IN THE SUPREME COURT OF THE STATE OF OREGON

RICHARD GRIFFITH and RETA GRIFFITH, husband and wife,
Plaintiffs – Appellants – Cross Respondents - Petitioners on Review,

v.

PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD,
Defendant – Respondent – Cross Appellant - Respondent on Review.

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Wallowa County Circuit Court No. 22CV10452
CA No. A181951
SC No. S072088

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# COMBINED BRIEF ON PETITION FOR REVIEW AND ON THE MERITS OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS ON REVIEW

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Review of the decision of the Court of Appeals
reversing the Limited Judgment entered on July 20, 2023, in
Wallowa County Circuit Court by the Honorable Wes Williams

CA Opinion Filed: March 19, 2025, as modified June 4, 2025
Author of Opinion: Tookey, P. J.
Joined by: Kamins, J., and Jacquot, J.

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## I. INTEREST OF *AMICUS CURIAE*

UP is a highly respected national non-profit section 501(c)(3) organization. Founded in 1991, UP has served as a voice for the interests of insurance consumers across the country for more than 30 years. Individual policyholders routinely call on UP for help in the wake of large-scale national disasters, such as hurricanes in the Gulf of Mexico and across the Eastern Seaboard; floods and windstorms in the Midwest; and wildfires in the West. UP also assisted Southern Oregon residents impacted by 2020 wildfires in coordination with public officials in the region.

UP routinely engages in nationwide efforts to educate the public, governmental agencies, legislators, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work, which is divided into three program areas: (1) Roadmap to Recovery (disaster recovery and claim help), (2) Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and (3) Advocacy and Action (advancing pro-consumer laws and public policy). UP does not sell insurance or accept money from insurance companies.

Public officials, state insurance regulators, academics, and journalists throughout the United States routinely seek UP's input on

insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office, and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative of the National Association of Insurance Commissioners since 2009. In these roles, UP assists regulators in monitoring policy language and claim practices through presentations and collaborations and the development of model laws and regulations.

UP chooses cases cautiously before it appears as *amicus curiae* nationwide. UP's briefs provide a counterweight to the claims of the insurance industry and facilitate evenhanded development of the law. Since 1991, UP has filed numerous *amicus* briefs in federal and state appellate courts across the country that seek to uphold the indemnity function of insurance. The United States Supreme Court and state supreme courts have cited UP's *amicus* briefs and studies in their opinions. *See, e.g., Humana Inc. v. Forsyth*, 525 US 299, 314 (1999); *Preferred Contractors Ins. Co., Risk Retention Grp. v. Baker & Son Constr.*, No. 100466-4 at 8 (Wash Aug 11, 2022); *Sproull v. State Farm Fire & Cas. Co.*, No. 126446, 2021 WL 4314060 (Ill Sept 23, 2021); *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal5th 93, 104-105 (2019); *Cont'l Ins.*

*Co. v. Honeywell Int'l, Inc.,* 188 A3d 297, 322 (NJ 2018); *Ass'n of Cal. Ins. Cos. v. Jones*, 2 Cal5th 376, 382-383 (2017).[1]

UP continues its mission of supporting policyholders through its *amicus* efforts here in support of the Griffiths on the attorney fee award issue raised in the cross-appeal, which will impact Oregon insureds for decades to come.

## II. SUMMARY OF ARGUMENT

The Court of Appeals' analysis of the attorney fee award amount on cross-appeal is fundamentally flawed because it considers the general factors of ORS 20.075[2] in isolation and without regard to the contextual purpose and protections of the specific statute, ORS 742.061[3], that requires the attorney fee award. This opens the door for the Court of

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[1] A list of *amicus curiae* briefs filed by UP can be found at https://uphelp.org/amicus-briefs/ (last visited July 20, 2025).

[2] ORS 20.075 outlines general factors for courts to consider in setting the amount of a reasonable fee award and applies to a variety of contexts.

[3] ORS 742.061(1) (emphasis added) provides a one-way, mandatory fee right for insureds in insurance cases:

> [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.

Appeals in this case, and Oregon courts in other cases, to arrive at an award amount that is inconsistent with the purpose and protections of ORS 742.061. If left uncorrected, this analytical framework creates a dangerous precedent that undercuts a key component of ORS 742.061's compensatory purpose: to make the insured whole. Any award amount that would leave an insured less than whole undermines the purpose of ORS 742.061 and should be rejected, and as applicable here, reversed.

## III. ARGUMENT

### A. The Oregon Court of Appeal's Analytical Framework Is Incomplete

On the cross-appeal, the Oregon Court of Appeals' analytical framework for considering a reasonable amount for the insureds' attorney fee award is incomplete because it does not include the purpose and protections of ORS 742.061. *See Griffith v. Prop. & Cas. Ins. Co. of Hartford*, 339 Or App 40, 45–47, 566 P3d 1235, *opinion adhered to as modified on reconsideration*, 341 Or App 30 (2025) (setting out incomplete analytical framework). Rather, the Oregon Court of Appeals acknowledges that ORS 742.061 mandates an attorney fee award, but then swiftly sets ORS 742.061 aside when considering the amount of that mandatory award. *See id.* Instead, the Court of Appeals considers the general factors of ORS 20.075 in a vacuum without regard to the contextual purpose and protections of the mandating statute. *See id.*

The heart of the Court of Appeals' analytical framework is set forth in the following excerpt:

> In any case in which an award of attorney fees is authorized or required by statute, ORS 20.075(2) requires the court to consider the factors in ORS 20.075(1) and 20.075(2) in determining a reasonable amount of the fee. *In Friends of Columbia Gorge v. Energy Fac. Siting Coun*., 367 Or. 258, 267, 477 P.3d 1191 (2020), the court stated,
>
> > "Those factors are frequently captured by the 'lodestar' approach, under which a fee award is 'based on a reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on the case, with certain adjustments potentially made to that amount for factors such as the risk of loss and the quality of the attorney's work.' *Strawn[ v. Farmers Ins. Co*., 353 Or. 210, 217, 297 P.3d 439 (2013)]."
>
> In contrast to the lodestar method, under which the fee is determined based on a reasonable hourly rate multiplied by a reasonable number of hours devoted to work on the case, with possible adjustments for factors such as the risk of loss and the quality of the attorney's work, the percent-of-recovery method sets the fee by calculating the total recovery secured by the attorney and awarding a reasonable percentage of that recovery. In general, the lodestar method is thought to more directly account for the amount of work done; the percent-of-recovery method more directly reflects the result achieved. *Strawn*, 353 Or. at 219, 297 P.3d 439 (discussing the two approaches in the context of class-action claims involving fee-shifting statutes and common funds). The lodestar method is the prevailing method for determining the reasonableness of a fee award in cases, such as this, involving a statutory fee-shifting award, even when, as here, the insured has retained counsel on a contingency-fee basis. *Id*. The percentage-of-fund basis is a particularly appropriate method when there is a risk of recovery, when litigation has been extensive, or when the recovery involves a common fund from which attorney fees can be paid. *See id*. at 221, 297 P.3d 439.

> Whichever method for the calculation of an award of fees is chosen, the amount awarded under ORS 742.061(1) must be reasonable; a windfall award of attorney fees is to be avoided. *See ZRZ Realty v. Beneficial Fire and Casualty Ins*. Co., 255 Or App 524, 556-57, 300 P.3d 1224 (2013) (The "potential for a windfall" in an award of attorney fees "is a factor that the court can consider in setting a reasonable attorney fee.").

*Id.* at 46-47. Nowhere in the above framework is the purpose and intended protections of the specific mandating statute, ORS 742.061, considered.

**B. In Insurance Cases, the General Factors of ORS 20.075 Must be Considered in Context with and Subject to the Specific Statute, ORS 742.061**

As a "basic rule[]," "when multiple statutory provisions are at issue in a case, this court, if possible, must construe those statutes in a manner that 'will give effect to all' of them." *Powers v. Quigley*, 345 Or 432, 438, 198 P3d 919 (2008) (quoting ORS 174.010). "[I]f two statutes are inconsistent, the more specific statute will control over the more general one." *Id.* "In short, if the court can give full effect to both statutes, it will do so, and if not, it will treat the specific statute as an exception to the general." *Id.*

In *Powers*, *id.* at 440-41, this Court concluded that the general rule for offers of judgment, ORCP 54 E, was in conflict with the specific statute, ORS 20.080, which mandated a fee recovery in small claims, provided certain conditions are met. The Court found a conflict because

ORS 20.080 was intended to discourage insurers and tortfeasors from refusing valid claims before a lawsuit is filed, yet ORCP 54 E would allow those same insurers and tortfeasors to "undermine the core purpose" of ORS 20.080 by limiting the amount of any such award through their timely offer of judgment after the lawsuit is filed. *Id.*

Approximately a year and a half after *Powers*, the Court of Appeals applied the *Powers* analysis to reach the same conclusion as to the interplay between ORS 742.061 attorney fee awards and ORCP 54 E offers of judgment. *Wilson v. Tri-County Metro. Transp. Dist. of Oregon*, 234 Or App 615, 624-8, 228 P3d 1225 (2010). "Just like the statute at issue in *Powers*, ORS 742.061(1)—which relates to attorney fees only on insurance claims—is the more specific statute." *Id.* at 628. The Court of Appeals "therefore [took] guidance from *Powers* and conclude[d] that ORS 742.061 is an exception to ORCP 54 E." *Id.* "Because of that exception, an offer of judgment, made after six months from proof of loss, will not serve to limit a plaintiff's entitlement to attorney fees under ORS 742.061." This Court denied review. *Wilson v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 348 Or 669, 237 P3d 824 (2010).

Under the legal standards recognized in *Powers*, Oregon courts considering the amount of an attorney fee award in an insurance case must apply the general factors of ORS 20.075 in a manner that gives

effect to the purpose of the specific mandating statute, ORS 742.061. Otherwise, the protection intended through ORS 742.061 may be undermined in any given case. In order to safeguard the ability of insureds to actually receive that protection in a reliable and consistent manner, the general factors of ORS 20.075 must be considered in context with the established purpose of ORS 742.061.

To the extent an Oregon court were to find the application of the ORS 20.075 factors to be in conflict with the purpose ORS 742.061 on the facts of a particular case, the specific statute, here ORS 742.061, should be considered an exception to the general statute, ORS 20.075, and the purpose of ORS 742.061 should prevail as paramount. ORS 20.075 should be deemed constrained by and subject to ORS 742.061.

In all insurance cases in which a fee award is at issue, the purpose of ORS 742.061 should be considered a necessary and essential part of the analytical framework for consideration of the ORS 20.075 factors.

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### C. ORS 742.061 Has a Compensatory Purpose to Make the Insured Whole

In *Long v. Farmers Ins. Co. of Oregon*, 360 Or 791, 804, 388 P3d 312 (2017), this Court summarized the core purpose and intended protections of ORS 742.061 as follows:

> The purpose of ORS 742.061 is "to discourage expensive and lengthy litigation." *Dolan* [*v. Continental Cas. Co.*], 133 Or. [252,] 255, 289 P. 1057 [(1930)]. Requiring the insurer to pay the insured's attorney fees if and only if the insured obtains more in the litigation than was timely tendered advances that purpose insofar as it encourages insurers to make reasonable and timely offers of settlement and also encourages insureds to accept reasonable offers and forego litigation. ***But the statute also serves a compensatory purpose. The statute ensures that, when insureds file suit to obtain what is due to them under their policies, they do not win the battle but lose the war by expending much or all of what they obtained in the litigation on attorney fees.*** *See Dolan*, 133 Or. at 255, 289 P. 1057 (***purpose of attorney fee statute to ensure that the benefit of an insurance policy is not diminished by or entirely lost to attorney fees*** when insurance company wrongfully contests its obligation to pay); [*Travelers Ins. Co. v.*] *Plummer*, 278 Or. [387,] 392, 563 P.2d 1218 [(1977)] (***full payment of benefits contracted for in insurance policy is denied when insured must pay his or her own legal expenses to obtain benefits***, and legislature intended to address that problem by enacting statute); *Groce* [*v. Fidelity General Ins. Co.*], 252 Or. [296,] 311, 448 P.2d 554 [(1968)] (implying ***that purpose of statute is to ensure that insured is "ma[d]e whole"***).

(Emphasis added). An insured's recovery need not be reflected in a judgment, provided a recovery was made. *Id.* at 804-05 ("We conclude that the fact that plaintiff in this case did not obtain a

'judgment' memorializing these payments does not make ORS 742.061 inapplicable.").

This Court has also clarified that the "[r]ecovery of attorney fees under our statute is not defeated by the insurer's good faith in failing to settle." *Hardware Mut. Cas. Co. v. Farmers Ins. Exch*., 256 Or 599, 612, 474 P2d 316 (1970). "The statute is compensatory, not penal." *Id.*

The established purpose of ORS 742.061, and the protections intended thereby, should be an essential part of the analytical framework under which the general ORS 20.075 factors are applied to fee awards in insurance cases.

Further, to the extent any other aspects of ORS 742.061 are germane to the amount of a fee award based on the particular facts of a given insurance case, those other aspects should also be considered an essential part of the analytical framework under which the general ORS 20.075 factors are applied. The broader clarification that this Court can provide is that the general ORS 20.075 factors must be applied in context with and subject to the specific mandating statute, here ORS 742.061, in all aspects that are relevant to the particular award being considered.

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### D. An Appropriate Fee Award Must be Considered on a Case-by-Case Basis, but Establishing a Clear Guardrail for Such Case-by-Case Application Will Protect the Compensatory Purpose of ORS 742.061

How the general ORS 20.075 factors are applied in context with and subject to the purpose of ORS 742.061 should be considered on a case-by-case basis. What best serves the compensatory purpose of ORS 742.061 will depend on the particulars of each case.

Different cases will involve different fee agreements, and in many cases, the lodestar amount will be higher than a percentage contingent fee. Attorneys who specialize in insurance recovery for policyholders customarily write their contingent fee agreements to entitled them to the greater of a percentage of gross recovery or the lodestar amount. That arrangement is necessary to safeguard a minimum hourly recovery, depending on how much work the insurer ultimately forces. Anticipating how much work an insurer will force is a huge variable at the beginning of any representation that cannot be reliably known.

For example, if an attorney instead agrees to a straight percentage fee of 35% on the total gross recovery, if the insured recovers principal damages of $100,000, and if a court awards a lodestar amount of $100,000 in fees, the attorney would only recover $70,000 in fees ($200,000 in gross recovery x 35%), meanwhile the insured client would be enriched by $30,000 above and beyond their damages. For this

reason, attorneys handling coverage cases subject to ORS 742.061 fee awards must write their fee agreements to safeguard their fee, in the event the work ultimately required would leave the attorney short-changed under a straight percentage calculation. These customary contingent fee agreement forms are written to automatically adjust to all contingencies in the case, which cannot be fully foreseen when the representation is first accepted.[4]

Understanding that ORS 742.061 and ORS 20.075 must be applied on a case-by-case basis, this Court should nonetheless establish a single, clear guardrail in that case-by-case application that will prevent outcomes that are clearly contrary to the purpose of ORS 742.061: any award that would leave an insured less than whole undermines the purpose of ORS 742.061 and is presumptively unreasonable under the terms of ORS 742.061 (mandating an award of a "reasonable amount") and an abuse of discretion under ORS 20.075(3) (applying an "abuse of

[4] Insurance companies are unpredictable because they are professional litigants with deep pockets that sometimes make decisions based on macro-considerations, not just the merits of the particular claim at hand. Moreover, the individual adjusters and managers making those decisions vary, which means insureds are constantly subject to the variabilities of individual perceptions and temperaments. Attorneys representing insureds are simply not afforded the luxury of assuming an insurer will act in a manner that they deem rational. Experience yields precisely the contrary assumption, that until an insurer binds itself to an enforceable commitment, all eventualities must be contemplated.

discretion" standard in any appeal). As a practical matter, if an insured owes their attorney a percentage contingent fee under a customary fee agreement, but the insured then recovers a lesser lodestar amount, the insured is left less than whole. That outcome would undermine the purpose of ORS 742.061 and should be considered presumptively unreasonable and an abuse of discretion.

Where the insured owes their attorney a reasonable percentage of gross recovery under the terms of a customary fee agreement, looking retrospectively at how much time the insured's attorney actually spent under a lodestar analysis is not relevant to making the insured whole. If the actual time spent were made relevant to the court's consideration of a percentage contingent fee award, an insurer could easily gerrymander that analysis by changing course after having put its insured in a position where the insured believed that retaining counsel was necessary. Insureds do not typically retain legal counsel unless they believe it is necessary, and many insureds can only do so on a contingent fee basis. In those instances, comparing a lodestar analysis with a percentage contingent fee analysis misses the compensatory purpose of mandatory awards under ORS 742.061: the insured should be left whole.

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## IV. CONCLUSION

For the reasons stated above, this Court should accept review, establish the proper analytical framework for applying the ORS 20.075 factors to fee awards mandated by ORS 742.061, and reverse the Court of Appeals decision on the cross-appeal.

DATED this 21st day of July, 2025.

Respectfully submitted,

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Brief Length

I certify that this combined brief's word count is 3,157 and complies with the 5,000 word-count limitation in ORAP 9.05(3)(a) and the 14,000 word-count limitation in ORAP 5.05(b)(i)(A).

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I certify that the size of the Ariel type in this brief is not smaller than 14-point for both text and footnotes, as required by ORAP 5.05(3)(b)(ii).

DATED this 21st day of July, 2025.

*s/ Emily S. Miller*
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## Certificate Of Service

I certify that I filed the foregoing COMBINED BRIEF ON PETITION FOR REVIEW AND ON THE MERITS OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS ON REVIEW by causing it to be electronically filed with the Appellate Court Administrator on July 21, 2025, through the appellate eFiling system.

I further certify that on the same date, I served the foregoing document on the following parties through the use of the electronic service function of the appellate eFiling system and the email address recorded therein on said date:

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