1/25/2021 4:52 PM
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Envelope No. 50014199
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Filed: 1/25/2021 4:52 PM

2021-04625 / Court: 080

CAUSE NO. _____

PURA FLO LLC, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	OF HARRIS COUNTY, TEXAS
DAVID R. BREWER and DAVID R. BREWER, ATTORNEY AT LAW, PLLC, *Defendants*.	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION WITH REQUESTS FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, PURA FLO LLC, who files this its Original Petition complaining of DAVID R. BREWER and DAVID R. BREWER, ATTORNEY AT LAW, PLLC, and for cause of action against the Defendants would respectfully show as follows:

I.

DISCOVERY STATEMENT

1. Discovery, if any, will be conducted under Level I.

II.

PARTIES

2. Plaintiff, PURA FLO LLC, is a Texas for-profit limited liability company.

3. Defendant, DAVID R. BREWER, is an individual resident of Harris County, Texas who may be served with process at 1111 Caroline St Apt 2910, Houston TX 77010, or wherever else he may be found. ***{Request for Process Service will be submitted separately}***.

4. Defendant, DAVID R. BREWER, ATTORNEY AT LAW, PLLC, is a Texas for-profit professional limited liability company that may be served with process by serving its registered agent, David R. Brewer, Four Kingwood Place, 900 Rockmead Dr, Suite

132, Kingwood TX 77339, or wherever else he may be found. ***{Request for Process Service will be submitted separately}***.

III.

JURISDICTION AND VENUE

5. Venue is proper in Harris County, Texas, because the incident made the basis of this suit occurred in Harris County, Texas. Venue is further proper in that both Defendants named herein are domiciled in Harris County, Texas.

IV.

FACTS

6. Plaintiff hired Defendants to represent Plaintiff with respect to a breach-of-contract claim brought against Plaintiff. Specifically, Plaintiff was sued by Donald Clanton in that certain civil lawsuit which was filed on June 20, 2017, styled: Cause No. 2017-40842; *Clanton v. Pura-Flo Corporation*; in the 61st District Court of Harris County, Texas. Hereinafter, this lawsuit against Plaintiff by Donald Clanton will be referred to as the "**Clanton lawsuit**."

7. Plaintiff hired Defendants as their legal counsel because Plaintiff had confidence in Defendants' professional competence. It was Plaintiff's reasonable expectation that Defendants would provide Plaintiff with legal representation that was not negligent.

8. Defendants had a duty toward Plaintiff to exercise the same degree of care, skill, and diligence as attorneys of ordinary skill and knowledge commonly possess.

9. On October 23, 2017, Defendants filed an answer on Plaintiff's behalf in the **Clanton lawsuit**. The answer generally denied Clanton's allegations.

10. On January 10, 2018, Defendants filed an amended answer on Plaintiff's behalf in the **Clanton lawsuit**. The amended answer demonstrated that Defendants understood that

the contract made the basis of the **Clanton lawsuit**, by its own terms, was of indefinite duration.

11. The amended answer that Defendants filed for Plaintiff in the **Clanton lawsuit** acknowledged and emphasized that the underlying agreement was "a continual contract," that it would be unjust for Plaintiff "to be expected year after year" to continue to perform the contract, and because it was not possible for PURA FLO to "perpetually provide state of the art water coolers – for which [Clanton] made no new investment – indefinitely at the price quoted in 1994 for the original water coolers."

12. Attorneys of ordinary skill and knowledge who hold themselves out as having professional competency in the law of contracts in Texas would normally—in their exercise of care, skill, and diligence—conduct legal research on the case law applicable to the client's case. Had Defendants conducted basic legal research regarding Plaintiff's rights and obligations under the contract made the basis of the **Clanton lawsuit**, then Defendants would have discovered the abundance of statutory and case law authority that establish the rule of law that a contract for services of indefinite duration may be terminated at any time at the will of either party. Defendants either failed to conduct this basic research, or despite having conducted it, failed to act in the best legal interests of Plaintiff by failing to terminate the perpetual contract made the basis of the **Clanton lawsuit**. An attorney of ordinary skill and knowledge who accepts and assumes the responsibilities of defending a breach-of-contract lawsuit—in their exercise of care, skill, and diligence—would have given written notice terminating the contract of indefinite duration.

13. The **Clanton lawsuit** was tried before a jury, which rendered its verdict on or about January 30, 2019. One of the questions included in the jury charge (Question 5) was:

"Has the contract been terminated?" The jury answered: "No." The second part of Question 5 was the following question: "If you find that the contract has been terminated, when was it terminated?" The jury's answer was: "N/A" [not applicable].

14. If Defendants had exercised the same degree of care, skill, and diligence as attorneys of ordinary skill and knowledge commonly possess, then Defendants would have, first, explicitly terminated the contract, and, second, put on evidence to clearly establish that the contract was terminated by written notice before the time of trial.

15. Consistent with their finding that the perpetual contract made the basis of the **Clanton lawsuit** had not been terminated, the jury found that $50,000 (fifty thousand dollars) represented the losses that Clanton would in reasonable probability sustain in the future. If the contract been terminated before the time of trial, then the jury could not have reasonably found that Clanton would sustain future damages related to the contract.

16. After Clanton moved for the entry of judgment on the basis of the jury verdict, on March 18, 2019, Defendants filed a document on PURA FLO's behalf in the **Clanton lawsuit** entitled "Defendant's Motion to Request Court to Compel Court Reporter to Provide Copies of Certain Documents that Made Their Way into the Jury Room." In that document, Defendants disclosed that he failed to object to Clanton's request to "pre-admit" "all 37 of [Clanton's] exhibits," despite that he had "no time to review" them before trial began. In the said document, Defendants stated that Clanton had only produced an exhibit list, but not the actual trial exhibits themselves. In the said document, Defendants stated that "some of [Clanton's] exhibits would not be pre-admitted due to [PURA FLO]'s counsel's inadequate time to review them, as well as the questionable nature of some of them."

17. Contrary to the statements Defendants made in the "Defendant's Motion to Request Court to Compel Court Reporter to Provide Copies of Certain Documents that Made Their Way into the Jury Room," a cursory review of the transcript of the pre-trial conference in the **Clanton lawsuit** makes clear that Defendants' resistance to the previously undisclosed exhibits, if any, was minimal. Specifically, Defendants stated, for example:

> "In our motion in limine, we were objecting to [Clanton]'s [Exhibit] Nos. 26 and 27. **Those have now been proffered, I've reviewed them, those are A-okay.** We have **no objections**."

Immediately thereafter, Defendants bring up another of Clanton's exhibits (No. 37), which Defendant Brewer told the judge the parties "mutually agreed . . . is out."

Later on in the conference, Clanton's counsel stated that Clanton is "offering . . . Exhibits 2 through [Clanton's] Exhibit 36." Defendant Brewer's response on the record is: "And we are ***okay with preadmitting all of those***, Your Honor."

18. In the "Defendant's Motion to Request Court to Compel Court Reporter to Provide Copies of Certain Documents that Made Their Way into the Jury Room," Defendants also disclosed that instead of bringing up certain "discrepancies" in the exhibits submitted to the jury and the ones Defendant Brewer had previously reviewed, Defendant Brewer raised the issue only with the bailiff and Clanton's lawyer. Indeed, the very end of the trial transcript in the **Clanton lawsuit** makes clear that Defendants, through their negligence, caused Plaintiff to waive any argument regarding Clanton's trial exhibits. At the end of trial, after the jury exited the courtroom, the judge asked Defendant Brewer: "Anything else from [PURA FLO]?" Defendant Brewer responded as follows: "No, Your Honor, other than to thank you for your time." An attorney of ordinary skill and knowledge who accepts and assumes the responsibilities of

defending a breach-of-contract lawsuit—in their exercise of care, skill, and diligence—would have brought up any evidentiary issues with the judge presiding over the lawsuit. This is because such attorneys know that the bailiff has no ability to make any evidentiary rulings, and opposing counsel has no duty, authority, or incentive to help Defendants with preventing the admission of exhibits into evidence.

19. On March 26, 2019, the court presiding over the **Clanton lawsuit** entered a final judgment against Plaintiff based on the jury verdict. Clanton secured a judgment against Plaintiff "the sum of SIXTY-NINE THOUSAND, FIVE HUNDRED AND NO/100 DOLLARS ($69,500) on its claim for past and future damages arising from a breach of contract."

20. PURA FLO consulted with another attorney regarding its options with respect to the judgment in the **Clanton lawsuit**. It was only after discussing the facts of the case with this second attorney that Plaintiff realized that Defendants' representation fell short of their duty to exercise that degree of care, skill, and diligence which attorneys of ordinary skill and knowledge commonly possess. PURA FLO then realized that, but for Defendants breach of their duty of care, PURA FLO would not have been subject to a judgment for future damages, and indeed may have won the **Clanton lawsuit** altogether.

21. PURA FLO retained the second attorney to appeal the final judgment. PURA FLO's Notice of Appeal was filed in the **Clanton lawsuit** on June 13, 2019. The appeal was styled as follows: Case No. 14-19-00479-CV; *Pura-Flo Corporation v. Donald Clanton*; in the 14th Court of Appeals, Houston, Texas. The appeal challenged only the future damages portion of the judgment on grounds that a contract of indefinite

duration, by definition, cannot give rise to a reasonable expectation of future profits, and therefore no evidence supported an award for future damages.

22. Ultimately, the appeal was not successful. In a 2-1 panel judgment issued on August 27, 2020, the 14th Court of Appeals affirmed the future damages portion of the judgment. Significantly, the majority opinion relied heavily on the voluminous exhibits before the jury that were pre-admitted with Defendants' consent (on Plaintiff's behalf), which the panel majority held "constituted objective figures and data sufficient to support the jury's finding of lost profit damages." This reinforced Plaintiff's conclusion that Defendants breached their duty toward Plaintiff to exercise that degree of care, skill, and diligence which attorneys of ordinary skill and knowledge commonly possess, by agreeing to "pre-admit" exhibits that the Defendant Brewer himself admits he did not have sufficient time to review.

V.

CAUSE OF ACTION

23. Defendants' conduct constitutes legal malpractice. An attorney malpractice action in Texas is based on negligence.[1] Defendants owed a duty to Plaintiff, Defendants breached that duty, the breach of duty proximately caused Plaintiff injury, and Plaintiff suffered damages as a result.

24. Defendants breached their duty to Plaintiff by providing legal representation to the Plaintiff that was below the applicable standard of care by breaching their duty toward Plaintiff to exercise that degree of care, skill, and diligence which attorneys of ordinary

[1] *Fireman's Fund Amer. Ins. Co. v. Patterson & Lamberty, Inc.,* 528 S.W.2d 67 (Tex. Civ. App.— Tyler 1975, writ ref'd n.r.e.); *Patterson & Wallace v. Frazer,* 79 S.W. 1077 (Tex. Civ. App. 1904, no writ), *appeal after remand,* 93 S.W. 146 (Tex. Civ. App.), *rev'd on other grounds,* 100 Tex. 103, 94 S.W. 324 (1906).

skill and knowledge commonly possess. As a direct and proximate result of this breach, Plaintiff suffered injury and compensable damages.

25. Plaintiff's cause of action for legal malpractice did not accrue until after Plaintiff lost the **Clanton lawsuit** and consulted with their second attorney regarding appellate options. *See Willis v. Maverick,* 760 S.W.2d 642, 645 (Tex. 1988) (applying discovery rule to legal malpractice case and noting that "it is unrealistic to expect a layman client to have sufficient legal acumen to perceive an injury at the time of the negligent act or omission of his attorney") (quoting Ward, *Legal Malpractice in Texas,* 19 S. Tex. L. J. 587, 613 (1978). The special relationship between an attorney and client further justifies imposition of the discovery rule. *Id.*

26. Plaintiff would further show that the doctrine of alter ego applies in that "there is such unity between [DAVID R. BREWER, ATTORNEY AT LAW, PLLC] and [David R. Brewer] that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." *First Nat. Bank in Canyon v. Gamble,* 134 Tex. 112, 132 S.W.2d 100, 103 (1939). According to the papers on file with the Secretary of State, Defendant David R. Brewer is the sole organizer, member and director of Defendant DAVID R. BREWER, ATTORNEY AT LAW, PLLC.

VI.

DAMAGES

27. Plaintiff has suffered substantial injury and damages that were proximately caused by Defendants' legal malpractice, including actual damages, mental anguish damages, attorney's fees and exemplary damages. These damages include, but are not limited to, the attorney's fees that Plaintiff paid Defendants for their negligent legal

representation, the attorney's fees Plaintiff paid to their second attorney for the appeal, court costs associated with the trial litigation and subsequent appeal, and their costs and attorney's fees arising from the prosecution of this lawsuit for legal malpractice. Plaintiff seeks to recover the attorney's fees they paid as a proximate cause of Defendant's negligence. These represent the sums that Plaintiff would not have had to pay but for Defendants' negligent conduct with respect to the **Clanton lawsuit**. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp.*, 299 S.W.3d 106 (Tex. 2009).

VII.

REQUESTS FOR DISCLOSURE

28. Pursuant to Tex. R. Civ. P. 194, Defendant David R. Brewer is requested to disclose, within fifty (50) days of service of Plaintiff's Original Petition, the information or material described in Tex. R. Civ. P. 194.2(a)-(l).

29. Pursuant to Tex. R. Civ. P. 194, DAVID R. BREWER, ATTORNEY AT LAW, PLLC is requested to disclose, within fifty (50) days of service of Plaintiff's Original Petition, the information or material described in Tex. R. Civ. P. 194.2(a)-(l).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests and prays that Defendants be cited to appear and answer herein, and that Plaintiff have and recover damages including actual damages, mental anguish damages, attorney's fees, and exemplary damages, in an amount that is within the jurisdictional limits of this Court, plus pre- and post-judgment interest at the highest lawful

rate, court costs, and such other and further relief, whether special or general, at law or in equity, to which Plaintiff is justly entitled.

Respectfully Submitted,

MILAN G. MARINKOVICH & ASSOCIATES, PLLC

By: /s/ *Milan G. Marinkovich*

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