

PROFESSIONAL LIABILITY UPDATE

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By Jessica B. Rudin

The Second Appellate District, Second Division holds an attorney can be liable for malicious prosecution for continuing to prosecute a lawsuit after the discovery of facts showing the case has no merit.

Zamos v. Stroud 03 C.D.O.S. 5831

Zamos and his law partner represented Brookes in a foreclosure lawsuit. Brookes settled a portion of the lawsuit. Two years after the settlement she hired Stroud to sue Zamos and his partner for fraud. The fraud case was based on Brookes' allegations Zamos lied about the extent of his future representation and the results he could achieve. Upon receipt of the complaint, Zamos sent Stroud transcripts from three hearings in the foreclosure lawsuit where Brookes made statements on the record that directly contradicted the allegations in her fraud complaint. Neither Stroud nor Brookes dismissed the fraud complaint.

Stroud continued to represent Brookes and prosecute the fraud action for two years. At trial the court found that no reasonable jury would believe Brookes' claims. Even if it did, Brookes was estopped from pursuing her claims by reason of her statements. Zamos sued Stroud and Brookes for malicious prosecution.

Stroud filed a special motion to strike the complaint pursuant to CCP §425.16.

The motion was granted because Stroud had probable cause to bring the lawsuit based on his client's statements and their corroboration by third parties. On appeal Stroud argued that **Swat-Fame v. Goldstein** [PL Update No. 136] precluded a claim that a lawsuit was maliciously maintained. In **Swat-Fame** Division Seven of the same District held that an attorney who initiates an action with probable cause can continue to prosecute the case even if he learns the facts upon which the suit was based were false.

Division Two disagreed with Division Seven. Dictum in **Pacific Gas and Electric Co. v. Bear Stearns & Co.** (1990) 50 Cal.3d 1118 relying on Restatement of Torts 2d §674 supported holding an attorney liable for malicious prosecution "if the attorney continues to prosecute a lawsuit after discovery of facts that the lawsuit has no merit." According to the **Zamos** court, the **Swat-Fame** court failed to correctly analyze the **Bear Stearns** case and the cases upon which it was based.

The **Zamos** court held that an attorney who learns the case he has filed lacks merit should advise dismissal of the action or risk liability for malicious prosecution. Damages would be calculated not from the date the action was filed, but from the time an attorney should have caused the action to be dismissed.

Although malicious prosecution is a disfavored tort, it makes little sense to hold attorneys responsible for their knowledge on the day they file a lawsuit but not thereafter. Holding an attorney responsible throughout the case promotes the efficient administration of justice and reduces harm to individuals.

Stroud argued a departure from **Swat-Fame** would necessarily inject self-protection into the attorney-client relationship and impinge on an attorney's duty to zealously advocate on behalf of the client. The court disagreed, noting that attorneys also have ethical duties to refrain from asserting positions in litigation without probable cause.

*Comment: Zamos conflicts with three recent Appellate decisions: **Swat-Fame v. Goldstein** (2002) 101 Cal.App.4th 613 [PL Update No. 136]; **Morrison v. Rudolph** (2002) 103 Cal.App.4th 506 [PL Update No. 143]; and, **VanZant v. Daimler-Chrysler** (2002) 96 Cal.App.4th 1283[PL Update No. 132]. Although **Zamos** is the minority view, arguments that malicious maintenance is not a viable legal theory are now susceptible.*