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-Respondent, Petitioners on Review,	Multnomah County Circuit Court Case No. 090101006 Court of Appeals No. A146351 Supreme Court No. N004629

BRIEF OF *AMICUS CURIAE* PROFESSIONAL LIABILITY FUND IN SUPPORT OF DEFENDANTS' PETITION FOR REVIEW

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

If review is allowed, *Amicus Curiae* Professional Liability Fund intends to file a brief on the merits pursuant to ORAP 8.15(5)(d).

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1. Introduction.

The PLF requests this Court review the Court of Appeal's holding that an attorney can commit malpractice by failing to assert a "colorable" but not valid claim, based on a "lost settlement opportunity" theory. *Rowlett v. Fagen et al*, 262 Or App 667, ___P3d___(2014). The vague and amorphous standard that the Court of Appeals applied conflicts with the clear, established legal principles described in this Court's opinions, including *Chocktoot v. Smith,* 280 Or 567, 573, 571 P2d 1255 (1977), *Harding v. Bell,* 265 Or 202, 205, 508 P2d 216 (1973) and *Drollinger v. Mallon,* 350 Or 652, 260 P2d 482 (2011). In *Drollinger,* in fact, this Court specifically rejected an almost identical theory of recovery, yet the case was not cited by the Court of Appeals. This is likely because the "lost opportunity" theory was not raised or briefed by the parties. The court's opinion will be impossible to apply in practice, is dangerous precedent for the legal profession and civil justice system, and needs to be reviewed by this Court.

2. Interest of *Amicus Curiae* the Professional Liability Fund.

The PLF is a non-profit corporation that provides primary malpractice coverage for most Oregon lawyers. In 1977, the Oregon Legislature authorized the Oregon State Bar to require all active members of the state bar engaged in the private practice of law to carry professional liability insurance. ORS

9.080(2)(a). The statute also authorized the creation of a professional liability fund, to pay

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

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

The PLF has an interest in and commitment to maintaining a predictable cost for PLF coverage despite the volatility of legal malpractice claims. The PLF aims to keep malpractice insurance rates affordable for all covered lawyers and thereby protect the interests of public. It has an interest in this litigation because the Court of Appeals' opinion greatly expands the scope of potential liability for Oregon attorneys. It creates a new, undefined standard of care that is inconsistent with established case-law and impractical given the nature of the practice of law. It alters the fundamental distinction between legal and factual issues that underlies the "case-within-a-case" causation analysis as defined by

this Court over forty years ago, and it creates a new legal malpractice theory that requires juries to speculate whether a legal position is "colorable," and then speculate further as to whether an adversary would have settled a case because of that "colorable" claim.

The majority's opinion will lead to increased numbers of malpractice and professional liability claims, payments on speculative or meritless claims that no longer can be defeated as a matter of law early in litigation by motion, the quicker depletion of claims expense allowances, and ultimately, higher PLF assessments for attorneys which, in turn, will be passed on to the clients, *i.e.* the public.

The opinion also encourages behavior that will have negative consequences on the practice of law. It encourages – if not requires – the "defensive" practice of law to foreclose the possibility that a "legal expert" might later testify that the attorney could have taken some "colorable" position that might have coerced a settlement from an opposing party. This creates a conflict of interest because it could require lawyers to disregard the very professional judgment for which the client is paying, to avoid potential malpractice liability.

3. Statement of Facts Relevant to Review.

Defendants (the "attorneys") represented plaintiffs (the "clients") in a dispute against co-members of an LLC. The attorneys filed a complaint and an

arbitration statement that did not include an "oppression" claim. The complaint was dismissed for failure to prosecute, which the attorneys appealed. The attorneys then filed a new complaint that did include an oppression claim. The defendant in that case moved to dismiss the oppression claim as not viable under Oregon law, and that motion was denied. The parties then settled the case in 2007 for $200,000.

The clients then brought a legal malpractice claim against the attorneys for, *inter alia,* failing to timely assert the oppression claim. The clients alleged that, had the claim been asserted earlier, they would have received "more monetary value" for the clients' LLC interest than they ultimately received in the 2007 settlement. The clients' purported damages were the difference between the 2007 settlement and the "value of [the clients'] equity interest" in the LLC assuming a ruling in their favor at trial.

The attorneys moved to dismiss the specification of negligence regarding the oppression claim on the ground that it was not valid. The trial court agreed that the LLC Act did not authorize such a claim. The parties then tried the case on the remaining specifications of negligence, and the jury found that the attorneys' negligence did not cause the clients' harm.

The Court of Appeals reversed in a split decision. The court held that the trial court should have assumed the truth of the clients' allegation that assertion of an oppression claim would have led to a higher settlement. *Id.* at 680-81.

The court disagreed with the concept that "plaintiffs had to establish with certainty that an oppression claim would have been viable" in the case-within-the-case, because that is "not the applicable standard on a motion for judgment on the pleadings." *Id.* at 681. Instead, the attorneys should have moved for summary judgment. *Id.* The court made clear, however, that such a motion would have been unsuccessful because the clients could have filed an affidavit from a legal expert. *Id.* at 681-82.

The court specifically ruled that the legal validity of the claim was irrelevant. It reasoned, even if an LLC oppression claim "is not valid, defendants still could have breached their duty of care by failing to assert a colorable claim of oppression earlier in the * * * litigation." *Id.* at 682. The court believed "there can be no question that the claim was colorable," because the attorneys eventually asserted an oppression claim, they were subject to ORCP 17, and the claim survived a motion to dismiss in the underlying action. *Id.* The court then examined the legislative history of the LLC Act and concluded, "[a]t the very least, it was possible for plaintiff to establish that the oppression claim * * * had some teeth." *Id.* at 686. But the court saw no reason to simply decide the legal question before it, because "such an assertion of a colorable claim could have altered the outcome for [plaintiff] by giving him increased leverage to secure a settlement on much more favorable terms than what he obtained in 2007." *Id.*

Judge Armstrong concurred in the disposition, but was troubled both by the majority's reasoning, and that it was reached without briefing or argument by the parties. He first observed that the question answered by the majority was not the question presented by the parties on appeal. *Id.* at 700 ("The majority, however, entirely reframes the dispositive question, which reflects the sort of creative reimagining that we normally do not countenance") Judge Armstrong noted that "although it is axiomatic that the court may affirm on grounds not argued to the trial court, there is no authority to reverse the trial court on grounds not argued to it." *Id.* The concurrence noted the majority's holding relied on 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.* at 700. The concurrence ultimately concluded, however, that the trial court erred because an oppression claim by an LLC member is valid.

4. Questions Presented.

A. Whether an attorney can be liable to a client for failing to assert a "colorable" but legally invalid claim?

B. If an attorney can be liable to a client for failing to assert a "colorable" claim, what is the standard for judging whether a claim is colorable, and is "colorability" a question of law or fact?

C. Does Oregon recognize a claim for "lost settlement opportunity" based on a failure to raise a "colorable" claim?

5. Proposed Rules of Law.

A. An attorney does not breach the standard of care or cause a client harm by failing to assert an invalid claim.

B. Whether a claim is legally valid is a question of law that must be decided by the trial court, not the jury, whenever the crux of a malpractice claim is that an attorney failed to take some legal position.

C. Oregon does not recognize a claim for lost settlement opportunity based on the failure to take a legally invalid position.

6. The Majority Distorted and Misapplied Legal Principles Governing Legal Malpractice Claims.

A. This Court Should Review this Case Because it Involves Issues that Are Particularly Within the Province of this Court.

The majority's opinion is based on a distortion and misapplication of established legal principles on issues that are particularly within the province of this court. ORAP 9.07(14). The issues implicated by the Court of Appeals' opinion concern, *inter alia*, the duties an attorney owes a client in litigation, and the workings of the case-within-the-case when an attorney fails to take a legal position in a judicial proceeding. These subjects impact the practice of law and, ultimately, the functioning of the civil justice system.

At least in the absence of a statute to the contrary, this court is the ultimate arbiter of the conduct of attorneys, due to its duty to define and shape the common law of a legal malpractice claim, its obligation to create and

enforce rules of professional conduct, and its responsibility to ensure a functioning civil justice system. *See Stevens v. Bispham*, 316 Or 221, 229, 851 P2d 556 (1993) ("Legal malpractice is a common-law tort claim. In the absence of any pertinent legislation, it is for this court to define what constitutes legally cognizable harm in a tort case."); *Reynolds v. Schrock*, 341 Or 338, 349, 142 P3d 1062 (2006) (recognizing attorney exception to aiding and abetting claim for attorneys "because safeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself"); *see also, e.g.,* ORS 9.250 (Supreme Court determines whether individuals are qualified for admission as attorney); ORS 9.490 (Supreme Court adopts and enforces rules of professional conduct).

As explained in more detail below, the Court of Appeals misapplied fundamental principles that govern a legal malpractice claim, in a manner that alters the duties that an attorney owes to a client, and changes the nature of a legal malpractice case. The court did so without the benefit of briefing or argument from the parties. This is the type of decision where Supreme Court review is appropriate because it impacts the practice of law and "the legal system itself." *Reynolds,* 341 Or at 349. It is particularly so here because the Court of Appeals was not correct.

B. The Majority's Opinion on the Standard of Care.

To prove legal malpractice, a plaintiff must show: "(1) a *duty* that runs from the defendant to the plaintiff; (2) a *breach* of that duty; (3) a resulting *harm* to the plaintiff measurable in damages; and (4) *causation, i.e.,* a causal link between the breach of duty and the harm." *Stevens v. Bispham,* 316 Or 221, 227, 851 P2d 556 (1993). A common legal malpractice claim is that an attorney failed to take some position during litigation. These cases typically rise or fall on causation, *i.e.,* by analyzing the "case-within-a-case" to determine what would have happened in the underlying litigation had the attorney taken the omitted position. *Harding,* 265 Or at 205 (clients must "show the existence of a valid cause of action or defense which, had it not been for the attorney's alleged negligence, would have brought about a judgment favorable to the client in the original action"); *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].")

In conducting that analysis, questions about the legal validity of a position the attorney failed to take are answered by the trial court. *Chocktoot v. Smith,* 280 Or 567, 573, 571 P2d 1255 (1977) ("The legal consequences of an attorney's failure * * * to present a timely pleading or motion to take an appeal

are matters for argument, not proof."). How a jury would have ruled on factual questions are answered by the malpractice jury. *Id.*

1. The Colorability Standard is Vague and Undefined.

This court has written little about the "breach of duty" element of a legal malpractice claim.[1] Although this Court has never examined this specific issue, it has never suggested that an attorney's duty to a client includes taking "colorable" but ultimately incorrect legal positions. This new rule set out in the majority opinion conflicts with other Court of Appeals authority; in *Machado-Miller v. Mersereau & Shannon,* 180 Or App 586, 590, 43 P3d 1207 (2002) stated that if an attorney failed to raise an invalid position, not only did the attorney's omission not "cause" harm, it also "strongly implies that, in failing to raise and argue the issue, the attorney did not breach a duty."

Moreover, to compound the problem, the Court of Appeals did not define "colorable." The word is used in some statutes – such as ORS 183.482(3) and ORS 419A.200(4)(a) – but it is not a known term of art in legal malpractice cases. Black's Law Dictionary defines "colorable" as "the appearance of a legal claim to a right, authority or office." *Black's Law Dictionary*, p. 110

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[1] The Courts' opinions on the standard of care primarily have concerned the circumstances under which expert testimony is required. *See Vandermay v. Clayton*, 328 Or 646, 655, 984 P2d 272, (1999) (expert testimony not required to show attorney breached standard of care by failing to follow clients' instructions); *Arp v. Kerrigan*, 287 Or 73, 87, 597 P2d 813 (1979) (evidence supported jury finding that attorney did not breach standard of care).

(Pocket Ed. 1996). Webster's defines it as "seemingly valid and genuine: having an appearance of truth, right, or justice: Plausible." *Webster's Third New International Dictionary*, p.449 (2002 Ed.) It is impossible to know from the Court of Appeals' opinion whether one of these definitions now governs an attorney's duty to a client, much less how such an amorphous standard would be applied in practice. For example, how would a jury instruction read?

More importantly, the court's analysis of whether an oppression claim was "colorable" sends contradictory signals about whether it is a question of law or fact. The court appeared to decide the issue as a matter of law, but did so based on legislative history (the law) and also the attorneys' conduct (the facts). 262 Or App at 682-86. The court referenced ORCP 17, conflating whether a claim is permissible under ORCP 17, with a duty to assert all claims that might satisfy ORCP 17. It also ruled that whether the attorneys should have raised the oppression claim should have been assumed true for a motion to dismiss, and could be defeated on a motion for summary judgment using an ORCP 47E affidavit. *Id.* at 681-82. This suggests that the "colorability" of a legal position is a question of fact, limited only by the imagination of an expert on the law, but not a judge.

This Court should address and correct the Court of Appeals' "colorability" standard. It is a far cry from the clear, long- standing rule embodied in *Milton, Chocktoot* and *Harding, i.e.,* that a legal malpractice

plaintiff always must prove the existence of a "valid cause of action," which is a question of law for the court. *See Harding*, 265 Or at 205 (requiring malpractice plaintiff to show "the existence of a valid cause of action").

2. Attorneys Do Not Owe a Duty to Take Legally-Incorrect Positions.

Whatever "colorable" means, its use as a standard to define an attorney's duty to a client has no support in the law of this Court. It also places attorneys in untenable positions given the nature of the profession. Lawyers often are faced with unsettled legal propositions given the chameleon-like quality of the law and the myriad of fact patterns that attorneys face. Law is not a discipline where the answer to an unsettled question can be conclusively established through the scientific method:

> "Of all professionals, lawyers are the most vulnerable to an error revealed in hindsight. The essence of the legal system portends a high frequency of errors. Unlike any other profession, the practice of law often involves a process by which attorneys must take positions inconsistent to those of their clients' adversaries, antagonists or competitors. Usually, only one side will prevail."

Mallen & Smith, *Legal Malpractice* § 19:1, p.1189-90 (2008 ed).

For that reason it is "universally recognized" that "an attorney is not liable for an error in judgment on an unsettled proposition of law." *Id.* at 1190. This doctrine "has developed concurrently with the concept of legal malpractice." *Id.*

The doctrine described in Mallon & Smith was expressly approved by the Court of Appeals in *Copeland Lumber Yards, Inc. v. Kincaid*, 69 Or App 35, 38, 684 P2d 13 (1984) ("We agree generally with the proposition that a lawyer should not be held liable for a mistake in the exercise of professional judgment. When an area of law is unsettled, a choice between possible courses of action necessarily involves judgment.") [2] Although this Court has not had occasion to examine this issue in the legal malpractice context, it has observed that "[a]ctions against professionals often involve the exercise of what the professionals refer to as 'judgment.'" *Rogers v. Meridian Park Hospital*, 307 Or 612, 615, 772 P2d 929 (1989).

The Court of Appeals did not explain how a duty to raise all "colorable" arguments is feasible given the unique qualities of the legal profession that underlie this "universally recognized" doctrine. There could be scores of "colorable" positions that an attorney could assert given the circumstances and complexities of the typical case, combined with the forgiving standards of ORCP 17, but an attorney should not have a <u>duty</u> to do more than exercise professional judgment when faced with an unsettled legal position. Attorneys certainly should not have a duty to take positions that are legally invalid, simply because the position is "colorable" to an expert on the law.

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[2] Here, whether an LLC member may bring an oppression claim was "unsettled." The two trial courts that addressed this question came to different conclusions.

A contrary rule sends the wrong message to attorneys about the duties they owe their clients, and it gives the judicial stamp of approval to "scorched earth" litigation. The opinion can be read to require an attorney to take every unsettled legal position that might satisfy ORCP 17, or potentially be liable for the lost settlement value of even non-viable claims. This puts the trial attorney in a difficult and conflicting position between protecting himself or herself from potential liability versus exercising professional judgment as to which claims to assert.

The better rule is that an attorney does not breach the standard of care by failing to take a legally invalid position, irrespective of its "colorability." At a minimum, this issue is important enough to the legal profession that it deserves to be briefed and argued, and then decided by this Court.

C. The Opinion on Causation.

The Court of Appeals decision also conflicts with this Court's decisions relating to causation in the legal malpractice context. Like the trial court, the Court of Appeals should have decided as a matter of law whether an oppression claim is legally valid in order to determine whether the failure to assert the claim caused plaintiff damage. This was the issue briefed by the parties, as required by *Chocktoot*. The Court of Appeals refused to rule on that issue, holding that it was irrelevant to a "lost settlement opportunity" claim. The court

did not address *Chocktoot* or the recent *Drollinger* case, where this Court rejected a similar "lost chance" theory of recovery.

1. The Legal Validity of a Claim is for the Court.

The parties in this case tried the case-within-the-case, and the jury found for the attorneys based on causation. The "case-within-the-case" is a well-known feature of legal malpractice litigation. *See, e.g., Drollinger,* 350 Or at 668-69 (describing the "case within a case" methodology "that is typically used to prove legal malpractice in a litigation context"). The phrase, "case-within-a-case," is a short-hand expression of the traditional causation requirement applied in the legal malpractice context: a litigant can prove an attorney's negligence caused harm only by establishing what would have happened in the litigation where the negligence occurred. *See e.g., Harding,* 265 Or at 205 (clients must "show the existence of a valid cause of cause of action or defense which, had it not been for the attorney's alleged negligence, would have brought about a judgment favorable to the client in the original action").

It has been established for over four decades that, when a client claims his or her attorney breached the standard of care by failing to take some legal position, the causation inquiry is a legal one for the legal malpractice judge to resolve. In *Chocktoot v. Smith*, this Court held that "[u]nlike its decision of a disputed issue of the professional standard of care, the jury cannot decide a disputed issue of law on the testimony", "in determining the probable

consequences of an attorney's earlier negligence in a later action for malpractice, the line dividing the responsibility of judge and jury runs between questions of law and questions of fact." 280 Or at 573, 374. That is,

> "with respect to an issue of law in the earlier case, the issue in the malpractice case is what the outcome *should* have been if the issue had been properly presented, under the law as it was at the time or could have been convincingly argued to be.
>
> This is an issue in the first instance for the trial judge. The legal consequences of an attorney's failure, in the earlier case, to present a timely pleading or motion or to take an appeal are matters for argument, not proof."

Id. at 573. Thus, the "question what decision should have followed in the earlier case if the defendant attorneys had taken proper legal steps is a question of law for the court." *Id.* at 575.

In this case, the clients alleged that the attorneys breached the standard of care by not raising an oppression claim earlier. The attorneys moved to dismiss on the ground that an oppression claim for LLC members is not legally valid. The trial court decided that issue as a matter of law, holding that the LLC statute does not authorize an oppression claim. The Court of Appeals majority reversed, on the ground that the legal validity of an oppression claim was irrelevant. The court held that the factual question of the claim's "colorability" should have been assumed true by the court, and would be an appropriate

subject for expert testimony. In so holding, the court did not cite or distinguish *Chocktoot*, even though its ruling was directly contrary to that case.

This conflicts with fundamental, long-established principles on causation and the standard of care, and should be reviewed and reversed by this Court.

2. If a "Lost Settlement" Claim Exists in Oregon, it does not Change the Law/Fact Distinction for Causation.

The Court of Appeals' decision was based, in part, on its characterization of the clients' claim as involving a lost settlement opportunity. The court reversed the jury's verdict to allow the clients to present expert testimony on whether an earlier assertion of an oppression claim would have garnered some better settlement. From that, the court ruled that it did not matter whether an oppression claim was legally valid. Thus, the majority transformed a legal question – whether an oppression claim is legally valid – into a factual one, *i.e.*, whether it was close enough.

This court has never expressly considered the viability of the "lost settlement opportunity" theory of attorney liability. Even assuming this type of claim exists in Oregon – and as argued below, it should not in this context – the court provided no reason why such a claim would change the traditional distinction between issues of law and fact in the causation analysis. Because the claim that the court approved could be asserted in any case involving a failure

to take a legal position, it is not hyperbole to state that the court's opinion eviscerates the traditional case-within-a-case framework.

That is, any claim that might have been dismissed by a judge under *Chocktoot* because the client could not prove causation as a matter of law, now can be reformulated into a claim for the lost settlement opportunity. This would then present a jury question on the "colorability" of the legal position, irrespective of its validity, presumably based on "expert" testimony from an expert on the law.

This Court recently rejected a similar attempt by a client to alter the case-within-a-case framework. In *Drollinger,* the issue was whether a convicted felon could state a claim against his post-conviction attorney without first having been exonerated for the crime. 350 Or at 667. After holding that the client did not need to prove exoneration in that context, this Court turned to the client's alternative argument, *i.e.*, that it was enough to prove that the attorney's purported malpractice caused the felon to lose the "opportunity" to obtain relief. The court squarely rejected the argument.

> There has been some suggestion, in the course of the argument of this case, that plaintiff is simply alleging that defendants' negligence caused him to lose his only *opportunity* to obtain relief from his conviction, and that such a pleading should be legally sufficient. If such a pleading *were* sufficient, then plaintiff would be relieved from the onerous burden of showing that he would have prevailed in the post-conviction proceeding and, then, in any subsequent proceeding in

> the underlying criminal case, under the "case within a case" methodology that is typically used to prove legal malpractice in a litigation context. *See Chocktoot v. Smith,* 280 Or 567, 570–71, 571 P2d 1255 (1977) (describing "case within a case" methodology); *Harding v. Bell,* 265 Or 202, 205, 508 P2d 216 (1973) (same).
>
> However, such a pleading is not legally sufficient in Oregon. * * * In our view, the loss of chance doctrine should not be imported into the legal malpractice context. Whatever the merits in the medical malpractice context, where the proof burden facing some plaintiffs otherwise would be insurmountable and where statistical evidence that can fill the void is readily available, the argument for its application in the legal malpractice context is less compelling, where it would simply reduce the plaintiff's burden *vis-à-vis* the traditional "case within a case" methodology.

Id. at 668.

The theory of relief that the majority recognized in the present case is another iteration of the "lost chance" claim that this Court rejected in *Drollinger.* The Court of Appeal's opinion relieves the clients of the burden of proving the case-within-the-case because of the "lost chance" to garner some higher settlement. Thus another reason this Court should review this case is that it conflicts with *Drollinger.*

3. That a Party Might Have Settled an Invalid Claim Is Not a Principled Reason to Find an Attorney Negligent.

Irrespective of the legal/factual issue, this Court should review whether Oregon recognizes the claim that the Court of Appeals created in this case. As a general matter, commentators have questioned the wisdom of "lost settlement

opportunity" claims, as they are inherently speculative and dependent on the subjective whims of third parties not before the court. Mallen & Smith, *Legal Malpractice*, § 31:47, p.673 (citing authority and stating: "Public policy concerns are manifest when a client complains, with the perfect wisdom of hindsight, that a settlement would have been a better result * * *. Usually the contention that the attorney should be liable for a missed settlement opportunity is speculative.").

While this Court has not specifically addressed this issue, courts from other jurisdictions have looked unfavorably upon "lost settlement" claims. As one court put it, a "plaintiff must prove that his underlying claim would have been successful even if the malpractice action arises out of a settlement because even frivolous claims may have settlement value." *Novich v. Husch & Eppenberger*, 24 SW3d 734, 736-37 (Mo Ct App 2000). Many courts agree that such claims are speculative and contrary to public policy, particularly without evidence of a specific settlement offer from an adverse party. *See, e.g., Campbell v. Magana*, 184 Cal App2d 751, 758, (1960) (noting malpractice claim for lost settlement value "fell in the category of speculation, conjecture and contingency. The basic rules concerning damages preclude recognition of this type of recovery."); *Thompson v. Halvonik*, 36 Cal App 4th 657, 663-64 (1995) (rejecting claim for lost settlement value because plaintiffs' evidence suggested "speculative harm" given "the myriad of variables that affect

settlements"); *Fuschetti v. Bierman*, 319 A2d 781 (NJ Super 1974) (excluding expert testimony of potential settlement value of action because "no expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial"); *Whiteaker v. State,* 382 NW2d 112, 116 (Iowa 1986) (affirming rejection of lost settlement claim because there was no evidence of a "concrete settlement offer" from the opposing party).

This Court does not need to reject the lost settlement opportunity theory *in toto* to resolve this case. But it should reject the claim created by the Court of Appeals here, *i.e.*, a lost settlement opportunity theory based on the failure to raise a "colorable" claim, supported by expert testimony about what a third party would have done had the claim been asserted. *Rowlett*, 262 Or App at 686, n.4 (stating that it was "evident" that plaintiff could support their lost settlement theory because there was "testimony from their expert" that an adverse party might have settled). This requires a jury to stack speculation about the colorability of an unsettled legal position on top of speculation about how some third party would have reacted to it. It pushes legal malpractice claims further afield from the clear rule established by *Chocktoot* about how the "case-within-the-case" is supposed to work.

This Court should reject the claim that the Court of Appeals created because it is unduly speculative and contrary to public policy. That a defendant

might have settled is not a principled reason to find that an attorney committed malpractice. Defendants settle claims for any number of reasons, including for peace of mind; because there is excess exposure; because of the costs of defense; or for many other reasons unrelated to the merits.

But the mere possibility of a settlement, divorced from the merits of the clients' legal position, should not itself shape or define the duty that an attorney owes to a client, or be a reason to hold an attorney liable for malpractice. This Court should reject the claim created by the Court of Appeals, apply *Chocktoot,* and decide whether an oppression claim is valid in Oregon. If it is not, then it should hold that the clients cannot establish causation, irrespective of whether an expert might testify that the assertion of a "colorable" position might have abstractly increased a clients' bargaining power.

D. The Majority's Position Negatively Impacts the Practice of Law.

Finally, the majority's decision is bad for the practice of law and sends the wrong message to attorneys and clients. The opinion endorses – if not requires – scorched earth litigation. There is no other way for an attorney to protect himself or herself from a potential "lost settlement opportunity" claim arising out of a failure to take a "colorable" position. This could create conflicts of interest between attorneys and their clients, as it requires attorneys to litigate "defensively" to ward off future malpractice claims, instead of relying on their

judgment about how to address the myriad of difficult and unsettled issues that arise over the lifetime of a case.

Requiring the assertion of all "colorable" claims that might impact settlement will result in many more claims being alleged. Treating such issues as questions of fact will encourage the filing of speculative claims. It will also increase motion practice, drive up legal costs, delay resolution of cases, impact insurance rates, and waste already limited judicial resources. It is bad policy for the question whether an attorney committed malpractice to turn on whether someone might have paid to make a lawsuit go away, rather than the principled reason that the claim had legal merit.

The Court of Appeals did not address the impact of its decision on the practice of law, likely because these issues were not briefed or otherwise addressed by the parties. This Court should do so.

7. The Remaining ORAP 9.07 Factors Weigh in Favor of Review.

The remaining factors identified in ORAP 9.07 strongly support this Court accepting review:

- The case involves several significant issues of law. ORAP 9.07(1). The majority's opinion creates a new standard of care for Oregon attorneys, fundamentally alters the case-within-a-case framework, and approves a "lost settlement" claim based on a failure to raise an invalid claim.

- This issue will arise often. ORAP 9.07(2). In 2012 the PLF processed 890 claims. It is impossible to know how many might have been evaluated differently given the standards described in the Court of Appeal's opinion, but it reasonable to assume that the court's opinion impacts any claim arising out of litigation.
- All attorneys who practice law in Oregon, and their clients, are affected by this decision. ORAP 9.07(3).
- The legal issues involve Oregon common-law; the case is free of procedural obstacles to review; the opinion was published; and the Court of Appeals was divided. ORAP 9.07(4), (7), (11), (12).
- The issues described by the majority were not briefed or argued by the parties. The court ruled without benefit of the adversarial system to flesh out and frame the many issues and doctrines implicated by the court's ruling. ORAP 9.07(7), (8).
- This case presents an issue of first impression in the sense that this Court has never addressed whether a failure to assert a "colorable" claim breaches the standard of care; how to define "colorable"; whether there can be a lost settlement claim based on the failure to take an incorrect legal position; and whether such a claim alters the factual/legal dichotomy for analyzing the case-within-a-case. The majority's discussion of these issues conflicts with *Harding, Chocktoot, Drollinger,* numerous other cases from this court and

- the Court of Appeals, as well as respected treatise and cases from other jurisdictions. ORAP 9.07(5), (9), (14).
- The PLF has filed a motion requesting permission to appear as an *amicus curiae* in this matter. ORAP 9.07(16).

8. Conclusion.

For the preceding reasons, the PLF requests that this Court accept review of this case.

Respectfully submitted this 30th day of July, 2014.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 30th day of July 2014, I filed the original **BRIEF OF *AMICUS CURIAE* PROFESSIONAL LIABILITY FUND IN SUPPORT OF DEFENDANTS' PETITION FOR REVIEW** with the State Court Administrator by Electronic Filing.

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

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I further certify that on the same date I served a true and correct copy of the foregoing document upon the following by US Mail:

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DATED the 30th day of July 2014.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,960.

Type Size

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

DATED the 30th day of July 2014.

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