No. S220775

In the Supreme Court

OF THE

State of California

NANCY F. LEE,

Plaintiff and Appellant,

v.

WILLIAM B. HANLEY,

Defendant and Respondent.

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division Three
No. G048501

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENT

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the Association of Southern California Defense Counsel (hereafter ASCDC or Association) submits this application for leave to file the accompanying amicus curiae brief in support of Respondent William B. Hanley and respectfully urges this court to reverse the Court of Appeal's published opinion in *Lee v. Hanley* (July 15, 2014, as mod. Aug. 8, 2014, G048501) 227 Cal.App.4th 1295.

ASCDC is a voluntary membership association consisting of approximately 1,100 attorneys, among whom are some of the leading trial

lawyers of California's civil defense bar. ASCDC's members routinely represent and defend professionals, businesses, civic and religious institutions who provide the goods, services, jobs and investments vital to the country's economic health and prosperity. The Association is dedicated to promoting the administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation and trial practice in this State.

ASCDC and its member-attorneys have been called upon many times to address similar questions of public concern regarding procedural issues and substantive rights relating to professionals who practice in this State. As practicing litigation attorneys themselves, ASCDC's members are particularly interested in matters affecting the legal profession.

Because ASCDC members often represent attorneys in litigation, the Association is also interested in defining the standards of conduct governing attorneys and shaping the proper interpretation of the statute of limitations that applies to claims against members of the legal profession. The Association has participated before this court as amicus curiae in prior cases, such as, *Viner v. Sweet* (2003) 30 Cal.4th 1232 to address the proper definition of legal causation in attorney-liability actions, and *Beal Bank v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503 concerning whether judicially-created "tolling" exceptions may be engrafted upon the legislated time limits set forth in Code of Civil Procedure section 340.6.

This case raises another important question of statutory interpretation involving whether the statute of limitation set forth in section 340.6—the one-year and four-year time limits on claims against attorneys "arising in the performance of professional services"—applies to a client's claim for return of "unearned" legal fees against her litigation attorney.

The Association and its members have substantial interests in seeking resolution of the issue presented for review consistent with the plain meaning of section 340.6 and this court's controlling precedent. Accordingly, ASCDC respectfully requests leave to file its amicus curiae brief in support of Respondent William B. Hanley.

DATED: January 25, 2015

Respectfully submitted,

Harry W.R. Chamberlain II
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By: _____

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ISSUE PRESENTED

Does the one-year statute of limitations for actions against attorneys set forth in California Code of Civil Procedure section 340.6 apply to a former client's claim against an attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit?

BACKGROUND AND PROCEDURAL HISTORY

Nancy F. Lee hired attorney William B. Hanley to represent her in litigation. After settlement of Lee's case, she sought a refund of "unearned" attorney fees she had advanced. Hanley had written Lee a letter stating she had a credit balance of $46,321.85 and the invoice for Hanley's services so

reflected. When the refund was not forthcoming, Lee hired a second lawyer to try to get the refund. More than a year later, Lee's second lawyer filed an action against Hanley seeking the refund. (Typed opn. at 2-4.)

In two amended pleadings, Lee declined to allege a claim for actual fraud. Her second amended complaint included causes of action styled as "breach of contract, breach of fiduciary duty, unjust enrichment, money had and received, and an equitable right to the return of unused funds." (Typed opn. at 12.) Under the one-year statute of limitation found in Code of Civil Procedure section 340.6, the trial court sustained Hanley's demurrer and dismissed the action. (*Id*. at 3-4.)

In reversing the judgment of dismissal, the Court of Appeal stated: "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." (Typed opn. at 2-3, emphasis added.)

ARGUMENT

A. The Court of Appeal's Decision is Contrary to the Plain Meaning Code of Civil Procedure Section 340.6

The sole question presented is whether the attorney's "wrongful act" of not returning "unearned" fees is one that "aris[es] in the performance of professional services" within the meaning of section 340.6. It does.

The Court of Appeal erred by taking a labeling-approach to Lee's attempt to avoid the broad and encompassing language of the statute of limitation. The Legislature enacted section 340.6 to address *any* claim of attorney-misconduct arising in the performance of professional services—

whether the theory of liability is based in "tort" or in "contract" or whether the cause of action is labeled "malpractice" … "fiduciary breach" … "debt" … "unjust enrichment" … "theft" … "conversion" or something else. (Cf. typed opn. at 3-4 11-12.) The plain meaning of section 340.6 applies here—because the claim is involves the alleged "wrongful act or omission" of an attorney "arising from the performance of professional services" the label applied to the cause of action is irrelevant. The one-year and four-year time limits of section 340.6 come into play.

"As in all cases of statutory interpretation, [courts] begin with the language of the governing statute. … [Their] role in interpreting it is 'to divine and give effect to the Legislature's intent.'" (*Beal Bank v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 507-508 (*Beal Bank*), internal citations omitted.) When a statute is unambiguous, the plain meaning of its language controls. (*Id.*; *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911 ["If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs"].)

The same words should be accorded the same meaning consistently throughout the statute. (E.g., *People v. McCart* (1982) 32 Cal.3d 338, 344 ["When a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout"]; *Hoag v. Howard* (1880) 55 Cal. 564, 565 ["examining the provisions of a statute in order to ascertain its meaning, every part of it must be looked to, and where a word or clause is found repeatedly used in it, it will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended"].)

As relevant to this case, section 340.6, subdivision (a) provides in part: "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. In no event shall the time for commencement of legal action exceed four years except [where specified circumstances give rise to tolling].” (See *Beal Bank*, 42 Cal.4th at p. 508, brackets in original text.)

The use of the connective phrase “arising from” “arising in” or “arising out of” “broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.” (*Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 328 (emphasis added).

Thus, when evaluating claims ***arising out of*** certain conduct or events (here, “professional services”) the all-encompassing language chosen by the Legislature has “broader significance and connotes more than causation”; it means “incident to, or having connection with.” (*Davis v. Farmers Ins. Group* (2005) 134 Cal.App.4th 100, 107; *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 806 [contract excluded claims for ‘“professional services,” broadly defining such services as “***arising out of*** a vocation, calling, occupation or employment involving specialized knowledge, labor or skill”] (emphasis added); accord *Allstate v. Interbank Fin. Services* (1989) 215 Cal.App.3d 825, 831.)

The Legislature chose two broad connecting phrases when it enacted the statute of limitation that specifically dealing with an “Action Against Attorney”: Section 340.6 applies to all such actions, except those for actual fraud, brought against an attorney “for a wrongful act or

omission" which arise "in the performance of professional services." (*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881 (*Vafi*), citing § 340.6, subd. (a); *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 431 [applying section 340.6 to "breach of contract" cause of action], overruled on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 (*Laird*); see also *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805 [applying section 340.6 to action alleging lawyer charged unconscionable fees].)

Historically, based upon "this plain language," the California courts have rejected the notion that section 340.6 only means malpractice when it refers to "a wrongful act or omission"—such a narrow interpretation is belied by the actual words used by the statute. (See *Vafi*, 193 Cal.App.4th at p. 882.) Had the Legislature intended to limit the broad reach of section 340.6 *only* to legal malpractice actions between clients and attorneys based upon "negligence" principles, it could easily have done so. (*Id*. at pp, 882-883; see, e.g., Code Civil Proc., § 340.5 ["Professional Negligence Against Health Care Provider"] "]; cf. ABM at 5, 13 [asserting that section 340.6 is not an "all-inclusive" statute of limitations—applying only to "malpractice" claims by clients against attorneys].)

In light of the broad language used, the courts have applied section 340.6 to a wide variety of tort and contract actions, including (contrary to Lee's arguments and the Court of Appeal's analysis) causes of action against attorneys alleging "breach of contract" and "breach of fiduciary duty." (*Vafi*, 193 Cal.App.4th at p. 883 [malicious prosecution]; see also *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [fiduciary breach]; *Radovich v. Locke-Padden* (1995) 35 Cal.App.4th 946, 951, 966 [same]; *Southland Mechanical Constructors Corp. v. Nixen*, 119

Cal.App.3d at p. 431 [contract breach]; cf. typed opn. at 11-12 ["plain meaning" of section 340.6 inapplicable to Lee's causes of action].)

The fees charged by Hanley for the underlying litigation he handled on Lee's behalf—whether earned or unearned—arise from the performance of the attorney's professional services. (*Levin v. Graham & James*, *supra*, 37 Cal.App.4th at pp. 800, 804-805.) The Court of Appeal agreed that the language used by section 340.6 is "plain and unambiguous." (Typed opn. at 13.) That being true, it should not have rejected the *specific* statute of limitation applicable to actions against attorneys alleging a "wrongful act or omission," in favor of some different catch-all limitations period. (*Vafi* , 193 Cal.App.4th at 881-882 *Levin v. Graham & James, supra,* 37 Cal.App.4th at pp. 800, 804-805; *Stoll*, 9 Cal.App.4th at pp. 1365-1366.)

B. The "Labeling" Approach Taken by the Court of Appeal to Claims Arising Out of the Attorney's Professional Services Conflicts with the Legislature's Intent and Controlling Precedent of This Court

The Court of Appeal and both parties seem to be in accord that where the language of the statute is clear and unambiguous in relation to its stated purposes (as it is in this context), the inquiry should end here. (ABM at p. 20; OBM at pp. 13-14; typed opn. at 11-12 ["[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' …"].)

But the appellate court's inquiry is not limited to the statutory language. The Court of Appeal relied upon recent decisions that have impermissibly engrafted additional language on plain meaning of section 340.6, the Court of Appeal in this case construed portions of the "legislative

history" of the statute out of context, suggesting that the Legislature's use of the "wrongful act or omission" language was "intended to create a specially tailored statute of limitations for *legal malpractice actions* . . . ." (Typed opn. at 11, emphasis added, citing *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668, disagreeing with *Vafi*, 193 Cal.App.4th 874 and *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 192.) To resort to secondary materials in determining the drafter's "intent," there must be an ambiguity suggesting more than one plausible interpretation, and the party claiming the ambiguity must show that her construction is plausible "in the context" of the dispute. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 Cal.4th 854, 867-868; see also *Beal Bank*, 42 Cal.4th at pp. 507-508.) Those criteria are not met.

Resorting to the liberal rules of pleading, the appellate court instead held that neither the nature of the cause of action nor the specific relief sought by Lee from her former attorney should determine whether section 340.6 applies. The decision acknowledged that Lee's "second amended complaint in the matter before [the court] 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." (Typed opn. at 11.)

But the Court of Appeal nevertheless concluded that the "facts" of Lee's second amended complaint might be so interpreted; consequently, section 340.6 should not apply. (Typed opn. at 12-13.) "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." (*Id*. at 13.)[1] How so?

In this regard, its decision parts company with the weight of reasoned authority and this court's precedent. Vague but artful pleading cannot overcome the plain meaning of section 340.6, the statute governing the time limits on claims which assert that an attorney-defendant has committed a "wrongful act or omission" arising "in the performance of professional services." (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201 [rejecting the practice of permitting a party in effect, to "plead around" statutory barriers to relief by simply "relabeling the cause of action"].)

This includes a tort or contract-based action asserting that the lawyer overcharged the client for his or her professional services, or failed to "refund" fees that were ostensibly "unearned" related to the legal work performed. Appreciating that Lee's claims are being addressed at the pleading stage, and the facts alleged should be accepted as true, does not alter the analysis.

Numerous prior cases interpreting *this* statute are instructive. Section 340.6 cannot be circumvented by merely alleging, among other things, that the defendant committed a "breach of fiduciary duty" by

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[1] In this, as in other contexts, it is not simply a matter of characterizing the "cause of action" as one for conversion—as opposed to legal malpractice, breach of fiduciary duty or breach of contract. It cannot be said that any time A owes B money that constitutes a claim for conversion. (See, e.g., *Baxter v. King* (1927) 81 Cal.App. 192, 194 [defendant's mismanagement of partnership accounts only stated a cause of action for debt or breach of contract under two-year statute of limitations, rather than three-year statute for "conversion"].) The "gravamen" of the action controls—here, the gravamen is an alleged "wrongful act or omission" arising out of Hanley's representation of Lee, and relabeling the theory does not alter her claim. (Cf. *Rubin v. Green*, 4 Cal4th at p. 1201.)

charging "unconscionable fees" or declining to refund fees that the client claims were "unearned" or "unreasonable." (See *Levin v. Graham & James*, *supra*, 37 Cal.App.4th at pp. 800, 804-805 [unconscionable fees is deemed "one measure of malpractice damage … [Levin's] repeated assertion that one can assert a claim or state a cause of action for refund of unreasonable attorney fees (e.g., quantum meruit, money had and received) without also alleging malpractice is the first of a sea of red herrings"]; see also *Stoll* 9 Cal.App.4th at pp. 1368-1369 [section 340.6 cannot be circumvented by alleging "breach of fiduciary duty" such as, among other means, charging unconscionable fees]; see also Hanley's RBM at 13-19 and cases digested therein.)

ASCDC certainly does not condone unethical practices; such as "stealing" a client's money, overbilling for services actually rendered or retaining funds for services that were never rendered at all. But placing reasonable limitations on civil actions—even if claims asserted are time-barred—does not mean that lawyers who overcharge or "steal" from clients will go scot-free. Criminal prosecution, and disciplinary sanctions, remain available for unauthorized appropriation or retention of "unearned" client funds. (See e.g., *Rubin v. Green*, 4 Cal.4th at p. 1199; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 471-472.)

"[S]ection 340.6 reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims." (*Beal Bank*, 42 Cal.4th at p. 512.) The public policies underlying section 340.6 are well settled and need not be repeated. In achieving that balance, any legislatively-approved "exceptions" to the application of section 340.6 are spelled out in the statute itself. "In contrast, the Court of Appeal's contratextual reading … would significantly undermine the Legislature's overall purposes in

adopting section 340.6." (*Ibid.*; see also *Laird*, 2 Cal.4th at pp. 610-611 each of the four tolling exceptions enumerated section 340.6 are exclusive, precluding judicially-adopted exceptions; typed opn. at 14-15 [rejecting Lee's "tolling" arguments].)

The Legislature did carve out one "exception" to the strict time limits applicable to a "wrongful act or omission" committed during the client's representation—an action based upon "actual fraud." (*Vafi*, 193 Cal.App.4th at pp. 881-882.) Lee was reticent to plead fraud, and for whatever reason after two attempts, she did not do so. (Typed opn. at 12.)

Whatever policies the Court of Appeal deemed might be served by rejecting the plain language of section 340.6—in favor of labeling Lee's causes of action as amounting to "theft" or "conversion"—are more than adequately addressed by the text of the statute itself.

CONCLUSION

The decision of the Court of Appeal should be reversed.

DATED: January 25, 2015

Respectfully submitted,

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WORD COUNT CERTIFICATION [CRC 8.204(c)]

Counsel for Amicus Curiae Association of Southern California Defense Counsel certifies that the Application for Leave to File Amicus Curiae Brief contains 443 words and that ASCDC's Amicus Curiae Brief in Support of Respondent contains 2,591 words, including footnotes, for a total of 3,034 words as measured by the Word 2010 word processing software used in the preparation of the application and the brief.

DATED: January 25, 2015

Respectfully submitted,

Harry W.R. Chamberlain II
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PROOF OF SERVICE BY MAIL

(State of California)

I am over the age of 18 and not a party to the within action. I am employed in the County of Sacramento, State of California with my office located at 555 Capitol Mall, Suite 1200, Sacramento, CA 95814.

On the date set forth below, I served the within document entitled**:**

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENT

by placing a true and correct copy thereof in a sealed envelope addressed to the parties as follows:

SEE ATTACHED SERVICE LIST

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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 January 2015 at Sacramento, California.

HARRY W.R. CHAMBERLAIN II

SERVICE LIST

Lee v. Hanley
No. S220775

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