IN THE SUPREME COURT OF THE STATE OF OREGON

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

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

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

Judge P.J. Armstrong, concurring

February 2015

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I. INTRODUCTION

The Oregon Trial Lawyers Association ("OTLA") files this amicus brief in support of respondents on review. OTLA files this brief to support the rule that a limited liability company ("LLC") member who holds a minority ownership interest has a valid claim for oppression under Oregon law against LLC managers, other LLC members (in member-managed LLCs), or the LLC itself, when any of them act in an oppressive manner.

A claim for oppression is well established under Oregon common law and gives rise to various equitable remedies that may be ordered by the court, including forcing the majority owner to either buyout the minority interest or issue a capital distribution. That law pre-dates the legislature's passage of the Oregon Limited Liability Company Act ("LLC Act" or "Act"). The LLC Act was not, except where expressly stated, intended to limit the claims and remedies available to an LLC member. Indeed, the Act confirms that LLC members and managers owe certain fiduciary duties, duties that include not oppressing a minority member in the manner alleged to have occurred in this case. The Act also provides that an LLC itself has on-going duties arising under the law in "tort, contract, or otherwise." The Act preserved and did not displace equitable claims for oppression available to minority owners of closely-held businesses.

II. STATEMENT OF FACTS

For the purpose of this brief, OTLA accepts the statement of facts and the plaintiffs' allegations, which were initially considered in the context of a motion to dismiss, that are set forth in the court of appeals opinion, *Rowlett v. Fagan*, 262 Or App 667, 327 P3d 1, *rev allowed*, 356 Or 516, 340 P3d 47 (2014).

III. ARGUMENT

A. The Background of the Oregon Limited Liability Act

The LLC Act was originally adopted in 1993 and amended in 1999. The Act set forth the fiduciary duties owed by LLC members and managers in conducting the business of the LLC, such as the duties of loyalty and care as well as the obligation of good faith and fair dealing in carrying out those duties. ORS 63.155(2) – (4) (defining members' duty of loyalty and care in member managed limited liability companies) and ORS 63.155(9) (adopting members' duties to managers in manager-managed limited liability companies).[1]

The LLC Act's text indicates that the fiduciary duties are limited to the duties of loyalty and care. *See* ORS 63.155 (stating that the "only" fiduciary duties owed to the LLC and its members are the duties of loyalty and care set forth in ORS 63.155(2) and (3)). However, those duties themselves are broadly stated. *See e.g.*, ORS 63.155(2) (stating that a member's duty of loyalty

[1] OTLA understands that Sunrise Partners LLC was organized as a manager-managed LLC. *Rowlett*, 262 Or App at 671.

"includes the following" and then listing the duties to account for profits in conducting the LLC business, to refrain from acting adversely to the LLC in conducting business, and to refrain from competing with the LLC).

In setting forth the standard of care for LLC members and managers, the legislature adopted prior common law standards, including those from claims arising from gross negligence to intentional and knowing violations of the law:

> A member's duty of care to a member-managed limited liability company and the other members in the conduct and winding up of the business of the limited liability company is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of the law.

ORS 63.155(3); *see also* ORS 63.155(9)(b) (applying standards to manager of a manager-managed LLC). The LLC Act further states that the duties of loyalty and care must be discharged "consistent with the obligation of good faith and fair dealing." ORS 63.155(4).

Moreover, it is clear from the LLC Act's text that the duties of the LLC itself, apart from the duties of its members and managers, come from the common law and are not limited:

> The debts, obligations *and liabilities* of a limited liability company, *whether arising in contract, tort or otherwise,* are solely the debts, obligations and liabilities of the limited liability company.

ORS 63.165(1) (emphasis added). Had the legislature intended to limit common law claims or other claims available against the LLC itself, it would

not have expressly acknowledged that the liabilities of an LLC may arise under contract, tort law, or otherwise.

B. The Equitable Claim for Oppression

At the time of the LLC Act, it was well established in Oregon that persons could bring claims for oppression for being "squeezed out" of a business entity through conduct that violated fiduciary duties and obligations of care. *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 631-32, 507 P2d 387 (1973) (applying broader equitable claims and remedies than otherwise available under statute to minority owners of closely held); *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 310, 564 P2d 277 (1977) (permitting equitable relief of forced buyout of owners of their interest in joint venture project arising from breach of fiduciary duty of loyalty, good faith and full disclosure). Such claims were not limited to the statutory rights existing under the corporations act or any other statute, but arose under common law as either separate from or an adjunct to statutory relief.

Indeed, in *Baker*, which was a 1973 case applying *then-existing* Oregon law, the court noted that while the remedy for oppressive conduct under the private corporation statute was solely dissolution, Oregon common law was far broader than the statute and provided for *other* appropriate equitable relief, including the right to a forced buyout of the oppressed minority shareholder:

> We have already held * * * that in a suit under ORS 57.595 for 'oppressive' conduct consisting of a 'squeeze out' or 'freeze out' in a 'close' corporation the courts are not limited to the remedy of dissolution, but may, as an alternative, consider other equitable relief * ** [d]epending upon the facts of the case and the nature of the problem involved.

Baker, 264 Or at 631-32 (citation omitted within quote), *citing Browning v. C &C Plywood Corp.*, 248 Or 574, 582, 434 P2d 339 (1967). Such relief could include, among other things, the ordering of a receiver; an accounting; a required dividend or capital distribution; the forced buyout of the minority shareholder; or an award of damages to the minority shareholder. This relief was available even though such remedies were not specifically provided by statute.

The defendants argue the principle that the expression of one thing is the exclusion of the other (*expressio unius est exclusio alterius*) applies and the inclusion of just the limited dissolution remedy in the LLC Act indicates the exclusion of other remedies, such as those expressly provided in the corporation statute. However, as discussed, Oregon courts had long recognized far broader equitable remedies than the limited dissolution remedy set forth in the corporation statute well before the legislature *later* codified more of those equitable remedies in 2001. *See Hickey v. Hickey*, 269 Or App 258, 275, ___ P3d ___ (Feb 25, 2015) (noting that the legislature in enacting ORS 60.592, part of the Oregon Business Corporation Act, codified *previously existing*

equitable remedies and did not intend to abandon the "equitable considerations inherent in those established remedies").[2] The Oregon Supreme Court did not apply the *exlusio unius* principle to the corporation statute even when that statute provided solely for dissolution as an equitable remedy. *Baker*, 264 Or at 631-32.

Other courts, outside of Oregon, recognize that corporation and LLC statutes do not provide the exclusive remedies available to oppressed minority shareholder or LLC members. See e.g., *Hollis v. Hill*, 232 F3d 460, 472 (5th Cir 2000) (stating that courts have "ordered buy-outs [of minority shareholders] even in the absence of specific statutory authority"); *Bedore v. Familian*, 125 P3d 1168, 1172 (Nev S Ct 2006) (noting that the question is not whether the court has the power to order a buyout of a minority shareholder absent specific authority, it is whether that power is appropriately exercised based on the nature of the majority shareholder's misconduct).

The secondary sources refer to the rulings of such courts as evidencing a common law remedy for oppression. *See* John Matheson and R. Kevin Malter, *A Simple Statutory Solution to Minority Oppression in the Closely Held*

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[2] The very recent *Hickey* case observes that the legislature codified existing Oregon law when it enacted ORS 60.592 in 2001 to set forth more clearly the remedies available for oppression under the Oregon Business Corporations Act. In so doing, *Hickey* expressly acknowledged that those remedies were already recognized by this Court even before they were formerly codified by the legislature. 269 Or at 274-75.

Business, 91 Minn L Rev. 657, 679-80 (2007) (citing states with common law oppression remedies); *see also* F. Hodge O'Neal and Robert B. Thompson, *2 Oppression of Minority Shareholders and LLC Members*, § 7.11 (2014 Update) (stating that "oppression concepts inform common law remedies for breach of fiduciary duty or dissolution"). Indeed, one secondary source, citing *Baker*, identified Oregon as a jurisdiction with a common law remedy for oppression. 91 Minn L Rev at 680.

C. The LLC Act Did Not Eliminate the Rights of LLC Members to a Claim for Oppression.

As the concurrence in the Court of Appeals correctly noted, the LLC Act does not foreclose the equitable remedies available to LLC members in the event of oppression. *Rowlett*, 262 Or App at 699 (Armstrong, J., concurring). There is nothing in the statutory text that eliminates the then-existing Oregon remedy available to members of closely held business entities. Indeed, as noted above, the statute's adoption of common law standards arising from the fiduciary duties of loyalty, care, and good faith and fair dealing (as well as the other statutory references to common law tort remedies) indicates that the legislature intended to adopt then-existing Oregon law and not replace it.

The legislative history confirms that the legislature intended to provide to LLC members at least the broad duties and corresponding remedies already available under the common law to victims of malfeasance by managers of

closely held corporations. *See* Exhibit J, Summary and Commentary to Limited Liability Act (Joint Limited Liability Task Force), Senate Judiciary Committee, SB 285, Feb 22, 1993, Section 33, page 7 (discussing the need to adopt "the broader, more extensive standard of care found in the corporate context").

As applied in this case, the trial court also erred when concluding that even if the oppression claim existed, it was swallowed by plaintiff's common law breach of fiduciary duty claim. The trial court concluded that it had not been presented with proof of the existence of an oppression remedy for LLC members, but did not conclude that one did not exist. ER 37-38 ("I'm not saying as a matter of law there is no such thing as an oppression or squeeze-out claim under an LLC"). In so doing, however, the trial court noted that the equitable remedy was not available because the oppression claim and the breach of fiduciary claim "exist from the exact same conduct" and the breach of fiduciary duty claim provides "a sufficient remedy." *Id*.

Equating a common law breach of fiduciary duty claim with a claim for oppression was error. *Baker* provides that a breach of fiduciary duty claim and a claim for oppression, while closely related, are not identical and can give rise to different remedies. *Baker* concluded that what is "oppressive conduct by those in control of a 'close' corporation" is "closely related to what we agree to be the fiduciary duty of good faith and fair dealing" owed by controlling shareholders, but not identical. *Baker* 264 Or at 629. In other words, a single

act in breach of a fiduciary duty or even continuing conduct in breach of that duty may not be sufficiently oppressive to obtain the highly disruptive remedy of a court-ordered dissolution of the entire business. *Id*. at 630. However, some acts in breach of a fiduciary duty may be sufficiently oppressive to give rise to "various alternative remedies" to dissolution, such as a forced buyout or required dividend or capital distribution. *Baker*, 264 Or at 631-32 (1973). These remedies would be broader than the pure damages remedy available for a breach of fiduciary duty claim tried to a jury.

IV. CONCLUSION

This Court should hold that a claim for oppression is, and has been for many years, a valid claim available to LLC members. As a result, the trial court incorrectly concluded that a legal malpractice claim could not be alleged when based on an attorney's failure to timely file an oppression claim.

DATED this 27th day of February, 2015.

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CERTIFICATE OF COMPLIANCE

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 2,099 words.

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 in ORAP 5.05(4)(f).

/s/ Scott A. Shorr
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CERTIFICATE OF FILING AND SERVICE

I certify that on February 27, 2015, I filed the original of **OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

All participants in this case are registered eFilers and will be served via the electronic mail function of the eFiling system. If any are not current upon filing, they will be served a copy by United States mail and a courtesy electronic copy by electronic mail.

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