distress brought about by an intentional breach of a contract." 284 Or at 466.

In short, *Farris II* did what it appeared to do. It stated the rule that the bench and bar have understood it to state for nearly fifty years: there is no tort liability for emotional distress damages arising from an insurer's denial of coverage. In concluding otherwise today, the majority changes the landscape of insurance litigation in Oregon. Under *Farris II*, Oregon was among those jurisdictions that did not recognize tort claims for bad-faith denial of insurance benefits, even when the insurer's conduct was knowing and intentional. Today, Oregon joins the minority of jurisdictions recognizing the *broadest* form of those claims, requiring a plaintiff to establish only an insurer's negligence. *See* Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 5:2 (2d ed 1997) (identifying the negligence standard as the minority position among jurisdictions that recognize first-party bad faith insurance claims); Dobbs *et al*, 3 *The Law of Torts* § 702, 772 (2d ed 2011) ("A little authority requires only proof of negligence as ground for the insurer's tort liability. But the mainstream core test for judging tortious bad faith requires the plaintiff to prove that (1) the insurer lacked a reasonable basis for denying policy benefits to the insured and (2) that the insurer acted with knowing or reckless disregard of the inadequate ground for denying the benefits.").

In my view, *Farris II* disposes of this case. "[T]he principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 692, 261 P3d 1 (2011) (internal

quotation marks omitted). If *Farris II* is to be abrogated, then plaintiff "must assume responsibility for affirmatively persuading [this court] that we should abandon that precedent." *Id.* (internal quotation marks omitted). In the absence of that showing, the trial court's judgment dismissing plaintiff's claim was correct and should be affirmed. I respectfully dissent.

Duncan, J., and Balmer, S.J., join in this dissenting opinion.