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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROGER M. CORMAN et al., Plaintiffs and Appellants, v. ROGER W. CORMAN et al., Defendants and Respondents.	B289047 (Los Angeles County Super. Ct. No. SP007923)

APPEAL from an order of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Affirmed.

Greines, Martin, Stein & Richland, Robin Meadow and Marc J. Poster, for Plaintiffs and Appellants.

Morrison & Foerster and Miriam A. Vogel; Freeman, Freeman & Smiley, Geraldine A. Wyle and Jeryll S. Cohen, for Defendants and Respondents.

Appellants Roger M. Corman (Roger M.) and Brian W. Corman (collectively sons), are the sons of respondents Roger W. Corman (Roger W.) and Julie Corman (collectively parents). The sons initially asserted claims against the parents in connection with three irrevocable trusts created and funded by the parents for the benefit of their children and grandchildren. The sons now appeal from an order of the probate court entered following remand after a prior appeal, arguing that the probate court did not comply with the instructions of this court's remand.

The only trust at issue in this appeal is the Pacific Trust, created in 1978, which initially designated Roger W. as trustee, and the Corman children and their issue as beneficiaries. As relevant here, the sons objected to an item in the Pacific Trust accounting showing a transfer of $1,314.642.43 to the parents in 2009. Roger W. testified at trial that the transfer was the return of an inheritance he deposited into the trust with the mistaken belief that he would avoid gift taxes in doing so. He withdrew the funds, plus two percent interest he charged the trust to avoid having the taxing authorities characterize the deposit as a gift, after learning of his mistake. The probate court found that Roger W. acted reasonably and in good faith under the circumstances known to him. The probate court declined to find a breach of fiduciary duty or that Roger W. had acted with fraud or dishonesty. The court further pointed out that Roger W. was not liable for any of his actions as trustee pursuant to the exculpatory clause of the Pacific Trust. While the probate court noted that Roger W. should not have withdrawn the two percent simple interest, it found that such withdrawal did not rise to a breach of fiduciary duty, as the Pacific Trust benefitted from earnings far in excess of the two percent interest. The probate

court thus excused Roger W. for liability to the trust for the two percent interest under Probate Code section 16440, subdivision (b).[1]

The sons appealed, arguing, among other things, that the probate court erred in finding that Roger W. did not breach his fiduciary duty by making the withdrawal of more than $1.3 million. The Court of Appeal found that Roger W.'s actions established as a matter of law that Roger W. breached his duty of loyalty to the trust. In doing so, the Court of Appeal did not address the probate court's factual finding that Roger W. acted in good faith. In fact, the Court of Appeal noted that "'It is no defense that the trustee acted in good faith, that the terms of the transaction were fair, or that the trust suffered no loss or the trustee received no profit.'" (Citing *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 906.) In other words, Roger W.'s good faith was irrelevant, as his actions constituted a breach as a matter of law. The Court of Appeal specified, "regardless of the validity of [Roger W.'s] claim to that money, the beneficiaries had an interest in contesting that claim and keeping the money where it was." (*Corman v. Corman* (Aug. 29, 2016, B251513) [nonpub. opn.] at p. 13 (*Corman I*).) The Court of Appeal found that the trust's exculpatory clause could not relieve Roger W. of liability for this breach. It found that the probate court's decision to excuse Roger W. from liability for the two percent interest excused him "from liability for an amount much lower than that for which he was actually liable." Thus, the Court of Appeal remanded "for a determination of whether Roger W.'s liability for withdrawing the $1.3 million with 2 percent interest should be

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[1] All further statutory references are to the Probate Code unless otherwise noted.

excused under section 16440, subdivision (b)." (*Corman I*, at p. 15.)

After the matter was remanded, Roger W. returned to the trust $1,314,644 plus two percent interest from the date of the withdrawal to the date paid.[2] The probate court thus found the matter moot, as there were no remaining contested facts to be decided. The sons appeal, arguing that the remand entitled them to a new determination of the consequences of Roger W.'s breach. Among other things, the sons argue they were entitled to an award of seven percent prejudgment interest as well as other remedies available to the trust, including double damages and punitive damages.

We interpret the Court of Appeal's opinion de novo, and find that the scope of remand was limited, as the probate court correctly determined. The sons' claims for additional interest and damages go beyond the scope of remand and were outside of the jurisdiction of the probate court. Therefore, we affirm the probate court's order.

FACTUAL BACKGROUND

Roger W., age 93, and Julie, age 76, were married in 1970 and are the parents of four adult children: Catherine (born 1975); Roger M. (born 1976); Brian (born 1977); and Mary (born 1984). Catherine and Mary are not involved in this matter. The

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[2] Roger W. deposited into the Pacific Trust the total amount withdrawn from the trust, $1,314,644, in four equal increments. Additionally, on January 19, 2018, Roger W. delivered to the trustee of the Pacific Trust a check payable to the Pacific Trust in the amount of $234,518.17 representing interest at the rate of two percent on the $1,314,644 accruing from January 2009 through April 30, 2017.

assets of the three trusts the parents created for their children and grandchildren are now purportedly worth more than $100 million.

The Pacific Trust, created in 1978, is an irrevocable trust that designated Roger W. as trustee and the Corman children and their issue as beneficiaries. The Pacific Trust began with $600,000 of Roger W.'s separate property and increased in value to as much as $80 million as a result of Roger W.'s and Julie's success in the film industry. They produced 168 films for the Pacific Trust.[3]

The Pacific Trust grants the trustee the power to manage, control, and invest trust assets. The trustee's control is "'subject always to discharge of its fiduciary obligations.'" The trustee does not have the power "'to purchase, exchange or otherwise deal with or dispose of the principal or the income of the trust estate for less than a full and adequate consideration.'" The trust also provides that "'[n]o liability of any nature whatsoever shall accrue to [the Trustee], for his actions as Trustee, except for fraud or dishonesty on his part, and each beneficiary . . . by accepting benefits received shall be deemed to have agreed to indemnify and hold the said Trustee harmless from claims or liability for matters arising by reason of his actions as such Trustee, except for fraud or dishonesty on his part.'"

PROCEDURAL HISTORY

In 2009, the sons filed petitions concerning the Pacific Trust and two other trusts established by the parents for the

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[3] During the time period relevant to this case, Roger W. was the trustee of the Pacific Trust and Julie was a special trustee. The parties assert that since that time, the parents have been replaced by a professional trustee.

benefit of their children. The petitions sought, among other things, accountings of the trusts, removal or suspension of Roger W. and Julie as trustees, the imposition of a surcharge and/or sanctions, and disgorgement of misappropriated trust assets. The petitions also sought "damages based on the amount that the trust assets have been depleted, lost, made unproductive or stolen based on the wrongful actions" of Roger W.

The probate court appointed counsel to serve as guardian ad litem (GAL) for the trusts' unborn beneficiaries. The court ordered Roger W. and Julie to prepare accountings for the trusts from 2004 to 2010.

In October 2011, the sons filed objections to the trust accountings provided by Roger W. and Julie.[4] In July and August 2012 a trial was conducted on the sons' petitions and objections to the accountings, but a mistrial was declared. The judge recused himself and the matter was reassigned.

A new court trial commenced in July 2013. Following trial, the probate court found that the parents had met their burden of proving the accuracy of their accountings for the three trusts. It further found that the sons had failed to show malfeasance or improper accounting, and had contested the accountings without reasonable cause and in bad faith. The probate court entered judgment ordering that the sons receive nothing on their petitions and approving the accountings filed by the parents.

The sons appealed, asserting, among other things, that the probate court erred in finding that parents did not breach their fiduciary duties as trustees of the Pacific Trust. As relevant here,

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[4] The GAL also filed objections to the accountings. However, in July 2012, the GAL settled his claims and withdrew his objections.

they asserted that Roger W. breached his fiduciary duty by withdrawing more than $1.3 million from the trust to repay a gift he claimed he made by mistake. The Court of Appeal noted that the sons asked that the Appellate Court "direct the probate court to order Roger W. to disgorge and return to the Pacific Trust the $1.3 million and 2 percent interest he withdrew." (*Corman I*, at p. 13.)

Because the relevant facts were undisputed, the Court of Appeal reviewed this issue as a matter of law. The Court of Appeal held that the probate court erred in determining that the trust's exculpatory clause relieved Roger W. of liability for withdrawing the $1.3 million plus interest. The Court of Appeal pointed to section 16461, which provides exceptions to the general rule that a trustee can be relieved of liability for breach of trust provisions in the trust instrument. The relevant exception provides that "[a] provision in the trust instrument is not effective to relieve the trustee of liability . . . for any profit that the trustee derives from a breach of trust." (§ 16461, subd. (b).) The Court of Appeal held that the "trust's exculpatory clause cannot relieve [Roger W.] of liability for the profit -- the $1.3 million with interest -- he derived from that transfer." (*Corman I*, at p. 14, citing *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1149 [for its authority to interpret a statute and its application to undisputed facts as a matter of law].) Thus, the probate court erred in relying on the trust's exculpatory clause to relieve Roger W. of liability for the withdrawal.

Because the probate court's decision to relieve Roger W. of liability was improperly grounded on the trust's exculpatory clause, the appellate court remanded the matter to the probate

court for a determination "of whether Roger W.'s liability for withdrawing the $1.3 million with 2 percent interest should be excused under section 16440, subdivision (b)." (*Corman I.,* at p. 15.)

The sons filed a petition for rehearing, asking the Court of Appeal to "direct entry of a judgment that required Roger W. to disgorge what he took, with interest." The sons argued that the breach of trust could not be excused under section 16440, subdivision (b).

The Appellate Court requested a response from the parents, who argued that to the contrary, section 16440, subdivision (b), permitted the probate court, in its discretion, to excuse a trustee from liability for any breach of trust if it is equitable to do so.

On September 20, 2016, the Court of Appeal denied the petition for rehearing.

Following remand, the probate court considered the parties' arguments regarding the scope of remand, concluding that the scope of remand was limited to a determination of whether Roger W.'s liability for withdrawing the $1.3 million with 2 percent interest should be excused under section 16440, subdivision (b). The court explained that the sons "limited their claim at the trial and appeal to the return of the $1.3 million plus interest. Although there is an explicit reference to profits in Probate Code section 16440, subdivisions (a)(2) or (a)(3), the petitioner's trial counsel apparently chose not to seek this additional relief." The probate court noted that the *Corman I* opinion did not discuss any additional damages, such as profits, which Roger W. received from the use of the $1.3 million. The probate court declined to

litigate factual issues that exceeded the reviewing court's direction.

On March 22, 2018, the probate court issued an order, noting that it had received satisfactory proof that Roger W. deposited into the Pacific Trust the total amount of $1,314,644 plus two percent interest on that amount accruing from the date of withdrawal to the date paid. Thus, "any additional proceedings, including further discovery, are moot . . . as there are no remaining contested facts to be decided."

On April 2, 2018, the sons appealed from the March 22, 2018 order.[5]

DISCUSSION

I. Standard of review

We are called upon to determine the scope of the remand issued in the prior appeal in this matter. "Whether the trial court has correctly interpreted an appellate opinion is an issue of law subject to de novo review." (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313 (*Ducoing*).) In interpreting the language of a judicial opinion, we look to the wording of the dispositional language, "'in conjunction with the opinion as a whole.' [Citations.]" (*Ibid.*)

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[5] On March 26, 2018, the sons also filed a petition for writ of mandate or prohibition to overturn the probate court's rulings. (*Corman v. Superior Court*, B289001). The parents submitted preliminary opposition to the writ petition, arguing that the sons had an adequate remedy at law by way of appeal from the March 22, 2018 order. This court denied the petition without opinion on April 17, 2018. The parents thus do not contest the propriety of the sons' appeal from the March 22, 2018 order. We agree with the parties that the March 22, 2018 order was properly and timely appealed.

II. The remand was limited to whether Roger W.'s liability for withdrawing the $1.3 million with two percent interest should be excused under section 16440, subdivision (b)

The sons claim that the probate court erred by limiting the scope of remand to the issue of whether Roger W.'s liability for withdrawing the $1.3 million with two percent interest should be excused under section 16440, subdivision (b). Instead, the sons assert that the proper question on remand was: "if Roger W.'s breach of fiduciary duty was not excusable, what is the consequence?" The sons claim that instead the probate court should have considered their claims that they were owed seven percent prejudgment interest pursuant to Civil Code section 3287; 10 percent compound interest pursuant to Probate Code section 16441 and Code of Civil Procedure section 685.010; double damages under Probate Code section 859; any of Roger W.'s gains or the trust's losses; and, if Roger W. acted with malice, punitive damages and attorney fees and costs.

Such claims were outside the scope of the remand. The only question on remand was whether Roger W.'s breach should be excused under section 16440, subdivision (b). If Roger W.'s actions were not excused, the only outcome considered by the appellate court was Roger W.'s return of the money plus two percent interest. In reaching this conclusion as to the scope of remand, we analyze both the disposition and the opinion as a whole. (*Ducoing, supra,* 234 Cal.App.4th at p. 313.)

The Court of Appeal set forth the sons' original objection to the item in the Pacific Trust accounting showing the transfer of $1,314,642.43 to the parents in 2009. (*Corman I, supra*, at p. 11.) The opinion notes that the trial court determined "'that Roger W. acted reasonably and in good faith under the circumstances as

known to him'" and was "'excused from any liability related to his withdrawal of the interest related to this sum.'" (*Corman I*, at p. 12.) In addition, the probate court found that pursuant to the exculpatory clause of the Pacific Trust, Roger W. was not liable for any of his actions as trustee. (*Ibid.*) The *Corman I* court noted that the sons "ask us to direct the probate court to order Roger W. to disgorge and return to the Pacific Trust the $1.3 million and 2 percent interest he withdrew." (*Id.* at p. 13.) This was the sole financial remedy that the Court of Appeal entertained on this issue.

The Court of Appeal determined that Roger W. breached his duty of loyalty in withdrawing the money from the trust, "regardless of the validity of his claim to that money." (*Corman I, supra*, at p. 13). Notably, the appellate court did not evaluate the facts leading to the probate court's determination that Roger W. acted reasonably and in good faith. Roger W.'s good faith was irrelevant -- regardless of Roger W.'s good faith, the beneficiaries "had an interest in contesting that claim and keeping the money where it was." (*Ibid.*) Again, the Court of Appeal referenced the sons' interest in the return of the money, nothing more.

The *Corman I* court also determined that the probate court erred in excusing Roger W. from liability only to the extent that he profited from his breach of trust. (*Corman I, supra*, at p. 14.) Specifically, the *Corman I* court noted that, although a trustee can be relieved of liability for breach of trust by provisions in the trust instrument, there is an exception for "'any profit that the trustee derives from a breach of trust.'" (*Ibid.*, citing § 16461, subd. (b).) The appellate court thus concluded that the exculpatory clause in the trust could not relieve Roger W. of liability for "the profit -- the $1.3 million with interest -- he

derived from that transfer." (*Corman I*, at p. 14.) Because Roger W.'s liability for the $1.3 million plus two percent interest was not properly excused under the trust's exculpatory provision, the matter was remanded for the probate court to determine "whether Roger W.'s liability for withdrawing the $1.3 million with 2 percent interest should be excused under section 16440, subdivision (b)." (*Corman I*, at p. 15.) The disposition directed:

> "The probate court's order ruling that Roger W. did not breach his fiduciary duty as trustee of the Pacific Trust when he withdrew $1,314,642.43 from the trust based on a purported mistake is reversed and remanded for a determination whether Roger W.'s liability for the breach should be excused under Probate Code section 16440, subdivision (b)."

(*Corman I, supra*, at p. 47.)

Reading the opinion as a whole, it cannot be interpreted as permitting the probate court to address the issues now raised by the sons, such as additional interest, bad faith and punitive damages. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 863 (*Ayyad*) ["the trial court's jurisdiction on remand extends only to those issues on which the reviewing court *permits* further proceedings"].) Consideration of these issues would have been outside the scope of the probate court's jurisdiction. (*Id.* at p. 859 ["the rule requiring a trial court to follow the terms of the remittitur is jurisdictional in nature"].) After remand, "[t]he trial court may not expand the issues . . . to encompass matters outside the scope of the remittitur merely because the reviewing court has not expressly forbidden the trial court from doing so. [Citation.]" (*Id.* at p. 863, fn. omitted.) "Any material variance from the [appellate court's] directions is

unauthorized and void. [Citations.]" (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)[6]

The cases cited by the sons on this point are distinguishable. *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491-493, involved the doctrine of law of the case, not the scope of permissible proceedings on remand. Similarly, in *Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 617, the court discussed the doctrine of law of the case, indicating that under that doctrine, "we ordinarily will not revisit an issue of law that was actually presented and determined in a prior appellate proceeding." The doctrine of law of the case is not at issue in this appeal, thus these cases are irrelevant.

The remand was limited, and the probate court was not permitted to reopen the proceedings to discuss the various forms of relief the sons now seek. Thus, the probate court did not err in declining to do so.[7]

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[6] As set forth above, the factual questions of bad faith and fraud were decided in the first probate court proceeding and were not relevant to the decision in *Corman I*. Thus, the probate court had no authority to revisit these issues on remand.

[7] If the sons thought that the Court of Appeal's directive was in error in any way -- for example, if the Court of Appeal should have directed consideration of additional interest beyond the two percent discussed throughout the opinion -- the proper vehicle for fixing the error was the sons' petition for rehearing. (Cal. Rules of Court, rule 8.268; *Davis v. Basalt Rock Co.* (1952) 114 Cal.App.2d 300, 311 ["'if a party is dissatisfied with the judgment as rendered in an appellate court, his remedy is to petition for a hearing or modification of the judgment within the time allowed by law and before the remittitur has issued'"].) While the sons did file a petition for rehearing, they asked only that the Court of

III. Roger W.'s return of the money rendered remand moot

As set forth above, the sole issue the probate court was permitted to address on remand was whether Roger W.'s liability for the $1,314,642.43 he withdrew from the trust should be excused under section 16440, subdivision (b). When Roger W. returned the money to the trust, the issue was rendered moot, as there was no further relief the probate court could provide.

"'The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief. [Citations.] . . .'" (*Schoshinski v. City of Los Angeles* (2017) 9 Cal.App.5th 780, 791.) The sole question on remand was whether Roger W.'s liability to the trust for the $1,314,642.43 should be excused. Because he returned the money, the resolution of the question of whether his liability for that sum should be excused was unnecessary. Due to the limited nature of the remand, the probate court could provide no further effectual relief to the sons, and the matter was moot.

Appeal direct the probate court to "order disgorgement with interest." The sons gave no indication that the two percent interest (discussed numerous times throughout the opinion) was an incorrect measure of interest. Nor did the sons ask the Court of Appeal to direct that additional remedies could be imposed.

DISPOSITION

The order is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT