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: 090101006 Court of Appeals No.: A146351 Supreme Court No.: S062451

PETITIONERS' BRIEF ON THE MERITS

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

JANUARY 2015

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I. INTRODUCTION

Defendants represented Plaintiff in an action against Plaintiff's business partners in Sunrise, LLC ("Sunrise"), hereinafter referred to as "Sunrise litigation." Plaintiff settled that action in 2007 for $200,000, plus $59,309 in attorney fees, and then initiated this malpractice action against Defendants, hereinafter referred to as "malpractice action."

Plaintiff alleged he would have had a better outcome, but for the mishandling of his claims by attorneys David Fagan, James Finn, and Schwabe Williamson & Wyatt, PC ("Defendants"). He alleged ten claims. His negligence claim focused on the impact of Defendants' dilatory prosecution of his action. Plaintiff sought damages measured by the difference between the value of Plaintiff's Sunrise membership interest and the amount of the settlement. Evidence was presented concerning the value of Plaintiff's interest in 2003, 2005, and 2007. Defendants' evidence demonstrated the following values:

March 13, 2003	$30,169	*Tr. 1775/17-1723; ER-1.*
October 7, 2005	$108,274	*ER-2; Tr. 1794.*
December, 2007	$110,000 to $300,000	*ER-3-5.*

The jury rendered a defense verdict, finding Defendants were negligent, but the negligence did not cause Plaintiff any damage.

On appeal, Plaintiff asserted seven assignments of error, one related to the striking of two negligence allegations regarding Defendants' untimely

assertion of a so-called "oppression" claim, hereinafter referred to as "oppression allegations" (First Assignment of Error), and another related to the use of the 2007 "going concern" valuation date on the verdict form (Third Assignment of Error). The Appellate Court addressed the Third Assignment of Error first, concluding that the trial court erred in allowing the jury to consider a 2007 valuation date, because (in the Court's view) there was no evidence to support that date.

The Court then addressed the First Assignment of Error and reversed the trial court's ruling striking the oppression allegations. The trial court struck the oppression allegations after considering Defendants' argument that no such claim existed for LLCs and Plaintiff's argument that an equitable remedy for oppression existed for LLCs. The trial court concluded that it need not invoke its equitable jurisdiction to allow Plaintiff to maintain a negligence claim based on the alleged untimely filing of an oppression claim against the other Sunrise members, because a sufficient remedy existed in the underlying litigation under Plaintiff's breach of fiduciary duty claims against the other Sunrise members.

In overturning that ruling, the Appellate Court addressed neither the issue whether an oppression claim exists under LLC statute nor whether the trial court erred in declining to invoke its equitable jurisdiction. Instead, the majority chose to reinvent the issue, holding that failure to pursue a "colorable" oppression claim created an actionable basis for legal malpractice. Judge

Armstrong, concurring, accused the majority of "creatively reimagining" a new cause of action based on an attorney's failure to pursue a "colorable" claim – a theory that had neither been briefed nor argued by the parties. *Rowlett v. Fagan*, 262 Or App 667, 700, 327 P3d 1 (2014) (hereafter called "*Opinion.*").

The Court remanded for a new trial on Plaintiff's negligence claim.

II. QUESTIONS PRESENTED ON REVIEW

First Question Presented on Review

Did the Court of Appeals err by utilizing the wrong standard of review to overturn a jury verdict?

First Proposed Rule of Law

Yes. The prevailing party is entitled to have all evidence construed in the light most favorable to that party and the Court of Appeals may only overturn a jury verdict if there was no evidence on which the jury could have based their verdict.

Second Question Presented on Review

Where expert testimony and other evidence were properly admitted that an LLC membership interest could be valued as a going concern, did the trial court err by allowing the jury to consider that valuation date?

Second Proposed Rule of Law

No. Where there is properly admitted expert testimony and evidence to support a going concern valuation date, a jury may consider that date.

Third Question Presented on Review

Is a jury restricted to consider valuation dates for an LLC for only those dates when it had the highest value when there sufficient testimony and evidence that another date could be considered?

Third Proposed Rule of Law

No. Oregon law does not restrict a jury's consideration of the value of an LLC membership interest to only those dates at which the LLC had the highest value if there was sufficient evidence supporting another date.

Fourth Question Presented on Review

Can an unanswered question on a verdict form be the basis for a finding of instructional error?

Fourth Proposed Rule of Law

No. An unanswered question on a verdict form is not a basis for a finding of instructional error.

Fifth Question Presented on Review

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

Fifth Proposed Rule of Law

No. An attorney cannot be liable to a client for failing to assert a legally invalid claim.

Sixth 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?

Sixth Proposed Rule of Law

No. 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.

Seventh Question Presented on Review

Does the Oregon LLC statute provide an oppression claim for a minority member with an equitable buyout remedy?

Seventh Proposed Rule of Law

No. The Oregon LLC statute does not provide an oppression claim for a minority member with an equitable buyout remedy.

Eighth Question Presented on Review

Can a court decline to fashion an equitable buyout remedy for an oppression claim for an LLC member if there is an adequate remedy at law based on the same evidence and damages?

Eighth Proposed Rule of Law

Yes. A court can decline to fashion an equitable buyout remedy for an oppression claim for an LLC member if there is an adequate remedy at law based on the same evidence and damages.

Ninth Question Presented on Review

Does a court abuse its discretion to strike allegations in a complaint where the remaining allegations permit the same proof and request the same remedy?

Ninth Proposed Rule of Law

No. A court does not abuse its discretion to strike allegations in a complaint where the remaining allegations permit the same proof and request the same remedy.

III. NATURE OF ACTION AND FACTS MATERIAL TO REVIEW

A. Background Regarding Sunrise

In 2000, Gerald Rowlett, Tracey Baron, and Mike Pruett formed and became members and managers of Sunrise LLC. Sunrise hoped to develop three adjacent properties (the Rodney, Donley and Gilbert parcels), consisting of over 65 acres ("the Development"). Plaintiff invested a total of $25,000 in Sunrise. *Tr. 521; ER-6*. The properties required expensive monthly payments. *Tr. 522; Exh. 325, 327, 331*.

The three men had no meaningful development experience and lacked the means and skills to develop the parcels. *Tr. 1168-1169, 1191-1193; Exh. 505, 513*. Sunrise initially hoped to sell the undeveloped properties, but could not find a buyer. *Tr. 1151-1152; ER-1-2*. By February 2001, Pruett emailed stating "…The site is beginning to have warning signs all over it. It is looking more and more like an excellent way to lose our pants…." *ER-9.*

Because Sunrise was failing financially, it sought additional investors, including Bob Keys. *Exh. 309.* Defendants' evidence showed Plaintiff signed agreements to facilitate Keys investment.[1] *Tr. 668-669, 2038-2039; Exh. 591A.* Despite Keys' involvement and hundreds of thousands of dollars of other investors' money being expended, Sunrise defaulted on its land sale contract on the Gilbert parcel. *ER-10-12.* A foreclosure lawsuit was filed in December, 2002. *Tr. 991-995; Exh. 551.* The Gilbert property was essential to Sunrise. *Tr. 993.*

To avoid the foreclosure, Pruett, Baron, and Keys wanted to admit Randy Robinson, an experienced developer, as a member. *ER-13; Tr. 648-649, 795-798, 1137-1138.* Plaintiff vetoed Robinson's admission. *Tr. 648-649.* Sunrise, therefore, made a capital call on its members to raise money to avoid the foreclosure, but Rowlett declined to participate. *Exh. 106.* Sunrise's members believed Plaintiff's conduct was a breach of fiduciary duty. *Exh. 99; Tr. 797-799.* Rather than lose the project, Pruett and Baron voted in March, 2003 to remove Rowlett as a manager of Sunrise. *Exh. 98.* Rowlett retained his Sunrise membership interest. *Tr. 847-848.*

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[1] Rowlett asserts that his signature was "forged" on documents that facilitated adding Keys as a Sunrise member. *Opening Brief, 9-10.* However, since Defendant's testimony was that Rowlett admitted signing the documents, the jury must be assumed to have resolved that dispute in Defendants' favor. *Tr. 668-669, 2038-2039.*

Robinson thereafter invested in Sunrise, which prevented the foreclosure. *Exh. 553.* But for Robinson's investment, Sunrise would have failed in early 2003; all investor money would have been lost. *ER-13; Tr. 994-995, 1155.*

Because of Robinson's involvement, Phase I of the Sunnyside Road project, consisting of 88 building lots, was completed in 2005 and sold. Sunrise thereafter completed Phase II of the property by 2007. At the time Plaintiff's case settled, Sunrise was actively marketing and selling the Phase II building lots. *ER-14-24.*

B. Schwabe Involvement

Plaintiff hired Defendants to pursue claims on his behalf against the other Sunrise members. Attorney Fagan sued Keys, Baron, Pruett and Private Consulting Group in November 2002. *Exh. 14.* The Complaint was abated, and Rowlett's claims were then pursued in arbitration. *Exh. 15.* In May 2005, Fagan left Schwabe and Finn became primary counsel and filed an Amended Statement of Claim. *Exh. 16.* In 2007, Finn included an "oppression" claim in a newly filed action. *Ex. 17.* All pleadings included breach of fiduciary duty claims.

Settlement negotiations were ongoing throughout the litigation. *Exh. 589; Tr. 670, 1919.* Rowlett advised Defendants that he was satisfied to retain his Sunrise interest, rather than settle, because he believed that the value of his interest continued to increase as the property was developed. *ER-25-27.*

Rowlett accepted an Offer of Judgment on December 7, 2007 and received $200,000 and the right to petition for attorney fees ($59,309 were awarded). *Exh. 563.*

C. Legal Malpractice Trial

Plaintiff then sued Defendants for mishandling his claims, asserting that the 2007 settlement was less than what he would have received had his claims been properly pursued. During pre-trial ORCP 21 motions, the court struck two negligence specifications regarding Defendant Fagan's failure to timely assert an oppression claim against the other Sunrise members. The trial court did not believe the LLC statute was sufficiently broad to support an oppression claim seeking a buyout remedy, and further concluded there was a buyout remedy for Plaintiff in the underlying Sunrise litigation through the breach of fiduciary duty claims. Accordingly, the court did not invoke its equitable jurisdiction to create an oppression claim in the LLC context. *ER-37/21-39/2.*

In his Complaint and at trial, Plaintiff argued the value of Rowlett's interest in Sunrise should be calculated as of March 13, 2003 (when Rowlett was removed as a manager) or October 7, 2005 (after a distribution to other members and the alleged removal of Rowlett as a member of Sunrise). *Opening Brief, 14.* Defendants argued that, given the evidence that Sunrise was continuing to develop the property up to the time of settlement, 2007 was also an allowable date the jury could consider when valuing Rowlett's interest.

Defendants further presented evidence that regardless of whether Sunrise was valued in 2003, 2005 or 2007, the 2007 settlement amount exceeded or approximated the value of Rowlett's Sunrise interest.

The trial court properly instructed the jury on how to determine whether Plaintiff had suffered damages:

> In this case, a settlement of the underlying cases occurred. The fact that a client is dissatisfied with the settlement he received does not prove that the attorney was negligent or that the attorney caused damage to the client. Likewise, the fact that a client settles its lawsuit is not conclusive evidence that the attorney was not negligent, or that the amount of the settlement necessarily reflects the actual value of the client's claims. The client must prove that, but for the attorney's negligence, the client would not have accepted the settlement, and would have subsequently achieved a better outcome, either through a higher settlement or a trial.

Tr. 2317-2318. There was no objection to this instruction.

The verdict form asked the jury to answer whether (1) Defendants were negligent and (2) Defendants' negligence caused damage to Plaintiffs. *Verdict, Questions 1-6.* The jury found that the Defendants were negligent[2], but that the Defendants' negligence did not cause any damage to Plaintiff. *Id.*

Prior to the case being submitted to the jury, Plaintiff convinced the trial court to include a verdict form question identifying the valuation date used by the jury in the event the jury awarded damages. This was for the purpose of

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[2] Defendants disagreed with these allegations and put on evidence to the contrary at trial. However, because they prevailed on causation, Defendants did not appeal the finding that Schwabe's handling of the Sunrise litigation fell below the standard of care.

calculating prejudgment interest on any damages awarded. *Id*., *Question 10C; Tr. 2191.* This question was not answered by the jury because it awarded no damages. The jury found for Defendants on all other claims. *Id., Questions 11-28.*

D. Appellate Court Decision

The Appellate Court reversed the trial court's ruling striking two oppression negligence specifications. Although both parties' arguments related solely to whether a viable oppression claim seeking a buyout remedy exists for an LLC member, the Court instead, *sua sponte,* held failure to pursue a "colorable" claim constitutes negligence. The Court also reviewed the use of the 2007 valuation date under the "instructional error" standard and held that the inclusion of this date on the verdict form likely affected Plaintiff's rights because there was no evidence to support valuing Rowlett's interest on that date. The present petition for review followed.

IV. SUMMARY OF ARGUMENT

In the malpractice action, Defendants prevailed on all ten of Plaintiff's claims. Respecting the legal malpractice claim, the jury found Defendants negligent, but the negligence caused no damage to Plaintiff. Despite that defense verdict, the Appellate Court made a fundamental mistake, ignoring the evidence supporting the defense verdict and stating the facts in the light most favorable to Plaintiff.

At trial, Plaintiff claimed he was damaged because the settlement amount was less than the value of his interest in Sunrise. He asked the jury to calculate the value of his interest as of 2003 or 2005, the dates of the alleged wrongdoing by the other Sunrise members, and compare it to the settlement he received. Defendants produced evidence that Sunrise was an ongoing business when Rowlett settled in 2007 and expert testimony that it was appropriate to calculate Rowlett's interest in Sunrise as of that date. The trial court concluded there was evidence to allow the jury to consider Plaintiff's requested 2003 and 2005 valuation dates, as well as the value of Sunrise as a going concern in 2007.

Defendants' evidence regarding the value of Rowlett's interest in 2003, 2005 and 2007, demonstrated that the settlement amount exceeded or approximated the value of Plaintiff's membership interest regardless of the date used. The jury, in finding no damages due to the Defendants' negligence, necessarily accepted Defendants' evidence. Inexplicably, apparently misunderstanding the case altogether, the Appellate Court concluded "causation was not truly in dispute." *Opinion*, *694*.

Notwithstanding the foregoing, the Appellate Court unaccountably asserted there was no evidence to support the 2007 valuation. Then by ignoring Defendants' extensive evidence, the Court incorrectly found that including the 2007 valuation date in a jury verdict question that was never reached by the jury gave rise to "instructional error." The Court then concluded Defendants were

only able to argue the 2007 valuation date to the jury during closing argument because this date was on the verdict form, and the inclusion of the date thus was reversible error.

Had the Court employed the correct standard of review and interpreted Defendants' evidence regarding the 2007 valuation of Sunrise in the light most favorable to Defendants, it would have agreed with the trial court that evidence before the jury permitted consideration of the 2007 date, along with the 2003 and 2005 dates proposed by Plaintiff. Accepting Defendants' valuation evidence, it would have found the jury's "no causation" defense verdict had evidentiary support regardless of the valuation date used. It was not error at all, much less "instructional error," for the trial court to include the date on the verdict form and to allow Defendants to argue based on it.

Regarding the oppression claim issue, the Court elected to sidestep the issue briefed and argued by the parties – whether an oppression claim existed and whether the trial court was required to invoke its equitable jurisdiction to fashion a buyout remedy. Instead, the Court created, *sua sponte*, a new basis for attorney malpractice claims based on failure to prosecute a "colorable claim" to gain "leverage," regardless of whether the claim was legally viable.

Because the "colorable claim" theory was never argued to the trial court or the Appellate Court, it was not preserved and the Court should not have gratuitously created the theory. Additionally, the creation of a "colorable

claim" cause of action runs afoul of existing case law. *See Drollinger v. Mallon*, 350 Or 652, 668-69, 260 P2d 482 (2011)(Court held it was not sufficient for client to allege that attorney's purported malpractice caused the felon client to lose the "opportunity" to obtain relief.")

Because the majority's "colorable" claim theory does not withstand scrutiny, this Court should determine whether an oppression claim with an equitable buyout remedy exists for LLC members.

Alternatively, if this Court determines that an oppression claim does exist for an LLC member, this Court should determine whether the trial court abused its discretion when it declined to fashion an equitable remedy for an oppression claim. In light of Plaintiff's acknowledgment that the same evidence and arguments could be presented to support the identical measure of damages, this Court should find that the trial court did not abuse its discretion. Also, because Plaintiff put on all the same evidence and requested the same damages, he was not prejudiced by the trial court's decision to strike the two oppression allegations.

V. ARGUMENT

A. The Appellate Court failed to give proper deference to the jury's verdict.

The Appellate Court nullified the jury's verdict by construing the facts in the light most favorable to Plaintiff, ignoring facts favorable to Defendants, and placing far too much importance on the striking of two negligence allegations,

which did not impact the facts presented to the jury or the arguments made by Plaintiff.

In Oregon, a jury's verdict is given essentially conclusive weight, so long as there is properly admitted evidence to support it. Article VII (Amended), section 3 of the Oregon Constitution states:

> In actions at law … the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there was no evidence to support the verdict …

"The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate." ORCP 50. The Appellate Court's review is limited to the scope of review provided in the Constitution. ORS 19.415(1). "No judgment shall be reversed or modified except for error substantially affecting the rights of a party." ORS 19.415(2).

The Appellate Court ignored Defendants' evidence and assumed evidence and allegations favorable to Plaintiff, which are not supported by the record, in order to overturn the defense verdict. In so doing, the Court applied the incorrect standard of review to advocate for a desired result for Plaintiff. The Court went so far as to create, *sua sponte*, a previously unrecognized basis for legal malpractice – failure to allege a "colorable" claim.

The Court ignored the legal principles that favor jury's verdict. *See, e.g., Purdy v. Deere & Co.*, 355 Or 204, 234-35, 324 P3d 455 (2014) (When a party

seeks reversal of a jury verdict, the Oregon Constitution bars re-examination of any fact tried to the jury unless the court can affirmatively say there is no evidence to support the verdict and may not reverse the judgment unless the trial court's error substantially affected the rights of a party.). As shown by the brief recitation of Defendants' evidence, *supra*, there was plenty of evidentiary support for the jury's verdict. Therefore, unless the trial court committed some kind of legal error, the verdict should have been sustained. As Defendants will show, there was no such error.

B. Consideration of the 2007 valuation date was not reversible error.

In finding Plaintiff was entitled to a new trial, the Appellate Court incorrectly stated that inclusion of the 2007 date by the trial court was "erroneous" because it "had no basis in the expert testimony or, it appears, in Oregon law." *Opinion, 691*. The Court impermissibly ignored substantial evidence supporting jury consideration of the 2007 going concern valuation date. It also incorrectly interpreted Oregon law to find that the jury was restricted to Plaintiff's preferred valuation dates (2003 and 2005).

Applying the correct standard of review, this Court will find that the 2007 valuation date had a "basis" in the evidence and testimony. Allowing the jury to consider the 2007 valuation date was not erroneous and the jury verdict should be affirmed because admitted evidence supports the verdict. Oregon case law provides the jury broad discretion

in evaluating the properly admitted evidence and the trial court did not err when it allowed the jury to consider the 2007 valuation date.

1. Standard of Review

The Appellate Court should have construed the evidence in the light most favorable to Defendants and should have upheld the jury verdict. Defendants were the prevailing party at trial. *See Watson v. Meltzer*, 247 Or App 558, 560, 270 P3d 289 (2011) (Even where attorney found to be negligent but negligence did not cause client damage, attorney defendant was the prevailing party.);[3] *see also White v. Bello*, 276 Or 931, 933, 556 P2d 1362 (1976) (Defendant prevailing party where plaintiff failed to establish their claim for damages).

The Appellate Court is required to "accept as true all evidence and inferences therefrom in the light most favorable to the party who prevailed before the jury." *See James v. Clackamas Cnty.*, 353 Or 431, 433, 299 P3d 526, (2013) (quotes this proposition.). It is the function of the trial court to decide whether there is evidence upon which the jury may act. *See Wootten v. Dillard*, 286 Or 129, 136, 592 P2d 1021(1979) (Supreme Court "unconcerned with the quantum of evidence. [Supreme Court's] concern is only with the existence of evidence which, if accepted as being true by the trier of fact, would establish [liability]."). All conflicts in the evidence are deemed to have been resolved in

[3] Defendants acknowledge that this Court is not bound by decisions of the Appellate Court but offer the *Watson* opinion for its inherent persuasiveness.

favor of the prevailing party. *Id*.

A verdict may not be set aside "unless the court can affirmatively say that there is no evidence to support the verdict." *Purdy*, 355 Or at 234-35 (emphasis supplied). The standard for reversal "places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks reversal or modification of the judgment on appeal." *Id., citing Shoup*, 335 Or at 173-74. "No judgment shall be reversed … except for error substantially affecting the rights of a party." *Id., citing* ORS 19.415(2). To establish a court's instructional error substantially affected its rights, a party must show the court incorrectly instructed the jury on an element of a claim or defense and that incorrect instruction permitted the jury to reach a legally erroneous result. *Id., citing Wallach v. Allstate Ins. Co.*, 344 Or 314, 329, 180 P3d 19 (2008).

2. Appellate Court's Opinion

Despite Defendants prevailing, the Court unaccountably and impermissibly construed all evidence, *including that involving causation*, against, rather than in favor of, Defendants. The root of the Court's error in this regard is its assertion that Plaintiff was the "party in whose favor the verdict was returned." *Opinion, 670.* But, no verdict was returned "in favor" of Plaintiff. The jury found for Plaintiff on a single element of a single claim, but not on the claim.

In employing an incorrect standard of review, the Court remarkably stated "*[c]ausation was not truly in dispute*. As a result, we conclude that plaintiffs are entitled to a new trial on the negligence claim." *Opinion, 694* (emphasis supplied). However, causation was the primary issue in dispute and the jury specifically found Plaintiff failed to prove causation. The Court can only have reached this erroneous conclusion by ignoring Defendants' causation evidence entirely, as demonstrated by these statements:

> As for the propriety of the trial court's ruling, we agree with plaintiffs. There was no expert testimony that the settlement date was [a] permissible [valuation date]…
>
> Thus, the trial court erroneously permitted the jury to consider a valuation date that had no basis in the expert testimony or, it appears, in Oregon law.

Opinion, 691. The Court thereafter places an additional, incorrect burden on Defendants to present expert testimony that the jury *should* (rather than *could*) value Rowlett's interest as of 2007, stating:

> Defendants do not deny that neither Finn's nor Richter's testimony established that Rowlett's interest in Sunrise *should* be valued on the date of settlement.

Opinion, 691.

However, it is not Defendants' duty to present evidence of when Rowlett's interest *should* be valued. The jury was the factfinder and, under the proper standard of review, the Appellate Court is limited to determining

whether any properly admitted evidence supported the jury's conclusion that Rowlett's interest *could* be valued in 2007 as a going concern. *See Wootten*, 286 Or at 136. As discussed below, there was evidence to justify the jury's consideration of 2007 as a possible date of valuation.

The Court also suggests that defense counsel's closing argument referencing the appropriateness of Finn's approach to evaluating the value of Plaintiff's Sunrise interest was improper. First, since substantial evidence was presented to the jury supporting Finn's 2007 valuation, the argument was entirely proper. During closing argument, defense counsel never argued that the jury had to use the 2007 date when evaluating Plaintiff's interest, but rather went through each of the alternative valuation dates and showed that Rowlett's interest in Sunrise on the three valuation dates was less than or equivalent to Plaintiff's settlement. Defense counsel's closing argument was not improper.

The Court also found that the trial court's decision was not supported by Oregon case law, stating:

> …*Delaney* [*v. Georgia-Pac. Corp.*, 278 Or 305, 325, 564 P2d 277, *supplemented*, 279 Or 653, 569 P2d 604 (1977)] supports plaintiffs' expert's testimony … contrary [to Defendants' position that 2007 was a permissible valuation date]--the minority owner's interest in the business is generally valued at a high point or when the improper conduct culminated, not at a low point coinciding with, for example, the time of trial.

Opinion, 691. However, the Court's interpretation of *Delaney* is too restrictive. That case actually begins with the proposition that the factfinder should review

the facts on a case-by-case basis to determine if there is sufficient evidence to consider a particular date. *Delaney*, 278 Or at 324-25(Court should look at facts of individual case when fashioning appropriate relief.). Based on the Court's erroneous standard of review and misapplication of the law, it concluded that the trial court committed instructional error by permitting the jury to consider the 2007 valuation date.

3. Evidence supporting consideration of 2007 date.

Construing the evidence in Defendants' favor as the prevailing party, Defendants presented evidence and expert testimony regarding the December 2007 settlement date as being an available date for the jury to consider when evaluating the value of Plaintiff's interest in Sunrise.

Finn testified at length concerning valuation information related to Rowlett's interest in Sunrise as of 2007. Janet Larsen, counsel for Sunrise and Keys, went to Finn's office in August 2007 and brought documentation demonstrating the financial status of Sunrise from which the value of Rowlett's interest could be calculated. *ER-14-24.* Finn sent the information to Rowlett and his independent counsel, Katherine Heekin, and Finn's valuation expert. *Exh. 559; Tr. 2012*. Based on Sunrise's analysis, Rowlett's equity in the project was between $110,000 and $220,000. *ER-3-4*. Finn calculated Rowlett's interest had a "best case" value of $300,000. *ER-5*. Finn testified why, if

Rowlett's case went to the jury, he believed Rowlett could not secure a larger percentage of ownership interest or greater damages. *Tr. 2038-2042.*

The other members of Sunrise never disputed that Rowlett maintained his ownership interest. Larsen testified:

> Q: So during the whole time that you were involved, from 2002 all the way through 2007, when the case was settled, the issue of Mr. Rowlett being a member was not disputed. Is that fair?
>
> A: No. No. That issue was not disputed.

Tr. 847. Larsen also testified about the efforts taken by the parties to analyze the value of Rowlett's interest, where there was no dispute he had an ownership in the going concern. *Tr. 848.*

Finn's approach to evaluating damages as a going concern was also supported by testimony that Rowlett did not want an earlier "forced" buyout of his Sunrise interest. Following a failed mediation of Rowlett's claims in 2004, Defendant David Fagan testified:

> [Rowlett] just wanted to sit back; see what happened at Sunrise; see what happened with his interest. I think they were breaking ground, and he thought, well, let's just sit back and see what happens. *Tr. 662.*

Finn went to a June 2007 settlement conference, which again failed. Finn also testified regarding Rowlett's expressed willingness to maintain his Sunrise interest:

> Well, I think at that point [Rowlett] was still telling me he understood that they were continuing to develop the project. We knew by this time that they had sold Phase I, but that things were still happening out there, and he still thought that they were going to make a big profit on the next phase of the development. *ER-26-27*.

Significantly, and contrary to the Court of Appeals' misunderstanding of the record, Defendants presented expert testimony, through Peter Richter, that Finn's approach to the value of Rowlett's interest in Sunrise was correct and that the conduct by Schwabe during litigation did not negatively affect Rowlett's ability to pursue damages against the other Sunrise members. Richter's testimony was:

> Q: So now, did you look at Mr. Finn's approach to damages in this case?
>
> A: I did.
>
> Q: And did you form an opinion as to whether this approach was reasonable or not?
>
> A: I did.
>
> Q: And what is your opinion?
>
> A: That it was reasonable. …
>
> Q: And is it your understanding that Mr. Rowlett was always treated as a member of the organization?
>
> A: That's my understanding. He was never removed as an interest holder, so -- or a shareholder, if you will.

Tr. 2121-2122.

Richter further stated his opinion that the dismissal of the 2002 case was ultimately favorable to Rowlett. The delay resulted in Sunrise having new

money put into the development and potentially increasing its value. *Tr. 2123.* He also confirmed that Finn maintained all material claims and Sunrise was a going concern:

> Q: But as far as the claims that Mr. Rowlett was able to move forward with, did you see any substantial change, any material change, in the claims that Mr. Finn thereafter pursued as opposed to those in 2002?
>
> A: As I understand it, there was some defendants that were not sued in the second action, but there were other defendants that were sued. So, I mean, the deep pockets if you will, potentially, were Sunrise and Robinson and Keyes, and they were all part of that lawsuit that Mr. Finn pursued.
>
> So the answer to the question is I don't think it made any negative impact at all on Mr. Rowlett's -- in fact, Mr. Rowlett in his deposition, a couple of times said that he agreed with waiting to see what was going to happen, because Mr. Keyes had told him that the lawsuit was interfering with his ability to get money and things. So it looked to me, from the depositions, that Mr. Rowlett agreed to wait and see what would happen with the enterprise.
>
> Q: Okay. By that, are you saying that it -- the enterprise was developing, and he was waiting to see what happened with it?
>
> A: Yes. Again, as I understand it, he went out there to the project a few times.
>
> Q: What -- so far as any meaningful or viable claims, was your opinion that those claims were still being pursued by Mr. Finn?
>
> A: Yes.

Tr. 2123/23 - 2125/1.

Considering the testimony set forth above from Finn, Fagan, Larsen, and Richter, Defendants argued that, besides the 2003 and 2005 "valuation" dates

proposed by Plaintiff, the evidence supported the jury considering the December 2007 date to value Rowlett's interest.

It is the function of the trial court to decide whether there is evidence upon which the jury may act, *Wootten*, 286 Or at 136, and the trial court decided there was such evidence. As the foregoing recitation establishes, the trial court was correct. The Appellate Court's contrary ruling was wrong.

4. Oregon case law does not restrict the jury's consideration to the 2003 and 2005 valuation dates.

The Appellate Court further erred in concluding the 2007 valuation date was not supported by Oregon law. *Opinion, 691*. The Court reasoned that *Delaney*, 278 Or at 325, limited the jury to Plaintiff's requested 2003 and 2005 valuation dates. *Opinion, 685-86*. But, Oregon law does not support "fixing" Rowlett's damages only at a date of his choosing. In the corporate setting, a "buyout" may be valued at the time the member's interest is sold or transferred where the business is a going concern. In Rowlett's case, that "buyout" occurred in 2007, when Rowlett transferred his Sunrise interest in exchange the settlement.

Valuing Plaintiff's interest in the going concern, Sunrise, appears to follow logically from *Delaney* itself, but this Court has never addressed it directly. The Court of Appeals has considered the problem and has endorsed the rule. *See, e.g., Cooke v. Fresh Exp. Foods Corp., Inc.*, 169 Or App 101,

114, 7 P3d 717 (2000) (illustrating proposition). This position was also supported by the testimony of Defendants' expert, Richter.

Plaintiff's effort to restrict the jury to the 2003 and 2005 valuation dates is founded entirely on his expert Ellis's interpretation of Oregon law governing remedies for oppression. *Tr. 1522-1535*. That testimony was impeached on cross-examination and by Richter, which should end the matter. *Tr. 2115-2121*. Richter testified that the judge or jury "has to weigh the fairness" (*Tr. 2117/20*) and decide each case "on its own facts and circumstances." *Tr. 2118/5*. One consideration is whether the "acting majority engaged in any benefit to the enterprise." Richter noted that part of the conduct of which Plaintiff complained allowed for money to be infused into Sunrise. *Tr. 2119/2*.

Contrary to the Appellate Court's decision, *Delaney* does not limit consideration of potential valuation dates to *only* those dates where the value is highest. The *Delaney* court adopted a flexible standard, stating the court can fashion other appropriate equitable relief "[d]epending upon the facts of the case and the nature of the problem involved …." *Id.* Under *Delaney*, the trier of fact is to consider all of the evidence when determining value and is not limited to one side's evidence. *Id.*

The Appellate Court erred when concluding *Delaney* restricted the jury from considering the totality of the properly admitted evidence. However, even if *Delaney* limits the jury to consider only "highest value" dates, Defendants'

evidence would still allow the jury to consider the 2007 "buyout" date. Applying the correct standard of review, the value of Rowlett's Sunrise interest was $30,169 in 2003, $108,274 in 2005, and $110,000 to $300,000 in 2007. *ER-1-5; Tr. 1794, 1803/19-24.* The jury could have found Rowlett's Sunrise interest had its "highest value" in 2007.

There was evidence from which the jury would have been entitled to consider the 2007 date in determining whether Plaintiff suffered any damage due to Defendants' negligence. Oregon case law supports broad discretion when determining the valuation in a claim such as this. When the evidence is viewed, as it must be, in the light most favorable to Defendants as the prevailing party, the trial court did not err in allowing the jury to consider 2007 as one potential valuation date. The Appellate Court's contrary conclusion created a new and unsupportable proposition of law.

5. Inclusion of a question regarding the date of the valuation on the verdict form was not reversible error.

On the verdict form, the jury answered "no" when asked whether the Defendants' negligence caused damage to Plaintiff. The jury never reached any subsequent questions related to damages. Nevertheless, the Appellate Court reversed the jury's decision based on unanswered verdict form question 10C, which includes the 2003, 2005, and 2007 dates.

Importantly, it was Plaintiff, not Defendants, who insisted there be a "valuation date" question on the verdict form (to facilitate computation of prejudgment interest). *Tr. 2191*. Defendants asked the trial court to determine the date of valuation. *Tr. 2198.* The trial court allowed the jury to determine the valuation date, and Plaintiff sought to restrict the jury to the 2003 and 2005 dates. *Tr. 2203.* Defendants requested the 2007 valuation date be included. *Tr. 2198*. In this context the trial court allowed the 2007 date to be included for the jury's consideration in the instruction that Plaintiff requested.[4] *Tr. 2203.*

The Appellate Court inexplicably concluded that inclusion of the 2007 date by the trial court was "erroneous" because it "had no basis in the expert testimony or, it appears, in Oregon law." *Opinion, 691*. It was the Appellate Court's analysis of the evidence and the law that was erroneous. However, the Court's approach suffered from an even more fundamental flaw - the part of the verdict form about which the Court complains played no role in the jury's verdict.

The trial court's causation jury instruction did not mention valuation dates. *Tr. 2317-2318*. The verdict form required the jury to consider the questions in order, beginning with questions relating to liability. The jury

[4] When the trial judge ruled that the 2007 date would be included, Plaintiff did not withdraw his request for the instruction.

answered only those questions relating to negligence and causation. The jury never reached the questions concerning damages or valuation date.

The mere presence of an unanswered question on the verdict form could not have affected the verdict. *See Sam's Texaco & Towing, Inc. v. Gallagher*, 314 Or 652, 659, 842 P2d 383 (1992) (A jury's dispositive answers to questions about the defendant's liability on a special verdict form provided the basis for a judgment for the defendant despite the jury's failure to answer other questions on the form, such as those concerning damages.). Even if the Appellate Court's holding that the 2007 date should not have been included in the verdict form were correct, the jury never answered the question referencing the 2007 date, making it irrelevant.

As noted, the trial court instructed the jury to follow the verdict form instructions. *Tr. 2340-2346.* This Court adheres to the presumption that a jury follows a trial court's instructions. *Purdy*, 355 Or at 227. Given that presumption, the jury never reached the unanswered question. There is no reversible error where the structure of a verdict form prevents the jury from reaching a claimed erroneous instruction. *Sam's Texaco*, 314 Or at 659. Plaintiff cannot demonstrate, under ORS 19.415(2), that the mere presence of the 2007 date on the verdict form "substantially affected the rights of a party."

C. Striking the two oppression allegations was not reversible error.

The Appellate Court did not decide whether a minority LLC member has an oppression claim against the majority members and, instead, decided it was legal malpractice for an attorney to fail to allege such a claim because it was "colorable." However, the Court's creation of this rule should be reversed because (1) it was not argued to the trial court or the Appellate Court and was, therefore, not preserved and (2) it runs counter to Oregon case law requiring a client prove he had a viable claim and that, but for their attorney's negligence, he would have had a better outcome.

The Appellate Court's "colorable" claim rule must be overturned and, rather than remand this case for further review, this Court should rule on whether an oppression claim with a buyout remedy exists for an LLC member, and, if so, whether Defendants' alleged failure to assert such a claim earlier in the Sunrise litigation affected Plaintiff's evidence or measure of damages. The legislative history demonstrates that neither the oppression claim nor the buyout remedy exists. Additionally, the trial court in the malpractice litigation

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recognized that for the court to fashion a buyout remedy,[5] the Sunrise court would have needed to invoke its equitable jurisdiction, which the trial court found unnecessary because Plaintiff had identical proof and damages available under the breach of fiduciary duty remedy. Thus, even if an oppression claim and an equitable buyout remedy did exist, Defendants' alleged failure to timely assert such a claim in the Sunrise litigation did not result in any harm to Plaintiff. Therefore, the striking of the two oppression allegations in the malpractice action was not an error.

///

[5] Plaintiff argues to the Appellate Court that Rowlett had a claim for either an equitable remedy of a compulsory buyout or a judicial dissolution under an oppression claim. *Appeal Brief, 20-23*. However, Plaintiff was not seeking a dissolution remedy, a point which Plaintiff's counsel confirmed during the ORCP 21 motions hearing. *ER 29-30.* ("So the first thing that is important about the squeeze-out claim is it's not a statutory claim. It's an equitable claim."). Plaintiff's counsel stated the equitable remedy Rowlett was seeking was "[a] judgment compelling the purchase at fair value of Rowlett's entire interest in Sunrise as to be determined at trial, but not less than [$]900,000." *ER 33-34.* Plaintiff's counsel stated this was different than the $900,000 in damages Plaintiff demanded under the breach of fiduciary duty claim. *Id.* Regardless, neither requested remedy was dissolution under the statute. Plaintiff was always requesting a separate, equitable remedy. *ER 44.* ("Likewise, in this case, the trial court in the 2007 case had the authority under ORS 63.661 to choose an *equitable remedy* for the underlying defendants' actions, and the equitable remedy requested by Plaintiff, an amount equal to the fair value of Rowlett's interest in Sunrise, is the same equitable remedy permitted by *Cooke, Delaney, Chiles* and *Tifft.*"). Additionally, dissolution was never mentioned in Plaintiff's Complaint.

1. Background

a. Sunrise Litigation

In the Sunrise litigation, the breach of fiduciary duty claims were asserted on behalf of Plaintiff against the majority members from the beginning. Finn later added an oppression claim against the members and Sunrise. The other members tried to have the oppression claim dismissed under an ORCP 21 motion, but that motion was denied and the claim remained in the case until Plaintiff settled.

b. Malpractice Action

In Plaintiff's two claims for negligence and one claim for breach of fiduciary duty alone, Plaintiff enumerated 38 allegations of fault against the Schwabe Defendants, including two allegations that Fagan failed to recognize and allege a squeeze-out/oppression claim in a timely manner:

(1) "Defendants were negligent for failing to allege Plaintiff's squeeze-out/oppression claims in a timely manner." *Complaint, ¶ 87(a)(ii).*

(2) "Defendants were negligent for failing to recognize that the factual circumstances gave rise to a squeeze-out/oppression claim related to Rowlett's interest in Sunrise Partners, LLC." *Complaint, ¶ 87(b)(i).*

The Complaint also included several other allegations related to the timely presentation of claims on behalf of Rowlett, including:

- ¶ 37: Waiting almost a year after the 2002 litigation was dismissed to file the demand for arbitration.
- ¶ 49: Failing to arbitrate the dispute within the time required by the operating agreement.
- ¶ 87: Failing to diligently prepare and pursue Plaintiff's claims, including failing to timely take depositions, obtain electronic discovery and retain a valuation expert and provide accurate information to that expert.
- ¶113(a): Failing to advise Defendant Fagan regarding appropriate claims to assert on Plaintiff's behalf and the proper parties to sue in the 2002 case and 2003 arbitration; (b) failing to ensure that Defendant Fagan was diligently prosecuting the 2002 case and 2003 arbitration.

Plaintiff's damages for these claims were the same: "The difference between the settlement amount in the 2007 case and…the value of Plaintiff Rowlett's equity interest in Sunrise as of either March 13, 2003 or October 7, 2005, which is $2,200,000…." *Complaint, ¶ 90.*

Defendants moved to strike all allegations related to Plaintiff's oppression claims, arguing the LLC statute does not provide for relief based on "oppression" and the Sunrise trial court did not have jurisdiction to fashion an equitable remedy outside the statute. *Defendants' Reply ISO Rule 21 Motions, 10/5-14.* Plaintiff argued an oppression claim by an LLC member existed, which would have permitted the Sunrise litigation court to fashion the equitable remedy for the oppression claim different from the breach of fiduciary duty claim. *ER-29/24-30/1, 33/22-34/14.* According to Plaintiff "…ORS 63.661 [LLC statute] is broader than ORS 60.661 [corporation statute], giving the courts even more power to fashion an appropriate remedy for breach of

fiduciary duties and squeeze-out/oppression claims in cases involving LLCs." *ER-41*.

During oral argument, Plaintiff's counsel admitted she had not located any case in law in Oregon (or any other jurisdiction that had adopted the uniform LLC law) supporting the position that the LLC statute provided equitable relief for oppression claims. *ER-31/11-31/16*. Plaintiff also acknowledged the same evidence supporting an oppression claim could and would be presented under the breach of fiduciary duty claim:

> THE COURT: … If I were to conclude that … there was no available oppression and squeeze-out claim and you were proceeding only under breach of fiduciary duty and negligence claims, would that affect your decisions as to valuation dates for damages or does it really matter?
>
> MS. HEEKIN: The way I read the case law, there's talk about when you've got the kind of facts that amount to a breach of fiduciary duty, it's intertwined with what amounts to oppressive conduct. And so in the way that I read the case law, it appears our Appellate Courts treat it as one and the same, even though they can end up being a claim in law and a claim in equity.
>
> THE COURT: Mm-hmm.
>
> MS. HEEKIN: So we would, of course, like to continue to have all theories available to us.
>
> THE COURT: I understand. I'm just trying to figure out if it matters to your argument on valuation dates. It doesn't sound like it does.
>
> MS. HEEKIN: No, because the breach of fiduciary duty allegations are similar.
>
> THE COURT: They're pretty much identical.

HEEKIN: Exactly.

ER-35/6-36/7.

Judge Kantor struck the two oppression allegations, finding it unnecessary to invoke the equitable jurisdiction of the court because the breach of fiduciary duty claim in the Sunrise litigation allowed Plaintiff to present identical proof and obtain an identical remedy as the oppression claim would have. *ER-37/21-39/2*. The parties submitted competing orders. Defendants struck all references to an oppression claim [*Defendants' Proposed Order*, *2/6-7*] and Plaintiff struck only Paragraphs 87(a)(ii) and (b)(i). *Plaintiff's Proposed Order*, *2/12-14*. Judge Kantor accepted Plaintiff's order and all the other allegations related to oppression remained in the Complaint. *Court's Order on Defendant's Rule 21 Motions*.

Plaintiff's expert, Ellis, testified at length about the breach of fiduciary duties by Sunrise majority members, how Rowlett was oppressed by this conduct, and how it justified Plaintiff's preferred 2003 and 2005 valuations dates.

c. Appellate Court

The Appellate Court overturned the trial court's striking of the oppression allegations. The Court held the trial court had to accept as true the proposition that an oppression claim was available to Plaintiff and Plaintiff was financially damaged by Defendants' failure to file such a claim earlier.

Opinion, 681.

Contrary to the Court's ruling Defendants did not argue, and the trial court did not adopt, a standard that placed the burden on Plaintiff to establish the success of an oppression claim. Defendants argued a statutory oppression claim did not exist and, because a breach of fiduciary duty claim would allow Plaintiff the same proof and damages, the trial court should not adopt an equitable remedy for an oppression claim in the LLC setting. *ER-47/5-48/16*.

The Appellate Court incorrectly viewed the testimony in the light most favorable to Plaintiff. It cited to trial testimony and allegations that do not appear in the record to create support for Plaintiff's oppression claim. *Opinion, 686, fn 4.*

As Plaintiff's advocate, the Appellate Court stretched to find that "assertion of a colorable claim could have altered the outcome for Rowlett considerably...," stating

> And, outside the context of the pleadings, it is now evident that plaintiffs had evidence to support that theory. … Plaintiffs also had proof in the form of testimony from their expert, Ellis, and from the Sunrise defendants' own lawyer, that *had the oppression claim been asserted as early as in 2003, the Sunrise opponents would have immediately attempted to settle.*

Id. (emphasis supplied).

That description is utterly unsupported from this record. Neither Plaintiff's expert nor Sunrise's lawyer, Powell, testified to the impact of an earlier pled

oppression claim. Powell was explaining whether the 2002 lawsuit would have triggered a reporting requirement on the part of Keys to the SEC. *Tr. 954/17-956/14.* Powell stated that because the case was transferred to arbitration, Keys made the decision there was no need to report. *Id.* The actual questions asked, giving rise to the unsupported statement by the majority, were:

> Q: If there'd been a lawsuit pending, would that have created pressure on your clients?
> …
>
> A: Well, as lead counsel on this matter, when it first came in the door, we had to disclose this to the SEC, without disclosing any client confidences, we probably would have taken a different posture.
>
> Q: Can you explain what the different posture would be, without violating any attorney-client privileges? Can you describe it generally?
>
> A: We would have sought to seek a complete resolution of the matter fairly quickly.

Tr. 956-957. Powell's testimony has nothing to do with the specific pleading of an oppression claim. In fact, there was no testimony that pleading of an oppression claim would have made any difference whatsoever.

There also is no evidence supporting the majority's contention that Ellis testified that asserting an oppression claim as early as 2003 would have made the Sunrise opponents "immediately attempt to settle." *Opinion, 686, fn 4.* Ellis' testimony says nothing about settlement whatsoever. Ellis never stated that the failure to specifically plead an oppression claim, as opposed to the multiple other

claims asserted in the 2002 litigation and 2003 arbitration, somehow resulted in a different outcome. Specifically, Ellis testified he believed "Mr. Rowlett would have obtained a greater net recovery than he did in the 2007 settlement if his claims had been handled in a more competent and timely manner by [Defendants]." *Tr. 1519-1520.* Ellis testified "had that been done, the likely outcome would have been a Court ordered buyout of his interest…" with the most likely valuation date being October 2005, but possibly 2003. *Tr. 1529-1530.* Ellis never spoke the words "immediate settlement."

The Court's Opinion also embellishes the record to support its desired outcome. For instance, the majority states "Plaintiffs alleged that Defendants damaged them in the Sunrise litigation by failing to timely allege an 'oppression' or 'squeeze out' claim, *coupled with a demand for a forced buyout or dissolution of Sunrise*." *Opinion, 670* (emphasis supplied). This italicized language appears nowhere in the Complaint.

2. Standard of Review

Plaintiff argued the trial court's striking of the two negligence allegations related to pursuing an oppression claim should be reviewed for errors of law. *Appeal Brief, p. 16*. First, a trial court's decision to strike allegations should be reviewed for abuse of discretion. *See Cutsforth v. Kinzua Corp.*, 267 Or 423, 428, 517 P2d 640 (1973) ("The decision to strike certain allegations from a pleading rests within the sound discretion of the trial court, and this court will

not reverse that decision unless an abuse of discretion is shown."). Second, the trial court struck those allegations based on a decision not to invoke its equitable jurisdiction. *ER 37/21-39/2; see Thompson v. Coughlin*, 329 Or 630, 637-38, 997 P2d 191 (2000) ("If adequate relief may be obtained in law, then equitable jurisdiction will not be invoked."). The trial court's decision not to exercise its equitable jurisdiction should be reviewed under an abuse of discretion standard. *See, e.g., Mort v. United States*, 86 F3d 890, 892 (9th Cir. 1996) ("The district court's decision not to exercise its equitable jurisdiction is reviewed for an abuse of discretion.")

Under either the abuse of discretion or legal error standard, the trial court's striking of two oppression allegations was not error because (1) there is no oppression claim with a buyout remedy for LLC members and (2) even if there is an oppression claim that would have allowed the trial court to fashion an equitable remedy such as a buyout, the trial court did not abuse its discretion in refusing to invoke its equitable jurisdiction when the stricken allegations did not support any evidentiary showing or provide any remedy that was not presented to the jury under other claims for identical damages.

However, the Appellate Court did not review for errors of law or for abuse of discretion. Instead, it held the trial court must accept as true an oppression claim was available to Plaintiff, because Plaintiff so alleged. *Opinion, 680-81*. The Court's erroneous review standard led it to conclude

Plaintiff alleged sufficient facts in his Complaint to survive a motion to strike.

3. The Appellate Court's creation of a previously unrecognized claim for negligence for failure to bring a "colorable" claim was not preserved and is not supported by the case law. Therefore, Schwabe's failure to earlier bring such a claim was not below the standard of care.

Instead of deciding whether an oppression claim in the LLC context exists, the Appellate Court's majority created a new basis for a legal malpractice claim for failure to assert a "colorable" claim, stating:

> "[E]ven if…an equitable claim for oppression in the LLC context is not cognizable in Oregon, defendants still could have breached their duty of care by failing to assert a colorable claim of oppression…
>
> …[A]ssertion of a colorable claim could have altered the outcome for Rowlett considerably by giving him increased leverage to secure a settlement on much more favorable terms than what he obtained in 2007."

Opinion, 686-87.

The Court stated that had Defendants moved for summary judgment on the oppression allegations, Plaintiff could have defeated the motion with an affidavit from an "expert," noting that Plaintiff had "proof in the form of testimony from … [his] expert … that had the oppression claim been asserted as early as 2003, the Sunrise would have immediately attempted to settle." *Id. at 681-82, 686, n 4.*

In his concurrence, Judge Armstrong observed there was "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*. The concurrence also noted the majority "…entirely reframes the dispositive question presented to the Court, which reflects the sort of creative reimagining that we normally do not countenance." *Id. at 699-700.* He concludes the majority decision, "…results in 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.* Defendants agree.

First, the "colorable claim" issue was neither briefed nor argued by the parties before the trial court or the Appellate Court. Thus, the Court should not have considered it because it was not preserved. *See State v. Wyatt*, 331 Or 335, 346-47, 15 P3d 22 (2000) (Appellate Court cannot address argument that was not preserved.). The Appellate Court overreached when it, independent of any party's argument, relied upon a position that was not preserved, briefed, or argued by either party. *See State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) ("It is important for efficient judicial procedures that the positions of the parties be clearly presented to the initial tribunal and on appeal" an "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…." For this reason alone, the Appellate Court's decision should be overturned.

The decision should also be overturned because the Appellate Court's holding runs counter to Oregon case law. If Defendants had been given the opportunity to brief this issue, they would have argued that creation of a claim for malpractice based on the failure to assert a "colorable" claim does not comport with the established legal malpractice "case-within-a-case" standard. *See Harding v. Bell*, 265 Or 202, 205, 508 P2d 216 (1973) (Client "must show not only that the attorney was negligent but also that the result would have been different except for the negligence."). In order to meet this standard, Plaintiff had a duty to establish the legal validity of the underlying claim for which they claim negligent legal representation. *See id.* ("If the original action was lost, the client must show that the original claim was a sound one and that he was entitled to recover on it."); *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]."). If the claim is not valid, then the failure to timely allege it would not matter because the result would not have been different.

The Supreme Court recently declined to establish a "lost opportunity" claim, which was very similar to the Appellate Court's "colorable" claim. *See Drollinger*, 350 Or at 667-69. In that case, this Court rejected a convicted felon's argument that it was enough to prove the attorney's purported

malpractice caused the felon to lose the "opportunity" to obtain relief. *Id*. This Court reasoned that, were such pleading sufficient, plaintiff would be relieved of the "onerous burden of showing that he would have prevailed in the post-conviction proceeding…." *Id.* at 668.

Allowing clients to make malpractice claims based on a failure to allege all "colorable" claims does away with the causation element of a client's negligence claim and this Court should decline to create such an unmanageable rule.[6] The Appellate Court strayed from this established construct when it concluded that a Plaintiff need not prove the validity of an oppression claim, because a "colorable" claim would have improved his settlement position.

As a matter of public policy, attorneys should not have a duty to raise every "colorable" claim that passes the requirements set forth in ORCP 17. To do so would produce a "scorched earth" approach to litigation, particularly if an issue is unsettled. This standard is unworkable and losing party need only identify a difference in trial strategy to have a claim for malpractice. This contradicts the legal principle that an attorney is not liable for tactical errors involving an unsettled legal proposition. *See* Mallen & Smith, *Legal Malpractice* § 19:1, 1189-90 (2008 ed.); *see also, e.g., Halvorsen v. Ferguson*, 46 Wash App 708, 735 P2d 675 (1986) ("In general, mere errors in judgment or

[6] This issue has been briefed extensively by Janet Schroer on behalf of *amicus curiae* Professional Liability Fund, and Defendants join the PLF's arguments fully and incorporate such arguments by reference.

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.").

This Court has examined similar issues when evaluating whether an attorney has rendered inadequate assistance of counsel under the Oregon Constitution. *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) (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."). The practice of law is particularly susceptible to hindsight bias because litigation is designed to produce a winner and a loser. Thus, it is unrealistic and dangerous for legal malpractice claims to be viewed through the "colorability" lens, irrespective of the actual viability of the claim.

4. Oregon's LLC statute provides no oppression claim or buyout remedy.

Plaintiff's allegation that an equitable oppression claim was available to an LLC member is a conclusion of law and need not be accepted as true. Instead of reviewing Plaintiff's legal conclusion, the Appellate Court's majority adopted the "colorable" claim theory. Because the "colorable" claim theory is not supported by Oregon law, this Court should review whether an oppression claim requesting a buyout exists for LLC members and, if so, whether

Defendants' failure to earlier assert such a claim damaged Plaintiff in this case. The language of the LLC statute and the legislative history demonstrate that no such claim and remedy exists.

The LLC statute provides neither an oppression claim for minority members nor a buyout remedy. Instead, the LLC statute specifies only that a court may order a judicial dissolution when it is not reasonably practicable to carry on the business of the LLC. ORS 60.661(2). The statute does not provide a cause of action based on oppression and does not provide a buyout remedy in any situation. By comparison, oppression is a specifically enumerated ground for dissolution of a corporation in favor of a minority shareholder. ORS 60.661(2)(b). The Legislature's inclusion of "oppressive conduct" as a ground for dissolution of a corporation, and its failure to include a similar remedy in the later-enacted LLC statute, suggests the latter omission was intentional. *See Crimson Trace,* 355 Or at 501(The fact the legislature included a provision in one part of a statute supports inference that exclusion elsewhere is intentional.).

The Appellate Court found there was evidence the "legislature recognized and anticipated both the applicability of prior-existing common-law doctrines as well as the prospect of judicial development of the statute." *Opinion, 683*. The Court looked to legislative comments regarding apparent authority for LLC members and whether an LLC would be a security for support for its theories. *Opinion, 683*. The Court also relied on the

commentary regarding duty of loyalty to find it "necessarily [suggests] that the statutory standard of conduct and remedies for violations were not static and bound by the LLC Act as enacted." *Opinion, 685*. However, the Court's reliance on limited commentary that is wholly unrelated to the relevant section of the statute to support expanding the LLC statute to include an oppression claim and equitable buyout remedy is misguided.

A more complete review of the legislative history shows that the legislature deliberately omitted an oppression claim and did not give the court jurisdiction to fashion an equitable remedy. The exhibits presented summarizing the proposed Senate Bill 285, which eventually became Oregon's limited liability company statute, discuss the origins of the Judicial Dissolution provisions, which became ORS 63.661. *ER-49-50*. This summary explains that it was loosely based on the Oregon Business Corporation Act provision ORS 60.661 and the Oregon Uniform Limited Partnership Act provision ORS 70.330. *Id.* However, the drafters decided to only include 60.660(1), which allows for dissolution for fraud and/or continued abuse of authority, and ORS 60.660(4), which allows the LLC to request court supervision for a voluntary dissolution. *Id*. The drafters had the opportunity to include the oppression language set forth in the Corporation Act and knowingly did not do so.

Additionally, the drafters omitted the jurisdiction for the court to fashion a remedy other than dissolution, which other states have explicitly done. *See,*

e.g., Mich. Comp. Laws Ann. § 450.4515 (The court may issue an order or grant relief as it considers appropriate, including, but not limited to, the purchase at fair value of the member's interest in the LLC.). Plaintiff argues that because the Uniform Limited Liability Company Act specifically recognizes oppressive conduct as grounds for dissolution, ORS 63.661(2) "did not need specific language." *Appeal Brief, 20-21.* In fact, the Uniform Act's specific inclusion of such language supports Defendant's position that, without it, the Oregon statute does not provide for an oppression claim.

The Supreme Court's analysis in *Crimson Trace* also supports the position that the Court should not create an oppression claim with a buyout remedy for LLC members. In *Crimson Trace*, a former client moved to compel his lawyers to produce communications between his lawyers and the firm's in-house counsel. *Crimson Trace,* 355 Or at 476. The firm argued the communications fell within the attorney-client privilege as defined in OEC 503 and did not fall into any of the enumerated exceptions. *Id*. at 484. The client argued that if the communications were subject to the attorney-client privilege, the trial court could recognize a "fiduciary exception" to that privilege, although such an exception was not set out in OEC 503. *Id.*

The Supreme Court stated it is "…'[t]his court's statutory construction methodology, not policy considerations,' [that] guides [the Court's] determination of the meaning of statutes." *Id.* This Court concluded the

communications fell within the attorney-client privilege under OEC 503 but did not fall within the five enumerated exceptions, and then rejected the trial court's adoption of a judicially created "fiduciary exception." *Id*. at 493-94. This Court stated:

> … the scope of the privilege—as well as any exceptions to it—is a matter of legislative intent. …
>
> In some cases, discerning the legislature's intentions with respect to the scope of exceptions is straightforward. When, for example, statutory lists of conditions or exceptions are preceded by the phrase "including, but not limited to," courts readily acknowledge that such legislation is not exhaustive. …
>
> In other cases, legislation may set out a rule, but say nothing one way or the other about exceptions. The historical context of the enactment nevertheless may make clear that the legislature did not intend to foreclose the courts from adopting them. …
>
> In this case, OEC 503(4) enumerates five circumstances in which '[t]here is no privilege under this section.' The rule says nothing about the authority of the courts to add to those five exceptions. To the contrary, by taking the trouble to enumerate five different circumstances in which there is no privilege, the legislature fairly may be understood to have intended to imply that no others are to be recognized. That much follows from the application of the familiar interpretive principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). …

Id. at 496-97 (internal citations omitted).

The Supreme Court then looked at additional factors contributing to the inference that expression of one thing implies the exclusion of others, including (1) the longer the list of enumerated items and the greater the specificity with

which they are stated, the stronger the inference that the legislature intended the list to be exhaustive; (2) whether something is stated in one portion of the statute, but excluded in another -- the fact the legislature took the trouble to include a provision in one part of the statute strongly supports the inference that any exclusion elsewhere in the statute is intentional. *Id*. at 497-98. Applying all the factors, the Supreme Court concluded the list of attorney-client privilege exceptions indicated the list was exclusive. *Id*.

The client argued the legislative commentary supported the conclusion that OEC contemplated the recognition of other exceptions. *Id.* at 499. The client cited to commentary stating:

> "Oregon law recognizes two other exceptions to the lawyer-client privilege—an exception for assets left with the attorney, … and an exception for the fact of employment and name and address of the client, … By the adoption of Rule 503, the Legislative Assembly does not intend to affect these latter exceptions."

Id. (internal citations omitted), *citing* OEC 503 Commentary (1981). The client asserted because the commentary discussed two specific "exceptions" that were not enumerated in the OEC, the rule must contemplate the recognition of other exceptions. *Id*. The Supreme Court was not persuaded, stating:

> First, the commentary recognizes two specific, unenumerated exceptions, and no others. It does not necessarily follow from the stated intention not to eliminate the two exceptions that the legislature also intended to recognize other exceptions. In fact, it is at least equally plausible that the commentary was intended to recognize only the two exceptions that it explicitly mentions. Second, and in any event, the two "exceptions" that are identified

> in the commentary are not really exceptions at all, but circumstances that this court has found are not within the scope of the attorney-client privilege in the first place.

Id. at 500. The Court concluded OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. *Id.* at 501.

In the LLC statute, the legislature enumerated a list of situations in which the circuit court could dissolve an LLC.[7] This list is stated with sufficient specificity to infer the legislature "may be understood to have intended to imply that no others are to be recognized." The fact oppression is included as a ground for dissolution in the corporate context, but not in the LLC context, further demonstrates the legislative intent to exclude it as a basis for dissolution.

The drafters borrowed extensively from the corporation and partnership statutes and, in the case of the judicial dissolution provision, they elected not to include oppression as a basis for judicial action or a remedy other than dissolution. The legislative history does not support expanding ORS 60.661(2)

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[7] A circuit court may dissolve a limited liability company:

> (1) In a proceeding by the Attorney General if it is established that:
> (a) The limited liability company obtained its articles of organization through fraud; or
> (b) The limited liability company has continued to exceed or abuse the authority conferred upon it by law.
> (2) In a proceeding by or for a member if it is established that it is not reasonably practicable to carry on the business of the limited liability company in conformance with its articles of organization or any operating agreement.
> (3) In a proceeding by the limited liability company to have its voluntary dissolution continued under court supervision. ORS 63.661.

to include an oppression claim with a buyout remedy.

5. Even if an oppression claim for an LLC member exists, the trial court did not err when it declined to fashion an equitable remedy.

When the trial court struck the two allegations related to an untimely oppression claim in the malpractice action, it did so because an equitable buyout remedy under an oppression theory would not change the evidence or the damages sought. The trial court did not abuse its discretion, because the same evidence was presented by Plaintiff to the jury to support the same damages under other theories of liability.

While the Appellate Court quoted some of Judge Kantor's statement striking the oppression allegations, it omitted the italicized portions, which explain the trial court's ruling and which show that the Appellate Court misinterprets that ruling. The trial court stated:

> As to the oppression claim it's also out. The plaintiff has not provided me with any basis to permit this except for the broad language of the LLC statute and I disagree with you. I don't think it's as broad -- I think it's actually more restrictive and it does not include the opportunity to demonstrate oppressive conduct.
>
> *Even if it did I would conclude as a matter of law that the breach of fiduciary duty claims, which exist from the exact same conduct, and there is no other, would provide a sufficient remedy in a case where we are now. After all, we're talking about the legal malpractice claim. We can't consider dissolution obviously. And so what's the alternative to dissolution here? It's not really -- it doesn't work. And so even if I were permitted to go forward, I wouldn't permit a remedy under it. So you can't have any in this particular case.*

> I'd appreciate -- I'm not saying as a matter of law there is no such thing as a – an oppression or squeeze-out claim under an LLC. I'm saying the plaintiff has not provided me with a basis for it. I'm still wondering out there. I still think there might be something out there, but I haven't been shown it.
>
> *So I'm giving myself the opportunity in the other case to look at things like legislative history, the uniform act, how other states have interpreted that. I don't have that here. I only have the argument that the plaintiffs have proffered and I'm disagreeing with that [argument in the form that plaintiffs have made it]*.

ER-37/21-39/2 (emphasis supplied).

Having ignored the context of Judge Kantor's statements, the Appellate Court concluded the striking of the oppression claim was "based on the merits of a potential oppression claim by an LLC member in Oregon." *Opinion, 679.* It was not.

By omitting the context for Judge Kantor's decision, the Appellate Court misinterprets his decision as one based on the sufficiency of the facts to support an LLC oppression claim and buyout remedy. In fact, the trial court ruled that the fiduciary duty claim provided Plaintiff a buyout remedy based upon identical conduct and, therefore, an equitable remedy under an oppression claim was not warranted. *ER-31/11-32/16, 38/22-39/2*.

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Based on admissions from Plaintiff, the trial court was entitled to conclude it should not invoke its equitable jurisdiction, because to do so would provide no proof or damages different from the breach of fiduciary duty claim. Thus, striking the two oppression allegations was proper, whether Plaintiff intended to invoke law or equity.

6. Striking two oppression allegations was not prejudicial, because Plaintiff presented the same evidence and requested the same damages under other negligence allegations.

The facts of this case demonstrate that, even if an oppression claim and remedy were available in the Sunrise litigation, Plaintiff was not negatively impacted by Defendants' failure to earlier assert it in that case. Thus, it was irrelevant that the trial court in the malpractice litigation struck the two oppression allegations.

The "oppression" and breach of fiduciary duty claims were both based on the duty of "good faith" owed by the Sunrise manager-members to Rowlett [*Exh. 17, pp. 7-11*] and each supported the same relief -- the value of Rowlett's interest in Sunrise. When the trial court struck the two negligence allegations related to oppression, Plaintiff retained all his other oppression allegations, including the allegation that had Defendants asserted an oppression claim in a timely manner, Rowlett would have received more money for his ownership interest. *Complaint, ¶ 71*. The court never read the Complaint allegations to the jury and the jury was never advised that any allegations were stricken.

Therefore, the jury considered all evidence presented for all claims, as instructed by the court, including the evidence Rowlett presented concerning "oppression" and timeliness, which was the focus of Plaintiff's expert testimony and closing argument. *Tr. 2366-2367, 2388-2389.*

The only remedy sought by Plaintiff, both before and after the striking of the oppression allegations, was the value of Rowlett's interest, as calculated in either 2003 or 2005. The stricken allegations only went to Defendants' duty of care and the jury found a breach of a duty. Therefore, the jury considered Plaintiff's damages claims, which were unaffected by the ORCP 21 ruling. The trial court did not err when it struck the oppression allegations because they did alter the evidence or damages.

VI. CONCLUSION

The Court should reverse the Appellate Court's Opinion and reinstate the jury award in Defendants' favor.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE
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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 12,724 words.

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s/ Stephen C. Voorhees
Stephen C. Voorhees

CERTIFICATE OF FILING AND SERVICE

I certify that on this 16th day of January, 2015, the foregoing **PETITIONERS' BRIEF ON THE MERITS** was electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, by using the Court's electronic filing system.

I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by the Court's electronic e-service system:

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