1st Civil No. A102296

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FRITZI BENESCH,

Plaintiff and Appellant,

vs.

WILLIAM HOISINGTON and
ORRICK, HERRINGTON & SUTCLIFFE LLP,

Defendant and Respondents.

Appeal from the San Francisco Superior Court, Case No. 317187
Honorable Kevin M. McCarthy, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Commencing in 1977, Ernest and Fritzi Benesch retained a San Francisco law firm (Orrick, Herrington & Sutcliffe LLP) to establish and manage their family estate plan. For more than two decades, that firm and one of its partners (William Hoisington) repeatedly consulted with the Benesches regarding the plan, and crafted numerous documents to implement the plan.

In 1999, the 53-year Benesch marriage broke up. When Fritzi contacted Hoisington to revise her estate plan as a result, he declined to represent her further, citing conflicts of interest.

After reviewing copies of the Orrick firm's files, Fritzi's divorce lawyer revealed to her that the estate plan prepared by the Orrick firm and Hoisington had transferred away from Fritzi and Ernest to one of their daughters and son-in-law much of their stock in the family's successful clothing business. Until that moment, Fritzi did not know that this had occurred.

Fritzi sued the Orrick firm and Hoisington for legal malpractice stemming from these events. Fritzi alleged that the lawyers committed malpractice in structuring the estate plan, in transferring her wealth to her daughter and son-in-law contrary to her wishes, and in providing legal representation to her daughter without even soliciting (much less obtaining) Fritzi's waiver of the inherent conflict. As a result, Fritzi alleged she lost her controlling interest in the family business she and her husband had founded and built.

The San Francisco Superior Court entered summary judgment in the Orrick firm's and Hoisington's favor. It did so on a single ground: Fritzi's

claims were time-barred. Fritzi brings this appeal challenging the judgment.

As pertinent here, Code of Civil Procedure section 340.6 establishes a one-year statute of limitations for a legal malpractice action. However, it also provides for tolling:

> during the time . . . [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred[.]

When the facts are viewed in Fritzi's favor (as they must be on summary judgment), it must be deemed true that Hoisington and the Orrick firm continuously represented Fritzi on all estate planning matters between 1977 and at least August 17, 1999, the date when Fritzi's representation was transferred to a new estate planning lawyer after Hoisington apprised Fritzi he could no longer represent her because of the conflict occasioned by her marital breakup.

Since Fritzi filed this lawsuit on August 8, 2000, *less than one year later*, it is not time-barred.

The superior court's determination to the contrary cannot be sustained. At bottom, the court prejudicially erred because it granted summary judgment even though defendants *failed* to demonstrate an absence of triable issues of fact as to the application of the statute of limitations. In reality, there are triable issues of fact, thus precluding the entry of summary judgment. Here's why:

1. The superior court determined, as a matter of law, that the Orrick firm stopped representing Fritzi when Hoisington retired from the firm, purportedly on March 31, 1999. This was wrong. The question of

when the Orrick firm stopped representing Fritzi is a classic issue of fact, determinable only by a jury.

For 22 years, Fritzi had been a client of the Orrick firm with respect to all her estate planning matters. At all times, she was a client of the *firm*, not just Hoisington. Hoisington's retirement did not automatically change that. This is especially true because Fritzi didn't even learn of the retirement until after Hoisington had ceased representing her. Nowhere in its moving papers did the Orrick firm demonstrate the absence of a triable issue of fact on the inherently factual termination point. It never established with certainty the date of Hoisington's retirement; it never proved that it notified Fritzi that Hoisington had retired; it never informed Fritzi that the firm's representation of her ceased with Hoisington's departure, or at any other time; and even now, it continues to maintain possession of the original file in the Benesches' estate plan. The Orrick firm did not prove that it honored its own internal rule requiring that a client be sent a disengagement letter when the firm's representation comes to an end.

Bottom line: There is a triable issue of fact – a jury question – as to when the Orrick firm ceased to represent Fritzi. Summary judgment therefore was impermissible.

2. The superior court wrongly concluded, again as a matter of law, that Fritzi's consultation with Hoisington on August 14, 1999, did not address "the specific subject matter in which the alleged wrongful act or omission occurred" within the meaning of Code of Civil Procedure section 340.6. This, too, was a question of fact, properly determinable by a jury, not by the trial court on summary judgment.

Fritzi's representation by Hoisington and the Orrick firm involved the creation and implementation of Fritzi's estate plan. The project was

anticipated to remain ongoing for Fritzi's life. It started with the drafting of Fritzi's will in 1977. Thereafter, the Orrick firm and Hoisington prepared some 40 documents in refining and implementing the estate plan. Twenty-two years after the attorney-client relationship commenced, the estate plan was still being refined through Hoisington's preparation in 1999 of a codicil to Fritzi's will.

Throughout more than two decades of attorney-client representation, Fritzi (and Ernest) retained and consulted the Orrick firm and Hoisington regarding a specific subject matter – the family estate plan. Services that contemplated and accomplished estate asset transfers, including the stock gifts, transfers, redemptions and the like that form the heart of Fritzi's legal malpractice suit could properly be viewed by a jury as part of a continuing representation by Hoisington and the Orrick firm as to the single "specific subject matter" of the Benesches' estate plan. The issue as to the scope and nature of defendants' representation was one of fact, not resolvable on summary judgment.

3. The superior court was also wrong in concluding, as a matter of law, that Fritzi knew or should have discovered that the Orrick firm and Hoisington breached their duty to her as early as 1992 in connection with a $6 million stock gift and that the statute of limitations began to run at that time. What Fritzi knew or didn't know is likewise a classic issue of fact, and defendants (once again) did not establish the absence of a triable issue on this question.

Moreover, what Fritzi knew is beside the point where, as here, the limitations statute was tolled while the attorney-client relationship was in force. Since the Orrick firm and Hoisington continued to represent Fritzi concerning the family estate plan through at least August 17, 1999, and since it is undisputed that neither defendant ever terminated the relationship

prior to that date, the statute of limitations was tolled throughout the duration of the representation and did not commence to run before then, irrespective of anything Fritzi purportedly knew or should have suspected.

Fritzi's lawsuit against the Orrick firm and Hoisington, filed less than one year after statutory tolling ceased, is not time-barred. Since the defendants failed to carry their burden on summary judgment to demonstrate the absence of triable issues of fact as to statute of limitations issues, the entry of summary judgment was prejudicially erroneous.

The judgment in favor of the Orrick firm and Hoisington must be reversed.

STATEMENT OF FACTS[1]

A. Fritzi And Ernest Benesch Marry And Raise A Family.

Fritzi and Ernest Benesch married in 1946. (Appellant's Appendix ["AA"] 92, 342, 780.) They had two daughters, Valli and Connie. (AA 276, 609.)

Valli became a lawyer and practiced for two years at Brobeck, Phleger & Harrison before joining the family business. (AA 182, 183, 609.) Valli married Robert Tandler ("Bob"), also a lawyer, and had two daughters. (AA 321, 342.) Connie worked as a freelance journalist and never married. (AA 141-142, 609.)

B. The Benesches Develop A Successful Clothing Manufacturing Business.

In 1947, Fritzi and Ernest started a small clothing operation in San Francisco. It grew into Fritzi California, a successful ladies clothing manufacturer. (AA 92, 609, 661.)

1/ On summary judgment, the standard of appellate review is de novo; the facts must be viewed in the light most favorable to Fritzi. (E.g., *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 ["In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [Citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor"].)

Valli joined the company in 1978 and became its president in 1983. (AA 101, 609.) Shortly after marrying Valli in 1983, Bob joined Fritzi California to help Valli run the business. (AA 734, 793-794.)

C. In 1977, The Benesches Retain The Orrick Firm And Its Partner, Hoisington, To Develop And Implement Their Family Estate Plan; The Attorney-Client Relationship Endures Unbroken For 22 Years And Involves The Preparation Of More Than 40 Documents.

In 1977, Fritzi and Ernest retained the Orrick firm to advise and represent them in regard to establishing, developing, implementing and maintaining a family estate plan. (AA 14, 34, 109.) Hoisington was a partner in the Orrick firm, and was the Orrick attorney involved in performing estate planning services for the Benesches. (AA 40, 207, 245, 277-278, 563.)

For an uninterrupted period of more than 22 years, the Orrick firm and Hoisington continued to represent the Benesches regarding all their estate planning matters. During that period, the Benesches consulted repeatedly with the Orrick firm and Hoisington. This resulted in the attorneys creating for the Benesches more than 40 documents, starting with wills and a related revocable trust agreement, and continuing through revisions and codicils, as well as various stock transfers and transactions involving the family business and impacting the prospective Benesch estate. (AA 35, 279-280, 588, 595, 611, 624, 663, 1057.)

There is no evidence showing the attorney-client representation was ever limited to discrete time periods or to separate or discrete transactions. Rather, the Orrick firm and Hoisington undertook to and did establish a

long-term estate plan for the Benesches, and undertook to and did implement that plan over time. (AA 561, 563, 586, 824-825.)

D. The Orrick Firm And Hoisington Undertake To Represent Valli And Bob Without Informing Fritzi Of Such Potentially Conflicting Representation Of Her Prospective Heirs.

In 1981, Valli and (and later, Bob) – principal beneficiaries of Fritzi's and Ernest's estate plan – also retained the Orrick firm and Hoisington, for advice on their own estate, corporate and tax matters, as well as the legal affairs of the family business. (AA 344,1014.) Fritzi was not informed of that representation of her prospective heirs, nor was the potential conflict inherent in that representation ever explained to her, nor was she ever asked to consent to that representation or to waive the conflict. (AA 589, 669.)

E. In August 1999, The Benesch Marriage Breaks Up And Fritzi Is Informed Of A Conflict Of Interest.

In 1999, Fritzi sought a divorce. (AA 566.) She contacted Hoisington, whom she believed still to be with the Orrick firm, to tell him about the breakup and to revoke her estate planning documents. (AA 765-766.)

On August 14, 1999, Hoisington met with Fritzi. He said nothing about having retired from the Orrick firm. He told Fritzi he could no longer represent her because of conflicts of interest, and he referred her to another attorney, Robert Mills. (AA 657, 725-726, 766, 815.) After the meeting,

Hoisington drafted a codicil to Fritzi's will, as requested by Fritzi long beforehand, in 1998. (AA 211-214, 595, 726, 765-767, 809-811.)

On August 17, 1999, the Orrick firm sent Mills some of Fritzi's estate planning documents, including the new will codicil. (AA 261, 589, 657, 1237.) Fritzi was copied on the Orrick firm's transmittal letter. (AA 589, 657, 1237.)

Thereafter, the Orrick firm continued to maintain custody of all Fritzi's files, including Fritzi's original estate planning documents. (AA 589, 628, 642, 657.)

Sometime after the August 1999 meeting, Fritzi called the Orrick firm to speak with Hoisington and was given his telephone number in Lafayette, California. Only then did she learn that Hoisington had retired from the Orrick firm and was in practice for himself. (AA 591, 657, 670.)

Although the Orrick firm asserts that Hoisington retired on March 31, 1999 (AA 566), its records reflect he was still connected with the firm in some capacity into 2000. (AA 803.)

The Orrick firm never notified Fritzi of Hoisington's retirement. (AA 670, 886, 892-893.) Contrary to the Orrick firm's own rules (AA 591, 658)[2], it never gave Fritzi any notice that it was terminating its attorney-client relationship with her (AA 590, 657).

2/ The Orrick firm's internal rules provide:
"Whenever the Firm withdraws from an engagement or completes an engagement, a letter should be sent spelling out who has the responsibility for taking actions on behalf of the client if it appears from the circumstances that there may be an expectation by the client that the Firm has some ongoing responsibilities and the lapse of time could prejudice the client. The letter could also cover other relevant matters such as disposition or transfer of files and payment for outstanding fees." (AA 658, 1128-1130.)

F. Following Her Divorce Lawyer's Review Of Her Estate Planning Documents, Fritzi First Learns Of The Orrick Firm's And Hoisington's Malpractice.

Around September 9, 1999, Fritzi met with her divorce lawyer, who had investigated and made inquiries concerning the details of the Benesch family estate plan. (AA 587-588.)

From the divorce lawyer, Fritzi was "shocked," "disturbed" and "dumbfounded" to learn – for the first time – a number of facts (AA 707, 730, 943-944), including (1) that her trust's ownership of the shares of outstanding Fritzi California stock had been markedly diminished from the 71% the Benesches had owned as of 1991, down to 17.8% (AA 1111); (2) that, contrary to her wishes (AA 695, 696, 700, 730-731), control in Fritzi California had been transferred to Valli and Bob (the Orrick firm's and Hoisington's other, younger clients) through various complicated, sophisticated, multifaceted transactions that had never been explained to Fritzi sufficiently to allow her to make informed decisions regarding the merits and consequences of those transactions or to agree knowingly to participate in them; and (3) that the estate plan, including asset transfers, treated her daughters unequally (favoring Valli over Connie), something Fritzi never would have countenanced (AA 657, 662, 664, 669).

Among the aspects of the estate plan transactions of which Fritzi was not informed by her attorneys were the following:

- *1992 Stock Gifts*: Fritzi was not told either the dollar value ($6 million) of gifts of more than 100,000 shares of company stock to Valli, Bob and their two daughters, or that these were outright gifts, providing her with no life estate or benefit. (AA 592, 653.)

- *1994 Stock Bonuses*: Fritzi did not understand that the company was granting another 100,000 shares (worth at least $6 million) to Valli and Bob. The information in company records was misleading, stating that the stock vested over a five-year period when in fact it vested immediately, and Fritzi was not told the transaction would immediately diminish her estate by transferring company control (over 51% of the stock) to Valli and Bob. (AA 592.)

- *1998 Stock Redemption*: This was a transaction in which Fritzi and Ernest redeemed a significant number of their Company shares and sold additional shares to Valli and Connie. Valli, Bob, Hoisington and others had discussed and planned for the transaction for some nine months, but Fritzi knew nothing of it until Hoisington delivered a memo to her at 11 p.m. the night before obtaining her signature on the necessary documents. In other words, unbeknownst to Fritzi, Hoisington took nine months to work with others on the agreement transferring Fritzi's wealth, but gave Fritzi one night (commencing almost at midnight) to consider it. (AA 592, 617, 618, 654, 655, 666, 714.)

Additional facts are supplied in the Legal Discussion.

STATEMENT OF THE CASE

A. The Operative Complaint Is Filed.

On August 8, 2000, less than a year after Fritzi learned what had happened in her estate plan, Fritzi Benesch filed this lawsuit in Contra Costa Superior Court against the Orrick firm, Hoisington, her husband Ernest, and Valli and Bob. (AA 320.) The operative amended complaint

succeeded the original in October 2001, after a change of venue to San Francisco County. (AA 341-A.)

As against the Orrick firm and Hoisington, the lawsuit alleged causes of action for legal malpractice. Fritzi alleged, among other things, that her lawyers, who had represented her and her husband in all their estate planning matters since 1977, failed to disclose to Fritzi that they had undertaken to represent Valli and Bob; failed to solicit, much less obtain, Fritzi's waiver of the conflict in concurrently representing principal beneficiaries of her estate plan; and unbeknownst to Fritzi and without obtaining her informed consent, drafted documentation (i.e., trust amendments, gifts and other transactions), transferring 70% of the company to their other clients, Valli and Bob, fraudulently concealing from Fritzi that that had been accomplished. (AA 333-336, 344-346, 354-357.)[3]

B. The Motions For Summary Judgment.

The various defendants moved simultaneously for summary judgment.[4] The superior court noted that meaningful analysis of the multiple motions presented a task of "enormous" proportions, involving

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3/ The original complaint also alleged a violation of the Elder Abuse statute against the Orrick firm and Hoisington. (AA 337-338.) However, the amended complaint pressed this allegation only against Valli and Bob (AA 357), and Fritzi acknowledged in her opposition to the Orrick firm's and Hoisington's summary judgment motion "that the elder abuse claim . . . is inapplicable to Orrick and Hoisington." (AA 586; see AA 1382 [order].)

4/ Fritzi also moved for summary adjudication of certain issues against various defendants. As to the Orrick firm and Hoisington, she sought summary adjudication on issues addressing duty and various affirmative defenses, which the court granted in part and denied in part. (AA 1362-1369.)

"multiples of thousands of pages" and taxing the court's limited staff attorney resources. (9/17/02 Reporter's Transcript [RT] 4-5.)

The Orrick firm and Hoisington jointly sought summary judgment on grounds that (1) the action was time-barred; (2) they breached no duty because Ernest was Fritzi's ostensible agent, and they always did what Ernest instructed them to do; and (3) Fritzi could not prove that any alleged breach caused her damage. (AA 7-31, 551-580.)[5]

In respect to the limitations argument – the only ground on which summary judgment was granted[6] – defendants argued that the Orrick firm's representation of Fritzi ceased when Hoisington retired from the firm, an event that the Orrick firm asserted occurred on March 31, 1999. Although defendants conceded that Hoisington continued to represent Fritzi through August 17, 1999, they claimed the final services Hoisington performed for Fritzi – drafting a will codicil – addressed different subject matter than the stock transactions that Fritzi alleged improperly diminished the value of her estate, and that "continuous representation" tolling ended much earlier – specifically, with the conclusion of the latest (1998) stock transaction cited in the complaint. (AA 7-31, 551-580.)

Fritzi filed opposition. In regard to limitations, she asserted that the lawsuit was timely filed less than one year after the Orrick firm and Hoisington ceased representing her in connection with her estate planning on August 17, 1999. As to the duty issue, she asserted there was no ostensible agency, and these defendants breached their duty to fully inform

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5/ We do not discuss the summary judgment motions filed by the other defendants, because the rulings on those motions are not relevant to this appeal from the judgment entered in favor of the Orrick firm and Hoisington.

6/ The superior court expressly rejected the lawyers' other summary judgment arguments. (AA 1383.)

her of the nature and consequences of various estate plan transactions, depriving her of the ability to make informed decisions about the transactions and resulting in a substantial depletion of her estate's assets; regarding the damage issue, Fritzi asserted that, among other things, the attorneys' breaches caused her estate to lose 33.2% of the stock in, and control of, Fritzi California. (AA 582-606.)

C. The Superior Court Awards The Orrick Firm and Hoisington Summary Judgment Solely On Limitations Grounds.

Following a hearing, the superior court granted the Orrick firm's and Hoisington's motion for summary judgment. (AA 1371-1383.) It did so only on limitations grounds, finding the lawsuit time-barred as to these defendants. (AA 1383.)

The court expressly rejected the Orrick firm's and Hoisington's arguments seeking summary judgment or summary adjudication on the alternative grounds of duty and damages, finding there were triable issues of fact as to each of those issues. (AA 1378-1383.)

D. Judgment Is Entered.

On February 10, 2003, the superior court entered judgment against Fritzi in favor of the Orrick firm and Hoisington. (AA 1387.)

STATEMENT OF APPELLATE JURISDICTION

The Orrick firm and Hoisington served notice of entry of judgment on February 12, 2003. (AA 1385-1390.) On April 11, 2003, Fritzi timely appealed from the judgment. (AA 1392.)

The judgment is appealable because it finally disposes of all issues between Fritzi and the Orrick firm and Hoisington. (Code Civ. Proc., § 904.1, subd. (a)(1); Cal. Rules of Court, rule 2(a)(2).)

LEGAL DISCUSSION

I.

THE SUMMARY JUDGMENT MUST BE REVERSED BECAUSE DEFENDANTS FAILED TO SUSTAIN THEIR BURDEN OF ESTABLISHING THE ABSENCE OF TRIABLE ISSUES OF MATERIAL FACT GERMANE TO THE ISSUE OF TOLLING THE STATUTE OF LIMITATIONS – NAMELY, THE DATE WHEN EACH DEFENDANT CEASED TO REPRESENT FRITZI, AND THE "SPECIFIC SUBJECT MATTER" OF THE ATTORNEY-CLIENT REPRESENTATION.

While a legal malpractice action must be filed within one year after the client 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, the limitations period is tolled:

> during the time . . . the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred[.]

(Code Civ. Proc., § 340.6, subd. (a)(2).)

On summary judgment, the Orrick firm and Hoisington had the affirmative burden of establishing that there were no triable issues of fact as to the application of the statute of limitations. To do this, they had to establish as a matter of law that tolling ended more than a year before Fritzi filed her lawsuit. They failed to do so.

The superior court awarded the Orrick firm and Hoisington summary judgment because it concluded that, as a matter of law, tolling had ended, and, thus, the statute of limitations started to run, more than a year before Fritzi filed suit. This was prejudicial error because the issues resolved were factual, not legal, and thus were not resolvable summarily.

The decision was based on determinations that (a) Hoisington retired on March 31, 1999; (b) the Orrick firm stopped representing Fritzi when Hoisington retired; and (c) Hoisington's drafting of the will codicil in August 1999 addressed a different "specific subject matter" than had the estate planning matters challenged as malpractice in Fritzi's complaint. (See AA 1371-1378.) Each of these determinations was factual. Since the facts on each of these matters were materially disputed and since defendants' motion failed to negate the existence of triable issues of fact as to each of these matters, the motion should have been denied.

Far from establishing a limitations defense as a matter of law, the evidence and the law negate it. At the very least, there are jury issues as to what constituted the specific subject matter of the representation and when the representation ceased. Summary judgment therefore was improper.

A. Burden of Proof and Standard of Review.

1. Burden of Proof.

The statute of limitations is an affirmative defense which defendants had the burden to plead and prove. (E.g., *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 473.) "'[I]t is not plaintiff's initial burden to disprove affirmative defenses . . . asserted by defendant.'" (*Ibid.*,

quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001), ¶ 10:235, p. 10-75 (rev. # 1, 2001).)

To secure summary judgment based on the statute of limitations (Code Civ. Proc., § 340.6), the Orrick firm and Hoisington, as the moving parties, had to establish as a matter of law every element of that affirmative defense: "A defendant moving for summary judgment based on an affirmative defense has the initial burden to show that *undisputed facts* support each element of the affirmative defense." (*Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1328, emphasis added.)

As the Supreme Court has explained: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; see *Consumer Cause, Inc. v. SmileCare*, *supra*, 91 Cal.App.4th at p. 468, quoting *Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289-290 ["'the defendant has the initial burden (on summary judgment) to show that undisputed facts support each element of the affirmative defense'"].)

"'If the defendant does not meet this burden, the motion must be denied.'" (*Ibid.*)

2. Standard of Review.

Review of summary judgment is *de novo*. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) The appellate court independently reviews the record and, "[i]n practical effect, . . . assume[s] the role of a

trial court and appl[ies] the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*DiStefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258; *Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648 [same].)

The court's opinion as to the ultimate merits is beside the point. "The matter to be determined by the appellate court is 'whether facts have been presented which give rise to a triable factual issue. The court may not pass upon the issue itself.'" (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1494, quoting *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181.) These rules apply where the issue pertains to the application of a statute of limitations defense. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)[7]

The ultimate public policy goal is that cases should be tried on the merits unless there is absolutely no factual issue to be tried. (E.g., *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392.)[8] Thus, "[a]n appellate

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7/ "[R]esolution of the statute of limitations issue is normally a question of fact," so that summary judgment is proper solely "where the uncontradicted facts established through discovery are susceptible of only one legitimate inference." (*Ibid.*; see, e.g., *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 997 [summary judgment reversed; record presented triable factual issue as to whether continuing violation doctrine tolled FEHA's one-year limitations statute]; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1060 [summary judgment reversed because "triable issues of fact remain as to the limitations issue"]; *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103 [reversing summary judgment in legal malpractice action because trial court misapplied "continued representation" tolling provision in Code of Civil Procedure section 340.6].)

8/ "Due to the drastic nature of summary judgment, any doubts about the propriety of granting the motion must be resolved in favor of the party opposing the motion." (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355 [the moving party's evidence is construed strictly while the resisting party's is construed liberally]; *Bennett v. Shahhal* (1999) 75

(continued...)

court will reverse a summary judgment if any kind of a case is shown." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 43; see also *Bennett v. Shahhal*, *supra*, 75 Cal.App.4th at p. 388 ["Summary judgment is proper *only* where there is no triable issue of material fact" (emphasis added)].)

Public policy was violated in this case. Fritzi was improperly deprived of her right to a trial by jury. When the evidence is construed favorably to Fritzi as required, there are triable issues of fact as to whether she timely filed this lawsuit within one year after the Orrick firm and Hoisington ceased to represent her regarding their furnishment of the estate planning services in which their wrongful acts and omissions occurred.

B. Summary Judgment Was Improper Because There Is A Material Factual Issue As To Whether The Orrick Firm And Hoisington Each Continued To Represent Fritzi Until At Least August 17, 1999, A Date Less Than One Year Before She Filed This Lawsuit.

The parties agree about when Fritzi's relationship with the Orrick firm and Hoisington *started*: It began in 1977, when Fritzi and her husband retained these lawyers to create, implement and maintain their family estate plan. (AA 14, 34, 109.)

When the representation *ceased* is the matter the lawyers dispute. The Orrick firm and Hoisington assert the cessation issue is one of law,

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8/(...continued)
Cal.App.4th 384, 388 ["We resolve all doubts as to whether any material, triable issues exist in favor of the party opposing summary judgment"].)

properly determined by the trial court. Fritzi asserts the question is one of fact.

As we now demonstrate, Fritzi's position is the correct one, as defendants have failed to demonstrate beyond cavil that they stopped representing Fritzi more than a year before she filed this lawsuit, or that their representation of her ever addressed more than a single specific subject matter, namely, the Benesch estate plan.

1. The Conceded Facts.

a. Representation by Hoisington and the Orrick firm in estate planning matters commenced in 1977 and lasted for 22 years.

The Orrick firm and Hoisington concede they represented the Benesches in estate planning matters, beginning in 1977. They further concede that the representation continued into 1999. (E.g., AA 561-563.)

b. Hoisington concedes representing Fritzi through August 17, 1999.

Hoisington concedes he terminated his representation of Fritzi effective August 17, 1999, *less than a year* before she filed this lawsuit on August 8, 2000. (AA 590, 657.)[9]

9/ He could hardly do otherwise. He concedes: Fritzi contacted him shortly before August 17, 1999, to tell him that she and her husband were divorcing and to revoke her estate planning documents (AA 726); he met with her on August 14, 1999, and informed her that he had to terminate

(continued...)

c. The Orrick firm concedes representing Fritzi until Hoisington retired from the firm, which it says happened March 31, 1999.

The Orrick firm concedes it represented Fritzi through the date of Hoisington's retirement from the firm, which it says was March 31, 1999. (AA 573 ["Orrick performed no legal services for Fritzi after Bill Hoisington retired from the firm on March 31, 1999. After that date, the continuous representation tolling provision of section 340.6 no longer applied to Fritzi's claim against Orrick"].) However, on August 17, 1999, the Orrick firm sent Fritzi a newly-drafted codicil to her will. (See AA 1237.)

2. The Orrick Firm Failed To Carry Its Burden On Summary Judgment To Establish Conclusively That Its Attorney-Client Relationship With Fritzi Ended More Than A Year Before She Filed This Lawsuit.

The Orrick firm asserts that Hoisington's retirement automatically severed the firm's attorney-client relationship with Fritzi, that the firm performed no legal services for Fritzi after the retirement date, and that, as a result, Section 340.6's continuous representation tolling provision necessarily ceased to apply when Hoisington retired. Thus, according to

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9/(...continued)
their relationship because of conflicts of interest (AA 657, 815). Nonetheless, he thereafter drafted a long-promised will codicil for Fritzi and the Orrick firm shipped it, with copies of her estate documents, to a different estate planning lawyer. (AA 566, 657, 817-818.)

the Orrick firm, the statute of limitations on Fritzi's claim commenced to run as of March 31, 1999. (AA 567-568.)

One fatal problem with the Orrick's firm's position is that it treats the termination issue as one of law when actually it is one of disputed material fact, resolvable only by a jury.

To secure summary judgment based on the statute of limitations (Code Civ. Proc., § 340.6), the Orrick firm had to establish – beyond any factual dispute – that Fritzi filed her lawsuit more than one year after the firm ceased to represent her in regard to the Benesch family estate plan, and that, therefore, she was not entitled to rely on Section 340.6's "continuous representation" tolling provision. (E.g., *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 121; *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th at pp. 1494-1495.) The Orrick firm did not carry its burden.

The evidence, viewed in the light most favorable to Fritzi, reveals that the Orrick firm (a) failed to nail down the date of Hoisington's retirement; (b) failed to establish that Hoisington's retirement – whenever it may have occurred – necessarily terminated the firm's existing attorney-client relationship with Fritzi; and (c) failed to establish that it ceased to represent Fritzi when Hoisington left the firm. As to each of these matters, there are disputed issues of material fact.

a. The Orrick firm didn't even nail down the date of Hoisington's retirement.

The threshold premise of the Orrick firm's limitations claim is that Hoisington retired on March 31, 1999. The problem with this position is that it is based on the Orrick firm's ipse dixit, not on undisputed evidence. (See AA 802-804.)

This asserted "fact" cannot be accepted conclusively as true because:

- Orrick firm internal documents suggest Hoisington was with the Orrick firm until March 2000. (AA 208-209, 802-804, 1066-1067.)
- The Orrick firm never notified Fritzi of Hoisington's retirement from the firm. (AA 628.)
- Although the Orrick firm claimed it sent its clients notice of Hoisington's retirement by letter dated March 18, 1999 (AA 590-591), the only document it produced in purported confirmation was an unsigned letter found in the firm's electronic files, stating that Hoisington was (a) retiring from the Orrick firm and (b) associating with another firm, the latter point being something that never happened, as Hoisington actually went into business for himself. (AA 591, 1069.)[10] Fritzi, moreover, denied she ever received this letter (AA 591, 670), and even had the letter been sent, it did not state that the client's attorney-client relationship with *the Orrick firm* was terminated (AA 591).
- When Fritzi contacted Hoisington in August 1999 with news of her impending divorce and to revoke her estate-planning documents, she reached him by telephoning the Orrick firm's number; at that time, she was not apprised, and had no inkling, that he had left the firm. (AA 589, 726, 761.)
- At the August 14, 1999, meeting with Hoisington, at which he informed Fritzi he could no longer represent her, Hoisington did not tell her, or even hint to her, either that he had retired

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10/ The Orrick firm produced no evidence that this inaccurate letter was ever sent to Fritzi or to anyone else. (See AA 893.)

or that the Orrick firm had ceased to represent her when he did. (AA 589.)

- After Fritzi's codicil was prepared following the August 14, 1999, meeting with Hoisington, *the Orrick firm* sent it to Fritzi's new lawyer. (AA 1237.)

Since the Orrick firm's statute of limitations defense is grounded intrinsically in Hoisington's retirement, the Orrick firm – in order to prevail on summary judgment – first had to pinpoint the date of Hoisington's retirement as an indisputable fact. It did not do that. Therefore, the retirement date (to the extent determinative of tolling at all) is for the jury to resolve. The Orrick firm was not entitled to summary judgment under a date-of-retirement theory.

b. Equally disputed is whether Hoisington's retirement, even if assumed to have occurred on the cited date, necessarily terminated the Orrick firm's relationship with Fritzi.

Even if there were no triable issue of fact as to the date of Hoisington's retirement, and even assuming that Hoisington did retire on March 31, 1999, that would not establish as a matter of law (or at all) that the Orrick firm's 22-year attorney-client relationship with the Benesches simultaneously ceased. The notion that a partner's retirement automatically terminates the attorney-client relationship is counterintuitive at best. Not surprisingly, the Orrick firm did not identify any authority – and we know of none – holding that an attorney's retirement from a law firm ipso facto terminates the law firm's attorney-client relationship with the clients whose files the attorney handled.

The law, as well as basic principles of attorney professional responsibility and common sense, dictate precisely to the contrary. The relationship between an attorney and client is essentially contractual, its beginning and end depending on the terms of the agreement. (E.g., *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 504; *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913.) Where a law partnership – like the Orrick firm – represents a client, the departure or death of the responsible partner doesn't automatically terminate the representation. On the contrary, in such circumstances the firm and each of its partners are legally obligated to complete all unfinished business on behalf of the firm. (E.g., *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 216, disapproved on another ground in *Allied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10 [when a partner departs a law firm, the firm must complete all unfinished business]; *Little v. Caldwell* (1894) 101 Cal.553, 560 [surviving partners must complete outstanding contracts]; 1 Witkin, Cal. Procedure (4th ed. 1996), Attorneys, § 93, p. 130, citing *Little v. Caldwell*, *supra*, 101 Cal. at pp. 559, 560.) This is consistent with the principle that a client who contracts for the services of a law firm is entitled to the participation of *all* its members. (*Ibid.*; *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445; *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558.)

Since Fritzi was a client of the Orrick firm for more than 22 years and Hoisington serviced Fritzi's business on behalf of the firm, Hoisington's departure, far from terminating Fritzi's relationship with the Orrick firm, entitled Fritzi to expect and receive the services of other partners in the firm.

One matter of unfinished estate-planning business that Hoisington had agreed to perform for Fritzi was preparing the codicil to her will, which

she had first requested in 1998. (AA 726.) That task was not fulfilled until Hoisington wrote it up following his August 14, 1999, meeting with Fritzi, after which the Orrick firm forwarded the codicil to Fritzi's new lawyer on August 17, 1999. (AA 1237.)

What occurred in this case – a long-term attorney-client relationship involving the lawyer's preparing numerous documents over time – is typical of estate-planning practice. It is typically a long-term, evolving process. (E.g., 1 Cal. Transactions Forms: Estate Planning (West 1999) § 1:65, p. 82 ["A client must understand that estate planning is normally an evolving rather than a static process"]; 1 Cal. Estate Planning (Cont.Ed.Bar 2003) § 1.1, p. 3 ["'Estate planning' is the process of putting an individual's financial affairs in order"].) Thus, estate planning clients reasonably should be able to expect (absent a contrary agreement, not proven to exist here) that the representation will remain ongoing unless and until counsel notify them otherwise.

For precisely these reasons, leading practice guides for estate planning attorneys uniformly advise that the client must be told affirmatively when the representation has ended.[11] The Orrick firm itself

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11/ E.g., 1 Cal. Estate Planning, *supra*, at § 2.32, p. 94 ["Unlike services rendered in the litigation context, estate planning services are often performed over many years, and it may be difficult to identify when they begin or end. The relationship between the estate planning attorney and client is usually open-ended, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of ongoing representation can continue until the client's death (and sometimes beyond)"]; *id.* at § 1.56, p. 33 ["The attorney may wish to use the final letter to disengage from the estate planning project and specify that the attorney's work has been completed"]; 1 Cal. Transactions Forms: Estate Planning, *supra*, at § 2:9, pp. 18-19 ["The estate planner must develop customs and procedures in his or her office concerning . . . termination of the attorney-client relationship when the work is complete"]; *id.* at § 2:44, p. 64 ["the estate planning attorney, at

(continued...)

has an internal rule requiring such notification. (See note 2, *supra.*) The fatal problem for the Orrick firm is that there is no evidence that it ever sent any notice of termination to Fritzi, or that she ever received any such notice. Indeed, the evidence is that she did not.

Based on the governing law, a law firm cannot *assume* (as the Orrick firm convinced the trial court to do) that when an estate planning partner retires, his clients are *automatically* abandoned – cut loose from the firm's representation, without so much as written notification of the retirement or the termination of the relationship.[12] Indeed, the law (as well as the Orrick firm's internal rules) are precisely to the contrary. If the evidence here established anything as a matter of law, it would be that the Orrick firm's attorney-client relationship with Fritzi continued after Hoisington retired.

Besides being contrary to these controlling principles, the asserted proposition that Hoisington's retirement cut off the Orrick firm's representation of Fritzi cannot be squared with the body of decisions and treatises construing Section 340.6 and other continuous-representation tolling provisions. Such authorities uniformly hold that "for purposes of the statute of limitations, the attorney's representation is concluded *when the parties so agree*, as when the agreed tasks end. This does not require that there be formal termination, such as withdrawing as counsel of record." (3

11/(...continued)
the end of the estate planning attorney's work, should terminate the attorney-client relationship. There should be a definite closure on the estate planning case, subject to reopening it again if the client comes back at a later time and wants additional work done"].

12/ The Orrick firm's notion that retirement silently terminates the attorney-client relationship makes no sense as a business tactic, either. Some lawyer in the equation – the retiring partner, the firm, or both – will ordinarily have a financial incentive to maintain the client's ongoing and future estate planning business.

Mallen & Smith, Legal Malpractice (5th ed. 2000 & 2002 Supp.) Statutes of Limitations, §22.13, p. 442, emphasis added.)

Neither the Orrick firm nor Hoisington has pointed to a single fact establishing (or even hinting) that Fritzi ever agreed that her 22-year relationship with the Orrick firm would terminate upon Hoisington's retirement, or otherwise, prior to August 17, 1999, the date when copies of Fritzi's file documents were shipped to her new estate planning lawyer. In fact, the record affirmatively demonstrates that the Orrick firm's representation continued until at least that date, as that is when the Orrick firm conveyed to Fritzi's new lawyer the codicil that Hoisington had previously undertaken to prepare. (AA 1237.)

Based on the facts and the governing law, the question of when the Orrick firm stopped representing Fritzi, if not resolvable as a matter of law in *Fritzi*'s favor, is at least inherently factual, resolvable by a jury. As the authorities hold, questions of whether and when the attorney defendant stopped representing the client plaintiff must be based on consideration of all the facts and circumstances, viewed objectively according to some cases (e.g., *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th at pp. 1484-1499; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887) or from *the client's* perspective according to others (e.g., *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1171).

At a minimum, the question whether Hoisington's retirement from the Orrick firm (whenever it occurred) worked to terminate the firm's representation of Fritzi is a disputed matter, a point that a jury could readily decide in Fritzi's favor. Accordingly, it cannot be resolved in defendants' favor on summary judgment. Indeed, it is difficult to see how the issue could be resolved in the Orrick firm's favor at all, in light of the following facts:

- It was the Orrick firm (not Hoisington alone) that was retained to provide estate-planning services, which by their nature (and in Fritzi's understanding) were contemplated to remain ongoing, unless terminated, throughout the course of Fritzi's lifetime. (See, e.g., *Heyer v. Flaig* (1969) 70 Cal.2d 223, 230, disapproved on another ground in *Laird v. Blacker* (1992) 2 Cal.4th 606 [estate lawyers owe continuing duty of care to effectuate estate plan].)
- The Orrick firm continuously performed estate-planning services for Fritzi for more than 22 years. (AA 611.)
- The Orrick firm never notified Fritzi it was terminating its attorney-client relationship with her. (AA 628, 886.)
- The Orrick firm's own internal procedures require that a disengagement letter be sent,[13] but none was sent to Fritzi.
- On an occasion ostensibly after Hoisington's retirement, Fritzi met with Hoisington in connection with estate planning matters, and was not told that Hoisington was seeing her in any capacity other than as a partner in the Orrick firm, as he had done for the preceding 22 years. (AA 629, 670.)
- After Hoisington's alleged retirement, the Orrick firm continued to maintain all the files in the Benesch estate plan, including Fritzi's original estate planning documents. (AA 628.)

13/ See note 2, *supra*.

- The Orrick firm never turned over Fritzi's files to anyone before August 17, 1999, and even then it kept the originals and provided her new attorney with copies. (AA 628.)[14]
- On August 17, 1999, the Orrick firm sent Fritzi's new counsel a newly-drafted codicil that Fritzi had asked Hoisington to prepare long before his retirement, while he was a partner in the Orrick firm. (AA 808-811, 1237.)

Under these facts, a jury could easily and permissibly conclude that the Orrick firm continued to represent Fritzi after Hoisington retired. Whether viewed from Fritzi's client perspective or objectively, the facts preclude any determination that, as a matter of law, the attorney-client relationship between Fritzi and the Orrick firm terminated when Hoisington retired. The summary judgment based on that determination is flat-out wrong.

c. The Orrick firm failed to establish that its representation of Fritzi in connection with the Benesch family estate plan ceased before August 17, 1999.

Finally, the Orrick firm has contended that its representation of Fritzi ended with Hoisington's retirement, ostensibly on March 31, 1999, because the firm (as distinct from Hoisington) provided her with no legal services

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14/ In fact, the Orrick firm still has the original files. (AA 590, 628, 890.)

after that date.[15] This is belied by the fact that it was the Orrick firm, not Hoisington, that conveyed to Fritzi's new lawyer on August 17, 1999, the codicil Fritzi previously requested it to prepare. (AA 1237.) If the Orrick firm was not involved in Fritzi's continuing estate-planning representation, why was it involved in completing this final task?

Even if the Orrick firm's position were not contradicted by the evidence, it would still be untenable. It is tantamount to arguing that no matter what type of services an attorney was providing, and no matter whether the attorney mentioned anything to the client, and no matter what the client's agreement or expectation, representation automatically ceases for purposes of Section 340.6's continuous representation provision whenever activity in the file slows or lapses. This undoubtedly would come as a surprise to any client of estate planning attorneys – it certainly did to Fritzi.

Under the Orrick firm's reasoning, tolling would cease the day after any estate planning task was completed. That simply does not square with the law or with what estate planning practice is all about.

The very nature of estate planning practice, as noted, contemplates continuous representation, extending throughout the client's lifetime and even beyond. Numerous treatises and other authorities expressly so declare.[16] In furtherance of their financial interests, as well as their clients'

15/ AA 567-568 ["The question as to Orrick is simple. Orrick stopped providing legal services to Fritzi no later than March 31, 1999, when Bill Hoisington retired from Orrick. Accordingly, ***at the very latest***, Fritzi had to file her suit against Orrick within one year from the date of Bill Hoisington's retirement, or by ***March 31, 2000***"], AA 573 ["Fritzi had one year after his retirement to file her claim against Orrick"].

16/ E.g., 1 Cal. Estate Planning, *supra*, at § 2.32, p. 94, emphasis (continued...)

estate-planning interests, estate planning attorneys desire and encourage a continuing relationship, so that fees will continue to be generated and their clients' estate planning interests will remain current and effective. Together, attorney and client create and implement the estate plan, administer and periodically review it, and make changes as needed throughout the vicissitudes of the client's life and circumstances. Once again, the authorities so declare.[17]

16/(...continued)
added ["Unlike services rendered in the litigation context, estate planning services are often *performed over many years, and it may be difficult to identify when they begin or end.* The relationship between the estate planning attorney and client is usually *open-ended*, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of ongoing representation can continue until the client's death (and sometimes beyond)"]; B. Ross, California Practice Guide: Probate (The Rutter Group 2002) § 1:23, p. 1-12 ["Frequently, counsel who drafted the testamentary instrument being offered for probate is also asked to serve as the probate attorney. In most cases this practice is desirable, since the attorney, by reason of his or her former professional relationship with the now-deceased client, is privy to information about decedent's assets and intentions unknown to others"]; *Heyer v. Flaig*, *supra*, 70 Cal.2d at p. 230 ["Defendant owed a duty of care to the plaintiffs to effectuate in a non-negligent manner the testamentary scheme of the testatrix. Such a duty may extend beyond the date of the original drafting of the will when the attorney's negligent acts created a defective estate plan upon which the client might rely until her death. The duty effectively to fulfill the desired testamentary scheme continued until the testatrix' death, when the testatrix' reliance became irrevocable"].)

17/ See, e.g., 1 Cal. Estate Planning Practice (Cont.Ed.Bar 2001), § 1.57, p. 45 ["Because much of the estate planning process will have effects in the future, 'completion' of the plan is difficult to define. . . . Follow-up is necessary to ensure that the plan is properly carried out. ¶ The attorney must also follow up to ensure that the plan remains timely. . . . Reliable follow-up is needed to satisfy clients as well as to reduce the risk of malpractice"]; 1 Cal. Estate Planning, *supra*, § 1:56, p.
(continued...)

The relationship between Fritzi and the Orrick firm fit this mold precisely. Fritzi reposed trust in the Orrick firm's estate planning services and ongoing representation for more than 22 years. The Orrick firm prepared over 40 documents for the Benesches over that period. The Orrick firm has not provided a shred of demonstration that it ever limited or ended (or ever wanted or intended to limit or end) the representation before August 17, 1999.

Hoisington's retirement simply is not determinative of when the Orrick firm stopped representing Fritzi in regard to the family estate plan, whether or not the firm actively provided services past that point. A jury could easily conclude that Fritzi remained a client of the Orrick firm until the Orrick firm told her differently, or vice versa. Based on the evidentiary record in this case, termination happened, at the earliest, when the Orrick firm shipped copies of file documents and the new codicil to Fritzi's new estate planning lawyer on August 17, 1999, less than one year before Fritzi filed this lawsuit.

For all these reasons, the Orrick firm utterly failed to prove the absence of triable issues of fact as to its limitations defense. Accordingly, it was not and is not entitled to summary judgment.

17/(...continued)
33 [in order to avoid "duty for the attorney to keep the client informed of changes in the law that might affect the client's estate plan," the attorney "may wish to use the final letter to disengage from the estate planning project and specify that the attorney's work has been completed"]; 1 Cal. Transaction Forms: Estate Planning, *supra*, § 1:65, p. 81 [unless told otherwise, "a client may very well expect the attorney to continually notify the client of changes in the law"].

C. Summary Judgment Must Be Reversed Because The Orrick Firm And Hoisington Failed To Establish The Absence Of Triable Issues Of Fact Concerning The "Specific Subject Matter" Of Their Representation Within The Meaning Of Code Of Civil Procedure Section 340.6, subdivision (a)(2).

Although defendants jointly asserted that Fritzi had one year following Hoisington's retirement to sue the Orrick firm for malpractice (AA 567-568, 573), they contended as to Hoisington himself that tolling actually stopped earlier. Conceding that Hoisington represented Fritzi continuously through August 17, 1999, they maintained her lawsuit nonetheless is time-barred because Hoisington supposedly did not provide continuous representation "regarding the specific subject matter in which the alleged wrongful act or omission occurred" any later than 1998, when the last stock transaction charged as malpractice took place. (AA 573-575; Code Civ. Proc., § 340.6, subd. (a)(2).)

The fatal problem with defendants' approach is that it is not based on indisputable facts and inferences. While a jury conceivably might buy into defendants' position, a jury could also reject it. A jury could conclude that the stock transactions that improperly depleted Fritzi's prospective estate, when viewed in the light most favorable to Fritzi's claims, were part and parcel of the "specific subject matter" of the Orrick firm's and Hoisington's overall estate planning representation. Rather than looking at the overall estate planning picture, defendants' position parses the representation into discrete transactions, something a jury might be

unwilling to do, especially taking into account the Benesches' 22-year relationship with the defendants and the fact that estate planning goals have overarching objectives consummated through multiple documentary acts. (See, e.g., AA 561-564.)

The cases examining Section 340.6's "specific subject matter" tolling provision prohibit defendants' stingy interpretation. Appellate courts consistently read Section 340.6 broadly.

As one practice manual put it succinctly: "For the estate planning attorney, the 'specific subject matter' will usually be the estate plan itself." (1 Cal. Transaction Forms: Estate Planning, *supra*, § 2:8, p. 13.) "[O]rdinarily the representation is on the same specific subject matter until the agreed tasks have been completed or events inherent in the representation have occurred." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528; see e.g., *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th at p. 1497, quoting 2 Mallen & Smith, Legal Malpractice, Statutes of Limitations, *supra*, § 18.12, p. 120 ["'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal"']; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, 91 Cal.App.4th at p. 887-888 [same].)

There is no dispute that Hoisington (and the Orrick firm, for that matter) represented Fritzi continuously from 1977 into 1999. What defendants seek to ignore, however, is that the entirety of the representation addressed a single specific subject matter, a single goal: effectuation of the Benesch family estate plan. (See, e.g., AA 587 [the attorneys undertook to implement the Benesches' long-term estate planning goals].) Even the Orrick firm's billings in connection with stock transactions described the firm's services as "estate planning." (AA 408-419.)

Estate planning was the only purpose for which the Benesches ever retained Hoisington. (AA 772.) All consultations concerned effectuating the estate plan. Every one of the 40+ documents that the Orrick firm and Hoisington prepared for the Benesches pertained to effectuating the estate plan. That included the new will codicil, which had been in the works for a long time (AA 726) and was conveyed by the Orrick firm to Fritzi's new counsel on August 17, 1999 (AA 1237). Moreover, key "events inherent in the representation" (*Crouse v. Brobeck, Phleger & Harrison, supra*, 67 Cal.App.4th at p. 1528) – such as the deaths of Fritzi and Ernest Benesch (see *Heyer v. Flaig, supra*, 70 Cal.2d at p. 230 [noting client's expectation of relying on estate plan to and beyond death]) – had yet to occur, and, until the termination occurred in August 1999, Fritzi had every reasonable expectation that the Orrick firm and Hoisington would continue to represent her in developing and implementing the estate plan until those events transpired.

The appellate decisions have held analogous types of multifaceted long-term representation – particularly transactional (as opposed to litigation) representation – to address a single specific subject matter for purposes of tolling under Section 340.6. *Crouse v. Brobeck, Phleger & Harrison, supra*, 67 Cal.App.4th 1509, is illustrative.

In *Crouse*, a client retained an attorney to assist in the sale of her limited partnership in 1987. She was supposed to receive a promissory note in the sale, but the attorney failed to deliver the note; indeed, he lost it. The attorney was still representing the client in connection with the partnership sale and the note three years later in 1990 when the obligors on the note sought to renegotiate its terms; however, a restructuring agreement fell through because the attorney was unable to find the note and surrender it as part of that transaction. After receiving advice from other counsel, and

after a different restructuring deal finally closed, the client sued the attorney (and the two firms where he had been a partner) for legal malpractice. (*Id.* at pp. 1521-1523.) In the trial court, the attorney obtained summary judgment on limitations grounds, circumventing application of Section 340.6's continuous representation tolling provision with the argument that the different phases of his representation involved different specific subject matters. (*Id.* at pp. 1520, 1523.)

The Court of Appeal reversed. It determined the attorney had characterized the subject matter of his representation too narrowly. Taking the client's more expansive view, the court held that the representation, through its various phases, had nonetheless addressed a single specific subject matter: the sale of Crouse's limited partnership interest and collecting the proceeds of the sale. (*Id.* at pp. 1528-1531.) The court observed that the attorney-client relationship continued over the three-year period, 1987-1990, even though the work proceeded in multiple phases. As the Court of Appeal declared, the attorney "continued advising Crouse on matters relating to the original business transaction because he assisted in both restructuring the transaction in 1990 and helping Crouse collect on the new note created as part of the restructured transaction." (*Id.* at p. 1529.) Accordingly, the representation addressed a single specific subject as a matter of law.

So too, here. Over a 22-year period, Hoisington and the Orrick firm continued to represent Fritzi in formulating, effectuating and restructuring her estate plan.

Other decisions, like *Crouse*, support a broad reading of what constitutes a specific subject matter:

- In *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th 1488, the attorney advised the client in 1988 to disclaim her life estate in a home her

mother had devised to her by will in exchange for an undivided fractional interest in the home; he advised her again in 1990, regarding distribution of the home when other heirs sought to sell it. Notwithstanding the two-year gap and the different aspects of the services provided, the representation was held to involve the same specific subject matter under the tolling provision of section 340.6. (*Id.* at pp. 1497-1499.)

- Likewise, in *O'Neill v. Tichy*, *supra*, the client alleged that his attorneys committed malpractice in advising him in 1977 concerning a business reorganization. The reorganization resulted in NLRB proceedings, resolved adversely to the client five years later in 1982 and affirmed in 1988; the attorneys were not formally discharged until 1989; the Court of Appeal concluded that "'so long as there are unsettled matters tangential to a case, and the attorney assists the client with these matters, he is acting as his representative,' and the statute of limitations is tolled.'" (*Id.* at p. 121, quoting *Gurkewitz v. Haberman* (1982)137 Cal.App.3d 328, 333.)[18]

Here, the lawyers repeatedly stressed that the Benesches worked steadily with Hoisington and the Orrick firm over a period of decades to develop and implement an intricate, multifaceted family estate plan

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18/ Even *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, which affirmed a finding that an attorney's representation involved two separate subject matters, is analytically consistent with the cited law on this topic. There, the attorney represented the client in a real estate transaction and in initial efforts to correct his negligence in that transaction. The client ultimately hired new counsel to prosecute a lawsuit seeking to clean up the mess. As part of the litigation, the client hired the negligent attorney as an expert witness and consultant in the lawsuit. The client then sued the attorney for his negligence in the transactions and the appellate court affirmed summary judgment for the negligent attorney on limitations grounds, concluding that rehiring the attorney as an expert was in a completely different capacity – i.e., as an expert witness and consultant, not as counsel; accordingly, the subsequent hiring did not toll the statute of limitations.

designed to pass portions of their wealth to their daughters and granddaughters and to minimize the effect of federal estate taxes. (E.g., AA 12, 14, 561, 563.) They conceded that their representation implemented a general estate plan that encompassed dozens of separate documents, including among them Fritzi's will and later her codicil. (AA 662, 1057.) Yet, when it comes to Section 340's "specific subject matter" provision, defendants do an about-face, conveniently re-characterizing the final document in the chain – the codicil bequeathing Fritzi's best jewelry – as addressing a separate subject matter unto itself. (AA 568, 573-575.)[19]

The nature, scope and duration of defendants' representation of Fritzi is for a jury to determine. Just as in *Crouse*, this Court should acknowledge that a jury could adopt Fritzi's view that Hoisington and the Orrick firm were her estate planning lawyers, whose singular job (unless expressly terminated) was to assist her in all manners needed to implement her estate plan until her death.

The defendants submitted no evidence demonstrating that they ever terminated their representation or carved it into discrete periods in any way. They never demonstrated the absence of a triable issue of fact on this point. Therefore, the matter was and is one for a jury to determine.

Under the evidence, a jury could properly conclude that the entirety of defendants' representation involved a single specific subject matter within the meaning of Section 340.6, subdivision (a)(2). Because that

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19/ The Orrick firm's own legal malpractice expert testified that to treat every codicil as a separate matter would be unreasonable: "And if a lawyer were required to treat each separate transaction as a separate matter, in a situation like this where you have a continuous representation of two people with respect to their estate plan over 22 years, then you'd have to treat them all as separate matters; every gift, every codicil, every document, every aspect. That's not what the rules [of professional conduct] are intended to achieve." (AA 596, 903-904.)

representation endured until the Orrick firm and Hoisington sent the codicil and copies of Fritzi's file documents to a new lawyer on August 17, 1999, a jury could properly conclude the statute of limitations was tolled until that date, and this lawsuit, initiated less than a year later on August 8, 2000, was timely filed.

D. Since The Statute Of Limitations Was Tolled, What Fritzi Purportedly Knew Or Should Have Known Is Irrelevant.

The Orrick firm and Hoisington argued that Fritzi had at least constructive knowledge of their purported wrongdoing years before she sued them. Accordingly, they asserted, she had one year after "specific subject matter" tolling ended to file her lawsuit. (AA 567-573; see Code Civ. Proc., § 340.6, subd. (a) [unless tolled, legal malpractice action "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"].)

In ruling on this argument, the trial court fundamentally erred in two ways. First, it accepted the proposition that Fritzi had actual or constructive knowledge of wrongdoing, even though this was contested; second, it made the insupportable determination that the statute of limitations actually started to run contemporaneously with the earliest acts alleged as malpractice in her complaint, i.e., a 1992 stock sale transaction. From these premises, the court reached the apparent conclusion that the statute of limitations ran out long before the lawsuit was filed. (AA 1378 ["The statute of limitations thus began running when plaintiff first discovered, or through the use of reasonable diligence should have discovered . . . [that]

defendants allegedly breached their professional duties by failing to fully inform plaintiff of the terms and effect of the 1992 gift"].)

As to Fritzi's knowledge, both defendants' argument and the trial court's ruling on it ignore the principle that on summary judgment, defendants' version of the events must be disregarded. Rather, the facts must be viewed and all reasonable inferences must be drawn in the light most favorable to Fritzi, the non-moving party. And according to Fritzi, she neither knew nor should she have known that her attorneys were diminishing her resources, handing her business over to her daughter (whom they were also representing, without Fritzi's knowledge or consent), and treating her two daughters unequally.

The court's unfounded conclusion the statute of limitations was triggered by Fritzi's supposed constructive knowledge while the attorney-client relationship was ongoing founders for a legal reason as well. The court fundamentally misconceived how Section 340.6's tolling provision works.

Even if we were to assume *arguendo* that Fritzi did have actual or constructive knowledge of wrongdoing, the statute of limitations still would never commence to run while the representation continued. During the entirety of that period – through August 17, 1999 – time effectively stood still. (E.g., *Kulesa v. Castleberry*, *supra*, 47 Cal.App.4th at p. 108 ["Under the plain language of the statute, the continued representation tolling applies categorically, not conditionally: the clock stands still"]; *O'Neill v. Tichy*, *supra*, 19 Cal.App.4th at pp. 120-121 ["the client's awareness of the attorney's negligence does not interrupt the tolling of the limitations period so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence

occurred"]; see also *Gurkewitz v. Haberman, supra*, 137 Cal.App.3d at p. 336.)[20]

For all the reasons expressed, Fritzi timely filed this lawsuit against the Orrick firm and Hoisington. As the moving parties, the Orrick firm and Hoisington failed to carry their burden on summary judgment. Summary judgment therefore was awarded improperly, and the judgment in favor of the Orrick firm and Hoisington must be reversed.

II.

NO OTHER GROUND SUPPORTS THE JUDGMENT IN FAVOR OF HOISINGTON AND THE ORRICK FIRM; THE SUPERIOR COURT RIGHTLY REJECTED THEIR ARGUMENTS ON DUTY AND DAMAGES.

The superior court relied solely on the limitations ground in granting summary judgment; indeed, the court expressly rejected the alternative grounds (duty and damages) that the Orrick firm and Hoisington had

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20/ A contrary interpretation – effectively requiring an estate planning client to review his or her attorney's services for malpractice every time there was a lull in file activity – would undermine some of the acknowledged purposes of the continuous representation rule, to "'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618, quoting Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 17, 1977; see *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, 91 Cal.App.4th at p. 887 [quoting *Laird*].)

advanced. (AA 1353.) This brief, accordingly, focuses chiefly on the limitations ground, because the summary judgment statute now provides that a reviewing court cannot affirm a summary judgment on a ground not relied upon by the trial court without first affording the parties "an opportunity to present their views on the issue by submitting supplemental briefs." (Code Civ. Proc., § 437c, subd. (m)(2).)

If this Court intends to address the summary judgment grounds rejected by the trial court, we assume it will notify us and afford us the opportunity for supplemental briefing as commanded by the revised statute. In the meantime, we will address each of the rejected grounds briefly and show that each was properly rejected.

As noted in the Statement of the Case, in addition to asserting the statute of limitations, the Orrick firm and Hoisington also sought summary judgment (or, alternatively, summary adjudication) on grounds that, as a matter of law, they committed no breach of duty, and even if they did, Fritzi could not prove that any alleged breach caused her damages. (AA 571-580.) Their duty argument asserted there was no breach because they always followed Fritzi's instructions and, in any event, Ernest Benesch was Fritzi's ostensible agent and they always did what Ernest told them to do. (AA 575-576.) As to damages, they argued it was speculative whether Fritzi really would have made different decisions in regard to the estate plan had she been advised fully. (AA 577-580.) The superior court rejected both arguments, and rightly so.

Duty: The Orrick firm and Hoisington have argued that Fritzi made Ernest her ostensible agent for estate planning purposes by delegating to him the task of dealing with Hoisington and working out the details of their estate planning, so that as long as Hoisington did what Ernest directed,

Hoisington and the Orrick firm committed no breach. (AA 571-575.) The superior court correctly rejected this argument. (AA 1378-1381, 1383.)

These lawyers unquestionably owed separate duties of care to Fritzi and to Ernest, as each was their client. (See, e.g., 1 Estate Planning Practice, *supra*, § 1.63, pp. 48-49 ["The lawyer . . . should not assume that the parties are in agreement on estate planning objectives. They often are not. Even if one spouse speaks for the other at a meeting, the attorney should not assume that the spouses agree. The lawyer should explain to the clients that they can function harmoniously, independently of one another"]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 529, 526 ["A lawyer owes undivided loyalty to his client"; thus, "(t)he loyalty he owes one client cannot consume that owed to the other"]; *Meighan v. Shore* (1995) 34 Cal.App.4th 1025 [attorney consulted by *husband* in a medical malpractice action owed duty to inform *wife* of her rights with respect to possible cause of action for loss of consortium, even though her rights were not the purpose of the consultation]; *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1429 [where attorney is retained to represent both insured and insurer, each is "entitled to expect counsel to fulfill the duty it has undertaken"].)

The Orrick firm and Hoisington failed to demonstrate the absence of triable issues of fact on agency. Fritzi has denied that Ernest was her agent, actual or ostensible, and moreover, as the court noted, Fritzi has asserted that she never gave her lawyers instructions to undertake the challenged transactions.[21] (AA 1379.)

21/ And even if she had so instructed them, the question would remain whether her lawyers had advised her sufficiently to permit her to give them informed instructions. (See, e.g., AA 370 ["Plaintiff was never (continued...)

"Breach of duty is usually a fact issue for the jury; if the circumstances permit a reasonable doubt whether the defendant's conduct violates the boundaries of ordinary care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court." (*Ishmael v. Millington, supra*, 241 Cal.App.2d at p. 525.)

Here, there are triable issues of fact as to whether the Orrick firm and Hoisington breached their duties to Fritzi by failing to construct an estate plan based on the wishes and informed instructions and consent of *both* spouses and by failing to adequately advise *Fritzi* on the terms and consequences of each transaction. (See AA 1378-1381.)

Damages: Fritzi alleged in her complaint and testified at deposition that if her lawyers had explained the true nature of the transactions at issue, she never would have agreed to them and never would have signed the documents effecting them. (AA 345, 600, 603, 605, 632, 744.) Further, had the lawyers disclosed that they were representing the contemplated beneficiaries of the transactions (i.e., Valli and Bob), she could have chosen not to waive the conflict or, at the least, would have been alerted in light of it to question closely the transactions and the motives underlying the transactions that benefitted them. (AA 344-346.) The lawyers' failure to advise her adequately was the breach. (See AA 586.) The resulting damages included, among other things, Fritzi's loss of 33.2% of the stock in, and control of, Fritzi California. (AA 586, 668, 669, 695, 696, 700.)

21/(...continued)
given a meaningful choice. She was never fully informed about the material considerations she should take into account in formulating an ESTATE PLAN, the choices and alternatives available to her"].)

As the trial court correctly recognized (AA 1381-1383), this showing is ample to raise a triable issue of fact as to Fritzi's damages flowing from her lawyers' malpractice.

For all the reasons expressed, this Court should reverse the judgment in favor of the Orrick firm and Hoisington, and reinstate Fritzi's timely-filed legal malpractice lawsuit against these defendants.

CONCLUSION

The Orrick firm and Hoisington have failed to carry their burden on summary judgment to demonstrate conclusively that Fritzi's lawsuit is time-barred. And, as the superior court correctly concluded, triable issues abound on issues of duty, causation and damages. In short, Fritzi is entitled to take her legal malpractice claims to trial.

For all the reasons expressed, the superior court erred in entering summary judgment in favor of defendants William Hoisington and Orrick, Herrington & Sutcliffe. The judgment in favor of those defendants must be reversed and the case against them permitted to advance to trial.

Dated: August 4, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1), California Rules of Court, I certify that the attached Appellant's Opening Brief in *Benesch v. Hoisington, et al.*, 1st Civil No. A102296, contains 12,324 words, as counted by Corel WordPerfect, version 9.0, the software program within which the brief was generated.

DATED: August 4, 2003

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