IN THE SUPREME COURT OF THE STATE OF OREGON

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

PETITIONERS' REPLY TO RESPONDENTS' BRIEF AND RESPONSE TO OTLA'S BRIEF

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

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I. INTRODUCTION

Plaintiff pled and presented ten legal claims at trial. He prevailed on a single element of one single claim (*i.e*. Defendants breached the applicable negligence standard of care), but the jury returned a "no causation" defense verdict. The causation issue presented to the jury was whether Defendants' negligence caused Plaintiff to settle for less money than he would have otherwise received through settlement or at trial absent the negligence.

The first issue before this Court is simply whether any admitted evidence supported the jury's no causation verdict. Plaintiff does not dispute the content of the evidence identified in Defendants' Merits Brief. Plaintiff did not object at trial to the admission of Defendants' 2007 valuation evidence. He instead argues this Court should simply disregard the 2007 valuation evidence. In doing so, Plaintiff ignores the standard of review and concocts factually erroneous arguments. Plaintiff also distracts this Court by unnecessarily arguing the negligence of Schwabe, a non-issue on appeal.

The second issue before the Court is whether the trial court's dismissal of two oppression allegations was an error and whether that error substantially affected Plaintiff's rights. However, rather than address the legal viability of the oppression obligations, the Appellate Court creatively reimagined a new standard for legal malpractice – failure to timely bring a colorable claim. This issue was not preserved and the Appellate Court should not have decided the

appeal based on an argument Plaintiff never made. This Court should hold an equitable oppression claim does not exist in the LLC context and even if one did, the striking of two allegations did not substantially affect Plaintiff's rights. The jury verdict, following a three week trial, should not have been overturned.

II. THE JURY'S CONSIDERATION OF THE 2007 VALUATION EVIDENCE WAS NOT REVERSIBLE ERROR.

The issue regarding the 2007 valuation evidence is simply whether it meets the "any evidence" standard, such that it could be considered by the jury. Respondent did not assign error to the admission of the 2007 valuation evidence. Trial judge, Henry Kantor, heard three weeks of evidence, including the entire testimony of attorney James Finn and expert witness Peter Richter and correctly concluded the jury could consider the 2007 valuation evidence for purposes of determining whether the settlement amount Rowlett accepted was reasonable. The jury also considered the evidence regarding the 2003 and 2005 valuation dates promoted by Plaintiff. Having weighed the evidence for 2003, 2005, and 2007, the jury determined that, regardless of Defendants' standard of care breach, Plaintiff would not have had a better outcome than the settlement amount he accepted.

As set forth in Petitioners' Merits Brief, Defendants' evidence concerning Plaintiff's interest in Sunrise LLC supported the following values:

March 13, 2003	$30,169
October 7, 2005	$108, 274

December 7, 2007 $110,000-$300,000.

Because the value of Rowlett's interest in Sunrise was measured against Rowlett's accepting a 2007 settlement of the underlying case for $200,000, plus an award of attorney's fees of $59,309, Defendants' evidence supported the jury's no causation defense verdict, regardless of the valuation date.

A. Valuation Evidence Was Before the Appellate Court.

The Appellate Court was directed to the same evidence Defendants cited to this Court in its Merits Brief. The Appellate Court did not have to "search the record" to locate these facts and was obligated to view them in a light most favorable to Defendants. Defendants' Appellate Answering Brief provided the following:

- P. 14: "Finn separately testified, explaining the factors he considered in concluding that the settlement approximated the value of Rowlett's interest in Sunrise at the time, Tr 2011-2054, and another defense expert, Peter Richter, testified that the amount of the settlement was reasonable. Tr 2121-2124."
- PP. 30-31: "Defense counsel also pointed to evidence that, considering all the circumstances, the settlement amount was reasonable. Tr 2011-2052 (Finn explains how he determined value of Sunrise and Rowlett's interest); Tr 2115-2121, 2129-2136 (Richter testifies settlement was reasonable when made);" Tr 2401-2409; 2438-2463; 2470-2495."
- PP. 25-27: Defendants advised the Appellate Court as to the "going concern" basis for the 2007 valuation, and the case law supporting that valuation date.
- P. 33: The reasoning for Judge Kantor allowing the jury to consider the 2007 valuation was also identified.

- PP. 10, 13-14, 38-40: Testimony regarding value of property and operating agreement in effect, which determined the amount to which Rowlett was entitled.

Contrary to Plaintiff's contention, the Appellate Court did not need to "rifle through stacks of transcripts to make defendants' argument." *Resp. 23.* The evidence was identified by witness and page number and the legal arguments were identified and supported by case cites.

B. Plaintiff and the Appellate Court Ignore the Standard of Review.

Defendants prevailed at trial, and evidence relevant to causation and damages are construed in Defendants' favor. *Watson v. Meltzer*, 247 Or App 558, 560, 270 P3d 289 (2011). Bamboozled by Plaintiff's erroneous claim that Plaintiff was entitled to have the evidence construed in his favor, the Appellate Court adopted Plaintiff's damages arguments wholesale. In so doing, the Appellate Court construed findings relevant to causation, not negligence, in Plaintiff's favor and ignored Defendants' evidence to the contrary.

Defendants' word count limitation prevents responding to each instance where Plaintiff's and the Appellate Court's facts violate the applicable review standard. Some examples, however, follow.

1. $1.04M Valuation for 2003 Was Contradicted.

The 2003 valuation of $1.04M represented to this Court by Plaintiff (*Resp. 10)* is based on an invalid $11M appraisal of Sunnyside Road Property, which the Appellate Court improperly adopted. *Opinion, 670.* The erroneous $11M value comes from a 2001 appraisal, which Defendants' expert testified

was invalid. *Tr. 1687-1688*. Plaintiff's own exhibit, a May 24, 2001 appraisal report, demonstrates the appraisal's invalidity because not a single one of the appraisal assumptions was satisfied. *Exh. 394, p. 2-3; Tr. 1685-1688.*

Plaintiff's expert used this invalid appraisal, despite the existence of a May 19, 2003 "as is" appraisal of $6.65M. *Exh. 558.* Defendants' expert, the only appraiser at trial, testified the 2003 appraisal was the only valid indication of the properties' 2003 value. *Tr. 1692.* Applying the 2003 appraisal, Defendants demonstrated the 2003 value was $30,169, not $1.04M, which is consistent with the fact that, in 2003, Sunrise was broke and its property was being foreclosed. *Tr. 993-994.*

2. $2.2M Valuation for 2005 Was Contradicted.

Plaintiff's 2005 valuation of $2.2M was also based on erroneous appraisal figures, and required acceptance of Plaintiff's claim that the original Operating Agreement applied. However, Rowlett admitted he signed a Consent Agreement for a subsequent Operating Agreement. *Tr. 668-669, 2038-2039; Exh. 591a.* The Appellate Court, however, stated Rowlett's signature was forged (*Opinion, 671*), even though this causation/damages evidence should have been interpreted in Defendants' favor.

Additionally, Defendants' appraisal evidence showed the 2005 valuation was significantly lower than Plaintiff argued: $355,312 under the original Operating Agreement or $108,274 under the subsequent Operating Agreement.

ER-2, Exh. 616. Despite all of the above, the Appellate Court wrote "[c]ausation was not truly disputed." *Opinion, 694*. This statement reflects a fundamental misunderstanding of the case.

C. The Jury Was Not Limited to the 2003 and 2005 Values Alone.

The jury was not, as Plaintiff argued, required to consider only the 2003 and 2005 valuation evidence simply because his expert, Barnes Ellis, said so. *Tr. 2201; see Stokes v. Lundeen*, 168 Or App 430, 7 P3d 586 (2000) (Questions of law for the court and not a proper subject for expert testimony). It was for the trial judge to make the legal determination of what valuation dates could be considered by the jury based upon the evidence presented. Defendants argued the "going concern" valuation approach to the trial court, explaining the application of the 2007 date as follows:

> We believe and will argue that Mr. Finn, the way he evaluated damages as an ongoing concern that this business was ongoing, his client had a membership interest in it, and just figuring out what that interest was worth … that the approach he took was the correct approach.

Tr. 2198. Defendants' expert, Richter, testified Finn's valuation approach was reasonable. *Tr. 2121-2122*. Based on these arguments and the evidentiary record, Judge Kantor ruled there was sufficient evidence for the jury to consider the 2007 valuation.

Consideration of the 2007 date is supported by the case law as well. *See, e.g., Cooke v. Fresh Exp. Foods Corp., Inc.*, 169 Or App 101, 114, 7 P3d 717

(2000)(Value plaintiff's shares in going-concern corporation at time of the buyout not date of the "oppressive" conduct.); *see also Chiles v. Robertson*, 94 Or App 604, 639-40, 767 P2d 903 (1989)(Value as of date shares actually purchased because plaintiff's ownership continued). As discussed in Defendants' Merits Brief, Plaintiff misconstrues *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 324-25, 564 P2d 277 (1977) as requiring Rowlett's interest be valued as of 2003 or 2005. *Delaney* instead allows the fact finder broad discretion.

D. Defendants' Established 2007 Valuation Could Apply.

The Appellate Court's error is demonstrated by the following statement:

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

Opinion, 691 (emphasis supplied). Similarly, Plaintiff argues "[n]o expert testified December 7, 2007 was the date on which the jury 'should' tabulate damages." *Resp. 18.*

However, Defendants were not required to "establish" a specific valuation date "should" apply. Instead, the legal issue before Judge Kantor was whether "any evidence" supported the jury's consideration that a valuation date "could" apply. *See Skow v. Shulps*, 224 Or 548, 553, 356 P2d 521 (1960)(Court determines if there was sufficient evidence to go to the jury). It was for the jury to then determine, which date "should" apply based upon the totality of the

evidence. *See State v. Broom*, 132 Or 363, 367, 285 P 817 (1930)(Question of evidence admissibility was for the court and the weight to be given to it was a question for the jury). Plaintiff and the Appellate Court forget Plaintiff's expert was neither judge nor jury.

Since Plaintiff did not object during trial to the relevance or competency of Finn's or Richter's testimony or admissibility of the documents supporting their analysis, Plaintiff is foreclosed from asserting their admission was error now. *Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977). Plaintiff is left to argue the weight of the evidence, which the trial court correctly left to the jury.

After the close of evidence, Plaintiff asked that the verdict form include valuation dates, so prejudgment interest could be calculated if Plaintiff was awarded damages. *Tr. 2191.* Over Defendants' objection, the Court adopted Plaintiff's proposal. Therefore, Defendants requested the 2007 date also be included. *Tr. 2188-2200.* The trial court agreed sufficient evidence had been admitted to include all three dates on the verdict form. *Tr. 2203.*

While Judge Kantor noted Finn's familiarity with the litigation and valuation information likely qualified him as an expert, Finn's 2007 valuation testimony was not of the nature that would require expert testimony. *See State v. Beden*, 162 Or App 178, 183, 986 P2d 94 (1999)("Expert testimony is needed *only* when an average juror would be unable to *understand* the issues without

expert assistance….”). Finn testified about his methodology and the documents from which he evaluated the value of Rowlett’s 2007 interest. Rowlett, an experienced homebuilder with expertise in valuing building lots, worked with Finn to confirm the accuracy of the Sunrise information. *Tr. 563, 2027-2028.* This testimony and the underlying financial records provided the jury with the information necessary to understand the basis for the 2007 valuation opinions.

To the extent expert testimony was needed, witness Richter testified Finn’s approach to the 2007 valuation was reasonable, noting Rowlett had a continuing ownership interest in Sunrise, an ongoing business concern. *Tr. 2121-2122*. Richter also opined the 2007 valuation maximized Rowlett’s recovery. *Tr. 2123.* This evidence was properly considered by Judge Kantor when he concluded the jury could consider the 2007 valuation.

Remarkably, the Appellate Court acknowledges Finn testified “…the settlement amount approximated the value of Rowlett’s Sunrise interest at the time, in December, 2007,” but then suggests that evidence was somehow inadequate. *Opinion, 690.* However, the adequacy or weight determination is for the jury, not the Appellate Court. Plaintiff had the burden to prove the settlement was inadequate to compensate Rowlett for the value of his Sunrise ownership interest. Defendants’ evidence that the settlement amount approximated or exceeded the value of Rowlett’s interest on each of the

possible dates, including 2007, was precisely what the jury required to determine "but for" causation. The jury was instructed as follows:

> The client must prove that but for the attorney's negligence, the client would not have accepted the settlement, and subsequently would have achieved a better outcome, either through a higher settlement or at trial.

Defendants' evidence that the 2007 "going concern" valuation approximated the settlement amount was adequate for the jury's consideration of the "better outcome" issue presented.

Despite the fact the jury verdict question containing the dates was never reached by the jury, the Appellate Court remand is based upon the 2007 date being included on the verdict form. However, interpreting the causation evidence and inferences in Defendants' favor and applying the correct "any evidence" standard to the 2007 evidence requires reversal of the Appellate Court's opinion and reinstatement of the jury verdict.

E. Plaintiff's New Objections to the 2007 Evidence Are Erroneous.

As noted above, Plaintiff did not object to admission of the evidence supporting the 2007 valuation at trial. Therefore, Plaintiff is now left to concoct new arguments challenging this evidence. This Court should disregard these erroneous arguments.

1. Defendants' Argument Did Not Violate Any Stipulation.

Plaintiff erroneously maintains a "stipulation" was violated when Defendants presented evidence of the 2007 value and when Defendants argued

the 2007 settlement was reasonable in light of all the valuation evidence. *Resp. 11, 13, 16-17.* Plaintiff fails to mention the purported stipulation was ruled upon pretrial through Plaintiff's Motion in Limine. Plaintiff claimed that when Rowlett's case settled in December 2007, Defendants agreed they would never argue that the $200,000 figure represented a reasonable settlement amount. However, having considered Plaintiff's argument and evidence, Judge Kantor ruled:

> Ms. Heekin, I cannot conclude that it is the agreement. I know you asked for it, but Mr. Kwitman never said 'you have it.' *Pretrial Tr. 498-499*.

As a result, the Court went on to hold:

> I am not going to conclude that this exchange of emails and ultimate agreement precludes [Defendants] from – from not being able to argue that the $200,000 figure, which happened to be the settlement date, **was a reasonable figure**. *Id. at 500* (emphasis added).

Defendants agreed they would not argue the $200,000 settlement conclusively fixed the value of Rowlett's interest, and Judge Kantor acknowledged that limitation. At Plaintiff's request, the court expressly instructed the jury on the issue, stating:

> …the fact that a client settles his 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.

Tr. 2317-2318.

Plaintiff did not appeal Judge Kantor's Motion in Limine ruling or object to the jury instruction. Plaintiff never objected to the evidence Defendants introduced related to the 2007 valuation on the basis that Defendants were violating the pretrial stipulation or ORE 408. Contrary to Plaintiff's contention, Defendants' evidence and argument that the settlement was reasonable in light of the 2007 valuation evidence was consistent with the trial court's ruling.

2. Defendants' 2007 Valuation Evidence Was Not Stale.

Plaintiff argues Defendants' admitted evidence concerning the value of Rowlett's interest should be ignored altogether, because it was based on August, 2007 financial disclosures by Sunrise and subsequent analysis by Finn. Plaintiff is apparently arguing the 2007 valuation analysis, which began in August and continued right up to the time of settlement, was simply too stale for jury consideration. Of course, this argument only goes to the weight of the evidence. Plaintiff's argument is also remarkable in that Plaintiff, when trying to establish his Sunrise interest value as of March, 2003, presented only the invalid 2001 appraisal in support. None of the evidence presented by either party was specific to the precise valuation date.

3. 2007 Settlement Resulted in Termination of Rowlett's Interest.

Plaintiff argues for the first time the 2007 valuation evidence should be ignored because the 2007 settlement did not result in a termination of Rowlett's interest in Sunrise. Plaintiff's Complaint sought damages based upon a

"buyout" remedy. When Rowlett settled his case, he dismissed the Complaint with prejudice, and Rowlett's entitlement to a "buyout" was extinguished. Thus, the purpose of Sunrise and Finn calculating the value of Rowlett's Sunrise interest in Fall, 2007 was precisely for purposes of evaluating the "buyout" value of Rowlett's claim.

4. Sunrise Was a Going Concern Through Settlement.

Plaintiff also appears to dispute that Sunrise was a "going concern" at the time of the settlement. This spurious argument is quickly dispatched by a review of Exhibit 559, which includes a financial summary and shows Sunrise was actively selling building lots and had substantial equity at the time of settlement. *Tr. 2013*. Finn testified about the ongoing business. *Tr. 2022-2024.* Expert Richter explained how Rowlett's delay in settling until 2007 allowed for development of the Sunrise property and for Rowlett to maximize his recovery. *Tr. 2122-2123.*

5. Defendants' Closing Argument Was Not Improper.

Plaintiff argues Defendants made an "impermissible causation pitch" during closing argument when Defense counsel suggested the jury conclude Defendants' actions did not cause damages. *Resp. 28-30*. First, Plaintiff did not object to this argument at the time and the issue is not preserved. *See Madden v. Condon Nat. Bank*, 76 Or 363, 367, 149 P 80 (1915)(Where no objection is made and exception preserved, the propriety of closing arguments

not subject to review). Second, Defendants' closing explained there was no causation on any of the dates considered, because the settlement exceeded or approximated Rowlett's Sunrise interest. Third, since Defendants put on sufficient evidence regarding the 2007 date to permit the jury's consideration, Defendants' argument that it approximated the settlement value was not improper. Fourth, and perhaps more troubling, Plaintiff misrepresents Defendants' argument. Plaintiff states Defendants argued the jury should "mark the causation box 'no' by valuing damages on December 7, 2007," citing to transcript page 2495. *Resp. 29*. The referenced page contains no such words. Defendants' concluding statement followed a full discussion on why Plaintiff would not have had a better outcome on any of the dates proposed. Plaintiff also ignores Defendants' arguments regarding the $30,000 value in 2003 or $108,000 in 2005. *Tr. 2476-2477*.

III. DISMISSAL OF TWO OPPRESSION ALLEGATIONS BY THE TRIAL COURT WAS NOT REVERSIBLE ERROR.

To reverse a jury's decision, the Appellate Court must find an error that substantially affected Plaintiff's rights. ORS 19.415(2). The Appellate Court's ruling that striking two oppression allegations was reversible error because an oppression claim was "colorable" should be overturned. The colorable claim issue was not preserved and the holding is contrary to controlling legal authority.

Additionally, by fashioning a totally new basis for malpractice (i.e. failure to timely bring a colorable claim), the Appellate Court avoided ruling on the only question before it (i.e. did an equitable oppression claim exist). Rather than remand the case for further consideration by the Appellate Court, this Court should find one does not exist, and, therefore, the trial court did not err by dismissing the oppression allegations. Even if this Court concludes an equitable oppression claim does exist, the Appellate Court's reversal should be overturned, because dismissal of the two oppression allegations did not substantially affect Plaintiff's rights.

A. The Appellate Court Erred When It Created a "Colorable Claim" Standard.

1. Plaintiff Did Not Preserve the Issue of a Colorable Claim.

The Appellate Court fashioned a new basis for legal malpractice not briefed or argued to the trial court or appellate court – failure to timely file a colorable claim (hereinafter "colorable claim theory"). The concurrence recognized the Appellate Court could not *reverse* the trial court on grounds not argued to the trial court or the Appellate Court. *Opinion, 700*; *see also* ORAP 5.45(1) No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief.").

The majority's "crafting a solution tailored to crack the nut" (*Resp. 34*) violated the touchstone of preservation - "procedural fairness to the parties and

to the trial court." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). Plaintiff does not point to where the colorable claim theory was presented to either court, and instead declares "[t]he issue here was front and center" without further explanation. *Resp. 34.* Plaintiff claims he preserved this issue when he argued to the Appellate Court that Defendants were attempting a "variety of 'extra-pleadings maneuvers' that were 'out of bounds on a Rule 21 motion.'" *Id.* First, this statement does not address the requirement that Plaintiff preserve the issue with the trial court. Second, such a generalized statement is not sufficient for preservation. *See State v. Haynes*, 352 Or 321, 334-37, 284 P3d 473 (2012) (For preservation, parties and the court must understand the essential contours of the full legal or factual argument).

During the pretrial motions, Plaintiff only argued an oppression claim existed in equity *(ER-28-44)* and never argued anything similar to the Appellate Court's colorable claim theory. Similarly, Plaintiff did not present this issue to the Appellate Court, but rather, presented the question on appeal "Does an oppression claim for the squeeze-out of a minority LLC exist under Oregon law?" *Appeal Br. 3*. Defendants and the trial court could not have understood the essential contours of the full legal argument, because Plaintiff never articulated them. Requiring Plaintiff to comply with the minimum requirements for preservation is not "an unreasonably stringent standard of preservation."

Resp. 36. Rowlett did not articulate the colorable claim theory and the Appellate Court improperly, unilaterally created one.

2. A Claim Must Be Viable and Not Just Colorable to Support a Claim for Malpractice.

In addition to the preservation defect, the Appellate Court's colorable claim theory is not in line with Oregon law. *See Harding v. Bell*, 265 Or 202, 508 P2d 216 (1973); *see also Milton v. Hare*, 130 Or 590, 280 P 511 (1929) (discussed at length in Defendants' Merits Brief, pp. 40-44). Defendants have located no case law in Oregon supporting the Appellate Court's new theory. Because Plaintiff lacks any independent legal support for the colorable claim theory, Plaintiff simply refers back to the Appellate Court's conclusions.

The two cases cited by Plaintiff in support of the Appellate Court's theory are not on point. *Resp. 38-39, citing Hamilton v. Silven, Schmeits & Vaughan*, 2013 WL 2318809, at *6 (D. Or. May 28, 2013); *citing also Chiles v. Robertson*, 94 Or App 604, 628, 767 P2d 903 (1989). In the unreported *Hamilton* case, the District Court used the term "colorable claim," when discussing whether personal injuries, which were dismissed in the underlying case, were sufficient to support a malpractice case for dismissal of those claims. *Id.* at 2. That case has no bearing on the issue in this case, despite the words "colorable claim" appearing therein. Similarly, Plaintiff's citation to *Chiles v. Robertson* is not analogous. In that case, minority shareholders alleged that the majority breached their fiduciary duty when the majority assigned leases to a

purchaser without seeking an increase in the rents, which would have benefited the minority. *Chiles*, 94 Or App at 607. The court held that for the majority to have a duty to seek increased rent, there must have been at least a "colorable claim" that the minority had a legal right to refuse to consent to the assignments. *Id*. at 628. The court did not discuss whether failure to timely bring a "colorable claim" supported legal malpractice.

Plaintiff also argues the Sunrise court's ruling that Plaintiff had a "good squeeze-out claim" constitutes a binding determination of the validity of an LLC oppression claim. *Resp. 41*. Even though Plaintiff avoids the phrase, Plaintiff is arguing Judge Litzenberger's ORCP 21 denial of the motion to dismiss the oppression claims in the Sunrise litigation somehow created "law of the case." Plaintiff did not preserve this issue. Furthermore, the underlying litigation did not establish Plaintiff's right to a malpractice claim based on an untimely assertion of an equitable oppression claim. Defendants were not parties to the Sunrise litigation and there was no appellate review of the decisions in that case; therefore, "law of the case" doctrine is inapplicable. *State v. Pratt*, 316 Or 561, 569, 853 P2d 827 (1993).

Under Oregon law, it is not sufficient for a claim simply to be "colorable" for it to support a malpractice claim, and a prior court's denial of a motion to dismiss an oppression claim does not establish the viability of such a claim for later cases.

B. Oregon Does Not Recognize an Oppression Claim with an Equitable Remedy.

Defendants previously briefed the issue that the LLC statute does not provide an oppression claim with an equitable remedy extensively. *Merits Br. pp. 44-55.* Defendants will avoid reiterating that argument, while addressing points raised by Plaintiff's and Oregon Trial Lawyers Association's (OTLA) briefing.

1. Plaintiff Never Sought Judicial Dissolution.

Plaintiff argues that he had a squeeze-out claim because he was entitled to judicial dissolution under ORS 63.661. *Resp. 46.* The Sunrise case never involved dissolution, even after the oppression claim was added. *ER-43-44.* Plaintiff specifically stated to the trial court he was not making a statutory claim. *ER-29-30.* Dissolution would not have benefited Rowlett, because it would have ended the Sunrise development when it was facing foreclosure, rendering Rowlett's interest valueless. Thus, Plaintiff has always sought a buyout of his interest. Plaintiff's "theoretical" claim to a remedy that he never sought and never mentioned to the trial court is insufficient to remand this case.

Despite the fact that Plaintiff never requested dissolution, Plaintiff presents a red herring to this Court, arguing dissolution should have applied because "[i]t 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." *Resp. 50.* Two of

the three cases Plaintiff cited from other jurisdictions in support of this position do not even address the "reasonably practicable" standard. *See Ayers v. Ag Processing Inc.*, 345 F Supp 2d 1200, 1206-09 (D Kan 2004); *see also Reid Point, LLC v. Stevens*, 2008 WL 3846174, at *8 (NC Super 2008)(Statute applies different standard for dissolution and court found insufficient to plead assets of LLC will be misapplied and wasted). Additionally, other jurisdictions have found breaches of fiduciary duty alone do not support the finding that it is not reasonably practicable for the LLC to continue. *See 1545 Ocean Ave.*, 72 A.D.3d 121, 132, 893 N.Y.S.2d 590 (2010) (Dissolution based on reasonably practicable standard not appropriate unless the majority members' actions are "contrary to the contemplated functioning and purpose of the limited liability company."). Here, it is undisputed Sunrise successfully continued its business.

Plaintiff never requested dissolution and did preserve with the trial court the argument that he had an oppression claim under the judicial dissolution provision of the LLC statute. The availability of dissolution is not an issue in this case and should not now become Plaintiff's excuse to overturn the jury's decision.

2. An Oppression Claim Should Not Be Read into Oregon's LLC Statute.

There is no Oregon case law recognizing an oppression claim with an equitable remedy in context of an LLC and one should not be read into the statute. As discussed at length in Defendants' Merits Brief, *Crimson Trace*

demonstrates the Court should not look outside the statute to create causes of action and remedies that are not enumerated. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014). While Defendants acknowledge it is not binding on the Oregon Supreme Court, case law from jurisdictions with similar LLC statutes is instructive. *See 1545 Ocean Ave.*, 72 A.D.3d at 126.

In *1545 Ocean*, the New York appellate court held the LLC statute, which only provided for dissolution where it was not reasonably practical to continue the company's business, did not incorporate an oppression claim. *Id.* at 127, *citing* NY Limit Liab Co §702 (McKinney) (hereinafter "LLCL"). The court reasoned that when the legislature amended the LLCL and did not amend §702 to include an oppression claim "the Legislature can only have intended the dissolution standard therein provided to remain the sole basis for judicial dissolution of a limited liability company." *Id.* at 126. The court also found it inappropriate to import dissolution based on oppression from the corporate or partnership statutes. *Id.* Grounds for dissolution under New York's and Oregon's LLC are identical. ORS 63.661; LLCL § 702. Oregon's legislature expressly provided the stated dissolution standard remain the sole basis for judicial dissolution of an LLC.

The cases Plaintiff cites in support of squeeze-out liability are not relevant. *Resp. 48*. In the unreported case, *Anderson v. Wilder*, 2003 WL

22768666, at *6 (Tenn App 2003), the court concluded the majority members of an LLC owed fiduciary duties to the minority members. *Id.* There was no separate claim for oppression in that case. *Id.* Plaintiff also cites to *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *4 (Del Ch 2000). *Resp. 48*. That case does not mention oppression at all. Instead, the court determined two managers breached their duties of loyalty to the third manager by failing to act in good faith. *Id., at *1*.

Plaintiff's case law is not helpful on this point. In contrast, the case cited by Defendants is from a jurisdiction with identical language to Oregon's LLC statute and that court concluded the statute does not provide an oppression claim. This Court should adopt the reasoning set forth in that case to conclude that Oregon's LLC statute does not provide for an oppression claim.

3. An Equitable Remedy Should Not Be Read Into Oregon's LLC Statute.

The Oregon statute also does not include a remedy other than dissolution and the judiciary should not read an equitable remedy into the statute. *See Schweigert v. Beneficial Standard Life Ins. Co.,* 204 Or 294, 306, 282 P2d 621 (1955)("It is not within our province to construe [the statute] contrary to the language employed. We must leave it to the legislature to make the necessary changes if, in fact, it initially intended to grant the species of relief…."); *see also Wyoming.com, LLC v. Lieberman*, 2005 WY 42, 109 P3d 883, (Wyo. 2005) (Denying liquidation or buyout for disassociated member because statute

does not provide for such remedy); *see also Lynch v. Carriage Ridge, LLC*, 266 Wis. 2d 1059, 668 N.W.2d 562 (Ct. App. 2003)(Denying buyout in part on the ground that the statute did not authorize it); *see also Williams v. Heins, Mills & Olson, PLC*, 2010 WL 3305017 (Minn. Ct. App. 2010) (Former member could not sue for judicial buyout of his interest under the Minnesota statute).

Plaintiff argues Oregon case law provides "an equitable remedy of a buyout or dissolution." *Resp. 45-46*. However, all the case law relied upon by Plaintiff is in the context of corporations and partnerships. These cases are not controlling on the limited liability companies and neither Plaintiff nor OTLA have cited to cases where Oregon courts have found them to be controlling.

In fact, the OTLA's cites to cases and secondary sources that supposedly recognize that LLC statutes do not provide the exclusive remedies to oppressed minority LLC members deal solely with corporate oppression. *Amicus Br. pp. 6-7*. Similarly, OTLA states "oppression concepts inform common law remedies for breach of fiduciary duty or dissolution." *Amicus Br. 7, citing 2 Oppression of Min. Shareholders and LLC Members § 7:11*. OTLA again fails to mention that statement relates to corporate oppression. Furthermore, that article goes on to note "[s]ome states have also created a parallel rule in state LLC statutes, allowing for the dissolution of LLCs on grounds similar to oppression." Even that treatise recognizes that other states' LLC statutes are not in line with their corporate statutes when it comes to oppression.

OTLA also does not cite to the secondary source acknowledging "[i]n opting for the LLC form of business, [LLCs investors] have also sidestepped a wide variety of important corporate protections including the right to a judicial dissolution or buyout in the event of illegal, fraudulent, or oppressive majority conduct." *See* Sandra K. Miller *et. al.*, *An Empirical Glimpse into Limited Liability Companies: Assessing the Need to Protect Minority Investors*, 43 Am. Bus. L.J. 609, 632-33 (2006). By electing the LLC form, Plaintiff is bound by the limited remedies available.

C. Even if an Equitable Oppression Claim Does Exist, the Dismissal of the Two Oppression Allegations Did Not Substantially Affect Plaintiff's Rights.

Rowlett would have the Supreme Court believe the trial court's removal of the oppression allegations somehow barred Rowlett from arguing his attorneys were negligent. Nothing could be further from the truth. The entire malpractice trial revolved around Rowlett's allegations that Defendants did not timely prosecute his case. Despite the removal of two oppression allegations, the word "oppression" remained in the Complaint (¶¶ 44, 51, 64, 71), and Plaintiff's expert and Plaintiff's counsel both used the words oppression and squeeze-out repeatedly.

Plaintiff's focus on these two allegations is simply an attempt to obtain a trial do-over for an issue that was fully litigated. The complaint was never read to the jury and the deletion of the allegations did not alter Plaintiff's claimed

damages or his proof. Rowlett requested one remedy for both breach of fiduciary duties and oppression, the difference between the Sunrise buyout value in either 2003 or 2005 and the settlement amount. He presented the same proof in support of both claims. Dismissal of the two oppression allegations did not substantially affect Plaintiff's rights.

Both Plaintiff and OTLA argue that an oppression claim can be read into the fiduciary duties enumerated in the LLC statute. *Resp. 46; Amicus Br. 2-3*. Plaintiff states the basis for a squeeze-out claim "arise out of the intersection between fiduciary duties and squeeze-outs." *Resp. 46.* Plaintiff's circular argument demonstrates there is no distinction between the two claims. Reading the fiduciary duties to include an oppression claim makes the claims redundant.

Plaintiff acknowledged this to the trial court, when Plaintiff's counsel stated that "the kind of facts that amount to a breach of fiduciary duty, its intertwined with what amounts to oppressive conduct….our Appellate Courts treat it as one and the same…." *ER-35/6-36/7.* Plaintiff advised Judge Kantor a separate oppression claim would not have an impact on her liability or damage arguments. *Id.* Plaintiff's correct contention that the duty not to oppress is founded upon the LLC statute's fiduciary duties along with Plaintiff's acknowledgment that they are one-in-the-same demonstrates that the striking of the two oppression allegations had no impact on Plaintiff's proof or damages.

IV. CONCLUSION

For the above stated reasons, the Appellate Court's opinion should be overturned. If this Court concludes that this case should be remanded, the entire case should be remanded for consideration by the jury, as instructed by the Appellate Court. *Opinion, 699* (Remand for a new trial on the negligence claim); *see also Wilson v. B. F. Goodrich Co.*, 52 Or App 139, 152, 627 P2d 1280 (1981).

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,890 words.

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)(g).

s/ Candice R. Broock
Candice R. Broock

CERTIFICATE OF FILING AND SERVICE

I certify that on this 2nd day of April, 2015, the foregoing **PETITIONERS' REPLY TO RESPONDENTS' BRIEF AND RESPONSE TO OTLA'S BRIEF** was electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, by using the Court's electronic filing system.

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

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I further certify that on the same date I served two true and correct copies of the foregoing document upon the following counsel of record by US mail:

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