No. 19-35847

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Timothy C. Rote,

Plaintiff-Appellant,

v.

Oregon State Bar Professional Liability Fund, et. al.

Defendants-Appellees

On Appeal from the United States District Court
For the Portland District of Oregon
No. 3:19-cv-00082-MO
Hon. Michael Mosman

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

There are but a few pressing points to make in this reply brief.

First, Defendants-Appellees are attempting to cast this case, with their attendant arguments supporting dismissal, using a post-discovery summary judgment standard—where they seek a presumption in their favor on disputed facts. The claims for Malpractice, Breach of Contract, Implied Covenant of Good Faith, RICO, IIED and Jurisdiction rest on facts that are disputed. Discovery is therefore warranted. All that is required of Appellant at this early stage of this litigation is an adequately pled complaint. Appellant implores the court to evaluate the appellees' arguments in this light.

Second, the Oregon and Federal Racketeering laws are not identical. Oregon's RICO statute proscribes state crimes which include many misdemeanors (only felonies for state law predicates are actionable under the Federal RICO statute), and many other offenses which would certainly not be envisioned as the type of serious crimes which were enacted as Federal RICO predicates. For example, Oregon RICO predicates include such as offenses as perjury, tampering with public records, criminal impersonation, official misconduct, prostitution, animal fighting, common theft, and even more surprising, the unlicensed production of alcoholic beverages.

Third, because Appellant was not given proper instruction with leave to amend, there may still be correctible deficiencies in the complaint. For example, Appellant is seeking noneconomic damages as well as economic damages. Noneconomic damages may not attach to the RICO claims, but do to the other claims. Whether the complaint accurately ascribes noneconomic damages separate from IIED, under these circumstances, may be corrected with the proper instruction from the court when remanded. The substance of the complaint is not confusing.

Fourth, whether the transfer from Clackamas County to the U.S. District Court of Oregon was timely is a priority issue and remains a question of fact. Appellant claims Nancy Walker was on notice no later than December 6, 2018. The United States is not so sure. Even though the fraud claim against Walker is not being appealed, discovery is required to determine whether the United States even had a statutory opportunity to move the case. If not, the dismissal of every claim must be reversed. Appellant timely and adequately challenged the removal. Any presumption of fact falls in favor of the Appellant, not the United States. Any resistance to discovery favors the Appellant.

Finally, there are no checks and balances in place to constrain the actions of the Oregon State Bar Professional Liability Fund. As previously addressed, the OSBPLF organized under the umbrella of the Oregon Judicial Department to be a

captive insurance company for the mutual benefit of members of the Bar and members of the public consuming legal services. The PLF has assets quickly approaching $100 Million. One would think that there would be strict scrutiny of the OSBPLF's behavior, but that is not the case. The Oregon Secretary of State is tasked with auditing state and quasi-state bodies every year or so to ensure compliance with the respective entity's charter and financial management. The OSBPLF has not been audited since 2003.

Whether the attorney defendants graduated from Yale or Yonkers, the one attribute the defendants all share is a giddy willingness to engage in perjury and other predicate acts to prosecute or defend claims. They also share a deep connection to, support and tolerance of child porn, cybercrime and identity theft. The PLF is at the center of this effort and offers its vendors financial incentives to comply. It's not unusual for a PLF law firm vendor to bill the PLF $500,000 a year in defense fees.

It may be helpful to again review how the connection of defendants. In 2004, Max Zweizig filed a retaliation complaint alleging he was fired over noticing the petitioner (his indirect employer) of alleged over-billing of $400 to no-named clients. That allegation was refuted and remained uncorroborated. Eventually arbitrator Bill Crow opined that there was no over-billing. Zweizig's first attorney was James Egan, who resigned after finding out Zweizig had not disclosed to him

that he had been given notice of termination three weeks before the allegation. James Egan is now Chief Judge of the Oregon Court of Appeals.

Zweizig's sixth attorney in the arbitration was defendant Linda Marshall. Marshall beget Christiansen. Computer forensic reports were published revealing that Zweizig had downloaded and disseminated child pornography. In response, Christiansen and Marshall surreptitiously contacted Judge Robert Jones deputy clerk and alleged a first amendment blog chapter written by petitioner was a veiled threat of a plot to assassinate Judge Jones. The U.S. Marshals Service responded to that allegation at the request of the deputy clerk and found the allegations meritless. One can only presume that Christiansen and Marshall expected the contact with the clerk to remain in the shadows and unreported. This case is about what goes on in the shadows.

Christiansen and Marshall were sued for defamation in Clackamas, 16cv07564, and beget the PLF, which in turn beget Matt Kalmanson. Christiansen and Marshall then filed a series of unsworn false statements in anti-SLAPP to defeat the defamation suit. They prevailed. Christiansen separately made a series of false statements in his declaration about the Jones event in 3:15-cv-2401. Eventually the U.S. Marshals Service released the details of their interview with Christiansen and the deputy clerk, revealing that Christiansen, Marshall and Kalmanson had engaged in multiple counts of perjury. It is likely that Kalmanson

did not know initially that Marshall and Christiansen had lied about the exchange, but then again he did write the Answering Brief in this case.

The PLF has now represented Zweizig and his girlfriend Sandra Ware in two lawsuits—19cv14552 and 19cv01547. Counsel for Zweizig, Ward Greene, filed in 19cv01547, a knowingly false *lis pendens* against property owned by Tanya Rote (Appellant's wife). In response to counterclaims against Greene and Christiansen (brought by Appellant and Tanya Rote), the PLF again beget Kalmanson, and further beget a bevy of law firms defending the PLF, Kalmanson, Christiansen and now Greene. Symbolically, these current acts by the PLF to dismiss the counterclaims are material, as it robed the Rote's of a remedy guaranteed by Article I, Section 10 of Oregon's Constitution. A false *lis pendens* is fact dependent and those facts have not yet been adjudicated, the Clackamas County decision paving the way for host of other criminal acts like false title. And yet the PLF knowingly pursued, as that have in the past, early dismissal before the evidence can be presented. In 19cv01547, the Rote's presented specific evidence that should have defeated the anti-SLAPP and it still did not matter. The decision by Judge Linninger is under appeal.

Behind the scenes, the PLF controls 80% of the pro tem Judges in the Portland Metro area. The PLF also has a quid pro quo relationship with the Chief Judges in the Tri-County area of Portland Oregon. Early dismissals of malpractice

claims in the Tri-County area are the highest in the United States and almost all of those claims are heard by pro tem Judges. It's RICO at its core.

These predicate acts, by the PLF and its attorney members, of Oregon and Federal RICO also implicate 18 U.S.C. 242, Deprivation of Rights under the Color of Law. This is the PLF's New Testament. The fact that the Brandsness malpractice in this case is so absolutely clear speaks not only to the PLF's resolve but also their success in influencing Judges in the Tri-County area. The influence extends well into the Federal Judiciary.

Prior to Judge Mosman dismissing the Appellant's complaint in this case, Appellant filed a Writ of Mandamus to remove Judge Mosman. Appellant was in possession of a declaration by arbitrator Crow that identified Judge Mosman as one of the two Federal Judges that contacted him seeking to influence the outcome of the arbitration. That influence was designed to affect a positive financial outcome for Sandra Ware, Zweizig's girlfriend. Ware also had a relationship with Judge Kugler, who was the second Judge that contacted Crow. The PLF represented Ware in 19cv14552 and 19cv01547. Ware is not an Oregon attorney. Ware's New Jersey Bar membership has been suspended. Taking up Ware's defense at the request of a member of the judiciary is, in and of itself, a predicate act.

II. LAW & ARGUMENT

A. The U.S. District Court of Oregon Did Not Have Jurisdiction

Defendants offered nothing in their Answering Brief that could in any way eliminate or mitigate the factual dispute on whether the removal to federal court was timely. The United States is not entitled to a presumption of fact to support its removal. This question was preserved by Appellant. Section 28 U.S.C. 1446 (b) provides that "the notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."

Jane Doe, aka Nancy Walker, was not served but plaintiff Rote alleges the United States did receive notice on December 6, 2018. The United States does not admit when it received notice. The notice of removal was filed on January 16, 2019, more than 30 days after notice of the complaint to Jane Doe (Walker). The action of removal is therefore time-barred. This question can only be resolved through discovery. Appellees are not entitled to a presumption in their favor on disputed facts.

This error taints the question as to whether an Article III Judge had jurisdiction to even consider the state court claims against the other defendants.

The record shows that appellees strongly encouraged and supported Judge Mosman usurping the jurisdiction and authority of Clackamas County Court to address the state contract and tort claims brought by Appellant, believing that Judge Mosman would retaliate against Appellant for naming Nancy Walker in this action. And Judge Mosman did retaliate. Walker is not above the law.

Whether the transfer was timely is a priority question. In addition to that question, appellees offered no credible argument on whether (1) the tort of fraud against Walker is outside the FTCA; (2) the FTCA applies to independent contractors who by definition were not performing services for the government; (3) Walker was acting in her capacity as an employee (''*Court Reporter Fair Labor Amendments of 1995*'')[1]; and (4) Walker was acting within the scope of employment. Many of these separate arguments do not require discovery, even though the question of notice most certainly does.

There Federal Government treats Walker as an independent contractor (not as an employee) when producing transcripts. And, therefore, in addition to not being timely transferred, the United States had no right to usurp jurisdiction in this case.

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[1] PUBLIC LAW 104–26—SEPT. 6, 1995

B. The Claims for Malpractice, Breach of Contract and Breach of Duty Were Adequately Pled and Supported

The Court dismissed the malpractice, breach and fiduciary duty claims on the basis of the absence of a duty based on the alleged absence of a written contract (Doc #38, p2) on April 25, 2019. The contract was, however, in evidence as of February 5, 2019 (Doc #18-1) and referenced in the Appellant Second Amended Complaint.

Counsel for the PLF intentionally misled the court into believing that there was no written contract. Brandsness for example could have and should have been transparent to the court, as he has an ethical duty to do, by filing the written agreement. Instead, Brandsness intimated that he provided no professional service to Appellant Rote just because Brandsness did not file the answers and counterclaims for Rote.

The PLF does not dispute Brandsness performed professional services for Rote, but does dispute the content and degree of the professional services. Bernick, Stendahl and the PLF nonetheless joined in this incredibly weak argument asking for a presumption of fact in their favor. Brandsness' Answer in 3:15-CV-2401 was provided at #16-1, Rote's #16-2, Rote Motion to Compel and Dismiss #16-3. Brandsness should have filed a Motion to Compel and Dismiss on behalf of the corporate defendants no later than Appellant's Motion to Compel and Dismiss. He did not. And he resigned under a cloud of malpractice.

Brandsness should also have filed a Motion to Dismiss, citing *Hatkoff v. Portland Adventist Medical Center*, 252 Or App 210 (2012). By the time Appellant determined that the non-signatory corporate defendant in that case could have filed a Motion to Compel arbitration, it was too late. The U.S. District Court considered the opportunity to arbitrate waived. The 9th Circuit agreed, even though under Oregon Law that is a question for the arbitrator.

Appellant would ask the Court to take notice that attorney Peter Mersereau, who was hired by the PLF to represent Brandsness, also intimated to the Court in his Motion to Dismiss and Reply in this case that a written contract did not exist. Andrew Brandsness endorsed that lie by allowing Mersereau to make that argument on his behalf. Mersereau was also acting on behalf of the Oregon State Bar PLF. That perjury, or in the alternative an unsworn falsification, is an Oregon RICO predicate act.

Mersereau's website Bio claims that "Peter handles a significant number of legal malpractice defense assignments as a long-standing member of the Oregon Professional Liability Fund defense panel[2]. He is also on the litigation defense panels for the pooled trusts administered by the Oregon School Boards Association and the Special Districts Association of Oregon."

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[2] Legal defense vendors hired by the Oregon State Bar Professional Liability Fund.

Appellant adequately alleged "(1) a duty that runs from the defendant to the plaintiff; (2) a breach of that duty; (3) a resulting harm to the plaintiff measurable in damages; and (4) causation, i.e., a causal link between the breach of duty and the harm.*" See Watson v. Meltzer*, 247 Or App 558, 565, 270 P3d 289 (2011), rev den, 352 Or 266 (2012).

Appellant adequately alleged the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach and defendant's breach resulting in damage to plaintiff." See *Slover v. Or. State Bd. of Clinical Soc. Workers*, 927 P.2d 1098, 1101 (Or. Ct. App. 1996).

Appellant adequately alleged a breach of good faith and fair dealing. "A party may violate its duty of good faith and fair dealing without also breaching the express provisions of a contract." *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 240 P.3d 94, 101 (Or. Ct. App. 2010). "[T]he dispositive question in this case is whether it is appropriate to imply a duty . . . in order to effectuate the parties' objectively reasonable expectations regarding the . . . agreement." *Id*.

The Stendahl letters (ER 132-137) specifically fail to consider or evaluate Brandness' duty to have filed a Motion to Dismiss under *Hatkoff*. The PLF's refusal to cover such a claim represents a RICO predicate act.

The 3:15-CV-2401 case (#18-35991) is now under appeal to the United States Supreme Court. Among the questions referred include whether the 9th

Circuit ignored the mandates of the Federal Arbitration Act, Oregon Uniform Arbitration Act and usurped state law to exercise judgment on matters reserved for the arbitrator.

C. The Civil Rico Claims Were Adequately Pled and Supported

If the Appellant's claims were in any way deficiently pled, the Court should have given that specific instruction. Appellee's have not raised any argument in their answering brief that is not fact dependent and that can be used to defeat the Appellant's claims at this stage of the litigation.

At a minimum the Oregon Civil RICO claims should not have been dismissed. Perjury, fraudulent billing, false swearing, unsworn falsification, solicitation of the abuse of a civil office and wire fraud are some examples of criminal activities and Oregon RICO predicate acts.

The State of Oregon recognizes that Oregon and Federal RICO statutes differ. That's why the State sought more than $2 Billion in damages against Oracle alleging violations of Oregon RICO statutes for and through a pattern of racketeering activity by committing or attempting to commit the crimes of unsworn falsification, ORS 162.085, and fraudulently obtaining a signature, ORS 165.042, obtaining execution of documents by deception, ORS 165.102, and wire fraud, 18 U.S.C. § 1343.

In *State of Oregon v. Oracle America, Inc*., No. 14C 20043 (Cir. Ct. Oregon, Aug. 22, 2014) the State alleged Oregon predicate crimes and claims under ORS 166.720(3) (the counterpart to section 1962(c)) of "unsworn falsification, and fraudulently obtaining a signature, and obtaining execution of documents by deception." Generally, these state "predicates" as a whole and individually do not approach the predicates in the Federal RICO statute in terms of seriousness.

The Oregon Racketeering Influenced and Corrupt Organizations Act (ORICO), *ORS 166.715 to 166.735* is against all defendants. Walker and the United States have been sued in the Civil Rights Actions Appeal #20-3507.

ORICO makes it unlawful to knowingly use or invest proceeds derived from a pattern of racketeering in an enterprise, to acquire or maintain an interest in an enterprise through a pattern of racketeering, to participate in an enterprise through a pattern of racketeering, or to conspire to do any of those things. *ORS 166.720*.

Under *ORS 166.715 (6)*, by reference *ORS 161.515*, defines "Racketeering activity" includes conduct of a person committed both before and after the person attains the age of 18 years, and means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce or intimidate another person to commit a crime.

Plaintiff adequately alleged that the PLF was the enterprise, managed by Carol Bernick[3], that the enterprise instructed and rewarded the criminal acts so described in the complaint and that the enterprise and members profited from the racketeering (Doc #47). In fact the PLF's annual net profit is $6 Million and it's tax free. The vendor panel bills approximately $10 Million a year to the PLF. The PLF pays out only $2 Million annually in damage claims.

Plaintiff further alleged that there was a pattern of racketeering. "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided at least one of such incidents occurred after November 1, 1981, and that the last of such incidents occurred within five years after a prior incident of racketeering activity.

Plaintiff adequately alleged that the enterprise profited from the predicate acts and has grown from a captive insurance group with $25 Million in assets to approaching $100 Million in assets, all the time raping, pillaging and plundering the very non-attorney citizens it was created to protect.

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[3] Now Nena Cook, who represented Zweizg and Ware in 19cv14552.

Appellant alleged in his complaint that the defendants committed and aided and abetted in a long list of crimes including bribery, perjury, subornation of perjury, unsworn falsification, obstruction, soliciting official misconduct, tax evasion, fraudulent billing, computer crimes, displaying obscene material to a minor, use of threats and intimidation to extort, public investment fraud, money laundering, identity theft, mail and wire fraud (Doc #47).

Appellant further alleged that the predicate acts were directed at the plaintiff and are the proximate cause of the Appellant's damages.

The complaint provided adequate specificity on the elements of Oregon and Federal RICO and should not have been dismissed.

D. The Claim for Noneconomic Damages and Intentional Infliction of Emotional Distress (IIED) was Adequately Pled and Supported

Appellant cannot confirm the theory the Court adopted in dismissing this claim. That of course speaks to the Court's refusal to outline the areas in which the complaint may have been deficient.

Again, Appellee's offer no credible argument that would justify dismissal. Whether the PLF, Bernick, Stendahl refused to cover the malpractice claim against Brandsness was retaliatory is discoverable and, if so would be actionable as IIED. Whether the PLF hired three separate law firms to file anti-SLAPP Motions of ten pages each (seven pages of which were identical) and encouraged those same law firms to file fraudulent fee petitions of $57,000 as acts of retaliation is actionable.

Appellant's Claim for IIED does appear to be adequately pled. Appellant alleged that the "(1) the defendants intended to inflict severe emotional distress on the plaintiff, (2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." *Sheets v. Knight*, 308 Or 220, 236, 779 P2d 1000 (1989).

Appellant further argued that the element of intent "does not require a malicious motive or a purposeful design to inflict emotional distress on the plaintiff," *Delaney v. Clifton*, 180 Or App 119, 132, 41 P3d 1099 (2002), and can depend on the defendant "know[ing] that such distress is certain, or substantially certain, to result from his conduct." *McGanty v. Staudenraus*, 321 Or 532, 550, 901 P2d 841. Bernick's act of intent may not represent Stendahl's as example even though such conduct was certain to cause emotional stress.

An Insurance company's refusal to cover and a refusal to acknowledge coverage is actionable under Oregon law. *Richardson v. Guardian Life Ins. Co.*, 161 Or App 615 (1999).

III. CONCLUSION

Appellant did not intend to be the author exposing the depth and breadth of legal corruption in Portland, Oregon. As the court can no doubt observe, there is a lot of rioting and criminal behavior here. That spirit of insurrection has invaded the PLF, which has then taken form in RICO.

Plaintiff-Appellant requests the dismissal be vacated and the case remanded to the District Court to provide, if necessary, leave to amend with specific instruction on any pleading deficiency. Ideally the case will be remanded to a District outside of Oregon.

Date: October 9, 2020

/s/ Timothy C. Rote
Timothy C. Rote

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,640 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: October 9, 2020

/s/ Timothy C. Rote
Timothy C. Rote

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 9, 2020

/s/ Timothy C. Rote
Timothy C. Rote
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