

Filed: February 24, 2012

IN THE SUPREME COURT OF THE STATE OF OREGON

GREENWOOD PRODUCTS, INC.,  
an Oregon corporation;  
and JEWETT-CAMERON LUMBER CORP.,  
an Oregon corporation,

Petitioners on Review,

v.

GREENWOOD FOREST PRODUCTS, INC.,  
an Oregon corporation;  
JIM DOVENBERG, an individual;  
and BILL LAFORS, an individual,

Respondents on Review.

(CC050302553; CA A135701; SC S059097)

En Banc

On review of an order of the Court of Appeals.\*

Argued and submitted November 7, 2011.

Kevin H. Kono, Davis Wright Tremaine LLP, Portland, argued the cause for petitioners on review. Timothy R. Volpert filed the brief for petitioners on review. With him on the brief were Kevin H. Kono and Robert D. Newell.

Maureen Leonard, Portland, argued the cause and filed the brief for respondents on review. With her on the brief was Ron D. Ferguson.

Cody Hoesly, Larkins Vacura LLP, Portland, filed the brief for *amicus curiae* Oregon Trial Lawyers Association.

WALTERS, J.

The decision of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to the Court of Appeals to consider defendants' unresolved assignments of error.

\*Appeal from Multnomah County Circuit Court, Jerry B. Hodson, Judge. 238 Or App 468, 242 P3d 723 (2010).

1                   WALTERS, J.

2                   Greenwood Products, Inc.,<sup>1</sup> and Jewett-Cameron Lumber Corp.,

3 (hereinafter "plaintiffs), who obtained a jury verdict in their favor on a breach of contract  
4 claim against Forest Products, Dovenberg, and LeFors (hereinafter "defendants"), seek  
5 review of a Court of Appeals decision reversing the judgment entered on that verdict.

6 The contract in question required defendants to sell, and plaintiffs to buy, all of  
7 defendants' large and ever-changing inventory, for a certain percentage over defendants'  
8 cost for that inventory. In their action against defendants, plaintiffs alleged that  
9 defendants had breached the contract by erroneously accounting for their cost of

10 inventory -- causing plaintiff to pay some \$820,000 more for the inventory than it should  
11 have. Defendants moved for a directed verdict on the breach of contract claim, but the  
12 trial court denied the motion and sent the claim to the jury, which returned a verdict for  
13 plaintiffs. The Court of Appeals held that the trial court should have granted defendants'  
14 motion for a directed verdict because the contract did not impose any obligation on  
15 defendants to accurately account for the cost of the inventory. For the reasons discussed  
16 below, we reverse the Court of Appeals decision in part and remand to that court to  
17 consider other issues that defendants raised in their appeal.

18                   Because we are reviewing a trial court's denial of a motion for a directed  
19 verdict, we consider and present the facts in the light most favorable to the party that

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<sup>1</sup> The company we call "Forest Products" in this opinion in fact is "Greenwood Forest Products, Inc." and the company we call "Greenwood" in fact is "Greenwood Products, Inc." Because the companies' real names are so similar, we have adopted the "Greenwood" and "Forest Products" denominations to avoid confusion.

1 opposed the motion -- in this case, plaintiffs. *Knepper v. Brown*, 345 Or 320, 323, 195  
2 P3d 383 (2009). In 2002, when the events that led to the action in question took place,  
3 defendant Forest Products was an Oregon corporation whose primary shareholders were  
4 two individuals, defendant Dovenberg and defendant LeFors. Forest Products was in the  
5 business of processing and selling industrial wood products, and maintained a large  
6 inventory of such products at numerous distribution centers throughout the United States.  
7 Dovenberg was friendly with Boone, the financial and administrative head of, and largest  
8 shareholder in, Jewett-Cameron Lumber Co., a wholesale distributor of lumber and  
9 related materials. Dovenberg had expressed to Boone his interest in selling Forest  
10 Products or otherwise retiring from the business. Initially, Boone felt that it would be  
11 unwise for Jewett-Cameron to attempt any kind of purchase of the business, because  
12 acquisition of Forest Products' enormous inventory would be overwhelming. In 2001,  
13 however, Dovenberg and Boone conceived a plan that would allow Jewett-Cameron to  
14 acquire Forest Products' inventory over time.

15 Under the plan, Jewett-Cameron would create a wholly owned subsidiary,  
16 Greenwood Products, Inc. ("Greenwood") that initially would acquire Forest Products'  
17 equipment and place of business and would hire most of its employees. Greenwood then  
18 would proceed to purchase Forest Products' nationwide inventory over a two-year period,  
19 in geographically determined "units." Until a particular unit's inventory was sold, Forest  
20 Products would continue to sell and replenish inventory within the unit, using employees  
21 loaned back to it by Greenwood. Eventually, after all the units of inventory were sold to  
22 Greenwood, Forest Products would be stripped of its assets, and its involvement in its

1 former business would end (Forest Products itself, however, would continue to exist).

2 To facilitate the plan, Forest Products and Greenwood/Jewett-Cameron  
3 entered into an Asset Purchase Agreement ("the APA").<sup>2</sup> The APA provided that, on a  
4 designated closing date -- February 28, 2002 -- Greenwood would purchase Forest  
5 Product's furniture and equipment and a license to use certain of Forest Product's  
6 intangible assets, and would take over Forest Product's lease on its offices. Also by the  
7 February 28, 2002, closing date, Forest Products would dismiss most of its employees,  
8 and Greenwood would rehire them.<sup>3</sup>

9 The APA provided that, over a two-year period after the closing date,  
10 Greenwood would purchase Forest Product's nationwide inventory in seven installments  
11 or "units":

12 **"1.4. Purchase of Inventories.** *[Forest Products] agrees to sell*

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<sup>2</sup> Although the agreement technically was between Forest Products and Jewett-Cameron (Greenwood did not yet exist), we refer to Greenwood as the contracting party throughout the following discussion -- again, to avoid confusion.

<sup>3</sup> The APA specifically provided:

**"4.4 Forest Products' Employees. \* \* \***

"[Forest Products] shall determine which, if any, of its employees it wishes to retain after it has disposed of its principal business and shall terminate all of its other employees on or before the closing. [Forest Products] shall indemnify and hold [Greenwood] harmless from any and all liability concerning any action, complaint, grievance, or proceeding filed by any employee for any act alleged to have been committed before the closing.

"[Greenwood] agrees to offer employment to all of the employees of [Forest Products], but not necessarily at the same rate of compensation or with equivalent fringe benefits."

1           *and [Greenwood] agrees to purchase [Forest Products'] inventories, work*  
2           *in process, raw materials and packaging (except the portions which are*  
3           *unusable as agreed by the parties prior to transfer) in stages over a two*  
4           *year period following closing, for a price equal to [Forest Products'] cost*  
5           *(including transportation, processing and storage) plus a premium of 2 %,*  
6           as follows: immediately upon execution of this agreement and prior to  
7           closing the parties will separate the inventory into seven discrete units by  
8           location. [Forest Products] shall sell and [Greenwood] shall purchase the  
9           first unit of inventory on May 31, 2002, and [Forest Products] shall sell and  
10          [Greenwood] shall purchase an additional unit at the end of each three  
11          month period thereafter until all of the units of inventory have been sold  
12          and purchased. The specific unit of inventory to be sold at the end of each  
13          three month period shall be selected by mutual agreement of the parties.  
14          Payment for each unit of inventory shall be due 30 days after purchase.  
15          Conveyance shall be by Bill of Sale."

16       (Emphasis supplied). Finally, the APA provided for management of Forest Product's  
17       inventory during the transition period in the following terms:

18                   **"1.5. Interim Services and Supply Agreement.** During the two-  
19                   year inventory transition period [Forest Products] agrees to replenish,  
20                   process, and maintain inventories in keeping with its past practice at each  
21                   of the locations where the inventory has not yet been sold. [Greenwood]  
22                   agrees to provide [Forest Products] with all management and administrative  
23                   services associated with purchasing, processing, and maintaining [Forest  
24                   Products'] inventory at each such location for a fee of \$150 per month for  
25                   each unit of the 7 units of inventory described in Section 1.4 above that is  
26                   retained by [Forest Products]. During the inventory transition period  
27                   [Forest Products] will also sell inventory from such retained locations in the  
28                   regular course of business exclusively to [Greenwood] to allow  
29                   [Greenwood] to fill customer orders. *[Greenwood] shall pay 102% of*  
30                   *[Forest Products'] costs for all such purchases* and payment shall be due  
31                   30 days after invoice and shipping. [Greenwood] agrees to assume the  
32                   credit risk associated with its customers and to bear the loss of  
33                   nonpayment."

34       (Emphasis supplied).

35                   Thus, every three months after closing, Greenwood would purchase, in a  
36       single transaction, all of Forest Products' inventory in a given geographic "unit"

1 (including products in warehouses, products being processed, and products en route from  
2 one location to another), paying Forest Products the cost of the inventory plus two  
3 percent. Until a particular geographic unit of inventory was sold in that manner,  
4 employees of Greenwood (who formerly had worked for Forest Products and were, in  
5 essence, contracted out to Forest Products for a nominal \$150 per month fee) would  
6 manage the sale, processing, and replenishing of inventory in the unit in much the same  
7 manner as they previously had for Forest Products, with Forest Products being paid by  
8 Greenwood for the cost of any inventory sold plus a two-percent premium. After a unit  
9 of inventory was sold, Forest Products would be, in the words of one witness, "out of the  
10 picture as far as \* \* \* that product line, and that area," and Greenwood would step into  
11 Forest Products' shoes and be responsible for providing its own inventory.

12           After closing on February 28, 2002, Greenwood took over Forest Products'  
13 offices and equipment. Most of Forest Products' employees and management all became  
14 employees of Greenwood, holding the same positions that they had occupied at Forest  
15 Products. Forest Products continued to exist side-by-side with Greenwood -- with Forest  
16 Products responsible, at least on paper, for maintaining the inventory that Greenwood  
17 employees sold. What this meant in practice was that, in those "units" that had not yet  
18 been purchased by Greenwood, Greenwood employees sold wood products to outside  
19 customers, purchasing inventory to cover each sale from Forest Products, at cost plus two  
20 percent. The purchases and sales were tracked automatically on two sets of books -- as  
21 one witness described it, "when a sales entry was made, it was made in one company and  
22 automatically appeared as a \* \* \* purchase and a sale in the other company." Although,

1 as noted, Forest Products was responsible, during the transition, for replenishing,  
2 processing, and maintaining the supply of inventory that Greenwood employees would be  
3 selling, it was Greenwood employees who actually performed all of that work, under the  
4 "management and administrative services" provision of the asset purchase agreement.

5 In fact, the parties interpreted the "management and administrative  
6 services" provision as extending to the work performed at Forest Products' highest levels.  
7 After the closing, Forest Products retained only two employees -- Dovenberg and LeFors;  
8 the remainder of the company's central staff went to work for Greenwood. Various key  
9 Greenwood employees, including Fahey, the head bookkeeper, and Patillo, the vice  
10 president, spent part of their day attending to Forest Products' accounts and overseeing  
11 that company's operations. In practice, it was difficult to say which "hat" a given  
12 employee was wearing at any given time.

13 After the February 28, 2002, closing, units of inventory were purchased and  
14 sold as the parties had envisioned for some 13 months, at which point the parties agreed  
15 to "finish it off" in a single transaction. At that point, Greenwood issued two promissory  
16 notes, dated March 18, 2003, for the remaining inventory. A few months later, in June of  
17 2003, Greenwood issued another promissory note and paid some \$100,000 in cash for "an  
18 accumulation of payable for prior purchases of inventory that were due for payment."

19 The amounts of the notes and cash payment were based on inventory numbers provided  
20 by traders' assistants and other higher level "accounting people" (including Fahey and  
21 Patillo) who, at the time of the sale and purchase, were employed by Greenwood but who



1 provided inventory-related services to Forest Products.<sup>4</sup> At the time of the final payments  
2 and transfers, the transaction set out in the APA appeared to be essentially completed.

3           In August 2003, Greenwood's books were audited by a certified public  
4 accountant, Schmidt. Schmidt found certain unusual entries in the books -- an  
5 unexplained account with a balance of nearly \$1.2 million and many entries that did not  
6 appear to be related to normal inventory activity. Schmidt suspected that there was a  
7 problem with the "intercompany account," *i.e.*, the accounting of sales of inventory  
8 between Greenwood and Forest Products. On the theory that any inventory transactions  
9 by Greenwood also should be reflected in Forest Products' books, Schmidt asked for, and  
10 obtained, permission to review Forest Products' books. While comparing those books  
11 with Greenwood's books, Schmidt found hundreds of entries that did not match. Schmidt  
12 eventually decided that, to really understand what had happened with the inventory, he  
13 would have to reconstruct both Greenwood's and Forest Products' books from scratch,  
14 using "invoices and purchase orders and all the underlying documentation that would  
15 happen on a day-to-day basis in a business." When Schmidt completed that work, the  
16 figures led him to the conclusion that Greenwood had paid Forest Products for  
17 \$819,731.68 of inventory that it never had received.

18           After Schmidt completed his work on Forest Products' books, Dovenberg  
19 approached him about some inconsistencies in Dovenberg's own personal accounts.

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<sup>4</sup> The value of the inventory involved in the final transaction apparently was presented to Greenwood by Patillo at a meeting of Greenwood's board of directors on March 13, 2003. It was at that meeting that the board approved the issuance of the promissory notes and the amounts of those notes.

1 Schmidt attempted to help Dovenberg sort out the problem. Ultimately, the two men  
2 determined that Fahey, the bookkeeper (who was employed by Greenwood but was  
3 providing inventory-related services to Forest Products) had embezzled at least \$360,000  
4 from Forest Products accounts between February and December of 2002. As it turned  
5 out, Fahey had attempted to hide the embezzlement by adding false entries in the  
6 inventory accounting between Forest Products and Greenwood, and those entries  
7 appeared to be the cause of at least some of the discrepancy that Schmidt had identified  
8 between the inventory Greenwood had paid for and the inventory it received.<sup>5</sup>

9           The parties had some discussions about how to deal with Greenwood's  
10 alleged overpayment, but those discussions were unproductive. Eventually, Greenwood  
11 and Jewett-Cameron (hereinafter "plaintiffs") filed the present action against Forest  
12 Products, Dovenberg, and LeFors (hereinafter, "defendants") asserting breach of contract  
13 and equitable claims for reformation or rescission of the promissory notes.<sup>6</sup> Plaintiffs  
14 also sought, as damages, some \$101,000 for accounting fees incurred in unraveling the  
15 parties' books and nearly \$102,000 for excess interest incurred because of the initial  
16 incorrect accounting. Defendants answered, denying many of plaintiffs' allegations and  
17 asserting defenses of accord and satisfaction, waiver, and estoppel. Defendants also  
18 asserted several counterclaims, including a claim based on plaintiffs' failure to pay the

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<sup>5</sup> Forest Product eventually brought a civil action against Fahey and obtained a \$369,000 damages award. Fahey also was criminally prosecuted and was convicted before the trial in the present breach of contract action.

<sup>6</sup> The original complaint contained only breach of contract and reformation claims. The rescission claim was added by amendment midtrial.

1 entire face value of their promissory notes to Forest Products (by that time, plaintiffs had  
2 paid part of the face value of the notes).

3           The case went to trial, and plaintiffs presented the testimony of only two  
4 witnesses -- Boone and Schmidt -- in their case in chief. At the close of plaintiffs'  
5 evidence, defendants moved for a directed verdict on plaintiffs' breach of contract claim,  
6 which alleged that Forest Products had breached the APA by "intentionally or negligently  
7 misstat[ing] its cost of inventory such that [Greenwood] signed notes and paid cash for  
8 that inventory at a figure that was \$819,731.68 higher than it should have been." In the  
9 midst of the arguments on that motion, plaintiffs offered to amend their claim to  
10 eliminate the "intentionally or negligently" wording (which, as defendants had pointed  
11 out, was suggestive of a tort claim). The trial court stated that such a motion was  
12 unnecessary and ruled against defendants' directed verdict motion. Later, plaintiffs  
13 formally moved to amend the breach of contract claim, and this time the trial court  
14 expressly allowed the motion, approving new wording that alleged that Forest Products  
15 had breached the agreement by "erroneously account[ing] for its inventory such that  
16 [Greenwood] signed notes and paid cash for that inventory at a figure that was  
17 \$819,731.68 higher than it should have been." Defendants thereafter renewed their  
18 directed verdict motion, but the trial court again denied it.

19           In the end, the jury returned a verdict for plaintiffs on the breach of contract  
20 claim, finding that plaintiff had been damaged in the amount of \$819,731.68 for the  
21 overpayment of inventory and \$52,592.09 for accounting fees incurred in ferreting out  
22 the accounting errors (the jury also found that Forest Products was entitled to recover

1 unpaid amounts, which it determined to be \$1,043,757, on the promissory notes, and that  
2 Dovenberg was entitled to receive \$71,170.58 in commissions from Greenwood).<sup>7</sup> The  
3 court thereafter decided plaintiffs' equitable claims in defendants' favor and entered a  
4 judgment awarding damages according to the jury's verdicts. In a supplemental  
5 judgment, the trial court found that both parties had prevailed in part and awarded  
6 attorney fees to both sides.

7 Defendants appealed the general and supplemental judgments, and  
8 plaintiffs cross-appealed. With regard to the general judgment, defendants' primary  
9 contention was that the trial court had erred in denying defendant's directed verdict  
10 motions. Defendants argued, among other things, that "the allegation and the evidence  
11 fail[ed] to state a claim in this arm's length contractual relationship." In so arguing,  
12 defendants referred specifically to plaintiffs' unamended breach of contract claim, with its  
13 "intentionally or negligently" wording. Apparently based on that wording, defendants  
14 insisted that the claim was actually a claim for tortious misrepresentation and that  
15 plaintiffs had failed to offer the level of evidence required to prove such a tort claim  
16 (clear and convincing evidence) and had failed to present any evidence at all on a  
17 necessary element of a negligent misrepresentation claim (the existence of a "special  
18 relationship").

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<sup>7</sup> After the jury returned its verdicts, the parties argued about whether the verdicts were internally inconsistent and whether the court should enter a judgment that "corrected" the supposed misunderstanding. The trial court ultimately determined that the verdicts were not inconsistent, and neither party has challenged that determination in this court.

1           The Court of Appeals, however, recast defendants' assignment of error as a  
2 claim that "there could be no breach *because the APA did not obligate Forest Products to*  
3 *properly state the cost of its inventory.*" [Greenwood Products v. Greenwood Forest](#)  
4 [Products](#), 238 Or App 468, 480, 242 P3d 723 (2010) (emphasis added). With that claim  
5 of error in mind, the Court of Appeals examined the two provisions of the agreement that  
6 it deemed to be relevant to the question -- (1) section 1.4, which provides that "[Forest  
7 Products agrees to sell and [Greenwood] agrees to purchase [Forest Products'] inventories  
8 \* \* \* for a price equal to [Forest Products'] cost \* \* \* plus a premium of 2%," and (2)  
9 section 1.5, which states that "during the two-year inventory transition period, [Forest  
10 Products] agrees to replenish, process, and maintain inventories in keeping with its past  
11 practice at each of the locations where the inventory has not yet been sold."

12           The Court of Appeals concluded that the two provisions, in fact, did *not*  
13 obligate Forest Products to accurately state the cost of its inventory. It explained:

14           "[N]either provision expressly imposes an obligation on either Forest  
15 Products or Greenwood to accurately state the cost of that inventory to the  
16 other. Nor is such an obligation necessarily implicit in the obligations that  
17 those provisions do explicitly impose. Thus, Forest Products was not  
18 obligated under the APA to accurately state the cost of its inventory."

19 *Id.* at 481. The court went on to consider whether the answer was any different under the  
20 amended version of the breach of contract claim, and concluded that it was not:

21           "Just as the APA imposed no obligation on Forest Products not to  
22 'misstate[] its cost of inventory,' it imposed no obligation not to  
23 'erroneously account[] for its inventory.' Even if the latter could be deemed  
24 to be somewhat broader than the former, ultimately both are predicated  
25 upon a purported contractual obligation for Forest Products to accurately  
26 account for its inventory to Greenwood. Again the APA imposes no such  
27 obligation explicitly or by necessary implication."

1 *Id.* at 482. The court concluded that defendants were entitled to prevail on their directed  
2 verdict motion, and it reversed the trial court's judgment for plaintiffs on that claim.  
3 Once the Court of Appeals decided to reverse the trial court's judgment for plaintiffs on  
4 their breach of contract claim, the court was required to reverse the trial court's award of  
5 attorney fees to plaintiffs on that claim, and it did so. *Id.*<sup>8</sup>

6 Plaintiffs petitioned for review by this court, and we allowed their petition  
7 to consider the Court of Appeals' pronouncement that the asset purchase agreement  
8 imposed no contractual obligation on defendants (or plaintiffs, for that matter) to  
9 accurately state the cost of the inventory. Because it seemed to us that the agreement  
10 may have *implied* such an obligation, we asked the parties to answer a series of questions  
11 about that issue. In their response, plaintiffs argued at length that a requirement that  
12 someone be responsible to accurately account for or state the cost of inventory was  
13 necessary to carry the clear intentions expressed in the APA into effect (and, thus, was  
14 "necessarily implied")<sup>9</sup> because, otherwise, the heart of the parties' agreement -- that

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<sup>8</sup> The Court of Appeals also (1) reversed the trial court's decision about defendants' ability to recover expert expenses incurred in enforcing payment on the promissory notes plaintiffs had issued; and (2) rejected plaintiffs' cross-appeal, which challenged the denial of plaintiffs' rescission claim, on the ground that the issue had not been preserved. *Greenwood Products*, 238 Or App at 485-86. Plaintiffs have not challenged those other decisions in this court and we do not address them in this opinion.

<sup>9</sup> Plaintiffs relied on the doctrine of necessary implication, which holds that "[i]f it can be plainly seen from all the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making their contract, or is necessary to carry their intention into effect -- in other words, if it is a necessary implication from the provisions of the instrument -- the law will imply the obligation and enforce it."

1 Forest Products would charge, and Greenwood would pay, Forest Products' *actual* cost  
2 for the inventory it *actually* transfers to Greenwood plus two percent -- could not be  
3 realized. Plaintiffs also argued that the APA necessarily and impliedly placed that  
4 obligation on Forest Products, rather than Greenwood, because the information that  
5 would be needed to determine the amount and cost of inventory involved in the  
6 transaction would be in Forest Products' financial records, which Forest Products would  
7 have a right to control. Forest Products argued, in response, that, insofar as the APA  
8 obligated Greenwood to "provide [Forest Products] with all management and  
9 administrative services associated with purchasing, processing and maintaining [Forest  
10 Products'] inventory" at each unit during the period of transition, and insofar as  
11 Greenwood employees in fact managed the accounts for both Greenwood and Forest  
12 Products, an obligation on Forest Products to account for the amount and cost of the  
13 inventory involved in the transaction could not be implied.

14           After considering the parties' responses and the record, we conclude that the  
15 Court of Appeals' "no obligation" holding has no basis in any argument that was raised in  
16 the trial court. In those circumstances, we also conclude that the Court of Appeals'  
17 argument was not a proper basis for reversing the trial court's denial of a directed  
18 verdict.<sup>10</sup>

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*Card v. Stirnweis*, 232 Or 123, 134, 374 P2d 472 (1962) (quoting *Pinnacle Packing Co. v Herbert*, 157 Or 96, 106, 70 P2d 31 (1937)).

<sup>10</sup> The problem that we are identifying -- the fact that the Court of Appeals reversed on the basis of a perceived error that was not raised in the trial court -- is not just a technical one. To apply the doctrine of necessary implication, a court must consider

1           We begin by considering the arguments for a directed verdict that  
2 defendants actually raised in the trial court. Defendants' first argument, in their written  
3 motion filed at the conclusion of plaintiffs' case in chief, was that plaintiffs had "failed to  
4 prove any specific act which would constitute a breach of contract between the parties."  
5 In their oral presentation of the motion, defendants explained that plaintiffs had alleged,  
6 and were therefore required to prove, that defendants had intentionally or negligently  
7 had "misstated" the cost of inventory and that plaintiffs failed to present any evidence  
8 showing that, at any point after closing, anyone connected with Forest Products ever had  
9 made *any* "statement" about the cost of inventory. Defendant suggested that, in fact, all  
10 of the evidence that plaintiffs had presented showed that it was Greenwood and its  
11 employees who had stated the cost of the inventory.

12           Plaintiffs responded, however, that their evidence was directed at showing  
13 that Forest Products ultimately had the right to control its own accounting and that, when  
14 Greenwood's employees made any statements about the cost of Forest Products'  
15 inventory, they were acting as Forest Products' servants. Plaintiffs pointed to testimony  
16 by Boone that, under the contract, Forest Products remained responsible for its own  
17 accounting. Plaintiffs also observed that the jury had heard testimony that Dovenberg  
18 and LeFors continued to have offices at Forest Products and that they had a right to, and  
19 did, obtain information about Forest Products' inventory -- testimony that suggested that

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and interpret the express terms of the agreement between the parties and other admissible evidence to determine the parties' intent. In this case, because the argument was never raised, plaintiffs had no occasion to present the arguments and evidence that they could have presented in support of the existence of an implied obligation on Forest Products to accurately account for or state the amount and cost of the inventory.



1 the two men understood that they had a right and responsibility to control Forest Products  
2 accounting and had made at least some efforts in that area. Plaintiffs argued that the  
3 evidence before the jury was sufficient to defeat defendants' suggestion that, as a matter  
4 of law, Forest Products had never made or participated in any statement about the cost of  
5 inventory. The trial court apparently agreed with that assessment, insofar as it denied  
6 defendant's motion for a directed verdict. This court also agrees: Although defendants  
7 introduced evidence that Greenwood and its employees were solely responsible for any  
8 errors in Forest Products inventory accounts, plaintiffs' evidence about the divided  
9 responsibilities of Greenwood employees and the continuing right of control of Forest  
10 Products' principals was sufficient to create a jury question.

11 Defendants' next arguments all were based on the supposition that, insofar  
12 as plaintiffs had alleged that Greenwood had "intentionally or negligently misstated its  
13 cost of inventory," they were really alleging some sort of tort -- intentional or negligent  
14 misrepresentation -- and not a breach of contract. Defendants argued that plaintiffs had  
15 failed to offer evidence that would support a claim for either type of misrepresentation by  
16 the "clear and convincing evidence" standard that applies to claims of tortious  
17 misrepresentation. Defendants also insisted that plaintiffs could not recover damages for  
18 the alleged "negligent misrepresentation" without establishing that a "special  
19 relationship" existed between plaintiffs and defendants -- and that they had not and could  
20 not prove such a relationship.

21 Plaintiffs responded that they were not alleging any kind of tortious  
22 misrepresentation and that their claim was, in fact, a claim that defendants had breached

1 the agreement by misstating the cost of inventory and by collecting more in payment than  
2 they were entitled to receive. They offered to move to strike the "intentionally or  
3 negligently" wording, but the trial court suggested that that was unnecessary because  
4 "that was included in defendants' motion." Defendants objected that plaintiffs should not  
5 be permitted to amend their pleadings "to kind of sweep up this overall theory that he's  
6 now trying to put before the court." Plaintiffs responded that, because of prior  
7 communications between the parties, defendants were estopped from arguing that  
8 plaintiffs should not be permitted to amend their complaint. The trial court did not speak  
9 directly to either defendants' objection or plaintiffs' response, but the fact that it denied  
10 defendants' directed verdict motion indicates that it was operating under the assumption  
11 that the "intentionally or negligently" wording had been stricken and that the claim at  
12 issue was not for tortious misrepresentation, but for breach of contract. Given that the  
13 trial court took that position, the absence of evidence that would support a claim of either  
14 intentional or negligent misrepresentation was not relevant.

15 Defendants' final argument at trial for a directed verdict was that plaintiffs'  
16 evidence did not and could not support a conclusion that the amount of inventory  
17 transferred to Greenwood had been misstated in any way. That argument was, in  
18 essence, an attack on the methodology that Schmidt had employed to determine that  
19 Greenwood had been overcharged. Defendants argued that, although Schmidt's analysis  
20 may have revealed significant accounting problems between Greenwood and Forest  
21 Products, it could not determine the *actual* amount of inventory that was transferred --  
22 and that Schmidt had acknowledged as much. It followed, defendants argued, that there

1 was no evidence to support plaintiffs' allegation that Greenwood had paid for more  
2 inventory than it received, *i.e.*, that the cost of the inventory transferred had been  
3 misstated.

4           The trial court properly rejected that argument. Schmidt testified that he  
5 had based his analysis on the amount and value of inventory that had been reported for  
6 various transactions, and that his assumption was necessary, because there was no way to  
7 go back and physically count the inventory in question. Schmidt's assumptions and  
8 overall analysis may not have been the *only* way to go about assessing whether  
9 Greenwood had overpaid for the inventory that it had received, but those assumptions and  
10 analyses were reasonable and clearly constituted evidence that would support a jury  
11 verdict for Greenwood.

12           We have rejected each of the three arguments that defendants raised in the  
13 trial court in support of their directed verdict motion. Although defendants renewed their  
14 directed verdict motion later in the trial -- after plaintiffs had been permitted to amend the  
15 breach of contract claim to allege that defendants had breached by "erroneously  
16 account[ing] for its inventory" -- defendants did not advance additional reasons for  
17 granting their motion but simply stated that the motion was based on "all the reasons  
18 previously announced."<sup>11</sup>

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<sup>11</sup> We assume that, when defendants thus referred to their "previously announced" reasons, they intended to adapt those reasons to the amended wording of the complaint. Thus, we assume that, in their second motion, defendants were objecting that there was no evidence that any person connected with Forest Products had engaged in accounting at all, much less the "erroneous accounting" that plaintiffs had alleged as a breach of contract. That argument fails for the same reason that the corresponding

1           We turn, then, to an entirely different argument -- the one that the Court of  
2 Appeals relied on to reverse the trial court's denial of defendants' directed verdict  
3 motions. As discussed above, \_\_\_ Or at \_\_\_ (slip op at 10-11), the Court of Appeals held  
4 that defendants could not be found in breach of their obligation under the agreement to  
5 state or accurately account for the cost of inventory *because the agreement placed*  
6 *defendants under no such obligation.*

7           There is a simple reason why that argument did not provide a basis for  
8 granting defendants' motion for a directed verdict. As we have recounted, defendants  
9 offered three arguments to the trial court for directing a verdict for defendants on the  
10 breach of contract claim. The argument that the Court of Appeals advanced was not one  
11 of them.<sup>12</sup> Because the trial court never had an opportunity to consider the argument, it is  
12 not, and was not, a proper basis for reversing the trial court's decision. *See Remington v.*  
13 *Landolt*, 273 Or 297, 302, 541 P2d 472 (1975) (grounds not stated in motion for directed  
14 verdict will not be considered by appellate court). *See also* ORCP 60 ("A motion for a

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argument in defendant's original motion failed -- there was at least some evidence before the jury that would allow it to conclude that defendants ultimately were responsible for the accounting that was used to calculate what plaintiffs owed.

<sup>12</sup> In an effort to demonstrate that the issue was raised at trial, defendants selectively have quoted from the transcript of the directed verdict arguments, focusing on their own statements to the court that plaintiffs had "failed to identify any specific act which would constituted a breach" and questioning "what exactly is the breach of contract they are trying to collect on?" But, when those statements are read in context, it is clear that they are directed at whether plaintiffs had offered evidence showing that defendants had actually engaged in any action that constituted a misstatement or erroneous accounting, and not at whether, in the first place, the APA imposed on defendants any obligation *not* to misstate or erroneously account for the cost of the inventory.

1 directed verdict shall state the specific grounds therefor").

2           We have concluded that the trial court in this case properly rejected each of  
3 the grounds that defendants' raised at trial for granting their motion for a directed verdict  
4 on plaintiffs' breach of contract claim. We also have concluded that the additional  
5 argument that the Court of Appeals relied on in reversing the trial court -- that the  
6 obligation that Forest Products supposedly breached did not exist under the contract as a  
7 matter of law -- was not preserved. It follows that the Court of Appeals decision, which  
8 rests on the premise that defendants were entitled to a directed verdict on plaintiffs'  
9 breach of contract claim, must be reversed.

10           Defendants raised other claims of error in the Court of Appeals that,  
11 because of its decision on the directed verdict issue, that court either did not address or  
12 decided in a way that depended on defendants prevailing on the directed verdict issue. In  
13 the latter category is defendants' claim that the trial court erred in allowing plaintiffs'  
14 attorney fees on their breach of contract claim -- a claim with which the Court of Appeals  
15 agreed, resulting in the reversal of the supplemental judgment that allowed the attorney  
16 fees. *Greenwood*, 238 Or App at 479. That decision obviously must be reversed: The  
17 reasoning underpinning the reversal on attorney fees -- that plaintiffs did not prevail on  
18 their breach of contract claim -- has not been sustained by this court or, at least, remains  
19 an open question until defendants' other claims of error are decided. We therefore  
20 remand to the Court of Appeals to consider defendants' remaining claims, including their

1 challenge to the trial court's allowance of attorney fees and the amount of those fees.<sup>13</sup>

2           The decision of the Court of Appeals is affirmed in part and reversed in part, and  
3 the case is remanded to the Court of Appeals to consider defendants' unresolved  
4 assignments of error.

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<sup>13</sup>           The other matters that remain to be decided on remand are (1) a claim that the trial court erred in denying defendants' motion for a new trial based on newly discovered evidence; and (2) a claim that the trial court erred in instructing the jury concerning the "loaned servant" doctrine when there was no evidence to support that instruction. It strikes us that the latter claim of error may be resolved by our conclusion that "plaintiffs' evidence about the divided responsibilities of Greenwood employees and the continuing right of Forest Products' principals was sufficient to create a jury question." \_\_ Or at \_\_ (slip op at 15). However, we leave it to the Court of Appeals to make that determination.