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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL STEPHENS et al.,

Plaintiffs and Respondents,

v.

MARY GAUSTAD, as Trustee, etc.,

Defendant and Appellant.

G045464

(Super. Ct. No A217826)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard W. Luesebrink. (Retired judge of the Orange County Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Order reversed and remanded.

Vogt, Resnick & Sherak, David A. Sherak and Jeany A. Duff for Defendant and Appellant.

Ascher & Associates, Ralph Ascher and Richard Vergel de Dios for Plaintiffs and Respondents.

* * *

BACKGROUND

In *Stephens v. Gaustad* (March 13, 2012, G045073) (nonpub. opn.) (*Stephens I*) this court affirmed a trial court order requiring trustee Mary Gaustad (Mary) to pay reasonable attorney fees to two beneficiaries of a trust (her siblings, Michael and William) established by their now deceased mother, Barbara Stephens. We affirmed the order under Probate Code section 17211, subdivision (b). (All further undesignated statutory references will be to that code.) We said the trial court could reasonably find, on the evidence presented, that Mary had opposed Michael and William’s accounting contest “without reasonable cause and in bad faith.” (*Ibid.*) In particular, Mary had used trust funds to pay her attorneys for the defense of her own conduct when she allegedly used other trust funds to buy a Big Bear cabin for herself. Additionally, Mary paid herself from trust funds for time spent on litigation defending herself against claims of self-dealing. Her advice-of-counsel defense was too “flimsy” to overturn the trial court’s determination of bad faith. (*Stephens I, supra*, G045073, p. 3.)

However, because the notice of appeal in *Stephens I* was filed before the trial court determined the *amount* of fees to be awarded, that issue was left unresolved. The amount turned out to be \$175,000. In this appeal, Mary challenges the reasonableness of the \$175,000 figure. She asserts that reasonable fees would have been more in the neighborhood of \$52,189.65, the amount of the “compensatory recovery” in the underlying judgment without the section 859 liability.

DISCUSSION

I. Mistake About a Key Factor

Remand cannot be avoided. It is undeniable that among the factors bearing on the reasonableness of a fee award is the “success or failure” of the moving party. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) Yet in *Stephens I*, it was

undisputed that, at the very time the trial judge made his attorney fee order, he was under an erroneous impression of the true amount which Michael and William were to recover. The trial judge said, plainly on the record, that the judgment was \$220,010.45. However -- as Michael and William expressly conceded in *Stephens I* -- the true figure should have been \$150,071.60, that is, about \$70,000 less. The true figure was thus almost a third less than what the trial judge thought the recovery was.

In *City of Long Beach Redevelopment Agency v. Morales* (2007) 157 Cal.App.4th 287, a trial judge made a factual mathematical error of less than 2 percent in evaluating whether a public agency's final offer in an eminent domain case triggered a statute which provides for attorney fees when a public entity's offer is "unreasonable." (*Id.* at p. 291.) The court concluded the case had to be remanded for reconsideration. (*Id.* at pp. 289, 295.) The rule of decision of *Morales* necessarily applies with even greater force to a case like this one where the trial court makes a discretionary decision that is based on a mathematical error of over 30 percent.

If there is any doubt, the subsequent reduction in *Stephens I* of Michael and William's recovery by more than an additional \$100,000 removes it. Of the \$150,071.60 at stake in *Stephens I*, we affirmed only \$45,392.30. That is, this court affirmed less than a third of what the trial judge actually awarded to Michael and William. Put yet another way, only *one-fifth* of the recovery on which the trial judge predicated the attorney fee award survived.

A reversal of an underlying judgment will vacate a subsequent attorney fee award predicated on that judgment. (See *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1436-1437 [collecting cases].) The case before us is practically that: 80 percent of what Michael and William started with has been reversed.

Michael and William are correct to point out that the court in *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1508 said that fee awards need not be "proportionate" to the amount recovered. But they forget that the *Niederer* court also

recognized that the amount recovered ““is certainly relevant to the amount of attorney’s fees to be awarded.”” (*Ibid.*, quoting *Riverside v. Rivera* (1986) 477 U.S. 561, 574 [106 S.Ct. 2686, 91 L.Ed.2d 466].) In the case before us, there is no way we can say that the disparity between the results obtained and the results the trial judge *thought* had been obtained did not affect the trial court’s weighing of the various factors which went into the \$175,000 award. (See *Environmental Protection Information Center v. Department of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217, 232 [“less than complete success” in litigation should be viewed as an argument to reduce lodestar amount under private attorney general statute]; *Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836, 846-847 [“when a plaintiff is successful within the meaning” of the private attorney general statute, “the fact that he or she has prevailed on some claims but not on others is a factor to be considered in determining the amount of the fee awarded”].)

Michael and William have no answer to the fact that, even at the time the trial court made the \$175,000 award, the \$220,000 amount recovered was clearly a major factor in the trial judge’s mind. As shown by a colloquy with Mary’s counsel, the trial judge specifically pointed out to her “that the amount of the judgment was \$220,010.45.” The reference to \$220,010.45 was a direct response to Mary’s counsel’s argument that the fee award should have been no more than the \$52,000 compensatory amount provided in the judgment. The court’s point was that if it followed Mary’s counsel’s logic to its conclusion, the fees should have been \$220,000, not \$52,000.

The only answer which Michael and William have to the fact that the trial judge started off with the wrong number is to point out that the \$175,000 was the product of his weighing of what they assert were “many factors.” Actually, a review of the trial court’s minute order shows that “many” was, at most, four factors, and the “recovery realized” clearly played a major role in the court’s final number. Here is what the court wrote: “Given the nature, extent and intensity of this litigation and the *recovery realized*

by Petitioners, the Court finds that \$175,000 is a reasonable attorneys' fee in this matter.” (Italics added.)

2. *Mary's Other Arguments*

For the benefit of the parties and the trial judge on remand, we now address Mary's various other contentions that the \$175,000 award cannot be sustained on appeal. (See Code Civ. Proc., § 43 [“if a new trial be granted” appellate court must “pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case”].) Despite the fact the case must be remanded, none of these other contentions are persuasive.

(a) *The argument that Michael and William's fee request was insufficiently documented.* The background to this arguments is: Michael and William requested fees in the amount of \$246,277. Their request was supported by declarations giving three categories of information: time spent, amount of fees generated, and a generalized, aggregated description of the tasks involved. For example, the declarations showed 63.9 hours were spent conducting and responding to discovery. But there were no detailed itemizations of billing records where the various individual tasks of litigation are broken down into simple steps and the time itemized in minute increments, with the attorney working on each step identified. (A typical example might be: “review letter re meet and confer request, .3 hours; attorney: ABC; 150 dollars per hour.”) On appeal Mary now claims that the records were just too skimpy for Michael and William to have carried what she asserts was their burden to justify their fees, including the absence of particular attorney identifications with each attorney's individual rate given.

This court's recent decision in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 829-830 (*Jaramillo*) disposes of Mary's argument. There, in a context where a plaintiff was also statutorily entitled to fees, his counsel submitted what we described as “very general entries.” (*Id.* at p. 830.) In fact, those entries were far more

general than the ones submitted by Michael and William here. (See *ibid.* [noting entries such as “‘Trial prep.’ for the five hours spent on April 19, 2009, or ‘T/C--Client’ for the 0.3 hours spent July 21, 2009”].)

Here, as in *Jaramillo*, the summary nature of the documentation was to protect the attorney-client privilege. We said that while submitting entries in a “‘blocked’ style with ‘vague and ambiguous descriptions’” increases the risk that the court will “discount a fee request,” a trial court still has discretion to accept such entries in making its order. (*Jaramillo, supra*, 200 Cal.App.4th at p. 830.)

We need only add that Mary has *not* challenged the merits of the assertion of attorney-client privilege as the reason more detailed entries were not presented, nor has she shown any need to “separate out work that qualifies for compensation” under section 17211 from work that did not so qualify. (See *Jaramillo, supra*, 200 Cal.App.4th at p. 830 [noting that blocked billing is “problematic” in cases where there is a need to separate work qualifying for compensation from work that doesn’t].) Indeed, the trial judge here did exactly what the *Jaramillo* court, based on our previous decision in *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325, had predicted: Using its discretion, in light of the blocked billing, the trial judge *discounted* Michael and William’s fee request from \$246,277 to \$175,000. In context, it was the discount from \$246,277 from \$175,000, not the aggregate \$175,000 figure itself, that provoked the trial judge’s comment about the skimpiness of the documentation.

(b) *The argument that the trial court improperly placed the burden on Mary to show the fees were unreasonable.* At the hearing the trial judge pointed out that Mary’s own counsel had not proffered the fees which *she* incurred in opposing Michael and William’s petition. From that mention Mary asserts that the trial judge was effectively putting the burden on her “to oppose the fee request.”

Not so. The trial judge was merely making the common sense observation that given the necessarily reciprocal nature of the litigation process (“one side usually has

to match the other side, and vice versa” he said), evidence that one side had substantially less fees than the other might be of some value in showing supposedly “excessive” litigation.

(c) *The argument that the trial court failed to consider that Michael and William had overlitigated their petition by re-litigating the validity of the transfer of the cabin.* As in *Stephens I*, Mary places great emphasis on the dicta of Judge Schulte who, in the process of *denying* Mary’s summary judgment motion, opined that Michael and William could not “litigate the validity of the transfer” of the Big Bear cabin. The argument is that Michael and William generated unnecessary attorney fees in re-litigating that transfer, the dispute over which had in fact been settled back in 2004. The simple answer to the contention is that Michael and William did not relitigate the *validity* of the Big Bear cabin, they merely presented the *circumstances* surrounding the settlement of the dispute over the cabin. Those circumstances were necessary for Judge Luesebrink, presiding at the trial, to understand their actual claim, which was that Mary had subsequently used trust funds to pay for her own defense against allegations of self-dealing.

DISPOSITION

The \$175,000 attorney fee award is reversed and the matter remanded to the trial court to exercise its discretion in light of the true amounts which Michael and William have actually recovered.

Mary shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.