APPENDIX

APPENDIX

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Appendix A

MAINE SUPREME JUDICIAL COURT
Sitting as the Law Court

Docket No. Cum-18-252
Decision No. 2019 ME 87

Tucker J. Cianchette et al.

v.

Peggy A. Cianchette et al.

ORDER DENYING MOTION TO RECONSIDER

Eric L. Cianchette, Peggy A. Cianchette, PET, LLC, and Cianchette Family, LLC, have filed a motion to reconsider the Court's decision dated June 4, 2019. The motion has been reviewed by the panel that decided the original appeal.

The motion to reconsider is DENIED.

Dated: June 25, 2019

For the Court,

/s/______________________
Matthew Pollack
Clerk of the Law Court
Pursuant to M.R. App. P. 12A(b)(4)

Appendix B

Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 2019 ME 87
Docket: Cum-18-252
Argued: April 10, 2019
Decided: June 4, 2019

Panel: MEAD, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.*

TUCKER J. CIANCHETTE et al.

v.

PEGGY A. CIANCHETTE et al.

JABAR, J.

[¶1] Peggy A. Cianchette, Eric L. Cianchette, PET, LLC, and Cianchette Family, LLC (collectively, Peggy and Eric) appeal from a judgment of the Superior Court (Cumberland County, *Warren, J.*) denying their motions for judgment as a matter of law and a new trial following a jury verdict in favor of Tucker J. Cianchette on his claims for breach of contract, breach of fiduciary duty, and fraudulent misrepresentation. They argue that the court erred by (1) allowing Tucker to proceed on a claim of fraudulent misrepresentation based upon allegations that, at the time the contract was executed, Peggy and Eric did not intend to perform their obligations under the contract; (2) failing to give a requested

* Saufley, C.J., sat at oral argument but did not participate in the development of the opinion.

jury instruction; and (3) allowing Tucker to proceed on a claim for breach of fiduciary duty when the parties' relationship was governed by a limited-liability-company operating agreement. We affirm the judgment.

I. BACKGROUND

A. Facts

[¶2] The following facts, including all justifiable inferences, are drawn from the trial record as viewed in the light most favorable to the jury's verdict. *See Hansen v. Sunday River Skiway Corp.*, 1999 ME 45, ¶ 5, 726 A.2d 220.

[¶3] In 2012, the owner of Casco Bay Ford (the dealership)—a Ford vehicle dealership in Yarmouth, Maine—hired Tucker as general manager. A year later, the owner approached Tucker and offered to sell him the dealership and the real estate upon which it sits. Because Tucker lacked the financial resources to complete the purchase on his own, he brought the opportunity to Peggy and Eric Cianchette, his step-mother and father. Although the owner of the dealership was aware of Peggy and Eric's prospective roles in financing the purchase, he made it a condition of the sale that Tucker be a part-owner of the dealership because he "would have never sold the business to someone that [he] didn't know and was not in the car business."

[¶4] Together, Peggy, Eric, and Tucker formed PET, LLC (PET), to purchase, own, and operate the dealership. Peggy and Tucker are each 33% owners of PET, while Eric owns the remaining 34%. Peggy was named manager of PET and remains in that role to date. Peggy and Eric formed a separate company, Cianchette Family, LLC (Cianchette Family), to own the real estate where the dealership is located.

[¶5] Because the dealership is a certified Ford Motor Company (Ford) dealership, Eric, Tucker, and Peggy each had to receive certain approvals from Ford. Eric and Tucker were required to personally guarantee a "floor plan" line of credit to finance the dealership's vehicle inventory, which they sought from Ford Motor Credit Company, LLC (Ford Credit). Tucker was approved as "dealer principal" or "F(ii)"—a person with proven capacity in the vehicle dealership business who is approved to be the face of the dealership and communicate with Ford.[1] Additionally, Ford approved a lease agreement between PET and Cianchette Family for $23,000 per month.

[¶6] In December 2013, PET and Cianchette Family completed their respective purchases of the dealership and the real estate. Almost immediately following the sale, Peggy informed PET that the rent would be nearly tripled to $65,000 and would be paid to a third party, Top of Exchange, LLC—a company owned by Eric and a trust established for the benefit of Peggy and Eric's children, excluding Tucker.

[¶7] The next year, Peggy, Eric, and Tucker began discussions about Tucker purchasing Peggy and Eric's shares of PET, leaving him as the sole owner of the dealership. At Eric's urging, Tucker obtained a loan commitment letter from Androscoggin Savings Bank (Androscoggin). When Tucker presented the

[1] Both Tucker and Peggy applied for F(ii) status, but only Tucker was approved.

commitment letter to Eric, however, Peggy and Eric rescinded the offer to sell their shares. After Tucker pushed Peggy and Eric for a reason why they had had him seek a commitment letter for no reason, he was told "I guess we just wanted to see you fail."

[¶8] In 2015, Peggy directed Michael Cianchette—her son and Cianchette Family's attorney—to move $600,000 out of PET's operating account with Ford Credit and into a new account at Merrill Lynch that was opened by forging Tucker's signature. Because the Merrill Lynch account earned significantly less interest, and because Tucker's compensation was based on all income earned by PET, including interest, his compensation as general manager was reduced. Additionally, Peggy, without any vote by PET's shareholders, made a $375,000 interest-free loan from PET to Cianchette Family for use on a real estate project in Florida. Tucker had no interest in or knowledge of the real estate project. As of the trial date, the loan had not been repaid.

[¶9] That same year, Peggy and Michael approached Tucker at the dealership and presented him with a check for some of his share of PET's profits and an amendment to PET's operating agreement that they wanted him to agree to. The amendment would have converted Tucker's shares in PET into a new lower class of stock that would have allowed Peggy and Eric to take all profits. The amendment also included a waiver of claims for any and all violations of PET's operating agreement that may have occurred up to that point. Tucker refused to sign the amendment.

[¶10] In September 2015, Peggy, Eric, and Tucker again began discussing a sale of Peggy and Eric's interests in PET to Tucker. When Tucker agreed, Peggy and Eric presented him with a purchase and sale agreement that had been drafted by Michael. However, as a condition of the agreement, Tucker was required to first sign the amendment to PET's operating agreement that he had previously refused to sign. Once again, Tucker refused to the sign the amendment and, by extension, the purchase and sale agreement.

[¶11] Two months later, Peggy and Eric presented Tucker with two separate purchase and sale agreements, one for their ownership interests in PET and one for the real estate, each agreement contingent on the successful closing of the other. Peggy and Eric required him to pay a $150,000 nonrefundable deposit to enter into the agreements. Eric later explained that he required the deposit because he wanted it to make it "hurt" if Tucker failed to close the deal.

[¶12] Tucker paid the deposit and signed the agreements with Peggy and Eric. The following provisions were included within the membership agreement and are pertinent to this appeal:

> 2.5 Closing Date and Place. The consummation of the transactions referred to in this Agreement (the "Closing") shall take place on January 31, 2016 (the "Closing Date"). . . . Notwithstanding the foregoing . . . Buyer shall have the right to extend the Closing Date for not more than thirty (30) days . . . provided the purchase price shall increase by $1,000 for each

> calendar day the Closing does not occur after January 31, 2016.
>
> . . . .
>
> 4.5 Proof of Ability to Close. On or before November 30, 2015, Buyer shall provide Sellers with a pro-forma closing statement showing expected sources of funds sufficient to complete the transactions described herein. . . . If Sellers, in their sole discretion, are not satisfied that the Buyer has sufficient funding to close on this transaction, the Sellers may terminate this contract without penalty by providing Buyer with written notice of termination on or before December 15, 2015. . . .
>
> . . . .
>
> 6.2 Seller's obligations under this Agreement are contingent upon buyer having obtained from Ford Credit the release of any personal guarantees or other performance guarantees given by either of Sellers in regard to Casco Bay Ford's floor plan financing facilities and any other personal guarantees which either Seller has given in regard to PET or Casco Bay Ford to any person, including, but not limited to vendors, Ford Motor Company, governmental entities, and other credit providers. . . .

[¶13] To finance his purchase, Tucker secured a loan commitment from Androscoggin and expected the approval of a loan guarantee from the Small Business Association. Tucker also received the approval of Ford to move forward with his purchase and the approval of Ford Credit to secure a "floor plan" in his name alone. Tucker provided documentation of these approvals to Peggy and Eric. To his surprise, Peggy accused him of being dishonest in his disclosures and threatened to terminate the agreements unless Tucker signed a new contingency agreement that required him to provide new disclosures and that extended Peggy and Eric's termination right to January 15, 2016. Tucker signed the new contingency agreement, provided updated disclosures, and again received the necessary approvals to move forward with his purchase.

[¶14] Pursuant to section 6.2 of the membership agreement, Tucker was required to obtain the release of Peggy and Eric's personal guarantees related to the dealership. To this end, Tucker sought and received a draft letter from Ford Credit in December 2015 that purported to release Eric from any future liability on the dealership's floor plan. There is no dispute that the letter did not release any past liabilities already accrued. At the time, however, Tucker believed that the letter was sufficient to satisfy the requirements of section 6.2 and, despite providing the letter to Peggy and Eric, received no indication that Peggy and Eric believed that the release was insufficient. A representative of Ford Credit testified that, had Peggy and Eric made Ford Credit aware that the draft letter was insufficient, a complete release of liabilities could have been provided on an expedited basis.

[¶15] In January 2016, as the closing date drew near, Peggy and Eric threatened to terminate the sale agreements unless Tucker executed a new amendment that terminated his right to extend the closing date and added several other new requirements to successfully close the sale. When Tucker refused to sign the amendment, Peggy and Eric purported to terminate the sale agreements in accordance with their section 4.5 termination right. On January 29, 2016, Tucker attended the scheduled closing.[2] Peggy and Eric had already traveled to Florida and did not appear.

[¶16] After the failed closing, Peggy and Eric placed Tucker on administrative leave from his position as general manager of the dealership. When Peggy and Eric later became aware that Ford could rescind the dealership's certification because there was no longer a dealer principal on site, they requested that Tucker return as general manager. Tucker agreed, provided that they worked towards a new closing date in April 2016. In March 2016, the parties initially agreed to the new closing date, but shortly after Tucker returned as general manager, Peggy and Eric informed Tucker that they would not be selling the dealership, that they had found a new general manager who had been approved as dealer principal, and that he was fired.

B. Procedure

[¶17] Tucker brought suit in June 2016, alleging (1) breach of the membership agreement; (2) breach of the subsequent agreement in March 2016; (3) fraudulent misrepresentation; (4) fraud in the sale of

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[2] The closing date was moved up due to the original scheduled date, which fell on a weekend.

a security; (5) breach of fiduciary duty; and (6) breach of PET's operating agreement.[3] Peggy and Eric brought several counterclaims, and the parties each moved for partial summary judgment. The court granted summary in favor of Tucker on all of Peggy and Eric's counterclaims except dissociation,[4] granted Peggy and Eric summary judgment on Tucker's securities fraud claim, and denied summary judgment as to the remainder of Tucker's claims. *See Cianchette v. Cianchette*, No. CV-16-249, 2018 Me. Super. LEXIS 13 (Jan. 17, 2018).

[¶18] Following a two-week trial, the jury returned a verdict in favor of Tucker on all claims and awarded him $3,100,000 for breach of the membership agreement, $213,000 for fraudulent misrepresentation, $23,000 for breach of PET's operating agreement, $550,000 against Peggy for breach of fiduciary duty, and $1,500,000 in punitive

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[3] Tucker and several investors formed CBF Associates, LLC, to complete the purchase of the real estate that Casco Bay Ford sits upon. Because successful closing of the real estate agreement was contingent on the closing of the membership agreement, that sale also did not close. As part of this action, CBF asserted its own claim for breach of the real estate agreement and prevailed at trial.

[4]Pursuant to the Maine Limited Liability Company Act, a member of an LLC may be dissociated—i.e., removed as a member of the company—by judicial expulsion in certain enumerated circumstances. 31 M.R.S. § 1582(5) (2018). Here, Peggy and Eric sought the judicial expulsion of Tucker as a member of PET. Following the trial, however, the court granted judgment in favor of Tucker on the dissociation claim, leaving him as a member of PET. Peggy and Eric do not challenge that judgment on appeal.

damages against Eric.[5] Peggy and Eric filed a motion for a new trial, *see* M.R. Civ. P. 59, and a renewed motion for judgment as a matter of law, *see* M.R. Civ. P. 50(b), asking the court to set aside the jury verdict, both of which were denied by the court. This timely appeal followed. *See* M.R. App. P. 2B(c)(2).

II. DISCUSSION

A. Fraudulent Misrepresentation

[¶19] Peggy and Eric first argue that the court erred by denying their post-trial motion for judgment as a matter of law and by not setting aside the jury's verdict on Tucker's claim of fraudulent misrepresentation. "We review the denial of a motion for judgment as a matter of law de novo to determine if any reasonable view of the evidence and those inferences that are justifiably drawn from that evidence supports the jury verdict." *Russell v. ExpressJet Airlines, Inc.*, 2011 ME 123, ¶ 10, 32 A.3d 1030 (quotation marks omitted).

[¶20] In order to prevail on a claim for fraudulent misrepresentation, Tucker is required to prove five elements:

> (1) . . . a false representation (2) of a material fact (3) with knowledge of its falsity or in

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[5] Prior to the return of the jury's verdict, it was agreed that Tucker could not recover for both fraudulent misrepresentation and breach of the membership agreement, nor for both breach of fiduciary duty and breach of PET's operating agreement, because the respective claims were predicated on the same or similar conduct. Accordingly, the court reduced Tucker's award for fraudulent misrepresentation by $213,000 and his award for breach of PET's operating agreement by $23,000 to prevent double recovery.

> reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Drilling & Blasting Rock Specialists, Inc. v. Rheaume, 2016 ME 131, ¶ 17, 147 A.3d 824 (quotation marks omitted). At issue here are the first two elements—a false representation of a material fact. Peggy and Eric argue that an intention not to perform a contract, even when such an intention existed at the time of the execution of the contract, cannot support an action for fraudulent misrepresentation because it is not a false representation of a material fact. To support this, they rely, in large part, on *Shine v. Dodge*, 130 Me. 440, 443, 157 A. 318, 319 (1931). We disagree.

[¶21] In *Shine*, a disgruntled purchaser of stocks sued the seller. *Id.* at 441-42, 157 A. at 318-19. The seller argued that Shine could not prevail because Shine failed to "aver[] a misrepresentation by [the seller] of a material fact, but rather set[] forth expressions of opinion by [the seller] as to the merits of the stock, or the breach of a promise by [the seller] to guarantee dividends on it in case of a default." *Id.* at 443, 157 A. at 319.

[¶22] The seller's argument reflected the traditional rule by which liability for fraudulent misrepresentation, often termed "deceit," was judged. *Id.*, 157 A. at 319. In short, the viability of the action depended on whether the seller's statement was of fact or opinion. *Id.* at 446, 157 A. at 320. When the false statement was an expression of opinion, there was no liability. *Id.* at 443, 157 A. at 319. Before explaining that the purchaser had failed to prove her case for fraudulent misrepresentation because "a false statement as to the value of property is held to be merely an expression of opinion," we stated that it was "well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform." *Id.*, 157 A. at 319. Since that time, however, we have stepped away from that "well-settled" notion.

[¶23] More recently, the Restatement (Second) of Torts has promulgated a broader rule, which states:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

Restatement (Second) of Torts § 525 (Am. Law Inst. 1977). Although our adoption of the Restatement's rule has not been explicit, we have cited it with approval on several occasions. *See Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 188-89 (Me. 1990); *Arbour v. Hazelton*, 534 A.2d 1303, 1305 (Me. 1987); *Letellier v. Small*, 400 A.2d 371, 376 n.3 (Me. 1979). We take this opportunity to explicitly adopt the Restatement's formulation of fraudulent misrepresentation and overrule the contrary rule stated in *Shine*.

[¶24] Pursuant to the Restatement, "[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." Restatement (Second) of Torts § 530(1) (Am. Law Inst. 1977). This is true regardless of whether there is an express statement of intent because "a promise necessarily carries with it the implied assertion of an intention to perform." *Id.* § 530(1) cmt. c. When, as the jury found, Peggy and Eric entered into the membership agreement with no intention of actually performing that agreement, they made a false representation.

[¶25] Likewise, Peggy and Eric's false representation of their intent to perform their obligations under the membership agreement is not an expressed opinion, it is a fact and a fact that was material to the formation of the agreement. As acknowledged in the comments to the Restatement, "[s]trictly speaking, 'fact' includes not only the existence of a tangible thing or the happening of a particular event or the relationship between particular persons or things, *but also the state of mind, such as the entertaining of an intention*." *Id.* § 525 cmt. d (emphasis added); *see also id.* § 530(1) cmt. a ("The state of a man's mind is as much a fact as the state of his digestion.").[6] Further, because an

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[6] For clarity, we note that neither this opinion nor the Restatement provides that every false representation of an opinion is actionable as fraudulent misrepresentation. Rather, although the Restatement acknowledges that the "holding of an opinion" can be considered a fact much in the same way an intention can be—i.e., the fact of a declarant's state of mind—it finds it "convenient to distinguish between misrepresentations of opinion and misrepresentations of all other facts, including intention" because there is "a marked difference between what constitutes justifiable reliance upon statements of the maker's opinion and what constitutes justifiable reliance upon other

intent to never perform the contract at the time of its execution is something that "a reasonable man would attach importance to . . . in determining his choice of action in the transaction in question," *id.* § 538(2)(a) (Am. Law Inst. 1977)—i.e., whether to enter into that contract—the existence of that intent is material. *See Mariello v. Giguere*, 667 A.2d 588, 590-91 (Me. 1995) (explaining that a fact was material when "a reasonable person would attach significance" to that fact).

[¶26] This is not to suggest, however, that every false representation of intent is actionable as a tort. The statement of the rule itself also highlights its limiting principle—the intent to not perform must be present *at the time* the parties are entering into the contract.[7] *See* Restatement (Second) of Torts § 530(1) cmt. b ("If the statement is honestly made and the intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit

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representations." Restatement (Second) of Torts § 525 cmt. d (Am. Law Inst. 1977). It is only in this sense that the Restatement separates out and acknowledges that a misrepresentation of opinion may be actionable in the appropriate circumstances. *See* Restatement (Second) of Torts §§ 538A, 539, 542-43 (Am. Law Inst. 1977) (defining "opinion" and stating the rules as to when an opinion may be justifiably relied upon).

[7] Peggy and Eric argue that the court erred by not explicitly instructing the jury that the intent to not perform must have existed at the time of contracting. However, they did not make this argument to the trial court, and therefore this argument was not preserved for appeal. *See Clewley v. Whitney*, 2002 ME 61, ¶ 9, 794 A.2d 87. When read as a whole, there is no obvious error in the court's instructions. *See Morey v. Stratton*, 2000 ME 147, ¶ 10, 756 A.2d 496.

if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect."). Where the intent not to perform arises at some point *after* the contract is entered into, then the appropriate remedy lies solely in an action for breach of contract.[8]

[¶27] In this case, a reasonable view of the evidence and all justifiable inferences supports the jury's finding that Peggy and Eric entered into the membership agreement with the intent of never performing their obligations under that contract. The evidence also supports a finding that Tucker justifiably relied upon that false representation to his detriment. Accordingly, the court did not err by denying Peggy and Eric's motion for judgment as a matter of law.

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[8] Although Peggy and Eric argue that a tort claim and a breach of contract claim cannot coexist based upon the same or similar conduct, the Restatement makes it clear that the existence of a tort claim for fraudulent misrepresentation is a separate cause of action that exists "whether or not the promise is enforceable as a contract. . . . [I]t is immaterial to the tort liability that the damages recoverable are identical with, or substantially the same as, those which could have been recovered in an action of contract if the promise were enforceable." Restatement (Second) of Torts § 530(1) cmt. c. Stated another way, one "who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively." *deNourie & Yost Homes, LLC v. Frost*, 893 N.W.2d 669, 682 (Neb. 2017) (quotation marks omitted). Any duplication in damages awarded for the contract and tort claims can be resolved by post-judgment judicial action, as the court took here.

B. Jury Instruction on the Ford Credit Release

[¶28] Next, Peggy and Eric argue that the court erred by denying their motion for a new trial based upon the court's refusal to give a jury instruction specifically stating that the draft letter from Ford Credit releasing Eric from future liability—given to Peggy and Eric in December, a month prior to the January closing date—was insufficient, as a matter of law, to meet Tucker's obligation under section 6.2 of the membership contract. We review the denial of a motion for a new trial for an abuse of discretion. *See Seabury-Peterson v. Jhamb*, 2011 ME 35, ¶ 14, 15 A.3d 746.

[¶29] "[A] party can demonstrate entitlement to a requested instruction only where the instruction was requested and not given by the court and it: (1) states the law correctly; (2) is generated by the evidence in the case; (3) is not misleading or confusing; and (4) is not otherwise sufficiently covered in the court's instructions." *Clewley v. Whitney*, 2002 ME 61, ¶ 8, 794 A.2d 87. Additionally, the court's "refusal to give the requested instruction must have been prejudicial to the requesting party." *Id.*

[¶30] In regard to section 6.2 of the membership agreement, the court instructed the jury as follows:

> [S]ection 6.2 of the dealership contract included a condition that Tucker obtain releases of Eric and Peggy from any personal [guarantees] given to Ford Credit or any personal [guarantees] given to any other vendors, including Ford Motor Company. And that provision required releases for Eric and

> Peggy from any potential—potential personal guarantee liability with respect to the time period prior to closing as well as from any potential personal guarantee liability with respect to the time period after the closing. That condition was a requirement for closing but did not allow Eric and Peggy to terminate the dealership contract at [any time] prior to closing.

This instruction accurately informed the jury that Tucker was required to obtain a release for "*any* potential . . . personal guarantee liability" incurred by Peggy and Eric in relation to the dealership, including that incurred during "the time period prior to closing." The court's instruction also informed the jury that section 6.2 did not provide a mechanism by which Peggy and Eric could prematurely terminate the membership agreement. Therefore, taken as a whole, the court's instruction provided the jury with the appropriate interpretation of section 6.2 and what it required of Tucker prior to closing. *See id.* Further instruction as to adequacy of the specific draft release letter would serve only to "clarify a matter [already] addressed by the court." *Id.* ¶ 11.

[¶31] Regardless, even if it was error for the court not to specifically inform the jury that the draft letter was insufficient to meet Tucker's obligation under section 6.2, Peggy and Eric have not shown prejudice because that section of the membership agreement only required a complete release of Peggy and Eric's personal guarantees *prior to closing*. Peggy and Eric, however, purported to prematurely terminate the membership agreement, relying upon section 4.5 of the membership agreement, which only allowed for their unilateral termination based upon a subjective good faith belief that Tucker lacked adequate funding to close. Moreover, Ford Credit's representative testified that, had he been informed of the insufficiency of the draft release, a complete release could have been provided on an expedited basis. That testimony, combined with Tucker's ability to extend the closing date by another thirty days, makes it such that the jury was entitled to find that Tucker had not failed to meet his section 6.2 requirement at the time that Peggy and Eric breached the contract, regardless of whether the jury found that the breach occurred when Peggy and Eric purported to prematurely terminate the agreement or when they failed to attend the scheduled closing.

[¶32] Therefore, it was not an abuse of discretion for the court to deny Peggy and Eric's motion for a new trial based upon the court's refusal to instruct the jury as to the insufficiency of the Ford Credit draft release letter.

C. Breach of Fiduciary Duty

[¶33] Finally, Peggy argues that the court erred by denying her motion for judgment as a matter of law because Tucker could not have proceeded against her on a claim of breach of fiduciary duty arising from her role as PET's manager while also maintaining a claim for breach of PET's operating agreement. She argues that Maine's Limited Liability Company Act, 31 M.R.S. §§ 1501-1693 (2018), transforms any breach of fiduciary duty into a breach of PET's operating agreement that sounds solely in contract law. This presents a question of statutory interpretation that we consider de novo.

See Caruso v. Jackson Lab., 2014 ME 101, ¶ 12, 98 A.3d 221.

[¶34] Maine's Limited Liability Company Act seeks "to give maximum effect to the principles of freedom of contract and to the enforceability of limited liability company agreements." 31 M.R.S. § 1507(1). To achieve this goal, the Act provides that the operating agreement of an LLC "governs relations among the members as members and between the members and the limited liability company." 31 M.R.S. § 1521(1). The default rules contained within the Act work to "backstop the agreement to the extent the agreement does not address a matter." Comm. Amend. A to L.D. 1580, No. H-819, Subchapter Cmts., Subchapter 2, at 69 (124th Legis. 2009). If both the LLC's operating agreement and the Act are silent on an issue, common law controls. *See* 31 M.R.S. § 1507(2).

[¶35] The Act expressly imposes fiduciary duties upon the manager of an LLC:

> **1. Good faith; diligence; care; skill.** Persons shall discharge their duties under this chapter in good faith with a view to the interests of the limited liability company and of the members and with the degree of diligence, care and skill that ordinarily prudent persons would exercise under similar circumstances in like positions. .
>
> . . . .
>
> **3. Fiduciary duty.** Subject to the terms of section 1521, subsection 3, paragraph A, a member not involved in the management of a limited liability company does not have a fiduciary duty to the limited liability company,

> or to any other member, or to another person that is a party to or is otherwise bound by a limited liability company agreement, solely by reason of being a member.

31 M.R.S. § 1559(1), (3). The operating agreement of an LLC may then limit, expand, or eliminate those duties:

> **3. Expansion, restriction or elimination of duties.** Except as provided in section 1611, a member's or other person's duties may be expanded, restricted or eliminated as provided in this subsection.
>
> **A.** To the extent that, at law or in equity, a member or other person has duties, including fiduciary duties, to the limited liability company or to another member or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or other person's duties may be expanded or restricted or eliminated by provisions in a written limited liability company agreement; except that the implied contractual covenant of good faith and fair dealing may not be eliminated.
>
> **B.** A written limited liability company agreement may provide for the limitation or elimination of any liabilities for breach of contract and breach of duties, including fiduciary duties, of a member or other person to a limited liability company or to another member or to another person that is a party to

> or is otherwise bound by a limited liability company agreement.

31 M.R.S § 1521(3)(A), (B).

[¶36] The operating agreement of PET does not include any provisions that would create, modify, or eliminate the fiduciary duties of its manager. The closest provision speaks only to the liability of PET's manager, not the existence, limitation, or elimination of fiduciary duties:

> 5.4.1. The Managers shall not be liable, responsible, or accountable in damages or otherwise to the Company or to any Member for any action taken or any failure to act on behalf of the Company within the scope of the authority conferred on the Managers by this Agreement or by law, unless the action was taken or the omission was made fraudulently or in bad faith or unless the action or omission constituted gross negligence.

Compare 31 M.R.S. § 1521(3)(A) (allowing duties to "be expanded or restricted or eliminated") *with* 31 M.R.S. § 1521(3)(B) (allowing for "the limitation or elimination of any *liabilities for breach of contract and breach of duties*, including fiduciary duties" (emphasis added)). In the absence of provisions within the agreement addressing fiduciary duties, the default rules of the Act control, *see* 31 M.R.S. § 1559(1), and are not contractual in nature, *see Perry v. Dean*, 2017 ME 35, ¶ 14 n.5, 156 A.3d 742 ("[A] claim for breach of fiduciary duty is a tort claim."). *See Lee v. Pincus*, No. 8458-CB, 2014 Del. Ch. LEXIS 229, at *25 (Del. Ch. Nov. 14, 2014) (explaining that a contract "preempt[s] the default fiduciary relationship" only when it "expressly address[es] [the] issue, and thereby create[s] a right that is solely a creature of contract" (quotation marks omitted)).

[¶37] In this case, Tucker alleged that Peggy breached her fiduciary duty as manager of PET by failing to act in good faith toward the interests of PET and its owners by tripling the rent paid, transferring money into an account with a lower interest rate to punish Tucker, making a no-interest loan without approval, and attempting to shield herself from liability for these actions by requesting Tucker waive her breaches of the operating agreement. Although these allegations relate to the same or similar conduct as those forming Tucker's claim for breach of PET's operating agreement, Peggy's failure to discharge her duties as manager in good faith provides Tucker with an independent cause of action against Peggy. *See, e.g., PT China LLC v. PT Korea LLC*, No. 4456-VCN, 2010 Del. Ch. LEXIS 38, at *26, *32 (Del. Ch. Feb. 26, 2010) (stating that where "the fiduciary duty claims arise independently of the duties imposed contractually" by an operating agreement, the fiduciary duty claim may survive "even if both are related to the same or similar conduct").

[¶38] Accordingly, the court did not err when it denied Peggy's post-judgment motion for judgment as a matter of law based upon her argument that Tucker could not proceed on a claim for both breach of fiduciary duty and breach of PET's operating agreement.[9]

The entry is:

Judgment affirmed.

Catherine R. Connors, Esq. (orally), Pierce Atwood LLP, Portland, and Lee H. Bals, Esq., Jennie L. Clegg, Esq., and Katherine M. Krakowka, Esq., Marcus Clegg, Portland, for appellants Eric L. Cianchette, Peggy A. Cianchette, PET, LLC, and Cianchette Family, LLC

Jennifer A. Archer, Esq. (orally), Timothy H. Norton, Esq., and Emily G. Atkins, Esq., Kelly Remmel & Zimmerman, Portland, for appellees Tucker J. Cianchette and CBF Associates, LLC

Benjamin P. Gilman, Esq., Maine Chamber of Commerce, for amici curiae of Maine State Chamber of Commerce and Associated General Contractors of Maine, Inc.

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[9] To the extent that these claims do have an overlapping factual basis supporting them, the court properly remedied the issue by reducing Tucker's damages as to his claim against Peggy for breach of PET's operating agreement.

Appendix C

STATE OF MAINE	SUPERIOR COURT
CUMBERLAND, ss	CIVIL ACTION
	DOCKET NO. CV-16-249

TUCKER CIANCHETTE, et al.,
Plaintiffs

v. ORDER

ERIC CIANCHETTE, et al.,
Defendants

Pursuant to the written jury verdict in this case, judgment shall be entered as set forth below. As the court has ruled, plaintiff Tucker Cianchette was entitled to seek expectation damages on his claim of fraudulent misrepresentation. Restatement 2d of Torts §549(3).[1] The parties agreed that if that ruling is correct and if Tucker prevailed on the fraudulent misrepresentation claim, his expectation damages would be the same as any damages that he was awarded for breach of contract. This was set forth in the jury instructions. Tucker is not entitled to recover those damages twice. Accordingly, judgment

[1] This was discussed on the record in connection with defendants' claim that Tucker was required to elect his remedies prior to a jury verdict. At that time the court mistakenly cited § 249 of the Restatement instead of §549 of the Restatement.

is entered below for a single amount on both Counts I and VII.[2]

Although the jury verdict found $213,000 was owed to Tucker for reliance damages, the only evidence offered as to reliance damages related to costs that Tucker would have incurred if the contract had closed (nonrefundable deposit that was part of the purchase price, fees paid to banks in connection with financing). Since those costs were to be deducted from any award for contract or expectation damages under the jury instructions, the court understands that plaintiffs agree that if contract damages were awarded, Tucker is not also entitled to his reliance damages. Accordingly, no reliance damages are included in the judgment.

The court understands that plaintiffs agree that any damages awarded to Tucker on both his claim for breach of the LLC agreement and his claim for breach of the duty of good faith and fair dealing would be duplicative. Accordingly, the judgment below reflects that the $23,000 awarded against Peggy Cianchette jointly and severally on count IX is also included in the $550,000 awarded against Peggy Cianchette individually on count X. The total judgment amount awarded against Peggy Cianchette reflects that $23,000 is part of her joint and several

[2] The court understands that defendants do not agree that Tucker's claim for fraudulent misrepresentation states a cognizable claim or that he is entitled to expectation damages on that claim and have argued that election of remedies was required prior to trial or at least prior to verdict. The court has ruled against defendants on those issues.

liability on Count IX and that $527,000 represents her remaining individual liability.

Counts III, VI, and VIII of the complaint have been previously dismissed, along with counts I through III and V of defendants' counterclaim.

The entry shall be:

1. On Count I and Count VII of the complaint, judgment is entered in favor of plaintiff Tucker Cianchette and against defendants Eric and Peggy Cianchette jointly and severally in the amount of $3.1 million.

2. On Count II of the complaint, judgment is entered in favor of defendants Eric Cianchette and Peggy Cianchette and against plaintiff Tucker Cianchette.

3. On Count IV of the complaint, judgment is entered in favor of plaintiff CBF Associates LLC and against Cianchette Family LLC in the amount of $750,000.

4. On Count V of the complaint, judgment is entered in favor of defendant Cianchette Family LLC and against plaintiff CBF Associates LLC.

6.[sic] On Count IX of the complaint, judgment is entered in favor of plaintiff Tucker Cianchette and against defendants Eric and Peggy Cianchette jointly and severally in the amount of $23,000.

7. On Count X of the complaint, judgment is entered in favor of plaintiff Tucker Cianchette and against Peggy Cianchette in the amount of $550,000. This amount shall be reduced by any payment recovered by Tucker on count IX so that the total amount awarded against Peggy Cianchette on counts

IX and X shall be no more than $550,000, of which $23,000 is joint and several.

8. Judgment is entered in favor of Tucker Cianchette and against Eric Cianchette for punitive damages in the amount of $1.5 million.

9. Accordingly, the total judgment amounts to be entered are the following:

(a) in favor of Tucker Cianchette and against Eric and Peggy Cianchette jointly and severally - $3,123,000.

(b) in favor of CBF Associates LLC and against Cianchette Family LLC - $750,000

(c) in favor of Tucker Cianchette and against Peggy Cianchette - $527,000

(d) in favor of Tucker Cianchette and against Eric Cianchette - $1,500,000.

10. This order shall not constitute a final judgment because judgment has not entered on defendants' equitable counterclaim for disassociation.

11. Pre-judgment interest shall run from the date the complaint was filed to the entry of final judgment at 3.65%. Post-judgment interest shall run from the entry of final judgment at 7.76%.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: March 5, 2018

/s/______________________

Thomas D. Warren

Justice, Superior Court

Appendix D

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET
NO. CUM-18-252

TUCKER J. CIANCHETTE and CBF ASSOCIATES LLC,
Plaintiff-Appellees

v.

ERIC L. CIANCHETTE, PEGGY A. CIANCHETTE, PET, LLC and CIANCHETTE FAMILY LLC,
Defendants-Appellants

On Appeal from Cumberland County Superior Court
Docket No.: PORSC-CV-2016-249

APPELLANTS' MOTION FOR RECONSIDERATION

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Eric L. Cianchette, Peggy A. Cianchette, PET, LLC and Cianchette Family LLC

Pursuant to Me. R. App. P. 14(b), Appellants Peggy Cianchette, Eric Cianchette, Cianchette Family, LLC, and PET, LLC ("Appellants") respectfully move the Court to reconsider in part[1] its decision dated June 4, 2019 ("Decision"), vacate the judgment, and remand for further proceedings with respect to the concurrent claims of breach of contract and fraudulent misrepresentation.

INTRODUCTION

Reconsideration of the Decision is required for two primary reasons: (1) Constitutional guarantees of due process and fundamental fairness require remand in order to provide a fair opportunity for defense of the claims under the newly-adopted rule of law; and, (2) the Decision overlooks the requirements of the Restatement (Second) of Torts and stands in direct contradiction to the judgment as entered.

To be clear, Appellants do not contest the Court's adoption of a new rule of law in Maine and overruling of its precedent. Appellants do, however, take issue, in the strongest possible terms, with the Court's decision not to remand this case in light of the Decision and the implications of the Decision on the evidence that would have been presented had the decision of the Court been known and proper instructions given to the jury. The Decision, absent remand, undermines the core fairness which must

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[1] Appellants do not request reconsideration of the contract and fiduciary duty claims related to the management of the LLC and subsequent $550,000 total award. The LLC claims were a matter of first impression for the Court. The transactional claims, however, were defended under the former controlling law.

ground the due process promised by the judicial system and granted by the Constitution.

This Court has recognized that when a new rule of law is established remand is the appropriate course of action. *See Guardianship of Sebastian Chamberlain et al.*, 2015 ME 76, 118 A. 3d 339 (Me. 2015). The *Sebastian* Court announced a new standard of proof in certain actions. *Id.* at ⁋ 2. Because that newly-announced standard was not the standard applied by the trial court, this Court remanded, noting "[a]lthough the facts as stated in the court's judgment may appear compelling, we cannot determine whether the court would have made the same factual findings if it had applied" the newly-adopted standard. *Id.* at ⁋ 35, fn.8. The same holds true in this case. In the Decision, this Court announces a new standard (the "limiting principle" mandated by the Court) that was not applied by the trial court. Regardless of the evidence contained in the record, appellate courts are not finders of fact. The new standard enunciated in the Decision requires new findings on both the contract and tort claims by the fact finder.

The injustice in this case is not simply that the Court overruled established precedent, thereby establishing a new rule of law. Rather, in doing so, the Decision has fundamentally altered the landscape of this case in a way that Appellants could not possibly have predicted. The Appellants were deprived of the opportunity to try their case knowing what rules of law the Court would later adopt. Specifically, in the Decision the Court notes that, "The statement of the rule itself also highlights its **limiting principle** – the intent to not perform must be present *at the time* the parties are entering into the contract." *Decision* at ⁋ 26 (emphasis added). Had this standard been known prior to trial, Appellants would have presented a very different defense both as to the contract and the fraud claims.

Furthermore, not limiting the evidence of fraud to the time of contract execution almost certainly colored the jury's assessment of whether Appellants had breached the contract (as opposed to properly exercising termination rights). Had the trial court been aware of the "limiting principle," it is clear that some of the evidence that was permitted would have been excluded, removing some of the emotion and negative energy from the trial.[2] In addition, had the "limiting principle" been part of the instructions to the jury, the jury could have focused attention on the legally-required timing elements – the moment of contract formation and the time for contract performance – rather than generally diffuse accusations. There is simply no way to know whether the jury believed that Appellants either (i) entered into the contract never intending to close or (ii) entered into the contract intending to close but, ultimately, decided otherwise. Or, given the highly-emotional evidence submitted by the Plaintiff (now irrelevant under the Court's newly-adopted temporal

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[2] For example, testimony submitted by Tucker about a phone call made by Eric occurring ten months after the contract was signed, and highly prejudicial to Eric, would not have been relevant to the question of Appellants' intent when the contracts were signed. Under the newly-adopted temporal requirement, Appellants would have objected under Rule 403, and either the jury would have never heard the evidence or this Court would have reviewed the trial judge's decision pursuant to an objection.

requirement), whether the jury was hopelessly confused and prejudicially tainted about the entirety of the claims.

The reason failure to remand is fundamentally unfair is revealed by the Decision itself. As recognized by the Court, the general rule of *Shine* had been characterized as "well-settled" and, until June 4, 2019, had never been overruled. Decision at ¶23. In point of fact, *Shine* has been cited with approval by many courts in recent years.[3] With the Decision, the Court failed to address the interplay between the new rule regarding fraud in contract formation and the elements of a traditional "fraudulent misrepresentation" claim that are familiar to courts and litigants. Further, the Decision appears to overrule other well-settled areas of Maine law *sub silentio*. The Court should remand to the Superior Court in order to apply the newly-adopted rule and ensure a fair opportunity for defense of the claims under the new controlling law in harmony with this Court's other jurisprudence.

ARGUMENT

A. Fundamental Fairness Requires Remand

Basic principles of fundamental fairness support remand. As both the Law Court and the United States Supreme Court have stated, the very foundation of our nation requires the judicial process

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[3] In 2017, mere months prior to trial in the instant case, this Court noted "that a promise to take a future action will not support an action for fraud." *Johnson v. Crane*, 2017 ME 113, ¶6, 163 A. 3d 832, 834 (Me. 2017) (citing *Shine*). The *Johnson* opinion did not reach the merits of the appeal, but did not offer the remotest suggestion that this Court believed *Shine* anything but good law.

– the procedural due process afforded to all availing themselves of the legal system – to be "fundamentally fair." *In Re A.M.*, 2012 ME 118, ¶14, 55 A. 3d 463, 468 (Me. 2012); *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The Decision acknowledged that at the time of trial the operative precedent governing the claims was *Shine*. On appeal, this Court decided to announce a new holding, clearly overruling *Shine*. Whatever the policy implications of the Court's decision, Appellants recognize that such is the natural development of the common law.

By affirming the judgment of the trial court, however, and failing to remand for further consideration in light of the Decision, the Court has undermined the fairness which must be inherent in the legal system. The defense was presented at trial in accordance with *Shine*, which Appellants (correctly) believed to be the controlling precedent at the time. No defense was made in respect of the limiting principle articulated in the Decision because no court had ever announced (or suggested) that to be Maine law.[4] With the Decision's pronouncement of a new rule, procedural due process must permit presentation of a full defense responsive to the newly-adopted law and the jury must be given the appropriate instructions. The right to a full, fair hearing "embraces not only the right to present

[4] As discussed at the argument in the case, the Law Court had **never** before cited to § 530 of the Restatement (Second) of Torts. The Decision is its first appearance in authoritative Maine law.

evidence, but also a reasonable opportunity to **know the claims** of the opposing party **and to meet them**." *Morgan v. United States*, 304 U.S. 1, 18 (1938)(emphasis added). At trial, Appellants had no way to know this Court would, on appeal, adopt a new rule of law, nor what the boundaries of that new rule would be. The claims of the opposing party could not be met in the dark.

The fundamental unfairness of failing to remand is highlighted by recognition that if the law prior to the trial were as announced in the Decision, Appellants would have presented a very different case. This would have focused on presenting evidence and argument responsive to the "limiting factor" announced by this Court. This defense would have been supported through appropriate jury instructions, informed by the law as it now stands. And, importantly, Appellants would have had legal grounds from which to object in good faith to certain evidence.

The Maine Rules of Evidence serve a fundamental role in ensuring that litigation occurs in an orderly, predictable, and (most importantly) fair manner, with opportunity for both trial courts to make informed rulings and the Law Court to review those decisions. This is critical to ensure trials are resolved on the facts and law, rather than prejudice and emotion. Had the "limiting principle" enunciated in the Decision been known[5] during the

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[5] Attorneys are ethically bound to expedite litigation. M. R. Prof. Conduct 3.2. This necessarily requires choices on where to best focus efforts in terms of legal argument and submission of evidence. With different law comes different assessments on

trial, it would have served an important gatekeeping function regarding the evidence submitted to the jury. Without that "limiting principle," the alleged evidence of fraud was allowed untethered to any moment in time and infected the entirety of the case. Indeed, without a temporal restriction instruction, the jury could well have concluded that a fraud occurred post-contract formation, and concluded that the later fraud was a breach of contract. For that reason alone, the entire case needs to be remanded for a new trial with a fraud instruction consistent with the change in law enunciated by this court.

Further, the Decision makes clear that the instructions given to the jury were inadequate in two respects: (1) the jury should have been instructed as to "limiting principle," i.e., the temporal requirement of the newly announced post-*Shine* law, and (2) the jury should have been instructed that, as noted in the Decision, "[w]here the intent not to perform arises at some point after the contract is entered into" that is not actionable as fraud. *Id.* at ⁋ 26. The jury received neither of these critical instructions.[6]

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how to advance claims and defenses. This is why procedural due process should lead to remand.

[6] While the Court implies in the Decision that the instructions were sufficient because the jury was instructed that Eric and Peggy had to have known that the representation was false, such an instruction did not require the jury to consider *when* the representation was made. There is no way to know whether the jury felt there was a misrepresentation the year prior to contract formation (which would not be actionable as a tort), sometime after contract formation (which would not be actionable as a tort) or upon the signing of the

In footnote 7 of Decision, the Court suggests that Appellants waived the right to insist on these instructions and that there was no obvious error in instructing the jury without these two elements. Decision, ¶26, fn.7. Appellants respectfully suggest that appropriate objections were made at trial and, regardless, the error was obvious.

First, Appellants objected to the entirety of the tort claim as in contravention of *Shine*. They could not then further object to the "fraud" instruction taken directly from §7-30 of the *Maine Jury Instruction Manual*. The instruction, as given, accurately reflected the elements of fraudulent misrepresentation *at the time* (i.e, *prior* to the Decision) because *at the time* Maine law did not recognize a tort based on a promise to perform in the future under *Shine*.[7] (T. 2663-2664). Given the trial court's ruling that a fraudulent misrepresentation claim was appropriate for consideration by the jury, any objection (beyond the objection made to the fraud claim itself) to the instructions would not have been appropriate. *Wood v. Bell*, 902 A. 2d 843, 851 (Me. 2006). Indeed, there is nothing to which the Appellants could have cited in support of any request to modify the instructions. There is no specific instruction regarding misrepresentation of an intent

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contract (which is now actionable as a tort under the new law enunciated by the Decision).

[7] The comments to §7-30 of the *Maine Jury Instruction Manual* do not describe any scenario, nor cite any case law, where a "temporal requirement" exists permitting "intent" to serve as a fact for purposes of a "fraudulent misrepresentation" claim.

to perform a contract in Justice Alexander's Maine Jury Instruction Manual, there is no prior Maine case law that articulates any such claim (quite to the contrary), nor could Appellants cite to the Decision since it had not yet been issued.[8]

Said another way, when this Court decided to overrule *Shine* in its entirety, there were a number of different paths available as a consequence. As noted in the Briefs, jurisdictions vary greatly in the palliative rules they adopt alongside the Restatement. The "temporality" adopted in the Decision is one, the requirement of election another, the "independent duty" rule a third, and so on. There is simply no way the Appellants could have anticipated which, if any, of these rules the Court would adopt. Nor should Appellants have been expected to do so. It is the height of judicial inefficiency to require parties to propose jury instructions by listing every conceivable iteration of law on the remote chance that this Court would overrule precedent upon appeal, particularly when the controlling case law indicates the claim is invalid. Further, in light of the holdings of this Court that jury instructions must state the law correctly (see, for example, *Darlings Auto Mall v. GM LLC*, 135 A. 3d 819, 823 (Me. 2016)), it would be questionable practice, at best, for Appellants to have

[8] As discussed *supra*, prior to the Decision, the Law Court had never – even in passing – cited to § 530 of the Restatement (Second) of Torts. Appellants cannot be reasonably expected to advocate at trial for inclusion of a rule they believed neither supported by Maine law nor, as a matter of policy, desirable for this Court to adopt.

submitted instructions without any support. Like all pleadings, objections to instructions must be made in good faith. *M. R. Civ. P. 11.* Appellants respectfully suggest that there was no waiver and that the error was obvious.

Second, contrary to this Court's observation in footnote 7, the failure to include the temporal requirement in the instructions is, unquestionably, obvious error. The Court relied on *Morey v. Stratton*, 2000 ME 147, to support its observation in footnote 7. In *Morey*, unlike here, it was the appellants who argued that the law should be changed and a new instruction given on remand. The Court in *Morey* declined to change Maine law and as such, the prior jury instructions were not obviously in error. Here, however, the Court has changed the law governing the claims at issue; Appellants had advocated for continued adherence to *Shine's* "well-settled" rule.

Consider this: if the instructions given had not mentioned reliance as a necessary element of fraud, that would be obvious error; reliance is a fundamental element of a fraudulent misrepresentation claim. Under the Decision, it is a fundamental element of the claim that, in order to constitute a fact, the "intent to not perform must be present at the time the parties are entering into the contract" while an intent not to perform formed before or after contract formation is not sufficient. It is, therefore, axiomatic that the failure to mention the temporal requirement is obvious error. This case is the paradigm for the "exceptional circumstances" which require a remand. *Mason v. Torrey*, 1998 ME 159, ¶ 5, 714 A. 2d 790, 791-792 (Me. 1998) (obvious error standard employed in civil cases to vacate a judgment when the error is "of the exceptional kind that seriously affected" the fairness and integrity of the trial), *Twin Island Dev. Corp. v. Winchester*, 512 A. 2d 319, 324 (Me. 1986)(judgment should be disturbed if the instructions given failed to inform the jury "correctly and fairly" and the error was "exceptional" in a civil case in that it "seriously affected the fairness, integrity, or public reputation" of the case.), *Michaud v. Wood*, 1998 ME 156, ¶ 4 (remand is appropriate when "the instructions failed to sufficiently inform the jury correctly and fairly in all necessary respects of governing law and the error is so exceptional that it seriously affected the fairness or integrity of the trial.")

There was no way for Appellants to predict that this Court would both overrule Shine **and** establish the temporal requirement. At no time was the jury told they were <u>required</u> to find this critical timing element of the "fraud" claim or that if they concluded the intent not to perform was formulated post execution of the contract that no fraud claim could lie. Further, the Court cannot assume that the jury would have found the required temporal connection. As the United States Supreme Court has noted, "it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact **which only a jury could make but which has not been made**, the appellate court cannot take the place of the jury." *Securities and Exchange Commission v. Cherney Corp.*, 318 U.S. 80, 88 (1943)(emphasis added).

In point of fact, if Appellants had been aware of the temporal requirement dictated by the Decision, the evidence in the record would be different. For example, if Appellants had known that the lynchpin to defeating the fraudulent misrepresentation claim was focusing on the time the contract was executed, Appellants, in their direct and cross examination, and in closing argument, would have focused the jury's attention on the distinction between an intent not to close, and justifiable skepticism about whether contractual contingencies could be satisfied. Likewise, Appellants would have highlighted their repeated decisions not to terminate the contract — instead extending their contingency rights – as evidence of their intent. Appellants would have pressed the Plaintiff, who had the burden to establish the misrepresentation by clear and convincing evidence, as to his explanation for the Appellants' repeated extensions if they had been misrepresenting their intent from the outset.

In short, given the change in the well settled law of Maine, and the adoption of a rule not addressed by the standard instruction provided by Justice Alexander's treatise, a remand is required. Indeed, failure to remand would not only be grossly unfair to Appellants, but it would undermine confidence in the judicial branch for both attorneys and the public, both of whom rely upon a clear, consistent court system. It cannot be the rule that parties must conceive, prepare for and present evidence at trials based upon the law as it then exists and, simultaneously, prepare and present a different case in anticipation of how this Court might overrule well settled precedent should an appeal ultimately be taken. It would create an impossible situation for trial practice and leave parties with the impression that the law is not, "reason free from passion," but rather a gamble, the outcome of which cannot be reasonably foreseen, with rules that change without opportunity for response.

The importance of a remand when the Court overturns its precedent cannot be overstated. (See *Sebastian* 2015 ME 76, 118 A. 3d 339 (Me. 2015)) "Fundamental fairness" is more than an aspirational ideal. It is a requirement of our system, safeguarded by the Constitution, and must be zealously enforced by the Court. *Mathews v. Eldridge*, 424 U.S. 319, 333 (U.S. 1976). To deny the Appellants the opportunity to present their defense based on the law as enunciated in the Decision would be manifestly unfair and a deprivation of basic Constitutional rights.

B. The Decision Does Not Fully Explain The Adoption of the Restatement And Stands In Direct Contradiction to the Judgment as Entered

<u>1. The Decision Does Not Explain Whether Fraudulent Misrepresentation Claims are Alternative or Additive to a Contract Claim</u>

In the Decision, the Court states that it is overruling *Shine* and adopting §§ 525 and 530 of the Restatement (Second) of Torts. What the Decision overlooks, however, is that § 530 of the Restatement does not support the proposition that every misrepresentation of contractual intent is enforceable in tort.

Specifically, the comments to the Restatement (First) of Torts made it clear that pursuing a tort claim based on an allegation of a misrepresentation of an intent to perform under a contract was an *alternative* to a contract action ("If the agreement is enforceable, the person misled by the misrepresentation has a right of action under this Section *as an alternative to* his right of action upon the contract.") (emphasis added). *Restatement (First) of Torts, §530*, comment (b). With the adoption of the Restatement (Second) this concept was further refined and comment (c) to the Restatement (Second) provides, in pertinent part, as follows

> This is true whether or not the promise is enforceable as a contract. If it is enforceable, the person misled by the representation has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.

Restatement (Second) of Torts §530, comment (c) (emphasis added).

In the instant case, the Decision is not clear whether the "fraudulent misrepresentation" claim is an alternative to the contract claim, or additional to the contract claim. Further, if the tort claim is additional to the contract claim, the Decision is not clear why this is so. Is it always the case that, unlike the Restatement, this new cause of action is added onto a contract claim? Or must there be particular circumstances to warrant simultaneous claims?

The Decision suggests the Court believes the tort claim is an alternative to the contract claim, noting that the Plaintiff, "could not recover for both fraudulent misrepresentation and breach of the membership agreement." *Decision* at ¶18, fn.5. If footnote 5 of the Decision is intended to be in accord with the Restatement, meaning the contract claim and tort claim are alternative theories, then a remand is necessary to explicitly address the causes of action in the alternative.

In sum, if the Court wishes to announce a rule on when concurrent contract and tort claims may, perhaps, be advanced, reconsideration and clarification of the Decision is necessary. If the Court believes these claims are alternative theories, then due process requires they be addressed as such at the trial level.[9] But in either case, remand is the appropriate course of action to apply the newly-announced law – whatever it is – to these concurrent claims.

2. The Question of Reliance Upon the Temporally-Constrained Intentions Has Not Been Addressed by a Jury

As discussed *passim*, the Court's announcement of a new rule of law subsequent to trial prevented Appellants from presenting the fact finder with a case based on allegations about the intent of Appellants *at the time* the contract was signed. Regardless, however, of whether the tort claim is an alternative or additive to the contract claim, there has been no direct consideration of remaining legal elements of the "fraudulent misrepresentation" claim in light of the Decision.

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[9] If these are alternative causes of actions under the Court's view of the Restatement, the Appellants would have had opportunity to request the trial court bifurcate the trial. *See Bresler v. Wilmington Trust Co.*, 761 Fed. Appx. 160 (4th Cir. 2019)(discussing prudence of bifurcation when concurrent contract and tort claims, predicated on the same acts, are alleged). In such a scenario, the contract claim could have been considered independently of the tort evidence, removing the negative energy from the emotional event which occurred in the instant trial and letting a jury consider a straightforward contract theory.

As the Court noted, there are five legal elements necessary to support such a claim under Maine law. *Decision* at ¶20. The essence of *Shine* dealt with a question logically arising under the first two elements: "what is a fact?" The prior rule held that, even if proven, it was "well-settled" that a "preconceived intention not to perform" a contract "could not support an action of deceit." The Decision announced a new rule: "intentions" at the very instant of contract formation can be facts.

In the instant case, however, there has been no examination of the critical linkage between those intentions – now facts under the newly-adopted rule – and the resulting harm suffered by the Plaintiff. Under Maine law "pecuniary loss is an essential element of a fraud action." *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987). If the Plaintiff is made whole by the contract (or an action thereon), then there is no "pecuniary loss" resulting from reliance upon contractual intentions.[10] To hold otherwise would mean a valid tort claim exists even if the transaction had closed.

This demonstrates why a remand is necessary. Appellants must be permitted to present evidence and argument on all the elements of a fraudulent misrepresentation claim in light of the Court's adoption of a temporal requirement and overruling of Shine. The jury must be instructed on the difference between a breach of a contract and an intent – at the

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[10] The requirement of "pecuniary loss" as an "essential element" of the fraud claim underlies the Decision's suggestion that these claims are alternative theories, as the plaintiff "could not recover for both fraudulent misrepresentation and breach of the membership agreement." *Decision* at ¶18, fn.5.

moment of formation – not to perform the contract. And the trial court must, in the first instance, ensure that those claims are pursued fairly, with opportunity for review by this Court on questions squarely set before it.

3. The Decision Does Not Explain or Address the Legal Basis for Punitive Damages

Finally, the Decision is not clear regarding the treatment of punitive damages. As discussed *supra*, the Decision holds that the plaintiffs, "could not recover for both fraudulent misrepresentation and breach of the membership agreement." *Decision* at ¶18, fn.5. The judgment entered by the trial court and affirmed by the Decision provided, in pertinent part, for (i) $3,100,000 in breach of contract damages, (ii) $0 in fraudulent misrepresentation damages (following remitter), and (iii) $1,500,000 in punitive damages.

The Decision offers no guidance on the nature of the punitive damage award. If the punitive damages are a recovery based upon the claim of fraudulent misrepresentation, the judgement as entered is in direct conflict with the Decision's statement that the plaintiff "could not recover" simultaneously in both tort and contract. *Id.* If the punitive damages are awarded based upon the claim of breach of contract, then the Decision does not explain how such a result is in accord with this Court's seminal holding that, "[n]o matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract." *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989).

If this Court wishes to overrule Drinkwater and provide for punitive damages resulting from a breach of contract, it should reconsider the Decision and make that holding explicit for the sake of clarity in Maine law. If, however, the Court does not wish to take this drastic step, it should vacate the judgment and remand for further proceedings, thus removing the inconsistency between the Decision and the judgment noted supra. Questions arising from the interplay of fraud, contract, and punitive damages can then be addressed in a straightforward manner at the trial level with full consideration of the newly-adopted law, with procedural due process provided.

CONCLUSION

Appellants directly contested the claims of the plaintiffs related to the management of the LLC at trial. The Superior Court made legal rulings, and those rulings were upheld on appeal. It was a fair process, with reasonable opportunity to know the claims. The alleged errors were squarely put before this Court, resulting in clear legal holdings that did not overturn precedent. That dispute is now over.

With respect to the remaining claims, however, this Court overturned its controlling precedent and fundamentally changed the law in Maine. Given the change in Maine law heralded by the Decision, fundamental fairness requires further proceedings. "Although the facts as stated in the court's judgment may appear compelling, we cannot determine whether the court would have made the same factual findings if it had applied" the newly-adopted legal standard. *Sebastian*, 2015 ME 76 at ¶35, fn.8; *accord Maine Eye Care Associates v. Gorman*, 2006 ME 15, 890 A.2d 707 (remanding because trial court applied incorrect legal standard). If the Court reconsiders its holding, vacates the judgment and remands for further proceedings, then consideration can be given to the appropriate interplay between the Decision and this Court's holdings in *Drinkwater* and *Jourdain*, among others. A jury, under proper instructions, can find the relevant facts, subject to the responsible application of the Maine Rules of Evidence. The law may then develop organically, in incremental steps, informed by fully-developed arguments, rulings of trial courts, and all subject to the appropriate review and guidance of the Law Court.

Fairness "embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan*, 304 U.S. at 18. This requires that the applicable rules of law be known before a party can be required to present evidence in defense. Such is the essence of due process. Remand would emphasize the "prudence" of jurisprudence, and ensure the fundamental fairness of the judicial system remains intact. The Court should therefore grant this Motion.

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/s/

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