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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

STEPHEN CHRISTOPHER
NIFONG,

Plaintiff and Respondent,

v.

AIMEE CAROLINE NOZZI,

Defendant and Appellant.

2d Civil No. B266982
(Super. Ct. No. 56-2014-
00452763-PR-TR-OXN)
(Ventura County)

This dispute, between siblings Stephen Christopher Nifong and Aimee Caroline Nozzi, concerns a missing coin collection.¹ Stephen claimed that Aimee converted the coins, his inheritance from a grandparent. The trial court declined to find a conversion of Stephen's property, but found Aimee liable for breach of an oral trust or for gross negligence in handling a bailment.

¹ Following the format used in the briefs, we refer to family members by their first names.

Substantial evidence does not support Stephen's oral trust theory of liability. The putative trustor did not cede ownership of the coin collection by delivering it to others *in his lifetime*, and directing that it be held in trust for Stephen. Aimee did not breach an oral trust because none was created. Substantial evidence supports Stephen's theory that Aimee was grossly negligent as a bailee. Aimee's conduct in storing gold and silver coins at her house without taking any precautions to prevent their loss or theft fell below the requisite standard of care. Finally, we conclude that the value ascribed to the coins was based on speculation and surmise. We remand the case for a new trial limited to the valuation of the coins.

FACTS

The parties' parents are Robert (Decedent) and Elizabeth Nifong. Stephen described Aimee as "very hostile." She speaks ill of him to others.

As a child, Stephen was introduced to coin collecting by his maternal grandfather, Thomas Leach (also known as g-dad), a resident of Kansas. They visited Kansas coin shops to look at coins in rolls and bags, and searched through coin rolls from banks. Thomas taught Stephen to select the most brilliant uncirculated coins, i.e., those without scratches or imperfections. Thomas mainly collected U.S. silver dollars and \$20 gold pieces, focusing on the condition of the coins, their dates and mint marks. The coins were organized and placed in slotted plastic insert pages within four blue three-ring binders (the Collection).

Thomas lived with the Nifongs in Oxnard for two years in the mid-1970s. By then, he had completed the Collection to his satisfaction, and showed Stephen the blue binders a dozen times. The parties' sister Angela recalled seeing the gold and

silver coins when Thomas lived in Oxnard. Thomas returned to Kansas, taking the Collection with him.

Stephen recalled that the binders generally displayed 18 uncirculated silver dollars and two uncirculated gold pieces per page. He approximated a total of 160 gold pieces and 1,440 silver dollars. This estimate was based on Stephen's creation of a simulated coin collection, using a binder containing plastic sheets with silver dollar-size slots.

Over the years, Thomas repeatedly told Stephen that he wanted Stephen to inherit the Collection upon Thomas's death. After Thomas died in 1988, Elizabeth went to Kansas to handle his estate. She returned with the Collection, promising Stephen that she would hold onto it until he was settled. Stephen discussed ownership of the Collection with his parents, who said that it belonged to him. Elizabeth died in 2001.

Like his father-in-law, Decedent had a coin collection, though it was relatively small. Stephen could easily distinguish between the coin collections of Thomas and Decedent. Thomas's distinctive handwriting appeared in his binders, noting information about a coin, including its date, mint mark and condition. Decedent's and Thomas's coin collections were both kept in the same location after Thomas died: a locked den closet at the parental home in Oxnard.

Stephen left the Collection in Oxnard because his government housing in Idaho was not a safe place for valuables. He returned to California in 2003, 2007 and 2010 to visit Decedent. Each visit, Stephen saw the Collection, which did not appear to change. Decedent said that the Collection belonged to Stephen, and that Decedent was only safeguarding it. Stephen never inventoried the Collection, nor recorded the dates or mint marks of the coins in the binders.

The last time that Stephen saw his father—and the Collection—was in December 2010, when Decedent was ill and convalescing away from home. During Stephen's visit, Aimee opened the closet at Decedent's home where the Collection was kept, using the combination to the padlock. She and Stephen admired the coins, which Aimee had never seen. Stephen asked to take the Collection. Aimee refused, saying that she needed Decedent's approval and an appraisal.

Stephen telephoned Decedent from Idaho to discuss the Collection. Decedent told Stephen that he was free to take it when he was next in town; Stephen believes that Decedent said the same thing to Aimee. Decedent suggested that Aimee send the Collection to Stephen in Idaho; however, Stephen told Aimee *not* to send him the Collection, lest it be lost in the mail. Instead, Stephen asked Aimee to take the coins to her home, because Decedent was in and out of the hospital and Stephen was concerned that the Collection would disappear.

Aimee testified that Stephen first told her in December 2010 that Thomas left him the Collection. Until then, Aimee had no knowledge of Thomas's bequest. She discussed the Collection with Decedent, who told her that it belonged to Stephen. Aimee moved coins from the locked closet at Decedent's home to various unlocked locations at her house. She recalled storing a red binder under her bed and a box of coins in her den.

Aimee believes that she brought to her home all of the coins that she and Stephen looked at together in December 2010. She is certain that no one stole anything from the parental home between the time she and Stephen looked at the Collection in December 2010 until she transported coins to her own home. She averred that if any part of the Collection was stolen or is missing, the theft or loss occurred while it was at her house.

Decedent died in January 2013, two years after Stephen last saw him and the Collection. The day after Decedent's funeral, Aimee purportedly turned over the coins in her possession to Stephen. She did not give Stephen blue binders containing silver dollars or gold pieces and did not attempt to value the coins she delivered.

Stephen received Decedent's coin collection, valued at around \$1,100; the coins Stephen received from Thomas's collection were in poor condition with a value of only about \$1,000. When Stephen asked Aimee where the blue binders containing the gold and silver coins were, she replied, "I don't recall." At trial, Aimee testified that she did not recall what coins were in the binder she and Stephen viewed in 2010.

Stephen presented testimony from Donald Ketterling, a professional numismatist. Ketterling did not examine any coins from the Collection, as they are all missing. His valuation was, in his words, "based upon a series of assumptions concerning the per coin value, number of coins and their condition." He assumed that the coins were of good quality because Thomas kept them in individual holders, "a common practice of collectors and feature of better quality collections." He assumed that the coins were of a certain type and year. Ketterling used a valuation date of January 28, 2013, Decedent's date of death, on the assumption that Decedent had possession of the Collection. Using assumptions he made about the size, composition and quality of the Collection, Ketterling arrived at a total value of \$768,000.

Decedent created a revocable trust in 2001 (the Trust). Aimee was the successor trustee. Stephen contested Aimee's 2014 trustee's report and account. He petitioned the probate court to determine ownership of the Collection, alleging

that it was in Decedent's possession but was not listed as an asset of Decedent's estate or Trust. Stephen alleged that Aimee and unknown others took the Collection, and asked that it be delivered to him.

THE JUDGMENT

A court trial was conducted in 2015. The statement of decision describes Aimee as "evasive" and deems her testimony "untrustworthy" and full of "inconsistencies." Aimee smirked while Stephen testified to emotionally painful matters, showing her intense dislike of him. Stephen was a credible witness, and the court believed his testimony that the Collection included four blue binders of uncirculated gold and silver coins. The court found "compelling evidence that the binders, as described by Stephen Nifong, existed in December 2010 and were within the control of Aimee Nozzi."

The trial court determined that Thomas created "an oral trust of personal property." Aimee, "[a]s Successor Trustee of the oral trust," had a duty to preserve the Collection and deliver it to Stephen. Aimee breached the obligations imposed by the oral trust by failing to take reasonable and prudent measures.

The trial court also relied upon a bailment theory. Aimee served as bailee of the Collection, and was "grossly negligent" by failing to insure it, or move it to a secure location, or give it to Stephen when he made a request.

The trial court believed the expert testimony of Donald Ketterling, who valued the Collection based on assumptions about coins he never viewed. The court found that there were 160 uncirculated gold pieces worth \$480,000 and 1,440 uncirculated silver dollars worth \$237,600.

In light of Aimee's breach of the oral trust and her gross negligence as a bailee, the trial court found that Aimee's interest in the Trust can serve as a source of recompense for Stephen's loss. The court awarded Stephen damages of \$717,600, plus interest from the Decedent's date of death. The award was surcharged against Aimee's interest in the Trust. The court removed Aimee as successor trustee of the Trust, and appointed a professional trustee.

DISCUSSION

1. *Basis For The Probate Court Proceeding*

Stephen petitioned the court under a Probate Code provision that allows "any interested person" to lay claim to property belonging to him that was in the possession of the decedent, or is in the possession of a trustee. (Prob. Code, § 850, subd. (a)(2)(C), (3)(A).) An "interested person" includes an heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right or claim against a decedent's estate or trust. (Prob. Code, § 48, subd. (a)(1).) An interested person may pursue claims that are normally raised in a civil action. (Prob. Code, § 855; *Estate of Myers* (2006) 139 Cal.App.4th 434, 440; *Estate of Kraus* (2010) 184 Cal.App.4th 103, 110-111.)

Stephen had standing as an interested person to bring a petition alleging that a coin collection belonging to him was in Decedent's possession, or in the possession of Aimee, as successor trustee following Decedent's death. The court's ruling on the petition is appealable. (Prob. Code, § 1300, subd. (k); *In re Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1534.)

2. *No Oral Trust Was Created*

The trial court found that Thomas created an oral trust, with Stephen as the beneficiary. Elizabeth and Decedent had possession of the Collection comprising the trust res, and

Aimee acceded to her parents' duty to carry out the oral trust. The court identified Stephen's testimony as showing the existence of the oral trust. Aimee preserved a challenge to this finding: she submitted written objections to the court, citing California law and arguing that the elements of an oral trust were not proved by clear and convincing evidence. She asked the court to delete its finding of an oral trust.²

The existence of an oral trust must be established by clear and convincing evidence, and "[t]he oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property." (Prob. Code, § 15207.) The settlor must deliver the personal property to another person, with an oral declaration that the transferee holds it in trust for a beneficiary. (*Estate of Gardner* (2010) 187 Cal.App.4th 543, 552; *Kucker v. Kucker* (2011) 192 Cal.App.4th 90, 94, fn. 3.) The interest must "pass immediately" and cannot be dependent upon the settlor's death. (*Nichols v. Emery* (1895) 109 Cal. 323, 330.)

The immediate transfer of property during the settlor's lifetime makes an oral trust distinguishable from a testamentary gift that "operates only upon and by reason of the death of the maker. Up to that time it is ambulatory" so that the maker "has parted with no rights and divested himself of no modicum of his estate and *per contra* no rights have accrued to and no estate has vested in any other person." (*Nichols v. Emery*,

² Stephen argues on appeal that Kansas law controls the creation of the oral trust, because Thomas resided in Kansas. Documents Stephen filed with the trial court make no mention of Kansas law. Likewise, Aimee cited only California law. Absent a showing that Stephen asked the trial court to follow Kansas law, we apply California law. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.)

supra, 109 Cal. at p. 329.) If no proprietary interest is created in a beneficiary until after the settlor's death, the disposition is testamentary. (*Monell v. College of Physicians & Surgeons* (1961) 198 Cal.App.2d 38, 49-50.) For example, a gift of funds "if I should pass away" proved no present transfer of a beneficial interest to an oral trust, but "look[ed] to the only act of transfer as occurring, if at all, after the decedent's death." (*Id.* at p. 52.)

Trial testimony shows that Thomas intended to gift the Collection upon his death. Stephen testified that Thomas "told me over and over again that *when he died*, he wanted me to have the coins. He also told this to my mother and my father. It was something that the family knew"; Stephen also testified that the coins "were considered mine by my mother and father (and g-dad) *from the time that g-dad died*." (Italics added.) The court relied on this testimony.

As a matter of law, no oral trust was created. There is no evidence that Thomas unconditionally delivered the Collection to Stephen's parents with the intent to divest himself of the Collection in his lifetime, accompanied by an oral command to hold it in trust for Stephen. Whether living in Kansas or California, Thomas kept the Collection, while telling family members that Stephen would inherit it. After Thomas's death in 1988, Elizabeth went to Kansas to handle his estate and returned with the coins. The Collection was Thomas's post-death gift to Stephen, not the subject of an oral trust.

3. *Liability For Gross Negligence*

Aimee challenges the sufficiency of the evidence supporting the court's finding that she was grossly negligent as the bailee of Stephen's property. The absence of substantial evidence to support a judgment is a viable issue on appeal, even

without an objection in the trial court. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.)

As owner of the Collection since 1988, Stephen chose to leave it at the parental home because it seemed, to him, to be the safest place. Decedent informed Aimee that the Collection belongs to Stephen, and suggested that she send it to Stephen. Aimee conveyed this suggestion to Stephen. Stephen testified that he directed Aimee not to mail him the coins “because they were too valuable and could be lost in the mail. I asked [Aimee] to take the coin collection to her home and keep them [*sic*] in a safe place. Dad was in and out of the hospital at that point and I was concerned that they [*sic*] would disappear.”

Stephen’s testimony describes a voluntary deposit of his property, also known as a bailment. “A voluntary deposit is made by one by giving to another, with his consent, the possession of personal property to keep for the benefit of the former.” (Civ. Code, § 1814.) A voluntary deposit is “gratuitous” when the person receiving it receives no consideration. (Civ. Code, § 1844.) No evidence shows that Aimee was paid to take possession of Stephen’s coin collection. (Compare Civ. Code, § 1851 [deposit “for hire”].)

A gratuitous bailee “must use, at least, slight care for the preservation of the thing deposited.” (Civ. Code, § 1846, subd. (a).) Under this standard, the bailee can be held liable for damages resulting from “gross negligence.” (*Davis v. National Lumber Co.* (1913) 22 Cal.App. 111, 113; *Sellick v. Clipper Yacht Co.* (9th Cir. 1967) 386 F.2d 114, 116 [gross negligence standard applied to the gratuitous deposit of a boat].) Implicitly acknowledging that this was a gratuitous deposit, the trial court applied a gross negligence standard here. Gross negligence is defined as a want of even scant care, or an extreme departure

from the ordinary standard of conduct. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) The plaintiff must affirmatively show negligence on the part of the bailee. (*Perera v. Panama-Pacific Exposition Co.* (1918) 179 Cal. 63, 67.)

A bailee is not an insurer of property. (*Perera v. Panama-Pacific Exposition Co.*, *supra*, 179 Cal. at p. 67 [bailee “was not an insurer against theft” of jewelry deposited for sale at a public show]; *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc.* (1966) 246 Cal.App.2d 529, 533 [“A bailee is not, absent specific agreement, an insurer.”].) One who stores property is not bound to insure it, unless he or she receives specific instructions to insure, or habitually purchases insurance in dealings with the depositor, or an agreement requires insurance. (*Schroeder v. Mauzy* (1911) 16 Cal.App. 443, 449-450 [the depositor of a piano, who always directed the warehouseman to insure it, was entitled to recover when the piano was destroyed by fire]; “Bailee’s duty to insure bailed property,” 28 A.L.R.3d 513, [*2a], [*3].)

No evidence suggests that Stephen instructed Aimee to purchase insurance, or that they had an agreement requiring insurance or a course of dealing in which insurance was purchased in the past. The evidence does show, however, that Stephen asked Aimee “to take the coin collection to her home and keep [it] in a safe place.”

Aimee moved the Collection to her home, put some of it under her bed and some of it in her den. The trial court could reasonably find that Aimee was grossly negligent by failing to keep the Collection “in a safe place.” Removing gold and silver coins from a locked closet in the parental home, and stowing them indiscriminately around one’s home—instead of placing them in a locked cabinet or safe—does not meet the standard for a gratuitous deposit. Gross negligence occurred when Aimee

failed to use even “slight care” (Civ. Code, § 1846) to protect an asset that is both easy to steal and extremely valuable, even to an untrained eye.

“A depositary is not bound to deliver a thing deposited without demand.” (Civ. Code, § 1823.) When Stephen demanded the return of the Collection, Aimee failed to deliver it to him, handing him bits and pieces that did not amount to much. Substantial evidence supports the trial court’s finding that Aimee was grossly negligent in failing to deliver the Collection to Stephen.

4. *Insufficiency of the Valuation Evidence*

Aimee contends that no substantial evidence supports the \$717,600 award. She reasons that numismatic expert Ketterling could not value coins he never saw, so that the award is based on an assumption that the Collection contained uncirculated coins of a certain grade. The trial court expressly noted Aimee’s objection to the admissibility of the evidence, preserving the issue for appeal.

Expert testimony is required to value rare coins. (*United States v. Kayne* (1st Cir. 1996) 90 F.3d 7, 12 [rare coin valuation is “an esoteric subject”]; *United States v. Romano* (2nd Cir. 2015) 794 F.3d 317, 331-332.) Ketterling testified that “[c]oin grading has become very sophisticated and specialized” since the 1980s, employing a numerical grading system. During the decades that Thomas collected, coins were available “in bulk.” Ketterling noted that imperfect “scratched and marred” coins in coin bags or rolls are graded less highly.

Ketterling assumed that Thomas did not acquire imperfect scuffed or marred coins. Proceeding from that assumption, Ketterling opined that the grade of the Collection ranged from MS-63 to MS-68. The grade dramatically affects a

coin's value. For example, a common MS-64 silver dollar is worth \$85; the same coin rated MS-65 is worth \$165; an MS-66 is worth \$325; an MS-67 is worth \$725; and an MS-68 is worth \$4,200. For silver dollars in the Collection, Ketterling assumed a per coin value of \$200. A gold piece could be worth \$2,450 if rated at MS-63, or \$11,500 at MS-66. Ketterling believed that the gold pieces in the Collection fell within that range.

Expert testimony must be based on matters of a type reasonably relied upon by experts, and personally known to the witness or made known to him at or before the hearing. (Evid. Code, § 801, subd. (b).) Expert opinion based on speculation or conjecture is inadmissible. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.) “[T]he expert’s opinion may not be based “on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” [Citations].” (*Ibid.*)

Ketterling’s opinion is based on assumptions lacking evidentiary support. This led to conjectural testimony, such as “if” the coins came in rolls or bags, “they likely would have been” lower grades, followed by the assumption that Thomas’s collection process made it “likely” the coins lacked scuffs or marring. This clashed with Stephen’s testimony that he and Thomas combed through bags and rolls of coins to select the best ones for their books. Ketterling candidly admitted that “without knowing the dates and mint marks of the coins involved it is not possible to place a value on individual coins.” Stephen neither

inventoried the Collection nor recorded the dates and mint marks on the coins.

Ketterling's valuation of the unseen coins was made "in a vacuum [based on] things that he might think could have happened." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338.) Though it is not possible to value the coins comprising the Collection without knowing their dates and mint marks—let alone their condition—Ketterling proceeded to do so anyway, based on surmise, speculation and guesses. The judgment was impermissibly based on Ketterling's creative facts about the quality of the Collection.

5. *The Damages Award Must Be Reversed*

The judgment awarding Stephen \$717,600 plus attorney fees and costs must be reversed. The trial court is directed to conduct a new trial to determine the value of Stephen's lost property, without relying on speculation about the condition, dates and mint marks of the coins. To this end, the court may hear testimony about (a) the prices of gold and silver at the time of the loss, (b) the weight of the gold and silver in the coins, then (c) determine the value of the lost precious metal. Stephen bears the burden of proof.

We should clarify that the Collection was never part of Decedent's Trust. Stephen inherited the Collection when Thomas died in 1988, but left it at the parental home in Oxnard. Decedent and Elizabeth agreed that Stephen owned the Collection; they safeguarded it as bailees. The Collection never belonged to Decedent, did not become an asset of Decedent's estate or Trust, was not listed as a Trust asset, and Aimee did

not exercise fiduciary control over it when she became successor trustee of the Trust upon Decedent's death in 2013.³

The Trust has no duty to pay any of the attorney fees associated with this dispute between two siblings over a non-Trust asset. On remand, the trial court should address whether Aimee's gross negligence in her personal capacity as Stephen's bailee (i.e., not in her capacity as trustee) authorizes the court to surcharge the loss against Aimee's share of Decedent's Trust.

DISPOSITION

The judgment is reversed. The trial court is directed to conduct a new trial on the issue of damages. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

³ Without citation, Stephen claims that Aimee "took control of their father's trust and all of the assets in his possession" on some unspecified date before Decedent's 2013 death, though Decedent lived at home until he died. No evidence in the appellate record shows that Aimee controlled Decedent's assets as successor trustee during his lifetime.

Glen M. Reiser, Judge
Superior Court County of Ventura

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