IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PEGGY FORAKER, Plaintiff, v. **USAA CASUALTY INSURANCE COMPANY**, Defendant.	Case No. 3:14-cv-87-SI **OPINION AND ORDER**

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Michael H. Simon, District Judge.

In this lawsuit, Plaintiff Peggy Foraker asserted three claims against her automobile insurance carrier, Defendant USAA Casualty Insurance Company, arising out of a January 2012 car accident with an uninsured driver. Under Oregon common law, Plaintiff alleged breach of express contract and breach of the implied covenant of good faith and fair dealing. Plaintiff also

alleged financial abuse of a vulnerable person, in violation of Oregon Revised Statutes ("ORS") §§ 124.005, et seq. Earlier in this action, the Court dismissed Plaintiff's claims of breach of express contract and financial abuse of a vulnerable person. On March 23, 2017, the Court held that Plaintiff may seek noneconomic damages from her claim of breach of the implied covenant of good faith and fair dealing if she properly alleges and proves physical injury resulting from Defendant's alleged breach. The Court also denied Plaintiff's motion to reinstate her claim for financial abuse of a vulnerable person and granted Plaintiff leave to file a Second Amended Complaint.

Plaintiff filed her Second Amended Complaint ("Complaint") on April 21, 2017. In her Complaint, Plaintiff asserts her original three claims, plus two new claims: a claim for declaratory relief and money judgment for uninsured motorist benefits and a common law negligence per se claim for negligent performance of an insurance contract. Defendant moves to dismiss Plaintiff's two new claims and Plaintiff moves for leave to amend. For the reasons discussed below, Defendant's motion is granted and Plaintiff's motion is denied.

BACKGROUND

On January 4, 2012, Plaintiff was injured in an automobile collision caused by an intoxicated, uninsured motorist. The next day, Plaintiff reported the accident to Defendant, her insurer. By February 2013, more than a year later, Defendant had paid Plaintiff $159,329.76 for covered medical expenses. On April 8, 2013, Plaintiff made a policy-limits demand against Defendant for $1 million, which was the limit of Plaintiff's uninsured motorist ("UM") coverage with Defendant. On May 30, 2013, Plaintiff and Defendant agreed to an "open extension" of time for Defendant to respond to Plaintiff's demand.

On November 14, 2013, Defendant offered to pay Plaintiff $250,000 to resolve Plaintiff's UM claim. Plaintiff rejected Defendant's offer. On December 16, 2013, Plaintiff sued Defendant

in Oregon state court, and Defendant removed the action to federal court, asserting diversity jurisdiction. The case was assigned to U.S. District Judge Anna Brown.

Defendant moved to dismiss Plaintiff's financial abuse claim as premature, and the Court granted the motion. The Court then bifurcated Plaintiff's implied covenant claim from her claim for breach of express contract. The parties stipulated to a bench trial and waived their rights to a jury. Plaintiff also moved for partial summary judgment, which the Court granted in part and denied in part, determining, among other things, that the other driver was 100 percent at fault for the accident. ECF 139. The issues of causation and damages, however, still needed to be determined.

The Court held an eight-day bench trial from January 25 to February 3, 2016. The Court found that the other driver's negligence was a substantial contributing factor that caused Plaintiff's injuries and "awarded" Plaintiff $1,172,338.04 in economic damages and $750,000.00 in non-economic damages as a result of the uninsured motorist's conduct. ECF 237. On February 19, 2016, Defendant paid Plaintiff $1 million, which was the policy limit of her UM coverage.

The parties then cross-moved for summary judgment on Plaintiff's claim of breach of express contract. The Court granted Defendant's motion and denied Plaintiff's motion. The Court explained that because Defendant never actually denied Plaintiff's UM claim and because Defendant paid Plaintiff $1 million promptly after the Court rendered its decision regarding causation and the amount of Plaintiff's damages, Defendant did not breach any express term of its contract with Plaintiff. ECF 315. The Court also determined that because Plaintiff initiated litigation during the claims negotiation process, Plaintiff "effectively short-circuited the claims

process before the expiration of the open-ended time extension for Defendant to state a final position on Plaintiff's policy-limits demand." Id. at 11.

On November 4, 2016, Judge Brown sua sponte recused herself from the remainder of this case. ECF 325. On November 8, 2016, the lawsuit was reassigned to the undersigned judicial officer. At that time, certain motions were pending, which the Court denied without prejudice. On January 20, 2017, Plaintiff moved to reinstate her statutory claim for financial abuse of a vulnerable person. ECF 333.

At the request of the Court, the parties briefed the following legal questions:

> 1. Under the circumstances of this case, are non-economic damages available under Oregon law for Plaintiff's claim of breach of the implied covenant of good faith and fair dealing?
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> 2. Under the circumstances of this case, what is the proper measure of economic damages for Plaintiff's claim of breach of the implied covenant of good faith and fair dealing?
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> 3. Should Plaintiff be permitted to reinstate her statutory claim for financial abuse of a vulnerable person, or would such a claim be futile under the circumstances of this case?

The Court issued its opinion answering the three questions on March 29, 2017. The Court determined that non-economic damages could be available for Plaintiff's claim of breach of the implied covenant if she could plead and prove physical injury as a result of Defendant's alleged breach. The Court also determined that the measure of damages for such breach is traditional expectation damages and are not subject to the $1 million bodily injury policy limit contained in the insurance policy issued by Defendant. Finally, the Court concluded that Plaintiff could not assert her claim for financial abuse of a vulnerable person under Oregon law, but granted Plaintiff leave to seek reconsideration if Oregon law were to change, because the Ninth Circuit recently had certified a question to the Oregon Supreme Court that could have implications on this claim.

DISCUSSION

A. Plaintiff's Claim for Declaratory Judgment

Plaintiff argues that she "needs" to add a claim for declaratory relief because she prevailed in the Phase I bench trial in proving that the other driver was at fault, causing Plaintiff significant economic and non-economic damages, and Defendant owed Plaintiff at least the full amount of the $1 million insurance policy issued by Defendant. Plaintiff notes that a verdict[1] was entered in her favor, and argues that under the Federal Rules of Civil Procedure every verdict must at some point be reduced to a judgment.[2] Because Judge Brown granted summary judgment in favor of Defendant on Plaintiff's breach of contract claim, Plaintiff argues that she must add some claim to her Complaint on which she prevailed at trial and on which judgment can be entered in her favor. Plaintiff contends that she is not seeking to add any new cause of action to litigate moving forward, but is merely conforming her pleadings to the results of the bench trial and its "verdict." She argues this is necessary in order for a "clean record," so any appellate court can see what claim was alleged and tried, for a judgment to be entered, and for this to be a "trial" and not an "arbitration."

Defendant responds that Plaintiff's declaratory judgment cause of action is more than an exercise of pleading-cleaning, because Plaintiff is seeking the entry of a judgment against Defendant in this claim and will then request prejudgment interest. Defendant further argues that any pleading-cleaning exercise is unnecessary because after the Court issued its verdict on the

[1] Although this was a bench trial and not a jury trial, the Court announced its findings in a document titled "Verdict." ECF 237.

[2] Plaintiff cites to Rule 49 as requiring that a "court must approve, for entry under Rule 58" a judgment. Rule 49 only applies to jury trials. The rule that applies to bench trials is Rule 52, which similarly requires that "[j]udgment must be entered under Rule 58." Fed. R. Civ. P. 52(a)(1). Rule 52 also permits a court the discretion to enter a judgment after partial findings have been made, or to wait until the close of evidence. Fed. R. Civ. P. 52(c).

damages suffered by Plaintiff caused by the uninsured motorist, Defendant paid to Plaintiff the UM policy limits benefits, Judge Brown already denied Plaintiff's request for prejudgment interest, and the parties have already agreed that Plaintiff is entitled to recover reasonable attorney's fees in prosecuting Phase I of this action.

The procedural history of this case has been somewhat complicated with bifurcations and split resolution of the issues. The case was originally bifurcated to address in Phase I Plaintiff's breach of contract claim. It was then bifurcated again and the trial part of Phase I only addressed the issues of whether the uninsured motorist was a substantial factor in causing Plaintiff's injuries and the total economic and noneconomic damages suffered by Plaintiff as a result of those injuries. The 100 percent fault of the uninsured motorist had been resolved through partial summary judgment before the bench trial. Plaintiff "succeeded" in the Phase I bench trial and obtained a "verdict" in her favor. In that verdict, the Court found that the uninsured motorist was, in fact, a substantial factor in causing Plaintiff's injuries and determined the total amount of damages suffered by Plaintiff from those injuries.

Plaintiff did not, however, prevail in Phase I at summary judgment on her breach of contract claim. Shortly after the Court concluded that the uninsured motorist caused Plaintiff's injuries and that those injuries resulted in damages that exceeded the policy limits, Defendant paid Plaintiff the full policy limits. Because Plaintiff had given Defendant an open-ended extension of time to consider her policy limits demand, the Court found that Defendant had not breached the insurance contract by waiting until after the Court's decision on causation and damages before Defendant paid Plaintiff the policy limits.

As Plaintiff points out, it is unclear on what "claim" she prevailed at trial, because she did not prevail in her breach of contract claim. The Court is not unwilling to allow Plaintiff to add a

new claim for declaratory relief to confirm that which the Court has already adjudicated in Plaintiff's favor. Plaintiff's new declaratory judgment claim, however, is not what the Court declared after the bench trial.

Plaintiff's claim seeks a declaration that the Defendant owes Plaintiff $1 million dollars under the uninsured policy limit, that Plaintiff is entitled to a money judgment for $1 million, and that Plaintiff is entitled to prejudgment interest and attorney's fees. But after the bench trial, the Court simply declared that the uninsured motorist was a substantial contributing factor in causing Plaintiff's injuries and those injuries resulted in $1,922,338.04 in economic and noneconomic harm to Plaintiff. See ECF 237. The Court's verdict only related to the liability of the uninsured motorist and Plaintiff's total damages. It did not specifically address whether Defendant was liable for anything. Although the liability of the uninsured motorist may well be a straight line to Defendant's liability under Plaintiff's UM policy, Defendant's liability is not something the Court actually decided at trial. Nor was it necessary for the Court to resolve Defendant's liability under its UM policy because of Defendant's prompt payment after the trial.[3] Thus, adding a claim declaring Defendant's liability is not, strictly speaking, amending the pleadings to conform to what was tried in this case.

Additionally, regarding prejudgment interest, Judge Brown has already determined that Plaintiff may not recover prejudgment interest on her breach of contract claim, because the UM policy did not provide for prejudgment interest and because Judge Brown found that Defendant did not breach the insurance policy and granted summary judgment against Plaintiff on her breach of contract claim. Plaintiff's claim for prejudgment interest, therefore, has already been adjudicated against her and she may not attempt to revive that claim now. Moreover, because the

[3] Whether Defendant's payment was sufficiently "prompt" after the accident is the subject of Plaintiff's remaining claim for breach of the implied covenant of good faith.

only appropriate declaratory judgment claim would be one declaring the liability of the uninsured motorist and the amount of Plaintiff's economic and noneconomic damages suffered, it would not involve any damages owed by Defendant and would not be a claim on which prejudgment interest against Defendant could be based.

Regarding attorney's fees, the parties agree that Plaintiff is entitled to reasonable attorney's fees for prosecuting her claim at the Phase I bench trial. No new claim is required for Plaintiff to pursue attorney's fees. In fact, on March 10, 2017, the Court granted Plaintiff leave to file a motion for her Phase I attorney's fees before the final resolution of this case. ECF 336. Plaintiff has yet to file that motion.

The fact that Plaintiff obtained a verdict in her favor after the bench trial does not require amending the pleadings to add a new cause of action. The verdict can be part of the judgment that will ultimately be entered in this case without identifying a specific cause of action on which Plaintiff prevailed. Although Federal Rule of Civil Procedure 15 permits such an amendment, it does mandate one. See Fed. R. Civ. P. 15(b)(2) (noting that a party may move to amend the pleadings to conform to issues tried by express or implied consent, but that "failure to amend does not affect the result of the trial of that issue"). That said, the Court is not unwilling to allow a properly asserted claim for declaratory relief that accurately describes what the Court actually declared after the trial—that the uninsured motorist caused Plaintiff's injuries and the amount of Plaintiff's economic and noneconomic damages suffered as a result of the accident. Because Plaintiff's Second Claim for Relief does not do so, Defendant's motion to dismiss is granted with respect to this claim and Plaintiff's motion amend is denied.

B. Plaintiff's Claim for Negligence per se

Under Oregon law, to state a claim for negligence per se, a plaintiff must

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

Abraham v. T. Henry Constr., Inc., 230 Or. App. 564, 573 (2009) (alterations in original) (quoting McAlpine v. Multnomah Cty, 131 Or. App. 136, 144 (1994)).

Defendant moves to dismiss Plaintiff's negligence per se claim, arguing that in a first-party insurance coverage dispute, unless there is a special relationship, Oregon law does not permit a plaintiff to bring a tort claim against his or her insurer. Plaintiff responds that under Oregon law a negligence per se claim may be brought when an insurer violates ORS § 746.230, the Unfair Settlement Claims Practices Act, under two theories. First, ORS § 746.230 provides a duty of care that is independent of the terms of the insurance contract, which gives rise to a tort claim against an insurer. Second, because the statute articulates a statutory duty of care, the violation of that law is actionable as negligence per se. Although there is not an Oregon case directly on point regarding either of Plaintiff's arguments, Oregon courts have developed a body of case law regarding an insurer's liability in tort that informs the Court's analysis.

In Farris v. United States Fid. & Guar. Co., the Oregon Supreme Court held that an insured cannot recover emotional distress damages resulting from the insurer's refusal to defend, finding that the insurance code was intended to prohibit insurance companies from breaching insurance contracts and not to allow recovery of emotional distress damages. 284 Or. 453, 458 (1978). The court explained that there was nothing in the legislative history of ORS § 746.230 to indicate that actions for breach of contract would be converted into tort actions, the statute expresses no public policy promoting damages for emotional distress, and "[c]oncern about the insured's peace of mind does not appear to be the gravaman of the statutory policy." Id. Three years later, the Oregon Supreme Court confirmed that "violation of the provisions of the

Insurance Code prohibiting certain conduct [do] not give rise to a tort action." Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 328 (1981). In *Employers' Fire Ins. v. Love It Ice Cream* Co., the Oregon Court of Appeals similarly held that "the violation of ORS 746.230(1)(f), which requires insurers to settle claims promptly and in good faith where their liability is reasonably clear, does not give rise to a tort action." 64 Or. App. 784, 790 (1983).

The Oregon Supreme Court later clarified in Georgetown Realty Inc. v. Home Ins. Co., that an insurer may be liable to its insured in tort when the insurer is subject to a standard of care that exists independent of the contract and without reference to the specific terms of the contract, such as when the insurer undertakes the duty to defend, thereby creating a special relationship with concomitant duties. 313 Or. 97, 110-11 (1992). Under analogous circumstances, Oregon courts have occasionally allowed a plaintiff to rely on statutory provisions to create such an independent standard of care. See, e.g., Abraham v. T. Henry Constr. Inc., 230 Or. App. 564, 573 (2009) (finding state building code provided standard of care independent of terms of the contract); Simpkins v. Connor, 210 Or. App. 224, 232 (2006) (finding statute requiring the production of medical records upon receipt of an authorized request provided statutory duty owed to patients and those authorized to obtain records). The Oregon appellate courts have not, however, specifically held that ORS 746.230 provides a standard of care sufficient to permit a tort action against a first party insurance provider.[4]

Although Oregon appellate courts have not specifically addressed Plaintiff's argument that ORS § 746.230 provides a statutory standard of care that is independent of the contract and

[4] Plaintiff submitted a 2013 Oregon trial court Order denying a motion to dismiss a plaintiff's negligence claim, and to strike certain paragraphs of the complaint relating to the negligence claim, which stated that "ORS 746.230 provides a standard of care, independent of the contract, that may give rise to a claim for negligence." ECF 349-1 at 3, 4. There does not, however, appear to be any relevant appellate decision in that case.

therefore gives rise to a tort claim against the insurer under Georgetown Realty, several federal decisions in this district, and a recent unpublished decision in the Ninth Circuit affirming one such decision, have relied on the Oregon cases discussed above, among others, to hold that a tort action may not be brought against a first party insurer. See, e.g., Braun-Salinas v. Am. Family Ins. Grp., 665 F. App'x 576 (2016); Vail v. Country Mut. Ins. Co., 2015 WL 2207952, at *8 (D. Or. May 11, 2015); Braun-Salinas v. Am. Family Ins. Grp., 2014 WL 1333731, at *7-8 (D. Or. Apr. 1, 2014); HTI Holdings, Inc. v. Hartford Cas. Ins. Co., 2011 WL 6205903, at *5 (D. Or. Dec. 8, 2011). These cases primarily rely on Oregon's case law that declines to allow an insured to bring a tort claim against its insurer except when the insurer has chosen to defend the insured. These cases also particularly rely on the fact that Love It expressly found that ORS § 746.230(1)(f) did not give rise to a tort claim.

Plaintiff also argues that Georgetown Realty and its progeny do not need to be analyzed because the Oregon Supreme Court, in Shahtout v. Emco Garbage Co., 298 Or. 598 (1985), provides the necessary authority for allowing a negligence per se claim based on ORS § 746.230. Plaintiff primarily relies on Clinicient, Inc. v. Sentinel Ins. Co., Ltd., 2016 WL 8470106 (D. Or. Nov. 28, 2016), adopted by 2017 WL 991295 (D. Or., Mar. 14, 2017). In Clinicient, the undersigned adopted the Findings and Recommendation ("F&R") of Magistrate Judge Paul Papak. The F&R acknowledged that Oregon law does not provide for any private cause of action in tort for the violation of ORS § 746.230(1). Id. at *5. The F&R further acknowledged that some opinions in this district have interpreted the fact that Oregon law does not allow "statutory torts arising out of the violation of statutes lacking any provision for private causes of action as

necessitating the conclusion that such statutes do not give rise to a standard of care the violation of which could be actionable as negligence per se."[5] Id. The F&R explained, however, that:

> Oregon law does not support that construction. In Shahtout v. Emco Garbage Co., 298 Or. 598 (1985), decided seven years after Burnette, specifically addressing negligence per se rather than statutory torts, the Oregon Supreme Court clarified that:
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> > The phrase "negligence per se" can apply only to cases brought on a theory of liability for negligence rather than liability grounded in obligations created by statute. **Even when a statute neither expressly nor impliedly gives a person injured by its violation any claim for damages, that person may have such a claim under existing common-law theories, based on negligence** or on something else, to which the statutory violation may be relevant. . . .
> >
> > . . . . In a negligence case, the plaintiff must show that defendant did not meet an applicable standard of due care under the circumstances. When a plaintiff . . . invokes a governmental rule in support of that theory, **the question is whether the rule, though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine**; in other words, that noncompliance with the rule is negligence as a matter of law.
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> Shahtout v. Emco Garbage Co., 298 Or. 598, 601 (1985) (emphasis added). Thus, Shahtout necessarily stands for the proposition that a claim for negligence per se may rely for the requisite statutory standard of care on a statute that, under Burnette, does not and cannot give rise to a statutory tort. Because the two district court opinions on which Sentinel relies conflate statutory torts with negligence per se and presume that a cause of action for the latter requires a statute giving rise to the former, their holdings are untenable under Shahtout.

[5] The F&R references Braun-Salinas and HTI Holdings, and their discussions of Burnette v. Wahl and its progeny, which "stand[] for the proposition that, absent express provision for a private cause of action, Oregon courts presume that a regulatory statute does not 'create any civil obligation or afford civil protection against the injuries which it was designed to prevent.'" Clinicient, 2016 WL 8470106, at *5 (quoting Burnette, 284 Or. 705, 711 (1978)).

> * * *
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> Under Shahtout and Abraham, there is no requirement that the violated statute (or rule) provide for a private cause of action to remedy its breach.
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> Here, it is clear that Clinicient has alleged that Sentinel violated Section 746.230(1) in a variety of ways, that Clinicient was injured in consequence of those violations, that Clinicient was a member of the class of persons intended to be protected by Section 746.230(1), and that the damages Clinicient suffered were of the kind Section 746.230(1) was enacted to prevent. Moreover, Clinicient's allegations that Section 746.230(1) was enacted to prevent insureds in its position from suffering the kinds of damages it allegedly did appear to be correct as a matter of law. In consequence, Clinicient's allegations are plainly sufficient to state claim for negligence per se under applicable Oregon law. See Abraham, 230 Or. App. at 573-74.

Clinicient, 2016 WL 8470106, at *5-6 (emphasis in original) (some citations omitted).

Plaintiff also cites to Ivanov v. Farmers, 344 Or. 421 (2008), as supporting the conclusion that ORS § 746.230 supports tort claims under Oregon law. In Ivanov, the Oregon Supreme Court listed tort and contract claims brought by the plaintiffs, but specifically noted that "neither the parties nor the trial judge raised issues regarding the individual elements of the various legal claims set out in plaintiffs' complaint. The parties have similarly ignored those matters on review." Id. at 425 n.2. Instead, the sole issue on which the defendant had moved for summary judgment was an issue of law under ORS § 742.524(1)(a), arguing that the plaintiffs were required to prove the medical reasonableness and necessity of their individual claims. Id. at 426-27. The Oregon Supreme Court disagreed, finding that the insurance company's argument was based on a faulty reading of ORS § 742.524(1)(a), that the plaintiffs' did not have the initial burden of demonstrating medical necessity but instead the insurance company had the initial burden of establishing that the denials were reasonable, and that the gravaman of the plaintiffs' complaint was that the insurance company employed unreasonable complaint review practices

and thus the insurance company "needed to establish that the procedures it employed to deny plaintiffs' claims satisfied its statutory and common-law duties and did not violate the prohibition set out in ORS 746.230(1)(d)." Id. at 429-31.

The court in Ivanov did not discuss negligence per se, Shahtout, Georgetown Realty, or any of the arguments raised in this case. Plaintiff argues, however, that if tort claims are not viable against the insurer, then it would be superfluous for the Oregon Supreme Court to reference both contractual and common-law duties in Ivanov. Plaintiff further argues that the fact that the Supreme Court reinstated all of the plaintiffs' claims in Ivanov, including the bad faith tort claim, shows the viability of such claims under Oregon law.

The Court does not believe that the Oregon appellate courts have definitively spoken on the issue of whether ORS § 746.230 can provide the statutory duty of care necessary under Shahtout to support a negligence per se claim or under Georgetown Realty to provide the independent standard of care separate from the insurance contract to support a tort claim. Federal courts considering Oregon law have split on these issues.[6] Accordingly, the Court asked the parties whether the Court should certify these questions to the Oregon Supreme Court. Although the parties have not agreed on much during the highly contested litigation of this matter, they both strongly urged the Court not to certify any questions to the Oregon Supreme Court. Each party argues that its position is the only reasonable interpretation of Oregon law. Because both parties agree that the Court should not certify any questions to the Oregon Supreme Court, the Court will respect that agreement and will not do so.

[6] Indeed, this Court has adopted Findings and Recommendations from two different Magistrate Judges, each concluding differently with respect to the viability of a negligence per se claim under similar circumstances. See Clinicient, 2017 WL 991295; Vail, 2015 WL 2207952.

The Court is thus required to decide what the Oregon Supreme Court would decide on the questions at issue if presented before that court. Oregon courts have repeatedly held that an insured may not bring a tort claim against its insurer except under narrow circumstances, which are not present in this case. Although the Court does not agree with the parties that Oregon law is clear on these issues, the Oregon Supreme Court has not been expansive in providing tort remedies to first party insureds and has repeatedly focused on contract remedies as providing the appropriate claim. Allowing a negligence per se claim for alleged violations of ORS § 746.230 is not materially different from allowing a direct statutory tort claim, which is expressly precluded. Thus, it would be an expansion of Oregon law. Without better guidance from the Oregon appellate courts, the Court declines to expand tort remedies against insurers as Plaintiff requests in this case. The comment in Ivanov regarding common-law and statutory duties is not sufficient, particularly in a case that did not directly address the elements of a tort claim against an insurer, negligence per se claims, or claims under ORS § 746.230, to overcome the decades of Oregon case law limiting first party tort claims against insurers.

Moreover, as explained by the Ninth Circuit in an unpublished decision,

> Oregon's highest and intermediate courts, however, have allowed a negligence per se claim only where a 'negligence claim otherwise exists.' Deckard v. Bunch, 358 Or. 754, 370 P.3d 478, 483. n.6 (2016). Because the Insureds cannot bring a negligence claim under a statutory or common law theory, they are also precluded from bringing a hybrid negligence per se claim.

Braun-Salinas, 665 F. App'x at 577-78; see also Abraham v. T. Henry Const., Inc., 350 Or. 29, 36 n.5 (2011) ("As the Court of Appeals correctly noted, however, negligence per se is not a separate claim for relief, but is simply shorthand for a negligence claim in which the standard of care is expressed by a statute or rule."). In this case, Plaintiff cannot bring a traditional negligence claim against her insurer. Thus, Plaintiff may not bring a claim of negligence per se.

Although the Court acknowledges that it adopted the F&R in Clinicient and recognizes that there may be some common law merit to Plaintiff's arguments, this federal court is tasked with evaluating what it believes the Oregon Supreme Court would most likely decide. After considering the body of Oregon case law, the Court does not believe Oregon would allow an insured to bring a negligence per se claim against its insurer for an alleged violation of ORS § 746.230 under the facts of this case. Thus, Defendant's motion to dismiss this claim is granted and Plaintiff's motion to amend is denied.

CONCLUSION

Defendant's partial motion to dismiss (ECF 345) is GRANTED. Plaintiff's Second and Fourth Claims for Relief are dismissed. Plaintiff's motion to amend (ECF 347) is DENIED.

IT IS SO ORDERED.

DATED this 26th day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge