IN THE SUPREME COURT OF THE STATE OF OREGON

GERALD L. ROWLETT, an individual; WESTLAKE DEVELOPMENT COMPANY, INC., an Oregon corporation; and WESTLAKE DEVELOPMENT GROUP, LLC, an Oregon limited liability company, Plaintiffs-Appellants, Respondents on Review, v. DAVID G. FAGAN, an Oregon resident; JAMES M. FINN, an Oregon resident; and SCHWABE WILLIAMSON & WYATT, PC, an Oregon professional corporation, Defendants-Respondents Petitioners on Review.	Multnomah County Circuit Court Case No. 090101006 Court of Appeals No. A146351 Supreme Court No. S062451

BRIEF ON THE MERITS OF *AMICUS CURIAE* PROFESSIONAL LIABILITY FUND

Date of Opinion: May 14, 2014
Author: Judge Nakamoto
Affirmed in part and reversed and remanded in part.
Judge P.J. Armstrong, concurring

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I. Interest of Amicus

The PLF is a non-profit corporation that provides primary malpractice coverage for most Oregon lawyers. In 1977, the Oregon Legislature authorized the Oregon State Bar to require all active lawyers in private practice whose primary office is in Oregon to carry professional liability insurance. ORS 9.080(2)(a). The statute also authorized the creation of a professional liability fund, to pay

> "all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible."

The Board of Governors created the PLF in 1978. In 2012, approximately 7,700 attorneys participated in the fund. The standard primary plan provides $300,000 in coverage, with an additional $50,000 allowance to defend claims. The PLF also provides optional excess coverage on an underwritten basis to Oregon law firms.

The PLF has an interest in this litigation because it must maintain a predictable cost for PLF coverage despite the volatility of legal malpractice claims. The purpose of the PLF is ensure affordable malpractice insurance coverage for Oregon lawyers and thereby protect the interests of public.

II. Questions Presented on Review

First Question Presented on Review

Should an attorney be liable to a client for failing to assert a legally invalid claim?

First Proposed Rule of Law

An attorney cannot be liable to a client for failing to assert a legally invalid claim.

Second Question Presented on Review

Does Oregon recognize a claim for lost settlement opportunity based on a failure to raise a colorable claim, without pleading and proof of a concrete settlement opportunity in an ascertainable amount?

Second Proposed Rule of Law:

Oregon does not recognize a claim for lost settlement opportunity based on a failure to raise a colorable claim, without pleading and proof of a concrete settlement opportunity in an ascertainable amount.

III. Nature of Case/Statement of Facts

1. Nature Of Case

This is a legal malpractice claim. Plaintiffs (collectively, "Rowlett") asserted claims for negligence, breach of fiduciary duty and negligent misrepresentation. The jury found in favor of the defendant attorneys (collectively, "Schwabe") on the breach of fiduciary duty and negligent

misrepresentation claims. The jury also found that Schwabe breached the standard of care in some respect, but the breach did not cause Rowlett harm. The Court of Appeals reversed the jury's verdict.

2. Facts

The Court of Appeals recited the facts in the light most favorable to Rowlett, an error addressed in Schwabe's brief on the merits. For the purpose of this brief, however, the relevant facts are undisputed.

A. Underlying Facts.

Schwabe represented Rowlett in a dispute against his co-members of an LLC (the "underlying litigation"). In 2002, Rowlett filed a complaint that included a claim for breach of fiduciary duty but not for oppression. The court dismissed the complaint for failure to prosecute, which Rowlett appealed. In 2007, Rowlett filed a new complaint that now included a claim for oppression. The defendants moved to dismiss the oppression claim as not permitted by the LLC Act. Judge Marilyn Litzenberger denied the motion. Sometime later, the parties settled for $200,000.

Rowlett then brought this action against Schwabe, alleging negligence, negligent misrepresentation and breach of fiduciary duty. There were over 25 specifications of negligence, two of which alleged that Schwabe failed "to allege plaintiffs' squeeze out/oppression claims in a timely manner." Rowlett's purported damages were the difference between the $200,000 settlement and the

value of the oppression claim assuming a judgment in Rowlett's favor. Significantly, it was not for the "settlement value" of the earlier oppression claim.

Before trial, Schwabe moved for judgment on the pleadings on the "oppression" specification of negligence on the ground that, *inter alia*, the LLC Act did not authorize the claim. Rowlett responded that Schwabe was "judicially estopped" from making this argument based on positions taken in the underlying litigation. Rowlett also argued that Oregon recognizes an oppression claim.

Judge Henry Kantor granted Schwabe's motion regarding the oppression specification of negligence, and the parties tried the remaining claims and specifications of negligence. The jury found that Schwabe did not breach any fiduciary duties and did not make any negligent misrepresentations. The jury did find that Schwabe breached the standard of care in some manner, but it also found that the breach did not cause Rowlett harm.

B. The Court of Appeals' Decisions.

The Court of Appeals reversed the jury's verdict. *Rowlett v. Fagan, et al*, 262 Or App 667, ___P3d ____ (2014). Writing for the majority, Judge Nakamoto considered the evidence in the light most favorable to Rowlett, the trial court loser, including the evidence on causation, which the court concluded was "not truly in dispute." *Id*. at 670, 694. The court then held that the trial court should

not have dismissed the oppression specification of negligence.[1] The court rejected what both parties had assumed – that "plaintiffs had to establish with certainty that an oppression claim would have been viable" – because that standard in the court's view is "not the applicable standard on a motion for judgment on the pleadings." 262 Or App at 681.

The court made clear, however, that even if Schwabe had moved for summary judgment, Rowlett could have defeated the motion with an affidavit from an "expert" on the law. *Id.* at 681-82. The court reasoned that, even if an oppression claim "is not valid, defendants still could have breached their duty of care by failing to assert a colorable claim of oppression earlier in the * * * litigation," because it might have garnered a higher settlement than what Rowlett ultimately received. *Id.* at 682.

The court then ruled that an oppression claim would have been "colorable," because Schwabe had asserted it on Rowlett's behalf in the underlying litigation, Schwabe was subject to ORCP 17, and Judge Litzenberger had denied a motion to dismiss that claim. *Id.* The court also examined various legal sources and decided that an oppression claim "had some teeth." *Id.* at 686. But, rather than simply decide the legal question before it, the court held that, irrespective of its legal merit, "an assertion of a colorable claim could have altered the outcome for

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[1] The court also reversed the jury's finding on causation on the ground that the verdict form misled the jury on a question that it never reached. *Id.* at 688-694.

[the client] by giving him increased leverage to secure a settlement on much more favorable terms than what he obtained in 2007." *Id.* The court stated again that this lost settlement theory could be proven by expert testimony, specifically noting that Rowlett had "proof in the form of testimony from ***[his] expert * * * that had the oppression claim been asserted as early as in 2003, the Sunrise opponents would have immediately attempted to settle." *Id.* at 686 n 4.

In a concurring opinion, Judge Armstrong expressed concern over Judge Nakamoto's opinion. He first noted that Rowlett did not advance a "colorable claim/lost settlement" theory before the trial court or the Court of Appeals. *Id.* at 699-700. Judge Armstrong accused the majority of "the sort of creative reimagining that we normally do not countenance" and observed that there "is no authority for the proposition that * * * we can *reverse* the trial court on grounds not argued to it. Much less is there any authority that we can reverse on grounds not argued to *us*." *Id.* at 700 (emphasis in original) (quoting *State v. Branstetter*, 181 Or App 57, 62 n 3, 45 P3d 137 (2002)). Judge Armstrong also was troubled by the "unsettling proposition that a party may be held liable for malpractice for failing to assert a claim that is not, in fact, cognizable." *Id.* He ultimately concluded, however, that an oppression claim by an LLC member is permissible under Oregon law. *Id.* at 700-701.

IV. Summary of Argument

The PLF filed a substantial memorandum in support of Schwabe's petition for review. Rather than reproduce that petition here, the PLF will summarize its prior arguments below, and focus on several arguments raised by Rowlett in his opposition to the PLF's petition for review (the "Opposition").

First, it is too late for Rowlett to adopt the Court of Appeals' theory as his own. The Court of Appeals should not have gone beyond the parties' arguments in order to reverse a jury verdict based on an unpreserved argument, and it should not have created a new claim for Rowlett to press on retrial, *i.e.*, that Schwabe's failure to raise a "colorable" claim led to a lost settlement opportunity.

Second, Rowlett argues that Schwabe is precluded from contesting the legal validity of the oppression claim that it purportedly failed to "timely" assert. This is plainly wrong. Schwabe was not a party in the underlying litigation. A plaintiff who sues an attorney based on the handling of litigation always must prove the validity of the underlying claim. A contrary rule would radically reshape the law of legal malpractice and would be particularly unfair to attorneys who represent plaintiffs.

Finally, Rowlett argues that Oregon law supports the "lost settlement opportunity" claim created by the Court of Appeals. It does not. The theory as presented by the Court of Appeals is directly contrary to Oregon law. It is a species of a "lost chance" claim that, as this Court recently held, has no place in

legal malpractice litigation. It makes the "case-within-the-case" methodology a dead letter in cases arising out of litigation because every plaintiff who cannot prove the existence of a valid claim now can argue that the invalid claim might have provided "leverage." Moreover, it is incredibly speculative, particularly given the Court of Appeals' repeated statement that it can be based on expert testimony. And it is bad policy. While the Court of Appeals' novel theory benefits Rowlett, it is bad for the civil justice system, and does not provide a principled reason to award damages against an attorney.

V. Argument

1. The Court of Appeals Should Not have Reversed a Jury Verdict Based on an Unpreserved Issue Not Even Raised on Appeal.

The Court of Appeals erred when it "creatively" reframed Rowlett's arguments to fit a theory of recovery not presented to it or the trial court. In the trial court, the parties focused on whether the LLC Act recognizes an oppression claim. Rowlett also argued that Schwabe was "judicially estopped" from contesting the validity of the oppression claim. Rowlett never argued that the legal validity of the oppression claim was irrelevant because the law only requires the claim to be "colorable" enough to result in a settlement.

The Court of Appeals took it upon itself to challenge a proposition that was undisputed between the parties, ruling that, even if an LLC oppression claim "is not valid, defendants still could have breached their duty of care by failing to

assert a colorable claim of oppression earlier in the * * * litigation" and that "an assertion of a colorable claim could have altered the outcome for [plaintiff] by giving him increased leverage to secure a settlement on much more favorable terms than what he obtained in 2007." 262 Or App at 682, 686.

Had the client made this argument on appeal, the Court of Appeals could not have considered it because it was not preserved. *See State v. Wyatt*, 331 Or 335, 346-47, 15 P3d 22, 29 (2000) (Court of Appeals may not address unpreserved arguments). This is both a preservation issue and one of judicial overreach –as Judge Armstrong observed, Rowlett did not make this argument in the trial court or on appeal. Rowlett has had multiple opportunities to respond to Judge Armstrong's charge of "creative reimagining," but has yet to point to some place in the record where it pressed this theory below.

This Court observed in *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988) that "it is important to efficient judicial procedures that the positions of the parties be clearly presented to the initial tribunal and on appeal" and that an "equally important justification for requiring preservation of claims of error, consistent with the directive to administer justice 'completely,' Or. Const. Art. I, § 10, is fairness to the adversary parties * * * ." 307 Or at 188. Reversing a jury verdict based on a theory of liability not argued to the trial court or the appellate court is not indicative of "fairness" and is not "consistent with the directive to administer justice completely." *Id.*

This Court should reverse the Court of Appeals on this ground alone, and simply decide the issue put before it by the parties: whether Oregon law recognizes a claim for oppression between LLC members.[2]

2. Summary of Positions on Standard of Care and Causation.

As noted, the PLF already filed a brief in this Court that identifies the many ways the Court of Appeals erred. Rather than repeat those arguments in full, the PLF summarizes them below as context for responding to Rowlett's Opposition.

A. An Attorney's Duty in the Face of Uncertainty is to Exercise Reasoned Judgment, not Assert All Colorable Claims.

Clients who alleges malpractice in litigation must prove that they lost "a valid cause of action or defense which, had it not been for the attorney's alleged negligence, would have brought about a judgment favorable to the client in the original action." *Harding v. Bell*, 265 Or 202, 205, 508 P2d 216 (1973); *see also Milton v. Hare*, 130 Or 590, 280 P 511 (1929) ("Unless [the client] had a good cause of action against [her opponent], whom she accuses of having cheated and defrauded her, she has no cause of action against [the client's attorney.").

The "valid claim" requirement has been the law in Oregon for almost a century. For that entire period, no court has suggested that an attorney's duty to a

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[2] The PLF takes no position on whether Oregon recognizes an oppression claim between LLC members or whether inclusion of this specification of negligence would have made a difference. If the Court rejects the Court of Appeals' decision on preservation grounds, the PLF requests the Court make clear that the majority's opinion has no precedential value. The opinion sets a dangerous precedent on issues not before the court and not briefed by any party.

client includes taking "colorable" but ultimately incorrect legal positions. There are frequently scores of "colorable" positions that an attorney could assert given the circumstances and complexities of civil litigation, particularly business litigation. But attorneys should not have a duty to raise every colorable argument that passes ORCP 17's forgiving standards, unless the standard of care in Oregon requires an unlimited budget and scorched earth litigation. Indeed, if a particular position is "colorable" because a legal issue is unsettled, then the opposite position also is "colorable." The "colorability" standard is unworkable and the word has no place in legal malpractice litigation.

Whatever "colorable" means, its use as a standard to define an attorney's duty to a client has no support in the law of this Court, and it is unfair to litigation attorneys whose work is particularly susceptible to hindsight bias. Litigation attorneys are unlike other professionals because in every case that goes to trial, one client will suffer an adverse outcome. If "colorability" were the standard, then a losing party only would have to identify a difference of opinion on trial strategy to prove a breach of the standard of care.

For this reason it is "universally recognized" that attorneys are not liable for tactical errors involving unsettled legal propositions, a doctrine that "has developed concurrently with the concept of legal malpractice." Ronald E. Mallen & Jeffrey M. Smith, with Allison D. Rhodes, *Legal Malpractice*, vol. 2 § 19:1 (2014 ed) (hereinafter, "*Legal Malpractice*"); *see also, e.g., Halvorsen v.*

Ferguson, 46 Wash App 708, 735 P2d 675 (1986) ("In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice. * * * This rule has found virtually universal acceptance when the error involves uncertain, unsettled, or debatable proposition of law.").

Although the Court has not written on this subject, it has examined a similar issue when evaluating whether an attorney has rendered inadequate assistance of counsel under Article I, section 11, of the Oregon Constitution. In such cases, the court examines whether the attorney failed to exercise "reasonable professional skill and judgment," and if not, whether the failure "had a tendency to affect the result of his trial." *See Montez v. Czerniak*, 355 Or 1, 7, 322 P3d 487, *opinion adhered to as modified on reconsideration*, 355 Or 598, 330 P3d 595 (2014) (internal citations omitted). A court must "make every effort to evaluate a lawyer's conduct from the lawyer's perspective at the time, without the distorting effects of hindsight" and not "second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment" because "seldom does a lawyer walk away from a trial without thinking of something that might have been done differently or that he would have preferred to have avoided." *Id.*

Oregon's treatment of inadequate assistance of counsel claims reflects an understanding that the practice of law is particularly susceptible to hindsight bias because litigation is designed to produce a winner and a loser. The same concerns

should apply to legal malpractice claims. It is unrealistic and dangerous to the profession to analyze the standard of care with reference to the "colorability" of a particular position not taken, irrespective of the actual validity of that position or the state of the law at the time. An attorney should not have a duty to raise an invalid claim simply because it is "colorable" to an expert on the law.

This Court should reject the Court of Appeals' "colorability" standard.

B. In a Legal Malpractice Claim Arising Out of Litigation, the Client Must Prove the Legal Validity of the Underlying Claim.

The "colorability" standard also impacts causation. In the trial court, the parties tried the "case-within-the-case," *i.e.*, whether Schwabe's purported malpractice forced plaintiff to settle for some amount less the actual value of his claim assuming no malpractice. This makes sense. As noted, it has been established for almost a century that, when an attorney is accused of malpractice in conducting litigation, the client must prove the existence of a valid claim. *See, e.g.*, *Harding*, 265 Or at 205.

It is also established that any question about the legal validity of a claim is decided by the court as a matter of law. *Chocktoot v. Smith*, 280 Or 567, 573, 571 P2d 1255 (1977). The role of the malpractice court is not to predict what a particular judge would have ruled but, rather, to decide what the law actually is. *Id.* at 72 (The legal consequences of an attorney's failure, in the earlier case, to

present a timely pleading or motion or to take an appeal are matters for argument, not proof.").

The Court of Appeals strayed from – nay, rejected – this established construct when it held that Rowlett did not need to prove the validity of his oppression claim in order to recover from Schwabe, because a "colorable" claim would have increased the chance of a better settlement. This creates an exception to the case-within-the-case framework that swallows the rule. In every case where a plaintiff cannot prove the validity of a claim, that plaintiff now can present an expert to opine that the claim was colorable enough to cause the plaintiff to lose the chance of a better outcome through settlement. This Court recently rejected a similar attempt to reduce a plaintiff's burden in legal malpractice claims based on a "lost chance" theory, however. *Drollinger v. Mallon*, 350 Or 652, 668, 260 P3d 482 (2011).

In *Drollinger*, the question was whether a convicted felon could state a claim against his post-conviction attorney without having been exonerated for the crime. 350 Or at 667. After holding that the client did not need to prove exoneration in that context, this Court rejected the client's alternative argument, *i.e.*, that it was enough to prove that the attorney's purported malpractice caused the felon to lose the "opportunity" to obtain relief.

> There has been some suggestion, in the course of the argument of this case, that plaintiff is simply alleging that defendants' negligence caused him to lose his only *opportunity* to obtain

> relief from his conviction, and that such a pleading should be legally sufficient. If such a pleading *were* sufficient, then plaintiff would be relieved from the onerous burden of showing that he would have prevailed in the post-conviction proceeding and, then, in any subsequent proceeding in the underlying criminal case, under the "case within a case" methodology that is typically used to prove legal malpractice in a litigation context. * * * However, such a pleading is not legally sufficient in Oregon. * * * In our view, the loss of chance doctrine should not be imported into the legal malpractice context. Whatever the merits in the medical malpractice context, where the proof burden facing some plaintiffs otherwise would be insurmountable and where statistical evidence that can fill the void is readily available, the argument for its application in the legal malpractice context is less compelling, where it would simply reduce the plaintiff's burden *vis-à-vis* the traditional "case within a case" methodology.

Id. at 668.

So, too, here. There is no compelling reason to reduce a plaintiff's burden in legal malpractice claims, particularly when at issue is the easily-proven legal validity of the underlying claim. This Court should reject the Court of Appeals' "colorability" standard for proving causation in a malpractice claim.

3. The Court Should Reject Rowlett's "Preclusion" and Related Policy Arguments.

In the trial court, Rowlett argued that Schwabe should be "judicially estopped" from contesting the validity of his oppression claim because Schwabe had asserted an oppression claim on Rowlett's behalf in the underlying litigation. Although Rowlett abandoned this argument on appeal, a variation appears in his Opposition. Rowlett now invokes the "law of the case" doctrine to make a similar

point, *i.e.*, that the "validity of [the oppression] claim had been decided long before he filed his malpractice complaint," by Judge Litzenberger in the underlying litigation. (Opp, 1.)

Rowlett uses that argument as a springboard for a broader point about legal malpractice claims generally – that it is "unseemly" to require clients to prove the validity of a claim that the attorney asserted in litigation on the client's behalf. Rowlett argues: "[T]o lighten [Rowlett's] pockets and sign papers certifying the claim's validity under ORCP 17C(1), then do a '180' and insist the claim they took his money to prosecute did not actually exist is not just unseemly; it is the type of maneuver that heightens the public's distrust of the legal profession." (Opp, 7.)

Judge Nakamoto made a similar point. Possibly referring to the "judicial estoppel" argument that Rowlett had abandoned, the majority ruled that Rowlett did not need to prove the legal validity of oppression claim because Schwabe had "certified, pursuant to ORCP 17 C(1), that the [oppression] claim was 'warranted by existing law or by a nonfrivolous argument for the extension * * * of existing law or the establishment of new law.'" 262 Or App at 683 (quoting ORCP 17C(3)).

This Court should reject these arguments.

A. Litigators Are not Precluded from Defending Themselves in Malpractice Claims Against their Former Clients.

Rowlett and the Court of Appeals appear to be making a preclusion argument of some sort. A fundamental element of any preclusion doctrine, however, is an identity of parties. *Nelson v. Emerald People's Utility. Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993). If the source of their argument is "judicial estoppel," that doctrine allows a court to preclude "a party from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding." *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609, 892 P2d 683 (1995) (emphasis added).

Schwabe was not a party in the underlying litigation. Schwabe did not assert any claims, no claims were asserted against it, and it was not represented by counsel. Schwabe did not – and could not – appear as attorneys on its own behalf. Attorneys have ethical duties to represent only the interests of their clients. *E.g.*, *Reynolds v. Schrock*, 341 Or 338, 350, 142 P3d 1062 (2006) (noting, "lawyers cannot serve their clients adequately when their own self-interest * * * pulls in the opposite direction"). Rowlett, in fact, asserted a breach of fiduciary duty claim against Schwabe based on a purported conflict of interest, and the jury rejected it. There are no grounds upon which to consider Schwabe akin to a party in the underlying litigation.

Rowlett's estoppel and preclusion arguments also are incompatible with the case-within-the-case paradigm. If accepted by this Court, they would excuse a plaintiff from proving causation in most cases arising out of litigation, because attorneys must present their clients' cases in their most favorable light. The rule would be particularly unfair to plaintiff's attorneys, who can expect that the complaints that they draft and certify will be used to establish the validity of a claim if they are later sued for malpractice.

This Court should reject Rowlett's preclusion and estoppel arguments.

B. The "Law of the Case" Does not Bind a Litigator Who Is Sued for Conduct in Litigation.

The "law of the case" doctrine is also irrelevant. This Court recently observed the "term 'law of the case' is best reserved for use in the context in which a party seeks to relitigate an appellate decision." *Kennedy v. Wheeler*, 356 Or 518, 531, ___ P3d ____ (2014). This is not how Rowlett uses the phrase. Rowlett wants this Court to conclude that Judge Litzenberger's ruling denying the motion to dismiss in the underlying litigation establishes the law of <u>this</u> case. If Judge Litzenberger's ruling did not even bind Judge Litzenberger (and it did not – she was entitled to changed her mind), how could it bind this Court? *Id.* at 526 ("A [trial] court is not barred from changing a ruling which it believes to be erroneous if neither party has been prejudiced beyond simply ending up on the

losing side of the ruling.") (quoting *State ex rel Harmon v. Blanding*, 292 Or 752, 756, 644 P2d 1082 (1982)).

It is possible that Rowlett was imprecise in his terminology. What he may have meant by "law of the case" is that Judge Litzenberger's ruling is a "fact" that establishes what would have occurred if Schwabe had asserted an oppression claim earlier in the litigation. But if Schwabe had asserted an oppression claim earlier, a different judge – or even Judge Litzenberger herself – might have found it invalid. This is why courts do not guess how other courts would have ruled on unsettled legal issues – they simply make legal rulings. As stated by Justice Linde:

> "The object in the [malpractice trial] is not to reconstruct what Judge Sisemore would actually have done, or what the judges of the Court of Appeals would actually have done on appeal. Rather, with respect to an issue of law in the earlier case, the issue in the malpractice case is what the outcome *should* have been if the issue had been properly presented, under the law as it was at the time or could have been convincingly argued to be."

Chocktoot, 280 Or at 573.

The "law of the case" – and Judge Litzenberger's 2007 ruling – has no bearing on any issue before the court.

C. Certifying Pleadings Under ORCP 17 in Underlying Litigation does Not Preclude an Attorney From Challenging the Validity of a Claim in Subsequent Malpractice Litigation.

Finally there is ORCP 17, which requires an attorney to certify that a position taken in litigation is "supported by evidence" or is "warranted by existing

law or a nonfrivolous argument for the extension" of existing law. Nothing in ORCP 17, or any case law interpreting it, states that by certifying that an argument is "nonfrivolous," the attorney is precluded from contesting how a court or jury would have decided a "certified" allegation when the attorney's interests are at stake vis-à-vis the client.

ORCP 17 does not turn pleadings into insurance contracts between attorneys and their clients. By certifying a pleading, an attorney is not guaranteeing a particular result. Schwabe must not have guaranteed a particular result in this case, otherwise Rowlett would have sued for breach of contract. *See Allen v. Lawrence*, 137 Or App 181, 903 P2d 919 (1995) (attorneys promise to obtain a particular result gives rise to breach of contract claim).

Thus Rowlett's claim that it is "unseemly" that Schwabe would "lighten [Rowlett's] pockets * * * then do a '180' and insist the claim they took his money to prosecute did not actually exist" is disingenuous. Legal and factual allegations are not "established" simply because they are certified as "nonfrivolous" under ORCP 17. Some claims are stronger than others. This is why causation is a key issue in every malpractice case. If Rowlett's view of ORCP 17 is correct, then the best result a client with a weak but "nonfrivolous" claim could hope for is legal malpractice. That client then could settle their claim, point to the pleading as proof of the claim's "colorability," and then hire another attorney to opine on the claim's settlement value. If this truly is a permissible theory of recovery,

attorneys will be less likely to take difficult cases or to settle them. So while the Court of Appeals' decision undoubtedly benefits Rowlett, it does not benefit the public or the profession.

The Court should reject the idea that certifying a pleading under ORCP 17 in the underlying litigation binds an attorney in subsequent malpractice litigation.

4. This Court Should Reject the "Lost Settlement Opportunity" Claim Created by the Court of Appeals.

In his Opposition, Rowlett dismisses the PLF's concerns about the "lost settlement opportunity" as a "linguistic trick." It is not. The PLF is not the first to point out the problems with claims of this sort, which do not depend on a valid underlying claim or an actual settlement opportunity. Such claims are also contrary to Oregon law, speculative, and place an unfair standard on attorneys that could impact the civil justice system itself.

A. Existing Oregon Law Does not Support this Claim.

The Court of Appeals' version of a "lost settlement opportunity" claim reduces a plaintiff's burden in every malpractice claim arising out of litigation. A claimant who cannot prove that they lost a legally valid claim now can hire a legal expert to opine that the claim was colorable enough to result in a settlement. This is little more than a variation on the "lost chance" theory of causation that is sometimes seen in medical malpractice litigation. That is, Rowlett now wishes to

prove that the earlier pleading of an oppression claim would have increased the chance of a more favorable settlement.

But as this Court has held already, "lost chance" theories have no place in legal malpractice litigation because the actual value a claim can be determined easily by briefing the legal issues and trying the facts. *Drollinger*, 350 Or at 668-69. There is no need to speculate about the "chance" of a settlement. *Id; see also Rivers v. Moore, Myers & Garland, LLC*, 2010 WY 102, ¶ 29, 236 P3d 284 (Wy 2010) ("There is simply no comparable ground motivating the adoption of loss of a chance in legal malpractice."); *Daugert v. Pappas*, 104 Wash2d 254, 262, 704 P2d 600 (1985) ("Thus, clearly the loss of chance analysis * * * is inapplicable in a legal malpractice case."); *Campbell v. Magana*, 184 Cal App2d 751, 754, 8 Cal Rptr 32 (Ct App 1960) (noting lost settlement claim "violates an established rule of this State (and most others) that one who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment * * *").

The Court of Appeals did not cite a single case that supports reducing a legal malpractice plaintiff's burden in this manner. In his Opposition, Rowlett for the first time cites *King v. Jones*, 258 Or 468, 483 P2d 815 (1971). Rowlett claims that this Court allowed the plaintiff in *King* to sue based on having received a "less favorable settlement" than she would have received due to

attorney error. (Opp, 6.) This is inaccurate. The question in *King* was whether the plaintiff could sue her attorneys after releasing the defendants in the underlying action. This Court ruled that she could. *Id.* at 474.

At no point in *King* did this Court discuss a lost settlement opportunity claim. The plaintiff, in fact, alleged that she lost the value of a "judgment," not a settlement. *Id.* at 469, 472. In allowing the claim to proceed, this Court specifically cited the "rule that plaintiff, in an action for malpractice against [her attorneys], must show that she had a good cause of action" that was lost due to the attorney's malpractice. *Id.* at 472. This Court did not excuse the requirement that the client prove a "valid claim" as a pre-requisite to recovery.

Oregon law, then, does not support the Court of Appeals' decision.

B. It is Bad Policy to Divorce the Merits of a Legal Malpractice Claim from the Merits of the Underlying Claim.

As a policy matter, this Court should be skeptical of a legal malpractice claim that is based not on the actual value of the underlying claim but, instead, on the nature of litigation, which permits aggressive attorneys to use the liberal pleading and discovery rules to extract settlements out of risk averse defendants. Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 Va. L. Rev. 955, 992 (1998) (observing that in "an expensive litigation system, a lawyer may maintain a weak position throughout pretrial to improve his own client's settlement position by putting an opponent to the

expense of litigating the issue--not because of a serious hope of convincing a jury on the merits"). It is one thing to accept these perverse incentives as a necessary byproduct of the "search for truth." It is quite another to award a plaintiff "damages" against an attorney simply because the plaintiff could have asserted an underlying claim that would have been expensive and risky for a defendant to litigate.

Excusing the "valid claim" requirement turns attorneys into insurers for their clients because even weak claims have theoretical "settlement value." As stated in one treatise:

> "Some litigants have urged that they should not be required to prove that they would have prevailed or succeeded, because their loss was of an *opportunity* to do so, which can be opined upon by "experts." Sometimes, this is coupled with the observation that "every" claim has some "settlement value," which should be the demonstrative loss. Of course, this argument would render attorneys liable as guarantors since there is usually some value to their clients' claims."

Legal Malpractice, vol. 4 § 37:15.

That is, every claim – even a nuisance claim – is potentially "worth" something, *e.g.*, some amount less than the cost of litigating the claim, or the purported damages multiplied by the risk of an adverse verdict. Litigants settle for various reasons, however, and every defendant's appetite for a "cost of defense" or nuisance value settlement is different and changes over time depending on factors wholly unrelated to the merits of the case or the issue being

litigated. No expert can calculate with any degree of certainty how a particular defendant might react to a "colorable" but ultimately invalid claim, much less a valid claim.

That a claim is "colorable" enough to extract a settlement – irrespective of its actual legal validity – is not a principled reason to lessen a plaintiff's burden of proof or penalize an attorney for conduct in litigation. *See Beatty v. Wood*, 204 F3d 713, 719 (7th Cir 2000) ("A legal malpractice cause of action is meant to provide a litigant with damages that he would have been entitled to under law had the case been properly handled. It is not a vehicle for compensating a litigant for the damages that could have been extracted by pursuit of a meritless case."); *Novich v. Husch & Eppenberger*, 24 SW3d 734, 736-37 (Mo Ct App 2000) (a "plaintiff must prove that his underlying claim would have been successful even if the malpractice action arises out of a settlement because even frivolous claims may have settlement value"); *Ins. Co. of the W. v. Haight Brown & Bonesteel LLP*, No. C037535, 2002 WL 31630879, at *9 (Cal Ct App Nov. 22, 2002) ("A party cannot ignore the merits of the underlying claim and defeat a motion for summary judgment by claiming lost settlement value as the sole measure of damages. * * * While lost settlement value might, in appropriate cases, be considered part of the measure of damages * * * it cannot stand alone and make viable an otherwise untenable malpractice claim.").

The "valid claim" requirement forces a plaintiff to prove no more than what the plaintiff would have had to prove in the underlying litigation. This is far from an insurmountable burden, particularly when at issue is the legal validity of a claim. And if a claim is not legally valid, then by definition a plaintiff who asserts this theory is stating that his or her attorney should have used the costs and risks of litigation to recover more through settlement than what the claim was worth. *Jones Motor Co. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F3d 1190, 1193 (7th Cir 1999) ("To impose malpractice liability for booting a nuisance suit would * * * simply encourage nuisance suits, of which we have enough already.").

There is no sound public policy reason for allowing a plaintiff to recover for malpractice that occurred in litigation without having to prove the legal validity of the underlying claim.

C. Lost Settlement Opportunity Claims Are too Speculative in the Absence of an Actual Settlement Offer.

The PLF is not asking this Court to reject all claims that are based on a "lost settlement opportunity." An attorney can commit malpractice in the handling of a settlement. An attorney might fail to communicate a settlement offer to a client, fail to comply with a client's instructions regarding settlement, or provide poor advice regarding settlement.

The claim created by the Court of Appeals is entirely different from those examples, however. It is a "lost settlement opportunity" claim without an actual settlement offer, that the Court of Appeals stated could be proven with expert testimony that a third party would have "immediately" settled had only a particular claim been alleged.[3] A lawyer/expert with such predictive powers truly would be a "super lawyer." But just as there is no superman, no lawyer can predict with any degree of certainty how the past would have unfolded if only "x" had happened. *Fuschetti v. Bierman*, 319 A2d 781 (NJ Super 1974) ("[N]o expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial."); *Thompson v. Halvonik*, 36 Cal App4th 657, 663-64 (1995) (rejecting lost settlement value claim as too speculative given "the myriad of variables that affect settlements").

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[3] The Court of Appeals repeatedly suggested that Rowlett could use expert testimony to prove its lost settlement claim. *Rowlett,* 262 Or App at 686 n.4. Rowlett does did not mention expert testimony in his Opposition. Rowlett contends instead that there was an "express concession by the opposing party" that they would have immediately settled if the original complaint had included an oppression claim. Rowlett cites only to the Court of Appeals' opinion for this statement. (Opp, 7.) The PLF understands that Schwabe disputes that there was either a "concession" or expert testimony on the likelihood of settlement had their been an oppression claim. The PLF takes no position on this dispute. The PLF's arguments concern the Court of Appeals' conclusion that a lost settlement opportunity claim can be pleaded or proven without a concrete settlement opportunity of an ascertainable amount.

Judgments should not be awarded against attorneys based on such speculative, crystal-ball gazing. *See Legal Malpractice*, § 33:37 ("Public policy concerns are manifest when a client complains, with the perfect wisdom of hindsight, that a settlement would have been a better result * * *. Usually the contention that the attorney should be liable for a missed settlement opportunity is speculative."). As the authors of *Legal Malpractice* have put it:

> Particularly troublesome and potentially omnipresent is the situation when, often after an unfavorable result, the client contends that the attorney should have settled the case though there had not been an acceptable offer or even any negotiations. Clients have claimed as damages the amount for which the case "should have been settled" and, sometimes, the "settlement value" of the case, not the amount received or paid. The typical claim is made with the benefit of hindsight that the attorney should have initiated or pursued and finalized settlement negotiations that never took place.

Id.

Courts from other jurisdictions have rejected such claims without an actual settlement offer on which to "hook" the claim. In an oft-cited opinion, the California Supreme Court rejected a legal malpractice claim based on the lost settlement value of a claim because it falls "in the category of speculation, conjecture and contingency. The basic rules concerning damages preclude recognition of this type of recovery." *Campbell*, 184 Cal App2d at 758.

In *Whiteaker v. State*, 382 NW2d 112, 116 (Iowa 1986), the Iowa Supreme Court also rejected a lost settlement opportunity claim when there was no "concrete settlement offer" from the underlying opposing party. The

Pennsylvania Supreme Court follows the same rule, noting in one case that "in order for one to prevail on a claim of legal malpractice, one must establish that the party against whom the initial claim was asserted, in this case the City, would have reached agreement upon a settlement in an ascertainable amount." *Rizzo v. Haines*, 555 A2d 58 (Pa 1989).

This Court similarly should reject the claim created by the Court of Appeals because it is too speculative. If a "lost settlement opportunity" claim exists, a plaintiff must plead and prove the existence of an actual settlement offer of some ascertainable amount. A claim that is based on expert testimony does not state a claim.

VI. Conclusion

The PLF requests that this Court reaffirm that a client cannot recover from an attorney for conduct in litigation without pleading and proving the existence of a valid claim. An attorney does not breach the standard of care by failing to assert an invalid claim, and an attorney cannot cause a client harm if an unasserted claim is legally invalid. While a "lost settlement opportunity" claim might exist under some circumstances, at a minimum it depends on pleading and proving the

existence of an actual, concrete settlement opportunity of an ascertainable amount.

Respectfully submitted this 16th day of January 2014.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,222.

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DATED the 16th day of January, 2015.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 16th day of January 2015, I filed the original BRIEF ON THE MERITS OF *AMICUS CURIAE* PROFESSIONAL LIABILITY FUND with the State Court Administrator by Electronic Filing.

I further certify that on the same date, I caused the foregoing be served upon the following counsel of record by electronic filing:

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