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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MASOUD BAMDAD,

Plaintiff and Appellant,

v.

BRUCE M. MARGOLIN, et al.,

Defendants and Respondents.

B268444

(Los Angeles County  
Super. Ct. No. BC570357)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Elizabeth Allen White, Judge. Reversed and  
remanded with directions.

Masoud Bamdad, in pro. per., for Plaintiff and Appellant.

Berman Berman Berman Schneider & Lowary, James W.  
McCord and Howard Smith, for Defendants and Respondents.

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## INTRODUCTION

Masoud Bamdad was convicted of numerous federal crimes. During the pendency of his federal criminal case, he was represented by a series of defense lawyers. After his conviction, Bamdad sued some of them. Bruce M. Margolin, through his firm the Law Offices of Bruce M. Margolin (collectively, Margolin), was one of those attorneys.

Bamdad, now in federal prison, filed this action against Margolin for legal malpractice and other causes of action. The trial court sustained Margolin's demurrer without leave to amend and entered a judgment of dismissal with prejudice. Bamdad appeals, arguing the trial court erred by dismissing his malpractice action with prejudice rather than without prejudice. We agree and reverse the judgment with directions to enter a judgment of dismissal of Bamdad's malpractice cause of action without prejudice.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

### A. *Bamdad's Conviction*

On May 6, 2009 Bamdad, a physician and surgeon, was convicted in the United States District Court for the Central

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<sup>1</sup> The facts in this background section are from Bamdad's first amended complaint and from matters of which we take judicial notice. (See *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1402 ["[o]n appeal of a judgment of dismissal entered after the sustaining of a demurrer without leave to amend, we accept as true all the material allegations of the complaint, reasonable inferences that can be drawn from those allegations, and facts that may properly be judicially noticed"].)

District of California of multiple federal crimes involving unlawfully prescribing and distributing controlled substances, including oxycodone. Margolin represented Bamdad at the arraignment, after which Bamdad at some point retained other attorneys to represent him in the federal criminal action. Bamdad paid Margolin \$15,000.

Bamdad is currently imprisoned in a federal penitentiary in Illinois. He has filed several unsuccessful and pending direct and collateral challenges to his conviction in federal district court in California and Illinois, and a petition in the Ninth Circuit Courts of Appeals claiming judicial misconduct by the district judge who presided over his criminal trial.

#### B. *Bamdad's Malpractice Action*

Bamdad filed this action on January 21, 2015. In his operative first amended complaint, Bamdad alleged he was arrested and held without bond after raids by Drug Enforcement Agency agents on his residence and his medical clinics. According to Bamdad, he was merely “practicing pain management and prescribing medically-approved controlled substances, based on his own discretion,” to “patients who were suffering from chronic pain and needed treatment.” Bamdad alleged his “criminal investigation was tainted by the DEA agents['] unconstitutional activities,” including “clandestinely” recording Bamdad “with concealed equipment” and lying in the affidavit of arrest.

Bamdad alleged Margolin did not sufficiently review or study Bamdad's indictment and affidavit of arrest and he “did not have the required experience in the federal courts. . . .” Bamdad alleged Margolin “did not know the difference between a state

and federal crime” and failed to challenge the defects in the investigation, arrest, and charging documents. Bamdad asserted causes of action for legal malpractice, misrepresentation, breach of fiduciary duty, “willful misconduct,” breach of contract, unfair competition and false advertising, fraudulent concealment, and intentional and negligent infliction of emotional distress. Bamdad also alleged he “has at least four open cases in different federal courts,” and “[a]ny desirable rulings in any one of the cases will result in Bamdad’s habeas and relief.”

C. *Margolin’s Demurrer*

Margolin demurred. In his demurrer to the first amended complaint, Margolin argued that none of Bamdad’s causes of action stated sufficient facts to constitute a cause of action because Bamdad “failed to plead he had obtained a post-conviction exoneration,” and all of his causes of action were “time-barred, which also includes the one-year limitation under [Code of Civil Procedure] Section 340.6.”<sup>2</sup> Margolin asked the trial court to take judicial notice of a number of documents relating to Bamdad’s criminal prosecution and conviction, including motions, orders, and complaints filed in the United States District Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. Margolin argued Bamdad’s entire action failed because he had not alleged and could not prove factual innocence through post-conviction exoneration, and none of Bamdad’s post-conviction actions would allow him to “obtain the required

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<sup>2</sup> Statutory references are to the Code of Civil Procedure. Pursuant to California Rules of Court, rule 8.155(a)(1)(A), we augment the record to include Margolin’s demurrer to the first amended complaint, which was filed in the superior court.

exoneration.” Margolin also argued the statute of limitations in section 340.6 barred all of Bamdad’s causes of action. Margolin asked the court to sustain the demurrer “without leave to amend, at which time the Court should enter an order of dismissal” in his favor. Margolin did not ask for a judgment of dismissal with prejudice.

Bamdad filed an opposition to the demurrer. He argued, among other things, that in 2009 the Legislature amended section 340.6 to address claims by a convicted defendant who is suing his former criminal defense attorney but who has not yet obtained exoneration: “If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case.” Among other things, Bamdad argued that, because he had not yet obtained exoneration, the statute of limitations under section 340.6 had not yet commenced.

On November 12, 2015 the trial court sustained the demurer without leave to amend, ruling all of Bamdad’s causes of action were “barred by the statute of limitations.” The court granted Margolin’s requests for judicial notice and ruled that, because Bamdad had not alleged “he obtained a postconviction exoneration within the statute of limitations period,” he had not pleaded “an essential element of a legal malpractice cause of action resulting in a conviction.” The court also ruled Bamdad’s other causes of action were barred by the applicable statutes of limitation. Although the court’s written ruling did not state the court would dismiss the action with prejudice, the court signed an

order, prepared and submitted by counsel for Margolin, dismissing the entire action with prejudice.

D. *The Judgment of Dismissal with Prejudice*

On November 17, 2015 Bamdad filed a notice of appeal and, on December 3, 2015, an objection to dismissal of the case with prejudice. In the latter document, Bamdad again stated his habeas petitions were still pending in federal court, section 340.6 allowed him “to file his complaint up to two years after his release and proof of his actual innocence,” and the statute of limitations “for filing a complaint against his lawyers had not yet accrued.” Bamdad asked the court either to hold the “case in abeyance until resolution of [his] cases in federal courts” or “dismiss the case without prejudice, in order to give Bamdad a chance to re-file his complaint against Mr. Margolin and his law offices in [the] future.” In response, Margolin argued Bamdad’s request for a dismissal without prejudice was “without any legal support,” and the court did not have jurisdiction to grant his requested relief. The court overruled Bamdad’s objection and entered a judgment of dismissal with prejudice on December 8, 2015.<sup>3</sup>

## DISCUSSION

Bamdad’s appeal is a limited one. He does not challenge the trial court’s order sustaining the demurrer without leave to amend. Nor does he argue the court should not have entered a judgment of dismissal. He argues only the trial court should

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<sup>3</sup> The November 12, 2015 signed order of dismissal is appealable. (See section 581d; *Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 692, fn. 5.)

have dismissed his malpractice action without prejudice rather than with prejudice. And he's right.

Section 340.6, subdivision (a), the statute of limitations governing legal malpractice claims, provides: "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. *If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case.* Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled . . . ." (Italics added.)

Legal malpractice claims by convicted defendants present a timing problem. "[W]hen a former criminal defendant sues his or her attorney for legal malpractice, the former client's actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1197 (*Coscia*); see *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545; *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1096 ["to prove malpractice by a criminal defense attorney, the former criminal defendant must satisfy the elements of a civil malpractice claim *and* prove his or her actual innocence"].) Moreover, "an

individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action.” (*Coscia*, at p. 1201; see *Kemper*, at p. 1096.) Specifically, a malpractice plaintiff suing his or her former criminal defense attorney “must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People’s refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel.” (*Coscia*, at p. 1205; accord, *Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1189.)

Here’s the problem: “Because of the time required to complete postconviction proceedings, the statute of limitations in most cases will have run long before the convicted individual has had an opportunity to remove the bar to establishing his or her actual innocence.” (*Coscia*, *supra*, 25 Cal.4th at p. 1207.) The Supreme Court in *Coscia* solved this problem by holding that, although “the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a),” “the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies.” (*Coscia*, *supra*, at pp. 1210-1211.)

The Legislature subsequently decided to solve this problem a different way. In 2009, eight years after the Supreme Court decided *Coscia*, the Legislature amended section 340.6, subdivision (a), to add the language on which Bamdad relies: “If



the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case.” This amendment modified the *Coscia* approach “to provide accrual of a two-year limitation period from the date factual innocence is established.” (3 Mallen & Smith, *Legal Malpractice* (2017 ed.) § 23:40, p. 514.)

The Legislature amended section 340.6 in 2009 as part of a series of laws enacted “to remedy some of the harm caused to all factually innocent people who have been wrongfully convicted and served time in state prison in California.” (Legis. Counsel’s Dig., Assem. Bill No. 316 (2008-2010 Reg. Sess.) § 1, p. 2402.) The bill implemented some of the “more modest recommendations” of the Commission on the Fair Administration of Justice (Assem. Com. on Appropriations, Summary of Assem. Bill No. 316 (2009-2010 Reg. Sess.) Apr. 22, 2009, p. 2), and was designed to “remove some of the obstacles to compensation for the factually innocent” and to “ease their transition back into society.” (Legis. Counsel’s Dig., Assem. Bill No. 316 (2009-2010 Reg. Sess.) § 1.) The amendment extended “the statute of limitations for malpractice actions against an attorney to two years after the plaintiff achieves post-conviction exoneration in a case in which the plaintiff is required to show factual innocence as an element of his or her malpractice claim . . . .” (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 316 (2009-2010 Reg. Sess.) June 23, 2009, p. 4; see *id.* at p. 6 [Assem. Bill. No. 316 “extend[s] the statute of limitations to file a claim of malpractice to two years after innocence has been established”].)

Bamdad was convicted in May 2009, which is the time Margolin concedes Bamdad sustained actual injury.<sup>4</sup> (See § 340.6, subd. (a).) Margolin concedes “the amended language in Section 340.6” applies, although he argues the court properly dismissed Bamdad’s complaint with prejudice under the amended statute and *Coscia*. Under section 340.6, however, the statute of limitations has not begun to run on Bamdad’s malpractice claims; indeed, it may never begin to run, if Bamdad never obtains postconviction exoneration. Of course, because Bamdad (admittedly) cannot allege facts showing he is factually innocent or that he has achieved postconviction exoneration, his malpractice cause of action is defective. But that does mean Bamdad will never be able to file a malpractice action against Margolin in the future if he obtains postconviction exoneration and becomes able to plead actual innocence. If that occurs, under section 340.6, subdivision (a), Bamdad will have two years from the date of his exoneration to file a new action. (See 3 *Mallen & Smith, supra*, § 23:40, p. 514 [the 2009 amendment to section 340.6 “appears to provide open-ended time exposure for a lawyer,

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<sup>4</sup> Margolin does not state in his respondent’s brief when he contends the statute of limitations accrued. Because “actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action” (*Coscia, supra*, 25 Cal.4th at p. 1197), Bamdad’s malpractice cause of action will not accrue until he can prove actual innocence. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [“ordinarily, the statute of limitations runs from ‘the occurrence of the last element essential to the cause of action’”]; accord, *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1341.)

though limited by the time when post-conviction remedies are no longer available”].)

Margolin argues: “Based upon the holding in *Coscia* and the amended language in [s]ection 340.6, the trial court did not act in error when it dismissed the entire action with prejudice . . . because the documents before the court evidenced there was no reason to stay and/or hold the Legal Malpractice in abeyance or dismiss the action without prejudice given the final disposition reached in [Bamdad’s] criminal case which rejected each and every challenge to his May 6, 2009 conviction.” So far. Even if Margolin is correct that all of Bamdad’s direct appeals and habeas petitions have been unsuccessful to date (and Bamdad’s allegations, which we assume are true (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100), are to the contrary), that does not mean they will always be unsuccessful. It may be, as Margolin suggests, that the prospects for habeas relief are dim. But, as the legislative history of the amendment to section 340.6 noted, “[o]ften time, the exoneration process takes years, surpassing timetables set by the Statute of Limitations to file a cause of action.” (Sen. Rules Com., 3d reading analysis of Assem. Bill No. 316 (2009-2010 Reg. Sess.) p. 6.) For this and other reasons, the Legislature has determined that malpractice plaintiffs like Bamdad have the right to file a malpractice action up to two years after “the exoneration process” is complete. By entering a judgment of dismissal with prejudice, the trial court deprived Bamdad of this statutory right because a dismissal with prejudice precludes Bamdad from litigating his malpractice cause of action against Margolin, even if he obtains post-conviction exoneration. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793 [““with prejudice” clearly means the plaintiff’s

right of action is terminated and may not be revived,” and a “dismissal with prejudice . . . bars any future action on the same subject matter”]; *Federal Home Loan Bank of San Francisco v. Countrywide Financial Corporation* (2013) 214 Cal.App.4th 1520, 1527 [““[d]ismissal with prejudice is determinative of the issues in the action and precludes the dismissing party from litigating those issues again””].)

Margolin asserts that Bamdad’s “continued filing of meritless appeals—contrary to the U.S. Court of Appeals for the Ninth Circuit—will not allow him to obtain ‘any future desirable rulings which could result in habeas relief’ given that a final disposition of his criminal case has been reached through the U.S. Supreme Court.” Margolin appears to be referring to two orders from the Ninth Circuit, one of which denied a request by Bamdad for a certificate of probable cause and one of which denied a motion for reconsideration. These orders, however, relate to Bamdad’s direct appeal. They have nothing to do with Bamdad’s habeas petitions. ““Postconviction relief in the form of a final disposition of the underlying criminal case”” includes ““a grant of habeas corpus relief.”” (*Jones v. Whisenand* (2017) 8 Cal.App.5th 543, 551; see *Coscia, supra*, 25 Cal.4th at p. 1205; *Khodayari v. Mashburn, supra*, 200 Cal.App.4th at p. 1189.)

What, then, of Bamdad’s other causes of action? In addition to legal malpractice, Bamdad’s first amended complaint included causes of action for fraud, breach of contract, and breach of fiduciary duty. Although Margolin suggests section 340.6, subdivision (a), applies to “all of [Bamdad’s] other causes of action” because they “arise out of the alleged negligent handling of the underlying criminal action,” Bamdad, who has the burden on appeal to show error (*In re Marriage of Rifkin and Carty*

(2015) 234 Cal.App.4th 1339, 1342, fn. 1), does not argue section 340.6, subdivision (a), including its 2009 amendment, applies to any of his other causes of action. Therefore, the trial court did not err in dismissing those causes of action with prejudice.

### **DISPOSITION**

The judgment is reversed. The trial court is directed to vacate its order sustaining the demurrer without leave to amend and dismissing the action with prejudice, and to enter a new order sustaining the demurrer without leave to amend and dismissing Bamdad's cause of action for legal malpractice without prejudice and dismissing his other causes of action with prejudice. Similarly, the trial court is directed to enter a new judgment dismissing Bamdad's legal malpractice cause of action without prejudice and dismissing his other causes of action with prejudice. Bamdad is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

BENSINGER, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.