RISK MANAGEMENT
INSIGHTS

by W. Brian Ahern, RPLU

Malicious Prosecution Against an Attorney– Statute of Limitations Defined

An interesting decision involving malicious prosecution claims against attorneys was handed down in March of this year. In a published opinion in *Vafi et al. v. McCloskey et al.,* B223237 (Cal. App. 2 Div.), the court found, in a case of first impression, that a malicious prosecution claim against an attorney is limited by the one-year statute of limitations rather than the two-year statute of limitations for tort actions.

The Court opined that the statute of limitation was "…an issue which it seems no reported decision has addressed."

In the case, which is certified for partial publication, plaintiff Vafi, an entrepreneur, and his girlfriend, Kathleen Keller, created a disposable swimsuit design and formed a corporation named ONE SUIT. Vafi applied for a patent under his name and Keller applied for a trademark under her name. After a few years, the couple parted. Keller sued Vafi for trademark infringement. Vafi counter-sued and moved for summary judgment, which was denied.

Just days before the two-year statute of limitations was due to expire, Vafi sued Keller and her legal team, including attorney Heather McCloskey, for malicious prosecution under California Code of Civil Procedure Section 335.1, a general provision which applies to "injury to…an individual caused by the wrongful act or neglect of another."

McCloskey's firm moved to strike on the basis that the claim was barred under Section 340.6 which states "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers…." The trial court dismissed the claim and the Court of Appeal affirmed that decision.

According to John Klinedinst, a professional liability litigator, "This case was unusual in that the plaintiff waited two years to file the claim. Typically, malicious prosecution claims are emotionally based, and the party sues relatively quickly."

In its decision, the Court of Appeal, Second Appellate District, carefully reviewed the wording of Section 340.6 and concluded that there was no language in the statute which exempts malicious prosecution claims from the limitations period. Furthermore, one of Vafi's claims was that Section 340.6 is limited to situations where a client has sued his attorney for malpractice. The court stated "Again, we are bound by the plain language of the statute, which clearly applies when 'the plaintiff' discovers the wrongful act rather than a client."

While the case is interesting, Klinedinst feels that it "doesn't change the landscape much" in terms of malicious prosecution actions toward attorneys."

An important take away from the case is that the claims under Section 340.6 may apply not only to clients and former clients of a law firm but also to others such as individuals or entities. The case is a good reminder that law firms need to handle conflicts as they arise to avoid claims down the road.

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