

PROFESSIONAL LIABILITY UPDATE

January 3, 2003

Issue No. 143

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Chip B. Cox

Edward F. Donohue, III

Kathleen M. Ewins

Kathleen A. Foley

Bruce N. Furukawa

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

William L. Jacobson

Farand C. Kan

Anna Kapetanakos

Joseph P. McMonigle

Douglas J. Melton

Robin M. Pearson

Jessica B. Rudin

Richard J. Sciaroni

Steven Sharafian

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

MALICIOUS PROSECUTION

California Law

by Jessica B. Rudin and Jennifer A. Becker

The Fourth District holds that unless an attorney is aware of specific factual errors, he or she will not be liable for malicious prosecution for initiating an action based on a client's version of events.

Morrison v. Rudolph (2002) 103 Cal.App.4th 506

Cynthia Ping (Ping) purchased a condominium from the Morrisons. She claimed that after she took possession of the condominium, she noticed construction defects and learned that the Home Owners' Association (HOA) was initiating construction defect litigation against the builders. Ping was unable to pay for necessary repairs, and the defects and the litigation precluded a sale. After Ping lost the property in foreclosure, the HOA sued her for unpaid assessments. Ping cross-complained against the HOA and the Morrisons for fraud and negligent misrepresentation.

After the Morrisons obtained summary judgment on Ping's cross-complaint, they sued Ping's attorneys, Haight, Brown & Bonesteel and George Rudolph ("Rudolph") for malicious prosecution. Rudolph obtained summary judgment on the issue of probable cause to file the cross-complaint.

The Court of Appeal agreed with the

trial court. Rudolph had set forth undisputed facts to establish an objectively reasonable basis for the cross-complaint because Ping told Rudolph that the Morrisons had failed to disclose defects in the condominium and that she would not have purchased the property had the disclosures been made. The Court agreed with the reasoning of *Swat-Fame v. Goldstein* (2002) 101 Cal.App.4th 613 (PL Update No. 136) and held that Rudolph was entitled to rely upon the facts communicated by his client, absent notice of specific mistakes.

The Court also relied upon and thus revived *Tool Research & Engineering Corp. v. Henigson* (1975) 46 Cal.App.3d 675, (disapproved on other grounds in *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863.) The *Tool Research* court held that an attorney may vigorously pursue litigation even where it is unclear whether the client or the client's adversary is truthful "so long as that issue is genuinely in doubt." Because there was no evidence that

601 Montgomery Street, Suite 900
San Francisco, California 94111
Telephone (415) 397-2222
Facsimile (415) 397-6392
www.longlevit.com

3130 Wilshire Boulevard, 2nd Floor
Santa Monica, California 90403-2300
Telephone (310) 829-0977
Facsimile (310) 829-0991
www.longlevit.com

Rudolph had notice of a specific factual mistake in Ping's account, he was entitled to rely on her version of events when initiating the action against the Morrisons.

Comment: Morrison, like Swat-Fame, establishes yet another protection against malicious prosecution liability for attorneys. The ability of attorneys to rely on a client's version of events allows attorneys to comply with ethical rules mandating vigorous advocacy on behalf of a client.