Case No. S282866

IN THE SUPREME COURT
STATE OF CALIFORNIA

DANIEL ESCAMILLA,
Plaintiff and Appellant/Petitioner,

v.

JOHN FITZPATRICK VANNUCCI,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION 1, CASE A166176
HON. TARA DESAUTELS, JUDGE, ALAMEDA SUP. CT. CASE NO. RG21111193

OPENING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

Petitioner hereby certifies that he is not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

DATED: February 27, 2024

/s/ Daniel Escamilla
Daniel Escamilla

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Treatises

ISSUE PRESENTED

What statute of limitations applies to a malicious prosecution action brought against an attorney when the claim does not arise from an attorney-client relationship?

SUMMARY OF ARGUMENT

In a published opinion, the Court of Appeal chose between two conflicting lines of decisions to find that a specific one-year statute of limitations applied when a malicious prosecution defendant is an attorney, even while acknowledging that the less protective two-year statute of limitations would apply when a malicious prosecution defendant is a member of any other group or class of occupation. The Court of Appeal affirmed that incongruent result by applying the one-year limitation of section 340.6 of the Code of Civil Procedure, a statute designed as a shelter to reduce costs of errors and omissions (E&O) insurance coverage for legal malpractice claims against attorneys.[1] The Court of Appeal rejected prior controlling law on the other side of the split, which holds that section 340.6 is *not* applicable to malicious prosecution actions:

> [T]he applicable statute of limitations for malicious prosecution is the two-year period supplied by Code of Civil Procedure section 335.1, "irrespective of whether the party being sued for malicious prosecution is the former adversary . . . or the adversary's attorneys . . . ."

Parrish v. Latham & Watkins, 238 Cal.App.4th 81, 86 n. 2 (2015) (*Parrish I*), aff'd without reaching limitations issue, *Parrish v. Latham & Watkins,* 3 Cal.5th 767, 775 (2017) (*Parrish II*), quoting *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC,* 225 Cal.App.4th 660, 668 (2014) (*Roger Cleveland*), disapproved only "to the extent . . . inconsistent" in *Lee v.*

[1] All further undesignated statutory references are to the California Code of Civil Procedure.

Hanley, 61 Cal.4th 1225, 1239 (2015) (*Lee*). *Parrish I* was affirmed without reaching the limitations issue. *Parrish II*, 3 Cal.5th at 775.

In deciding *Roger Cleveland,* Justice Aldrich set forth a comprensive analysis of the legislative history and background of the statute.[2] The ultimate conclusion of *Roger Cleveland* that section 340.6 is inapplicable to claims filed against a former litigation adversary's attorney is both supported and sound. In a note containing a limitation, *Lee* had "disapprove[d]" *Roger Cleveland* "to the extent [it was] inconsistent with [our] opinion" (*Lee*, 61 Cal.4th at 1239). In all other respects, the ultimate conclusion of *Roger Cleveland* remains undisturbed:

> In particular, *Lee* criticized *Roger Cleveland 's* premise that section 340.6(a) should be understood " 'as a professional negligence statute' " (*Lee*, at p. 1239, 191 Cal.Rptr.3d 536, 354 P.3d 334)—without analyzing *Roger Cleveland 's* ultimate conclusion that section 340.6(a) is inapplicable to claims filed against a former litigation adversary's attorney.

Parrish II, 3 Cal.5th at 775 (emphasis added). The Court of Appeal was misled into the contrary view by inaccurate decisions and pleadings that have mischaracterized this Court's holding in *Lee* as entirely disapproving of *Roger Cleveland*.

Justice Aldrich's ultimate conclusion in *Roger Cleveland* is the only reading of section 340.6 that would allow the statute, as applied, to comport with the Equal Protection clauses of both the California and United States Constitutions. That reading provides equal protection of the law of the same two-year limitation to *all* citizens, regardless of occupation, who violate the *non*-professional obligation (applicable to all persons) to avoid engaging in the intentional tort of malicious prosecution.

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[2] *Roger Cleveland* was decided by a panel that included Justice Aldrich (author), Justice Klein and Presiding Justice Croskey.

STATEMENT OF THE CASE

This review follows the Court of Appeal's published decision affirming the trial court's order granting Respondent John Vannucci's ("Respondent") Special Motion to Strike Appellant/Petitioner Daniel Escamilla's ("Petitioner") complaint for malicious prosecution. The trial court had ruled that Petitioner's lawsuit was barred under the one-year statute of limitations for attorney malpractice claims in Code of Civil Procedure section 340.6, even though Petitioner had never been in an attorney-client relationship with the defendant attorney. The Court of Appeal affirmed, and this Court granted review on January 31, 2024. In this appeal, Petitioner argues the two-year statute for tort claims in Code of Civil Procedure section 335.1 governs his malicious prosecution claim against Respondent, a determination that would conform to the ultimate conclusion of *Roger Cleveland* as set forth above.

STATEMENT OF FACTS

This action began with a fugitive recovery operation on September 1, 2012.[3] Petitioner and his partner, Adam Haslacker ("Haslacker") both duly authorized and experienced California fugitive recovery agents, received a tip from a confidential informant, that a dangerous gun-carrying fugitive gang member with a "no bail" felony warrant for narcotics trafficking (an individual that Petitioner had been contracted to arrest) was being harbored by his brother, Defendant Andy Yu Feng Yang, and sister-in-law, Defendant Lan Ting Wu, at a marijuana-grow house in Oakland where they lived

[3] CT Vol 3, pg 714.

with their toddler son.[4] See *Escamilla v. Vannucci,* Cal.App.5th [2023 Cal.App.Lexis 878] (Oct. 23, 2023, A166176), at ¶ 2 (*Escamilla*) ("[t]he parties do not dispute that in September 2012, [Petitioner] and his associate searched the residence . . . for Yang's brother, who had skipped bail on a drug charge.").

After conducting more than twelve (12) hours of surveillance on the inner-city Oakland residence, Haslacker and Petitioner observed the garage door open and their target, Yuteng Yang, standing inside the open garage of the Oakland residence. The fugitive was positively identified by Haslacker and Petitioner, each using binoculars.[5]

Petitioner immediately notified the Oakland police that they were about to enter the building. After being advised that no police patrol units were available to assist, Petitioner and his partner entered the garage identifying themselves as fugitive recovery agents, keeping their firearms drawn and in the low-ready position. While Petitioner's partner stayed in the garage with the fugitive's brother, sister-in-law, and their toddler son, Petitioner entered and searched the 2-story home room by room. [6]

Petitioner was unable to locate the fugitive and it was later determined that while Petitioner was searching the upstairs area, the fugitive had escaped out of the back yard using a ladder which was resting against the rear fence to scale the fence.[7]

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[4] *Id.* Yuteng Yang was arrested for trafficking a large volume of marijuana and narcotics and released on a $250,000.00 bail bond. Bail was later forfeited when Yuteng Yang failed to appear in court and a no-bail felony warrant issued. This warrant was recorded in the National Crime Information Center (NCIC) and Yuteng Yang was therefore deemed a fugitive under California law. *Id.*

[5] CT Vol. 3, pg. 714.

[6] *Id.*

[7] *Id.*

Subsequently, Defendant Andy Yang, through false statements made in court filings, obtained a Temporary Restraining Order ("TRO") against Petitioner. Petitioner appeared at the Oakland hearing with Haslacker and, after hearing testimony, the judge vacated the TRO and ordered Yang to pay $2,000.00 for Petitioner's court and travel costs. Yang, furious about the outcome of the TRO hearing, then hired Respondent John Fitzpatrick Vannucci ("Respondent") as his attorney.

Respondent filed a Superior Court Complaint in the San Francisco Superior Court seeking $2,500,000 in general damages, $225,000 in special damages (including alleged medical expenses) and $8,000,000 in punitive damages for each of his three clients.[8] This lawsuit claimed a total of $32,175,000 in damages against Petitioner and formed the basis for the malicious prosecution action at issue here.[9]

In the original action brought by Respondent, Petitioner successfully brought a motion to transfer the matter from the San Francisco venue selected by Respondent to Orange County, based on Respondent's improper venue selection at the time of the filing of the original action. An order transferring the case to Orange County was issued on November 18, 2015. The original complaint and the first amended complaint filed by Respondent each included a cause of action alleging that Petitioner acted with racial animus under the Ralph Act. (CT Vol. 1, pgs. 18, 144.) This cause of action was abandoned after Petitioner's final demurrer was sustained, where the Court found that there was insufficient evidence alleged in the cause of action. (CT Vol. 1, pg. 160.)

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[8] CT Vol. 1, pgs.31-39 (Statement of Damages, attached to Complaint for Damages,).

[9] *Id.*

The complaint also contained a cause of action for battery, which was maintained through the jury trial, despite the deposition testimony of Respondent's clients that they were not touched at all by Petitioner or his partner. In the jury trial, Respondent argued that 18 million dollars in damages should be awarded against Petitioner, after Respondent had initially asserted a total of 24 million dollars sought against Petitioner.[10]

After quick deliberations, the jury issued its verdict, completely rejecting Yang's claims against Petitioner, finding that "…Daniel Escamilla's conduct was lawful and consistent with community standards." (CT Vol. 1, pg. 201.)

In a cross-complaint filed in the underlying lawsuit by Petitioner against Yang, the jury also found that Yang, by filing a frivolous TRO against Petitioner, engaged in the "wrongful use of legal process [by] civil harassment proceedings resulting in a temporary restraining order against [Petitioner]." (CT Vol. 3, pgs. 640-644.) The jury awarded Petitioner out-of-pocket losses of $10,000 and injury to reputation damages of another $10,000, resulting in a final judgment against Yang for $20,000.[11]

After this jury verdict, Petitioner filed a malicious prosecution case against Respondent and his clients within two (2) years of the final judgment on the underlying jury verdict. Leading to the issue presented, Respondent then brought a Special Motion to Strike the malicious prosecution causes of action against him under section 425.16 (Anti-SLAPP motion) claiming that as an attorney, he was entitled to a shorter one-year statute of limitations for malicious prosecution. (CT Vol 2, pg. 321.)

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[10] Respondent represented this amount as the total in the Statement of Damages attached to the underlying Complaint for Damages. CT Vol. 1, pgs. 31-33.

[11] CT Vol. 3, pgs. 640-644; Vol 3, pg. 456; Vol 1, pg. 201, 203 (Amended Jury Verdict).

The trial court agreed, finding that the section 340.6(a) one year statute of limitation applies when the malicious prosecution defendant is an attorney, and dismissed Respondent from the malicious prosecution action. (CT Vol 4, pgs. 789-794.)

Petitioner timely appealed, contending that section 335.1 sets out the statute of limitations for malicious prosecution actions against attorneys where the action *does not arise out of an attorney-client relationship* and noted that "[w]hich statute of limitations governs in this situation is a legal issue subject to our de novo review." *Vafi v. McCloskey* 193 Cal.App.4th 874, 880 (2011). Nevertheless, the Court of Appeal affirmed, relying upon an erroneous legal analysis by other decisions that overextended this Court's holding in *Lee*, inconsistent with this Court's limited disapproval of *Roger Cleveland*.

ARGUMENT

I. The Language and History of Section 340.6 Show That it Was Designed to Reduce Costs of E&O Insurance Policies for Legal Malpractice, a Type of Policy That Does Not Cover (and In California Is Prohibited from Covering) Intentional Torts

A. Section 340.6 Adopted the Same Terms Used in "Errors and Omissions" (E&O) Policies for Wrongful Acts or Omissions In Client Relationships

"In making a determination as to which statute of limitations applies to malicious prosecution actions, we begin our analysis with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. . . . We look first to the words of the statute itself as the most reliable indicator of legislative intent." *Stavropoulos v. Superior Court,* 141 Cal.App.4th 190, 195 (2006) (*Stavropoulos*). Section 340.6, subdivision a, provides that the statute covers "[a]n action

against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." (section 340.6(a) (emphasis added)).

By its plain language, section 340.6 uses the same terms and structure used in the insurance industry for policies for Lawyers Professional Errors and Omissions (E&O) insurance, also known as Lawyers Professional Liability (LPL) insurance or generally "legal malpractice" insurance, for liability arising from the performance of professional services for others. With respect to determining the scope the foregoing underlined terms provided in the statute, authorities in E&O coverage cases are instructive, because E&O insurance policies use some of the same phrasing and terms that appear in section 340.6. *See, e.g.*:

> A. COVERAGE PROVISION:
>
> We will pay on behalf of the insured damages that the insured becomes legally obligated to pay because of claims made against the insured for wrongful acts arising out of the performance of professional services for others.
> ...
> "Professional Services" means services performed for others in the Insured's capacity as an insurance agent, insurance broker…
> "Wrongful Act" means any actual or alleged negligent act, error or omission, Personal Injury, or Advertising Injury.
> …
> This policy does not apply to any claim . . . arising out of any dishonest, fraudulent, criminal, or malicious act, error, or omission or acts of a knowingly wrongful nature committed by or at the direction of any insured. . . ..

Matthew T. Szura & Co. v. Gen. Ins. Co. of Am., 543 F. App'x 538, 540 (6th Cir. 2013) (emphasis added, bold removed).[12] Professional E&O policies in California are designed

[12] This example is cited not as legal authority, but to illustrate the nature and scope of E&O insurance coverage. The Court may take judicial notice that E&O insurance cases involve a similar type of "scope of coverage" review that a statutory interpretation of

to indemnify a person for liability stemming from performance of professional services and, other than outlier policies, the enforcement of which is questionable, are not designed to indemnify intentional torts like malicious prosecution.

Consistent with the insurance language focus of the statute's appropriate interpretation, this Court in *Lee* recognized that the Legislature had borrowed language from an article which had suggested that the phrase "wrongful act or omission" should be used in place of the word "malpractice." *Lee*, 61 Cal.4th at 1235. "Legal malpractice is best stated in terms of the actual wrong: a wrongful act or omission occurring in the rendition of professional services." *Id.* (quoting Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* 52 Cal. State Bar J. 22, at p. 77 (1977)).

It is these more precise terms that appear in E&O policies, and the Legislature adopted the terms of art used in the insurance industry when it enacted the statute. This aligned the statute with its intent shown in the statute's legislative history—namely, to reduce the costs to attorneys of insurance coverage for legal malpractice claims arising in the performance of professional services provided to others.

B. Professional Liability Coverage Expressly Excludes Coverage of Liability for Intentional Torts Like Malicious Prosecution

Such E&O insurance coverage does not typically include claims *outside* of the scope that this Court found applicable in *Lee*. In California, insurance policies purporting to indemnify against liability from intentional torts are prohibited as a matter of public policy. In *Maxon v. Security Ins. Co.,* 214 Cal.App.2d 603 (1963) and in *State Farm Fire*

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section 340.6 requires here, based upon the Legislature's decision to craft a statute which uses virtually identical language to that is found in E&O insurance policies for attorneys.

Casualty Company v. Drasin, 152 Cal.App.3d 864 (1984) (*Drasin*), it was held that insurance coverage for a malicious prosecution claim was precluded by public policy as codified in California Insurance Code section 533 (precluding insurance coverage for intentional torts). *See* Cal. Ins. Code § 533 ("An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."); *Downey Venture v. LMI Ins. Co.,* 66 Cal. App. 4th 478, 499-500 (1998). Even in policies that purport to include such coverage, California Insurance Code section 533, acts as "an implied exclusionary clause which, by statute, must be read into all insurance policies." *Id.*

Indemnification of claims for malicious prosecution is precluded in California. *Id.*, at 518. *See Maxon*, 214 Cal.App. 2d at 615:

> However, while the appellant might be legally obligated to pay damages for malicious prosecution, the respondent insurer cannot under the public policy of this state indemnify the insured against liability for his own willful wrong. That policy is a part of every insurance contract and is expressed in section 533 of the Insurance Code, which codifies the general rule that an insurance policy indemnifying the insured against liability due to his own willful wrong is void as against public policy.

Id.; see also, Drasin, 152 Cal.App.3d at 860. Thus, the policy consideration relied-upon by those courts that have found the intent of the statute to cover such claims—the reduction of an attorney's costs for liability coverage if a shorter statute of limitations is applied for malicious prosecution—is nonexistent. Although there are some situations where costs of defense may be covered, a limitations shelter for intentional torts, contrary to public policy, could not have been the intent of the Legislature.

C. The Legislative History of Section 340.6, as Discussed in *Lee*, Reveals That the Statute Was Specifically Intended for Legal Malpractice Claims

This Court in *Lee* conducted an exhaustive legislative intent analysis, concluding with the finding that Section 340.6 had been advanced in the Legislature as a new statute of limitations for claims of legal malpractice. *See Lee*, 61 Cal.4th at 1233 (citing authorities to note that 340.6(a) was enacted "amid rising *legal malpractice* insurance premiums" and that the "increase in premiums was due in part to two features of the law that had produced uncertainty surrounding the limitations period for claims of *legal malpractice*.") (emphasis added). The legislative history has long referenced the statute as a "statute of limitations for legal malpractice claims." *See, e.g.:*

> All legislative history subsequent to the May 9, 1977 amendment continued to speak of the bill as creating a statute of limitations for legal malpractice claims. [citations]. see also *Roger Cleveland, supra*, 225 Cal.App.4th at p. 681 . . . ["all the subsequent legislative material that we have reviewed referred to what became section 340.6 as a statute of limitations for legal malpractice"].
>
> In a letter urging Governor Brown to sign the bill, the bill's sponsor wrote: "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." (Assemblyman Willie L. Brown, Jr., letter to Governor Edmund G. Brown, Jr., Aug. 31, 1977, p. 1.) Governor Brown approved Assembly Bill 298 on September 16, 1977.

Lee, 61 Cal.4th at 1235-36 (emphasis added). The fact that the historical record refers to this bill as "a new statute of limitations for legal malpractice actions...," up through the bill sponsor's final letter before Governor Brown's approval, is a clear indication of the legislative intent that the new statute of limitations applied to legal malpractice actions.

II. A Split of Interpretations Grew Out of a Misapprehension of the Limited Scope of *Lee's* Partial Disapproval of the *Roger Cleveland* decision, which correctly applied the Two-Year Statute of Limitations of Section 335.1 to Malicious Prosecution Actions Brought Against Attorneys by Non-Clients

Even after the enactment of section 340.6(a), California cases examining the legislative history have held that a two-year limitations period applies for claims for injuries to the person set forth within section 335.1, and that this two-year limitations period is applicable to malicious prosecution actions:

> We therefore conclude that the Legislature intended the phrase 'injury to, or for the death of, an individual caused by the wrongful act or neglect of another' to be interpreted as embracing all infringements of personal rights, including malicious prosecution, and intended the two-year limitations period set forth in section 335.1 to apply to malicious prosecution actions.

Stavropoulos, 141 Cal.App.4th at 197.[13] From review of the current split below, several pleadings and decisions from other post-*Lee* cases opened the chasm by inaccurately characterizing *Roger Cleveland* (in reality, disapproved only "to the extent" inconsistent with *Lee*) as "overruled," or otherwise "expressly disapproved" *without qualification*. This served to remove from legal analysis or effective consideration that portion of *Roger Cleveland* that was *not* inconsistent with *Lee*—including *Roger Cleveland's* ultimate conclusion that section 340.6(a) is inapplicable to claims filed against a former litigation adversary's attorney.

The Court issued a clarification of its *Lee* holding, as to *Roger Cleveland,* in *Parrish II.* The Court pointed out that *Lee* had been determined "without analyzing *Roger*

[13] *See also, e.g., Bellows v. Aliquot Associates, Inc.,* 25 Cal.App.4th 426, 429 (1994); *Feld v. Western Land Development Co.,* 2 Cal.App.4th 1328, 1334 (1992); *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.*, 202 Cal.App.3d 330, 334 (1988); *Storey v. Shasta Forests Co*., 169 Cal.App.2d 768, 769-770 (1959).

Cleveland's ultimate conclusion that section 340.6(a) is inapplicable to claims filed against a former litigation adversary's attorney." *Parrish II*, 3 Cal.5th at 775 (emphasis added). Nevertheless, courts are still divided after *Lee*, with the erroneous side of the split contending that a shorter limitations period applies to some, but not all, similarly-situated malicious prosecution defendants:

> [W]here the malicious prosecution defendant is an attorney, there is a split of authority as to whether the specific one-year limitations period applicable to actions against attorneys (§ 340.6) prevails over the more general "catch-all" two-year limitations period.

Area 55, LLC v. Nicholas & Tomasevic, LLP, 61 Cal.App.5th 136, fn 29 (2021) (emphasis added). Of importance here in resolving the split is that *Lee* did not concern a claim against a former litigation adversary's attorney. Instead, *Lee* was a case against an attorney (Hanley) by his former client (Lee). "Lee sued Hanley for breach of contract, breach of fiduciary duty, and related equitable violations." *Lee,* 61 Cal.4th at 1242. *See Connelly v. Bornstein,* 33 Cal.App.5th 783, 791 (2019) (*Connelly*) (describing *Lee* as an opinion "discussing the scope of section 340.6(a) as applied to a claim seeking the return of advanced but unearned attorney fees" by the attorney's former client).

Accordingly, *Lee* determined only the parameters of when section 340.6(a) would apply within the "attorney-client" context, which is the same context that would give rise to a normal legal malpractice E&O insurance claim. "It is axiomatic that cases are not authority for propositions not considered." *In re Marriage of Cornejo,* 13 Cal.4th 381, 388 (1996); *see also Ulloa v. McMillin Real Estate & Mortgage, Inc.,* 149 Cal.App.4th 333, 340 (2007). Even within the attorney-client context, the Court *did* consider

conversion, and, in the same fashion that E&O insurance would ordinarily be found not to cover an intentional tort, the Court found that section 340.6(a) did not apply:

> Of course, Lee's allegations, if true, may also establish that Hanley has violated certain professional obligations, such as the duty to refund unearned fees at the termination of the representation (Cal. Rules of Prof. Conduct, rule 3–700(D)(2)), just as an allegation of garden-variety theft, if true, may also establish a violation of an attorney's duty to act with loyalty and good faith toward a client. But because Lee's claim of conversion does not necessarily depend on proof that Hanley violated a professional obligation, her suit is not barred by section 340.6(a).

Lee, 61 Cal.4th at 1240 (emphasis added).

A. The Court of Appeal's Decision Was Internally Inconsistent Because It Was Required to Grapple With Roger Cleveland's Correct Conclusion That "The Legislature Actually Intended 'Plaintiff' to Mean 'Client,' and Reached the Wrong Conclusion in Finding That the Statute Does Not Apply to Third-Party Actions Against Attorneys for Malicious Prosecution"

In reaching the opposite conclusion on a different type of intentional tort (malicious prosecution), the Court of Appeal decision was forced to be internally inconsistent, interpreting the word "plaintiff" in section 340.6(a) differently depending upon which issue it was addressing. Taking the erroneous side of the split led to this inconsistency, because section 340.6(a) when read in its totality suggests that the term "plaintiff," in that context, was meant to reference a plaintiff who was the "client" of the defendant attorney. *See Roger Cleveland*, 225 Cal.App.4th at 680 ("The tolling provisions in section 340.6, subdivision (a)(1) through (3) refer to "plaintiff" but mean "client."); *Id.* ("The language in section 340.6, subdivision (a) refers to 'plaintiff' but in context means 'client' and incorporates legal malpractice principles of delayed discovery and 'actual injury' accrual that do not apply in a malicious prosecution action against

attorneys."). *See* section 340.6(a)(2) (tolling applicable when "[t]he attorney continues to represent the plaintiff"); section 340.6(a)(5) (tolling applicable when "[a] dispute between the lawyer and client concerning fees, costs, or both is pending resolution . . .") (emphasis added). The foregoing underlined terms provide strong evidence that the Legislature intended the overall statute to apply only to situations where the attorney formerly represented the plaintiff—*i.e.* malpractice actions.

By an erroneous presumption that section 340.6(a) was *not* intended for the attorney-client context, the Court of Appeal was forced into the contortions of defining the statute's use of the term "plaintiff" differently within the same decision, depending upon which subsection of the statute that it was addressing. *See Escamilla,* Cal.App.5th [2023 Cal.App.Lexis 878, *13] at ¶ 5 ("The statute of limitations applies when 'the plaintiff'—not the client—discovers a wrongful act 'arising in the performance of professional services'") (emphasis added). Compare *Escamilla*, ¶*5* at n. 5 ("section 340.6 has a different tolling provision for situations in which the attorney continues to represent 'the plaintiff'") (emphasis added); *Id.* at ¶ 16 ("tolled during the time '[t]he attorney continues to represent the plaintiff…'"). The Court of Appeal, after finding that "plaintiff" did not mean "client," later concluded for a later subsection that "[a] plain reading of this provision demonstrates that it is limited to situations where 'the plaintiff' is in an attorney-client relationship with the defendant attorney.") (emphasis added). The contrary findings cannot be reconciled. "It is a familiar principle of construction that a

word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended."[14]

Finally, the Legislature's use of the phrase "arising in the performance of professional services" (section 340.6(a), emphasis added), rather than "arising out of the performance of professional services," is significant in interpretation of section 340.6(a). The phrase "arising in connection with" has been interpreted as being limited to the privities to a contract. *See, e.g. Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("…'arising in connection with' reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract"). This suggests that section 340.6 is limited in application to those actions against an attorney by persons who have been in privity of contract with the attorney.

B. *Lee's* Determination that the Intentional Tort of "Conversion" Is Not Encompassed by Section 340.6 Similarly Indicates that the Intentional Tort of "Malicious Prosecution" Is Not Encompassed by Section 340.6

The statute's clarifications in the tolling subsections suggesting that "plaintiff" refers to a "client" should not be disregarded, for these references provide necessary context for interpretation of the plain language of the statute. In *Lee,* in categorizing different types of claims, the Court announced the following interpretation of the statute:

> We hold that section 340.6(a) applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation—that is, an obligation the attorney has *by virtue of* being an attorney—in the course of providing professional services.

[14] *Pitte v. Shipley* 46 Cal. 154, 160 (1873).

Lee, 61 Cal.4th at 1237 (italics in original, underline added). The Court referenced "professional obligation" in this context to mean:

> …an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.

Id. Confining the statute to actions brought by a party to the attorney-client relationship makes sense, because an attorney simply does not have a special relationship with an opposing party. Without a special relationship, *i.e.*, an attorney-client relationship, there can be no special duty of care "arising in the performance of professional services" as section 340.6(a) requires. This special duty of care of an attorney towards a client is distinguished from the *general duty of care* applicable to all persons as codified in California Civil Code section 1708.[15] The duty to refrain from malicious prosecution is an obligation shared by all persons and not an obligation held "by virtue of being an attorney." *Id.* The general rule in California is that while attorneys owe a professional duty to their clients, and may be held legally liable for a breach of that duty, attorneys owe no such duty to persons and entities they do not represent.[16] While an attorney has a duty under the California Rules of Professional Conduct, Rule 3.1, to not bring or

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[15] "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." Civil Code, § 1708.

[16] There is no general duty for an attorney to protect the interests of non-clients. *Fox v. Pollack,* 181 Cal.App.3d 954, 961 (1986) ("an attorney has no duty to protect the interests of an adverse party [citations] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client.").

continue an action without probable case, the intentional tort of malicious prosecution arises from common law rather than professional rules.[17]

The Court of Appeal chose to issue a decision on the other side of the split by following *Connelly* and *Garcia,* each of which misapprehended the nature of *Lee's* quite specific and narrow disapproval of *Roger Cleveland*. *See Escamilla*, at ¶¶ 8-15, citing *Connelly,* 33 Cal.App.5th 783, and *Garcia v. Rosenberg,* 42 Cal.App.5th 1050 (2019). Yet in *Lee,* this Court had cautioned against an overextension of that limited disapproval, when it ruled that while it may be true that section 340.6(a) applies to claims *other* than strictly professional negligence (the Court's note in qualification of *Roger Cleveland*), it still does *not* apply to claims that do not necessarily depend on proof that the attorney violated a professional obligation:

> Thus, while section 340.6(a) applies to claims other than strictly professional negligence claims, it does not apply to claims that do not depend on proof that the attorney violated a *professional* obligation.

Lee, 61 Cal.4th at 1228 (italics in original, underline added).

C. Proof at Trial of the Intentional Tort of Malicious Prosecution Does Not Depend on Proof that the Defendant Violated a Professional Obligation, Irrespective of Whether the Defendant Is an Attorney or a Non-Attorney

Just as this Court determined in *Lee* when providing the example of a claim for conversion ("whose ultimate proof at trial may not depend on the assertion that [attorney]

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[17] A violation of a State Bar Rule does not establish civil liability. The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. (See *Ames v. State Bar,* 8 Cal.3d 910, 917 (1973).) Because the rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond,* 35 Cal.App.4th 1070, 1097 (1995).)

violated a professional obligation," *Id.* at 1230), a malicious prosecution claim does not necessarily depend on proof at trial that the attorney violated a professional obligation. That is because the duty to avoid engaging in malicious prosecution (*or* conversion) is a *non*-professional obligation held by everyone, regardless of occupation as attorney or non-attorney.

Moreover, even under the hypothetical premise that "malicious prosecution" must be treated as a claim restricted to attorney defendants (it is not, and instead is an intentional tort that can be committed by both attorneys and non-attorneys), it still would not "necessarily" depend on proof that the attorney violated a professional obligation. *Lee,* 61 Cal.4th at 1237. Rule 3.1 of the Rules of Professional Conduct ("Meritorious Claims and Contentions") would be the professional obligation most closely related to the tort of malicious prosecution. Subsection (a)(1) of that Rule provides that a lawyer shall not "bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." When prosecuting that Rule against attorneys, the State Bar carries the burden of proof at trial and "must prove culpability by clear and convincing evidence." *See* Rules of Procedure of the State Bar of California, Rule 5.103.

Malicious prosecution, in contrast, is an intentional tort which in California consists of three (3) elements: "The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice." *Parrish II,* 3 Cal.5th at 775-776. A

plaintiff must prove these elements by a preponderance of the evidence.[18] Because a violation of Rule 3.1 has a higher burden of persuasion ("clear and convincing evidence") than the tort of malicious prosecution ("preponderance of the evidence"), an attorney could foreseeably be found liable for the tort of malicious prosecution without that finding necessarily "depend[ing] on proof" that the attorney "violated a professional obligation." *Lee,* 61 Cal.4th at 1237. The fact that even a *non*-attorney may be found liable for the tort of malicious prosecution (which *all* persons have a *non*-professional obligation to avoid) makes clear that this tort is excluded from application of section 340.6(a).

III. Interpreting Section 340.6 to Provide Differing Limitations Periods Based on Occupation Would Violate Equal Protection Guarantees

Finally, it is relevant that the Equal Protection clauses of both the California and United States Constitutions require that laws be applied consistently. The Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. California similarly affords "equal protection of the laws." CA Constitution art I § 7. If a statute purports to provide the shelter of a reduced limitations period for liability, then all persons, regardless of occupation, should be afforded the same reduced period. *See, e.g., Gray v. Sanders,* 372 U.S. 368, 371 (1963) ("all who participate in the election are to have an equal vote . . .

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[18] California Evidence Code section 115 ("Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."). "Even where the theory of the [civil] case involves the accusation of a crime, the burden of proving the crime . . . is met by a preponderance of the evidence; *i.e.*, the high degree of proof demanded in criminal cases is not required in civil cases even on the issue of a crime." Witkin, *California Evidence* § 36, at 185 (4th ed. 2000) (citations omitted).

whatever their occupation . . . This is required by the Equal Protection Clause of the Fourteenth Amendment"). *See also Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 305 (1945) ("a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations . . . The Act in question was a general one, applying to all similarly situated persons or transactions, and did not violate the equal protection clause of the Fourteenth Amendment.") (emphasis added).

Applying the view of the erroneous side of the split, to find a one-year statute of limitations for a person holding the occupation of attorney but a two-year statute of limitations for a person holding any other occupation, for the *same* claim of liability for the intentional tort, does not comport with Equal Protection. No rational basis or legitimate government interest is served by protecting a preferred group who commits an intentional tort intended to harm. The special protection afforded to attorneys, based solely on occupation, contradicts the core principle contained in both Constitutions that all people must have equal protection under the laws.

Attorneys are active participants in malicious prosecutions, so providing them a limitations shelter for this tort is akin to providing CPAs a shelter for financial fraud. Neither would advance public policy, and the Legislature could not have intended unequal limitations periods for the same tort based on occupation.

Upholding the decision below would render section 340.6 unenforceable as a violation of Equal Protection. The Court should definitively conclude that a consistent two-year statute of limitations applies equally to all malicious prosecution defendants regardless of occupation.

As noted in *Parrish I* in adopting the view of *Roger Cleveland,* "[c]onsidering the statutory language, the legislative history, the applicable public policy, and the interests of interpreting a statute to avoid absurd results, we concluded Code of Civil Procedure section 340.6 does not apply to malicious prosecution actions." *Parrish I*, 238 Cal.App.4th at 95 (emphasis added), citing *Roger Cleveland,* 225 Cal.App.4th at 668.

Significantly, *Lee* did not disapprove of that "ultimate conclusion" of *Roger Cleveland*, as this Court later noted in *Parrish II*, 3 Cal.5th at 775, and the conclusion reached by the *Roger Clevland* court is the only conclusion that would comport with the language and history of the statute, in its totality, for the reasons set forth herein.

IV. Conclusion

For the foregoing reasons, the Court of Appeal's decision affirming dismissal of Petitioner's malicious prosecution claim must be reversed. The lower courts improperly applied section 340.6 to shorten the statute of limitations and award attorneys' fees. This directly contradicts legislative intent, prior caselaw, and constitutional equal protection principles.

The ultimate conclusion in Roger Cleveland—which Lee did not fully disapprove—remains sound: section 340.6 does not govern malicious prosecution claims against a former adversary's lawyer. The statute aimed to curb rising malpractice insurance costs, but public policy bars coverage for intentional torts like malicious prosecution. Neither the language and history of 340.6 nor precedent supports restricting access to justice for certain plaintiffs based on a defendant's occupation.

Equal protection demands a consistent two-year statute to all defendants. Denying non-attorneys the same limitations shelter irrationally favors one profession over another for identical misconduct. Such unequal treatment cannot stand.

This Court should definitively hold that section 335.1's general tort period applies when attorneys face liability for acting beyond professional obligations. Unjustified expansion of 340.6's coverage flouts legislative intent and constitutional rights. Petitioner respectfully urges reversal of the judgment below to realign application of this statute with statutory construction principles and fundamental fairness.

DATED: February 27, 2024

Respectfully submitted,

/s/ Daniel Escamilla
Daniel Escamilla
Plaintiff and Appellant/Petitioner in Pro Se

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I hereby certify that pursuant to California Rule of Court, Rule 8.204(c)(1) this brief is produced using 14-point Times Roman type including footnotes and contains approximately 6,523 words, as counted by the Microsoft Word word-processing program used to generate the brief, which is less than the total words permitted by the Rules of Court.

DATED: February 27, 2024

/s/ Daniel Escamilla
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The Honorable Tara M. Desautels, Presiding Judge, Superior Court of California, County of Alameda, Dept. 1, 1225 Fallon St Oakland, CA 94612 (mail service)

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

/s/ Jessica Reyes
Jessica Reyes

STATE OF CALIFORNIA
Supreme Court of California

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