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, P.C., an Oregon professional corporation, Defendants-Respondents-Petitioners on Review.	Multnomah County Circuit Court No. 90-01006 CA No. A146351 SC No. S062451

BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW

Opinion Filed: May 14, 2014

Author: Judge Nakamoto
Reversed and remanded in part.
Judge Egan, concurring in full.
Judge Armstrong, concurring in part and in result.

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BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW

I. INTRODUCTION TO THE QUESTIONS PRESENTED

Respondent-on-review Gerald Rowlett walked into the offices of Petitioner Schwabe, Williamson & Wyatt, P.C. in the summer of 2002, because he feared being squeezed out of his one-third interest in Sunrise Partners, LLC. Schwabe associate Petitioner David Fagan alleged a kind of accounting action, not one for oppression. He did not ask for dissolution or a forced buyout. He did not take discovery.

The Sunrise majority removed Rowlett from management in violation of the articles of incorporation on March 13, 2003. Another two years later, on October 7, 2005, they removed Rowlett as a member and distributed $5.8 million, the bulk of the LLC's assets, among themselves. Rowlett received nothing. By now, Fagan had left Schwabe, and Petitioner Jim Finn had taken over, but done nothing in eleven months.

When Finn finally examined the file, he wrote the Sunrise lawyers "a more blatant squeeze-out is hard to imagine" (Ex 374). They moved to dismiss for want of prosecution, and Multnomah County Judge Litzenberger concurred. Yet Finn filed a second action, now asserting a squeeze out. The Sunrise defendants moved to dismiss the oppression claim, but Finn and Schwabe argued oppression exists for LLCs, and Judge Litzenberger agreed. Meanwhile,

the Sunrise defendants petitioned for their attorney fees from the want-of-prosecution dismissal. Rowlett settled and sued for malpractice.

Included on the verdict form in the malpractice action as the dates for valuing Rowlett's interest was the date he was removed from management and the date he was removed as a member. At Schwabe's urging, the trial court (Judge Kantor) included a third date, December 7, 2007, after the real-estate market crash, which was the date Rowlett settled. The jury returned a verdict finding defendants negligent, but no causation of damage.

II. QUESTIONS PRESENTED FOR REVIEW

ORAP 9.17(2)(b)(i) specifies questions presented "should not be argumentative and repetitious" and "may not raise additional questions or change the substance of the questions already presented." Defendants' questions have proliferated from six to nine, and contain skewed verbiage. The Court should disregard them and rely upon the following consolidated questions taken from the media release:

1. Did the Court of Appeals err in viewing the facts in a light most favorable to the plaintiffs, when the jury had returned a verdict form indicating that defendants had been negligent, but that the negligence of defendants had not caused damage to plaintiffs?

2. Can unanswered questions on a verdict form that a jury allegedly did not reach constitute reversible "instructional" error? If yes, may a

reviewing court consider a party's jury argument in determining whether the error was prejudicial, if that argument was based on admitted evidence?

3. Did the Court of Appeals err in holding that an attorney's failure to assert a colorable claim could support a claim for legal malpractice?

4. Did the Court of Appeals err in accepting legal conclusions based in plaintiffs' complaint?

5. Did the Court of Appeals err in failing to address whether oppression is a ground for dissolution of a limited liability company?

III. RESPONDENTS' PROPOSED RULES OF LAW

1. When the defendants did not argue before the Court of Appeals the facts they argue in the Supreme Court, the Court of Appeals could not have erred when it did not search the record or view those facts in a light most favorable to the defendants. Nor should a court give favorable inferences to evidence that would result in permitting the jury to calculate damages based on a date that has no basis in Oregon law.

2. An unanswered question on a defective verdict form provides grounds for reversal when context indicates some likelihood the error could have created an erroneous impression of the law in the jurors' minds and affected the case's outcome. Some likelihood exists where a party's closing argument emphasized the defect, asked the jury to select an answer that would cause it not to proceed to the unanswered question, and the verdict form mirrors

the request.

3. Where the underlying tribunal determined the claim was valid and that ruling was never overturned or appealed, the client has a cause of action against lawyers who negligently mishandled the claim unless the claim was not actually colorable.

4. Where a client alleges his lawyers mishandled a claim and the tribunal in the underlying action actually determined its validity in favor to the client, the claim's existence is not a pure legal conclusion. The claim's validity is a mixed issue of law and fact, taken as true for the malpractice action unless the lawyers show the client's claim was not actually colorable.

5. The Court of Appeals addressed whether oppression was a ground for LLC dissolution when it determined the claim was colorable. The Court of Appeals did not err, in any event, because oppression is a ground for LLC dissolution as a matter of law.

IV. NATURE OF THE ACTION AND JUDGMENT

The Court of Appeals adequately described the nature of the action and judgment.

V. STATEMENT OF FACTS

A. Why Rowlett largely receives the benefit of the facts.

Several points frustrate defendants' bid to disregard the Court of Appeals' fact statement and present a contrary version entirely in their favor.

First, the LLC-oppression issue arose on an ORCP 21G(3) motion for judgment on the pleadings (COA ER 33). Rowlett's facts are deemed true for that issue. *Boyer v. Salmon Smith Barney*, 344 Or 583, 586, 188 P3d 233 (2008).

Second, Schwabe's lawyers do not receive the benefit of every fact on the verdict-form issue either. They did not cross-assign error to the jury's negligence findings, and they are therefore bound by those findings. *Sam's Texaco & Towing, Inc. v. Gallagher*, 314 Or 652, 660, 842 P2d 383 (1992) (party who unanimously prevails on element receives benefit of verdict on that element). The Court of Appeals followed that procedure when it stated "the facts regarding defendants' breach of their duty of care" in Rowlett's favor. *Rowlett v. Fagan*, 198 Or App 667, 670, – P3d – (2014).

Defendants, furthermore, did not present to the Court of Appeals the evidence they say the Court of Appeals overlooked. *Am. Fed. of Teachers-Oregon v. Oregon Taxpayers United PAC*, 345 Or 1, 14, 189 P3d 9 (2008). And in reviewing prejudice arising from the verdict-form error, the Court considers both sides' evidence. *State v. Pine*, 336 Or 194, 199 & 210, 82 P3d 130 (2003); *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 856 P2d 305 (1993). Accordingly, this Court should adopt the Court of Appeals' fact statement, and those that follow.

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A. Origins of the Sunrise dispute.

The underlying dispute arose after Rowlett, a building contractor (Tr 235, 238), formed Sunrise with Michael Pruett and Tracey Baron in 2000 (Tr 279-80). Rowlett had procured a $2.6 million purchase option for an undeveloped plot, Kelly Creek (Ex 57; Tr 247), and had been working to acquire 67 acres, owned by separate landowners, along the Sunnyside Road in Happy Valley (Tr 281, 284-88). Baron agreed to provide financing through Sunrise (Tr 252-54).

Under the operating agreement, Sunrise could have only three Class A members (Ex 96 §8.3.2; Tr 411-12). Rowlett, Baron, and Pruett held the Class A shares, and each was a managing member (Ex 96, Tr 297). Class A ownership could not be diluted, even if the member declined to contribute to a capital call (Ex 96 §§3.2.1 and 8.3.3; Tr 411-13). Each Class A member also held an effective veto over the admission of a Class B member (*id.*).

Rowlett, by negotiating separately with the Sunnyside landowners, acquired rights to the parcels for $5 million (Tr 310). Combined into one developable tract, the land had an appraised value of $11 million (Ex 394). Rowlett assigned those rights to Sunrise along with his Kelly Creek option[1] (Tr

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[1] Rowlett made payments through two entities he wholly owned, Plaintiffs Westlake Development Company, Inc. and Westlake Development Group, LLC (Tr 235-38), which do not otherwise play a role.

276, 290-92, 304-08). He also withdrew $25,000 from his IRA to purchase Class B shares (Tr 463).

Rowlett had supplied Sunrise's major assets, but in 2002, he learned that Pruett, Baron, and Baron's boss Robert Keys had formulated a plan to dissolve Sunrise and transfer the land to a different entity without including Rowlett (Ex 56; Ex 313-15; Ex 352; Tr 313-15, 323-26, 384-85). When Rowlett questioned this, Baron excluded Rowlett from a meeting with a potential construction partner (Tr 1123-26). After Rowlett refused to sign an amended operating agreement (Tr 408, 1128), someone forged his signature on a resolution adding Keys as a member (Ex 63; Tr 1281).

B. Rowlett hires the Schwabe firm.

Frustrated and worried, Rowlett hired Schwabe in June 2002 (Tr 239, 395-95). Schwabe assigned the case to junior associate David Fagan, who had never tried a case (Ex 415). It took Fagan five months to file a complaint in Multnomah County Circuit Court (Ex 14). Fagan had the wrong venue.

The Sunrise operating agreement contained an arbitration clause, and when Keys' lawyer Janet Larsen pointed this out, Fagan stipulated to dismissing the complaint in January 2003 (Tr 685-86). It then took Fagan another eleven months to file an arbitration demand (Ex 15). According to Larsen's partner Greg Powell, had Fagan promptly filed an arbitration demand, SEC rules would have required investment advisors Keys and his company to

report the pending action, and this would have "pressure[d]" his clients to seek "a complete resolution of the matter fairly quickly" (Tr 956-57).

C. The Sunrise principals squeeze-out Rowlett and siphon assets.

Fagan did not promptly file a demand, and instead, the Sunrise principals signed a resolution on March 13, 2003 that removed Rowlett as a manager (Exs 97, 98). Two weeks later, they announced a capital call requiring Rowlett to contribute $604,000 or have his interest diluted (Ex 106). Fagan told Rowlett he did not need to respond to the capital call (*id.*), but did nothing more (Tr 755) until he finally filed the arbitration demand in December 2003 (Ex 15).

Fagan's arbitration demand, like his dismissed complaint, did not include an oppression claim, and it did not name Sunrise as a defendant, even though Sunrise held rights to the land (Ex 15; Tr 1320-21). Instead, as expert Barnes Ellis described, Fagan alleged a "sort of accounting case" (Tr 1529-33).

Fagan did not engage in discovery, hire experts, or take depositions (Tr 427-28, 762). According to Larsen, after a failed mediation, nothing happened for over a year (Tr 931). No one contacted her about the case from December 2004 until October 2005 (Tr 766-67). She had no idea Fagan had left Schwabe to take a job in The Hague that May (*id.*; Ex 11; Tr 408).

Over the summer, Keys, Baron, and Robinson arranged for the LLC to distribute $5.8 million to themselves (Ex 374; Ex 433; Tr 433-38, 1221-222).

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Rowlett received nothing (*id.*). They removed Rowlett as an LLC member altogether on October 7, 2005 (Ex 370; Tr 433-34).

D. The court dismisses the complaint for want of prosecution, and Rowlett settles.

Upon Fagan's departure, Finn took over the case and met with Rowlett, but did no work (Ex 5; Ex 24; Tr 773-74; 1857-58, 2066). During a second 11-month delay, Fagan billed a total 3.3 hours, and Finn billed no time until October 25, 2005, when he at last began to look for an arbitrator (*id.*; S Ct SER 39). Powell informed Finn the defendants were going to move to dismiss for want of prosecution (*id.*). Finn finally filed an amended statement of the claims in April 2006 that for the first time alleged a squeeze out and named Sunrise as a defendant (Ex 16).

But by then, Larsen had filed a motion with the circuit court seeking to have the arbitration dismissed for want of prosecution (Tr 773-74). Judge Litzenberger concurred and ordered Rowlett's complaint dismissed on September 6, 2006 (Tr 777, 899). The Sunrise principals then petitioned for $183,000 in attorney fees against Rowlett (Tr 899-90).

Finn did not suggest that Schwabe was at fault (Tr 440), despite emailing to his partners, "I can see Rowlett asking me why he should pay anything for what Fagan did" (Ex 29). Rather than refund Rowlett's money, Finn convinced him to pay to file a second, mostly identical complaint (Tr 441-42). Finn

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retained a valuation expert, but did not provide the expert with property appraisals, though he had them at the office (Ex 12; Tr 2063).

After the real estate market dropped in 2007, Finn told Rowlett that in the best case, his recovery might not exceed the $214,000 in attorney fees he had already paid Schwabe (Ex 381; Ex 36; Tr 239-41, 472). When the Sunrise principals sent an offer of judgment for $200,000 plus waiver of their pending attorney-fee petition, Rowlett accepted (Tr 468-69; Ex 383; Ex 563).

Valuation expert Shannon Pratt testified that in October 2005, when Baron, Keys, and Robinson took the $5.8 million and removed Rowlett as a member, his interest was worth $2,210,289 (Tr 1602). Alternatively, in March 2003, when they removed Rowlett as a manager, his interest was worth $1,042,821 (Tr 1613; Ex 428).

VI. SUMMARY OF ARGUMENT

Describing Rowlett's claim in 2007, Defendant Finn said "a more blatant squeeze out is hard to imagine" (Ex 374). He said it to the Sunrise defendants, and he told much the same to Judge Litzenberger, who agreed, finding a squeeze-out claim was cognizable in the LLC context. Thirteen days before the malpractice trial, however, Finn and Schwabe did an about face, filing an ORCP 23G(3) motion arguing an oppression claim did not exist.

The Court of Appeals properly found that given the procedural posture – a claim which had already been established as valid in the underlying litigation

– the lawyers could not chart a new course because it was colorable. The Professional Liability Fund and Schwabe's arguments to the contrary are speculative. They speculate that some other judge might have done something different, or an appeals court might have ruled otherwise. Neither happened. This was a pleading motion, and the lawyers cannot whitewash history to argue causation did not exist when the claim was ruled to exist in the underlying case.

And the claim was more than colorable. For a century, Oregon courts have recognized oppression claims in similar contexts, regardless of a statute's wording. But the LLC statute's wording also entitled Rowlett to dissolution, because it was no longer "reasonably practicable" to carry on the LLC's business in accordance with the operating agreement, in light of the Sunrise defendants' breaches. ORS 63.661(2). Fagan's, then Finn's, failure to file the most blatant claim in the case for four years was negligence.

Schwabe's other issue on review, briefed first, can be answered in a single sentence. The Court of Appeals did not err when it did not give defendants the benefit of evidence placing Rowlett's December 2007 settlement on the verdict form, because (a) Schwabe did not show that evidence to the Court of Appeals, (b) the evidence had no basis in Oregon law, and (c) Schwabe stipulated the evidence could *not* be used to that effect.

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VII. ARGUMENT

A. The Court of Appeals properly found placing the settlement date, December 7, 2007, on the verdict form was prejudicial error.

1. The verdict form does not merit another opinion.

A glance at Schwabe's brief reveals its verdict-form contention is awash in facts – who testified to what when – which is of scant interest to anyone not named in the caption. This issue can be affirmed, and the meat of the review reached, with a few points.

To be blunt, Schwabe's proposed date is bogus. This Court held in *Delaney* that the minority's damages from a fiduciary breach are tabulated on the date the majority's breach became full-fledged. *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 324-25, 564 P2d 277 (1977). The Court of Appeals added another date in *Chiles v. Robertson*, 94 Or App 604, 642, 767 P2d 903 (1989), which held that when the business had "continued to be profitable," the plaintiff receives the benefit by valuing the interest on a later date if a forced buyout is ordered. There is no other permissible date.

Rowlett was removed as Sunrise's manager in 2003 and cut out from the $5.8 million distribution in 2005. Those dates properly appeared on the verdict form as the potential culmination of the Sunrise principals' breaches. Schwabe's preferred date, in contrast, had relevance to only one fact. December 7, 2007 was the date of the settlement between Rowlett and the Sunrise principals. Not only was the date out of bounds under *Delaney* and

Childs, but a settlement's value cannot be used to establish damages. OEC 408; *Holger v. Irish*, 316 Or 402, 414, 851 P2d 1122 (1993). By stipulation, the settlement date was verboten (P Tr 501). For that reason, no witness, expert or otherwise, should have, or did, testify that the jury could select December 7, 2007 as the proper date for valuing Rowlett's damages.

Second, Schwabe's argument now – that the Court of Appeals neglected to give it the benefit of the "evidence" in establishing December 7, 2007 – could not have been error for a simple reason. Schwabe did *not* argue the evidence, expert or otherwise, fairly established 2007 as a valuation date. *Rowlett*, 262 Or App at 691. It is therefore improper for Schwabe to string together facts suggesting a trial record that the Court of Appeals purportedly disregarded. *Am. Fed. of Teachers-Oregon*, 345 Or at 14.

Third, December 7, 2007 could not properly appear on the verdict form even had it rolled off an expert's tongue. Peter Richter did not testify to the date, but even if he had, he does not wear black robes. He does not sit on the appellate bench or author opinions that could modify *Delaney* or *Chiles*. Such a date, even had it been uttered, would have had "no basis in Oregon law." *Rowlett*, 262 Or App at 691. As a consequence, Schwabe cannot push to receive "reasonable inferences" for an impermissible date.

The Court of Appeals (all three judges joining) got the verdict-form issue right. The following pages back this up.

2. Proper valuation dates under *Delaney* and *Chiles*.

Delaney establishes the standard date for valuing damages from a fiduciary breach. Two businesses formed a joint venture as partners in *Delaney*, thereby creating duties of loyalty, fair dealing, and full disclosure between them. *Delaney*, 278 Or at 310. Later, the majority partner, GP, took over management in violation of signed agreements. *Id.* at 324. As a consequence, this Court, under its equitable powers, ordered the majority to purchase the plaintiffs' interest at "a fair price." *Id.* at 325.

It fixed the date with care: "Although we are not convinced there was, as plaintiffs contend, a complete takeover by GP on May 28, we find that GP effectively ousted" the plaintiffs "from management of MPI on or after June 30," and therefore, "as of that date, considering the prior pattern of GP's high-handed behavior in relation to the venture, the plaintiffs were entitled" to a remedy. *Id.* at 324. The "fair price," the Court continued, "should be determined as of June 20, 1975, the date when we have found the entire management of the venture was taken over by GP." *Id.* at 325.

The Court of Appeals in *Chiles* authorized one additional date where the business happened to have prospered after the breach. The defendants in *Chiles* had (a) sold shares without allowing the minority to participate, and (b) given sweetheart deals on rental payments to entities they owned. The trial court ordered a buyout valued on the date that the defendants sold their shares

without the minority's participation. *Chiles*, 94 Or App 604 at 639-40. But the appellate court observed that the entities with the sweetheart rental arrangements had "continued to be profitable and ha[d] received benefits as the result of this case." *Id.* at 642. Consequently, it ordered valuation of the plaintiffs' interests at a more favorable date, "the date of the actual sale, not a presumed sale a number of years earlier." *Id.*

The Sunrise principals ousted Rowlett from management on March 13, 2003 (Exs 97), when his Sunrise interest was worth $1,042,821 (Ex 428; Tr 1613). The Sunrise principals ousted Rowlett as a member on October 7, 2005, when his shares were worth $2,210,289 (Ex 426, Tr 1602). Those dates mark the culmination of the breached fiduciary duties under *Delaney* and *Chiles*.

Schwabe's proffered date of December 7, 2007 when Rowlett accepted the offer of judgment was not tied to oppressive conduct in any way. It merely marked the end of the 2007 case. By listing a date on the verdict form after the real estate market had collapsed, the trial court, rather than using favorable valuation dates, permitted the jury to consider the worst possible valuation date, one that had no basis in Oregon law, one that reduced Rowlett's shares as a result of disappearing assets caused by the real-estate market bust.

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3. Schwabe cannot receive the benefit of evidence not presented to the court of appeals or which contradicts *Delaney*.

The main thrust of Schwabe's argument on review is easily rebutted. Schwabe contends that the Court of Appeals did not give it the benefit of evidence and arguments it did not make to the appellate court or, in some instances, to the trial court. (*Compare* Pet Merits Br 11-29 *with* Ans Br 34-36, *reproduced at* S Ct SER 45-47). The effort to bypass preservation, as well as critical flaws in its purported evidence, becomes apparent stepping through the issues in the rough sequence they arose.

a. Schwabe stipulated it could not use the settlement to establish Rowlett's damages.

It began pretrial. There, Rowlett filed a motion *in limine* to limit Schwabe's use of evidence of Rowlett's acceptance of the Sunrise principals' $200,000 offer of judgment (CR 91). Rowlett sought to prohibit Schwabe under OEC 408 from contending the settlement reflected the actual value of his interest (*id.*) Under OEC 408,[2] he argued evidence of a compromise is inadmissible unless offered for an independent purpose, and it may not be used beyond that purpose. *Holger*, 316 Or at 414; *Yardley v. Rucker Bros. Trucking*,

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[2] OEC 408(a) states, "Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."

Inc., 42 Or App 239, 245, 600 P2d 485 (1979). A jury must disregard the settlement in calculating damages and return a verdict for the full amount of harm. *Id.*

A settlement does not indicate a case's true value, this Court held in *Marsh v. Davidson*, 265 Or 532, 538, 510 P2d 558 (1973). When "a case settles, it is rarely possible to quantify the extent to which various factors contributed to the settlement value." *Withtol v. Lynn*, 209 Or App 56, 64, 146 P3d 365 (2006). A "number of other factors" besides the severity of an injury "can cause a case to be settled but such factors have nothing to do with the severity of plaintiff's injuries." *Id.* Here, Rowlett was staring down the barrel of a $183,000 attorney-fee petition after the want-of-prosecution dismissal, and Finn told him that with the real-estate decline, his recovery might not exceed his attorney fees (Tr 464-70).

Schwabe conceded OEC 408 barred the settlement's use to establish damages, but insisted it could tell the jury Finn was not negligent because "accepting the $200,000 was within the realm of what was reasonable to accept for plaintiff's interest in Sunrise" (*Id.*) Schwabe vowed it would *not* contend the settlement equated to Rowlett's actual damages from the malpractice (*Id.*). With that stipulation, the trial court stated, "I'm going to hold you, Mr. Voorhees" to "limit what you are agreeing to use it for" (P Tr 501).

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b. No expert testified December 7, 2007 was the date on which the jury should tabulate damages.

At no point did Finn or defendants' expert Richter ever testify the jury should value Rowlett's shares on December 7, 2007. The stipulation forbade it (*id.*). For that reason, despite pages of quotes, defendants have not located a single citation where a witness tells the jury it may, let alone should, calculate the value of Rowlett's damages on December 7, 2007. They could not do it then, and they cannot twist the testimony that direction now.

Finn told the jury how *he* – Jim Finn – had arrived at his decision to recommend settlement (Tr 2013). His testimony did *not* tell the malpractice jury that it should calculate damages on December 7, 2007, as the stipulation prohibited that.

Before Finn took the witness stand, the defense first put on evidence, in the form of a red and green chart, demonstrating that Sunrise had made no money at all in 2006 and had lost over $1 million in 2007 (SER 40). Finn then testified that the Sunrise defendants' lawyers had told him in August 2007 that "costs had been rising so dramatically" there "obviously wasn't very much profit" (Tr 2008-2010; 2031). Finn testified,

> "I told Gerald [Rowlett] here what they were telling us that the total equity [for the LLC] was $3.6 million. Because of the fact that [Sunrise] incurred all these costs, they were only going to make that much profit, and therefore, [Rowlett's] percentage interest of that amount was not going to be the big dollar amount that

> we had been hoping for, and they were telling me that was because these costs that had been incurred."

(Tr 2013.) In evaluating settlement, Finn said he was "looking at what their actual profit appeared to be" (Tr 2036). "And obviously at that point there was hardly any equity in the LLC, because it cost them almost that much to acquire the property" (Tr 2035).

To get there, Finn eyeballed Sunrise's costs and lack of profit in August 2007 ((Tr 2033; *see also* Tr 2010, 2063). Sunrise, though, was a real-estate holding company, and while Rowlett had handed him land appraisals conducted in 2002 and 2005, Finn admitted he "never gave" those appraisals "to an expert" (Tr 2063). Finn did not even arrive at his own fixed number, but instead in *August 2007*, came up with the "neighborhood" of what he thought Rowlett might get if he went to court (Tr 2033; *see also* Tr 2010, 2063). This is what Finn said he communicated to Rowlett during the months leading up to the offer of judgment, and his testimony was given to show what he told Rowlett in "explaining" his "thinking," his "strategy, and his "analysis of the case" (Tr 2064).

Thus, Finn was *not* telling the jury how *the jury* should calculate damages. He was telling the jury what *he* had done. Defense legal expert Peter Richter then took the stand and said that he had "look[ed] at Mr. Finn's approach to damages" and found "it was reasonable" (Tr 2121.) By telling the jury Finn's approach in the fall of 2007 was "reasonable," Richter was

testifying Finn was not negligent. That is all he could tell the jury, because the stipulation hamstrung him from saying anything else.

There is not one statement by Richter or Finn, moreover, singling out December 7, 2007 as a date when either of them did anything to value Rowlett's interest, at all. To the contrary, the record shows repeatedly that when Finn eyeballed the Sunrise profit and loss numbers, he did so in "*August of 2007*" (Tr 2010, 2063) (emphasis supplied).

Nor did Schwabe present evidence of any kind that placed a value on Rowlett's shares on December 7, 2007. Schwabe's damages expert Kathryn Thompson did not do it. Thompson told the jury only that Sunrise had lost money after 2005, including a loss over $1 million in 2007 (Tr 1770). Schwabe used Thompson, who was unqualified,[3] to low-ball the value of Rowlett's interest for 2003 and 2005 (Tr 1759-1881). But Thompson did *not* place a value of Rowlett's interest on a date past 2005 (*id*). The stipulation forbade it.

This is why Schwabe did not argue to the Court of Appeals that the evidence had supported its date. There was none.

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[3] Thompson was an accountant, not a valuation expert, and her testimony was inadmissible. *Sun Ins. Mtkg. Network, Inc. v. AIG Life Ins. Co.*, 254 F Supp 2d 1239, 1245 (MD Fla 2003). She had no business valuation experience or education, and did not use a recognized method in the field (Tr 1782-83). The Court of Appeals did not need to reach the impropriety of her testimony because it was reversing anyway. *Rowlett*, 262 Or App at 694 n 7.

c. Schwabe did not defend the December 7, 2007 date in Court of Appeals.

Notably absent from Schwabe's Answering Brief was an argument that expert testimony justified the December 2007 date (S Ct SER 45-47). The Court of Appeals did not error when it did not give Schwabe the benefit of evidence it never saw. *Am. Fed. of Teachers-Oregon*, 345 Or at 14; *State v. Knight*, 343 Or 469, 488 n3, 173 P3d 1210 (2007); *State v. Balfour*, 311 Or 434, 453, 814 P2d 1069 (1991).

When the parties discussed the verdict form in the trial court, the judge first found the jury would select between two dates, 2003 and 2005, to determine "the number of damages" (Tr 2199). Contrary to Schwabe's position now, the issue was "damages," not just prejudgment interest (*Id.*).[4] Schwabe's counsel then requested a third date, December 7, 2007, be given to the jury, "because Mr. Finn did it a certain way" (Tr. 2200). Rowlett objected because the only evidence of valuation dates had been supplied by Ellis, who had tried both *Delaney* and *Chiles* (Tr 1509; Tr 2201).

Ellis had testified the underlying tribunal would have valued Rowlett's interest on "the date of summation of the breaches of fiduciary duty," most likely, October 2005 (Tr 1520-22). Ellis explained that if the company's value

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[4] The trial court even asked Schwabe's counsel, "So if they pick [2007], there's no damages; right?" (Tr 2202). Answer: "Yeah, I think that's right" (*Id.*)

"has gone down," courts "will set the date at the consummation of the wrongdoing date; or, if the company has prospered since the wrongdoing, they will set the date later, whichever is favorable to the minority" (*id.*). Ellis said Finn made a "mistake" to think that Rowlett's damages depended on "what the then value was" in 2007, "because the market had obviously gone down" (Tr 1533).

As a consequence, Rowlett objected there was "no testimony by any of the experts" that "December 7, 2007, is a valuation date" (Tr 2203). He also pointed out that Oregon's "two cases" on the topic required valuation on the date of the "oppressive conduct" (*Id.*) The trial judge nonetheless decided to "permit the jury to consider all three alternatives, because Mr. Finn's testimony supported it" (*Id.*).

Finn's testimony did *not* support it. As shown, neither Finn nor Richter told the malpractice jury it should calculate damages on December 7, 2007. Finn himself had not even performed damage calculations on December 7, 2007 (Tr 2010, 2033, 2063). The only valuation date testimony came from Ellis. Rowlett's Opening Brief on appeal argued the 2007 date was wrong on the law and the evidence (Op Br 28-29).

Defendants did *not* deny this in their Answering Brief, arguing instead:

> "[P]laintiffs suggest that the inclusion of the settlement date on the verdict form misled the jury because Ellis's expert testimony was the only evidence which identified 'valuation dates,' and

> neither Finn nor Richter testified to a 'valuation date' with respect to the settlement. Besides again improperly overvaluing Ellis' expert testimony, and apart from the jury's never answering the 'valuation date' question (making it impossible to demonstrate prejudice), plaintiffs never explain how the jury could have been 'misled' by this discrepancy in terminology."

(S Ct SER 45-47).

Rowlett's Reply drove the point home. "Defendants now acknowledge that Rowlett was right" (Reply Br 10). "They do not challenge that Ellis' expert testimony was the only evidence" (*Id.* citing Ans Br 35). Accordingly, the Court of Appeals wrote,

> "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. That is correct because Finn only testified that the settlement amount approximated the value of Rowlett's interest at the time, in December 2007. In response defendants instead assert that no error occurred * * *."

Rowlett, 262 Or App at 691 (emphasis in original).

Having punted in the Court of Appeals, the rules of the game do not allow defendants to rehuddle, to change their play now, by insisting Finn's and Richter's testimony "could" be read to support the December 2007 date (Pet Merits Br 19). Nothing obliged the Court of Appeals to riffle through stacks of transcripts to make defendants' argument. *Balfour*, 311 Or at 453. It would not have worked, anyway.

d. December 7, 2007 does not fit *Delaney* or *Chiles*.

Schwabe cannot receive the "benefit" of testimony that would run afoul of Oregon law. Finn testified Rowlett's interest was worth little in 2007 (Tr 2010). *Chiles* is clear that a date after the culmination of the fiduciary breach may be used only if the business was "profitable." *Chiles*, 94 Or App 604 at 639-40. Schwabe's authority says the same thing. Like *Chiles*, the business in *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 114, 7 P3d 717 (2000), was also a "profitable going business." It was not losing money after the breach. *Id.*

Chiles advanced the laudable notion that when a fiduciary breach occurs, the plaintiff should not be saddled with the results of the wrongdoers' faulty business dealings, but the plaintiff may share in a later uptick since the breach kept the plaintiff from participating in the profit. Sunrise did not profit in 2007 (S Ct SER 40).

Nor may Schwabe fob December 2007 off as a "buy out" to squeeze within *Chiles*' holding that shares may be valued on the date of a forced buyout. There was no buyout. Rowlett, instead, accepted an offer of judgment, and that offer of judgment paid him as a "settlement of all claims by and between all parties" to the underlying action (S Ct SER 4-6). It did not require Rowlett to surrender his shares (*Id.*).

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December 7, 2007 was a settlement date. Nothing more, nothing less. Rowlett did not make an OEC 408 objection to putting the date on the form, but Schwabe's argument in this Court goes one impermissible step beyond that by insisting 2007 was a buyout. Had Schwabe made such an argument to the trial court, Rowlett would have countered it was a settlement and lodged an OEC 408 objection. *Outdoor Media Dimensions, Inc. v. State*, 311 Or 634, 659-60, 20 P3d 180 (2001) (arguments for affirmance on alternate grounds not permitted where record may have been different). The Court of Appeals also had no obligation to create inferences that would have violated OEC 408, *Delaney*, or *Chiles.* Schwabe cannot elbow the testimony so far as to contradict established law.

In a final effort to justify the date, Schwabe makes another pitch it never made, not to the trial judge, the jury, or the appellate court. It pretends the defense numbers could be lined up to put Rowlett's interest as worth more in 2007. According to Schwabe, the evidence could have shown Rowlett's interest was worth $30,169 in 2003, $108,274 in 2005, and $110,00 to $300,000 in 2007 (Pet Merits Br 27). Don't be fooled.

Schwabe carefully avoids placing specific dates next to the numbers or attributing them to a witness. The specifics are absent because the numbers conflate estimates from two witnesses, *both* of whom testified Sunrise was worth *less* in 2007, not more. And Schwabe's 2007 number is nothing more

than the August 2007 approximation of Finn, who is not a valuation expert.

To fill in what Schwabe omits, the first two numbers (2003 and 2005) came from Kathryn Thompson, who testified that Sunrise was worth *less* in 2007 than in 2005 (Tr 1770). Using the multi-colored chart, she showed Sunrise had no profit in 2006 and that in 2007 it sustained a $1.4 million loss (S Ct SER 40). She testified, "2005 is the only year that we have a tax return where there was any profit" (Tr 1770). She did *not* value Rowlett's interest on December 7, 2007.

Finn also based his actions on Sunrise's lack of profitability in 2007. Yet, Schwabe has set Finn's 2007 neighborhood number next to Thompson's 2003 and 2005 numbers to argue now that the jury might have believed Rowlett's value increased, thus justifying the 2007 date under *Chiles*. Schwabe's jury argument exposes the sophistry.

Schwabe argued in closing that using the 2007 date, "there are no damages" to Rowlett (Tr 2458). It also argued, "If you use the 2003 date, there are no damages because the number is lower than what [Finn] obtained for him" (*Id.*) "The only way that [Rowlett] obtains any damages in this case is if you conclude that an appropriate date is October of 2005" (*Id.*) Thus, Schwabe argued to the jury that Rowlett's interest was *more* in 2005, not less. The Court of Appeals did not err when it did not *sua sponte* dream up a theory that would have starkly contradicted Schwabe's closing. *Tarwater v. Cupp*, 304 Or 639,

644 n5, 748 P2d 125 (1988) (party may not shift position in Supreme Court to argue issue not raised in Court of Appeals).

Finn, moreover, is a lawyer, not a business valuation expert (Tr 1843-45). Finn took the costs and profit figures that the Sunrise lawyers gave him and "just do[ing] the multiplication" concluded Rowlett's "recovery would be in the neighborhood of $300,000 best case" (Tr 2033).

Had Schwabe attempted to introduce Finn's "neighborhood" math as an actual damages figure, you can bet the record on appeal would be different. *Outdoor Media*, 311 Or 634, 659-60. Finn's description of why in August 2007 he believed settlement was prudent was wholly inadmissible to prove the actual value of Rowlett's shares, because Finn lacked business valuation credentials. *State v. Rogers*, 330 Or 282, 310, 4 P3d 1261 (2000) (testimony must pertain to topic of expertise). Finn's neighborhood number, furthermore, pertained to "August of 2007," not four months later in December 2007 (Tr 2033; *see also* Tr 2010, 2063). And Finn's neighborhood number, if offered to stick a *value* on Rowlett's interest, would have violated the OEC 408 stipulation. Yet the defendants are now trying to use it for the very purpose they promised Judge Kantor they would not.

The Court of Appeals correctly held December 2007's appearance on the verdict form was error.

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4. The error prejudiced Rowlett.

The error was not harmless. Two decades ago this Court held in *Nolan*, 317 Or at 310, that an error in a verdict form that allows the jury to reach a result not supported by law mandates the same prejudice review as an instructional error. As this Court pointed out in *Nolan*, a faulty verdict form has a similar potential for mischief as a faulty instruction "in the sense that the court submits it to the jury and requires the jury to follow." *Id.* Thus, an "error in a verdict form, like an instructional error, is reversible if the verdict form probably created an erroneous impression of the law in the minds of the jurors which affected the outcome of the case." *Id.*

Schwabe makes no showing why an error like this one – an illicit date on the verdict form by which the jury could calculate damages – would entail a different type of prejudice from instructional error. The verdict form had the practical effect of instructing the jury it could determine damages on a verboten date. Whether on an instruction or the verdict form, the defect permitted the jury to calculate damages from the wrong point in time, years too late, years after the assets left, during the middle of the 2007 crash.

Schwabe argues Rowlett did not demonstrate prejudice because the jury did not checkmark "no" to damages, but instead checkmarked "no" to causation (Tr 2493). Given what Schwabe argued in its closing, the distinction is without a difference. In reviewing the defect, the Court does not wear

blinders. In assessing whether the judgment is reversible under ORS 19.415(2), the Court will "determine[] *from the record*" whether the error substantially affected the rights of a party. *Purdy v. Deere and Co.*, 355 Or 204, 214, 324 P3d 455 (2014) (emphasis in original).[5] The Court decides based on the instructions "considered as a whole in light of the evidence and the parties' theories of the case at trial," whether 'there is some likelihood that the jury reached a legally erroneous result[.]" *Id.* at 231-32. Prejudice in this context entails a "record-based review." *Id.* at 228.

What did the record show here? Vociferous arguments by Schwabe to mark the *causation* box "no" by valuing Rowlett's damages on December 7, 2007 (Tr 2495). Schwabe's closing argument insisted the settlement was "based on reality and real money earned and what really happened with this project and what Mr. Rowlett really had a piece of" (Tr 2439-40). Schwabe told the jury, "the date that you set for a value is the date the case settled. December 7th, 2007" (*id*). "You pick that date, because that's what Mr. Finn's approach to damages was" (*id.*).

Then Schwabe closed the loop (Tr 2495). "The question then, and the most important question here is, *did any of this cause any damage?* You're

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[5] ORS 19.415(2) states, "No judgment shall be reversed or modified except for error substantially affecting the rights of a party."

going to be asked that question, *did any of this cause any damage*, and the answer is Mr. Finn's advice was reasonable, they accepted a settlement at that range considering attorney's fees, that was their decision, the information provided was correct (*id.*) (emphases supplied).

Without the settlement date on the verdict form, defense counsel could not have made this impermissible causation pitch. The jury returned the verdict suggested by counsel. It found the Schwabe lawyers negligent, but that their negligence had not caused damage (S Ct SER 25-26).

To avoid the manifest prejudice from arguing an absence of causation based on the illicit date, Schwabe once again makes an argument it did not make in the Court of Appeals. It gestures toward the following instruction, which is says lends a presumption that the jury did not reach the valuation date:

> "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 damaged to the client. Likewise, the fact that a client settles its lawsuit is not conclusive evidence that the attorney was 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 2317-18).

How this instruction indicates the jury did not consider the valuation date in marking "no" to causation, let alone creates a presumption along those lines,

Schwabe does not explain. To the contrary, the instruction told the jury the settlement did not "necessarily" reflect the actual value of his claim, but Rowlett still had to prove he would have "achieved a better outcome, either through a higher settlement or a trial" than he achieved with the settlement (*id.*). And this Court considers the instructions "in the context of the evidence at trial and the parties' theories of the case[.]" *Purdy,* 355 Or at 227.

Here, as a consequence of the verdict form, Schwabe argued the settlement date affirmatively provided the benchmark for making that very determination. It asked the jury to make that comparison on the settlement date. A party's "closing arguments are an integral part of trial that can alter the result of the trial," as they did here. *Cler v. Providence Health Sys.*, 349 Or 481, 490, 245 P3d 642 (2010).

Sam's Texaco does not save this verdict either. The jury in *Sam's Texaco* had neglected to answer whether the defendant was negligent, but unanimously answered the causation element "no." *Sam's Texaco,* 314 Or at 660. Accordingly, it did not matter whether the defendant was negligent there, because all twelve jurors agreed causation did not exist and a related instructional or verdict-form error was not present. *Id.* Here, in contrast, Schwabe exhorted the jury to answer "no" causation on grounds rife with error. Having advocated for a "no" to the causation element, it cannot point to jury's

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skipping of the next element (damages) when skipping that box was precisely what Schwabe had lobbied the jury to do.

Schwabe also argued in the Court of Appeals the jury could have relied on other evidence such as Thompson's low-ball valuation of Rowlett's Sunrise interest in 2003 and 2005 to reach its no-causation result. Where an instructional defect – or in this case a verdict-form defect– exists, however, the error "renders the jury's verdict unreliable." *Pine*, 336 Or at 133. The Court reviews both parties' versions of the case to determine if the error affected the outcome. Rowlett's valuation expert tabbed his Sunrise interest at roughly $1 million in 2003 and $2 million in 2005, over and above his settlement with the Sunrise principals (Tr 1602, 1613; Ex 428).

The verdict-form error allowed Schwabe to circumvent the 2003 and 2005 valuations altogether. It allowed Schwabe to push for December 7, 2007, long after the fiduciary breaches had occurred and shortly after the market drop. "[Y]ou pick that date," Schwabe told the jury, and then mark no to causation (Tr 2439-40). This line of impermissible argument, made possible by the verdict form, created more than just some likelihood the error affected the outcome. The likelihood was strong here, exceptionally so, and the Court of Appeals properly reversed.

Rowlett has already proved defendants were negligent in handling his claims. The jury's finding of negligence should remain in effect; it has never

been demonstrated defective or even challenged. The finding remains entitled to weight under Oregon Const. Art VII, § 3. This Court should remand for a new trial on causation and damages only.

B. The Court of Appeals correctly held the complaint's allegation that Schwabe failed to timely assert a squeeze-out stated a claim for malpractice.

1. The standard of review is errors of law.

Thirteen days before trial, Schwabe filed an ORCP 21G motion attacking Rowlett's allegation that Fagan and Finn had failed to file a timely oppression claim. "[S]uch a motion is not favored by the courts." *Salem Sand & Gravel Co.*, 260 Or 630, 636, 492 P2d 271 (1971). Issues of fact cannot be tried on a motion for judgment on the pleadings. *Id.* The motion is permitted only when the complaint's allegations, taken as true, affirmatively show that plaintiff has no cause of action. *Id.*; *Boyer*, 344 Or at 587.

Schwabe suggests this Court should, instead, review for abuse of discretion. Were it so, every defendant would wait until trial's eve to file this disfavored motion. Review is for errors of law. *Salem Sand*, 260 Or at 636.

2. The Court of Appeals properly addressed the attack on Rowlett's pleading.

The Court of Appeals did not exceed its authority when it determined Rowlett's loss of a colorable claim was sufficient to allege malpractice. Schwabe was continually attempting to deny the complaints' truth, which

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Rowlett pointed out, noting his former lawyers were attacking the validity of a claim they had successfully championed (Op Br 20, Reply 2-3, 7-9).

The Court of Appeals crafted a rule, colorability, designed to address this procedural disregard, one that entitled the client, not his former lawyers, to receive the benefit of the facts of the pleading and the underlying case. Schwabe's preservation argument conflates how the Court of Appeals *resolved* that problem with whether *the issue* had been presented.

Preservation is concerned with issues more than arguments. *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988). The issue here was front and center. Rowlett repeatedly told the Court of Appeals the lawyers were attempting a variety of "extra-pleadings maneuvers" that were "out of bounds on a Rule 21 motion" (RER 2-4, 7-9). The majority responded by crafting a solution tailored to crack the nut. It fashioned a practical rule to solve the issue. Preservation is pragmatic as well as prudential and varies depending on fairness to the parties and the trial court. *Peeples v. Lampert*, 345 Or 209, 643, 191 P3d 637 (2008). Here is what happened:

Rowlett's third-amended complaint alleged malpractice arising from defendants' "fail[ure] to allege plaintiffs' squeeze-out/oppression claims in a timely manner" (S Ct SER 19). The complaint also alleged negligence from "Fagan's failure to recognize that the factual circumstances gave rise to a squeeze-out/oppression claim" (*Id.*).

When Schwabe filed its eve-of-trial motion, Rowlett introduced into the record what happened in the underlying litigation. Rowlett quoted Finn's brief to Judge Litzenberger that an LLC member "properly states a claim for Squeeze-out/Oppression, if they allege facts that show that majority shareholders used their control of the corporation (or in this case, the LLC) to their own advantage to exclude the minority from the benefits of participation" (S Ct SER 27). Rowlett quoted what Finn told Judge Litzenberger: it was "clear" the Sunrise defendants "owed Rowlett fiduciary duties as set forth in the Oregon LLC statute" and that those "breaches operated to squeeze Rowlett out of Sunrise," which was "sufficient to constitute a claim for relief" (*id.*). Rowlett also filed a copy of Judge Litzenberger's order (S Ct SER 1-3).

Rowlett argued the underlying decision was enough to show the claim's validity, not just judicial estoppel (S Ct SER 23-38). Rowlett said, "These facts and the law argued in the 2007 case by Finn and Schwabe were enough to defeat the motions to dismiss then and should be enough to defeat the motions to dismiss now" (S Ct SER 30-31). Rowlett later reiterated, "Thus, defendants sufficiently alleged a squeeze-out claim on plaintiffs' behalf in the 2007 case, and plaintiffs adequately allege the malpractice claims on that basis as well" (S Ct SER 38). Schwabe has omitted most of this from its Excerpt of Record.

In his Opening Brief on appeal, Rowlett pointed to the about-face: "Finn and Schwabe successfully argued in the underlying litigation that Rowlett did

have a squeeze-out claim ([Op Br] ER 29-32), only to reverse course in the malpractice litigation, denying that Rowlett had a right to a compulsory buyout" (Op Br 20). The lawyers responded with pages of argument attempting to pull in events from the later malpractice trial, which they asked the Court of Appeals to construe in their, not Rowlett's, favor, as well as rely on the jury's verdict on other claims (Ans Br 15-20, 27-28). Rowlett replied, "It should not be necessary to pause and spend valuable ink establishing that this Court accepts the complaint's allegations as true and draws all inferences in favor of Rowlett. It is necessary here" (COA Reply 2.) Rowlett proceeded to chastise Schwabe for its "extra-pleading forays" (*Id.* 3). Again and again, he proceeded to pin Schwabe back to the complaint and the posture of a "Rule 21 motion." (*Id.* 2-3, 7-9).

Thus, Rowlett placed before the Court of Appeals (a) Schwabe's two-faced representations about the oppression claim's validity, and (b) Judge Litzenberger's decision. He also (c) asked the court to cabin its review to the allegations he pleaded, and (d) pointed out Schwabe was repeatedly attempting to violate Rule 21G by attacking the allegation's truth.

Schwabe should not feign surprise that the majority fashioned a rule to address its tactics. Like the plaintiffs in *Knepper v. Brown*, Schwabe is "attempting to hold" both Rowlett and the Court of Appeals "to an unreasonably stringent standard" of preservation. *Knepper v. Brown*, 345 Or

320, 328, 195 P3d 383 (2008). Schwabe had repeatedly thumbed its nose at the nature of the motion it filed, and Rowlett dissented. Rowlett need not have presented the court's solution; he only had to raise the issue on which the court based its solution. *See Hitz*, 307 Or at 188.

Nor should Schwabe protest that the Court of Appeals observed the trial record supported Rowlett's pleading when Schwabe asked the court to peek at the transcript (Ans Br 15-20, 27-28). Having done so, Schwabe should not whine how the court noted Ellis' testimony about the "powerful" remedy of a "compulsory buyout" (Tr 1553; *see also* Tr 1529-30). It should not be heard to grouse about Sunrise lawyer Powell's testimony that Fagan's failures meant his clients did not have to report the pending action to the SEC, which otherwise would have "pressure[d]" them to seek "a complete resolution of the matter fairly quickly" (Tr 956-57). Powell's testimony did not single out oppression, but an oppression claim was among those not promptly pleaded. Oppression was likely to have changed the litigation's course.

And so it did, only too late. When Finn finally read the case file, he threatened the Sunrise lawyers with a "blatant squeeze out" (Ex 374.) He added an oppression claim to a new petition to try to resuscitate the then-dead case (Ex 16). The Sunrise defendants fought unsuccessfully to have the oppression claim dismissed, then settled.

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Thus, when Schwabe reached into the trial record to insist the malpractice dismissal of the oppression claim had no effect, the Court of Appeals found quite the opposite. After all, were the claim so meaningless, why file a disfavored motion on trial's eve? The answer is obvious. To avoid the jury comparing a poster-size blowup of Finn's words – "a more blatant squeeze out is hard to imagine" – with the four-year failure to allege it.

3. Mishandling of a claim ruled valid by the underlying tribunal gives rise to malpractice unless the claim was not actually colorable.

Where professional negligence caused a less desirable outcome on a "good cause of action," the client has a malpractice claim. *Harding v. Bell*, 265 Or 202, 204, 508 P2d 216 (1973). The Court of Appeal's colorability analysis fleshed out what that means in this narrow scenario: the underlying tribunal had ruled Rowlett had a good squeeze-out claim and the case then settled; yet Rowlett's former lawyers then attacked his allegation on a motion to dismiss in the malpractice case.

Because the claim was colorable, the lawyers could not blot out what happened in the original action, the Court of Appeals held. *Rowlett*, 268 Or App at 682-83. Because the claim's validity had already been determined in the venue where it counted, the lawyers, not the client, bore the burden of proving the claim should instead have played no part. Because the claim was colorable, the lawyers could not go back on their representations to the judge who ruled as

they requested. They could not rewrite history. *See also Hamilton v. Silven, Schmeits & Vaughan*, No. 20:09-cv-1094-SI, 2013 WL 2318809, at *6 (D Or May 28, 2013) (Simon, D.J.) ("Because there was a colorable personal injury trespass counterclaim in the underlying action," the lawyers failed to show "no disputed issue of fact as to whether they negligently represented the Hamiltons in prosecuting that counterclaim.").

Arguing this standard will have some broad, nebulous affect on how lawyers represent clients, the PLF (who was Schwabe's primary malpractice insurer) misframes the issue. The issue is *not*, as the PLF puts it, whether a client can proceed on a "legally invalid claim." No. The claim here was already ruled valid. This was not some unpresented theory, not a guessing game at what the judge might have done. Unlike the bulk of malpractice scenarios, the judge designated to make the ruling had made one, in Rowlett's favor, never overturned, never appealed, and both sides knew the claim had considerable fangs; they treated it as such. *Rowlett*, 198 Or App at 682-83. Given this circumstance, the Court of Appeals held, the lawyers could not simply file a motion to dismiss and glibly insist the client must prove *for a second time* the validity of a claim that had *already* been deemed valid.

This scenario is the flipside of *Chocktoot v. Smith*, 280 Or 657, 571 P2d 1255 (1977). *Chocktoot* addressed the ordinary scenario where the lawyer botched the claim and context required determination of the probable

consequence in the form of a legal ruling. *Id.* at 574. Here, there *was* a legal ruling. The judge did rule. There was no need for a crystal ball. In that context, or where the ruling was unfavorable to the client, the client properly bears the burden of showing something different would have happened with the ruling. Here, in contrast, Rowlett was *not* challenging the ruling. His former lawyers were. Causation did not require the client to alter the nature of the ruling he actually received.

Here, in contrast, it was the former lawyers who wanted to *interfere* with causation. There was no need for speculation by the client; he had the favorable ruling in hand. His former lawyers, instead, wanted to rip the ruling from his fingertips, deny the effect of a signed order, and insist a completely different legal outcome should have happened. The Court of Appeals answered that Schwabe could not break the causation chain – what actually happened – so easily, not unless the claim was not actually colorable.

It was the lawyers' burden in this context to show what had been part of the underlying case should be whitewashed. The PLF insists another circuit judge might have ruled differently, or Judge Litzenberger might have done so. But a merits ruling *was* made – it was part of the record – and the PLF and Schwabe, not the client, now want to speculate that ruling away. Finn, after calling this "a blatant squeeze-out," would flip the pencil's end and erase his own words, along with Judge Litzenberger's signature from her order. The

majority's response addressed this. Once the lawyers presented the claim in the underlying action, and the court in that action accepted the claim, it should be deemed valid in the malpractice action unless the lawyers show it was not actually colorable.

Under the *Chocktoot* framework, the issue was no longer purely legal – 280 Or at 574 – because the favorable ruling had taken on the status of a fact. The PLF can quibble about the niceties of the law of the case, but it was an established fact the oppression claim was recognized in the Sunrise litigation. That fact may not be rubbed from the complaint unless it lacked a colorable basis. The majority's approach to this mixed issue of law and fact both honors the original ruling, while allowing the judiciary to shut down a later malpractice claim if the underlying tribunal made a significant mistake.

Contrary to the PLF's rhetoric, this approach will *not* necessitate that attorneys raise every conceivable claim on the off-chance it is colorable. The claim here was presented, decided, deemed valid, and the negligence came from the failure to assert it when it mattered most. Those facts – actual presentation and a favorable ruling for the client – will keep the ghosts the PLF has conjured safely in the graveyard. The PLF's shadowy fears of second-guessing rely on cases addressing courtroom situations and tactical decisions like those mentioned in *Montez v. Czerniak*, 355 Or 1, 7, 322 P3d 487 (2014). Schwabe's malpractice, in contrast, stemmed from an associate's sheer laziness.

It did not take Superman to file a timely arbitration petition. To riff more on the PLF's rhetoric, filing the pertinent claim – the one Jim Finn called "blatant" – in 2002 rather than in 2006, did not require donning a red cape. Concluding that it might be a good idea to allege a squeeze out at the time one's client is actually being squeezed out does not require slapping an "S" on one's chest. To the contrary, this expertise was what Schwabe billed hundreds per hour for. Nor does the PLF's citation to authority precluding malpractice for a nuisance settlement add to this discussion. *E.g.*, *Beatty v. Wood*, 204 F3d 713, 719 (7th Cir 2000).

The PLF's "lost settlement opportunity" refrain grossly distorts Rowlett's complaint. Rowlett alleged that but for the negligence he "would have received a more favorable outcome" (COA ER 23 ¶ 89). He lost the opportunity to *prosecute* his claim for oppression when it mattered, in 2002, before $5.8 million walked out the door (COA ER 21). The testimony of Powell that an earlier prosecution would have resulted in a quick resolution was an *additional* fact demonstrating the strength of Rowlett's allegations. Rowlett was entitled to show, at a minimum, the settlement he did achieve (after his case had been dismissed for want of prosecution) would have contained another digit had it been prosecuted promptly, before the assets left the LLC.

The PLF's "lost settlement opportunity" mantra, in this context, is gibberish, because every malpractice case could be dubbed a lost opportunity.

The PLF's repetition of the phrase is meant to stuff Rowlett's claim in a box that does not fit, a classification of cases in which the claim had less than a 50/50 chance of success, as in *Drollinger v. Malon*, 350 Or 652, 260 P3d 482 (2011), where a prisoner alleged his lawyer mishandled a post-conviction motion. Criminal cases involve different burdens and finality concerns, *id.* at 661, but the PLF seizes on a comment discussing "loss of chance" arguments used in some out-of-state medical malpractice cases. *Id.* at 491. *Drollinger* dismissed allegations that the lawyer's negligence "caused plaintiff to lose his *chance* for relief from his convictions." *Id.* (emphasis in original). The PLF does not adequately describe what *Drollinger* meant by "loss of chance."

"Loss of chance" arguments are advanced where the plaintiff is unable to prove a different result would have occurred to a preponderance of the evidence, for instance, where "a doctor's belated diagnosis of disease that *only a small percentage* of people ordinarily survive, even with early treatment." *Id.* at 491 n 11 (emphasis supplied). "Loss of chance" arguments are less than 50/50 arguments. *Id.* Rowlett's odds were not so low. To the contrary, his claim's cognizability was demonstrable: proved when it counted, where it counted, in the Sunrise litigation itself.

Given that context – a favorable ruling and a settlement – a jury could properly infer malpractice from Schwabe's four-year delay. Requiring the client to prove this Court would have affirmed, when an appeal by the Sunrise

defendants was not in the works, would unfairly shift the burden from the lawyers to the client because Supreme-Court certainty is not how parties litigate. "Parties in arms' length transactions do not make demands only when their position is indisputably correct, nor do they make concessions only when they are certain that they would lose if the issue went to court." *Chiles*, 94 Or App at 628 n 18. "The existence of a colorable claim is sufficient to justify either the assertion or settlement of that claim." *Id.; see also King v. Jones*, 258 Or 469, 470, 483 P2d 815 (1971) (discussing malpractice from less favorable settlement).

Rowlett's claim bore fangs, and he was entitled to show his lawyers' four-year failure to assert it caused him a less favorable outcome. Allowing the lawyers to flip the chess board now, to rearrange the pieces, does our profession a disservice. It is one thing for a lawyer to take a different position for different clients in different cases. It is another thing for a lawyer to successfully convince a court that a claim exists, then profess the reverse to avoid the consequence of lollygagging.

This two-faced approach to lawyering should not permit Schwabe to void the ruling its lawyers advocated for. The client should get the benefit of the ruling when he paid the lawyers significant dollars to procure it. Having lightened Rowlett's wallet and convinced an officer of the court, Schwabe may not backpedal unless the claim was not colorable. If the lawyers wanted to

show a decision they procured was no good, then they bore the burden of unwriting what was written.

4. Oregon law protects LLC members from squeeze-outs.

With "some features of corporations and some features of partnerships," limited liability companies are relatively new business structures that combine aspects of both. *McNamee v. Department of the Treasury*, 488 F3d 100, 107 (2d Cir 2007). Oregon case law long provided an equitable right to a forced buyout or judicial dissolution of a partnership or close corporation, as a supplement to legal rights under the statute books, when a minority was squeezed out. *Delaney*, 278 Or at 310; *Baker v. Commercial Body Builders*, 264 Or 614, 631-33, 507 P2d 387 (1977); *Browning v. C&C Plywood Corp.*, 248 Or 574, 582, 434 P2d 339 (1967); *Chiles*, 94 Or App at 639-40. The law no more allows majority LLC owners to oppress the minority than it allows partners or shareholders to do so.

ORS 63.155(9)(b) holds LLC managers to the duties listed in ORS 63.155(2) through (8), which include the obligation to "discharge the[ir] duties" to the LLC and its "other members" in a manner "consistent with the obligation of good faith and fair dealing" and the "duty of loyalty." ORS 63.155 (2) & (4). The statute also provides,

> "ORS 63.661. **Grounds for judicial dissolution**. The circuit courts 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; or
>
> (2) *In a proceeding by or for a member if it its 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."*

ORS 63.661 (italics supplied).

Rowlett had a squeeze-out claim for two reasons. First, Rowlett was entitled to judicial dissolution under the express language of ORS 63.661 because the Sunrise defendants' conduct made it no longer reasonably practicable to carry on the LLC's business in accordance with Sunrise's operating agreement. Second, the Sunrise defendants had breached their good-faith duties under Oregon's LLC Act, thereby entitling Rowlett to the equitable remedy of a buyout or dissolution under the *Baker*/*Browning*/*Delaney*/*Chiles* line of cases. Both grounds arise out of the intersection between fiduciary duties and squeeze outs.

a. Fiduciary duties protect minority business owners.

The duty to avoid oppressing the minority falls within the fiduciary duties owed by majority business owners. LLC managers, as mentioned, have

an obligation to "discharge the[ir] duties" to the LLC and its "other members" in a manner "consistent with the obligation of good faith and fair dealing" and "the duty of loyalty[.]" ORS 63.155(2) and (4); *see also* ORS 63.155(9)(b).

LLCs, as mentioned, are a hybrid of partnerships and close corporations. *McNamee*, 488 F3d at 107. For both close corporations and partnerships, the good-faith duty condemns squeeze outs or conduct that oppresses the minority. *Delaney*, 278 Or at 310 (partnerships and joint ventures); *Baker*, 264 Or at 629 (corporations). For both close corporations and partnerships, when majority owners use their control to "their own advantage and exclude the minority from the benefits of participating" in the entity, their actions "constitute a breach of their fiduciary duties of loyalty, good faith, and fair dealing." *Noakes v. Schoenborn*, 116 Or App 464, 472, 841 P2d 682 (1992); *see also Delaney*, 278 Or at 310.

Good-faith violations ordinarily lead to a finding of oppression because the inherent characteristics of small business entities create an "always present" danger that majority owners will use the entity to favor themselves. F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Oppression of Minority Shareholders* 103 (2d ed 1997). Four characteristics – sometimes called "seeds of oppression" – give rise to that danger: (1) majority rule; (2) deference to the business judgment of decision-makers; (3) lack of exit rights; and (4) lack of advance planning by those who do not appreciate the risks of minority status.

Douglas K. Moll, *Minority Oppression & The Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 Wake Forest L. Rev 895-917 (2005).

The same characteristics – the same seeds of oppression – exist in LLCs. *Id.* at 943. Like close corporations and partnerships, the majority rules. ORS 63.130(1)(b). Like close corporations and partnerships, deference is given to the business judgment of LLC managers. *See* ORS 63.155(9). Like close corporations and partnerships, LLC members lack exit rights; they are trapped in their investments. Sandra K. Miller, *What Buy-Out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply In the Case of the Minority Owner of a Limited Liability Company?* 38 Harvard J. on Legis. 413, 437 (2001) And like close corporations and partnerships, the unlikelihood that LLC members would appreciate and obtain contractual protections before investing "cannot be over-emphasized." *Id.*

In all, minority LLC members are just as vulnerable as minority shareholders and partners, and courts have consequently found that breaches of duties by majority LLC owners also give rise to squeeze-out liability. *Anderson v. Wilder*, 2003 WL 22768666, at *6 (Tenn App 2003); *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *4 (Del Ch 2000).

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b. ORS 63.661's plain language entitled Rowlett to judicial dissolution.

The plain language of ORS 63.661 entitled Rowlett to a judicial dissolution in the face of the Sunrise squeeze out. The "text and context," which receive the primary focus, demonstrate so. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

Under ORS 63.661(2), a court may dissolve an LLC if "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." Oregon passed the LLC Act in 1993 before publication of the Uniform Limited Liability Company Act, which specifically identified "illegal, oppressive, fraudulent, or unfairly prejudicial conduct" as grounds for dissolution. ULLCA § 801(4)(v); Donald W. Douglas, *1993 OR Laws Ch. 173 (SB285) Limited Liability Company Act*, A-47 (1993). ORS 63.661(2) did not need added language.

In the event of a squeeze out, ORS 63.661(2)'s "reasonably practicable" formula allows for dissolution. It is "not reasonably practicable" to carry on a business in conformance with the operating agreement when some members are violating the operating agreement by squeezing other members out. It is "not reasonably practicable" to carry on business in conformance with the governing document when some members have precluded others from participating in the LLC. Courts construing language identical to ORS 63.661(2) have so held.

Ayers v. Ag Processing Inc., 345 F Supp 2d 1200, 1206 (D Kan 2004); *Della Ratta v. Dyas*, 996 A2d 382, 394-95 (Md App 2010); *Reid Point, LLC v. Stevens*, 2008 WL 3846174, at *8 (NC Super 2008).

Dissolution is particularly appropriate here where the Sunrise principals repeatedly disregarded the operating agreement, violating duties identified in ORS 63.155(4) and (6)(b). They forged Rowlett's signature to admit new members, removed him as manager, and announced a capital call designed to dilute his shares. Then they removed him as a member altogether and pilfered the LLC's assets, distributing $5.8 million to themselves (COA ER 9-13). As a consequence, it was no longer reasonably practicable to carry on the LLC's business in conformance with the operating agreement.

Schwabe argued in the Court of Appeals that ORS 63.661(2)'s language is fault neutral and focuses on the LLC's ability to carry on its business. The statute does *not* limit the focus to whether the LLC can carry on its business. It, instead, considers whether the LLC can do so "in conformance" with its "operating agreement." The text is entitled to its meaning, *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014), and Rowlett had a dissolution claim.

c. Equity also provided Rowlett a remedy.

Long-standing equitable principles also supplied a remedy. When the legislature legislates in an area where the common-law has traditionally

established the contours, the judicial past provides context for the enactment, what it does and does not do. Unless the legislature expressly disavows a well-established judicial backdrop, it remains in place. *Hatley v. Stafford*, 284 Or 523, 527 n 1, 588 P2d 603 (1978). The fabric does not unthread without more. Instead, the act is "construed in a manner consistent with the common law, absent a clear legislative intent to the contrary." *State v. Ford*, 310 Or 623, 637 n21, 801 P2d 754 (1990).

The parol evidence rule was at issue in *Hatley*, 204 Or at 527 n1. "Concededly," this Court wrote, "a literal reading" of the codification "would exclude any evidence of the terms of an agreement once that agreement had been reduced to writing[.]" *Id.* (interpreting ORS 41.740). As "the general rule," however, statutes "are to be construed in a manner consistent with the common law." *Id.* Consequently, judicial exceptions to the parol evidence rule such as partial integration continued to apply, though they did not appear in the statute. *Id.*; *see also Van De Hey v. U.S. Nat'l Bank*, 313 Or 86, 90 n 4, 829 P2d 695 (1992) (claim-preclusion statute); *Ford*, 310 Or at 637 n 21 (warrant statute).

Oppression claims have existed in Oregon for a century, *e.g.*, *Baillie v. Columbia Gold Mining Co.*, 86 Or 1, 167 P 1167 (Or 1917), but until quite recently, Oregon's close-corporation statute mentioned dissolution as the only form of relief. *Baker*, 264 Or at 629 (citing former ORS 57.595(1)); *Browning*,

248 Or at 582. Yet, *Baker* and *Browning* recognized equity's hands are not so tied. When faced with a squeeze out, "courts are not limited to the remedy of dissolution, but may, as an alternative, consider other appropriate equitable relief." *Baker*, 264 Or at 629. Equity courts may order a compulsory buyout when shareholders of a close corporation have been oppressed, along with a number of other forms of relief that took a full opinion page to list. *Id.*

Applying that rubric, *Delaney* held a forced buyout was available for a joint venture under partnership principles. *Delaney*, 278 Or at 310. A forced buyout was available to the shareholder in *Browning*, 248 Or at 582, regardless of the statutory silence. And so it was in *Chiles*, 94 Or App at 639-40.

There is no principled reason to grant that remedy in equity to minority stockholders, partners, and joint venturers, but deny it to minority LLC members – not where equity has traditionally provided the remedy in addition to dissolution under the statute. As a consequence, LLC statutes do not foreclose remedies besides dissolution, the Utah Supreme Court held in *OLP, LLC v. Burningham*, 225 P3d 117, 179 (Utah 2009).

Oregon's legislative history for LLCs confirms established principles did not evaporate. As the Court of Appeals recited, the legislative history reflected "no intention to change the underlying common law regarding the liability for apparent authority," for instance, a statement which demonstrates the legislators

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were not of a view that the Act displaced traditional judicial rules. *Rowlett*, 198 Or App at 684 (quoting Senator Shoemaker).

The Senate Committee's commentary is even more telling. The Committee discussed how the dissolution section "lists events that cause an LLC to be dissolved," which "follows, in large part, the structure of ORS 70.325" for "partnerships," the Senate said *Id.* (quoting Testimony on SB 285, Feb 22, 1993, Ex J, 17). There was no mention of foreclosing equitable remedies. Quite the contrary. The Committee's commentary stated, "*the existing and likely future judicial development* of the parameters of the partners' duty of loyalty is seen as adequately protecting the interests of members" of LLCs. *Id.* at 685 (quoting Testimony on SB 285, Ex J, 8) (emphasis supplied).

Thus, not only was the legislature aware that "existing" principles of duty of loyalty protected LLC members, but the Committee expected "likely future judicial development" as further "adequately protecting" those members. Fairly read, this commentary indicates additional specifics were unnecessary because the Committee believed judicial principles *already* provided those remedies and *judges* should retain flexibility to further develop those principles.

Schwabe attempts to blunt the force of this history by citing a different page from the same commentary, which states the dissolution section was "loosely based on" the Business Corporations Act ("BCA") and Partnership Act. (ER 50). Schwabe reasons the BCA contains specific language about

oppression. But the BCA does not even preclude equitable remedies. *Hickey v. Hickey,* 71 Or App 258, 275, - P3d - (2015). Additionally, there is no reason why oppression was not folded into ORS 61.551(2)'s broader focus on reasonable practicability. And as shown, the same commentary also expected "existing and likely future developments" from the judiciary. Schwabe also uses the commentary to suggest that only the Attorney General could move to dissolve for fraud. But the statutory text explains the AG could seek dissolution when the LLC "*obtained* its articles of organization through fraud," ORS 63.661(1)(b), thus placing the AG's focus on protecting the state. Existing judicial principles already protected individual members.

Nor does *Crimson Trace* lend support to Schwabe's attempt to cancel equity. To the contrary, in finding OEC 503's attorney-client privilege did not include an additional exception for fiduciary relationships, this Court stated "the historical context of the enactment" matters. *Crimson Trace*, 355 Or at 497 (citing *Hatley*). The *Crimson Trace* plaintiff was pushing for an exception never recognized in Oregon or many other jurisdictions. *Id.* Here, in contrast, equitable remedies have long been part of the judicial fabric alongside statutory remedies.

In *Crimson Trace*, moreover, OEC 503 enumerated five exceptions to the attorney-client privilege, suggesting the legislature did not intend an expansion. ORS 63.661, in contrast, contains one general statement applicable to LLC

members. Even were oppression not part of the reasonable-practicability rubric, historical context, again, shows a century's worth of courts adding equitable flesh to bare statutory bones, and a Senate quite happy to have the judiciary further develop the relevant duty. Nothing like that existed in *Crimson Trace.*

To borrow a line from a Delaware court which found authority not precisely enunciated in Delaware's LLC statute to invalidate an LLC merger, the "General Assembly never intended, I am quite confident, to enable two managers to deprive, clandestinely and surreptitiously, a third" member's interest. *VGS*, 2000 WL 1277372, at *4. Nothing "in the statute suggests this court of equity should blind its eyes to a shallow, too clever by half, manipulative attempt to restructure an enterprise" in the majority's favor. *Id.*

Nor should this Court believe the Oregon legislature intended to wipeout a century's worth of equity and lock vulnerable minority members into toxic arrangements without so much as a whisper in the record. The record, instead, discloses – indeed, embraces – trust in existing and future judicial developments to protect LLC minorities from malfeasance.

5. Schwabe's technical defenses do not work.

Schwabe also advances a battery of technical defenses. They do not work. Its insistence that Judge Kantor had "declin[ed] to fashion an equitable remedy" in this action because the Sunrise LLC could not be dissolved here is,

frankly, bizarre (Pet Merits Br 35, 51). Rowlett in this action was seeking damages from professional negligence for Schwabe's failure to assert an equitable claim, not trying to dissolve the LLC. *Hoekstre v. Golden B. Prod., Inc.*, 77 Or App 104, 106 (1985) (botched equitable claims may give rise to legal damages for malpractice).

Schwabe also incorrectly insists that the jury's consideration of a *different* claim (the failure to properly handle the fiduciary-duty claims Fagan did file seeking *damages* against the Sunrise defendants) could excuse the Rule 21 dismissal of his oppression allegations pretrial. This is rank speculation. The lawyers may not warp time to use a different jury verdict to justify dismissal of a never-tried claim. *See Rowlett*, 262 Or App at 687.

They are also dead wrong to suggest that Rowlett agreed in the trial court that the squeeze-out claim was unnecessary because it overlapped with the fiduciary claims Fagan eventually included in his 2003 arbitration demand. Defendants quote out of context a colloquy that focused on a different issue, whether the Sunrise principals' fiduciary breaches affected the valuation dates (P Tr 411). Rowlett's counsel stated,

> "we would, of course, like to continue to have all theories available to us.

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> 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."

(P Tr 410-11). The topic was whether different theories would have affected *valuation dates*, not whether the claims afforded the same relief. Counsel, in fact, reminded the judge that under "*Noakes v. Schoenborn*," 116 Or App at 464, a plaintiff can maintain "both a breach of fiduciary duty and an oppression claim" (P Tr 405). Counsel added that the fiduciary duty claims Fagan pleaded had "ask[ed] for damages, whereas under oppression," Rowlett would have been "asking for compelling the purchase" of his Sunrise interest (*id.*).

As a consequence, Fagan's inclusion in his tardy arbitration demand of a legal claim for damages for breach of fiduciary duty in 2003 did not duplicate a claim for oppression or excuse the dismissal of the negligence specification for failing to allege it. ORCP 19, first of all, provides that "relief in the alternative or of several different types may be demanded." Legal damages, moreover, were generally limited to recovery for the harm proved, that is, the harm that actually ensued from the breach. The legal remedy Fagan alleged in 2003 – a year after Rowlett hired Schwabe – would have entitled Rowlett only to those damages that flowed from the forged consent resolution admitting new members and his removal as manager.

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In contrast, a compulsory buyout or judicial dissolution would have entitled Rowlett to the entire value of his Sunrise interest. A compulsory buyout or judicial dissolution would also have rid Rowlett of his duplicitous business partners, and it would have done so before they siphoned the LLC's assets. A compulsory buyout would have given Rowlett a powerful remedy. By comparison, the claim Fagan alleged was weak medicine.

By the time Finn finally got around to alleging the squeeze-out claim, furthermore, the real estate market had begun its precipitous drop, allowing the Sunrise defendants to argue – as Finn and Fagan then did in the malpractice trial – that Rowlett's interest was not worth much. But while Fagan and Finn were dilly-dallying between 2002 and 2006, the Sunrise principals siphoned the LLC's assets during the market peak. Omitting a squeeze-out claim until 2006 damaged Rowlett. Omitting a squeeze out claim until 2006 was professionally negligent.

VIII. CONCLUSION

The Court should affirm the decision of the Court of Appeals ordering the trial court to reinstate the third amended complaint's allegations that defendants negligently failed to allege a squeeze out. The Court should affirm the Court of Appeals reversal of the judgment on the specifications that went to trial, but give effect to the jury's unchallenged finding that defendants were negligent by remanding for a new trial on causation and damages only. In no

event should the final judgment be reinstated, but rather, the case should be remanded to the Court of Appeals for determination of Rowlett's remaining assignments of error that Kathryn Thompson's testimony was inadmissible.

Dated this 27th day of February, 2015.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this opening brief complies with the word-count limitation in ORAP 5.05(2)(b), as modified by the court's order of December 6, 2011, allowing an extended brief. I also certify that the word count of this opening brief is 13,925 words.

I certify that the size of the type in this combined brief is not smaller than 14 point for both the text of the combined brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 27th day of February, 2015.

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CERTIFICATE OF SERVICE AND FILING

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