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(10)

SUPREME COURT CASE NO.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NANCY F. LEE,
Plaintiff-Petitioner and Appellant,

v.

WILLIAM B. HANLEY,
Defendant-Respondent and Respondent.

After a Decision of the Court of Appeal
Fourth Appellate District, Division Three
Court of Appeal Case No. G048501
Orange County Superior Court Case No. 30-2011-00532352
Honorable Robert J. Moss, Judge

2ND PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

1. By use of the term "arising in," in combination with the other terms of section 340.6's targeting phrase, did the Legislature intend a three step process for the application of section 340.6: identify the alleged "professional service" being challenged, identify the alleged wrong, and determine whether the alleged wrong was "arising in" or "came into being" **in** the actual performance, that is, the doing, of the professional service?

2. In enacting section 340.6, did the Legislature intend:

- a professional negligence statute, similar to section 340.5?
- to apply a one-year statute of limitations to "malpractice claims" specifically?
- to create a "specially tailored statute of limitations for legal malpractice actions"?

3. Is it accurate that an act of theft, or conversion, or other intentional tort, can never be considered the "performance of professional services," as that term is used in section 340.6?

4. Regarding the definition of "professional services," as used in section 340.6:

- is it informed by the *Neel* legal malpractice definition,[1] and is it shorthand for the term "the tasks they [attorneys] undertake," meaning the tasks agreed to in the retention agreement?
- is a requirement of the term, that an attorney be acting in service of his client, and/or providing a benefit to her?

5. When the "specific subject matter" of a "litigation retention" has been completed, and the litigation action dismissed, is it accurate that a wrong occurring after such completion could never be deemed "arising in the performance of professional services," as that phrase is used in section 340.6?

6. After a client has demanded return of her unused advances, is it true an attorney's knowing withhold of said funds, for his benefit, and to the detriment of his client, can never be deemed "professional services," as that term is used in section 340.6?

7. Is it true that "professional services," as that term is used in section 340.6, do not include:

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[1] From *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 180, 98 Cal. Rptr. 837, 491 P.2d 421:
"legal malpractice consists of the failure of an attorney 'to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise **in the performance of** the tasks which they undertake.'" (Bold added.)

- an attorney's "businessman functions," including receiving and/or holding of advances from clients?
- an attorney's "express trustee functions," including receiving and/or holding advances from clients?

8. Is the holding of *Samuels v. Mix* (1999) 22 Cal. 4th 1, 7 (to the effect it is the Legislature's exclusive province to specify limitations periods ("Because it involves such policymaking, to establish a statute of limitations 'belongs to the Legislature alone [citation], subject only to constitutional constraints [citation].' (Citations omitted)") still viable?

9. When the circumstances of the enactment of a complex statute of limitations are known and indicate the targeting phrase therein was "supplied" to the Legislature (not drafted by it), and when the outside draftsman represented that the phrase was "a specially tailored statute of limitations for legal malpractice," is an appellate court to apply the ordinary rules of statutory interpretation (those established for Legislature-drafted words), or is an appellate court to otherwise interpret the targeting phrase, perhaps through the eyes of the Legislature (i.e., could the "stilted phrasing" be interpreted to do what the Legislature intended), or on the basis of the outside draftsman's representation as to what the bill would do?

WHY REVIEW SHOULD BE GRANTED

1. **"Arising In" Mandates a Single, Specific, Demanding Connection**. Although any professional service necessary to the retention

("the tasks they undertake," or the "specific subject matter" of the "representation) can serve as **the** "professional service" for a section 340.6 inquiry, it is solely and only ***a specific***, identifiable, individual legal task (claimed to have been done wrongly (or omitted)) which is analyzed: what specific legal task (which was a "professional service") did the attorney allegedly perform under the retention agreement? (It's not the generalized collective of all services, but a single legal task for the section 340.6 inquiry.)

In the abstract, the query to the Court is, what is "arising in," or what "comes into being" **in**, the performance by an attorney of a legal task he undertook via the retention.

The Base Phrase. To answer, the base phrase, and the alternate phrase, must be considered. The base phrase is:

> "... a wrongful ... omission arising in the performance of professional services."

At the time attorney undertakes the representation, he incurs a "conditional duty" to perform the necessary-to-the-retention legal tasks. If he or she continues the representation, at some point, the necessary-to-the-retention legal tasks must be done; if attorney fails to do one such legal task (as in *Neel*) by its deadline, instantly upon the deadline, the duty to perform becomes unconditional (arises), and "a wrongful omission" arises because

he or she missed the deadline. Both the duty-becoming-unconditional, and also the wrong (the omission), are "**arising in the performance of**" a professional service which is one of the "**professional services.**"

The Alternate Phrase. The alternate phrase is:

"... a wrongful act ..., other than for actual fraud, arising in the performance of professional services.

As above, when attorney undertakes the representation, his duties to perform the necessary-to-the-retention legal tasks are "conditional." Upon **doing** any single legal task, however, the attorney's duty of due care, "... to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise," **arises**. If the attorney fails to perform to the level of "the skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise," that is, if he performs the duty below such standard, the wrong (the below standard performance) is "arising in the performance of" a professional service which is one of the "professional services." (Although attorney may be able to later correct his below standard performance (consider *Budd*), until he does so it remains a wrong.)

To appellant's knowledge there is no other duty, or thing, or result, or consequence "arising" in the "performance" of "a" "professional service."

It's noteworthy that section 340.6 specifically used "representation" and "specific subject matter" in the tolling provisions, but in the targeting provision, the section specifically stated "professional services" (not "legal services," and not any other watered down such term). It also used the very stilted, "arising in the performance of."

2. **Via Stoll v Superior Court, the Supreme Court in Effect Instructed Judges To Be "Intellectually Dishonest," i.e., To Disregard the Specific Targeting Phrase of Section 340.6 When Dealing With Attorney Wrongs.** Beginning with the "junk" analysis[2] of *Stoll v. Superior Court* (1992) 9 Cal. App. 4th 1362, which analysis bore – and still bears – the **Supreme Court's imprimatur**,[3] the courts have been unable or

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[2] Appellant believes *Stoll's* "analysis" is grossly unreasonable and inappropriate, and has itemized *Stoll's* shortcomings at Legal Discussion, III. "Stoll Is "Delusionally Bad" Law, with a "Faux Holding," with "Straw Men" and with Numerous Unsupported/Wrong Conclusions," *infra*. The word "junk," however sets up the "travesty" that was the Supreme Court's refusal to *sua sponte* review *Stoll* (9 Cal. App. 4th 1362) after real party in interest gave up – leaving *Stoll* the law of the land and instructing trial and Court of Appeal ("COA") judges to ignore the Legislature's targeting phrase!

[3] After attorney *Stoll's* demurrer on section 340.6 was overruled, he sought review by extraordinary writ, which the COA summarily denied; however, the Supreme Court later transferred the matter back to the COA, and, after hearing, the COA issued its ruling (9 Cal. App. 4th 1362). Real party in interest than simply ceased participating in the action; the Supreme Court's failure to *sua sponte* review the matter, left *Stoll* – with the Supreme Court's direct intervention and apparent stamp of approval – as the law of the land. In effect, *Stoll's* mandate to ignore section 340.6's targeting phrase bore the Supreme Court's approval. This was egregiously wrongful – a travesty – begetting judges who can't judge, attorneys improperly asserting section 340.6 (and judges granting such bogus requests), and a

unwilling to apply the targeting phrase of section 340.6, opting instead for a legal Rorschach test ("it's what I now perceive it to be") invariably resulting in the application of section 340.6 – **as the courts believed the Supreme Court mandated!** The Supreme Court imprimatur in effect instructed the lower courts to be intellectually dishonest, **and the courts have complied!**

It's noteworthy that the Opinion, at pg. 9, ll. 23-24, acknowledges:

> "True enough, **various cases** have broadly stated that section 340.6 applies irrespective of whether the theory of liability is based on contract or tort." (Bold added.)

However, that *Southland* "tort or contract" quibble, is not at issue in this case and is not what the COA was referring to. In this proceeding, both sides cited and argued *Stoll*, respondent specifically attributing, "(malpractice statute cannot be circumvented by alleging "breach of fiduciary duty.')" to *Stoll*.

The issue herein, and the reference to "various cases," is to the truly destructive, *ultra vires* language of *Stoll*, stating at p. 1363:

> [W]e hold that the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice **or breach of fiduciary duty** is identical ... **a claim based on either theory** falls within the statutory term "wrongful act or omission" and must be commenced within one year after the client discovers ...."

State Bar which can't process an "attorney stole my money" complaint; and a State Bar holding its trial of respondent in abeyance – forcing appellant to bear the costs of litigation. This case should be reviewed and *Stoll's* holding reconsidered.

Stoll completely ignores the concept of the gravamen of an action, and holds that every "wrongful act or omission" alleged against an attorney must be commenced within one year, and impliedly instructs all judges to disregard the targeting phrase enacted by the Legislature!

Appellant asserts that her claim of a stand alone fiduciary breach, which is not "legal malpractice," is not subject to section 340.6. ***It is only if Stoll is "Precedential" Law – Overriding the Statutory Targeting Phrase – That Appellant's SAC is Arguably Barred by Section 340.6 (and Saved by a Theft/Conversion Amendment)***.

Under *Stoll*, the question is not "what did the attorney do" (i.e., the wrong no longer needs to "come into being" **in** the performance of professional services), it's simply "is the defendant an attorney (and if so, section 340.6 applies)"; it's not an "action" or "Prince Valiant" statute (as the Legislature enacted via section 340.5), it's a "status" statute.

Two COAs have now – finally – criticized *Stoll*. This Court ("surely in cannot be the case..." *supra*) and, as noted in the Opinion, *Roger Cleveland Golf Co. v. Krane & Smith, APC* (2014) 225 Cal. App. 4th 680, first, finding in section 340.6:

> "... a legislative intent to apply the one-year statute of limitations to ***malpractice claims specifically***" (bold and italics added), (at Opinion, pg. 11, ll. 5-7)

and second, concluding:

"'Our review of the legislative history indicates the Legislature intended to create a ***specially tailored*** statute of limitations for ***legal malpractice actions*** ....' (*Id.* [225 Cal.App.4th] at p. 682.)" (Bold and italics added.) (Opinion, pg. 11, ll. 20-23)

In *Roger Cleveland, supra,* at pg. 673, the court actually, said:

"Unlike the *Vafi* and *Yee* courts, we read the language of section 340.6 as a professional negligence statute, similar to section 340.5, the statute of limitations applicable to a claim for professional negligence of a healthcare provider. As shall be shown, the legislative history and public policy considerations support this interpretation."

If section 340.6 is a professional negligence statute – a legal malpractice statute – then it has no application to "stand alone" attorney fiduciary duty breaches (unless such breach is also legal malpractice), contrary to *Stoll*!

In this proceeding, the Court is presented the appropriate vehicle to review and establish uniform law for all claims against an attorney – involving several important issues!

3. **A Case Of First Impression, A Stand Alone Breach Of Fiduciary Duty: As An Attorney, As A Confidential Fiduciary, And As A Trustee**. This case is one of "first impression": a stand alone fiduciary duty breach, with no claim that attorney breached his duty of due care. Appellant sued for breach of attorney's businessman function, or his

confidential relationship function (as an equitable fiduciary[4]) or of his "express trustee" function.

When acting as a businessman, or as a confidential fiduciary, or as an express trustee, attorney is not "performing professional services," and section 340.6 has no "arguable" application.

But the trial court found attorney's misappropriation/failure to return to be a wrong "arising in the performance of professional services"; the COA seemingly held that section 340.6 would have applied except the SAC pleaded facts from which the COA could envision a theft/conversion action.

Although the COA reversed, it commented only on theft and conversion leaving all the "stand alone" fiduciary breaches undiscussed, and at play in the trial court, and the Opinion as modified creates a wrongful, prejudicial law of the case.

4. **The COAs Are Divergent In Their Interpretations of Section 340.6 and Uniformity Is Needed on Several Important Issues**.

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[4] Appellant pleaded all her fiduciary causes of action as both an attorney's fiduciary duty breach (via her causes of action: First, Count 2; Second, Count 2; Fifth, Count 1; Sixth), and as a "confidential fiduciary's" breach (respondent recognized and appreciated appellant's vulnerabilities, appellant justifiably placed her trust in respondent, and by respondent's acceptance of her trust, a confidential and fiduciary relationship existed, with respondent bearing fiduciary duties – in truth, it was probably because respondent recognized appellant's vulnerabilities that respondent targeted and stole from appellant) (via her causes of action: First, Count 3; Second, Count 3; Fifth, Count 2). CT pgs. 161-189.

As the Opinion notes, in just the past year numerous COA holdings have been wildly divergent, at a minimum: *Roger Cleveland* (holding section 340.6 is a professional negligence statute and doesn't apply to malicious prosecution) versus *Vafi* and *Yee* and apparently this Opinion (*Lee v. Hanley*) (it does apply to malicious prosecution); This Opinion (an attorney's misappropriation of client funds can never be professional services as the taking is not of benefit to the client) versus *Prakashpalan* (holding, among other things (see immediately next section), that section 340.6 applies to bar all "non fraud" claims, including misappropriation). Since this Opinion criticizes *Levin* (and *Stoll*), there's another split; and this Opinion (seemingly that fiduciary breaches (except theft, etc.) are barred by the statute) versus *Roger Cleveland* (section 340.6 is a professional negligence statute, like section 340.5, and so fiduciary breaches which are not legal malpractice remain governed by the pre section 340.6 statute).

There's also *Samuels v. Mix* and *Roger Cleveland* (and perhaps this Opinion) (it is the Legislature's exclusive province to balance societal interests and enact statutes of limitation) versus *Stoll* and *Levin* (which truncated the targeting phrase, "extinguishing" claims not intended by the Legislature.

Appellant agrees with *Roger Cleveland* that:

- section 340.6 is a professional negligence statute, and
- section 340.6 has no application to malicious prosecution actions.

She agrees with this Court that:

- misappropriation can never be "professional services,"
- that *Levin's* statement of the law was over expansive.

She agrees with *Samuels, Roger Cleveland*, and this Opinion that it is the Legislature's exclusive province to enact SOLs.

She agrees with *Prakashpalan* that in an express trust setting, a trustor with "fraud based" claims should plead the more particular (than "fraud") cause of action. **She further alleges, however, that in that same setting, section 16460 (dealing with trustee's BOT) is more particular than section 340.6 (dealing with claims against an attorney generally).**

5. **Prakashpalan (A Case Decided After Appellant Filed Her AOB) Added New Law: In an Express Trust Setting, A "Fraud Based" Claim of Breach of Trust (Section 16460) Pleaded "More Particular" Statutory Provisions Than Would a Fraud Cause (Section 338d), and So a "Fraud Based Breach of Trust" Action Was the Appropriate Cause of Action to Plead, and Section 16460's SOL Would Apply.**

It's noteworthy that, in an "express trust" situation, *Prakashpalan, supra*, p. 1117-1123, held:

- that a client with "fraud based claims" can allege a Probate Code section 16460 ("section 16460") breach of trust ("BOT") action to effect an "actual fraud" exception to section 340.6, and

- that the provisions of section 16460 imposing fiduciary duties to account for the funds held, deposit them in trust, and return them promptly on demand, are "more particular" than the "general" provisions of a fraud cause, and so the section 16460 SOL is to be applied.

Since *Prakashpalan* was decided after appellant had already filed her AOB, however, she didn't know, and didn't specifically address her "fraud based claims" in a BOT action. Also, before *Prakashpalan,* appellant's counsel did not (could not) make the "connection" that an attorney's receipt of advances was "holding property for another's benefit," (*Prakashpalan, supra*, p. 1119) creating an express trust. It's somewhat noteworthy that the court did say,

> "Although no other cases have so applied Probate Code section 16460, we do not see this as a reason for not doing so here." (Id., p. 1122)

To see *Prakashpalan's* application of law to facts was eye opening, and appellant immediately informed the COA in her reply (ARB) herein that she had fortuitously pleaded the elements of a BOT action in her SAC, and if any elements were missing she could supply them by amendment.

That is, although appellant did not plead a separate BOT cause, she did plead as facts:

- attorney's receipt of client's advances for an express purpose,

- attorney's accountings which maintained the integrity of client's funds as her money,
- the purpose for attorney's hold ended,
- client's request for an accounting and return of the unused funds, and
- attorney failing to return funds.[5]

In her ARB, appellant also noted that although she wasn't willing to plead a "fraud" cause of action against respondent, she had previously specified the facts of her "fraud based" claims, stating exactly what respondent had done/represented (that respondent asked for advances and represented to her he'd hold all funds in trust and return all unused funds, that he had her sign what she believed were bank papers to open a Lee-specific trust account for her monies, that the representations were intended to induce appellant to advance funds, that she relied on such representations in making her advances, that respondent later admitted he never put her monies in trust, that respondent always intended to steal from her and made his representations and promises as part of his scheme to steal from her).

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[5] Appellant pleaded a "fraud based" BOT in her SAC at paras. R-3, -4, -5, -7, -13, -14, ITA-22, ITC-22, and R-9, -6, -11; Said paras. appear in the Clerk's Transcript at: CT 164:16-22; 165:3-10; CT 165:11 to 166:13; 165:27 to 166:13; 171:2 to 172:4; 166:24-167:11; 172:5-9; 177:12-19; 178:14-22; 131, 132; 168:13-28; 166:14-18. All as set forth in ARB, pg. 29, l.1 – pg. 31, l. 10.

Although the COA "bristled" over an unpleaded theft/conversion cause of action on the facts pleaded, it but didn't "bristle" over an unpleaded "fraud based" BOT cause of action, which came up because of newly enunciated law.

Appellant asserts that a fraud based BOT claim is another way of saying: (a) the holding of funds was not "professional services" (it was not measured by attorney's duty of due care – as consistently alleged in every appellant writing), (b) of asserting a newly discovered "fraud based" manner of effecting the "other than actual fraud" exception, and/or (c) of asserting that section 16460 is a SOL more specific ***than section 340.6***. By ignoring appellant's BOT claim, the COA established a "law of the case" prejudicial to appellant – and did so because her attorney did not/could not recognize an "express trustee" relationship, until that was pointed out by *Prakashpalan*. These important policy issues should be reviewed.

6. **Application of the Targeting Phrase As the Legislature "Would Have Interpreted It," Determines That Section 340.6 Had No Application To the Facts At Bar**. While appellant greatly appreciates the COA's holding herein, it was done on a "limited legal Rorschach" test (no definitions, or reasoned application). That is, the COA recited section 340.6's targeting phrase (and seemingly would have held section 340.6 applied), but held that theft and conversion of a client's funds are not acts in service to the client, or of any benefit to her, and so were not

professional services, and so section 340.6 did not apply (to theft or conversion).

Appellant contends, however, that section 340.6 has no application herein because there were **no** professional services; that an attorney's businessman function, or his express trustee function of a trust for himself, or an accounting function, is not "in service" to the client, nor "of benefit" to her, and is not professional services; if attorney somehow renders an accounting (a non "professional services" function), how would such act transform non professional services into professional services; why did a theft or conversion cause of action have to be available to "save" appellant's SAC, when section 340.6 had no application?

Although the COA recited appellant's other arguments,[6] it never addressed their validity.

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[6] First, that in promising to return/holding advances, attorney was acting as a businessman or an express trustee (*Prakashpalan* (2014) 223 Cal. App. 4th 1105, at 1119), that is, the holding or trust was to benefit only the attorney, the holding or trust was neither part of the "specific subject matter" of the representation, nor providing a service to client (or benefiting her), and so was not "professional services"; similarly, any taking or failure to return said funds would not be "professional services." Second, that the wrongful act (taking or failure to return) occurred **after** all legal tasks necessary to the retention agreement had been completed, and so couldn't be "arising in the performance of professional services." Third, the wrong (the taking or failure to return) was not a breach of the attorney's duty of due care (in the performance of a professional service) and so the statute simply had no application.

7. **Section 340.6 Is A Statute of Limitations For Insurers (Not Attorneys), and It's an "Action" or "Prince Valiant" Statute, Like Section 340.5 (Not a "Status" Statute)**. The Legislature intended a statute of limitations for insurance companies (not for lawyers[7]), to alleviate the malpractice insurance crisis (the seemingly astronomical increases in premiums on insurance policies) brought on primarily by the Supreme Court's "discovery rule" from *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* 6 Cal. 3d 176, 180, 98 Cal. Rptr. 837, 491 P. 2d 421 and *Budd v. Nixen* (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P. 2d 433. The discovery rule applied to every legal transaction in California, compelling all insurance companies to raise reserves (every policy was susceptible to a "years down the road" claim and so every company felt it had to increase reserves substantially). The Legislature dealt with this problem by imposing the four year from the occurrence absolute limit (where it had imposed a three year such term in section 340.5).

In section 340.5, the Legislature's evolved conclusion (first try was in 1970; redo was in 1975) was a "professional negligence only" statute (not lack of consent, nor errors in office practice), targeting the doing of

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[7] There's nothing in the Legislative history to indicate the Legislature intended, under either the four-year or one-year periods, a statute of repose, or a statute to settle matters, or a statute to reduce the "terrible annoyance" to attorney when sued. There's nothing to indicate the Legislature intended any benefit to attorney. There's nothing to indicate the Legislature wanted to remove the private policing mechanism of a trial.

medicine – an "action" statute (a "Prince Valiant"[8] statute) – so that all ("princely") claims extinguished were unquestionably insurance covered claims (not disputes over fees, nor disgorgement claims, nor intentional wrongs, etc.), and every dollar saved was an insurance dollar saved, thereby directly reducing the insurance company costs. There was no intent to save "attorney money," or reduce an attorney's burden. The intent was to extinguish 100% covered claims.

Via section 340.6, appellant asserts the Legislature intended a similar "action" statute for attorneys – so that attorneys were treated the same as doctors – so that all extinguished claims were professional negligence, a breach of the due care duty, and would directly, 100%, cut insurance company costs. **It was a statute of limitations for insurers, not for attorneys!**

8. **Only the Legislature Is Empowered to Determine What Claims are To Be Extinguished**. In *Samuels v. Mix* (1999) 22 Cal. 4th 1, 7, the Court "talked the talk" to the effect a statute of limitations was the *Legislature's* balance of societal interests, and it was solely the Legislature's province to determine what claims were to be extinguished. In *Stoll*, however, **and in the 22 years since *Stoll***, this Court has seemingly approved the bogus pronouncements of *Stoll*, decorating such

[8] The Prince is good and goes good things; his errors will be negligence, covered 100% by his malpractice insurance.

pronouncements with Supreme Court "imprimatur," the law of the land – begetting a "cowed," "covered," or "confused" judiciary which extinguished claims unintended by the Legislature.

The inescapable public concern is that judges (that is, simply "non-practicing-for-the-moment" lawyers) are favoring (practicing) lawyers – lawyers favoring lawyers!

The Supreme Court needs to remedy ***its*** wrong.

FACTUAL AND PROCEDURAL BACKGROUND

Via her SAC, plaintiff/appellant Nancy Lee alleged: That she hired attorney Hanley to represent her in certain civil litigation. **During the litigation, attorney demanded that appellant advance to him large sums to pay for his attorney services as they were to be performed.** [This was not in the COA's Opinion.]

In January 2010 the litigation settled, and attorney performed no further services in the underlying action. Attorney sent an invoice dated February 1, 2010, accounting for his time through January 2010, including settlement of the litigation and drafting the Settlement Agreement. The case was dismissed within days. Via attorney's invoice, and his accompanying cover letter, attorney stated that appellant had a "$46,321" "credit balance."

In April 2010, Lee telephoned attorney and asked for a final billing, **an accounting**, statement and return of her unused funds, but was told in a harsh manner she had no credit balance and would receive no refund.

On December 6, 2010, Appellant and attorney Wilson each wrote Attorney Hanley, and on December 28, 2010, Attorney Hanley refunded certain expert witness fees, but none of the unused advances.

More than a year after hiring Attorney Wilson, appellant filed a lawsuit against Attorney Hanley seeking the return of unused advances. 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. The court sustained the demurrer with leave but appellant opted to stand on her SAC. The court dismissed the action with prejudice. Lee appealed.

Judicial Notice. In the COA, Lee requested Judicial Notice of the Legislative History of section 340.6, which was granted, and of certain State Bar correspondence relative to her "my attorney stole my money" complaint, which was denied.

Petitions for Rehearing. After the Opinion herein was filed, appellant filed a Petition for Rehearing, and after the Order Modifying, she attempted to file a Petition for Rehearing (Second), which was "received," but then returned.

LEGAL DISCUSSION

I. Introduction.

There is a crisis in the judiciary, the bar and the State Bar, such that appellate courts are cheerleaders for the bar and refrain from criticism of

Stoll or *Levin* (applying a legal "Rorschach" test, instead of legitimately attempting to analyze the stilted, exacting language of section 340.6); judges are "cowed," "covered," or "confused," and can't judge or apply the language of the statute; members of the bar assert section 340.6 in bad faith (and the trial judges reward them for it); the State Bar can't process seemingly legitimate complaints of "my attorney stole my money" and State Bar judges suspend proceedings – forcing claimants – theft victims – to bear the expense of litigation.

The Legislature, having dealt twice with section 340.5, intended to regulate "legal malpractice" as defined by the *Neel* Supreme Court, and enacted a specific three-step process targeting such claims. Despite section 340.6's stilted, but discernable language, the process is not applied.

It is the Legislature's province to specify the claims to be restricted – and it did via 340.6's stilted and exacting language; it is for the judiciary to apply and give import and effect to that language.

Appellant asks herein that the Supreme Court clarify the law relating to section 340.6, define the terms of the targeting language, and apply that phrase, ruling that section 340.6 has no application on the facts pleaded in appellant's SAC; in the alternative, she asks the Court to interpret section 340.6 to comport with the Legislature's intent.

II. **In 1977 "Legal Malpractice" Was defined As The Breach of an Attorney's Duty of Due Care, Only.**

Neel (1971). In 1971, in Neel, supra, at pg. 180, the Supreme Court quoted the definition of legal malpractice, with footnotes, as follows:

> "Legal malpractice consists of the failure of an attorney 'to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' (Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal.Rptr. 821, 825, 364 P.2d 685, 689.) [footnote omitted] When such failure proximately causes damage, it gives rise to an action in tort. [footnote omitted] Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. [footnote omitted] Thus legal malpractice generally constitutes both a tort and a breach of contract. [footnote omitted]

In the omitted footnotes, the Supreme Court cited numerous cases, all of which had as their **gravamen, the breach of attorney's duty of due care**. Tellingly, however, the footnotes also cited law review articles, but cited only the pages within each article **discussing "professional negligence" and the attorney's duty of special care – only**. The Supreme Court referenced only an attorney's professional negligence – his duty of special care, breach, causation and damages – in relation to its definition and discussion of "legal malpractice." In Neel, footnote 3, the Supreme Court stated "... see generally Leavitt, The Attorney as Defendant (1961) 13 Hastings L.J. 1, **23-32**; Note (1963) Columbia L. Rev. 1292, **1294-1302**." (Bold added.)

By referencing only the sections of the articles dealing with professional negligence, the Court made clear – as stated in its definition – the term "**legal malpractice**" then (**1971**) meant solely and only **an attorney's breach of his duty to use (special) care** in rendering his professional services and so the gravamen of "**legal malpractice**" was **breach of attorney's duty to use due care** (hereafter a "Due Care Gravamen").

Also as noted above, in 1981 in *Southland*,[9] and in 1995 in *Quintilliani*,[10] the courts quoted *Neel's* definition of legal malpractice. Necessarily, this ***Supreme Court definition*** of "legal malpractice" informed the Legislature's, and all staff's, analysis, discussion and intent in enacting a "legal malpractice" statute, dealing with a "negligent act."

For *Stoll* to claim the Legislature or Mallen redefined legal malpractice is ludicrous – and the Supreme Court's refusal of *sua sponte* review extremely "unfortunate."

III. The Legislative History of Section 340.6.

Submitted in the COA is the legislative history of Assembly Bill 298, the enactment of CCP section 340.6 (hereafter referred to as "RJN" and an appropriate page number(s)).

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[9] *Southland Mechanical Constructors Corporation v. Nixen* (1981) 119 Cal. App. 3d 417, 173 Cal. Rptr. 917

[10] *Quintilliani v. Mannerino* (1998) 62 Cal. App. 4th 54, 64

In all the committee reports, fact sheets and digests relating to Assembly Bill 298 ("AB 298"), the problem to be addressed was "legal malpractice" (with a Due Care Gravamen).

AB 298 had two distinct formats: (1) As introduced by Assemblyman Brown on January 25, 1977, AB 298 used the format of 340.5, with minor variations ("In any action for damages against an attorney based upon the **attorney's alleged professional negligence**, the time for commencement ..." (AB 298, Introduced January 25, 1977) (RJN pgs. 48-49) (bold added); (2) As amended by Assemblyman Brown and reintroduced, and amended by the Assembly on May 9, 1977, AB 298 used the format proposed by attorney Mallen in his article, Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers*, 52 State Bar J. 22 (hereafter "Mallen, *Panacea*"), with the proposed statute of limitations at p. 24 (therein using the "targeting" language of the current statute, "... for a wrongful act or omission ... **arising in the performance of professional services** ...." (AB 298, Amended in Assembly May 9, 1977) (RJN pgs. 50-52) (bold added)). Assemblyman Brown, the State Legislature, all consulting staff personnel and the Governor, believed the two versions targeted the exact same wrong – claims against an attorney for "professional negligence," a Due Care Gravamen.

Legislative Counsel's Digest. In every version of the bill – as originally introduced (when it tracked exactly section 340.5), as amended to

Mallen's proposal (May 9, 1977), and in every subsequent amendment (May 17, 1977, August 17, 1977, and as it was chaptered) (RJN pgs. 48-65) – in each Legislative Counsel's Digest, in identifying the problem to be resolved (the opening such paragraph), the Digest set forth the exact same language for the existing problem: the statutes governing an "attorney's professional negligence" and the delayed accrual (until discovery of the material facts) of such actions (alluding to the holdings of *Neel*, and *Budd*). It's noteworthy that although Assemblyman Brown amended AB 298 to rewrite the bill as Mallen had proposed, the Legislative Counsel's Digest did not change a word of the description of the problem, continuing to reference only an "attorney's professional negligence" and the two year ("based upon a contract, obligation, or liability not founded upon an instrument in writing") and four year ("based upon an instrument in writing") statutes of limitations. (Accord, *Southland*, supra, p. 427).

Appellant alleges that the Legislature "targeted" via Section 340.6 solely and only "claims of legal malpractice" – not claims of fiduciary breaches, and not claims of malicious prosecution!

Assemblyman Brown's Understanding. Because Assemblyman Brown's amendments to AB 298 used the (nearly) exact format as Mallen's proposal, Assemblyman Brown had clearly seen the article (Mallen, *Panacea, supra*), and noted Mallen's assertions that his (Mallen's) proposal was: "a **specifically tailored statute** of limitations for **legal malpractice**"

(Id. at pg. 24), as was enacted in the "**medical malpractice field**" (Id. at p. 22). Appellant suggests Assemblyman Brown adopted Mallen's proposal because it purportedly did exactly the same thing as intended (a statute "tailored" to "legal malpractice"). It's noteworthy that the medical statute, 340.5, since it's 1975 amendment, targeted only "professional negligence" as the cure to the malpractice insurance crisis; It's also noteworthy that the Legislature were concerned at the time with the public criticism of "Legislature lawyers" favoring lawyers over doctors.

Based on Mallen, *Panacea*, there is no basis for any reasonable jurist to conclude that Mallen's proposed statute (which was modified and enacted as 340.6), or Assemblyman Brown's adoption thereof, intended that the statute apply to any cause of action except professional negligence, or a Due Care Gravamen.

On August 31, 1977 (after the bill was passed by both houses), Assemblyman Brown, the original author of AB 298, wrote to Governor Brown (RJN pgs. 29-30), stating in part:

> "I am writing to request your signature on AB 298. This bill creates a new statute of limitations **for legal malpractice actions** in an effort to close off the present **open-ended time frame** allowed for such actions. ¶ AB 298 provides a limitation period of one year from the date of **plaintiff's** discovery of the **negligent act** or four years from the date **such negligent act** was committed, whichever comes first. ... ¶ This measure would bring **legal malpractice statutory limits** more in line with current limitations on medical malpractice actions, and would, moreover, codify relevant

> case law in the area of **legal malpractice**, and provide easier access of attorneys to malpractice insurance."

That is, Assemblyman Brown urged adoption of a "professional negligence" limitations statute, **as had been enacted for medical providers** (which had targeted only professional negligence to alleviate the medical malpractice insurance crisis).

IV. **The Intended Effects of Section 340.6**.

In every version of AB 298, the Legislature had the **exact, identical intentions** as to a legal malpractice statute of limitations:

1. To create a statute of limitations for legal malpractice – only! (In RJN 1-45, the Legislature references only "legal malpractice," acts of negligence, or acts of "professional negligence"; as stated above, "legal malpractice" had only one, limited, specific definition; in Assemblyman Brown's "Fact Sheet," dated March 25, 1977 (RJN 2), which preceded the May 9, 1977 amendment of AB 298 (RJN 48-52), he used the word, "plaintiff," meaning client, in stating "... or one year after the plaintiff discovers... the damage ...."; also, in Assemblyman Brown's August 31, 1977 letter to the Governor, he also used "plaintiff" to mean client, in stating "...one year from the date of **plaintiff's** discovery of the **negligent act ....**")

2. "The purpose of the bill is to reduce the costs of legal malpractice insurance." (RJN 35) It's noteworthy that nowhere in the

Legislative history is there any mention of repose, or stability for attorneys, or that attorneys bear a terrible (or such), unwarranted burden by being sued so often. Rather, the purpose was simply to contain the runaway malpractice insurance costs, which the Legislature did by targeting 100% insurance covered wrongs, professional negligence.

3. To codify a statutory cut off of "later-discovered claims," which the Supreme Court had allowed in 1971 under the "discovery rule" of *Neel* and *Budd.* (RJN 40, 42: Under Comments; "Currently, the statute of limitations in legal malpractice actions is open-ended, since the statute does not begin to run until the negligent act is discovered. This bill places a four-year limit on most causes of action.") This particular rule and purpose was the prime motivation for the Legislature. The discovery rule applied to every action or activity any attorney took. That is, every lawyer-act was prone to a screw up which the client might not learn about for years, and this rule caused insurers to believe they needed bigger reserves, causing the insurers to raise premiums to establish the reserves. Passage of the four year absolute limit, reduced the need for large reserves, containing the premium increases. RJN 38: Under "Statute of Limitations for medical malpractice" "Proponents argue that the time for legislation providing an outer limit for legal malpractice actions has come, and that the special circumstances requiring the tolling of such statute serve both attorney and client interests.")

4. To "provide ... same treatment for attorneys with reference to statute of limitations as now afforded to physicians ...." (RJN 2, 9)

In section 340.5, the Legislature enacted an "action" statute, a "Prince Valiant" statute for lawyers, not a "status" statute (the Prince is good and does only good acts; if he errs it will be 100% covered by Prince's insurance and so the statute will save the **insurer** 100% of all costs saved). Section 340.6 should be interpreted as a Prince Valiant statute, and was until *Stoll* transformed it into a "status" statute. The Legislature intended to treat lawyers the same as doctors.

V. Stoll is "Delusionally Bad" Law, with a "Faux Holding," with "Straw Men" and with Numerous Unsupported/Wrong Conclusions.

The problems raised (but not justified or logically addressed) in *Stoll's* proclamation to the effect that "all" fiduciary breaches are governed by section 340.6, are generally the following:

1. Dicta versus Holding. In the first paragraph of *Stoll, supra*, at p. 1366, under "DISCUSSION," the court "held":

> "... although styled as a breach of fiduciary duty, the misconduct alleged in this case is nothing more than **professional malpractice** subject to the one-year statute." (Bold added.)

Stated otherwise, the gravamen of the *Stoll* action was **held to be** breach of attorney's duty of due care (the court impliedly finding Stoll failed to

disclose to his employer sufficient information so employer could make an informed decision in the purchase of a ski resort); the claimed wrong was therefore a "wrongful ... omission ... arising in the performance of professional services ...." ***Although the action was styled as a fiduciary breach, it was simply legal malpractice.***

In this regard, there was nothing unusual about the holding, and the case was consistent with prior holdings. This "actual holding," however, reduced to *dicta* the statement in the opening paragraph of the *Stoll* decision, at p. 1363-1364 stated:

> "... we hold that the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice **or breach of fiduciary duty is identical**. Unless tolled, **a claim based on either theory falls within the statutory term "wrongful act or omission"** and must be commenced within one year after the client discovers, or with reasonable diligence should have discovered, the facts constituting the act or omission, or four years from the date of the act or omission, whichever occurs first." (Bold added.)

Insofar as the wrongful omission was nothing more than (*Neel* defined) legal malpractice, then the "holding" of the case would only have application to a fiduciary breach which was also a due care breach (as that was all that was before the court), and the actual holding of the case (with appellant rephrasing Stoll's opening paragraph) would be to the effect: An action against an attorney on a claim for legal malpractice, including a

claim for legal malpractice styled as a breach of fiduciary duty, is subject to section 340.6.

2. *Stoll* Created a Straw Man. Stoll ignored (without discussion) the concept of a pleading's gravamen, and instead created a "straw man" – that all claims pleaded as fiduciary breach are exempt from section 340.6 (this is simply untrue). That is, court's regularly look at **every claim's gravamen** (whether pleaded as fiduciary breach, contract breach, etc.), and hold that if the gravamen is attorney's due care breach (from *Neel*), then section 340.6 applies; in this manner, courts regulate many, but-not-all fiduciary wrongs – as intended by the Legislature.

Stoll's "straw man" (all fiduciary breaches are excluded) ignores the **Legislature's specific inclusion of some, but not all, fiduciary breaches**, and *Stoll* then concluded that a "blanket" exception to section 340.6 would destroy the statute.

Stoll's straw man was its justification for omitting the statutory phrase ("arising in the performance of professional services."). The *Stoll* court attempted to destroy the Legislature's carefully crafted targeting phrase – destroying the Legislature's balance of interests – in order to "fix" a "made-up" problem.

Insofar as the words of a statute are to be given such meaning as intended by the Legislature, the Legislature's 1977 statement of the

problem being addressed was legal malpractice, and there is no reference in the legislative records to fiduciary breaches. The legislative records (RJN, p. 1-65) do not support any intent by the Legislature to address the "problem" of fiduciary breaches" (and in 1977 fiduciary breaches were not a problem) (see RJN).

3. Stoll's claim it was using the "*Southland* reasoning" was substantially amiss. That is, *Southland* interpreted the words of the statute, giving to the words a meaning as would save the statute, preventing an interpretation by which the statute would have no effectiveness whatever[11]. *Stoll's* truncation of the statutory language had the effect of extinguishing

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[11] *Southland's* holding that "wrongful act or omission" included wrongs styled as contract breaches was grounded on three tracks, 1) although Mallen's proposal excepted contract breaches, the statute as enacted did not, evidencing Legislative intent to include contract breaches; 2) by definition "legal malpractice," the problem being addressed, was both a tort and contract claim and so you would believe the Legislature was addressing both phases of the wrong; and 3) since the Legislature intended a "reduce malpractice insurance" purpose, and since the statute would have **no effectiveness whatever** (as every late claim could be alternatively filed as a contract breach), the court's choice to interpret the words with the meaning intended by the Legislature was judicial.

The *Southland* court's choice was to give to the words a meaning as apparently intended by the Legislature, thereby giving the statute effectiveness, and to refuse an interpretation by which the statute would have **no effectiveness whatever** (neither the four year occurrence provision, nor the one year discovery provision).

In the *Southland* action, all parties agreed the case was "legal malpractice" and that there was "a wrongful ... omission ... arising in the performance of professional services."

more claims – that is, 15 years after enactment, the *Stoll* court, "re targeted" the statute to extinguish more claims than the Legislature had targeted. The extinguishment of these "non Legislature targeted" claims, made the statute do more – but did not "save" the statute from total ineffectiveness. (This re targeting was also "judicial legislation" in violation of *Samuels v. Mix*, supra, at p. 7.

4. The *Stoll* court either didn't read the legislative records, or specifically, knowingly continued a misrepresentation about the records (and from the phrasing it appears the latter). That is, at p. 1367, the *Stoll* court stated:

> *Southland* found it of "some significance" that the Bill Digest of the Assembly Committee on the Judiciary indicated that the members had **reviewed and considered** a leading article on statutes of limitations for legal malpractice: Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* (1977) 52 State Bar Journal 22.... (Bold added.)

As set forth in the legislative materials, at RJN pgs. 3-6, is the identified, "Bill Digest," which states under COMMENTS (RJN p. 5), "Members of the Assembly Judiciary Committee **have been provided** the detailed analysis of recommended legal malpractice statutes of limitations recently published in the State Bar Journal ...."

Although the mischaracterization of members being "**provided**" a certain document, versus members having "**reviewed and considered**" a

certain document, might be a mild error in some circumstances, here, *Stoll* relied on a sentence and a footnote buried within the article to provide grounds for *Stoll's* conclusion the Legislature **intended** to target more claims for extinguishment and that the "targeting phrase" should be truncated.

5. The *Stoll* court "overemphasized" the Legislature's intent, writing that the Legislature intended to effect "any" legal malpractice, as if there were some secondary or tertiary form of "legal malpractice." *Stoll* used the phrase to bolster its expansion of the section 340.6 targets.

6. The "Context of Malpractice" and a "Precise Definition of Malpractice" – Huh? In addition, although the Supreme Court in Neel defined "legal malpractice," and although all legislative records indicate the Legislature intended to address the "legal malpractice" problem, *Stoll* "created," without explaining, a "context of malpractice," and claimed that in Mallen, *Panacea*, Mallen "precisely defined malpractice" - apparently something other than the *Neel* definition; a reading of Mallen, *Panacea* will convince this Court that, in context, the article attempts no such thing.

These "creative-but-inaccurate" concepts, **from a COA** – and passed on **with Supreme Court approval** are an issue because: Neel set forth the definition of legal malpractice (adopted and used in Southland and Quintilliani, among numerous others), from which the "gravamen"

approach arose, and, by such definition determines whether a matter is or it isn't (like pregnancy) legal malpractice. Additionally, from the identical sentence structures, the targeting phrase of section 340.6 is based upon the definition of legal malpractice, and the full definition of legal malpractice informs the interpretation of the targeting phrase.

Also in addition, all the legislative records identified the problem as (*Neel*) legal malpractice, and none of the records ever mentioned or discussed a "context of malpractice" or spoke of altering the definition of legal malpractice, or spoke of targeting any claims other than legal malpractice (e.g., fiduciary breaches).

7. In *David Welch Welch Co. v. Erskine & Tully* (1988) 203 Cal. App. 3rd 884, the gravamen of the action was not "legal malpractice." It was solely and only a fiduciary breach of loyalty, and the breach occurred years after the professional services (from which the legal malpractice must come into being) were completed. The case doesn't provide any facts to even argue that the gravamen was breach of the due care duty, or that plaintiff's claim was for a "wrongful act ... arising in the performance of professional services."

Stoll ***mis***characterized the *David Welch* holding as "... **distinguish[ing] between legal malpractice which does and does not involve a fiduciary's breach [it does no such thing!]**: 'where a cause of

action is based on a defendant's breach of its fiduciary duties, the four-year catchall statute set forth in Code of Civil Procedure section 343 applies." (*David Welch*, *supra*, 203 Cal. App.3d at p. 893)"

Since there was no legal malpractice to discuss in *David Welch*, there was no distinction to be made!

It's noteworthy that no court previously criticized *Stoll*, while so many (with the Supreme Court's approval) criticized *David Welch*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for Review.

Respectfully submitted,

Dated: August 25, 2014

By: _____
Walter J. Wilson,
Attorney for Petitioner Nancy F. Lee

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains **8,192** words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: _____
Walter J. Wilson

PROOF OF SERVICE BY MAIL

1. I am employed in the County of Los Angeles, State of California. At the time of service I was over 18 years of age and **not a party to this action.**

2. My business address is: 333 West Broadway, Suite 200, Long Beach, CA 90802

3. On August 25, 2014, I served the following document(s): **PETITION FOR REVIEW**

4. I served the documents on the **person or persons** below, as follows:

DIMITRI P. GROSS, ESQ.
LAW OFFICE OF DIMITRI P. GROSS
19200 VON KARMAN AVENUE, SUITE 900
IRVINE, CA 92612

CLERK FOR THE SUPERIOR COURT
SUPERIOR COURT OF CALIFORNIA
700 CIVIC CENTER DRIVE WEST, DEPT. C23
SANTA ANA, CA 92701

CLERK FOR THE COURT OF APPEAL
4TH DISTRICT COURT OF APPEAL, DIVISION 3
601 W. SANTA ANA BOULEVARD
SANTA ANA, CA 92701

OFFICE OF THE ATTORNEY GENERAL
300 S. SPRING STREET, SUITE 1700
LOS ANGELES, CA 90013

5. The documents were served by the following means:

a. **(XX) By United States Mail.** I enclosed the documents in a sealed envelope or package to the persons at the addresses in item 4 and **placed** the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid and mailed at **LONG BEACH, CA.**

Executed this 25th day of August 2014, at Long Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

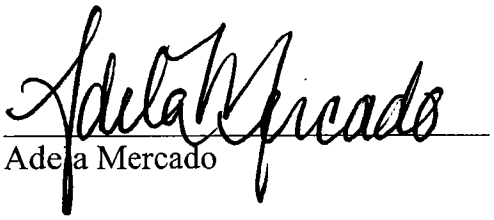
Adela Mercado

PROOF OF SERVICE BY ELECTRONIC DELIVERY

On August 25, 2014, I, Adela Mercado, submitted to the **Supreme Court** an electronic copy in .PDF format of Petitioner Nancy F. Lee's, **PETITION FOR REVIEW** by submitting it to

http://courts.ca.gov/24590.htm

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 25th day of August 2014, in Long Beach, California.



Adela Mercado

APPENDIX: OPINION OF COURT OF APPEAL

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.