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Court of Appeal Case No. G048501
Superior Court Case No. 30-2011-00532352

IN THE SUPREME COURT OF CALIFORNIA

Nancy F. Lee
Plaintiff/Appellant,

vs.

William B. Hanley,
Defendant/Respondent.

After A Decision From The Court Of Appeal Of The State Of California,
Fourth Appellate District, Division Three

Appeal from the Superior Court of Orange County
The Honorable Robert J. Moss, Judge

RESPONDENT'S PETITION FOR REVIEW

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I.

INTRODUCTION

This is a perfect case for review because there is a need for uniformity regarding the scope of California Code of Civil Procedure section 340.6,[1] and the central issue presented is an important one affecting the public and the entire legal industry.

Appellant Nancy L. Lee ("Lee") hired Respondent William B. Hanley ("Hanley") to represent her in litigation. She advanced money to Hanley for litigation fees and costs, and, after the litigation ended, Lee claims Hanley failed to return unearned fees. More than a year after she discovered her claims, Lee sued Hanley based on his alleged failure to reimburse unearned fees.

Section 340.6 provides that *all* claims against an attorney for wrongful acts or omissions (except for actual fraud) arising "in the performance of professional services" must be brought within one year.[2] Lee's lawsuit, which is based on an attorney's failure to reimburse funds advanced for litigation, is subject to section 340.6. This is consistent with the Legislative intent and several cases interpreting section 340.6. The trial

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[1] All statutory references will be to the Code of Civil Procedure unless otherwise indicated.

[2] Hanley disputes Lee's allegations in her pleadings, but for purposes of this petition will present them as pled in Lee's operative pleading.

court agreed and, after giving Lee multiple opportunities to amend, dismissed her second amended complaint.

The appellate court (the "Fourth District") reversed the trial court and revived Lee's stale claim. To support its holding, the Fourth District reasoned that a client's dispute with her attorney over client funds may support other causes of action which have a longer limitations period.[3] The answer, according to the Fourth District, requires litigation over whether the dispute involves a "theft of funds, an accounting error, or something else."[4]

The Fourth District's published Opinion requires review because it (1) contradicts the Legislative intent behind section 340.6 and cases interpreting the statute; (2) carves out unnecessary, additional exceptions to section 340.6, even though the only statutory exception is for "actual fraud"; and (3) attempts to distinguish disputes involving so called "traditional attorney services" *from* how an attorney handles client funds, even though both sets of duties to the client are implicated and intertwined.

The Opinion opens the door for creative parties with stale claims to plead around section 340.6 by alleging a dispute involving client funds.

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[3] E.g., conversion, theft, breach of fiduciary duty, common counts, etc.

[4] *Lee v. Hanley* (2014) 174 Cal.Rptr.3d 489, 492; 227 Cal.App.4th 1295. ("Lee")

It will eviscerate section 340.6 and foster the very uncertainty the statute was designed to eliminate.

II.

STATEMENT OF ISSUES

The central issue is whether a former client's claim against her attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit is an action governed by the one-year statute of limitation for actions against attorneys as set forth in California Code of Civil Procedure section 340.6.

The issue is presented in the following context: client signs a fee agreement with attorney to represent her on an hourly basis in litigation. The client's litigation is settled and the client demands a refund of funds advanced for the lawsuit. The client then sues the attorney, pleading various tort and contract claims against the attorney for allegedly refusing to return unearned attorney fees to client. The attorney demurrers based on the one-year statute of limitations. The trial court agrees and gives the client multiple opportunities to amend and plead actual fraud. Client refuses to plead a fraud cause of action. Judgment is entered in favor of attorney. The Fourth District reverses, finding the allegations could be pled as claim for "conversion," which has a two-year statute of limitations.

III.

SUMMARY OF ARGUMENT

Prior to section 340.6, attorneys were exposed to numerous limitations periods and indeterminate liability. This created a crisis due to the expense of insurance premiums and fear insurance companies would not write policies. Section 340.6 was intended to eliminate these problems by having a single, broad statute of limitations to address all forms of attorney malfeasance except those involving actual fraud.

Consistent with the Legislative intent, courts addressing section 340.6 have interpreted the statute broadly. Even where the client alleges only fiduciary duty violations or fee related issues, and does not allege acts below the "standard of care," courts have found such claims are still governed by section 340.6.

The manner in which an attorney handles client funds is part of an attorney's professional duties to a client. Even though the Legislature did not use the phrases "legal malpractice" or "professional negligence," ethical violations regarding handling client money can support a "legal malpractice" action. And, legal malpractice, by any interpretation, is covered by section 340.6.

By excluding *certain types of disputes* involving client funds from section 340.6, the Fourth District engrafted an exception to section 340.6.

The unintended consequences of this ruling can be widespread and significant. It will open the door for artful pleadings designed to avoid the one-year statute of limitations, requiring lawyers to defend against otherwise stale claims. This is precisely what Lee did in this case.

IV.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Lee alleges she hired Hanley to represent her in a lawsuit, she advanced money to be used for fees and costs in the litigation, and after the litigation was over Hanley failed to return unearned fees.

Based on these facts, on December 6, 2010, Lee and her new lawyer terminated Hanley.

On December 21, 2011, more than a year later, Lee filed a complaint for reimbursement of fees advanced in connection with litigation. The complaint clearly alleges a wrongful act arising in performance of professional services. For example, Lee alleges:

> Pursuant to the attorney client relationship, defendants were to provide **attorney services in the LAWSUIT** and were to be paid a **reasonable fee plus costs.**
> [¶] By virtue of the attorney-client relationship, defendants . . . were entitled to a reasonable attorney's fee only. **For their services regarding the LAWSUIT**, however, they stole from plaintiff $46,321, **and their fees overall were otherwise unconscionable**. (Clerk's Transcript ["CT"] 25-37 [emphasis added].)

Hanley demurred to the original complaint on the grounds the complaint was barred by section 340.6. (CT 83-94) According to Lee, the demurrer to the complaint was the ***first time*** Lee learned the *one-year statute of limitations for attorneys applied.*[5]

Prior to the hearing on the demurrer, Lee filed a first amended complaint. (CT 65-82) In an obvious effort to avoid the one-year statute of limitations, Lee alleged causes of action for breach of fiduciary duty, breach of contract, and common counts. Also, Lee's subsequent pleadings not only eliminated language from the original complaint which clearly brought her claims within section 340.6, but added that she was "satisfied" with Hanley's services and there was no legal malpractice.

Hanley demurred to the first amended complaint asserting all causes of action, regardless of how named, were barred by the one-year statute of limitations. (CT 83-94) The trial court sustained the demurrer to the first amended complaint with leave to amend, finding all claims were barred by section 340.6. (CT 158)

Lee filed a second amended complaint. (CT 161-189) Hanley demurred to the second amended complaint on the same grounds. (CT 190-

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[5] "**At no time before February 28, 2011** (when appellant received the Demurrer to Complaint), **did appellant have any knowledge or suspicion** that respondent claimed the advances were somehow 'professional services,' or **that 340.6 applied.**" Appellant's Opening Brief ("AOB"), p. 49 (emphasis added).

221) The trial court issued a tentative ruling sustaining the demurrer *without* leave to amend.[6]

At oral argument, Lee requested leave to amend, making various arguments how she could cure the defects including alleging fraud. The trial court gave Lee leave to file a third amended complaint. (CT 717; 736-745) Lee elected *not* to file a third amended complaint, conceding that she was "unwilling to plead fraud against [Hanley] . . . so was unable to further amend." (AOB p. 2)

An unopposed ex parte application resulted in an order dismissing the case with prejudice. (CT 792-795)

V.

REHEARING WAS DENIED; OPINION WAS MODIFIED

On July 15, 2014, the Fourth District issued its published Opinion. (Appendix, Exh. 1)

On August 8, 2014, the Fourth District issued an Order Modifying Opinion and Denying Petitions for Rehearing ("Modification Order"). There was no change in the judgment. (Appendix, Exh. 2)

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[6] "[Lee] claims that defendant failed to return unearned fees she had advanced and also did not return unused funds advanced for experts soon enough. CCP §340.6 provides that an action against an attorney for a wrongful act 'arising in the performance of professional services shall be commenced within one year . . . .' Here, the funds were advanced in connection with the performance of professional services and the attorney was required to return the funds upon his discharge." (CT 774)

The case as modified is *Lee v. Hanley* (2014) 174 Cal.Rptr.3d 489; 227 Cal.App.4th 1295.

VI.

GROUNDS FOR REVIEW

"The Supreme Court may order review of a Court of Appeal decision: . . . When necessary to secure uniformity of decision or to settle an important question of law." (*Cal. Rules of Court, rule* 8.500 subd. (b)(1).)

VII.

SUPREME COURT REVIEW IS NECESSARY TO RESOLVE THE ISSUE OF WHETHER A CLAIM FOR THE RETURN OF UNEARNED FEES IS SUBJECT TO SECTION 340.6

Section 340.6 subdivision (a) provides a one-year statute of limitation for *any* action against an attorney (except actual fraud) arising performance of professional services: "[a]n 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 . . ." (Emphasis added).

A. The Legislature Intended Section 340.6 to be Broadly Construed

Prior to section 340.6, attorneys were subject to different limitations periods depending on whether the cause of action was breach of oral contract, breach of written contract, fraud, tort, and so on. (*Stoll v.*

Superior Court (1992) 9 Cal.App.4th 1362, 1367 ("*Stoll*") ["Before section 340.6 was enacted, the statute of limitations for legal malpractice varied upon the plaintiff's choice of theory of liability."]; *see also,* Lee's Motion for Judicial Notice ("MJN"), Exh. 1, p. 36.)

To make matters worse, attorneys were subject to open-ended liability due to the delayed discovery rule as established in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176.

These factors led to not only an increase in malpractice insurance premiums, but concern that insurance companies would stop writing policies for attorneys. The Legislature wanted to address this problem by enacting a single statute of limitations governing attorneys' wrongful acts or omissions. (*Stoll, supra,* 9 Cal.App.4th at p. 1367.)

According to several courts, the Legislature "reviewed and considered Mallen, Panacea or Pandora's Box? A Statute of Limitations for Lawyers (1977) 52 State Bar Journal 22." (*Stoll* at p. 1367.) Mallen's article suggested language for the statute, including a version which *excluded* "actual fraud" and "breach of contract" from the one-year period. The Legislature, however, deleted the reference to "breach of contract." (*Stoll, supra*, 9 Cal.App.4th at p. 1368; *Southland v. Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 429 ("*Southland*") [the Legislature "deleted the breach of a written contract

exception from the proposal because it intended that section 340.6 apply to both tort and breach of contract malpractice actions."].)

A draft version of the statute also included the phrase "alleged professional negligence." (*See* MJN, Exh. 3, p. 49.) The Legislature, however, chose not to include limiting phrases such as "professional negligence" or "legal malpractice." (*See, e.g., Yee v. Cheung* (2013) 220 Cal.App.4th 184, 196 ("Yee") ["...the term 'malpractice' does not appear anywhere in the statute. If the Legislature had wanted to limit section 340.6 to malpractice actions . . ., it could have done so . . . . The Legislature did not do this, and instead, enacted a ***broadly worded statute*** that limits the time within which any plaintiff may bring an action against an attorney for the attorney's conduct 'arising in the performance of professional services.'"] [Emphasis added].)

Thus, the Legislature considered and rejected *limiting* language such as professional negligence, legal malpractice, and breach of contract, *in favor of broader* language: "wrongful act or omissions" "arising in the performance of professional services." By doing so, the "Legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims. The limitation of one year was designed to counteract the potential of lengthy periods of potential liability wrought by the adoption of the discovery rule, and thereby reduce

the costs of malpractice insurance. The only limitation of the one-year period was for actual fraud." (*Stoll, supra*, 9 Cal.App.4th at p. 1368.)

B. Courts Have Interpreted Section 340.6 Broadly and Applied it to Any Action Against an Attorney (except for Fraud), Including Disputes Involving Client Funds

Although the Fourth District takes a narrow view of section 340.6, many courts have interpreted the phrase "wrongful act or omission . . . arising in the performance of professional services" broadly. (*See, e.g.*, *Stoll, supra*, 9 Cal.App.4th 1362 [applying section 340.6 to breach of fiduciary duty and other ethical violations]; *Southland Mechanical Constructors Corp., supra*, 119 Cal.App.3d at pp. 428-431 [applying section 340.6 to breach of contract cause of action; "the phrase 'wrongful act or omission' has no single, settled legal meaning. It is sometimes used interchangeably as a reference to both tortious and contractual wrongdoing."]; *Vafi v. McCoskey* (2011) 193 Cal.App.4th 874, 880 ("*Vafi*"); *Yee, supra*, 220 Cal.App.4th at p. 194 [disagreed with in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668 ("*Roger Cleveland*")]; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 69 [causes of action for breach of fiduciary, and negligent misrepresentation for pre-engagement promises, were covered under section 340.6].)

In *Yee*, the court stated:

> The plain language of section 340.6 applies to all actions, with the exception of those actions asserting actual fraud, that are brought against an attorney for that attorney's wrongful act or omission ... arising in the performance of professional services.' [Citations] The words of the statute are quite broad, but they are not ambiguous: **any time a plaintiff brings an action against an attorney and alleges that attorney engaged in a wrongful act or omission, other than fraud, in the attorney's performance of his or her legal services, that action must be commenced within a year** . . . .' (*Yee, supra*, 220 Cal.App.4th at p. 194 [emphasis added].)[7]

Roger Cleveland disagreed with the holdings in *Yee* and *Vafi* that *malicious prosecution actions* are governed by section 340.6. However, even *Roger Cleveland* concluded:

> the Legislature's use of 'wrongful act or omission' by an attorney arising in the performance of professional services was ***intended*** to include ***any legal theory*** *related to a claim by a client or former client against his or her attorney*. . . . (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 680 [emphasis added].)

Other courts applying section 340.6 to *disputes over client funds* and ethics violations have held that section 340.6 applies to such claims, regardless of the title of the cause of action. (*See, e.g., Stoll, supra,* 9 Cal.App.4th 1362*; Levin v. Graham & James* (1995) 37 Cal.App.4th 798

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[7] *See also, Vafi, supra*, 193 Cal.App.4th at p. 881 (section 340.6 applies to all actions, except those for actual fraud, brought against an attorney "for wrongful act or omission," which arise "in the performance of professional services.").

("*Levin*"); *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105 ("*Prakashpalan*").)

In *Stoll*, an attorney was retained by a corporation to help it locate and purchase a ski resort. The attorney did not disclose to the client he had already entered into a finder's fee agreement with the owner of a ski resort for the sale of the resort. After the sale was complete, the attorney obtained his finder's fee. The corporation sued the attorney alleging he breached his fiduciary duties in violation of California Rules of Professional Conduct because of a pre-existing financial conflict of interest; an undisclosed relationship with another party; failing to disclose a conflict of interest; and charging an "'unconscionable fee'" to the corporation. (*Stoll*, 9 Cal.App.4th at pp. 1365-1366.)

As with Lee, the allegations in *Stoll* only related to ethical violations, as opposed to the attorney's legal advice. The *Stoll* court concluded: "although styled as a breach of fiduciary duty, the misconduct alleged ... is nothing more than professional malpractice subject to the one-year statute." (*Id.* at p. 1366.)

In *Levin*, the client, trying to avoid losing a summary judgment motion, stated in oral argument that the case was "not a malpractice case at all, but merely a suit to recover unconscionable fees charged and paid." (*Levin, supra*, 37 Cal.App.4th at pp. 802, 804-805.) This creative plea

(which is also similar to Lee's amended pleading to avoid the statute) was rejected. The appellate court stated:

> Levin's repeated assertion that one can assert a claim or state a cause of action for refund of unreasonable attorney fees (e.g., quantum meruit, money had and received) without also alleging malpractice is the first of a sea of red herrings beached on the pages of his briefs. [¶] In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies. (*Id.* at p. 805, citing *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417.)

In *Prakashpalan* the court found the plaintiffs' professional negligence and breach of fiduciary duty claims, arising from taking client settlement funds, were barred by section 340.6. The plaintiffs claimed (as does Lee) "holding of client trust funds is arguably not the rendering of professional services to which Code of Civil Procedure section 340.6 would apply." (*Prakashpalan*, 223 Cal.App.4th at p. 1122.) The court rejected this argument, stating "the funds in the trust account are settlement proceeds" and the attorneys conduct in holding such funds "arise out of the provision of professional services, namely, the settlement of the case on plaintiffs' behalf." (*Id.* at fn.4.)

As set forth below, how an attorney handles client funds, and other ethical duties, arises in performance of professional services.

C. How an Attorney Handles Client Funds is Part of the Attorney's Professional Duties which "Arise in the Performance of Professional Services"

In the attorney-client relationship the attorney owes a host of duties to the client. This includes fiduciary duties to disclose conflicts and manage client funds. (*See, e.g., Cal. Rules of Prof. Conduct, Rule* 3-700 (D)(2) [failure to return advanced fees]; Rule 4-100 (B)(1) [failure to notify client of receipt of funds]; Rule 4-100 (B)(3) [failure to render accounting]; *Stoll, supra*, at p. 1365, *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621 ("*Schultz*").)

A violation of an attorney's fiduciary duties (e.g., a claim of failure to return unearned fees) is a "wrongful act or omission . . . arising in the performance of professional services." Although "[t]here is no single, settled legal meaning of 'wrongful' act for purposes of the statute,"[8] alleged double billing, padding, billing for unperformed work, or failing to return unearned fees are unquestionably "wrongful acts" of an attorney. By their genesis – the reason the funds were in the attorney's possession – such "wrongful acts" arise "in the performance of professional services." It has to be, as the funds were transferred to the attorney for legal services.

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[8]*Southland Mechanical Constructors Corp., supra*, 119 Cal.App.3d at p. 431.

D. A Breach of Duties Involving Client Money Is "Legal Malpractice"

Even if the Legislature intended to limit section 340.6 only to "legal malpractice" or "professional negligence," an ethics violation relating to client money is a form of "legal malpractice."

The question in *Schultz* was whether the client sufficiently alleged "legal malpractice" against an attorney for charging excessive fees. As here, the client did not allege the attorney negligently performed legal services, but rather that he engaged in "self-dealing" by charging an "excessive and unlawful fee." (*Schultz, supra*, 27 Cal.App.4th 1611 at p. 1621.)

In addressing whether an ethics violation over fees can support *legal malpractice* the court held:

> While not a model of pleading, such an allegation is sufficient to charge an act of **professional negligence**. An attorney's **breach of the ethical duties of good faith and fidelity**, which are owed by an attorney to his or her client, amounts to **legal malpractice** and is actionable. (*Id.* at p. 1621 [emphasis added].)

Although *Schultz* did not address section 340.6, it demonstrates that an alleged violation of fiduciary duties related to client money is a form of "legal malpractice." And, it is beyond dispute that "legal malpractice" is covered by section 340.6.

Here, the faulty assumption is that legal malpractice arises only if the attorney botched the "case" or "transaction." But, legal malpractice can be based on a breach of the numerous duties an attorney owes a client, including the attorney's failure to properly account for client funds. Regardless of Lee's artful pleading designed to avoid the statute of limitations, she alleges Hanley committed ethical and fiduciary violations regarding handling her money. This is a form of legal malpractice within section 340.6.

VIII.

THE FOURTH DISTRICT'S INTERPRETATION OF SECTION 340.6 CARVES OUT AN EXCEPTION WHICH IS INCONSISTENT WITH THE STATUTORY LANUAGE AND THE LEGISLATIVE INTENT. IT WILL LEAD TO THE UNCERTAINY SECTION 340.6 WAS DESIGNED TO ELIMINATE

Even though Lee advanced money for professional services, the Fourth District declined to acknowledge that a dispute over unearned fees arises in the performance of professional services. Instead it offered alternative theories of recovery which may be alleged, including "theft" "conversion" and "money had and received." The Fourth District stated:

> For example, if a client leaves her purse unattended in the attorney's office and the attorney takes money from it, would we say that act arose in the performance of legal services? How different is it if, when the legal services have been completed and the attorney's representation has been terminated, the attorney keeps the unearned fees belonging to the client? To steal from a client is not to render legal

> services to him or her. We hold that, to the extent a claim is ***construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion***, section 340.6 is inapplicable.
> [¶] We do not know whether, on remand, the facts as ultimately developed will ***show a theft of funds, an accounting error, or something else. While a cause of action based on the theft or conversion of client funds, for example, would not be subject to the section 340.6 statute of limitations, a cause of action predicated on an accounting error could be.*** (*Lee*, 174 Cal.Rptr.3d at p. 492.)
>
> ...
>
> [¶] When we liberally construe the second amended complaint we see that, despite Lee's form of pleading, she has made factual allegations ***adequate to state a cause of action for conversion***, for example. [Citations] . . . . We do not mean to imply that Lee's causes of action other than conversion are necessarily barred by the section 340.6 statute of limitations. (*Id.* at p. 498.)

It is clear the Fourth District was troubled with Lee's allegations against Hanley. Although the Fourth District's disdain for Lee's untested allegations is understandable, in justifying the judgment of reversal the Fourth District (1) created an exception to section 340.6 that is inconsistent with the statute and (2) departed from cases holding fee disputes are subject to section 340.6 and the Legislative intent behind the broadly worded statute. The published Opinion has the potential to completely upend section 340.6.

A. Stolen Money From a Purse Analogy is Flawed

The Fourth District's *stolen-money-from-a-purse* analogy is flawed. Garden variety theft, such as stealing money from a purse, would not be conduct that arises "in the performance of professional services." There is no relationship in place where the client voluntary advances fees to the attorney for legal services.

If the analogy is taken to its logical conclusion, most fee disputes would be outside the scope of section 340.6 because, at their core, most disputes over client money, at least from the client's perspective, involve some element of "theft" of "client's money" (padding, double billing, billing for unperformed work). Although the gist of these types of claims may support several causes of action (breach of fiduciary duty, breach of contract, conversion), such allegations are subject to section 340.6 because they arise in performance of the attorney's duties to the client.

Also, if a party alleges the billing dispute is due to fraud, then the statute has a *fraud exception*. There is no reason to create additional exceptions such as "theft" or "conversion."[9] As discussed below, the

[9] Lee alleged Hanley "stole" the advanced fees which is a form of fraud. However, Lee failed to allege "fraud."

Fourth District went beyond the only exception in section 340.6 and suggested a "conversion" theory of recovery.[10]

B. Fourth District Carves Out Exceptions to Section 340.6

The Fourth District reasoned that an attorney's failure to return unearned fees is potentially outside the scope of professional services and may support conversion or other causes of action.

First, the position that disputes over client funds are outside the scope of section 340.6 has been rejected by courts which have weighed in on the issue.

In *Stoll*, which is not addressed by the Fourth District, the client there, as here, did not to the object attorney's services, but objected to ethics violations regarding conflicts and an unconscionable fee. As here, the client sued for "breach of fiduciary" – a cause of action subject to a different limitations period – to get around the one-year period. (*Stoll* at pp. 1365-1366.) The court held the one-year statute applied, even though the claim related to fee dispute and ethics violations. (*Id.*; *see also Levin*, 37 Cal.App.4th at pp. 802 [the client stated it was not a malpractice case, but a case for the return of unreasonable fees]; *Prakashpalan*, 223 Cal.App.4th 1105 [the money was delivered to the trust account during

[10] It bears repeating that Lee chose not to allege "fraud" against Hanley even though the trial court gave her numerous opportunities to do so.

representation, but the dispute arose years later]; *Schultz*, 27 Cal.App.4th at p. 1621 [the client was satisfied with the settlement, but alleged the lawyer charged an excessive fee. Such an allegation supported a legal malpractice cause of action].)

Although the Fourth District *did not* address *Stoll*, it tried to finely distinguished *Levin* and *Prakashpalan* to support its conclusion. The Fourth District stated:

> The critical point, however, is that those cases do not state that the statute applies whenever an attorney commits any tort of any nature. Rather, they include the qualification, as set forth plainly in the statute, that the wrongful act or omission must be one "arising in the performance of professional services. (*Lee*, 174 Cal.Rptr.3d p. 496.)

The Fourth District takes an overly-narrow view of "wrongful act" "arising in the performance of professional services." The failure of an attorney to return unearned fees and unused expert witness fees (which Lee voluntarily advanced as part of the attorney's representation) is an alleged wrongful act or omission arising in the performance of professional services. It strains reason to conclude it is anything else.

The Fourth District also distinguished *Prakashpalan* because the failure to deliver client settlement funds in that case arose from the attorney's duty to distribute settlement proceeds. (*Lee*, 174 Cal.Rptr.3d p. 496.) Although the way the money ended-up in the attorney's account may

be different, the duties to the client regarding client funds are the same. But, according to the stolen-money-from-a-purse analogy, the attorney in *Prakashpalan* still "stole" the client's "money," which, but for section 340.6, could support several causes of action with longer limitations period.

Second, in finding Lee's claims potentially outside section 340.6, the Fourth District found it significant that Lee (1) did not allege malpractice, i.e., was satisfied with Hanley's "services" in the litigation and (2) the fee dispute occurred after the litigation ended. (*Lee*, 174 Cal.Rptr.3d at p. 495.)

That Lee was "satisfied" with the "actual services" (e.g., litigation), but dissatisfied when Hanley did not return funds she claims were unearned is a red-herring and problematic distinction. Handling client funds is intertwined with the attorney's services, arises in the performance of professional services, and can form an independent basis of a malpractice claim.

Every dispute over client funds will involve, to a greater or lesser degree, an analysis of the attorney's professional services to the client. Trying to parse the "services," distinguish the type of "taking" (e.g., accounting error, conversion), and then attach a separate statute of limitations will open the door for creative attorneys to resurrect stale claims by pleading around the statute of limitations: allege the attorney's services

were adequate, but the over-billing was conversion, breach of fiduciary duty, common counts, or some other cause of action which has a longer limitations period.

And, isn't that what Lee did here? She filed an untimely complaint alleging an unconscionable fee; her lawyer discovered the lawsuit was untimely only after receiving Hanley's demurrer; and then Lee scrambled to resurrect a stale claim by carefully alleging facts and causes of action specifically designed to circumvent the application of section 340.6.

In reversing the trial court, the Fourth District created another exception to section 340.6. Not only is this impermissible,[11] it is unnecessary. The statute already has an exception for actual fraud. If the client believes the attorney "stole" money advanced in the litigation, as here, the client can allege fraud. Lee had **four** opportunities to allege fraud, but she chose not to.

In short, requiring parties to litigate whether otherwise stale claims are subject to section 340.6 defeats the purpose of the statute. It will lead to the very uncertainty section 340.6 was intended to prevent: multiple

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[11] "[I]f exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230; *Stoll* at p. 1369 ["the trial court essentially engrafted a second limitation on the one-year period for malpractice which happens to involve a breach of fiduciary duty."].)

limitations period, indeterminate liability, and increased insurance premiums.

IX.

LEE SHOULD NOT HAVE BEEN GIVEN LEAVE TO ADD CONVERSION OR ANY OTHER THEORY

While it is not entirely clear from the Opinion, it appears the Fourth District gave Lee an opportunity to plead conversion and other theories,[12] even though *she chose not* to plead fraud or conversion. "When a demurrer is sustained with leave to amend but plaintiff elects not to amend, it is presumed on appeal that the complaint states as strong a case as possible." (*Giraldo v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 252 [emphasis added]; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

The allegations of the second amended complaint are controlling and the best Lee can do by her own election. Based on the face of the pleading, the second amended complaint states only claims arising in the performance of professional services.

The Fourth District suggests the allegations of the second amended complaint would support alternative theories (e.g., fraud and conversion).

First, it does not matter what "cause of action" is alleged. Unless it is actual fraud it is within the scope of section 340.6.

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[12] (*Lee, supra,* 174 Cal.Rptr.3d p. 498.)

Second, Lee had multiple opportunities to allege fraud, conversion, or theft. She chose not to, allowing the case to be dismissed with prejudice.

X.

SUPREME COURT REVIEW IS NECESSARY BECAUSE THERE IS DISAGREEMENT BETWEEN THE COURTS REGARDING THE PLAIN MEANING OF THE STATUTE

Many courts that have addressed the application of section 340.6 have weighed in on the whether the language of section 340.6 is unambiguous. There is disagreement.

Some courts found the statute to be plain and unambiguous. (*Lee, supra,* 174 Cal.Rptr.3d at p. 497; *Vafi, supra,* 193 Cal.App.4th at p. 881 ["Based on its plain language, section 340.6 applies to all actions, except those for actual fraud, brought against an attorney 'for a wrongful act or omission" which arise "in the performance of professional services."]; *Yee, supra*, 220 Cal.App.4th at p. 194 ["The words of the statute are quite broad, but they are not ambiguous.")

Other courts have found the statute to be unclear or ambiguous. (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 678 ["While the *Vafi* and *Yee* courts find no ambiguity in the plain language of section 340.6, subdivision (a), we do."]; *Southland Mechanical Constructors Corp., supra*, 119 Cal.App.3d at 427; *Stoll, supra*, 9 Cal.App.4th at p. 1368.)

XI.

CONCLUSION

For the foregoing reasons, Respondent William B. Hanley requests that the Court grant this petition in its entirety.

Dated: August 25, 2014

LAW OFFICES OF DIMITRI P. GROSS

By: _____

Dimitri P. Gross
Respondent William B. Hanley

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504 of California Rules of Court, the enclosed brief of Respondent was produced using 13-point type, including footnotes and contains approximately 5,122 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 25, 2014

LAW OFFICES OF DIMITRI P. GROSS

By: _____

Dimitri P. Gross
Respondent William B. Hanley

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 19200 Von Karman Avenue, Suite 900, Irvine, California 92612.

On August 25, 2014, I served the foregoing document described as **RESPONDENT'S PETITION FOR REVIEW** on the interested parties in this action as follows:

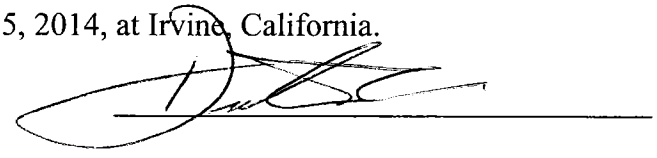
Walter J. Wilson, Esq. 333 West Broadway, Ste. 200 Long Beach, California 90802 *Attorney for Appellant Nancy F. Lee*	
Clerk of Court of Appeal: P.O. Box 22055 Santa Ana, CA 92702	Clerk of the Court Orange County Superior Court 700 Civic Center Drive West Santa Ana, CA 92701

(X) I am readily familiar with Law Offices of Dimitri P. Gross' practice for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to such practice, all correspondence is deposited with the United States Postal Service in the ordinary course of business on the date it is generated. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices in the United States and mailed at Irvine, California.

( ) Personal service was made by DDS Attorney Service to the person(s) and address(es) as follows:

(X) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed August 25, 2014, at Irvine, California.



CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY F. LEE, Plaintiff and Appellant, v. WILLIAM B. HANLEY, Defendant and Respondent.	G048501 (Super. Ct. No. 30-2011-00532352) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Reversed.

Walter J. Wilson for Plaintiff and Appellant.

Law Offices of Dimitri P. Gross and Dimitri P. Gross for Defendant and Respondent.

* * *

Plaintiff and appellant Nancy F. Lee hired Attorney William B. Hanley to represent her in certain civil litigation. After the litigation settled, Lee sought a refund of unearned attorney fees and unused expert witness fees she had advanced to Attorney Hanley. Not having received a refund, Lee hired Attorney Walter J. Wilson and terminated the services of Attorney Hanley. Attorney Hanley thereafter refunded certain expert witness fees, but no attorney fees. More than a year after hiring Attorney Wilson, Lee filed a lawsuit against Attorney Hanley seeking the return of attorney fees.

Attorney Hanley filed a demurrer to Lee's second amended complaint, based on the one-year statute of limitations contained in Code of Civil Procedure section 340.6.[1] The court sustained the demurrer and dismissed the action with prejudice. Lee appeals. We reverse.

Section 340.6 provides the statute of limitations for an action based on "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." According to the plain wording of the statute, to the extent the wrongful act or omission in question arises "in the performance of professional services," the statute applies; to the extent the wrongful act or omission in question does not arise "in the performance of professional services," the statute is inapplicable.

This notwithstanding, it seems that almost any time a client brings an action against his or her attorney the wrongful act in question is construed as one arising in the performance of legal services, such that section 340.6 applies. But surely it cannot be the case that every conceivable act an attorney may take that affects his or her client is one arising in the performance of legal services. For example, if a client leaves her purse unattended in the attorney's office and the attorney takes money from it, would we say that act arose in the performance of legal services? How different is it if, when the legal services have been completed and the attorney's representation has been terminated, the

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise specifically stated.

attorney keeps the unearned fees belonging to the client? To steal from a client is not to render legal services to him or her. We hold that, to the extent a claim is construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion, section 340.6 is inapplicable.

The matter before us was resolved at the demurrer stage, before the facts were developed. However, the "[r]esolution of a statute of limitations defense normally is a factual question . . . . [Citation.]" (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311.) Here, the facts alleged in Lee's second amended complaint could be construed as giving rise to a cause of action for the theft or conversion of an identifiable sum of money belonging to her. This being the case, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the section 340.6 statute of limitations. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321 (*Stueve Bros. Farms*).) Because this action has not reached a point where the court can determine whether the wrongful act in question arose in the performance of legal services, and thus, whether or not section 340.6 applies, the demurrer should not have been sustained.

I

FACTS

In her second amended complaint, Lee alleged that the litigation Attorney Hanley had handled for her settled on January 25, 2010, the lawsuit was dismissed three days later, and Attorney Hanley did no further work on the matter thereafter. Attached to her second amended complaint were copies of a February 1, 2010 letter from Attorney Hanley to Lee and a February 1, 2010 invoice for legal services. The letter stated that Lee had a credit balance of $46,321.85 and the invoice so reflected. The invoice itemized work performed in January 2010, including the drafting of a settlement agreement and cover letter on January 18, 2010. Lee also alleged that in April 2010, she telephoned

Attorney Hanley and asked for a final billing statement and a return of her unused funds but that Attorney Hanley, in a harsh manner, told her she had no credit balance and would receive no refund.

On December 6, 2010, Lee and Attorney Wilson each sent a letter to Attorney Hanley demanding the refund of $46,321.85 in unearned attorney fees plus approximately $10,000 in unused expert witness fees. By these letters, Lee terminated the services of Attorney Hanley and she and Attorney Wilson each informed him that Attorney Wilson would pursue the collection of the monies owed by Attorney Hanley to Lee and also would handle any remaining matters associated with the settled litigation.

In her second amended complaint, Lee also alleged that, on or about December 28, 2010, Attorney Hanley returned $9,725 in unused expert witness fees. However, he never returned the $46,321.85 in unearned attorney fees.

On December 21, 2011, Lee filed her initial complaint against Attorney Hanley. Attorney Hanley filed a demurrer based on the one-year statute of limitations. (§ 340.6.) However, before that demurrer was heard, Lee filed a first amended complaint. The court ruled that the demurrer was moot.

Attorney Hanley filed a demurrer to the first amended complaint, also on the basis of the statute of limitations. The court sustained the demurrer with leave to amend.

Lee then filed her second amended complaint and Attorney Hanley filed another demurrer, again based on the statute of limitations. The court sustained the demurrer with leave to file a further amended complaint. In her opening brief on appeal, Lee represents, albeit without citation to the record, that the court sustained the demurrer with respect to all grounds other than fraud, but gave Lee leave to amend with respect to allegations based on fraud. Lee also states that because she "was unwilling to plead fraud against" Hanley, she did not file a further amended complaint. The court dismissed her action with prejudice.

II

DISCUSSION

A. Preliminary Matter—Request for Judicial Notice:

Lee has filed a request for judicial notice, in which she asks this court to take notice of (1) certain portions of the legislative history of section 340.6, and (2) certain correspondence concerning her complaint to the State Bar of California about Attorney Hanley. Attorney Hanley opposes the motion. He says Lee failed to put the documents in question before the trial court and they are, in any event, irrelevant to the issues raised in this appeal.

The fact that Lee did not address the legislative history of section 340.6 in the trial court does not mean she may not raise it on appeal from a judgment of dismissal following the sustaining of a demurrer. "An appellate court may . . . consider new theories on appeal from the sustaining of a demurer to challenge or justify the ruling. As a general rule a party is not permitted to . . . raise new issues not presented in the trial court. [Citation.] . . . However, 'a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.' [Citations.] A demurrer is directed to the face of a complaint (Code Civ. Proc., § 430.30, subd. (a)) and it raises only questions of law [citations]. Thus an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citations.] After all, we review the validity of the ruling and not the reasons given. [Citation.]" (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959.)

In this case, the proper interpretation of section 340.6 is a question of law and this court may consider the legislative history of section 340.6 in addressing the issue. Consequently, we grant Lee's request to take judicial notice of the portions of the legislative history attached as exhibits 1 through 3 to her request.

However, the correspondence concerning the State Bar investigation of Lee's complaint about Attorney Hanley is irrelevant to the determination of the issues on appeal. Consequently, we deny Lee's request to take judicial notice of the documents attached as exhibit 4 to her request.

B. Standard of Review:

"We review de novo an order sustaining a demurrer to determine whether the complaint alleges facts sufficient to state a cause of action. [Citation.]" (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 192 (*Yee*), criticized on another point in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668, 677 (*Roger Cleveland*) [statute inapplicable to malicious prosecution claims].) "When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.]" (*Yee, supra*, 220 Cal.App.4th at p. 193.)

"'"'A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear of the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]' [Citation.]" [Citation.]' [Citations.]" (*Stueve Bros. Farms, supra*, 222 Cal.App.4th at p. 321.[2])

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2 We address the issues framed by the parties. In *Stueve Bros. Farms, supra,* 222 Cal.App.4th 303, we were not asked to address whether section 340.6 was simply inapplicable to causes of action based on the misappropriation of client assets.

C. Section 340.6:

Section 340.6, subdivision (a) provides: "(a) 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, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] . . . [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation. . . ."

D. Performance of Professional Services:

(1) Levin and Prakashpalan Cases—

Lee argues that the plain wording of section 340.6 shows the statute is inapplicable to her case. She says Attorney Hanley completed his legal work when the litigation he was handling was settled and the case was dismissed. Any actions he took thereafter, including the wrongful keeping of the money belonging to her, were not part of the performance of professional services, because the performance of professional services had terminated. She also contends that the misappropriation of client funds cannot be construed as the performance of professional services, no matter what the timing.

Attorney Hanley disagrees, citing *Levin v. Graham & James* (1995) 37 Cal.App.4th 798 (*Levin*) and *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105 (*Prakashpalan*). In *Levin*, the plaintiff stated causes of action for

malpractice, identified unconscionable attorney fees as an aspect of malpractice, and requested a refund of unconscionable attorney fees as a remedy for malpractice. Under the facts of the case, the court rejected the assertion that a claim of unconscionable attorney fees was anything other than a claim for malpractice, subject to section 340.6. The court observed that the plaintiff had asserted no claim independent of attorney malpractice, such as money had and received, and had not suggested another statute of limitations. (*Levin, supra*, 37 Cal.App.4th at pp. 804-805.)

According to Attorney Hanley, *Levin, supra*, 37 Cal.App.4th 798 shows that Lee's claim for a refund of attorney fees is subject to the one-year statute of limitations contained in section 340.6. However, that case is distinguishable from the one before us. The court in *Levin* did not address either a demurrer or a situation where the plaintiff had asserted a cause of action other than malpractice. Furthermore, it did not purport to address all possible claims with respect to attorney fees, such as claims of theft or conversion.

Here, Lee expressed her general satisfaction with Attorney Hanley's performance of services. Her claim that the credit balance belonged to her was not based on either malpractice or the unconscionability of the fee. Rather, she simply sought the return of money belonging to her, on various causes of action, including money had and received. *Levin, supra*, 37 Cal.App.4th 798 simply does not control.

We turn now to *Prakashpalan, supra*, 223 Cal.App.4th 1105. In that case, the plaintiffs alleged that the defendant law firm settled a class action lawsuit for 93 insureds in November 1997, but that the plaintiffs, as class members, did not learn until February 2012 that the defendant had failed to fully and properly distribute $22 million of the settlement funds. (*Id.* at pp. 1114-1115.) The trial court sustained the defendant's demurrer to the second amended complaint. (*Id.* at p. 1119.) The appellate court affirmed in part and reversed in part. (*Id.* at pp. 1137-1138.)

The appellate court held that the plaintiffs' malpractice and breach of fiduciary causes of action, based on the alleged wrongful withholding of the settlement funds, were barred by section 340.6. (*Prakashpalan, supra*, 223 Cal.App.4th at p. 1122.) The court stated: "Plaintiffs assert that the holding of settlement funds does not arise out of the provision of professional services and thus that section 340.6 does not apply for that reason. We disagree, as in this case, the funds in the trust account are settlement proceeds, [defendant's] conduct in holding such funds arises out of the provision of professional services, namely, the settlement of the case on plaintiffs' behalf." (*Id.* at p. 1122, fn. 4.)

According to Attorney Hanley, *Prakashpalan, supra*, 223 Cal.App.4th 1105 shows that when an attorney collects monies in the performance of professional services and a claim later arises over the retention or disbursement of those monies, the claim is one subject to section 340.6. Where in *Prakashpalan* the issue was the attorneys' failure to properly or fully distribute settlement funds collected in the performance of professional services, in the matter before us, Attorney Hanley observes, the issue is the attorney's failure to properly or fully distribute legal fees collected in the performance of professional services.

We see a difference in the two situations, however. An attorney's collection of settlement funds and distribution of those funds to the litigants entitled thereto is clearly part of the performance of the legal service of settling the lawsuit. However, an attorney's receipt of a client advance for the future performance of legal services does not constitute the attorney's performance of those services.

True enough, various cases have broadly stated that section 340.6 applies irrespective of whether the theory of liability is based on breach of contract or tort. The court in *Levin*, for example, stated: "Indeed, for any wrongful act or omission of an attorney arising in the performance of professional services, an action must be commenced within one year after the client discovers or through the use of reasonable

diligence should have discovered the facts constituting the wrongful act or omission. In all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies. [Citation.]" (*Levin, supra*, 37 Cal.App.4th at p. 805.) Similarly, the court in *Yee, supra*, 220 Cal.App.4th 184, stated: "The phrase '"wrongful act or omission"' is 'used interchangeably as a reference to both tortious and contractual wrongdoing.' [Citation.]" (*Id.* at pp. 194-195.)

The critical point, however, is that those cases do not state that the statute applies whenever an attorney commits any tort of any nature. Rather, they include the qualification, as set forth plainly in the statute, that the wrongful act or omission must be one "arising in the performance of professional services." (See, e.g., *Levin, supra*, 37 Cal.App.4th at p. 805; *Yee, supra*, 220 Cal.App.4th at pp. 194-195.)

(2) Legislative history—

Lee argues that the legislative history of section 340.6 shows the statute was intended to apply only to malpractice claims. We observe that the point was recently addressed in *Roger Cleveland, supra*, 225 Cal.App.4th 660.

The court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 criticized the decisions in *Yee, supra*, 220 Cal.App.4th 184 and *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 (*Vafi*) to the effect that section 340.6 applies to malicious prosecution claims. The *Roger Cleveland* court held, for various reasons not important here, that the statute of limitations of section 335.1 is the one that applies to those claims. (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 668.) It stated, inter alia: "Based upon the plain language of section 340.6, subdivision (a), we conclude the Legislature's use of 'wrongful act or omission' by an attorney arising in the performance of professional services was intended to include any legal theory related to a claim by a client or former client against his or her attorney, and not a claim by a third party, alleging the attorney

maliciously prosecuted an action against the plaintiff." (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 680.)

In addition, the court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 observed that its interpretation was consistent with the legislative history of section 340.6. It construed the legislative history of the statute, despite the plain wording of the statute, to reflect a legislative intent to apply the one-year statute of limitations to malpractice claims specifically. (*Id.* at pp. 680-682.)

The court noted that Assembly Bill No. 298 ((1977-1978 Reg. Sess.) as introduced Jan. 25, 1977) originally proposed a limitations period applicable "'[i]n any action for damages against an attorney based upon the attorney's alleged professional negligence.'" (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 681, fn. omitted.) However, commentator Ronald E. Mallen suggested using the phrase "'wrongful act or omission occurring in the rendition of professional services'" because the concept of attorney malpractice was difficult to define. (*Ibid.*) He further suggested that the limitations period be inapplicable to acts of actual fraud. (*Ibid.*)

As the court in *Roger Cleveland, supra*, 225 Cal.App.4th 660 explained in some detail, the suggested language "wrongful act or omission" was thereafter included in the proposed legislation, although various communications and legislative materials regarding the proposed legislation continued to refer to the bill as pertaining to the statute of limitations for attorney malpractice actions. (*Id.* at pp. 681-682.) The court concluded: "Our review of the legislative history indicates the Legislature intended to create a specially tailored statute of limitations for legal malpractice actions . . . ." (*Id.* at p. 682.)

(3) Plain meaning—

This notwithstanding, the courts have for years looked to the wording of the statute as ultimately adopted, pertaining to "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" (§ 340.6), and applied it

to allegations of wrongful acts or omissions other than malpractice. (See, e.g., *Vafi, supra*, 193 Cal.App.4th 874 [malicious prosecution].) "The principles of statutory analysis are well established. '"[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.]" [Citation.] Thus, we "avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend. [Citation.]" [Citation.]' [Citation.]" (*Id.* at p. 880.)

Here, we find the words of the statute to be plain and unambiguous. They provide the applicable statute of limitations for an action based on "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." (§ 340.6.) So, if the wrongful act or omission at issue arises "in the performance of professional services," the statute applies. If the wrongful act or omission at issue does not arise "in the performance of professional services," the statute is inapplicable. As we have already stated, an attorney does not provide a service to the client by stealing his or her money.

As we have stated, the second amended complaint in the matter before us included causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, money had and received, and an equitable right to the return of unused funds. It did not assert causes of action for theft, conversion, or fraud.

However, we bristle against cutting off a litigant's claims because of inartful or sloppy pleading. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103 (*Barquis*); *MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 816 (*MacIsaac*).) Rather, we liberally construe his or her pleading with a view to achieving substantial justice. (*Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, 756-757.) Even if a litigant is

inarticulate with respect to the relief sought, he or she is "nevertheless entitled to any relief warranted by the facts pleaded, and [the] failure to ask for the proper relief is not fatal to [his or her] cause. [Citations.]" (*MacIsaac v. Pozzo*, *supra*, 26 Cal.2d at p. 815.)

Moreover, "we are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have, of course, long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. [Citations.]" (*Barquis*, *supra*, 7 Cal.3d at p. 103.)

The second amended complaint in the matter before us alleged that, after Attorney Hanley's services with respect to the settled litigation had been fully completed, he knowingly refused to release money belonging to Lee, which he himself had characterized as her "credit balance." When we liberally construe the second amended complaint we see that, despite Lee's form of pleading, she has made factual allegations adequate to state a cause of action for conversion, for example. (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208-209, 215-216 [wrongful exercise of dominion over identifiable sum of money belonging to another].)

As we have already noted, "'"'A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear of the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]' [Citation.]" [Citation.]' [Citations.]" (*Stueve Bros. Farms*, *supra*, 222 Cal.App.4th at p. 321.) Here, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the statute of limitations. It is simply premature at this point to conclude that Lee cannot allege "facts sufficient to state a cause of action under any possible legal

theory" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870) that will survive the bar of the one-year statute of limitations.

E. Remaining Arguments:

(1) Introduction—

We address Lee's tolling and date of discovery arguments, in case on remand and further development of the facts, she continues to assert causes of action to which section 340.6 applies. However, we do not address Lee's argument that section 340.6 is unconstitutional as applied, due to her failure to provide any legal authority in support of that argument. (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 648-649.) We also do not address arguments Lee raised for the first time in her reply brief. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108.)

(2) Tolling—

Lee says that, even though she and Attorney Wilson each sent termination letters to Attorney Hanley on December 6, 2010, Attorney Hanley continued to represent her until he delivered to her the December 28, 2010 check for the refund of unused expert witness fees, because the delivery of the check was an act in representation of her as her attorney. This is, of course, contrary to her assertion, in other portions of her briefing on appeal, that all professional services were terminated when the settled litigation was dismissed. In any event, it is clear, for the purposes of the tolling provision of section 340.6, that Attorney Hanley's services were terminated no later than December 6, 2010, and that the one-year statute began to run no later than that date. (*Stueve Bros. Farms, supra*, 222 Cal.App.4th at p. 314.)

(3) Date of Discovery—

Lee also states she did not discover Attorney Hanley claimed that the taking of her money arose in the performance of professional services and that section 340.6 applied, until Attorney Wilson received the February 29, 2012 demurrer to her complaint.

Although Lee does not articulate the significance of her statement, we gather she views the date she discovered Attorney Hanley's legal theory as having some bearing upon the triggering of the statute of limitations. It does not. While the date of discovery of an attorney's alleged wrongful act is relevant to a determination of the running of the statute of limitations under section 340.6, the date of discovery of the attorney's legal defense is not. (Cf. *Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1146 [plaintiff's ignorance of legal theories is irrelevant].)

III

DISPOSITION

The judgment of dismissal is reversed. Lee shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY F. LEE, Plaintiff and Appellant, v. WILLIAM B. HANLEY, Defendant and Respondent.	G048501 (Super. Ct. No. 30-2011-00532352) ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING [NO CHANGE IN JUDGMENT]

On the court's own motion, the opinion filed in this case on July 15, 2014 is hereby ORDERED modified as follows:

1. On page 3 of the opinion, after the sentence reading, "We hold that, to the extent a claim is construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion, section 340.6 is inapplicable[,]" add the following footnote: "Of course, by so stating, we do not mean to imply that those are the only two causes of action to which the statute does not apply."

2. On page 3, delete the first full paragraph. Substitute the following paragraph: "The gist of Lee's second amended complaint was that, after Attorney Hanley's services to her had been terminated, he wrongfully refused to return money belonging to her. In other words, her lawsuit as framed was based on the purported acts or omissions of Attorney Hanley that did not arise in the performance of professional services to her. The matter before us was resolved at the demurrer stage, before the facts

were developed. We do not know whether, on remand, the facts as ultimately developed will show a theft of funds, an accounting error, or something else. While a cause of action based on the theft or conversion of client funds, for example, would not be subject to the section 340.6 statute of limitations, a cause of action predicated on an accounting error could be. The '[r]esolution of a statute of limitations defense normally is a factual question . . . . [Citation.]' (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Baright v. Willis* (1984) 151 Cal.App.3d 303, 311.) Here, we cannot say that Lee's second amended complaint demonstrates clearly and affirmatively on its face that her action is necessarily barred by the section 340.6 statute of limitations. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321 (*Stueve Bros. Farms*).) This being the case, the court erred in sustaining the demurrer."

3. On page 6, add the following sentence as the last sentence of the second full paragraph: "'When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer. [Citation.]' (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)"

4. On page 9, in the first sentence of the first full paragraph, insert the word "duty" between the words "fiduciary" and "causes."

5. On page 12, delete the paragraph reading: "As we have stated, the second amended complaint in the matter before us included causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, money had and received, and an equitable right to the return of unused funds. It did not assert causes of action for theft, conversion, or fraud."

6. On page 12, delete the first two words of the paragraph beginning, "However, we" and substitute the word "We."

7. Change the first citation appearing on page 13 to read: "(*MacIsaac, supra,* 26 Cal.2d at p. 815.)"

8. On page 13, add the following language at the end of the second full paragraph: "Given this, her second amended complaint was sufficient to withstand a demurrer. We do not mean to imply that Lee's causes of action other than conversion are necessarily barred by the section 340.6 statute of limitations. As we stated at the outset, whether the facts ultimately will show that Attorney Hanley's acts or omissions supporting Lee's various causes of action were acts or omissions arising in the performance of professional services is a matter yet to be determined."

9. Delete the last sentence of the paragraph which begins on page 13 and ends on page 14.

There is no change in the judgment.

Appellant Nancy F. Lee and respondent William B. Hanley each filed a petition for rehearing on July 30, 2014. Each of the petitions for rehearing is DENIED.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.