IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

TIMOTHY C. ROTE, Plaintiff, v. ANDREW BRANDSNESS, CAROL BERNICK, OREGON STATE BAR PROFESSIONAL LIABILITY FUND, ANTHONY ALBERTAZZI, NENA COOK PAM STENDAHL, MAX ZWEIZIG, Defendants.	Case No.: 18CV45257 . PLAINTIFF REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT. ORAL ARGUMENT REQUESTED

ARGUMENT

Due process in Oregon on a legal malpractice claim is virtually unheard of. Less than 1 out of 2,000 claims gets to a jury. It does not matter how ridiculous the argument made by the defendant attorney, as in this case, because the Oregon State Bar Professional Liability Fund ("PLF"), the captive insurance carrier covering malpractice claims in Oregon, is owned by the Oregon Judicial Department. Once the PLF purchases a result from the assigned Judge, which itself is an orchestrated event to suggest procedural due process, malpractice claims are dismissed and Oregon citizens suffer.

Plaintiff Supplements his Motion with **Reply Exhibits 1-3**. **Reply Exhibit 1** is copy of the Sheno Payne website of representative cases won, citing Zweizig v Rote and claiming that the 9th did not reverse the judgment because Timothy Rote could not compel arbitration without the corporate defendants in that case doing so. **Reply Exhibit 2** is Plaintiff's Civil Rights Lawsuit files against Defendants Moore, Brandsness, Leslie Roberts and others.

Reply Exhibit 3 is a copy of Plaintiff's 9th Circuit Court of Appeal Opening Brief, moving the Court to vacate the judgment in case 3:15-cv-2401, for which this case seeks to hold Brandsness accountable.

A. Defendant Has Offered No Testimony and Admits the Allegations

With those admissions, Plaintiff does not even need to provide any proof. Plaintiff has nonetheless done so.

Defendant has provided no testimony in this case on which the Court could even rely to grant Defendant's Motion for Summary Judgment or Motion to Dismiss. Defendant also does not take issue with any of the elements of the Plaintiff's Complaint.

As already explained, Defendant ***admits*** the allegations against him. Any allegations in the Plaintiff's complaint not responded to in an answer (that should have been filed after remand and Third Amended Complaint), other than allegations about damages, are therefore deemed admitted (Or. R. Civ. P. 19(C)).

Defendant admits and Plaintiff has shown a written contractual relationship with Plaintiff to provide advice and representation in federal case 3:15-cv-2401, i.e., that a duty was formed that runs from the defendant to the plaintiff.

Defendant admits to a breach of that duty and does not attempt to argue he did not breach that duty.

Defendant admits a resulting harm to the Plaintiff measurable in damages and does not attempt to deny that Plaintiff was damaged by Defenadnt's professional negligence.

Defendant admits to causation, i.e., a causal link between the breach of duty and the harm and does not attempt to break that causal connection.

If anything Brandsness knows and infers that the Oregon Court's will not allow his case to go to a jury, even in light of his perjury and unethical behavior.

Recognizing that Defendant's Motion For Summary Judgment (on admitted allegations) implicates a 42 USC 1983 constitution violation, Plaintiff has sued Brandsness,

his attorney Bernard Moore, Judge Leslie Robert and others seeking more that $25 Million in damages. See **Reply Exhibit 2**.

B. Plaintiff's Claims Are Factually Supported

To reiterate, Brandsness represented Plaintiff and Plaintiff's controlled corporations in case 3:15-cv-2401. Brandsness was instructed first and then ordered to file a Motion to Compel arbitration in that case and refused to do so for 10 months. Plaintiff Rote separately filed a Motion to Compel arbitration and the federal court denied that, finding (1) that Rote could not file without the controlled corporations also filing a Motion to Compel arbitration and (2) that Rote could not Compel because he was not a party to the arbitration agreement.

Shenoa Payne, an Oregon attorney who represented Max Zweizig on the 9th Circuit Appeal of the 3:15-cv-2401 case, the very case in which Brandsness was hired to represent and advise Rote, published her success at the 9th on her website citing to the 3:15-cv-2401 case and claims as follows:

> "Zweizig v Rote, … (holding that individual defendant was not entitled to compel arbitration because he was not [a] party to the arbitration agreement."

See **Reply Exhibit 1**.

Had Brandsness filed the Motion to Compel, as he was ordered to do, Zweizig would not have been able to take his claims to a jury. Rather like in his previous claims, Zweizig would have been forced to adjudicate his claims in arbitration. There is no doubt that the Supreme Court of Oregon and Oregon Court of Appeals do not favor arbitration on employment claims. Nonetheless, the relevant employment contract between Zweizig and his former employer NDT (which Brandsness represented) was determined to be binding on Zweizig on ORS 659A claims. The agreement was affirmed by the US District Court of Oregon as requiring arbitration and binding under the American Arbitration Act and Oregon Uniform Arbitration Act.

As noted previously, Zweizig was ordered to arbitration by a New Jersey State Court finding the employment contract applicable to ORS 659A employment claims, the very contract between Zweizig and his employer that Brandsness reviewed before rendering his advice. **See Motion Exhibit 10, pages 144-152**. The Motion to Compel filed in New Jersey State Court is provided herein as **Motion Exhibit 27**.

Defendant's Motions are in fact no more than a collateral attack on the prior findings that Zweizig's contract requires arbitration of Zweizig's ORS 659A claims.

Plaintiff has met his burden on alleging the necessary factual support on the elements of Malpractice (professional negligence), Breach of Contract, Breach of Implied Covenant of Good Faith, RICO, and IIED and has provided some evidence of the amount of economic damages. Noneconomic damages were pled and do not require a separate showing of evidence at this time. And again that is for a jury to decide.

Plaintiff alleged that Defendant Brandsness and Plaintiff entered into a contract for professional services, some of which was for the representation of Plaintiff and the corporations controlled by Plaintiff Rote. Some of the advice sought which was for legal advice on how to Answer, Compel Arbitration, Defend, etc. in federal cases 3:15-cv-2401 and 3:14-cv-0406. Brandsness provided advice and representation in both case from January 2016 through October 2016.

Plaintiff having both alleged and established that there was a contract to provide professional representation and advice (and provided billing statements showing that professional advice was given) to Plaintiff Rote, and that there would exist only a question of fact on what advice Brandsness gave to Plaintiff that lead Plaintiff Rote and Corporate defendants into filing Answers in case 3:15-cv-2401 as opposed to filing separate or combined Motions to Invoke and Compel Arbitration (**Plaintiff Motion Exhibit 7**). Brandsness does not dispute that he was ordered to file a Motion to Compel arbitration.

C. Defendant's Actions Are Sanctionable

Plaintiff reminds the Court that Defendant Brandsness, through counsel while in Federal Court, while represented by the PLF ***denied the existence of the contract*** under oath. The contract was provided herein as **Cross Motion Exhibit 4** and the Court should note that the contract was filed in federal court as Doc #18-1. Brandsness does not now deny the existence of the contract. Plaintiff would have the Court take due notice that an attorney hired by the PLF to represent Brandsness took this tactic on the nonexistence of a contract to provide professional advice by conflating the use of the word "representation" to attempt to avoid the Malpractice, Breach of Contract and Breach of Implied Duty claims in this case. Even that attempt to dupe the court (or engage the bias of the court) was also an attempt to take advantage of a pro se defendant and an act that is a discredit to the profession.

Defendant does not deny the he engaged in perjury in the Federal case in collusion with the PLF and Oregon Judicial Department and that those acts are predicate acts under Oregon Civil RICO.

Denying the existence of a contract should be sanctioned and a jury should hear this question.

D. Plaintiff is at a Minimum a Putative Client

Plaintiff reaffirms that Defendant's claim of not representing Plaintiff, in spite of the contract, fails under Oregon Law. See *O'KAIN v. Landre*ss, 450 P. 3d 508 - Or: Court of Appeals 2019, the Court of Appeals found a lawyer-client did exist even in the absence of a written agreement. See *Lahn*, 276 Or. App. at 477, 369 P.3d 85 (a lawyer-client relationship may arise through conduct in performing services that are traditionally performed by lawyers or through the intentions of the putative client." @516.

Plaintiff also cites *Hale v. Groce*, 304 Or. 281, 283-84, 744 P.2d 1289 (1987). In Hale, the Oregon Supreme Court considered whether a plaintiff, an intended beneficiary of a will and trust, could bring a claim against a lawyer when the lawyer allegedly failed to follow

his client's direction to include a bequest of a specific sum, $300,000, to the plaintiff in the client's testamentary instruments. Id. at 283, 288, 744 P.2d 1289. Were the general rule to apply, the plaintiff could not state a claim against the lawyer, because the plaintiff was not a client of and was essentially a stranger to the lawyer. Id. at 283-84, 744 P.2d 1289. The court, however, recognized an exception where the stranger is a "classic `intended' third-party beneficiary of the lawyer's promise to his client." Id. at 286, 744 P.2d 1289.

Even if the Court ignored all of this bad behavior by Brandsness, Plaintiff was still a putative client. See *Lahn*, 276 Or. App. at 477, 369 P.3d 85 (a lawyer-client relationship may arise through conduct in performing services that are traditionally performed by lawyers or through the intentions of the putative client." @516.

E. Defendant Admits to Refusing to Follow Orders

Defendant did refuse to follow Plaintiff's orders and which is similar to taking legal action without the consent of a client. A ***lawyers can also be accused of legal malpractice if they refuse to follow instructions given by their clients***. At the end of the day, the client is paying the attorney for legal representation and the attorney is obligated to follow instructions. If the attorney believes that it would not be beneficial to carry out these wishes, they may say so, but they cannot refuse to follow instructions if the client has made up his or her mind and instructed them which course of legal action they would like to take.

F. The PLF is Controlling Defendant's Actions In This Case

The PLF refused to cover the damage or provide counsel for repair (**Plaintiff Motion Exhibit 17**), but did represent Zweizig in multiple cases and did refuse to provide the contract of representation of Zweizig when it was subpoenaed by Plaintiff in this case.

The PLF did in refusing to repair publish a number of admissions that implicate a portion of the advice provided by Brandsness, which was that employer Northwest Direct could invoke arbitration and file a Motion to Compel, but that the other named corporate defendants and Rote could not. **See Motion Exhibit 17**. Even that advice is inaccurate.

The PLF does however do a great deal more. It is undisputed that the PLF provided free legal representation services to Max Zweizig in Clackamas cases 19cv14552, 19cv01547 and in this case. It is undisputed that Zweizig did not solicit that representation. **See Motion Exhibit 22, pages 33-34**. The PLF then resisted the subpoena of Zweizig's contract with the PLF, that subpoena provided herein as **Motion Exhibit 23**. The PLF public statement about who they are and what they do is provided herein as **Motion Exhibit 24**. I am not alone in my critiques of the PLF's unlawful use of a state agency's resources to engage in criminal conduct. **See Motion Exhibit 25. Based on my review there is no legal justification for the PLF to be providing free legal resources to child predator Max Zweizig.**

G. The Defendant's and PLF's behavior is Extreme and Outrageous

Whether the conduct alleged is sufficiently extreme or outrageous to be actionable is a fact-specific inquiry, one to be made on a case-by-case basis considering the totality of the circumstances. *Lathrope-Olson v. Dept. of Transportation*, 128 Or.App. 405, 408, 876 P.2d 345 (1994). factors include whether the conduct was undertaken for an ulterior purpose or to take advantage of an unusually vulnerable individual. See *Checkley v. Boyd*, 170 Or.App. 721, 14 P.3d 81 (2000). The setting in which the allegedly outrageous conduct occurs-for example, in a public venue or within the employment context-also can bear on the degree of offensiveness of the conduct. See, e.g., *Hall*, 292 Or. [131,] 137[, 637 P.2d 126 (1981); *Trout v. Umatilla Co. School Dist*., 77 Or.App. 95, 102, 712 P.2d 814 (1985).

Plaintiff has alleged adequately that Brandsness did not tender the malpractice for coverage, that Rote did so and that the PLF denied coverage in retaliation for filing for Plaintiff exposing the PLFs criminal conduct alleging the PLF conspired to conceal evidence. Brandsness is a co-conspirator.

Prior denials of the existence of a written contract (**Plaintiff Motion Exhibit 4**) and agreement by Brandsness to provide professional advice to Plaintiff, under oath, is contemptible and contrary to public policy, citing among others and **section 8.4 of Oregon's**

rules on professional conduct, which Defendant violated when denying the existence of a professional relationship.

H. Defendant Set in Motion All of the Damages Suffered by Plaintiff

The setting in Motion theory then applies to the claims in this case. Under that theory, Brandsness' bad advice and action to not Compel arbitration was first faulty, which interfered with Plaintiff's opportunity to successfully Compel arbitration. Then when it was challenged double downed on that faulty advice that would subject Plaintiff to a jury without the experience to evaluate the claims. And when he was confronted refused to file the Motion to Compel on behalf of the corporate defendants and then withdrew from representation. Most importantly, Brandsness took that action because the poor advice was intentional, that he knew it was false and he provided that false advice because as a matter of first impression he felt Plaintiff's blog was critical of Zweizig's gay porn. Plaintiff is critical of any of his employees who would use a business computer to create a unique and password protected hard drive partition to house child porn, porn and pirated music and video's. Almost all employers would object to that behavior. On information and belief, Brandsness intentionally committed this act of malpractice to cause emotional damage to Plaintiff and his family.

I. Defendant Failed to Advise Plaintiff on *Livingston*

Even under the most complimentary interpretations of Brandsness' duty, he failed to advise Plaintiff on *Livingston*.

In *Livingston v. Metropolitan Pediatrics, LLC*, 227 P. 3d 796, 234 Or. App. 137- Or: Court of Appeals, 2010, the Oregon Court of Appeals found "that under Oregon Law a non-signatory can compel arbitration. Generally, a third party's right to enforce a contractual promise in its favor depends on the intentions of the parties to the contract. *Sisters of St. Joseph v. Russell*, 318 Or. 370, 374, 867 P.2d 1377 (1994). Courts have relied on a number of rationales for permitting non-signatory defendants to invoke arbitration clauses in claims against them by signatories to a contract. Once again, the terms of the arbitration clause are at

the center of the inquiry, because it is the text of the arbitration clause that will determine whether the parties to the agreement intended that third parties could enforce its provisions. We conclude, as explained below, that the arbitration clause is broad enough to plausibly encompass plaintiff's claims against the individual defendants and to afford them the same right to request arbitration as MP." *Id*, @805. *Brandsness did not provide this advice*.

A non-signatory right to compel arbitration independently would only have been necessary if the party to the contract, namely Northwest Direct Teleservices ("NDT", former employer of Zweizig), had not filed a Motion to Compel arbitration. *Brandsness did not provide this advice*.

J. Plaintiff Is Entitled to Take This Case to a Jury

Left for the jury (and only for the jury) then is to determine what damages were suffered.

Plaintiff argues that damages in the 3:15-cv-2401 case would have been far lower than the jury awarded, if decided in arbitration before a sophisticated arbitrator. In Zweizig's prior arbitration, Zweizig sought millions of dollars in noneconomic damages and was awarded $5,000. There is certainly universal acceptance that arbitration awards are much lower. For example, recent sexual harassment lawsuit settled by the state in favor of some legislator assistants resulted in $1.1 million in noneconomic damages spread over eight aggrieved parties. Seven of those parties split an average noneconomic damage award of only $85,717 ($600,000/7). **See Plaintiff Exhibit 28**. That is born out by empirical evidence of arbitration of employment claims on a national scale, where the median damages are $36,500. **See Plaintiff Exhibit 29 and table 1, below.**

Plaintiff can show that damages awarded by a jury in employment cases in Oregon are 10 to 20 times higher than arbitration awards. Plaintiff alleges economic damages of $1,000,000 and noneconomic damages of $10,000,000.

It should be up to a jury to decide if Brandsness colluded with the PLF and Oregon Judicial Department in refusing to pay that malpractice claim.

Plaintiff believes the jury will find the actions and collusion of Brandsness and the PLF alarming and threatening to their own property rights and expectations under an insurance contract.

Plaintiff argues that it is abundantly clear that economic damages are provable in front of a jury; however in the absence of that trial, Plaintiff alleges economic damages of at least $900,000, plus non-economic damages of $10,000,000 and punitive damages of $50,000,000 for Brandsness intentionally skewering Plaintiff's opportunity to Compel arbitration in case 3:15-cv-2401 and committing perjury about the contract.

K. The PLF Always Petitions for Legal fees

Defendant seeking legal fees destroys his credibility, as one of Plaintiff's attorneys would point out. It is undeniable that that this is calling on the Court to abuse discretion for no other reason than to target and attack Plaintiff for opposing the PLF's support of child predator Max Zweizig.

Oregon follows the "American rule," which is that each side pays its own attorney fees, unlike a "loser pays" rule. There are many exceptions to the American rule, in which the prevailing party can make the losing party pay the reasonably attorney fees it incurred - typically claims based on statutes like employment discrimination claims, for example. However, legal malpractice claims are not among these. Neither are attorney fees for breach of contract, breach of implied covenant and IIED claims.

Moreover, there is nothing unreasonable about Plaintiff's pursuing a malpractice and other related claims in this case.

L. The Defendant's Motions Reaffirm Support of Child Predation

The biased recitations of the Defendant's Motions implicate support for child porn, child molestation and child trafficking, not only by the Defendant but also by the PLF, an agency owned by the Oregon Judicial Department.

Recently, Plaintiff moved the 9th Circuit to vacate Zweizig's judgment in case 3:15-cv-2401, for admissions by Zweizig of perjury and subornation of perjury during the Trial, provided herein as **Reply Exhibit 3**. 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 as follows:

1. young teen fucks two guys (Excerpt page 393);
2. older sisters gets lesbian with little sister (Excerpt page 394);
3. older man fucking young twink (Excerpt page 394);
4. teen 16 years young (Excerpt page 394);
5. older muscle guy fucks young twink (Excerpt page 395); and
6. older teen kisses, sucks and fucks hairless brother‖ (Excerpt page 395).

Oregon ranks the highest of all 50 states for the number of registered sex offenders per capita. Oregon ranks the highest for the number of practicing attorneys who support decriminalizing child porn. And perhaps that is why PLF's assets are used surreptiously to support the criminal activities of child predators.

Zweizig engaged in exactly the same criminal acts as Josh Duggar, downloading, possessing and distributing child porn from a business computer and from his home in New Jersey. Like Duggar, Zweizig made that child porn and porn available via peer to peer program called Winmx, which allowed anyone who had access to Zweizig's d:\ drive the opportunity to download that same child porn…and approximately 900 predators did exactly that. An update to Duggar is offered herein as **Reply Exhibit 4**. The PLF sponsors this filth.

The PLF's resistance to paying claims and acting beyond its charter getting a lot of public attention and it is not lost on this Plaintiff that this Defendant's stance on the malpractice and other claims against him is disguised support for child predation.

CONCLUSION

For the reasons outlined above, Plaintiff moves this Court to grant Plaintiff's Motion for Summary Judgment. It's been almost 5 years since Plaintiff filed his complaint. The Complaint was not answered and the allegations therefore admitted.

Defendant only pursued Summary Judgment after the PLF confirmed to Attorney Bernard Moore that Judge Leslie Roberts would be assigned to hear all cases associated with Plaintiff Rote. It is absolutely un-refutable that Defendant's Motions to Dismiss and Summary Judgment are soliciting abuse of a biased Court to deny Plaintiff access to a jury.

DATED: July 14, 2023

/s/ Timothy C. Rote

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DATED: July 14, 2023

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