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2021 Year in Review: Cases Involving Lawyers

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In these polarizing times, civility is too often lacking — and in 2021, California appellate courts made clear they were not pleased about it. In addition to addressing nuances to the causation element pertaining to legal malpractice claims and publishing malicious prosecution cases, the appellate courts tilted their focus to issues of attorney behavior, which must continue to be a positive example for society at large, and not the other way around.

Attorney Conduct Cases

Lawyers are professionals, and should thus act like it, said the court in *In re Mahoney*, 65 Cal. App. 5th 376. There, the appellate panel was confronted with an attorney's petition for rehearing void of legal citations, but which accused the court of favoring a litigant because it, "wield[s] a lot of legal and political clout in Orange County." Commenting that, "[o]ur society has been going down the tubes for a long time," the petition's author went on to impugn the integrity of the court.

The response from the court in *Mahoney* was a fine for contempt and a reminder: "We are professionals. Like the clergy, like doctors, like scientists, we are members of a profession, and we have to conduct ourselves accordingly. Most of the profession understands this. The vast majority of lawyers know that professional speech must always be temperate and respectful and can never undermine confidence in the institution. Cases like this should instruct the few who don't."

The court in *Karton v. Ari Design & Construction, Inc.*, 61 Cal. App. 5th 734, was on a similar page, commenting — while reducing an attorney's fees due to the attorney's perceived lack of professionalism — that, "[i]t is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook." In Karton, an attorney representing himself sought statutory attorney fees from an unlicensed contractor he had hired to remodel his home in an amount that the court deemed excessive, reducing it about threefold. The case was simpler than the attorney had made it, and the court determined that he had overlitigated the case.

Yet it was the lack of civility by the attorney throughout the handling of the matter that as much as anything justified the reduction in the fee, as it denoted a lack of skill which warranted adjusting the lodestar calculation: "Civility is an aspect of skill. Excellent lawyers deserve higher fees, and excellent lawyers are civil. Sound logic and bitter experience support these points. Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears."

Malicious Prosecution Cases

Malice is another form of incivility that can lead to financial detriment. However, as the court properly held in *Dunning v. Clews*, 64 Cal. App. 5th 156, a finding of malice by a client cannot be imputed to the attorney in a malicious prosecution action. In Dunning, the plaintiff purchased property with intent to construct and operate a private secondary school, which prompted a CEQA action by the owner of a horse ranch next door, arguing that an environmental impact report was necessary to assess the project's noise impact. The underlying CEQA action was summarily dismissed (affirmed on appeal), and the prospective school followed that with a malicious prosecution action against the horse ranch and its counsel. The horse ranch's counsel filed an anti-SLAPP motion (CCP Section 425.16), which the horse ranch joined. Both were denied by the trial court.

The appellate court in *Dunning* affirmed the denial of the anti-SLAPP motion as to the client, finding ample evidence suggestive of malice, most prominent being that the horse ranch had consistently and aggressively opposed any development at the site and had harassed prior owners. But despite there being evidence that the litigation had been pursued without probable cause, the Dunning court appropriately distinguished between the two elements, and refused to impute those client motives onto the attorneys hired to represent the horse ranch without proof the defendant attorneys knowingly pursued the untenable claims or otherwise acted with malice. The Court of Appeal accordingly reversed the denial of the anti-SLAPP motion as to the attorneys. Naturally, the attorney defendants were awarded their attorney fees.

Not as fortunate were the lawyers in the controversial case of *Area 55, LLC v. Nicholas & Tomasevic, LLP,* 61 Cal. App. 5th 136, another malicious prosecution action wherein the Court of Appeal reversed the trial court's granting of an anti-SLAPP motion. In the business of selling red wine aerators, Area 55 labeled its product as "Made in America." But one consumer believed this to be misleading since several components of the red wine aerator were made in China. Suit was filed and pursued for years, only to have the plaintiff go bankrupt in the interim, and not list the suit on his bankruptcy schedule. Nevertheless, the attorneys for the plaintiff continued to prosecute the matter even after the bankruptcy discharge. Area 55 successfully moved to dismiss on failure to prosecute grounds, and then filed a malicious prosecution action against the attorneys for the plaintiff, again met with an anti-SLAPP motion.

The primary issue before the *Area 55* court came down to whether Area 55 could show a probability of prevailing. The court determined it could as to all three elements of the tort: (1) favorable termination; (2) lack of probable cause; and (3) malice. As to the malice element, the Area 55 court reasoned that, "one does not simply abandon a meritorious action once instituted" and found sufficient evidence of malice by the attorneys for failing to do any investigation into the implications of the bankruptcy as "the extent of a defendant attorney's investigation and research may be relevant to the … question of whether or not the attorney acted with malice."

A third malicious prosecution opinion was issued in *Citizens of Humanity, LLC v. Ramirez*, 63 Cal. App. 5th 117, arising out of a wage/hour class action which was settled before class certification. The employer paid a sum to the employee to dismiss her individual claims, and she dismissed the class claims without prejudice and with court approval. Seven months later, however, the employer brought a malicious prosecution claim against the employee and her counsel on the basis that it had favorably terminated the class claims, which led to the filing of an anti-SLAPP motion.

Although the trial court denied the anti-SLAPP motion on the ground that the employer had established a probability of prevailing on its malicious prosecution claim, the Court of Appeal did not see it that way, holding that insofar as the prior lawsuit was resolved by way of settlement, the employer was unable to establish that the matter had terminated in its favor as a matter of law. In finding the anti-SLAPP motion should have been granted, the *Citizens of Humanity* court confirmed the bright line rule that an underlying individual settlement cannot be relied upon to establish the favorable termination element that is required in a suit for malicious prosecution.

Causation Cases

The "Biggest Loser" in 2021 published malpractice cases may have been the law firm defendant in *Michaels v. Greenberg Traurig, LLP,* 62 Cal. App. 5th 512, which had contended that the plaintiff — a fitness celebrity known for helping contestants lose weight on the television show, "The Biggest Loser" — had put forth insufficient evidence to establish causation. To maximize her brand, the plaintiff had hired the law firm to negotiate various deals, including one involving the her appearance on the television show, and another for branding and promotional service with a maker of nutraceutical products. The plaintiff contended that the law firm failed to identify an inconsistency between the two agreements, which caused her to lose profits.

In *Michaels*, the law firm filed for summary adjudication and sought to exclude the plaintiff's damage expert on grounds that his opinion was inadmissible speculation. The Court of Appeal reversed the granting of summary adjudication in part based on a distinction between established and unestablished businesses to which the plaintiff contended she would have derived profits. As noted in an article in this publication ("New decisions on expert testimony in legal malpractice cases," May 28, 2021), the *Michaels* court's analysis seems contrary to *Viner v. Sweet*, 30 Cal. 4th 1232 (2003); *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012); and *Perry v. Bakewell Hawthorne, LLC*, 2 Cal. 5th 536, 543 (2017). Meanwhile, the defendant law firm in *Michaels* may ultimately turn out to be a winner as trial in the case is set to commence on June 13.

However, in *O'Shea v. Lindenberg*, 64 Cal. App. 5th 228, the result went the other way, as the court determined that the plaintiff's expert witness had failed to present a sufficient nexus between the alleged negligence and damages caused by it. The *O'Shea* court noted that while the expert's opinion regarding the failure to secure a forensic underlying expert could be credited, the expert did not supply a, "direct connection between the lack of a forensic expert and the outcome of the case," but instead, "[w]hen asked, [the expert] could not testify to a, "reasonable degree of legal certainty that a forensic accountant's involvement would have resulted in different outcome."

The plaintiff argued that his expert need not tie the two elements together, but the O'Shea court disagreed, reinforcing the necessity of proximate causation in legal malpractice cases: "the plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims."

Causation was also the disputed issue in *Letgolts v. David H. Pierce & Associates*, PC, 71 Cal. App. 5th 272, arising out of an alleged delay by an attorney in seeking a default judgment, which the plaintiffs contended deprived them of a recovery due to the underlying defendant's bankruptcy and insolvency of his insurance carrier. The *Letgolts* court cited *Viner*, and analyzed the issue as a case within a case, explaining such an inquiry asks whether the lawyer's performance or lack thereof ultimately mattered. Finding that the underlying claim would not have implicated insurance anyway due to an exclusion in the policy pertaining to construction defect claims, the court in *Letgolts* concluded that the delay allegedly occasioned by the attorney did not matter, and affirmed the judgment of the trial court in favor of the defendant attorney.

Earlier in the year, *White v. Molfetta*, 64 Cal. App. 5th 628, came out similarly, in which an attorney was not liable to an incarcerated client who claimed that the attorney's delay in handing over the client file had caused the plaintiff to lose out on a habeas petition and corresponding emotional distress. There was no question in the case that the attorney had erred. But there was also no question, in the eyes of the *White* court, that the delay in turning over the client file had not prevented the plaintiff from filing a habeas petition. That was because the plaintiff too delayed for years filing the petition after the file had already been turned over.

That's not to say that the attorney was absolved, however, as the *White* court returned to the plea for professionalism that marked a number of the opinions released by the Court of Appeal in 2021: "We are a profession ... We have an obligation to perform to the absolute best of our abilities regardless of our own circumstances or those of our client. We owe more than was provided here. But on the facts of this case, the law does not permit a recovery."

Conclusion

We are now in our tenth consecutive year of publishing Year in Review articles regarding cases involving lawyers. 2021 continued the recent trend wherein the appellate courts felt compelled to publish cases on attorney decorum (perhaps this is largely due to the pandemic), as was detailed in prior published year in review articles. *See, e.g., Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019); *Levine v. Berschneider*, 56 Cal. App. 5th 916 (2020). Although we don't disagree with decisions on civility — like Utah attempting to defend the Ohio State passing attack in this year's Rose Bowl game, there is no defense for the lack of civility — here's to hoping the future brings cases which focus more on duty, breach and causation issues and less on attorney behavior.

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