

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TIMOTHY C. ROTE,
Plaintiff-Appellant,

v.

MAX ZWEIZIG,
Defendant-Respondent,

JOHN DOES (1-5),
Defendants.

Clackamas County Circuit Court
22CV17744

A181660

AMENDED APPELLANT'S OPENING BRIEF

Opening Brief on Appeal from the Judgment entered on May 5, 2023 in Clackamas County
Court by Leslie Roberts, Senior Circuit Court Judge.

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STATEMENT OF THE CASE

I. Nature of the Action

This is an appeal of dismissal of Plaintiff's Wrongful Use of a Civil Proceeding case brought against Defendant Max Zweizig. See ORS 31.230. At issue herein is the general judgment of dismissal signed on May 9, 2023, entered on May 22, 2023 granting defendant's Motion for Summary Judgment and denying Plaintiff's Cross-Motion for Summary Judgment.

This Amended Opening Brief has been filed on this day correcting only the Appeal case number, as required by the Court.

II. Jurisdiction

Appellate jurisdiction: ORS 19.205(1); ORS 19.240.

III. Appeal Dates

The general judgment of dismissal being appealed and in favor of defendant was entered in the trial court register on May 22, 2023, by Leslie Roberts. The Notice of Appeal was timely filed and served by ECF, email and certified mail, return receipt requested, on June 1, 2023, documented on the docket on June 5, 2023.

IV. Questions Presented on Appeal

A. Did the trial court err and abuse its discretion when granting the defendant's Motion for Summary Judgment.

V. Concise Summary of the Argument

Plaintiff Rote defeated Max Zweizig's fraudulent transfer claims in Clackamas case 19cv01547 (wherein Rote was a defendant) against three properties at Summary Judgment. The Court granted Summary Judgment against

two of the properties within four months of Zweizig initiating his lawsuit. The Court granted Summary Judgment against Zweizig's fraudulent transfer claim against a Sunriver property, a property owned by non-debtor Tanya Rote, after discovery in March 2021.

In March 2021 the Court (19cv01547) found that Zweizig not only lacked evidence to support his fraudulent transfer claim against the Sunriver property but further that Zweizig lacked probable cause to pursue his fraudulent transfer claims. The Oregon Court of Appeals affirmed without opinion (A175781) on 2.16.22 and denied Zweizig's Motion for Reconsideration on 3.21.22.

To prevail on a claim for wrongful initiation of a civil proceeding, the plaintiff must show "(1) commencement and prosecution by the defendant of a judicial proceeding against the plaintiff; (2) termination of the proceeding in the plaintiff's favor; (3) absence of probable cause to prosecute the action; (4) existence of malice; and (5) damages." *SPS of Oregon, Inc. v. GDH, LLC*, 258 Or App 210, 218, 309 P3d 178 (2013).

All elements of the wrongful initiation case but one (malice) were satisfied from the record in case 19cv01547. The only element not satisfied is the existence of malice, which may be inferred by the jury on the absence of probable cause.

Judge Roberts ignored the Court's prior findings on the lack of probable cause in case 19cv01547 and did not allow this case to proceed to a jury to determine whether there was malice. Plaintiff alleges that Roberts had no legal right to determine the lack of malice nor to supersede or ignore the findings of the Court in case 19cv01547, a finding that Zweizig had no evidence to support his claims and lacked probable cause.

Moreover, the Motion for Summary Judgment hearing record may be interpreted as encouraging Zweizig to file a separate defamation lawsuit against

Timothy Rote, implicating Court bias, which Zweizig has now done. While Roberts may have wanted the litigation between the parties to end, that's not what happened. Instead Zweizig now seeks in that same new lawsuit (23vc28582) to re-litigate the 19cv01547 case, attacking Tanya Rote again as leverage against Timothy Rote and to attempt to extort the Rote's. This Court may take judicial notice of that action, as a jury should and would in finding Zweizig pursued numerous prior and meritless litigation against Timothy and Tanya Rote implicating malice by Zweizig.

VI. Statement of Facts and Procedural History

A. Procedural History

After the Rote's prevailed at Summary Judgment in case 19cv01547 against Zweizig's fraudulent transfer claims, Plaintiff Rote pursued recovery of his damages caused by Zweizig.

The relevant procedural history in this case is as follows:

1. Plaintiff Complaint 6.1.22;
2. Defendant Answer 9.1.22;
3. Plaintiff Motion to Strike late Answer 9.12.22;
4. Defendant Amended Answer 10.7.22;
5. Defendant Motion to Amend Answer 10.13.22;
6. Defendant's Motion for Summary Judgment 10.13.22;
7. Plaintiff Motion to Strike Amended Answer 10.19.22;
8. Plaintiff Response to Motion for Summary Judgment and Cross-Motion 10.26.22;
9. Defendant Response to Plaintiff Motion to Strike 10.31.22;
10. Hearing Motion to Strike 11.14.22, Court Denying Plaintiff Motion to Strike;

11. Hearing Motion for Summary Judgment 04.05.23;
12. Judgment Entry 05.22.23; and
13. Notice of Appeal 06.05.23.

B. Evidence Offered At Motion for Summary Judgment

Some of the evidence offered by Appellant through the time of the Motion for Summary Judgment hearings include:

1. Zweizig's Fraudulent Transfer Action In Case 19cv01547

Zweizig filed a complaint in January 2019 and alleged fraudulent transfers on three properties. The first was a property located in Sunriver acquired in 2012 and owned by Tanya Rote. The second was Timothy Rote's house, arguing his use of an equity line over a 15 year period constituted a fraudulent transfer. The third was a rental property acquired by Tanya Rote in 2003 and located in Klamath Falls. See **Zweizig's Complaint, Exhibit 1**.

The Court granted summary judgment against the allegations on the home in West Linn and Klamath Falls in March of 2019 but permitted discovery on the Sunriver home owned by Tanya Rote. This is not refuted. See **March 18, 2019 order and hearing transcript (Exhibit 3, pages 62-86)**. Judge Van Dyk went to some length to inquire about why the Sunriver property was not a component opportunity from 2014 to 2018 and cited Judge Hernandez opinion in that case 3:14-cv0406. See **Exhibit 3, Pages 36-56**.

After two years of discovery, Zweizig presented no credible evidence to overcome the Rote's offer of written contracts and tax return evidence that the Sunriver property was not fraudulently transferred to Tanya Rote or Northwest

Holding, LLC in 2012, six years before Zweizig secured his judgment in federal case 3:15-cv-2401. Clackamas Count granted the Rote's Motion for Summary Judgment on the Sunriver property on March 24, 2021. **See Exhibit 5. The transcript of the MSJ hearing is provided herein as Exhibit 4.**

Zweizig described his malice and refusal to look at the evidence on the record multiple times, which will be explored in depth in the argument section of his brief (**Exhibits 2 and 4**). It is un-refuted that the Court granted the Rote's Motion for Summary Judgment on two of the three properties in March 2019 and again post discovery in March 2021 (**Exhibit 5**). Summary judgment against his claims was affirmed on Appeal (**Exhibit 6**). Zweizig used a *lis pendens* to interfere with the sale of the Sunriver home, a property owned by non-debtor Tanya Rote. Plaintiff suffered economic and non-economic damages in prevailing in this action.

2. Zweizig's Anti-Slapp Motion To Strike & Admissions

Zweizig filed an anti-SLAPP Motion to Strike the Rote's counterclaims in case 19cv01547, wherein Zweizig argued that the proper form of such a claim would be a wrongful use of a civil proceeding case in the event Zweizig failed in his fraudulent transfer action. **See Exhibit 1, page 17, lines 4-10:**

“As a basis for her counterclaims, Mrs. Rote insists the fraudulent transfer claim was filed “without a shred of evidence.” Tanya Rote Counterclaims., 8:6. The appropriate vehicle for that argument is a motion for summary judgment on the fraudulent transfer claim or an action following disposition of the fraudulent transfer claim.”

In so far as Zweizig prevailed on the anti-SLAPP based on an argument that a wrongful use action would be the proper procedure, issue preclusion will stop him from asserting any credible affirmative defenses to this action. See argument section on affirmative defense of reliance on counsel, probable cause and malice.

Although Zweizig cites Ann Lininger's order granting attorney fees on the anti-SLAPP dismissal of the Rote's counterclaims, adopting Zweizig's proposed language that the counterclaims were brought to harass Zweizig and delay the proceedings, that finding (however ill advised) is not demonstrative the efficacy of Zweizig claims in that case. All of this will be explored at greater length in the argument section of this Motion.

Plaintiff suffered economic and non-economic damages in prevailing in this action that informs this Court of the repeated abuses by Defendant.

3. Zweizig's Fraudulent Transfer Action In Case 3:14-Cv-0406

Zweizig brought a fraudulent transfer action against Timothy Rote in case 3:14-cv-0406 in federal court and after four years the Court concluded that there was no evidence to support Zweizig's claims and found in favor of Timothy Rote. See **Exhibit 3, page 295**. That Rote prevailed in un-refuted. Plaintiff offers this as support for how objectively unreasonable Zweizig's subjective belief is, how that belief once established will not be informed or deterred by the evidence and how the defendant's commitment to ignoring the evidence implicates malice because Rote published forensic reports showing Zweizig downloads, possesses and disseminates child porn.

Plaintiff suffered economic and non-economic damages in prevailing in this action that informs this Court of the repeated abuses by Defendant.

4. Zweizig's Attempt To Sheriff Sale Rote's Home

Zweizig filed a Motion to Sheriff Sale Plaintiff's home in West Linn and continued to attempt to do so after the home had been sold and was in escrow. Zweizig was in fourth position and there was no tenable way that Zweizig would have a superior lien or receive any of the proceeds of the sale, particularly a firesale through the Sheriff's office. Zweizig nonetheless forced Plaintiff Rote to incur fees and file multiple Motions to stop the Sheriff's Sale. It is un-refuted that Plaintiff prevailed on his Motion to stop the Sheriff Sale of his West Linn home. **See Exhibits 9, 11, 12, 13.**

Plaintiff suffered economic and non-economic damages in prevailing in this action.

5. Zweizig's Attempt to Sheriff Sale Tanya Rote's Sunriver Property.

Zweizig used a judgment on the anti-SLAPP to proceed with a foreclosure action on the \$20,970 anti-SLAPP award to Zweizig in spite of the fact that the judgment had been bonded. **See Exhibit 8.**

Plaintiff suffered economic and non-economic damages in prevailing in this action.

6. Zweizig's Attempt To Unlawfully Liquidate The \$20,970 Bond

Zweizig attached a judgment from a different case (19cv14552) to seek to liquidate a supersedeas bond securing the \$20,970 judgment in his favor from the

anti-SLAPP in case 19cv01547. Both Zweizig and his attorney filed declarations attesting to the accuracy of the exhibits provided in support. **See Exhibit 7.**

Plaintiff Rote suffered economic and noneconomic damages in prevailing in this action.

7. Zweizig's Attempt To Unlawfully Subpoena Records After Discovery

Zweizig unlawfully sought to subpoena records after close of discovery that was intended to harass Tanya Rote and her business in substantial retaliation for not capitulating to Zweizig's fraudulent transfer action in case 19cv01547. Plaintiff prevailed in the Motion to Quash the subpoena. **See Exhibit 10.**

Plaintiff suffered economic and non-economic damages in prevailing in this action.

C. Findings of the Court

Judge Roberts made a limited number of findings but nonetheless found that there was no smoking gun or other evidence of malice presented to her or on the record other than Zweizig's loss of his case and actions in cases 19cv01547 and 19cv00824. Roberts ignored the 19cv01547 Court's finding in March 2021 that Zweizig lacked probable cause to bring and continue that case.

ASSIGNMENT OF ERROR #1

(Unreasonable Attorney Fees)

The Trial Court Erred in Granting Defendant's Motion For Summary Judgment

I. Preservation of Error

Plaintiff-Appellant argued in his Response and Cross Motion that all the elements of Plaintiff's claims are satisfied, but if the Court believes there is a dispute on the existence of malice (one of the elements), that question is for a jury. Plaintiff made these arguments in his Response and Cross Motion (dated 10.26.22) and during a hearing on the respective parties Motion for Summary Judgment (dated April 5, 2023).

II. Standard of Review

This court reviews the trial Court's grant of summary judgment for errors of law. *Estate of Thompson v. Portland Adventist Med. Ctr.*, 309 Or App 118, 121, 482 P3d 805 (2021). This court will only affirm summary judgment if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, 309 Or App at 121. "In evaluating whether summary judgment is appropriate, [this court views] the 15 facts in the light most favorable to the nonmoving party, drawing all reasonable inferences therefrom in that party's favor. *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997)." *Estate of Thompson*, 309 Or App at 121.

There remains a genuine issue of material fact, if, based on the record viewed in a manner most favorable to the opposing party, an "objectively

reasonable juror could return a verdict for the [opposing] party on the matter that is the subject of the motion.” ORCP 47C.

The trial court and this court’s role is not to weigh the evidence but rather to determine whether there are disputed issues of fact: “Neither court, when considering whether a party is entitled to judgment as a matter of law at the summary judgment stage of the case, is permitted to make factual findings or weigh the evidence...” *Wieck v. Hostetter*, 274 Or App 457, 468, 362 P3d 254 (2015).

III. Argument

To prevail on a claim for wrongful initiation of a civil proceeding, the plaintiff must show “(1) commencement and prosecution by the defendant of a judicial proceeding against the plaintiff; (2) termination of the proceeding in the plaintiff’s favor; (3) absence of probable cause to prosecute the action; (4) existence of malice; and (5) damages.” *SPS of Oregon, Inc. v. GDH, LLC*, 258 OR App 210, 218, 309 P3d 178 (2013). In the context of a wrongful-initiation claim, probable cause “means that the person initiating the civil action ‘reasonable believes’ that he or she has a good chance of prevailing—that is, he or she has an objectively reasonable, subjective belief that the claim has merit.” *Id.*

Plaintiff refers this Court now to the hearing transcript, page 24, wherein Judge Roberts acknowledges that Zweizig lacked probable cause in the action cited in Plaintiff’s Response:

13 “And here what we have is a showing that

14 these claims in the collection actions were resolved

15 in -- in the plaintiff's favor -- that is to say
16 (indiscernible) favor -- and that -- and, arguably, we
17 can argue or someone can argue about probable cause.”

Plaintiff alleges and has shown that Zweizig lacked probable cause to pursue any of actions outlined in the fact section of this brief and as will be explored in greater detail below.

What the parties dispute is whether Zweizig pursued his claims out of malice, which Plaintiff argues is evident from the lack of probable cause in multiple actions. Zweizig disagrees. This is a material fact that is in dispute and a jury should hear.

Also from the Court, starting on page 25:

13 THE COURT: “Yes. I do hope that this will
14 conclude these kind of -- these -- these kind of
15 collateral litigations. I hope that we don't now have
16 a claim on behalf of the defendant here for malicious
17 initiation of civil litigation, that it -- that it can
18 end here.”

But it did not end there. Recently Zweizig filed a new lawsuit against Plaintiff and Tanya Rote, Clackamas case 23cv28582, wherein Zweizig is attempting to re-litigate case 19cv01547. See Def. Timothy Rote’s 23cv28582 Decl. and Exs. In Support of Anti-SLAPP Motion to Strike, Motion to Dismiss and Motion for Sanctions ¶ 5, Ex. 1 (Zweizig’s complaint for fraudulent transfer in case no. 19CV01547), Ex. 2 at 1 (general judgment of dismissal in case no.

19CV01547, dated April 6, 2021), Ex. 2 at 2 (decision of Oregon Court of Appeals to affirm case no. 19CV01547 without opinion). These materials are on file with the Court in this proceeding and also the type of public court filing of which this Court can and should take judicial notice.

Zweizig hires new counsel often to re-litigate issues he has lost. In the new case Zweizig is seeking IIED against Plaintiff and Tanya Rote because they won the 19cv01547 case and alleging fraudulent transfers on no statements of fact. Even given Zweizig's attorney, Chase Beguin, is fresh out of law school, new attorneys are schooled on not re-litigating cases lost. Plaintiff draws the attention of the Court to this matter because it reflects the lack of probable cause and malice that Zweizig brings to his lawsuits. He will not ever be convinced to act within the law. There is of course another reason judicial notice of this new lawsuit is important. Zweizig's IIED claim is a disguised defamation claim.

Continuing with the MSJ hearing, transcript, page 25:

"The Court:

19 And I certainly hope that statements that
20 are made in the pleadings which are personal about
21 various participants are never reflected outside of
22 absolutely privileged circumstances. If -- if some of
23 the -- the documents and -- and I -- I assume that you
24 know who I'm talking -- talking about.

25 If some of these documents were read on the

Continuing on page 26

1 street corner, there would be a very successful claim
2 for defamation. And so with that, I hope this is the
3 end of this litigation. Thank you all.”

The Court showed favoritism to Zweizig in even intimating that the allegations against Zweizig in the Plaintiff’s response were not true, allegations of downloading, possessing and distributing child porn, porn, pirated movies and videos, cybercrime and identity theft. The Court was in no position to determine if those allegations were true unless she read the forensic reports included in the material, which she admitted on the record to not doing.

A. Commencement and Results in Favor of Plaintiff

It is un-refuted that the following actions were commenced by Zweizig and decided in Plaintiff Rote’s favor:

1. Zweizig Clackamas case 19cv01547 (**Exhibits 1, 5 and 6**);
2. Zweizig Federal case 3:14-cv-0406 (**Exhibit 3, pages 36-56**);
3. Zweizig Motion to Sale Timothy Rote’s home 19cv00824 (**Exhibit 9**);
4. Zweizig Motion to Sale Tanya Rote’s Sunriver property 19cv01547 (**Exhibit 8**);
5. Zweizig Subpoena of Records Post Discovery 199cv01547 (**Exhibits 10, 15 page 37**);
6. Zweizig Motion to Liquidate Bond (**Exhibits 7 and 15, page 45**);
7. Zweizig Petition to Suppress Zweizig’s deposition (**Exhibit 14 and 4, pages 2-10**);

8. Zweizig refusal to release lien in case 19cv00824 (**Exhibit 12**);
9. Zweizig refusal to release lien in case 19cv01547 (**Exhibit 13**); and
10. Zweizig refusal to release lien in case 19cn01843 (**Exhibit 11**).

All of the above cases and motions within those cases were decided in Plaintiff's favor

The above represents more than ten years of litigation brought by Zweizig. Plaintiff alleges that he suffered economic and noneconomic prevailing on these Cases, Claims and related Motions.

B. Lack of Probable Cause

As with the malicious-prosecution claim, the existence of probable cause is a complete affirmative defense to a wrongful-initiation claim, and it is a question of law for the court when the facts or inferences are undisputed. *Id.* However, if the facts or inferences are disputed, then the jury must decide the facts and the court must instruct the jury on what facts constitute probable cause. *SPS of Oregon, Inc. v. GDH, LLC*, 258 Or App 210, 218, 309 P3d 178 (2013).

Zweizig had an ongoing duty, with or without counsel, to dismiss an action when evidence was acquired to show that his case lacked merit, as in case 19cv01547. Although contracts and other evidence (such as tax returns) were provided within a few months of his initiation of that case (January 2019), Zweizig justified continuing with the case only because he was owed a judgment, not because the action was valid. Plaintiff may draw a reasonable inference from Zweizig's former attorney resigning in July 2020 as in part associated with the

lack of merit of the case itself. According to Zweizig Ward Greene also resigned no longer wanting to be associated with the Zweizig and the raping of children.

Zweizig brought his claims in case 19cv01547 and 3:14-cv-0406 under ORS 95.230 and 95.240 and both statutes have a look back period of approximately four year from the date of judgment. The law requires that Zweizig must prove “intent” by Rote to avoid a judgment and that the transfers were made for less than equivalent value.

Plaintiff argues for example that when in case 19cv01547, Zweizig attacked a rental property owned by Tanya Rote, a Klamath Falls property (Alva) she acquired in 2003, in his effort to collect a judgment secured in November 2018, he had no probable cause and certainly no objectively reasonable basis to attack Tanya Rote’s property, property she acquired 15 years before the judgment was rendered. There is no plausible argument to attach any probable cause or reason for this attack other than to cause emotional harm and to use the litigation for a purpose other than to collect a judgment.

The Court agreed with the Rote’s only two months after Zweizig filed his complaint, stating on the record (**Exhibit 3, page 74**):

“3....I have a, I have a particularly
4 hard time with allowing you to pursue your claims as to
5 the Alva property and the West Linn property.”

And went to explain (**page 82**):

“5. I'm going to deny the motion for summary judgment
6 as to the Sunriver property. I'm going to grant it as

7 to the West Linn and the Alva properties. So I'll grant
8 partial summary judgment under these circumstances.
9 It's tough when you're moving for summary
10 judgment right out the gate, and the Court of Appeals
11 would say, you know, you have to pretty much be able to
12 conclude that discovery would not reveal anything
13 that's a little bit of an overstatement on my part
14 but not likely reveal anything that would add any
15 information to the Court's analysis.”

In fact, former counsel Williams Kastner asked for a reasonable amount of discovery on all the properties they pursued, to disprove the Rote’s allegations that the Sunriver property was transferred to a holding company in 2012, more than 6 years before Zweizig’s judgment in case 3:15-cv-2401 (**Exhibit 1, pages 5-6**). Even with Tax Return evidence showing the date of transfer and an independent opportunity to secure that tax return directly from the IRS, Zweizig proceeded until summary judgment was granted...again and again.

The court’s review is not limited to the moment when a plaintiff files a complaint: “a claim that was objectively reasonable when asserted may become unreasonable when viewed in light of additional evidence or changes in the law.” *Dimeo v. Gesik*, 197 Or App 560, 562 (2005). “[A] party has a continuing duty to evaluate its position throughout the course of litigation.” *Id.* Defendant would not drop his claims despite overwhelming contrary evidence.

It is un-refuted that Zweizig brought a fraudulent transfer action in case 19cv01547 against Timothy and Tanya Rote and the Court granted the Rote's Multiple Motions for Summary Judgment, the later finding that Zweizig (after two years of discovery) provided no credible evidence to support his claims. See **Exhibit 4, pages 80-90. Zweizig lacked probable cause.**

Exploring some of the Court's reasoning in granting summary judgment against the Sunriver property in 2021 will be helpful in this analysis. The Court in case 19cv01547 found on the record as follows:

(Exhibit 4, page 51):

THE COURT:

14 "So as I understand it, as we've
15 gotten through the morning, they're -- I'm learning that
16 there really aren't contrary documents on this issue of
17 fraudulent transfer.
18 The argument that I've heard so far this morning
19 is, there is a contract, there is no dispute from anyone
20 that this is a valid contract. And under this contract
21 there was valuable consideration in that the date of the
22 transfer was long before your judgment."

and further below from Exhibit 4, pages 76:

"2 THE COURT: And now -- and that's what I
3 understood. But now we have evidence that that's not true.
4 It wasn't after the jury rendered a verdict and that it was

5 transferred five, six years prior to the judgment. And so
6 while it appeared prior to discovery that those things were
7 true. That it's questionable. It was transferred after
8 the -- your client received his judgment. We now have a
9 tax return that supports a contract that was -- that's
10 valid on its face because I don't have any evidence that
11 it's not. That it was signed way back in 2012.
12 So the things in her declaration are no longer
13 true.

14 MR. ALBERTAZZI: Well, they're talking about --

15 THE COURT: Those were the suspicions before
16 discovery.”

And further below starting at page 81:

“12 I have a tax return that supports that 2012
13 contract. No evidence that it was subsequently filed after
14 a judgment. That I have evidence that it was maybe shared
15 in discovery after the fact but I don't have any evidence
16 that it's not authentic and it wasn't actually filed. It's
17 certainly something that could've been verified, you know,
18 with the IRS. It's a tax filing.
19 And so I'm left with really no proof that it was
20 a fraudulent. I mean, I have your lawyer telling me,
21 Judge, a jury could speculate and look at the timing and be

22 suspicious. That's true. But that's -- that doesn't
23 create a material issue of fact. Suspicion and speculation
24 and what they might think about evidence that you'll
25 possibly present, that doesn't get me past the summary

Continued page 82:

“1 judgment.

2 What should have been filed in response to the
3 summary judgment motion is all of the evidence that you're
4 telling me now that you have that would show -- that would
5 support fraudulent transfer. It doesn't require that you
6 tip your hand and tell me everything. It just requires
7 some issue of material fact and I don't have that on this
8 record.”

And continuing on page 84:

“8 THE COURT: Let's say that we have those two.
9 How does that get us around the fact that we have a 2012
10 signed, authenticated transfer contract as well as a tax
11 return? Now contract, one thing. But now we have a tax
12 return also from 2012 that completely 100 percent supports
13 the contract and shows that contract is, in fact, valid.
14 Was made in October of 2012. Lists the very property that
15 we are talking about. It validates that contract 100
16 percent.

17 THE PLAINTIFF: I understand that.

18 THE COURT: How do we get around that?

19 THE PLAINTIFF: Well, I -- unfortunately, I have

20 seen many different tax returns within these cases. Mr.

21 Rote is a CPA and I fully agree with anyone that would say

22 it would be our extreme burden to try and prove that they

23 weren't what they appeared to be.

24 THE COURT: Yep.”

It is un-refuted that Zweizig filed an appeal on Clackamas Court granting the Rote’s Motion for Summary Judgment, and that the Appeals Court affirmed without opinion and denied reconsideration. **See Exhibit 5 and 6. Zweizig lacked probable cause.**

It is un-refuted that Zweizig brought a fraudulent transfer action in federal case 3:14-cv-0406 against Timothy Rote and the Court found in favor of Rote at trial, finding there was no credible evidence of a fraudulent transfer. **See Exhibit 3, page 36-56. Zweizig lacked probable cause.**

It is un-refuted that Zweizig filed a *lis pendens* in case19cv01547 against Tanya Rote’s Sunriver home, the intent of which was to interfere with a sale of that home 3 days before closing. The sale of the Sunriver home failed because Zweizig refused alternative property. A Motion for Summary Judgment was granted against Zweizig claims.

By defendant Zweizig’s own admission in case 19cv01547 that question of probable cause should be litigated after summary judgment. **See Exhibit 1, page**

17. The Court's finding in that case shows there is a lack of probable cause for Zweizig to have pursued the case and to have filed the *lis pendens*. **See Exhibit 4, pages 50-90. Zweizig lacked probable cause.**

It is un-refuted that Zweizig attempted to foreclose on the Sunriver property after a supercedeas bond was placed on a \$20,970 judgment Zweizig secured through an anti-SLAPP against counterclaims brought by the Rotes in case 19cv01547. The attempt to foreclose was withdrawn after the Rote's threatened legal action because the bond was in the process of being secured and was in place within a few days of the Motion being filed. **See Exhibit 8, pages 7-8.** Zweizig again threatened to foreclose on the Sunriver property even though the bond was in place and the Rote's reached out to arrange payment. **See Exhibit 20. Zweizig lacked probable cause.**

It is un-refuted that Zweizig refused to remove a lien secured in case 19cn01843 in the amount of \$8,500 and filed days before the sale of Rote's West Linn home. The Court found there was no reasonable expectation that Zweizig would receive proceeds and ordered the lien be removed so the sale could proceed; however because that lien was filed after Zweizig's \$500,000 lien in case 19cv01547 was removed, the first sale of the home failed. **See Exhibits 11 and 17.** Zweizig had no reasonable basis to resist Rote's Motion to remove the lien. **Zweizig lacked probable cause.**

It is un-refuted that Zweizig refused to remove a lien secured in case 19cv01547 and attempted to interfere with the sale of Timothy Rote's West Linn home, even though the lien of \$20,970 was already secured by a suprecedeas

bond. Three Courts found there was no reasonable expectation that Zweizig would receive proceeds and ordered the lien be removed so the sale could proceed. **See Exhibit 13 and 17 (final closing statement). Zweizig lacked probable cause.**

In Deschutes County, the Court removed the lien of \$500,000 in case 19cv00824, which Zweizig opposed, the court having concluded that there was no reasonable expectation that Zweizig would receive any proceeds. **See Exhibit 12.** Zweizig attempted to hold Rote's home sale hostage by demanding that Rote pay a \$71,000 judgment in which he was not a debtor. **Exhibit 12, page 8-11. Zweizig lacked probable cause.**

It is un-refuted that Zweizig sought to have the proceeds of the supercedas bond in case 19cv01547 (securing the anti-SLAPP judgment against Timothy and Tanya Rote) liquidated. The Court found that Zweizig attached an appellate judgment from a different case (19cv14552) and denied the Motion for the Bond proceeds. **See Exhibit 15, page 45.** A Motion for Sanctions against Zweizig is pending in that case. **See Exhibit 7. Zweizig lacked probable cause.**

It is un-refuted that Zweizig attempted to use a subpoena post-discovery and in violation of the Court's scheduling order to interfere with Tanya Rote's insurance business as an act of leverage in case 19cv01547. The Court granted the Rote's Motion to Quash. **See Exhibit 15, page 37. Zweizig lacked probable cause.**

In the analysis of probable cause includes a two-step analysis. The first was whether defendant Zweizig had a subjective belief he would prevail on the

actions and motions he pursued. The second is whether there is any evidence from which a triar (and more often times a jury) could find facts or draw inferences requiring the legal conclusion that Zweizig's subjective belief was not objectively reasonable. See *Roop v. Parker Northwest Paving, Co.*, 94 P. 3d 885, at 898-899, Or: Court of Appeals 2004. Plaintiff alleges that Zweizig pursued claims that were objectively unreasonable and did so time and time again.

Zweizig cannot also take limited success to be demonstrative overall. Plaintiff conceded that Judge Ann Lininger was not an independent triar and opined that the Rote's counterclaims in case 19cv01547 were intended to harass and delay the proceedings. Whatever slight delay there was for the anti-SLAPP, the Rote's nonetheless prevailed on Summary Judgment twice, once in March 2019 (**Exhibit 3**) and again in March 2021 (**Exhibit 5**), which refutes any interest in a delay. Moreover, it is un-refuted that the *lis pendens* filed against non-debtor Tanya Rote's Sunriver property was intended to stop the sale of the property. Zweizig concedes that was both his intent and goal. Lininger's order is provided herein as **Exhibit 1, pages 19-21** and is a contributing factor in Plaintiff Rote Civil Rights law suit 3:22-cv-0985.

Zweizig's *lis pendens* arose out of his pursuit of a money judgment (**Exhibit 1**). Most states permit counterclaims when a plaintiff uses a fraudulent transfer statute claim to file a *lis pendens* against a property. In Florida for example, where a *lis pendens* arises out of other than duly recorded instruments on real property (mortgages and construction liens), the filer of the *lis pendens* must post a bond. "Florida's courts have carefully prescribed the procedures to be

followed by the trial courts in controlling and discharging a *lis pendens* in the cases that are not founded on a recorded instrument or construction lien. Trial courts and reviewing courts alike must balance (a) the *lis pendens* proponent's need to place non-parties on notice of the proponent's claims affecting the owner's real property, and (b) the damages that may be suffered by the owner (as third parties may turn away from the property because of the cloud of litigation) should the proponent's claims fail to prevail." See *LB Judgment Holdings, LLC v. Luis R. Boschetti, et al.*, Nos. 3D18-1190, 3D18-1323, and 3D18-1726 Lower Tribunal No. 12-11004 (Third District Court of Appeals, March 13, 2019).

Florida's Constitution is like Oregon's which demands that a citizen harmed must be provided a remedy for that harm. In Florida however, and as noted at the outset of this opinion, the Supreme Court of Florida held that the amount of a *lis pendens* bond "should bear a reasonable relationship to the amount of damages which the property-holder defendant demonstrates will likely result if it is later determined that the notice of *lis pendens* was unjustified." *Med. Facilities Dev., Inc.*, 675 So. 2d at 918 n.2. "The leading case on the computation of damages when a *lis pendens* has been found unjustified is *Haisfield v. ACP Florida Holdings, Inc.*, 629 So. 2d 963 (Fla. 4th DCA 1993)."

"*Haisfield* instructs that such damages, if any, are measured by any decline in market value between the time the *lis pendens* is recorded and the time it is discharged. *Haisfield* also recognizes that the expenses of preservation and maintenance of the property subject to a *lis pendens* may be awarded for the interval between recordation and discharge if the *lis pendens* is found to be

unjustified and the expenses are a consequence of the unjustified *lis pendens*.” *LB Judgment Holdings, LLC v. Luis R. Boschetti, et al.*, page 15.

Moreover in *Vukanovich v. Kine, LLC*, 268 Or.App. 623, 342 P.3d 1075 (2015) n4, the court opined that “We did not conclude, as plaintiff suggests, that a notice of *lis pendens* has no legal effect beyond reciting the facts of a pending suit and, therefore, never can slander title.” The question presented to this Court on appeal of the anti-SLAPP was whether a sophisticated client like plaintiff could file or induce counsel to file a knowingly false statement of facts in his complaint in order to file a *lis pendens* that might then enjoy qualified immunity from a counterclaim. Williams Kastner, Zweizig’s attorney at the time of the anti-SLAPP, was also involved as counsel in *Vukanovich*. Zweizig was well informed that damages could be pursued against him for damages he caused in 19cv01547.

In Oregon, a litigant like Zweizig may proceed to file a *lis pendens* without a bond and defeat the Rote’s right to counterclaim in that same case as Zweizig did in case 19cv01547 (**Exhibit 1**). Zweizig prevailed on the anti-SLAPP and at the Oregon Court of Appeals; however that is not a demonstrative point on whether damages arising from the *lis pendens* could be asserted in this action had the property value gone down, for example. Plaintiff is not asserting economic damages for the *lis pendens* at this time.

Not permitting Plaintiff to now pursue his only remaining remedy in this case would render the filing of the *lis pendens* on a money judgment and the anti-

SLAPP denial of counterclaims related or unrelated to the *lis pendens* as unconstitutional.

C. Evidence of Malice

Malice, in the context of a wrongful-initiation claim, is "the existence of a primary purpose other than that of securing an adjudication of the claim." *Erlandson v. Pullen*, 45 Or.App. 467, 477, 608 P.2d 1169 (1980). Malice, unlike probable cause, is a factual question for the jury [if disputed as to facts and inferences]. *Id.* With regard to the litigants in an underlying, allegedly wrongful action, a jury may permissibly infer in most cases that an action brought in the absence of probable cause is brought with malice. *Alvarez v. Retail Credit Ass'n*, 234 Or. 255, 263-65, 381 P.2d 499 (1963).

Defendant Zweizig has a deep and genuine disdain for Plaintiff Rote because he believes Rote is a "rich person" (**Exhibit 4, page 55, lines 11-16**) and because Rote stopped Zweizig from opening a competing business (Zweizig signed a non-compete agreement), exposed Zweizig's cybercriminal activities (Zweizig's destruction of programming to pursue an attempt to extort Rote) and exposed Zweizig's use of an employer issued computer to download, possess and distribute child porn from Zweizig's home in Woodbury New Jersey.

Zweizig's testimony, Exhibit 4, page 55:

"11 I would just drop this whole thing if I didn't
12 feel that this was, not only something in my best interest,
13 but in the best interest of, you know, not setting some
14 sort of limit on what a *rich person* can do to a person.

15 This has been tough and I think I have a very good case for
16 this or I wouldn't bring it.”

In this particular case the Court should have determined that there are inferences that can be drawn by a jury from Zweizig's consistent refusal to accept credible evidence through discovery, a refusal that he has repeated time and time again, pursuing property that Plaintiff had not even owned (Alva) or had not owned for more than six years (Sunriver, since 2012), the consistent lack of probable cause to pursue claims, refusal to accept counsel of his attorneys who wanted to stop the actions herein named, and his refusal to accept alternative property with a higher value greater than his judgment...all his refusal to evaluate the evidence does credibly implicate malice.

Zweizig filed his 19cv01547 action on January 9, 2019. He immediately filed a *lis pendens* which soured the sale of the Sunriver house that Tanya Rote had pending. This is un-refuted. In order to bring the 19cv01547 case to a close and allow Tanya to sell her Sunriver property, Timothy Rote offered Zweizig a 7.5 acre parcel of land (also in Klamath Falls) then worth \$750,000 on Zweizig's judgment of \$500,000. That offer was dated March 8, 2019. **See Exhibit 24.** Zweizig did not make a counter on that offer or even accept it as security of his judgment but rejected the offer out of hand in favor of pursuing his claims in case 19cv01547 against a Sunriver property not owned by Tanya Rote. Zweizig has an insatiable appetite to use civil litigation to harass and extort. Plaintiff argues the inferences that can be drawn from this rejection are that Zweizig wanted to continue to use the 19cv01547 litigation to interfere with the sale of the Sunriver

property, to engage with malice, to hurt Tanya Rote and cause as much emotional distress to the Rote's as feasible. Once the 19cv01547 litigation ended in favor of the Rotes, only then did Zweizig turn his attention to trying to foreclose on the Klamath Land, a property which is now worth more than \$1,250,000.

In July 2020, Zweizig attorney in case 19cv01547 resigned. According to Zweizig, Ward Greene and Williams Kastner resigned no longer wanting to be associated with Zweizig and the raping of children. See **Exhibit 2, page 9-15**.

While that may be true, it is equally probable that was just one of the reasons Kastner resigned. The other plausible reason was the lack of probable cause to pursue the claims brought by Zweizig in an attempt to take Tanya Rote's property. Zweizig had the benefit of counsel and waived any privilege when making this assertion.

If summary judgment against Plaintiff was not granted, Plaintiff would have been entitled to engage in discovery to determine if Zweizig was advised by Greene to drop the case. As of the time of Greene's resignation, Zweizig was in possession of the very evidence cited by Judge Watkins in granting the summary judgment motion—namely the contracts setting the date of transfer and portions of a tax return showing a transfer date of October 2012 of the Sunriver property to NW Holding, LLC. See **Exhibit 4, pages 76-90**. In that same exchange Zweizig also refers to seeing a lot of tax returns in prior litigation and discounting all of it. In fact, he referred to Judge's Hernandez ruling in case 3:14-cv-0406 (**Exhibit 3, pages 36-56**) as a "flim-flam." See **Exhibit 2, page 9**.

Plaintiff alleges that this malice Zweizig feels for Plaintiff Rote has become some type of psychotic obsession that effects Zweizig's ability to take legal advice from his attorneys, which in turn means he will continue to pursue cases and positions within a case that have no merit. Zweizig's refusal to release the liens against Timothy Rote's home in spite of very clear evidence that there would be no proceeds to him (**Exhibits 11-13**) or attempting to Sheriff Sale Rote's home (when the property was already listed and in the process of closing) and was sold subject to inspections, is a pronounced and malicious goal to just cause emotional and economic harm. There was nothing to be gained economically in a Sheriff sale, which as a rule sales property at a deep discount. The intention was to interfere with the higher value sale already in the process of closing, to engage in malicious abuse of the civil litigation process. See **Exhibit 17**, showing the closing statement distribution of proceeds to the First, Second and Third lien holders.

The same malice can be ascribed to Zweizig's use of a *lis pendens* against Tanya Rote's property, which as a result did interfere with a sale of that Sunriver property. Plaintiff is entitled to an inference that Zweizig filed the *lis pendens* and maintained the litigation after July 2020 (when Ward Greene resigned) out of malice and intent to cause economic and noneconomic damages or to use the assault on Plaintiff Rote's family as leverage.

Likewise, pursuing a subpoena designed to interfere with Tanya Rote's insurance business and her ownership of the Sunriver property, after discovery

had been closed, is a reflection of this malice. See **Exhibit 10**. Court granted the Rote's Motion to Quash that subpoena. See **Exhibit 15, page 37**.

Defendant also continued these discover abuses in case 19cv00824, wherein he secured ex parte an order dated November 2021 from Deschutes County, to produce the very documents that applied to case 19cv01547 and had already been denied in that case. See **Exhibit 18**.

Behind much of this is Zweizig unfettered commitment to using the civil process to retaliate against Plaintiff for Rote filing numerous criminal reports with forensic reports showing that Zweizig downloads, possesses and disseminates child. That is why he sought to suppress his deposition of December 21, 2020 (**Exhibit 2**), because it is an admission that his former attorney looked at the evidence and determined Zweizig is engaged in this criminal activity of child porn. Remarkably Zweizig then filed a Motion for Contempt and Declaration dated September 15, 2022, wherein he does not deny that he downloads, possesses and disseminates child porn. See **Exhibit 19**. He is no longer lying about his child porn business at least, but is incorrect that downloading, possessing and disseminating child porn is not child predation.

D. Damages

Plaintiff asserts that he has suffered economic damages of no less than \$75,000 (**Exhibit 22 in partial support**) and non-economic damages of no less than \$2 million. Allegation of emotional distress is sufficient to support damages element of claim. See *Lee v. Mitchell*, 152 Or App 159, 953 P2d 414 (1998). In order to bring a claim for wrongful use of a civil proceeding against another, a

person shall not be required to plead or prove special injury beyond the expense and other consequences normally associated with defending against unfounded legal claims.

E. Zweizig May Not Rewrite History

1. Issue Preclusion

Plaintiff asserts that a determination that lack of probable cause has been conclusively determined as to litigation in the related fraudulent transfer action in case 19cv01547 and in every action taken wherein Rote prevailed—thereby precluding re-litigation of that issue now .

Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact—or an issue of law—has been determined by a valid and final determination in a prior proceeding. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993); *Evangelical Lutheran Good Samaritan Soc. v. Bonham*, 176 Or App 490, 498, 32 P3d 899 (2001), rev den, 334 Or 75 (2002).

For issue preclusion to bar re-litigation of a factual or legal issue, five requirements must be met:

1. The issue in the two proceedings must be identical.
2. The issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding.
3. The party sought to be precluded must have had a full and fair opportunity to be heard on that issue.
4. The party sought to be precluded must have been a party—or in privity with a party—to the prior proceeding.

5. The prior proceeding must have been the type of proceeding to which courts give preclusive effect. *Nelson*, 318 Or at 104.

Plaintiff alleges that Judge Watkins found that Zweizig provided no credible evidence to support his claims. The Court had an extremely detailed discussion of the evidence. See **Exhibit 4, pages 49-90**. Mere suspicion is all Zweizig had and it's all he has ever had.

Judge Hernandez in case 3:14-cv-0406 also found that Zweizig had no evidence to support his fraudulent transfer claims in that case. See **Exhibit 3 pages 36-56**, also with an extensive discussion about the evidence.

The same can be said about each and every effort Zweizig took without the support of law to use a civil proceeding wherein the Court made finding that have a preclusive effect on this question of whether Zweizig had probable cause. In all cases and Motions cited in this brief, Zweizig did not have probable cause and his claims did not survive summary judgment or did not survive a Motion on the merits of his ask. There were for example hearing in Clackamas and Deschutes on Zweizig's effort to stand in the way of the sale of Plaintiff's home and he lost in all three occasions. There was a hearing on the Motion to Quash and he lost on the subpoena he issued after discovery was closed (**Exhibit 10, Exhibit 15, page 37**). There was a hearing on his Motion to suppress his deposition admissions and he was denied the Motion to Suppress (**Exhibit 4, pages 8-9**). And he had a hearing on the anti-SLAPP in case 19cv01547, wherein he prevailed on an argument that the proper time to bring a claim arising from his case was post

summary judgment and in a separate action (for a wrongful use claim) as this case is (**Exhibit 1, page 17, lines 4-8**).

Plaintiff argues that the record of the identified wrongful use cases, motions and resistance implicates the absence of probable cause and the existence of malice as the motivating factor. The Court's findings in the cases cited in this brief are that Zweizig lacked probable cause to bring his claims and/or to resist Motions. That issue need and may not be tried again. Judge Roberts had no right to rewrite history to protect Zweizig.

Plaintiff sees Zweizig's ongoing threats to his attorneys to leave and seek new counsel as being highly effective at moving those attorneys to take unprecedented abuses of litigation, particularly since all of the attorneys are contingent fee relationships. By Plaintiff's estimation Zweizig is out of pocket some \$10,000 after 20 years of litigation.

F. Zweizig Is Not A Whistleblower

Contrary to Zweizig's assertions, there are well over 1,000 pages of evidence filed in the public space (court documents and Rote's blog) that clearly show Zweizig downloaded, possessed and distributed a variety of pornography and pirated movies and videos. Some of that pornography is child pornography. The computer forensic reports and testimony of three computer forensic experts found unanimously that the material heretofore described and identified to Zweizig was downloaded, possessed and distributed using a peer to peer sharing program registered to Zweizig. That material was placed on Zweizig's employer issued computer and 120 gig hard drive by Zweizig during a period of time when

Zweizig admitted to having full control of the computer. Much of that time the computer was used by him from his home in Woodbury New Jersey. Zweizig admitted to reformatting the hard drive (spoliating evidence) and all three forensic experts opined that the hard drive was fully operational when Zweizig reformatted the hard drive. All three experts opined that no one else but Zweizig used that 120 gig hard drive. See Rote's anti-SLAPP Motion to Strike Zweizig's claims in case 23cv28582.

Let us also once and for all dispel this thought that Zweizig is a whistle blower. Timothy Rote hired Zweizig in August 2001 to be the IT Director for Northwest Direct, a company owned by Rote. Within a year of his hiring, Zweizig and three others conspired to breach their employment contracts and start a competing company, with the intent of stealing their employer's clients. Zweizig and Paul Bower organized a Delaware company called Superior Results Marketing. Zweizig owned a 49.5% interest in that company. Once Timothy Rote was informed of the scheme, Rote confronted Zweizig and Bower and took control of Superior Results. Bower was removed a short time after that. Zweizig was allowed to stay.

Approximately six months after Zweizig was allowed to stay, Zweizig launched another attack.

The first part of the plan was to remove all of the programming owned by Northwest Direct, which he did.

The second part was to fabricate the failure of his 120 gig hard drive, which he carried out in May 2003, in order to hide the programming he had been using up to that time.

The third part of his plan was then to stop processing data, stop returning that data to clients and not filing monthly client reports with a few key clients, which he also carried out starting in May 2003. Rote was then made aware of that portion of the plan in September 2003, when a client called him.

The fourth part of the Zweizig plan was then to attempt to use the threat of losing a few key clients to extort a raise and new title. Rote refused the extortion attempt. Under threat of a criminal complaint, Zweizig then processed and transmitted data and reports to those same clients that were due from May through August 2003. He completed that work on September 30, 2003.

Zweizig was terminated on October 2, 2003, but given 45 days to bring his team up to speed on his programming. He refused to do so then claiming that there was no such programming. On October 25, 2003 Zweizig made allegations that his employer had overbilled clients. The evidence he provided was fabricated by him in collusion with a member of his IT department. Zweizig alleged his employer has overbilled an unnamed client by \$400 in a month in which his employer billed had billed \$450,000.

On November 13, 2003, Zweizig's final day with the company, he returned his computer, the reformatted 120 gig hard drive and his active 60 gig hard drive. The company's critical programming could not be found on that 60 gig hard

drive, nor was it found on any of the other servers in Oregon or Iowa and was not found on back-up tapes. Zweizig had removed all of the programming.

During the arbitration in 2010, the arbitrator determined that employer Northwest Direct did not overbill clients and did nothing wrong. He nonetheless also concluded that Zweizig believed Northwest Direct had done something wrong. The arbitrator then ignored Zweizig's termination date and the evidence of that termination (the forensic reports confirming the 10.2.2003 termination date and the testimony of six witnesses) and all of the acts of cybercrime perpetrated by Zweizig against his employer including the removal and destruction of company owned programming. Northwest shut down after Zweizig's last day so that an outside programming company could re-create the programming Zweizig destroyed. More than 100 employees were laid-off during that time. All three forensic experts opined that the programming Zweizig claimed did not exist was found on the 120 gig hard drive which Zweizig re-formatted.

Zweizig's plan, hatched with his girlfriend Sandra Ware (NJ attorney), was to have Northwest's clients terminate their relationships with Northwest so that Zweizig and his new partners could compete with Northwest and avoid the non-compete mandates of their employment agreements.

G. Zweizig Is a Child Predator

Public outrage over the exploitation of children is real and a matter of public interest. As outlined in case 23cv28582 (Zweizig Exhibit 1, pages 3-5), to which this Court may take judicial notice, there are cognizable similarities and even

identical steps taken by both Zweizig and Josh Duggar to hide their child porn from family members. The forensic data and evidence found on Zweizig's computer, with references, to what was found on Josh Duggar's office computer was frankly almost identical, like a playbook. Public personality Josh Duggar was convicted of downloading, possessing and distributing child porn using a peer to peer program registered to him...just like Zweizig. Both used business computers. Both separated their office hard drive into multiple sectors, where the child porn was saved to a hidden sector. In Zweizig's case it was to a D:\shared drive. Both had separate login Id's and passwords. Both used peer to peer programs to share and acquire child porn on the dark web. This is generally regarded as the computer use footprint of a child predator's hard drive. One of computer forensic experts who testified against Zweizig in 2010 is a Eugene police officer.

Plaintiff Rote filed a criminal complaint with law enforcement in 2005 and included a copy of the forensic reports from the 120 gig hard drive Zweizig used from his home while employed by Northwest Direct (August 2002 to November 13, 2003). The child porn was not discovered until 2005 and by that time the chain of custody had been broken, making prosecution of Zweizig difficult.

Zweizig's girlfriend during this same period of time (2001 to 2015) was Attorney Sandra Ware. Once Zweizig determined that his termination was imminent he faked the failure of the 120 gig hard drive in May 2003, which he then used as cause to reformat that hard drive. That is undisputed. Zweizig then used a new 60 gig hard drive for his employer activity and continued to use the 120 gig hard drive for his porn, child porn and pirated movies and videos. This too is un-refuted.

From May 2003 through parts of September 2003, Zweizig removed all of the programming owned and used by his employer to process and report daily on

100,000 bits of information from his employer's call centers. Upon accomplishing that he attempted to extort a raise, bonus and vice-president title. Zweizig was terminated on October 2, 2003, by email and certified mail. Shortly thereafter Defendant Rote discovered that Zweizig had tampered with the servers in multiple locations and back-up tapes. Ultimately Zweizig denied the existence of the employer owned programing and refused to provide and restore the programming he removed. Zweizig refused and his employer NW Direct shut down for 10 days while an outside firm regenerated the programming. This statement of facts is also un-refuted.

Although Zweizig denied the existence of the employer owned programing, it was found on the 120 gig hard drive Zweizig reformatted first and then turned over on November 12, 2003. Looking for those programs is how the child porn, porn and pirated movies and videos were found. Plaintiff Rote has publicly accused Zweizig of cybercrime, identity theft, destruction of evidence, theft not to forget the child porn, porn and pirated material found on the 120 gig hard drive. All three forensic experts, one from law enforcement, found that Zweizig downloaded, possessed and distributed child porn.

A sample of the videos (and file names) Zweizig maintained on his computer 120 gig hard drive, which he used from his home in New Jersey, are:

1. young teen fucks two guys;
2. older sisters gets lesbian with little sister;
3. older man fucking young twink;
4. teen 16 years young;
5. older muscle guy fucks young twink; and
6. older teen kisses, sucks and fucks hairless brother

The Oregon Age of Consent is 18 years old. In the United States, the age of consent is the minimum age at which an individual is considered legally old enough to consent to participation in sexual activity. Individuals aged 17 or younger in Oregon are not legally able to consent to sexual activity, and such activity may result in prosecution for statutory rape. Oregon statutory rape law is violated when a person has consensual sexual intercourse with an individual under age 18. The age of the offender affects the severity of the punishment.

The video with a title of “teen 16 years young” is under Oregon Law considered child pornography and as outlined below, since Zweizig admitted to spoliating the evidence contained on the 120 gig hard drive, inferences may be drawn against Zweizig on the age of children in the videos he maintained on the 120 gig hard drive and whether those videos are child pornography. Rote maintains they are.

Zweizig admitted to reformatting the 120 gig hard drive on which the porn, child porn, music and video were found by computer forensic experts with the skill and expertise to determine what was on the hard drive before it was reformatted and/or otherwise destroyed. Criminals like Zweizig who store child porn on password protected hard drives rarely admit to the allegations against them, which is why computer forensic experts are called on to outline what was found on those hard drives. The experts in the Zweizig arbitration (including the expert hired by Zweizig) opined that no one but Zweizig used the 120 gig hard drive.

Spoliation comes with an inference against the party that destroyed the evidence: Oregon has a statutory provision allowing that willful suppression of evidence raises an unfavorable presumption against the party who suppressed it. O.R.S. § 40.135, Rule 311(1)(c); *Stephens v. Bohlman*, 909 P.2d 208, 211 (Or. Ct. App. 1996). It is un-refuted that Zweizig reformatted the hard drive.

Oregon ranks first among the states with the most sex offenders per capita.

CONCLUSION

For the reasons outlined above, the Appellant asks the court to reverse summary judgment dismissing Plaintiff's claims and remand the case for further consideration.

Dated: October 17, 2023

s/ Timothy C. Rote

Timothy C. Rote

Pro Se Appellant

CERTIFICATION OF COMPLIANCE

I certify that (1) this brief complies with the 10,000 word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 9,960.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii) and 5.05(4)(g).

DATED: September 5, 2023

s/ Timothy C. Rote _____

Timothy C. Rote
Pro Se Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2023, I caused to be served by US mail, postage pre-paid, a true copy of the Amended Appellant's Opening Brief to the persons listed below, as follows:

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s/ Timothy C. Rote

Timothy C. Rote
Pro Se Appellant

CERTIFICATE OF FILING

I hereby certify that on the 17th day of October, 2023, I filed the original and of the foregoing Amended Appellant's Opening Brief with the State Court Administrator at this address:

State Court Administrator
Court of Appeals
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

By United States Postal Service, certified first class mail.

s/ Timothy C. Rote

Timothy C. Rote

Pro Se Appellant