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Lack of Involvement by Co-Counsel Did Not Preclude Liability for Malicious Prosecution

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Cole v. Patricia A. Meyer & Associates, APC, 206 Cal. App. 4th 1095, 142 Cal. Rptr. 3d 646 (2012)

Brief Summary

A California appellate court held that: (1) attorneys whose names appeared on all of the pleadings and papers filed for the shareholders in a derivative suit could not avoid liability for malicious prosecution by showing that their only role was to try the case in the event of a trial; and (2) a defamation claim could be based on the law firm's publication of the complaint after suit had terminated in favor of the opposing parties.

Complete Summary

The former founder of a corporation sued a law firm and its co-counsel for malicious prosecution and defamation for prosecuting an unsuccessful shareholders' action for fraud. After concluding that there was a lack of probable cause based on unwarranted evidentiary inferences and that there was evidence of malice, the court turned to the liability of co-counsel.

Co-counsel had followed a practice of allowing its name to be used on all of the pleadings, anticipating an active role if the case went to trial. Co-counsel's probable cause consisted solely of relying on the filing law firm's expertise. Although Cal. R. Prof'l Conduct R. 3-110(c) allows an attorney to associate with or consult another lawyer, the court stated that even when the work on a case is performed by an experienced attorney, competent representation requires learning "enough about the subject matter to be able to judge the quality of the attorney's work."

Further, the recognized propriety of association of counsel and a division of duties does not authorize the associated attorney, who is served with all documents in the case, to ignore such filings and intentionally fail to learn anything about a case. Although the law firm did not personally sign any filings, the presence of its name on those documents supported an inference that it "presented" these filings to the court and thus initiated and co-prosecuted the action. The court relied upon Cal.Code Civ. Pro. § 128.7(b) ("presenting" pleadings, motions, and other similar papers to court includes "signing, filing, submitting . . ." these papers).

The court cautioned:

It also undercuts the public policy argument that attorneys should not be required to create a record of diligence before their role as co-counsel is triggered. Attorneys may easily avoid liability for malicious prosecution without having to engage in premature work on a case if they refrain from formally associating in it until their role is triggered. Attorneys may also avoid liability if they refrain from lending their names to pleadings or motions about which they know next to nothing.

The court held that the failure of the law firm to acquire any knowledge of the claims or to make any effort to independently investigate and research their validity "supports the conclusion that they lent their names to the case with indifference to its actual merit."

The court stated that although attorneys may associate other lawyers and divide the responsibilities for the case, associated attorneys have a duty to avoid frivolous or vexatious litigation. They may not avoid this duty through "willful ignorance" of co-counsel's actions. The court held that the lawyers could not avoid liability for malicious prosecution by claiming to have been ignorant of the merits of the allegations made against plaintiff. The court noted that a similar result was reached in *Sycamore Ridge Apartments LLC v. Naumann,*157 Cal. App. 4th 1385 (2007) (malicious prosecution claim may be maintained against attorneys who were associated, for limited purpose, and for a limited time, into case that was being maliciously prosecuted). The court emphasized that the attorneys' names appeared as counsel on filings over several years, with no indication that they had a limited role. In addition, the lawyers did not show that they made any effort to independently investigate and research the validity of the claims. They could thus be subject to malicious prosecution claims.

Plaintiff's defamation claim was based on the publication of the fourth amended complaint on the internet. Plaintiff alleged that as late as August 2009, the complaint could be accessed through a hyperlink under "Recent Cases" on the law firm's website. By August 2009, however, the case was no longer pending in any court because the California Supreme Court had denied the plaintiffs' petition for review. The court held that the litigation privilege did not apply to republications of privileged statements to nonparticipants in the action. The court noted that although the scope of the anti-SLAPP statute is broader than the litigation privilege, the law firm failed to show that the complaint was published on the internet in connection with a matter pending before a judicial proceeding or with an issue under consideration by a judicial body.

Significance of Opinion

This decision challenges a very common practice of law firms to put the name(s) of well-known counsel on its pleadings or to add the name of trial counsel. Although law firms may continue to do so, the associated counsel listed on the pleadings should be able to show they independently investigated and researched the validity of the claims. If they cannot do so, they could be subject to malicious prosecution claims. It is also significant to note that the court here held that the litigation privilege did not apply to the posting of a copy of the complaint on the law firm's website after all appeals were exhausted.

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