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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RACHEL CURRY LEADER et al.,

Plaintiffs and Respondents,

v.

TERRY LEE CORDS,

Defendant and Appellant.

D059224

(Super. Ct. No. 37-2007-00100913-
PR-TR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Reversed with directions.

This is the second appeal in this case. In *Leader v. Cords* (2010) 182 Cal.App.4th 1588 (*Leader I*), we reversed a probate court order to the extent it denied trust beneficiaries attorney fees under Probate Code section 17211, subdivision (b),¹ incurred in petitioning for an order requiring the trustee to make a final distribution. We specified

¹ Further statutory references are also to the Probate Code unless otherwise specified.

that on remand the court was to conduct further proceedings on the factual issue of whether the trustee acted in "bad faith," a component of the test for a fee award under the statute. (*Leader I, supra*, at p. 1591.)

In this appeal, we must decide whether the probate court erred on remand by denying the trustee's request to present new evidence on the issue of bad faith, or his subjective state of mind in delaying the final distribution. We find error. Under well established law, an unqualified reversal, or unqualified partial reversal, places the matter at large for retrial and the parties are free to present any competent evidence, including new or additional evidence, in support of or against the plaintiffs' claims. We reverse the judgment with directions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Original Probate Court Proceedings and Leader I*

In 2002 Rachel Curry Leader (Rachel) and her brother Adam Curry (Adam) succeeded to their mother Carol Curry Johnson's (Carol) interest in the family trust of her parents, the Glen Cords and Alice Sterling Cords 1991 Trust (the Trust). Carol's brother, Terry Lee Cords (Terry), is the successor trustee.

Glen Cords (Glen) died in 1999 and Alice Sterling Cords (Alice) died in 2001. According to Terry, and undisputed by Rachel and Adam, the trust assets originally exceeded \$3 million. The Trust owned a 50 percent interest in commercial and residential rental properties in a joint venture called Cords Corners. The other 50 percent interest was held by relatives. In 2001 Terry distributed the Trust's interest in these properties to himself and Carol as equal beneficiaries. Despite the change in ownership,

rent payments were deposited into a trust account and distributed to the trust beneficiaries and other owners. He deposited the fees in a trust account and distributed them to the property owners. In 2001 Terry also distributed the Trust's 100 percent ownership interest in two other properties to himself and Carol.

After Carol's death in 2002, Terry distributed trust assets, including rental payments to her estate, Rachel and Adam. In 2003 stock was sold and distributed, and in 2006 checking and savings accounts that held reserves for property maintenance were closed and distributed after the jointly owned rental property was sold to a third party.

Terry provided an accounting for the year 2002, but after that he prepared no accountings. In January 2007 Rachel and Adam demanded an accounting from 2003 forward. In May 2007 Terry provided an accounting for the years 2003 through 2006, which showed remaining cash assets of approximately \$75,000 and no liabilities. The Trust had owned Bank of America stock, with a stated market value of more than \$300,000, but Terry finally distributed it in April 2007 after numerous requests from Rachel and Adam.

In November 2008 Rachel and Adam petitioned the probate court for an order compelling Terry to make a final distribution of the remaining cash, and a finding he committed breaches of trust. The petition alleged that Terry's attorney had advised that Terry was willing to distribute the remaining cash only as part of a "global settlement" involving a dispute over jewelry of Alice. The jewelry, however, was not a trust asset. Alice's will bequeathed the jewelry to Carol and Terry, and they divided it. After Carol died, Terry insisted that Rachel give him all of the appraisals she obtained on her share of

the jewelry. Rachel heard nothing on the matter for a few years, but Terry raised it when she and Adam asked for a distribution of their share of the Bank of America stock. The petition sought attorney fees under unspecified authority.

In his objection to the petition, Terry conceded Alice's jewelry was not a trust asset. He alleged that he and Carol disagreed on its division under Alice's will, and Carol took jewelry without his consent. He claimed Rachel and Adam sought to "take advantage" of his "efforts to informally resolve the family dispute regarding distribution of Alice's jewelry."

At a hearing on January 7, 2009, Rachel and Adam appeared through their counsel, Martin Steinley, and Terry appeared through his counsel, Timothy Galvin. The court asked how the parties wished to proceed, and Steinley stated: "Your Honor, Mr. Galvin and I spoke outside, and we think that the matter would most efficiently be resolved if we bifurcated the issues. The threshold or central issue is whether Mr. Galvin's client, [Terry], the trustee, can withhold distribution of the remaining trust assets based upon a claim he believes that he has to jewelry that passed under the decedent's will. [¶] He's withholding distribution . . . on the basis that he should be entitled to more of the trust assets because he believes he did not receive his fair share of the jewelry that passed under the terms of the will. That is the . . . central issue . . . from which all the other issues will fairly quickly be resolved."

Steinley added: "Related to that issue are the issues of the trustee's attorney's fees, whether he should be able to pay those . . . out of the Trust or not and the issue of Rachel and Adam's attorney's fees and whether [Terry] personally should be responsible for

those attorney's fees. . . . [¶] So if we could get a special set on those issues, we believe that the other issues that are framed by the petition and the objections will fairly easily be resolved." Galvin responded, "I would concur in general, yes." Galvin thought an hour hearing would be sufficient because "I think it's purely a legal issue." Steinley agreed, "It's purely a legal issue. There are no disputed issues of fact."

Rachel and Adam's January 16 memorandum of points and authorities argued entitlement to attorney fees under section 17211, subdivision (b), which requires factual findings of objective unreasonableness *and* subjective bad faith. Terry's responsive memorandum argued: "Neither the court nor the parties anticipated that evidence would be taken at this hearing. Evidence is clearly required for the relief requested in Petitioners' papers. . . . The separate determination as to whether the Trustee has personal liability for bad faith conduct cannot be made in the absence of competent evidence for which a foundation has been established. Trustee submits that the court cannot rule on Petitioners' claims as a matter of law and that the Court should therefore deny the requested relief."

A hearing on the merits was held on February 10, 2009. Despite Terry's earlier concession, he argued that his refusal to make a final distribution was unrelated to the jewelry. Terry claimed he was retaining cash as an "administrative reserve" because of Rachel and Adam's request for attorney fees. In response to Steinley's argument that Rachel and Adam were entitled to fees under section 17211, subdivision (b) because of Terry's bad faith, Terry argued bad faith was a "factual matter and that requires a trial."

The court issued an order in March 2009, which states the " 'catalyst of this dispute appears to be the disposition of jewelry which originally belonged to Alice.' The jewelry, however, was not part of the Trust and was thus 'irrelevant to the issue of the distribution of the Trust now before the court.' " (*Leader I, supra*, 182 Cal.App.4th at p. 1594.) The court ordered Terry to distribute the remaining trust assets. The court denied Rachel and Adam's request for attorney fees under section 17211, subdivision (b), finding the petition was not " 'an action on an accounting.' " (*Leader I, supra*, at p. 1594.) Accordingly, evidentiary issues became moot. The court also denied Terry attorney fees from the Trust. (*Ibid.*)

Rachel and Adam appealed the order insofar as it concerned attorney fees. In *Leader I*, we construed section 17211, subdivision (b) to include Rachel and Adam's petition for final distribution. We explained: "[I]n the context of trust administration, it is established that the trustee's 'duty to account for funds and for property is not satisfied by the rendering of a paper account showing the disposition made of the trust property. Obviously, the mere furnishing of an account showing the receipt of trust funds and the use made thereof does not fulfill the duties of a trustee. He is under the further constraint to deliver the property to his beneficiary, since the latter is the rightful owner.' [Citation.] Terry's duty to account was inseparable from his duty to carry out the terms of the Trust by distributing the remaining Trust assets, and Rachel and Adam's petition arose from and was directly related to his account. Terry's account should have, but did not, indicate a forthcoming distribution of remaining Trust assets to the beneficiaries. A beneficiary may, of course, contest a trustee's account on the basis of a distribution made from the

Trust, and in our view a challenge to an omitted distribution equally qualifies as a 'contest[] [of] the trustee's account.' [Citation.] We do not envision that the Legislature intended to leave beneficiaries in Rachel and Adam's position without potential recourse under section 17211, subdivision (b), for the unreasonable and bad faith opposition to a petition for distribution, merely because they do not challenge the accuracy of the account's enumerated receipts and distributions, or assets and liabilities. Such a narrow reading of [section] 17211, subdivision (b) would defeat its remedial purpose." (*Leader I, supra*, 182 Cal.App.4th at pp. 1598-1599.)

In *Leader I*, Rachel and Adam asked us to direct the probate court to enter an order entitling them to attorney fees and costs under section 17211, subdivision (b), and to remand the matter solely for the court's determination of the reasonable *amount* of an award. We declined, because "[w]hile the record indicates the court found Terry's conduct unreasonable, it does not show the court found him in bad faith, an issue the court did not reach. Whether Terry acted in bad faith is a factual question for the probate court's determination in the first instance." (*Leader I, supra*, 182 Cal.App.4th at pp. 1599-1600.)

B. *Proceedings on Remand*

On remand, a new judge was assigned after Rachel and Adam challenged the original judge. In a case management conference, Terry informed the court he intended to present witnesses on the issue of bad faith. The court indicated it would accept new evidence, and set a trial readiness conference.

Terry submitted a trial readiness conference report that listed himself, his former attorney, Garrison Armstrong, and others as witnesses on the issue of bad faith. At the conference, Rachel and Adam argued the matter should be decided solely on the existing documentary record from the February 10, 2009 hearing before the previous judge. They cited the parties' agreement at the January 7, 2009 hearing that the only issues for the February 2009 hearing were legal ones. When the stipulation was made, however, Rachel and Adam had not even raised section 17211, subdivision (b). They first raised the statute on January 16.

The court found that under the stipulation and our decision in *Leader I*, "I'm obliged to consider [only] the [existing] record and make the findings." The court was concerned about giving Terry "a second bite at the apple." The court restated its position in a later ex-parte hearing. In the court's view, new evidence on the factual issue of bad faith was inadmissible because it was an issue at the hearing in February 2009, at which time Terry could have testified or presented other evidence.

At a hearing on the merits in August 2010, Terry's attorney, Jerry Cluff, made the following offer of proof: "[I]f Terry . . . were permitted to testify, he would testify that the positions that were taken on his behalf in opposition to the instant petition were taken in every event based on the advice of his counsel, Garrison Armstrong and myself. [¶] I would have a further offer of proof that if Garrison Armstrong were permitted to testify, he would testify that he was the one who devised the positions to be taken by Terry . . . and that Terry . . . took his advice in that regard."

The court found, based on the existing documentary record, that Terry acted in bad faith. The court explained: "I think the most compelling evidence is the failure to distribute for lo these many years. Actions speak louder than words. [Alice's] death was in 2001, and I have no evidence before me of any reason at all for failing to distribute the trust at any time along the way, after what might have been a reasonable administration period. No evidence of why it wasn't distributed in 2002, 2003, 2004. Years of inaction without any valid reason being offered." The court also stated the "refusal to perform started at some period after 2001 and just kept going."² After a separate hearing, the court awarded Rachel and Terry a total of \$89,235 in attorney fees and \$1,784.93 in other costs. Judgment was entered on January 14, 2011.

DISCUSSION

I

Terry contends the probate court's denial of his request to submit evidence on remand on the issue of bad faith under section 17211, subdivision (b) violates his constitutional due process rights. We are not required to address due process, however, because reversal is required under well established rules pertaining to trial court proceedings after a reversal on appeal.

² The court appears to have ignored documentary evidence of Terry's distributions of substantial trust assets beginning in 2001, including the Trust's interest in several real properties. The court's comments give the erroneous impression Terry made no distribution until Rachel and Adam petitioned for the final distribution of approximately \$75,000 in cash.

Section 17211, subdivision (b) provides in part: "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account." (§ 17211, subd. (b).) " 'Reasonable cause,' when used with reference to the prosecution of a claim, ordinarily is synonymous with 'probable cause' as used in the malicious prosecution context." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 926.) " 'Probable cause' to prosecute an action means an objectively reasonable belief that the action is legally tenable." (*Ibid.*) "In contrast, 'bad faith' . . . concerns the trustee's *subjective state of mind* and cannot be inferred from the absence of probable cause alone." (*Id.* at p. 926, fn. 47, italics added.)

Advice of counsel is a factor in determining bad faith, but it does not necessarily prove the absence of bad faith. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶¶ 12:1249, p. 12D-24, 12:1251, p. 12D-24 (rev. #1, 2010) (Croskey).) Advice of counsel cannot be a " 'mere cloak' to protect one against a suit." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54.) The defense is unavailable when counsel's advice is "implausible." (Croskey, *supra*, ¶ 12:1251, at p. 12D-24.)

We conclude the probate court erred by not allowing Terry to present new evidence on remand. "As a general rule, an unqualified reversal *vacates* the appealed judgment or order. As a result, the case is placed in the same procedural posture as if the judgment or order had never been entered, and all issues involved in the case must be adjudicated anew." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs

(The Rutter Group 2011) ¶¶ 11:65, p. 11-23 (rev. #1, 2011), 14:142, p. 14-46 (rev. #1, 2010) [an unqualified reversal issues "are placed 'at large' for retrial upon remand"] (Eisenberg); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 869, p. 928 (Witkin); *Weightman v. Hadley* (1956) 138 Cal.App.2d 831, 836.)³ The case is " 'before the court for trial de novo.' " (*Guzman v. Superior Court* (1993) 19 Cal.App.4th 705, 707.)

"The parties are entitled to retry the issues anew—meaning they can present any evidence in support of or against the allegations in the complaint. An unqualified reversal cannot restrict the presentation of evidence on remand." (Eisenberg, *supra*, ¶ 14.143, p. 14-46; Witkin, *supra*, Appeal, § 870, at p. 929; *Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1312-1313, fn. 10; *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499-1500.) Moreover, reversal and remand reopens the time for discovery and requests for leave to amend the pleadings. (Eisenberg, *supra*, ¶ 14:144.1, p. 14-47; Witkin, *supra*, Appeal, § 872, p. 934; *Pillsbury v. Superior Court* (1937) 8 Cal.2d 469, 472.)

When appropriate, the "appellate court can reverse a judgment in part, ordering only a *partial* retrial on remand." (Eisenberg, *supra*, ¶ 14:151, p. 14-51; Witkin, *supra*, Appeal, § 890, pp. 950-951.) "An unqualified partial reversal has the same effect on the

³ The general rule is qualified by exceptions; for instance, there is no retrial after an unqualified reversal "if the appellate opinion 'as a whole establishes a contrary intention' not to follow the general rule . . . even if the appellate court gave no specific directions to that effect." (Eisenberg, *supra*, ¶ 14:145.2, p. 14-47.) This exception is rarely found. (*Ibid.*)

part reversed as an unqualified general reversal." (Witkin, *supra*, Appeal, § 888, p. 950; *Hall v. Superior Court* (1955) 45 Cal.2d 377, 381.)

"Of course, upon a retrial the decision of the appellate court becomes the law of the case upon the facts as then presented. But the law must be applied by the trial court to the evidence presented upon the second trial. 'It is settled beyond controversy that a decision of this court upon appeal, as to a question of fact, does not become the law of the case.' " (*Weightman v. Hadley, supra*, 138 Cal.App.2d at pp. 835-836; *Muktarian v. Barmby* (1968) 264 Cal.App.2d 966, 968 [appellate court's recitation of facts is not law of the case].)

Leader I was an unqualified reversal on the issue of bad faith under section 17211, subdivision (b). *Leader I* merely directed the court on remand to "hold further proceedings on the factual issue of bad faith" (*Leader I, supra*, 182 Cal.App.4th at p. 1591 [introductory paragraph]), and to hold "further proceedings in accordance with this opinion" (*id.* at p. 1600 [disposition paragraph]). The directions were intended for the probate court's convenience, but they were not required. "Occasionally, the appellate court expressly states that the matter is remanded for retrial; but this step is not essential." (Eisenberg, *supra*, ¶ 11:65, p. 11-23; Witkin, *supra*, Appeal, § 885, p. 946; *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147.) Without the directions, the court's task on remand would have been the same, to conduct a new evidentiary hearing on bad faith.

"If the existing evidentiary record is adequate to permit the trial court to redetermine the issues on remand without a new trial, the appellate court may reverse

with directions to the trial court to redetermine the issues based on the evidence previously before it." (Eisenberg, *supra*, ¶ 14:153.1, p. 14-53; citing *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 751; *England v. Christensen* (1966) 243 Cal.App.2d 413, 435.) We did not suggest in *Leader I*, however, that retrial was limited to the existing record, which is wholly inadequate to permit a finding on Terry's subjective state of mind.

Terry was entitled to a new evidentiary hearing regardless of any stipulation made in the January 2009 hearing, and regardless of whether he could or should have presented evidence on the bad faith issue at the February 2009 hearing. The denial of a new evidentiary hearing after an unqualified reversal is reversible error. (See, e.g., *Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547, 548-549; *Weightman v. Hadley*, *supra*, 138 Cal.App.2d at pp. 835-836; *Rossi v. Caire* (1919) 39 Cal.App. 776, 777.)⁴

II

Rachel and Adam's reliance on *Eldridge v. Burns* (1982) 136 Cal.App.3d 907, for the proposition the probate court here had the discretion to disallow new evidence, is misplaced. In *Eldridge*, the court held that within the context of the particular facts, its reversal and remand on the issue of remedy "was not a direction that evidence be taken." (*Id.* at p. 918.) The appellate court pointed out that in the first appeal it set forth three alternatives for vindicating the plaintiff's rights in a real property dispute. The defendant

⁴ Given our holding, we are not required to address Terry's assertions the bad faith finding is not supported by substantial evidence and the amount of the attorney fees award is excessive.

could pay the plaintiff a sum of money in exchange for return of the property; the trial court could set aside a deed of trust and order a resale of the property; or the defendant could accept the trial court's or plaintiff's division of the property. Evidence "was applicable only if the first alternative was not used," and thus the issue of whether to take evidence "was a matter for the court's discretion." (*Id.* at p. 918.) The facts here are not analogous. Again, in *Leader I* we issued an unqualified reversal that set the issue of bad faith at large and entitled the parties to present new evidence. Rachel and Adam are mistaken in asserting that on remand the court "had to consider the earlier proceedings, and their effect on Terry's attempts to introduce new evidence."

Additionally, we reject Rachel and Adam's claim that Terry's failure to adduce evidence on the bad faith issue at the February 9, 2009 hearing constitutes forfeiture. Rachel and Adam cite Evidence Code section 354, under which a judgment or decision shall not be reversed for the erroneous exclusion of evidence unless the party brings the matter to the trial court's attention; *People v. Smith* (2003) 30 Cal.4th 581, 629-630, which held the defendant forfeited his argument that tape recorded conversations with his wife were admissible as prior consistent statements by not presenting the theory at trial; and *Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, which held the plaintiff forfeited an evidentiary claim when his attorney "explicitly agreed on the record to the exclusion of evidence." (*Id.* at p. 221.) These authorities are inapposite because they do not pertain to a reversal and new proceeding on remand. Further, Terry did object at the February 2009 hearing that the entitlement to attorney fees under section 17211,

subdivision (b) was a factual matter, which could not be decided without the submission of evidence.

We are also unpersuaded by Rachel and Adam's assertion reversal is unwarranted because the exclusion of new evidence was harmless error. Under the harmless error rule, "[w]e will not reverse for error unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result." (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Rachel and Adam cite no authority showing a harmless error standard applies to the denial of a new evidentiary hearing on remand, but to any extent it does, we conclude the exclusion of new evidence was prejudicial.

Bad faith in opposing a petition on a trustee's account, within the meaning of section 17211, subdivision (b), is based on the trustee's subjective state of mind. The court inferred Terry's "state of mind regarding his failure to complete distribution of the trust" strictly from circumstantial evidence. While a "subjective state of mind will rarely be susceptible of direct proof" (*FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, 798), on remand Terry is entitled to fill in the gap and present direct evidence of his state of mind in delaying the final distribution of a large estate, and to present evidence from his former attorney on the advice-of-counsel defense. As Rachel and Adam point out in the event of reversal, they are also entitled to present new evidence.

DISPOSITION

The judgment is reversed and the matter is remanded to the probate court for a new evidentiary hearing on the issue of bad faith within the meaning of section 17211, subdivision (b). Terry is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.