

Filed: December 29, 2023

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,

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,

Petitioner on Review.

(CC 19CV26557) (CA A172844) (SC S069409)

On review from the Court of Appeals.*

Argued and submitted November 17, 2022.

Daniel R. Bentson, Bullivant Houser Bailey PC, Seattle, Washington, argued the cause for petitioner on review. R. Daniel Lindahl, Bullivant Houser Bailey PC, Portland, filed the brief on the merits for petitioner on review, and Daniel R. Bentson filed the reply brief. Also on the briefs was Stuart D. Jones.

Travis Eiva, Eiva Law, Eugene, argued the cause and filed the brief for respondent on review.

Ralph C. Spooner, Spooner & Much, PC, Salem, filed the brief for *amici curiae* American Property Casualty Insurance Association and National Association of Mutual Insurance Companies. Also on the brief was David E. Smith.

Sage R. Vanden Heuvel, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, California, filed the brief for *amici curiae* Chamber of Commerce of the United States of America and Oregon Business & Industry. Also on the brief was Paloma Sparks, Oregon

Business & Industry, Salem.

James S. Coon, Thomas, Coon, Newton & Frost, Portland, filed the brief for *amicus curiae* Oregon Trial Lawyers Association. Also on the brief were John A. McHugh, MCH LAW LLC, Wilsonville, and Kristen William, Williams Weyand Law LLC, Salem.

Iván Resendiz Gutierrez, Miller Nash LLP, Portland, filed the brief for *amicus curiae* United Policyholders. Also on the brief were Seth Row and Jodi S. Green, Long Beach, California.

Before Flynn, Chief Justice, and Duncan, Garrett, DeHoog, and Bushong, Justices, and Balmer and Walters, Senior Judges, Justices pro tempore.**

WALTERS, S.J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Garrett, J., dissented and filed an opinion, in which Duncan, J., and Balmer, S.J., joined.

*Appeal from Lane County Circuit Court,
Bradley A. Cascagnette, Judge.
317 Or App 233, 505 P3d 1047 (2022).

**Nelson, J., resigned February 25, 2023, and did not participate in the decision of this case. James and Masih, JJ., did not participate in the consideration or decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on Review.

- No costs allowed.
- Costs allowed, payable by: Petitioner on Review.
- Costs allowed, to abide the outcome on remand, payable by:

1 WALTERS, S.J.

2 Plaintiff, whose husband was accidentally shot and killed during a camping
3 trip, brought this action against defendant, a first-party life insurer, claiming, among other
4 things, that defendant had negligently failed to investigate and pay her claim for policy
5 benefits, causing her to have fewer financial resources to navigate the loss of a bread-
6 winning spouse and, consequently, to suffer economic harm and emotional distress. The
7 trial court granted defendant's motions to dismiss plaintiff's negligence claim and to strike
8 her claim for emotional distress damages. The Court of Appeals reversed. *Moody v.*
9 *Oregon Community Credit Union*, 317 Or App 233, 248, 505 P3d 1047 (2022). Although
10 our reasoning differs, we concur in the decision of the Court of Appeals, and we hold that
11 plaintiff has pleaded facts sufficient to give rise to a legally cognizable common-law
12 negligence claim for emotional distress damages.

13 I. FACTS AND PROCEDURAL HISTORY

14 Because the trial court granted defendant's motion to dismiss, we take the
15 following facts from plaintiff's complaint. *Paul v. Providence Health System-Oregon*,
16 351 Or 587, 589, 273 P3d 106 (2012) ("When reviewing a trial court order granting a
17 motion to dismiss, we accept as true all well-pleaded facts in the complaint."). Plaintiff's
18 husband, decedent, was accidentally shot and killed by a friend during a camping trip.
19 Plaintiff filed a claim for life insurance policy benefits, and defendant initially denied
20 plaintiff's claim on the ground that decedent's death fell within a policy exclusion for
21 deaths "caused by or resulting from [decedent] being under the influence of any narcotic
22 or other controlled substance" -- apparently based on the fact that decedent had had

1 marijuana in his system at the time of his death.

2 Plaintiff filed this action against defendant,¹ alleging claims for breach of
3 contract, breach of an implied contractual covenant of good faith and fair dealing, and
4 negligence. Plaintiff sought both economic damages -- the benefits payable under the
5 policy -- and emotional distress damages. In her negligence claim, plaintiff alleged that
6 defendant had contracted with her husband and her to provide life insurance coverage and
7 benefits, that an Oregon statute requires "[d]efendant to follow a standard of care in the
8 performance of its insurance contracts independent of, in addition to, and outside of the
9 terms of the insurance contract," and that:

10 "Defendant Insurance Company negligently performed its
11 obligations under [ORS] 746.230 in its review, investigation, and eventual
12 decision to deny insurance benefits following the death of [plaintiff's
13 husband] in one or more of the following ways:

14 "(a) By refusing to pay the insurance benefits without conducting a
15 reasonable investigation based on all available information, in violation of
16 [ORS] 746.230(1)(d); and

17 "(b) Not attempting, in good faith, to promptly and equitably settle a
18 claim in which the insurer's liability has become reasonably clear, in
19 violation of [ORS] 746.230(1)(f)."

20 Plaintiff further alleged that defendant "knew, or in the exercise of reasonable care as a
21 corporation engaged in the business of marketing and selling insurance, should have
22 known, that one or more of its foregoing acts or omissions would create an unreasonable
23 risk of harm to the beneficiaries of its insured, including [plaintiff]." Finally, plaintiff

¹ The complaint named other defendants who have since been dismissed from the case.

1 alleged that, as a result of defendant's negligence, she had suffered "the noneconomic loss
2 of increased emotional distress and anxiety caused by having fewer financial resources to
3 navigate the loss of a bread-winning spouse."

4 Defendant filed motions to dismiss plaintiff's claims for negligence and
5 breach of the implied covenant of good faith and fair dealing and to strike the allegations
6 seeking damages for emotional distress, arguing that plaintiff's only remedy under
7 Oregon law was contractual. The trial court granted those motions and entered a limited
8 judgment dismissing all but the breach of contract claim. Plaintiff appealed the limited
9 judgment but, while the appeal was pending, she filed an amended complaint that alleged
10 only breach of contract and sought only the amount of benefits payable under the
11 insurance policy -- \$3,000. Thereafter, defendant paid the \$3,000 to plaintiff, the parties
12 stipulated to the entry of a judgment in favor of plaintiff and against defendant, and the
13 trial court entered a conforming general judgment.

14 II. THE COURT OF APPEALS DECISION

15 Meanwhile, plaintiff's appeal from the limited judgment, which challenged
16 the dismissal of her negligence claim and the striking of her allegations of emotional
17 distress damages, proceeded in the Court of Appeals. That court ultimately reversed the
18 trial court's ruling, holding that plaintiff could bring a claim for "negligence *per se*" and
19 seek emotional distress damages based on defendant's violations of ORS 746.230(1). In
20 its opinion, the Court of Appeals broadly described the issue before it as requiring it to
21 determine "when a party to a contract may sue another party to the same contract for
22 negligence." *Moody*, 317 Or App at 237. After noting that, ordinarily, the sole remedy

1 for a party's failure to meet a contractual obligation is an action for breach of the contract,
2 the court observed that, in specific circumstances, an injured party also may have a
3 negligence claim, quoting the following passage from *Georgetown Realty v. The Home*
4 *Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992):

5 "\"When the relationship involved is between contracting parties, and the
6 gravamen of the complaint is that one party caused damage to the other by
7 negligently performing its obligations under the contract, then, and even
8 though the relationship between the parties arises out of the contract, the
9 injured party may bring a claim for negligence *if the other party is subject*
10 *to a standard of care independent of the terms of the contract.*\"

11 *Moody*, 317 Or App at 237 (emphasis added). The Court of Appeals then observed that
12 an independent standard of care may arise out of a special relationship between the
13 contracting parties,² but it also may be expressed in a statute or administrative rule. *Id.* at
14 237-38. The court relied -- for that latter suggestion -- on its own opinion in *Abraham v.*
15 *T. Henry Construction, Inc.*, 230 Or App 564, 567, 573-74, 217 P3d 212 (2009)
16 (*Abraham I*), *aff'd on other grounds*, 350 Or 29, 249 P3d 534 (2011) (*Abraham II*), which
17 held that a couple who had discovered water leakage and resulting damage in a home that
18 had been built for them under a construction contract could sue the construction
19 company, not only for breach of contract, but also in tort, reasoning that the Oregon
20 Building Code provided "an independent standard of care sufficient to support a claim for

² As an example of such a "special relationship," the Court of Appeals offered the relationship between the parties in *Georgetown Realty* -- a liability insurer and its insured. *Moody*, 317 Or App at 237. The court explained that when such insurers undertake to defend their insureds, the insureds hand over control of their defenses to their insurers, creating a special fiduciary relationship between the parties. *Georgetown Realty*, 313 Or at 110-11.

1 negligence *per se*."³ *Moody*, 317 Or App at 237 (discussing *Abraham I*).

2 However, the court acknowledged, the violation of an independent standard
3 of care is not all that is required to state a negligence claim against another party to a
4 contract. According to the Court of Appeals, a negligence claim based on a statutory
5 violation requires a plaintiff also to plead and ultimately prove that

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

10 *Moody*, 317 Or App at 238 (quoting *McAlpine v. Multnomah County*, 131 Or App 136,
11 144, 883 P2d 869 (1994), *rev den*, 320 Or 507 (1995)).

12 After briefly outlining how that test appeared to be satisfied by plaintiff's
13 allegations that she had been injured as a result of defendant's violation of an Oregon
14 statute, particularly ORS 749.230(1)(d) and (f), the Court of Appeals addressed several
15 objections that defendant had levelled against that approach. Of particular note, the

³ This court affirmed the Court of Appeals decision in *Abraham I* on a different ground: We concluded that the plaintiff could bring a claim for ordinary common-law negligence against the builder and, thus, we did not decide whether the plaintiff could bring a claim for negligence *per se* based on the builder's violation of the Oregon Building Code. In doing so, we expressly agreed with the Court of Appeals that, when a plaintiff claims to have suffered damages as a result of the defendant's negligent performance of contractual obligations, that negligence claim may be viable, notwithstanding the contractual relationship between the parties, if the other party is subject to a standard of care that is independent of the terms of the contract. *Abraham II*, 350 Or at 39-40. We also agreed that a standard of care might be deemed "independent" for that purpose, "either because a 'special relationship' imposes a heightened standard of care * * * or because the common law, statutes, or administrative rules impose liability regardless of the contractual relationship between the parties." *Id.* at 40.

1 court: (1) rejected defendant's contention that this court's decision in *Farris v. U.S. Fid.*
2 *and Guar. Co.*, 284 Or 453, 587 P2d 1015 (1978) (*Farris II*), forecloses any negligence
3 *per se* claim based on a violation of ORS 746.230(1), 317 Or App at 243-46; (2) rejected
4 defendant's contention that, for a negligence *per se* claim to stand, a plaintiff also must
5 have a common-law negligence claim, *id.* at 241-43; and (3) rejected defendant's
6 contention that the emotional injury that plaintiff had alleged that she had suffered was
7 not of a type that ORS 746.230(1) was enacted to prevent, *id.* at 246-47. Having
8 disposed of those objections and having previously concluded that plaintiff's allegations
9 of negligence *per se* based on ORS 746.230(1) satisfied the "test" that it had created in
10 *McAlpine* for when a statutory violation supports a negligence *per se* claim, the Court of
11 Appeals reversed, holding that the trial court had erred in dismissing plaintiff's
12 negligence *per se* claim and striking her allegation of emotional distress damages. *Id.* at
13 248. Defendant petitioned for, and we allowed, review.

14 III. ARGUMENTS AND ANALYSIS

15 We begin our analysis with the premise, acknowledged by both parties,
16 that, in addition to contract claims, parties to a contract may assert viable tort claims.
17 Contract and tort claims are conceptually different and provide remedies for breach of
18 conceptually different obligations: "Contract obligations are based on the manifested
19 intention of the parties to a bargaining transaction, whereas tort obligations are imposed
20 by law -- apart from and independent of promises made and therefore *apart from the*
21 *manifested intention of the parties* -- to avoid injury to others." *Abraham II*, 350 Or at 36
22 (emphasis in original; internal quotation marks omitted).

1 In this case, plaintiff takes the position that her claim for common-law
2 negligence is analogous to the plaintiffs' common-law negligence claim in *Abraham II*
3 against the builder of their home for water damage from a leak. Plaintiff argues that she
4 is entitled to bring a common-law negligence claim against defendant for its failure to act
5 reasonably in performing the obligations of a life insurer and that she is entitled to
6 recover the emotional distress damages that she alleges. To support those arguments,
7 plaintiff invokes a statute -- ORS 746.230.

8 For its part, defendant accepts our holding in *Abraham II* and does not
9 contend that the fact that defendant and plaintiff have an insurance contract forecloses
10 plaintiff's negligence claim. Rather, defendant counters that, to rely on *Abraham II*,
11 plaintiff must establish that she is entitled to bring a common-law negligence claim. The
12 crux of defendant's argument is that plaintiff does not have a legally cognizable common-
13 law negligence claim for the emotional distress damages that she alleges. According to
14 defendant, that is so for three independent reasons: (1) in *Farris II*, this court decided
15 that the legislature did not intend to permit a common-law negligence claim against a
16 first-party insurer; (2) even if *Farris II* does not resolve the question, this court should
17 conclude that, in enacting ORS 746.230, the legislature deliberately decided not to
18 provide a basis for a negligence claim against a first-party insurer or to supply a standard
19 of care for a negligence *per se* claim; and (3) plaintiff does not have a legally protected
20 interest sufficient to subject defendant to liability for emotional distress damages.
21 According to defendant, it is not enough for plaintiff to establish that defendant violated a
22 statute -- a claim of "negligence *per se*," as plaintiff and the Court of Appeals describe it;

1 rather, plaintiff must demonstrate that she has a legally cognizable common-law
2 negligence claim, and she must plead its elements. Critical to an analysis of each of those
3 arguments is the question whether plaintiff has alleged facts sufficient to state a legally
4 cognizable common-law negligence claim for emotional distress damages.⁴ That is an
5 important question of first impression, and that is where we begin.

6 A. *A negligence per se claim depends on a viable common-law negligence claim.*

7 As set out above, the Court of Appeals viewed plaintiff's negligence claim
8 as a claim "based on a statutory violation" and opined that, to make out that claim -- a
9 claim that the court described as "negligence *per se*" -- plaintiff was required to plead,
10 and ultimately prove, the following elements:

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

15 *Moody*, 317 Or App at 238 (quoting *McAlpine*, 131 Or App at 144).

16 Defendant contests that conclusion, maintaining that a negligence *per se*
17 claim can be proved in that way only when, as this court stated in *Deckard v. Bunch*, 358

⁴ In her negligence claim, plaintiff sought to recover damages for both emotional distress and economic loss. Specifically, as to the latter, plaintiff alleged that, as a result of defendant's negligence, she suffered an economic loss in the amount of \$3,000 -- the amount of the contractual benefit to which plaintiff was entitled. Whether plaintiff would be entitled to maintain a negligence claim for such damages also is an open question. However, in this case, we need not address it. Here, plaintiff sought those same damages in her contract claim, and it is undisputed that they were awarded. In its briefing to us, defendant does not make any argument about whether plaintiff would have a common-law negligence claim for such economic loss. Accordingly, that question is not presented, and we do not decide it.

1 Or 754, 761 n 6, 370 P3d 478 (2016), "a negligence claim *otherwise exists*" (emphasis
2 added).⁵ And in this case, defendant argues, a negligence claim for violation of an
3 insurance statute does *not* "otherwise exist."

4 Defendant is correct that a negligence *per se* claim is not a separate type of
5 negligence claim with its own elements; rather, negligence *per se* is "simply shorthand
6 for a negligence claim in which the standard of care is expressed by a statute or rule."
7 *Abraham II*, 350 Or at 35 n 5. See also *Bob Godfrey Pontiac v. Roloff*, 291 Or 318, 325,
8 630 P2d 840 (1981) (describing an action for negligence *per se* as an example of a kind
9 of case "in which liability would be based upon violation of a statutory duty *when there is*
10 *also an underlying common law cause of action*") (emphasis added); Caroline Forell,
11 *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*,
12 77 Or L Rev 497, 529 (1998) (stating that "[n]egligence *per se* is traditionally only
13 available where a plaintiff would also have a common-law negligence action against the
14 defendant").

15 In *Deckard*, we again referred to negligence *per se* as a "shorthand
16 descriptor" of a negligence claim that otherwise exists, where the standard of care is
17 expressed by statute or rule and a violation of the statute or rule establishes a presumption
18 of negligence:

⁵ As discussed, the Court of Appeals rejected defendant's contention that, for a negligence *per se* claim to stand, a plaintiff also must have a common-law negligence claim, on the ground that that contention was unsupported by any pertinent case law. *Moody*, 317 Or App at 241-43. As we explain, the Court of Appeals was incorrect on that point.

1 "Negligence *per se* * * * is a shorthand descriptor for a negligence claim in
2 which the standard of care is expressed by a statute or rule. * * * When a
3 negligence claim otherwise exists, and a statute or rule defines the standard
4 of care expected of a reasonably prudent person under the circumstances, a
5 violation of that statute or rule establishes a presumption of negligence."

6 358 Or at 761 n 6 (internal quotation marks omitted). And in *Shahtout v. Emco Garbage*
7 *Co.*, 298 Or 598, 601, 695 P2d 897 (1985), we made the same point:

8 "In a negligence case, the plaintiff must show that defendant did not meet
9 an applicable standard of due care under the circumstances. When a
10 plaintiff (or a defendant seeking to prove negligence on plaintiff's part)
11 invokes a governmental rule in support of that theory, the question is
12 whether the rule, though it was not itself meant to create a civil claim,
13 nevertheless so fixes the legal standard of conduct that there is no question
14 of due care left for a factfinder to determine; in other words, that
15 noncompliance with the rule is negligence as a matter of law."

16 Thus, defendant is correct that, to make out a claim of negligence *per se*
17 and take advantage of a presumption of negligence arising from a statutory violation, a
18 plaintiff must show not only that the statute sets out an applicable standard of care, but
19 also that the plaintiff has an existing negligence claim.

20 Our agreement with defendant on that issue does not, however, resolve this
21 case. Although the Court of Appeals rested its decision on the idea that a plaintiff can
22 bring a claim for negligence *per se* even if the plaintiff does not have an existing
23 negligence claim, and the parties' arguments are primarily directed to that point,
24 plaintiff's complaint and the ruling of the trial court require that we decide whether
25 plaintiff pleaded a cognizable common-law negligence claim. As noted, plaintiff brought
26 a claim for negligence and alleged that an Oregon statute requires defendant to follow a
27 standard of care "independent of, in addition to, and outside of the terms of the insurance

1 contract"; that defendant negligently failed to perform its obligations; that defendant
2 knew, or in the exercise of reasonable care should have known, that one or more of its
3 acts or omissions would create an unreasonable risk of harm to plaintiff; and that plaintiff
4 suffered emotional distress damages as a result. Defendant filed a motion to dismiss that
5 claim, arguing that plaintiff's only remedy was for breach of contract, and the trial court
6 granted that motion. To decide whether the trial court erred in doing so, we must decide
7 whether plaintiff's negligence claim "otherwise exists," or, in other words, is legally
8 cognizable.

9 B. *To have a viable common-law negligence claim, plaintiff must establish that she*
10 *has a "legally protected interest" sufficient to subject defendant to liability for*
11 *purely emotional damages.*

12 With respect to that key question, plaintiff contends that she has alleged the
13 requisite elements of a negligence claim -- in other words, that defendant engaged in
14 conduct that "unreasonably created a foreseeable risk to a protected interest of the kind of
15 harm that befell the plaintiff," *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17,
16 734 P2d 1326 (1987) -- and that that conduct in fact caused her economic harm and
17 emotional distress. Plaintiff contends that she is entitled to seek emotional distress
18 damages because defendant's conduct infringed on her statutorily protected interest in
19 avoiding the wrongful denial, delay, and evaluation of her insurance claim.

20 In *Fazzolari*, this court stepped away from traditional concepts of "duty,"
21 "breach of duty," and "proximate cause" as aids to determine whether a plaintiff could
22 maintain a claim for negligence and, instead, the court reformulated the relevant question
23 as whether the defendant's "conduct unreasonably created a foreseeable risk to a

1 protected interest of the kind of harm that befell the plaintiff." 303 Or at 17; *see also*
2 *Scott v. Kesselring*, 370 Or 1, 10, 513 P3d 581, 589 (2022) (discussing reformulation of
3 the traditional tort principles of duty, breach, and proximate cause in *Fazzolari*). It is
4 now settled that

5 "[a] negligence complaint, to survive a motion to dismiss, must allege facts
6 from which a factfinder could determine (1) that defendant's conduct
7 caused a foreseeable risk of harm, (2) that the risk is to an interest of a kind
8 that the law protects against negligent invasion, (3) that defendant's conduct
9 was unreasonable in light of the risk, (4) that the conduct was a cause of
10 plaintiff's harm, and (5) that plaintiff was within the class of persons and
11 plaintiff's injury was within the general type of potential incidents and
12 injuries that made defendant's conduct negligent."

13 *Solberg v. Johnson*, 306 Or 484, 490-91, 760 P2d 867 (1988). The dispute here centers
14 on whether plaintiff has alleged a foreseeable risk to "a protected interest" sufficient to
15 subject defendant to liability for emotional distress damages.

16 1. *Legally protected interests previously recognized by this court*

17 Perhaps the simplest legally protected interest is in being "free from
18 physical harm at the hands of another." *Philibert v. Kluser*, 360 Or 698, 703, 385 P3d
19 1038 (2016). Physical harm includes both bodily injury and property damage.⁶

20 Generally, however, people do not have a legally protected interest in being free from
21 emotional distress, and, to date, this court has permitted common-law tort claims for
22 emotional distress damages only in the following three circumstances: (1) when the

⁶ To say that a person has an actionable claim for property damage, as in *Abraham II*, is equivalent to saying that the person has a legally protected interest in being free from that harm.

1 defendant also physically injures the plaintiff; (2) when the defendant intentionally
2 causes the emotional distress; or (3) when the defendant "negligently causes foreseeable,
3 serious emotional distress and also infringes some other legally protected interest." *Id.* at
4 702; *see also Hammond v. Central Lane Communications Center*, 312 Or 17, 22, 816 P2d
5 593 (1991) (stating that the court had recognized negligence claims for "psychic injury"
6 in those three circumstances). In that third category of cases, this court has looked for a
7 legal source of liability other than foreseeability: "[T]he injury's foreseeability, standing
8 alone, is insufficient to establish the defendant's liability[;] there must also be another
9 'legal source' of liability for the plaintiff to recover emotional distress damages."
10 *Philibert*, 360 Or at 703.

11 In *Philibert*, this court was asked to consider whether two brothers who had
12 watched their third brother die in a collision had stated a negligence claim for the
13 emotional distress damages that they had alleged. We began our analysis by explaining
14 the reason that the court is generally reluctant to recognize common-law negligence
15 claims for emotional distress damages:

16 "In contrast to physical harms, emotional harms occur frequently. * * * Any
17 number of people may suffer emotional distress as the foreseeable result of
18 a single negligent act. The *Restatement* provides an example: 'a negligent
19 airline that causes the death of a beloved celebrity can foresee genuine
20 emotional harm to the celebrity's fans, but no court would permit recovery
21 for emotional harm under these circumstances.' For that reason,
22 foreseeability, standing alone, is not a useful limit on the scope of liability
23 for emotional injuries. In *Harris v. Suniga*, 344 Or 301, 180 P3d 12 (2008),
24 this court explained that allowing recovery for *economic* loss on the basis
25 of foreseeability, without requiring more, would invite, in the words of
26 Judge Cardozo, 'liability in an indeterminate amount for an indeterminate
27 time to an indeterminate class.' Emotional distress, like economic loss,
28 ripples throughout society as a foreseeable result of negligent conduct.

1 Without some limiting principle in addition to foreseeability, permitting
2 recovery for emotional injuries would create indeterminate and potentially
3 unlimited liability."

4 *Philibert*, 360 Or at 703-04 (some citations omitted; emphasis in original). Nevertheless,
5 we explained, recovery for foreseeable emotional damage is permitted "when the
6 defendant's conduct 'infringed some legally protected interest apart from causing the
7 claimed distress.'" *Id.* at 704. And, in the context of emotional distress, we defined a
8 legally protected interest as "an independent basis of liability separate from the general
9 duty to avoid foreseeable risk of harm." *Id.* We then reviewed the circumstances in
10 which we had recognized the existence of such an interest. Those circumstances included
11 those in which a plaintiff had alleged (1) a right against certain wrongful invasions of
12 privacy, such as the invasion discussed in *Hinish v. Meier & Frank Co.*, 166 Or 482, 506,
13 113 P2d 438 (1941) (allowing claim for emotional distress when plaintiff's name was
14 signed without his consent on a telegram to the governor); (2) a right to have a party
15 comply with an obligation found in a court order or statute designed to protect the
16 plaintiff from the type of emotional harm that occurred, such as the statute at issue in
17 *Nearing v. Weaver*, 295 Or 702, 708, 670 P2d 137 (1983) (right to have officers comply
18 with statute requiring arrest to protect victims of domestic violence) and the order at issue
19 in *McEvoy v. Helikson*, 277 Or 781, 787-89, 562 P2d 540 (1977) (right to have lawyer
20 comply with order requiring retention of child's passport to protect father's interest in
21 child's custody); and (3) certain other common-law rights such those recognized in
22 *Macca v. Gen. Telephone Co. of N.W.*, 262 Or 414, 418, 495 P2d 1193 (1972) (right to be
23 free from private nuisance) and *Hovis v. City of Burns*, 243 Or 607, 613, 415 P2d 29

1 (1966) (right to have the remains of a deceased spouse remain undisturbed). *Philibert*,
2 360 Or at 705-06.

3 Turning to the claim before the court in *Philibert*, we described the harm
4 that the plaintiffs had alleged as a "palpable and distinct harm, different in kind even
5 from the emotional distress that comes with the inevitable loss of our loved ones," and we
6 held that the defendant's failure to protect against that harm was "a violation of [the
7 plaintiffs'] interest in not witnessing such a shocking and tragic event." *Id.* at 707.
8 Finally, we analogized the plaintiffs' common-law interest in being free from that kind of
9 injury to the interests at issue in two decisions in which "the court [had] determined that
10 an asserted common law interest [was] sufficiently important to support the imposition of
11 liability" for emotional injury -- the negligent handling of a spouse's remains in *Hovis* and
12 the unauthorized political use of the plaintiff's signature in *Hinish* -- and concluded that
13 "the interest in avoiding being a witness to the negligently caused traumatic injury or
14 death of a close family member is similarly important." *Philibert*, 360 Or at 707.

15 That was not the end of our analysis, however. We proceeded to carefully
16 "frame the contours of that interest and identify the elements that will allow a bystander
17 to recover for the negligent infliction of emotional distress, while also providing a
18 limiting principle that will avoid potentially unlimited claims or damages." *Id.* at 708.
19 We decided to limit bystander emotional injury claims to those where (1) the bystander
20 perceives the event contemporaneously and (2) is a close family member of the person
21 suffering the bodily injury. *Id.* at 711. In doing so, we recognized that our rule left open
22 the possibility of "false or inflated claims," but we ultimately concluded that that

1 possibility should not be an impediment to claims like the plaintiffs', stating,
2 "Juries are charged with discerning truth from self-serving fiction when
3 plaintiffs testify about their own injuries and are as competent to do this in
4 claims for emotional injuries as they are in other cases. * * * Laws also
5 may be structured to deter false claims by sympathetic plaintiffs whose
6 charisma may evoke inconsistent and unpredictable jury verdicts."

7 *Id.* at 714-15 (citations omitted). We imposed the requirements of personal observation
8 of the injury and injury to a close relative because, "on the basis of human experience,"
9 we considered them to be "objective indicators of possibly serious emotional injury," and
10 therefore more likely to be genuine. *Id.* at 715. Further, and in response to the concern
11 that aspects of our rule could seem arbitrary, we noted "the need to provide *ex*
12 *ante* understanding of liability and assistance in the orderly administration of justice." *Id.*
13 at 715-16. So articulated, we were convinced that our rule would not create a risk of
14 "indeterminate and potentially unlimited liability." *Id.* at 704.

15 Two years after deciding *Philibert*, this court again took up a question of
16 whether the plaintiffs had pleaded facts sufficient to state common-law negligence claims
17 for emotional distress damages. In *Tomlinson v. Metropolitan Pediatrics, LLC*, 362 Or
18 431, 434, 412 P3d 133 (2018), one set of plaintiffs were parents who had alleged that the
19 defendant physicians had failed to timely diagnose their older son, M's, genetic disorder
20 and failed to inform the parents of that disorder. The parents had alleged that, had the
21 defendants not failed to act, the parents would not have produced another child with the
22 same disorder. We described the legal question there as "whether the complaint alleged
23 sufficient facts to establish that defendants' conduct was negligent with respect to the
24 legally protected interests of the parents." 362 Or at 440.

1 In engaging that issue, we began by noting that the parents and the
2 defendants did not have a patient-physician relationship. At the same time, we also noted
3 that lack of privity has not always been a bar to claims against professional service
4 providers and that "we decide on a case-by-case basis whether a professional's
5 relationship with a third party is capable of supporting a negligence claim." *Id.* at 446.
6 We reasoned that the parents had alleged facts that, if proved, would establish that (1) the
7 defendants and the parents had a mutual expectation that the defendants would provide
8 the parents with information that implicated the parents' right and ability to make
9 informed reproductive choices; (2) meeting that expectation would not impose an undue
10 burden on the defendants beyond the obligation that they already owed to their patient,
11 M; and (3) protecting the parents' interest would not be detrimental to the interests of M.
12 We concluded that those factual allegations were sufficient, if proved, to establish that, in
13 addition to their obligation to protect M's interest, defendants also had a limited
14 obligation to protect the parents' interests. *Id.* at 450.

15 We then addressed the defendants' argument that, even if the parents were
16 permitted to pursue a common-law negligence claim in the alleged circumstances, they
17 were not entitled to recover emotional distress damages. We responded by stating the
18 general rule that, when a plaintiff establishes a cognizable negligence claim, damages are
19 recoverable to the extent necessary to make the plaintiff whole. *See id.* at 452 (citing
20 *United Engine Parts v. Ried*, 283 Or 421, 432, 584 P2d 275 (1978) ("The purpose of
21 awarding compensatory damages is to make the party entitled thereto whole.") (Internal
22 citation and quotation marks omitted.)). We also cited *Philibert*, 360 Or at 702, for the

1 proposition that, when a plaintiff alleges negligence and claims either physical injury or
2 the invasion of some legally protected interest, then, generally speaking, the plaintiff can
3 recover for all forms of suffering, including both physical and emotional distress
4 damages. *Tomlinson*, 362 Or at 452. Ultimately, in *Tomlinson*, we concluded that the
5 same legally protected interest that permitted the parents' negligence claim also permitted
6 the parents to seek emotional distress damages. *Id.* at 454. We explained that the parents
7 had alleged facts that, if proved, could establish a legally protected interest in receiving
8 information from the defendants that implicated the parents' reproductive choices and
9 their interest in avoiding emotional harm. *Id.* at 452, 452 n 9.

10 2. *Whether plaintiff here has alleged a legally protected interest sufficient to*
11 *subject defendant to liability for purely emotional damages*

12 In the case now before us, we must consider, as we did in *Philibert* and
13 *Tomlinson* and the cases that preceded them, whether plaintiff has alleged a legally
14 protected interest sufficient to subject defendant to liability for emotional distress
15 damages. We therefore repeat the material allegations of her complaint.

16 Plaintiff alleges that defendant contracted with her husband and her to
17 provide life insurance coverage and benefits and agreed to pay \$3,000 in the event that
18 plaintiff's husband died as the result of an accident. Plaintiff alleges that her husband
19 died as a result of an accident, but that defendant negligently failed to pay the promised
20 benefits by failing to conduct "a reasonable investigation based on all available
21 information" and by "[n]ot attempting, in good faith, to promptly and equitably settle a
22 claim in which the insurer's liability has become reasonably clear." Plaintiff alleges that

1 defendant "knew, or * * * should have known, that one or more of its foregoing acts or
2 omissions would create an unreasonable risk of harm to the beneficiaries of its insured,
3 including [plaintiff]." And finally, plaintiff alleges that, as a result of defendant's
4 negligence, she had fewer financial resources to navigate the loss of a bread-winning
5 spouse and that she suffered increased emotional distress and anxiety as a result. Thus,
6 the interest that plaintiff seeks to have us recognize as legally protected and sufficient to
7 subject defendant to liability for emotional distress damages is her interest, as the
8 surviving spouse of a deceased breadwinner, in having the insurance company with
9 which she and her husband had contracted for life insurance benefits conduct a
10 reasonable investigation of, and promptly pay, her claim for the promised benefits.

11 To decide whether that alleged interest is a legally protected interest
12 sufficient to subject defendant to liability for emotional distress damages, we begin, as
13 we did in *Philibert*, by acknowledging that this court is hesitant to permit recovery for
14 solely emotional injury but has nevertheless done so in limited circumstances. We have
15 not devised a "test" for determining when an interest is so protected; rather we have
16 looked for factors that demonstrate, to our satisfaction, that we will not be creating
17 "indeterminate and potentially unlimited liability," and that the interest in question is
18 "sufficiently important" and sufficiently circumscribed to support the imposition of
19 liability for emotional distress damages. *Philibert*, 360 Or at 704, 707. We acknowledge
20 that such an analysis requires an application of judgment, but that is the nature of the
21 common law. It requires that we proceed incrementally, looking at our past decisions and
22 applying similar reasoning to new circumstances. *See, e.g., Deep Photonics Corp. v.*

1 *LaChapelle*, 368 Or 274, 288-89, 491 P3d 60 (2021) (stability and consistency are critical
2 aspects of common-law decision-making; court's decision comported with that standard
3 because the changes it made to the common law were "marginal, incremental, and clearly
4 foreshadowed by our prior decisions"). We therefore proceed to consider the factors that
5 have been important to us in our past decisions.

6 a. Whether an Oregon statute indicates the existence of the alleged
7 legally protected interest.

8 In this case, plaintiff invokes a statute in support of her argument that she
9 has a sufficient legally protected interest, and she cites *Philibert* and its discussion of the
10 second category of circumstances in which this court has recognized a legally protected
11 interest sufficient to permit a claim for such damages -- "when another party has a legal
12 duty 'designed to protect plaintiff[] against the type of harm which * * * occurred.'" 360
13 Or at 705 (quoting *Nearing*, 295 Or at 708). In *Nearing*, the plaintiff had filed a
14 common-law negligence claim seeking to recover for the emotional distress that she had
15 suffered when police officers failed to arrest her ex-spouse, who had been caught
16 violating a restraining order. This court permitted the plaintiff's claim and described her
17 legally protected interest as arising from a statute establishing "a legal duty designed to
18 protect the plaintiff from the type of emotional harm that occurred." *Philibert*, 360 Or at
19 706; *Nearing*, 295 Or at 708. Here, plaintiff argues that, like the statute in *Nearing*, ORS
20 746.230(1) imposes a legal obligation designed to protect insureds and thus supports
21 plaintiff's argument that she has pleaded the required legally protected interest.

22 In considering plaintiff's argument, we are met with defendant's argument

1 that in *Farris II*, this court decided that the legislature did not intend to permit a common-
2 law negligence claim against a first-party insurer, as well as the dissent's view that, in
3 deciding as it did in *Farris II*, this court foreclosed plaintiff's common-law negligence
4 claim. See ___ Or at ___ (Garrett, J., dissenting) (slip op at 23:20). In response to
5 defendant, we first observe, as noted, that plaintiff does not ask us to hold that, in
6 enacting ORS 746.230, the legislature intended to create a statutory tort. Plaintiff does
7 not argue that the legislature expressly or impliedly intended to create a private right of
8 action for violation of ORS 746.230. See *Doyle v. City of Medford*, 356 Or 336, 344, 337
9 P3d 797 (2014) ("Statutory liability arises when a statute either expressly or impliedly
10 creates a private right of action for the violation of a statutory duty."); *Deckard*, 358 Or at
11 759 (same).⁷ When the legislature intends to impose liability for violation of a statute,
12 the elements of that statutory claim are determined by the legislature, and that claim is
13 distinct from any other common-law claim that a party may have, including a common-
14 law negligence claim. *Deckard*, 358 Or at 761. Here, the claim that plaintiff alleges is
15 not a statutory tort; rather, it is a common-law negligence claim.

16 Relatedly, plaintiff does not ask this court to create or recognize a type of

⁷ We sometimes refer interchangeably to "statutory liability" and "statutory tort." Compare *Doyle*, 356 Or at 344 ("statutory liability" arises when statute creates private right of action), with *Scovill v. City of Astoria*, 324 Or 159, 163, 921 P2d 1312 (1996) (referring to such claims as "statutory tort" claims), and *Gattman v. Favro*, 306 Or 11, 15, 757 P2d 402 (1988) (same). However, we have made clear that a claim of statutory liability is not necessarily a tort. *Deckard*, 358 Or at 761 n 7 ("[A] claim created by the legislature is not necessarily even a tort claim."); *Bellikka v. Green*, 306 Or 630, 635, 762 P2d 997 (1988) ("[s]tatutory liability is not necessarily 'tort' liability").

1 tort liability different from the tort of common-law negligence. As explained in *Burnette*
2 *v. Wahl*, 284 Or 705, 711-12, 588 P2d 1105 (1978), creating a tort based on a statutory
3 violation is an approach that is open to us when we deem it necessary or desirable:

4 "When neither the statute nor the common law authorizes an action and the
5 statute does not expressly deny it, the court should recognize that it is being
6 asked to bring into existence a new type of tort liability on the basis of its
7 own appraisal of the policy considerations involved. * * * If a civil cause of
8 action based upon a statute is established by a court, it is because the court,
9 not the legislature, believes it is necessary and desirable to further vindicate
10 the right or to further enforce the duty created by statute."

11 *See also Bob Godfrey Pontiac*, 291 Or at 332; *Miller v. City of Portland*, 288 Or 271,
12 277-78, 604 P2d 1261 (1980) (both discussing availability of such an approach). But that
13 is not the approach that we consider today. Here, our task is to decide whether plaintiff
14 has alleged a legally protected interest sufficient to state a common-law claim for
15 negligence and to subject defendant, a first-party insurer, to liability for emotional
16 distress damages.

17 That description of our task also explains the reason that we disagree with
18 the dissent. In *Farris II*, this court did not consider whether the plaintiff had alleged a
19 legally viable claim against a life insurer for breach of an extracontractual obligation.
20 The plaintiffs in *Farris II* were not individuals who brought a negligence claim against a
21 first-party life insurer. Instead, the plaintiffs in *Farris II* were partners in a sandwich
22 shop who alleged that they had been sued by a business competitor for unfair business
23 practices; that they had tendered the defense to the defendant, a third-party insurer; and
24 that the defendant had refused to defend them in breach of its contract and in bad faith,

1 causing them emotional distress as well as economic harm.⁸ The court described the
2 issue before it as a question "whether damages for emotional suffering may be awarded
3 in a case of this kind" -- that is, a case involving a claim that the defendant had breached
4 its contract in "bad faith":

5 "There is no doubt that defendant was guilty of a clear breach of its
6 contract. Plaintiffs contend that defendant is guilty of a tort as well as a
7 breach of contract because it exercised 'bad faith' in its decision to deny
8 coverage and to refuse a defense. The generally accepted rule is that
9 emotional distress caused by pecuniary loss resulting from breach of
10 contract is not recoverable."

11 *Farris II*, 284 Or at 455-56. Thus, the court said, it "becomes important (according to the
12 usual doctrine) whether plaintiffs' action for damages is one of contract or one of tort."

13 *Id.* at 456.

14 The next step in the court's analysis was to set out the text of ORS 746.230
15 and the penalties for violating that provision. Immediately after doing so, the court said

⁸ The dissent notes that the plaintiffs' complaint in *Farris II* included two causes of action, Or at (Garrett, J., dissenting) (slip op at 7:11-8:2), but this court did not draw a distinction between them in arriving at its understanding of the nature of the complaint. The reason may be that the two causes of action both allege the same breach of contract and neither alleges the breach of an extracontractual standard of care. We have only the abstract of record and do not know how either cause of action was denominated in the complaint. We do know, though, that in both causes of action, the plaintiffs alleged, in the same terms, that the defendant had denied coverage and that "[t]his denial of coverage and refusal to defend was a breach of the insurance policy issued by defendant and the denial and refusal were not made in good faith." In both causes of action, the plaintiffs sought the same economic and emotional distress damages. In the first, the plaintiffs also sought attorney fees; in the second, the plaintiffs also sought punitive damages, adding an allegation that the defendant's rejection of coverage and refusal to defend plaintiffs "was made with the knowledge that such action would inflict mental distress and anguish upon plaintiffs." In neither did the plaintiffs assert, generally, that the defendant's actions were in breach of an extracontractual standard of care or, in particular, that the defendant's actions were negligent.

1 the following:

2 "It is possible to contend that defendant's violation of the statute is a
3 tort, and, therefore, plaintiffs are entitled to recovery for emotional distress
4 as well as for their other damages. It is not our understanding that plaintiffs
5 make this contention. It is evident from the statutes that it was the intention
6 of the legislature to prohibit insurance companies from intentionally
7 breaching their contract to settle their insureds' claims as defendant did here
8 and to inflict certain consequences for so doing. However, such conclusion
9 does not dispose of the question whether damages for emotional suffering
10 were intended to be recoverable by an insured for such a breach. Because
11 the statutes did provide for the payment of damages not usually recoverable
12 in such a situation, it would appear that had the legislature intended to
13 enlarge the damages further, it would have so provided. It was certainly
14 not intended by the legislature that additional pressure to perform the
15 contract be exerted by allowing the recovery of damages for emotional
16 distress, since the statute provides for civil damages recoverable by the
17 state for that purpose. There is nothing to indicate that the legislature
18 intended, when it prohibited certain claims settlement practices in ORS
19 746.230, that actions for breach of insurance contracts would be
20 transformed, in all of the covered instances, into tort actions with a
21 resulting change in the measure of damages. The statutes express no public
22 policy which would promote damages for emotional distress. Concern
23 about the insured's peace of mind does not appear to be the gravamen of the
24 statutory policy."

25 *Farris II*, 284 Or at 457-58.⁹ We understand that paragraph to explain that the plaintiff's
26 claim was a claim for breach of contract and that, in enacting ORS 746.230, the
27 legislature did not intend to provide "tort" -- or emotional distress -- damages for such a
28 claim.

⁹ The Court of Appeals concluded that, because the court in *Farris II* had stated, after introducing the issue, that "[i]t is not our understanding that plaintiffs make this contention," the court's subsequent discussion and conclusion that the legislature did not intend to create a private right of action for the violation of the statute were merely *dictum*. *Moody*, 317 Or App at 243-44 (citing *Farris II*, 284 Or at 458). We do not agree with that assessment of the *Farris II* decision. The court clearly intended to foreclose the statutory tort "contention," whether or not the plaintiffs had meant to raise it.

1 The court then went on to consider whether, as a matter of common law, a
2 claim based on a "bad faith" breach of a contractual obligation should be considered a
3 claim sounding in tort. After discussing various California court decisions, the court
4 rejected that view, specifically holding that the plaintiffs' claim was one for breach of
5 contract:

6 "Contrary to the California holdings, * * * we believe defendant's
7 failure to undertake representation of plaintiffs which required them to
8 represent themselves could only have been a breach of contract, and, in
9 cases of breach, the law is clear that no recovery for mental distress because
10 of threat of pecuniary loss is recoverable."

11 *Id.* at 464-65.

12 Finally, the court considered the plaintiffs' arguments that, even if their
13 claim was for breach of contract, they should be permitted to recover emotional distress
14 damages because "one who enters into a contract of insurance does so to
15 guarantee himself peace of mind in case an action or claim is made against him and,
16 therefore, he should receive reimbursement for that for which he has bargained and not
17 received," and "the insurance business is tinged with a public interest similar to that of a
18 public utility, and public policy dictates that full responsibility for the results of failure to
19 perform should be imposed without respect to the rules applicable to other contracting
20 parties." *Id.* at 465-66. The court disagreed, adhering to "the universal rule" that
21 recovery for breach of contract does not include recovery for emotional distress damages.

22 *Id.*

23 In *Farris II*, this court understood its task as deciding *whether* the plaintiffs'
24 claim was "one of contract or one of tort," holding, as indicated, that the plaintiffs' claim

1 was for breach of contract.¹⁰ *Farris II*, 284 Or at 456, 463. In arguing otherwise, the
2 dissent contends that the complaint at issue in *Farris II* could be understood as alleging
3 one count for breach of contract and one count in tort. ___ Or at ___ (Garrett, J.,
4 dissenting) (slip op at 16:17-22). That stretch cannot hold. As noted, both counts
5 expressly alleged a breach of contract and both sought the same economic and emotional
6 distress damages. And, most importantly, the difference between contract and tort claims
7 is that they provide remedies for breach of conceptually different obligations. Again, as

¹⁰ That this court understood the plaintiffs' claim to be one in contract is also clear from its prior decision. *Farris v. U.S. Fidelity & Guaranty*, 273 Or 628, 542 P2d 1031 (1975) (*Farris I*). There, the court held that an unaggravated breach of contract could not support a claim for emotional distress damages, and it stated that it did not decide whether such damages would be available for "an aggravated breach." *Id.* at 638. Thus, it makes sense that, in *Farris II*, the issue before the court would be whether emotional distress damages would be available for the aggravated breach of contract that the plaintiffs apparently attempted to plead and not whether such damages would be available for breach of an *extracontractual* obligation to avoid injuries to others.

We also disagree with the dissent's contention that this court "has repeatedly characterized *Farris II* as declining to recognize a tort." ___ Or at ___ (Garrett, J., dissenting) (slip op at 13:16-17). The two cases that the dissent cites, *Georgetown Realty* and *Goddard v. Farmers Ins. Co.*, 344 Or 232, 179 P3d 645 (2008), describe this court's holding in *Farris II* as we do here -- that is, as holding that the plaintiff's claim in *Farris II* was for breach of contract and that, as a result, tort damages were not recoverable. In *Georgetown Realty*, for example, the court stated,

"The issue for decision in [*Farris II*] was whether damages for mental anguish and punitive damages are recoverable in a contract action against the insurer. The court again noted 'that the present action is not one in tort.'"

Georgetown Realty, 313 Or at 108 (citing *Farris II*, 284 Or at 460); *Goddard*, 344 Or at 264 ("The court [in *Farris II*] concluded that such denials of coverage are a breach of contract only and support only normal contract damages.").

1 noted, "[c]ontract obligations are based on the manifested intention of the parties to a
2 bargaining transaction, whereas tort obligations are imposed by law -- apart from and
3 independent of promises made and therefore *apart from the manifested intention of the*
4 *parties* -- to avoid injury to others." *Abraham II*, 350 Or at 36 (emphasis in original;
5 internal quotation marks omitted). In *Farris II*, the plaintiffs' complaint did not allege, in
6 either count, that the defendant owed them an obligation other than that specified in the
7 contract between them. In particular, the plaintiffs' complaint did not allege that the
8 defendant's actions were negligent.¹¹

9 We conclude that *Farris II* does not bar our consideration of the viability of
10 plaintiff's alleged common-law negligence claim. We therefore return to our
11 consideration of the following factor in that analysis: whether ORS 746.230(1) imposes a
12 legal obligation designed to protect insureds and their beneficiaries from the type of
13 emotional harm that results from delayed payment of claims. In conducting that analysis,
14 we find it helpful to consider, as we did in *Doyle*, 356 Or at 338-39, 363, whether a

¹¹ In arguing for a different understanding of *Farris II*, the dissent observes that, in *Farris II*, the court described the plaintiffs' argument as an argument that the defendant was "guilty of a tort as well as a breach of contract" because it had "exercised "bad faith" in its decision to deny coverage and to refuse a defense." ___ Or at ___ (Garrett, J., dissenting) (slip op at 8:13-16) (quoting *Farris II*, 284 Or at 455-56). We acknowledge that, in *Farris II*, the plaintiffs contended that the defendant's intentional, bad faith, breach of contract, could give rise to tort *damages*, but we do not understand the plaintiffs to have contended, or the court to have considered, the separate question, as explained in *Abraham II*, of whether the defendant had a tort *obligation* that was "*apart from the manifested intention of the parties* -- to avoid injury to others." *Abraham II*, 350 Or at 36 (emphasis in original). As noted, in *Farris II*, the plaintiffs' complaint did not allege that the defendant acted negligently.

1 decision permitting plaintiff's claim "would be consistent with the statute, appropriate for
2 promoting its policy, and needed to ensure its effectiveness."¹² In citing *Doyle*, we
3 recognize that *Doyle* is not a negligence case. Rather, it is a case in which the plaintiff
4 could not establish that the legislature intended to create a private right of action but,
5 nevertheless, asked this court to create a new type of tort liability. Although that is not
6 our undertaking here, plaintiff's invocation of ORS 746.230 requires a similar analysis.
7 We will not permit recovery of emotional distress damages based in part on the existence
8 of a statutory obligation if the claim for such damages is not consistent with the statute,
9 appropriate for promoting its policy, and needed to ensure its effectiveness.

10 We therefore begin, as we did in *Doyle*, by examining the statute's
11 provisions and the policies it is intended to promote. Defendant argues that, in enacting
12 ORS 746.230, the legislature considered what remedies to provide for its violation and
13 that its deliberate decision to limit those remedies to civil penalties payable to the state
14 indicates that the statute was not enacted to impose liability on insurers for its violation.
15 As we have explained, plaintiff accepts that the legislature did not intend to create such
16 liability, but she nonetheless contends that imposition of liability in negligence is
17 consistent with the legislative intent to prohibit certain unfair claims processing practices.

18 As a reminder, ORS 746.230 prohibits (1) "[r]efusing to pay claims without
19 conducting a reasonable investigation based on all available information," ORS

¹² As discussed in *Doyle*, 356 Or at 363, those factors are drawn from the *Restatement (Second) of Torts* section 874A comment h (1979) and are not exclusive.

1 746.230(1)(d); and (2) "[n]ot attempting, in good faith, to promptly and equitably settle
2 claims in which liability has become reasonably clear," ORS 746.230(1)(f). We agree
3 with plaintiff and the Court of Appeals that those prohibitions are evidently designed to
4 protect insureds and their beneficiaries from the type of emotional harm that plaintiff in
5 this case allegedly suffered. As the Court of Appeals reasoned, that intention is apparent
6 from the context in which the statute was adopted -- an insurance marketplace in which
7 insurers advertise and sell their products as providing "peace of mind" to their
8 policyholders:

9 "[W]e note that an elementary principle of insurance law is that insurance
10 policies do not merely provide for the payment of funds in case of loss;
11 they also provide the policyholder peace of mind. *See, e.g.*, 14 *Couch on*
12 *Ins.* § 198:4 n 1 (3d ed 2021) ('security and peace of mind are principal
13 benefits of insurance[.]') * * * The Oregon Supreme Court recognized that
14 principle in *Farris [II]*, noting that 'insurance contracts * * * are made for
15 economic and financial peace of mind.' * * * A corollary to that principle
16 is that statutes regulating the business of insurance -- notice of cancellation
17 requirements, for instance -- are likewise intended to ensure peace of mind
18 for policyholders. *See, e.g.*, 43 *Am Jur 2d Insurance* § 385 (2021) ('The
19 primary purpose of such statutes is to ensure peace of mind for a
20 policyholder.'). Thus, when the Oregon legislature enacted the Insurance
21 Code 'for the protection of the insurance-buying public,' ORS 731.008, we
22 take that to mean that the legislature enacted the code to ensure that the
23 insurance-buying public gets what it pays for, including the peace of mind
24 that is a principal benefit of an insurance policy.

25 "That certainly appears to be the point of a number of the provisions
26 of ORS 746.230, which are directed at unfair claim settlement practices that
27 implicate not only adverse economic consequences to the policyholder but
28 also the stresses of dealing with insurance company bad faith and delaying
29 tactics. * * * Violations of those provisions certainly have economic
30 consequences. But it cannot be denied that such violations commonly have
31 significant emotional consequences for policyholders as well. The
32 legislature may well have declined to provide a private right of action for
33 damages when it enacted ORS 746.230. Especially given that the very
34 nature of insurance is that it is purchased to ensure peace of mind, it is hard

1 to imagine that the legislature did not intend the law, at least in part, to
2 prevent policyholders from being forced to experience the stress of dealing
3 with unfair insurance claim settlement practices."

4 *Moody*, 317 Or App at 246-48 (some citations omitted).

5 As the Court of Appeals also observed, the conduct that ORS 746.230
6 proscribes includes conduct that is independent of the obligation to pay benefits due
7 under the insurance policy. For example, ORS 746.230 prohibits insurers from, "[f]ailing
8 to acknowledge and act promptly upon communications relating to claims," ORS
9 746.230.230(1)(b); "[f]ailing to affirm * * * coverage of claims within a reasonable
10 time," ORS 746.230.230(1)(e); and "[c]ompelling claimants to initiate litigation to
11 recover amounts due," ORS 746.230(1)(g). Those prohibitions suggest that the harm that
12 the legislature sought to prevent was not limited to the financial harm that occurs when
13 insurance benefits are not paid.¹³

14 Next, as the court did in *Doyle*, we consider how specific the statute is --
15 that is, whether it provides advance warning of the specific conduct that is prohibited. *Id.*
16 at 353; *see also Philibert*, 360 Or at 715-16 (emphasizing the importance of providing "*ex*
17 *ante* understanding of liability"). We find that the statute provides explicit notice to

¹³ The dissent states that the court in *Farris* explicitly rejected the proposition that the prohibitions set forth in ORS 746.230(1) are designed to protect policyholders' peace of mind. ___ Or at ___ (Garrett, J., dissenting) (slip op at 22:15-16). In *Farris II*, the court reasoned that that purpose was not a sufficient basis for concluding either that the legislature intended to provide a private right of action or that insurance contracts were not subject to the "universal rule" that emotional distress damages are not recoverable in a claim for breach of contract. Here, we consider that factor for a different purpose -- to determine whether plaintiff's common-law negligence claim for emotional distress damages is consistent with the legislature's purpose in enacting the statute.

1 insurers of the conduct that is required and, in requiring insurers to conduct reasonable
2 investigations and to settle claims when liability becomes reasonably clear, does so in
3 terms that are consistent with the standard of care applicable in common law negligence
4 cases.

5 Under *Doyle*, we also consider the adequacy of existing remedies and the
6 extent to which a common-law negligence action "will aid, supplement, or interfere with
7 existing claims and remedies and other means of enforcement." *Doyle*, 356 Or at 363-64.
8 One existing common-law remedy is a breach of contract action, but, in such an action,
9 emotional distress damages are not recoverable. Permitting a common-law negligence
10 claim for emotional distress damages would supplement, but would not interfere with, the
11 availability of a contract claim.

12 The same is true with respect to the remedies provided by the statute. As
13 discussed, in ORS 731.988 the legislature provides for a civil penalty. However, we
14 conclude that permitting a negligence claim for emotional distress damages would not
15 interfere with the ability of the director of the Department of Consumer and Business
16 Services to seek that remedy. The legislature has strengthened the ability of insurance
17 regulators to protect insureds by permitting the director to bring actions for "actual
18 damages" or other equitable relief, on their behalf. ORS 731.256. There is no reason to
19 believe that the director's apparently discretionary authority to do that would be
20 negatively impacted by allowing insureds to bring their own negligence claims. *Doyle*
21 instructs us to consider whether a tort action will "provide a greater deterrent and be more
22 likely to [e]nsure compliance with the law." 356 Or at 354. We conclude that permitting

1 a common-law negligence claim could have that effect, making it more likely that an
2 insurer would be deterred from unreasonably engaging in prohibited conduct and thereby
3 advancing the statute's purpose.

4 Nevertheless, we acknowledge, as defendant argues, that the legislature's
5 decision not to create a statutory private right of action may reflect a concern that
6 allowing plaintiff to recover emotional distress damages in this context would expose
7 defendants to new and unfairly burdensome liability. It is important that our analysis
8 account for such concerns, and we proceed to that undertaking.

9 b. Whether permitting recovery of emotional distress damages is
10 consistent with recovery of emotional distress damages in other
11 common-law actions and would not place an undue burden on
12 defendants.

13 In this case, plaintiff alleges a claim against a party with whom she had a
14 relationship, like that in *Tomlinson*, 362 Or at 446, that entailed a "mutual expectation of
15 service and reliance." Plaintiff alleges that she and defendant were in a contractual
16 relationship in which defendant undertook to provide her, as the named beneficiary of
17 that contract, with certain insurance benefits. That is important because, in such a
18 relationship, the service provider knows the identity of the person who contracts for or is
19 the named beneficiary of those services and can be expected to act reasonably with
20 respect to that person.¹⁴ As a result, any concern that providing a claim for emotional

¹⁴ When a party undertakes to provide services to another, that undertaking, and the contractual relationship that it reflects, may require that the service provider act with reasonable care. Thus, as this court explained in *Currey v. Butcher*, 37 Or 380, 384-

1 distress damages could expose a defendant to unanticipated and indeterminate liability is
2 ameliorated. See *Tomlinson*, 362 Or at 443-44 (people not generally required to
3 affirmatively protect economic and emotional interests of others, and some limiting
4 principle is therefore necessary to confer liability); *Philibert*, 360 Or at 704 (without
5 some limiting principle, liability for emotional harms is potentially limitless).

6 That is particularly true when the defendant undertakes to provide services
7 that, absent the exercise of reasonable care, may foreseeably create a risk of emotional
8 harm. For instance, in *Curtis v. MRI Imaging Services II*, 327 Or 9, 14-16, 956 P2d 960
9 (1998), a patient alleged that his physicians had negligently failed to guard against the
10 predictable psychological consequences of an MRI procedure, causing him severe
11 emotional distress but not bodily injury. In upholding the patient's claim, this court
12 observed that medical professionals may be required to protect against medical risks that
13 "happen to be psychological in nature," when they violate a standard of care that

86, 61 P 631 (1900), the contract serves as a "matter of inducement," and tort law imposes the "duty" to act with reasonable care. Accord, *Dowell v Mossberg*, 226 Or 173, 181, 355 P2d 624 (1960) (in professional relationships, "the contract of employment is a matter of inducement," and the "failure to exercise due care" makes the action one in tort). As this court stated in *Georgetown Realty*, "[t]he rule stated in *Currey* * * * has been followed * * * in cases involving physicians, lawyers, real estate brokers, architects, engineers, and landlords." 313 Or at 103. See, e.g., *Lindemeier v. Walker*, 272 Or 682, 538 P2d 1266 (1975) (contracting party has negligence claim against real estate broker for failure to obtain best price for real property); *Bales for Food v. Poole*, 246 Or 253, 424 P2d 892 (1967) (contracting party has negligence claim against architect for misplacing building on property); *Dowell*, 226 Or at 185 (contracting party has negligence claim against chiropractor for failure to diagnose disease); *Ashmun v. Nichols*, 92 Or 223, 234-35, 178 P 234, 180 P 510 (1919) (contracting party has negligence claim against landlord for failure to repair leased premises).

1 contemplates adverse psychological reactions. *Id.* at 15. We said that,

2 "where the standard of care in a particular medical profession recognizes
3 the possibility of adverse psychological reactions or consequences as a
4 medical concern and dictates that certain precautions be taken to avoid or
5 minimize it, the law will not insulate persons in that profession from
6 liability if they fail in those duties, thereby causing the contemplated harm."

7 *Id.* at 15-16.

8 Similarly, in *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 418, 69 P3d
9 710 (2003), the court again accepted the premise that a defendant in a professional
10 relationship with a client, there a real estate professional, could be liable for emotional
11 damages, but it emphasized that, in such cases, the relevant standard of care must include
12 protecting the client from such harms. *Id.* at 417-18. *See also Paul*, 351 Or at 599
13 (assuming without deciding that physicians have a duty, based on common law and
14 health care information statutes, to protect patients against disclosure of health care
15 information and emotional harm).

16 In *Tomlinson*, the parties were not in a direct physician-patient relationship,
17 but one step removed, in a relationship of "mutual expectation of service and reliance."
18 362 Or at 450. Accordingly, we did not employ an analysis that considered whether the
19 plaintiff had alleged a "standard of care that includes the duty to protect a client from
20 emotional harm." *Curtis*, 327 Or at 14. Rather, we determined, as a matter of common
21 law, that the parents had alleged facts that, if proved, could establish a legally protected
22 interest in receiving information from the defendants that implicated the parents'
23 reproductive choices and their interest in avoiding emotional harm. *Tomlinson*, 362 Or at
24 447.

1 We used a similar approach in *Hovis*, a case decided before *Tomlinson* and
2 which was discussed in *Philibert*. In *Hovis*, the plaintiff had purchased a burial plot from
3 the defendant city. The city had mistakenly buried the body of the plaintiff's husband in
4 the wrong plot, and, without permission from or notification to the plaintiff, the city had
5 disinterred the remains and moved them to the proper plot. At that time, Oregon statutes
6 required private cemeteries to obtain consent before moving a deceased's body, but those
7 statutes did not apply to municipal cemeteries. Therefore, the city argued, it had no
8 obligation to obtain the plaintiff's consent and she had no common-law negligence claim
9 for her emotional distress damages. 243 Or at 608-11. This court disagreed, recognizing
10 the common-law right of a surviving spouse to have a cemetery act reasonably in dealing
11 with her deceased husband's remains. *Id.* at 612-613. In *Philibert*, this court explained
12 *Hovis* as a decision that recognized the common law as an extracontractual "legal source"
13 of liability for emotional distress damages. *Philibert*, 360 Or at 706.

14 Here, as in *Tomlinson* and *Hovis*, the parties are in a relationship of "mutual
15 expectation of service and reliance." And, as in *Curtis*, the services that defendant
16 undertook to provide are services that, absent the exercise of reasonable care, may
17 foreseeably create a risk of emotional harm. The existence of that relationship reduces
18 the risk that, in allowing plaintiff's claim, this court will be extending "indeterminate and
19 potentially unlimited liability." In fact, contracts may, at times, provide a means for a
20 defendant to control the extent of its liability. That is, a contract between a service
21 provider and recipient potentially may alter or eliminate tort liability or remedies:

22 "Because tort liability is imposed by common law negligence principles,

1 that responsibility exists unless altered or eliminated by a contract or some
2 other source of law."

3 *Abraham II*, 350 Or at 36-37. As the court further stated in *Abraham II*,

4 "Parties may limit tort remedies by defining their obligations in such a way
5 that the common law standard of care has been supplanted, * * * or, in
6 some circumstances, by contractually limiting or specifying available
7 remedies."

8 *Id.* at 40 (citations omitted).¹⁵

9 The relationship between the parties is not, of course, determinative. In
10 deciding whether a plaintiff has a legally protected interest sufficient to subject a
11 defendant to liability for emotional distress damages, this court also has looked for other
12 indicators that permitting such recovery will not impose an unfair burden on defendants.
13 Thus, in *Philibert*, we looked to the nature of the injury and, in recognizing the plaintiffs'
14 claim, called out the "objective indicators of possibly serious emotional injury." 360 Or
15 at 715. Those indicators are present here as well. Life insurance is intended to provide
16 peace of mind and necessary resources for a beneficiary, and a life insurer's unreasonable
17 denial of promised benefits can certainly cause the beneficiary serious emotional injury.
18 There are objective indicators of such injury in that the death of a spouse is a significant
19 loss, and that loss is compounded when the death is sudden and the person who loses the
20 spouse is dependent on the spouse for their financial well-being. The spousal relationship
21 and the need for insurance benefits can be objectively established, as can the
22 unreasonable conduct of the insurer.

¹⁵ The insurance contract at issue here included no such provision.

1 c. Whether plaintiff's interest is "of significant importance."

2 Furthermore, this court will not permit recovery of purely emotional injury
3 unless we determine that the claimed harm is "of sufficient importance as a matter of
4 public policy." *Philibert*, 360 Or at 705. In this case, plaintiff alleges that she is the
5 surviving spouse of the decedent and was financially dependent on him. Plaintiff alleges
6 that defendant failed to reasonably investigate and pay life insurance proceeds to which
7 she was contractually entitled. Requiring reasonable investigation and prompt payment
8 of such proceeds benefits not only those in plaintiff's shoes, but also society at large.
9 When life insurance proceeds enable survivors to obtain basic needs such as food and
10 shelter, the survivors are not dependent on society for those needs. Importantly, Oregon
11 statutes governing the insurance industry indicate that the legislature has made a public
12 policy choice to protect against the unfair processing and payment of insurance claims,
13 which includes claims made by life insurance beneficiaries. When a surviving spouse
14 incurs serious emotional distress as a result of the violation of those statutes, the harm
15 and the statutory purpose are of sufficient importance to merit protection.¹⁶

¹⁶ In reaching that conclusion, we are not alone. Many other states, by statute or judicial decision, permit claims for emotional distress damages against first-party insurers in some circumstances. *See, e.g., Nassen v. National States Ins. Co.*, 494 NW2d 231 (Iowa 1992) (insurer liable in tort for emotional distress damages for bad faith denial of claim); *Curry v. Fireman's Fund Ins. Co.*, 784 SW2d 176 (Kentucky 1989) (permitting recovery in tort for consequential and punitive damages for bad faith breach of insurance contract); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P2d 1014 (1986) (insurer liable in tort for bad faith denial of claim); *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz 188, 624 P2d 866 (1981) (permitting emotional distress damages in tort action arising out of insurer's willful refusal to pay a valid claim); *Gruenberg v. Aetna Ins. Co.*, 9 Cal 3d 566,

1 3. *On balance, we conclude that plaintiff has alleged a legally protected*
2 *interest sufficient to subject defendant to liability for emotional distress*
3 *damages.*

4 We began this opinion by stating the reasons that this court has been
5 reluctant to permit recovery of emotional distress damages in the absence of physical
6 injury or property damage and the need for a limiting principle, in addition to
7 foreseeability, to avoid indeterminate and potentially unlimited liability. *Philibert*, 360
8 Or at 704. In this case, we are convinced that plaintiff has alleged a legally protected
9 interest that provides that limiting principle; that is, plaintiff, as the surviving spouse of a
10 deceased breadwinner, has a legally protected interest sufficient to support a common-
11 law negligence claim for emotional distress damages against her husband's life insurer for
12 failure to reasonably investigate and promptly pay her claim for insurance benefits. As in
13 *Nearing*, Oregon statutory law imposes an obligation to protect that interest. In
14 undertaking to provide insurance benefits, an insurer not only undertakes to provide
15 necessary financial resources but also undertakes to provide the peace of mind that comes
16 with knowing that those resources will be promptly paid, alleviating emotional distress
17 and avoiding further psychological harm. As in *Tomlinson* and *Hovis*, the parties are in a
18 relationship of "mutual expectation of service and reliance." As in *Curtis*, the services
19 provided are intended to avoid inflicting emotional, as well as financial, harm. And, as in
20 *Philibert*, there are objective indicators of possibly serious emotional injury. Considering

510 P2d 1032 (1973) (insurer liable in tort for emotional distress damages for violation of implied covenant of good faith and fair dealing).

1 negligence claim and in striking her claim for emotional distress damages.

2 The decision of the Court of Appeals is affirmed. The judgment of the

3 circuit court is reversed, and the case is remanded to the circuit court for further

4 proceedings.