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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Conservatorship of the Estate of IDA MCQUEEN.	
FESSHA TAYE, as Conservator, etc., Petitioner and Respondent, v. EARLINE DRUMGOOLE et al., Objectors and Appellants.	A126825 (Alameda County Super. Ct. No. HP05237122)

I.
INTRODUCTION

Conservator Fessha Taye brought this litigation on behalf of conservatee Ida McQueen, a mentally and physically disabled elder, against several of McQueen's family members and the family's legal representative.[1] Specifically, it was claimed that these individuals violated the terms of a trust set up for McQueen by her father when they sold the family residence, in which McQueen held a life estate, without her consent or knowledge and then misappropriated the entirety of the sales proceeds for their own use.

Following a jury trial, Taye, on McQueen's behalf (respondent), obtained an award of $99,900 in damages against three of five defendants who proceeded to trial—Alameda County attorney Carol Veres Reed (the family attorney), trustee Ray Blackshire (McQueen's uncle), and Earline Drumgoole (McQueen's sister) (collectively referred to

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III.B., III.C., and III.D.

[1] A limited conservatorship was established on December 16, 2005, expressly for the purpose of pursuing elder abuse litigation on McQueen's behalf.

as appellants).[2] The jury found each appellant liable on various causes of action, including financial elder abuse, concealment, conversion, breach of fiduciary duty, and negligence. After the trial, the court awarded respondent $320,748.25 in attorney fees and conservatorship costs.

Appellants have filed this appeal claiming multiple instances of prejudicial error, including that the instructions given to the jury on the collateral source rule and the Rules of Professional Conduct were erroneous. Appellants also claim that the trial court unduly restricted appellant Reed's testimony and barred admission of relevant evidence so that she was not allowed to provide a full explanation on the reasonableness of her actions as it related to the claim of financial elder abuse. Appellants further argue that respondent failed to state a cause of action for conversion, and that the trial court erred in submitting this theory to the jury. Lastly, it is claimed that the attorney fee award was excessive and should be reduced. We reject all of these contentions and affirm.

II.

FACTS AND PROCEDURAL HISTORY

McQueen is a senior citizen, whose date of birth is February 16, 1935. She suffers from mild mental retardation, progressive spastic quadriparesis, scoliosis, osteoporosis, arthritis and has a history of hypertension. She uses a wheelchair and is unable to read or write.

A testamentary trust was created for McQueen's benefit by her now-deceased father, Earl Blacksher, under his 1989 will.[3] The will gave McQueen the right to live in the family home located at 10709 Estepa Drive in Oakland during her lifetime. The will also provided that the trustee, in his discretion, shall pay as much of the trust principal as he deems necessary for McQueen's care, comfort and health expenses during her lifetime. Upon McQueen's death, the will directs that the remaining trust assets shall vest

[2] The court granted a nonsuit on one defendant's behalf and the jury's verdict exonerated another defendant from all liability.

[3] In this record, Earl Blacksher is sometimes referred to as Earl Blackshire. He is also sometimes referred to as McQueen's stepfather. While acknowledging this inconsistency in the record, we refer to him as McQueen's father, Earl Blacksher.

in any of Blacksher's six children who may be living, in equal shares. Blacksher named his two brothers, Lee and appellant Ray Blackshire, as co-trustees of the trust for McQueen.

Earl Blacksher died on or about March 1, 1990. On April 10, 1990, Lee and Ray Blackshire were appointed as co-administrators of Blacksher's estate. At the time of Blacksher's death, a mortgage with Beneficial Finance existed against the family home. Lee Blackshire, in his capacity as co-administrator of the estate of Earl Blacksher, and with court permission, loaned the estate sufficient funds to pay off the existing Beneficial Finance mortgage. This transaction reduced McQueen's monthly expenses to an amount she could reasonably afford to pay from her Social Security Supplemental Income (SSI). McQueen's sister, appellant Earline Drumgoole, administered McQueen's financial affairs after the death of their father, including becoming McQueen's representative payee for her SSI benefits.

An order for final distribution of the estate of Earl Blacksher was prepared by appellant Reed, an attorney whose father had drafted Earl Blacksher's will. The order for final distribution was filed and recorded in Alameda County on September 20, 1994. The order formally created a trust, it designated the family residence as the trust res, and it directed the trustee to pay the net income of the trust to McQueen for her care, comfort and support during her natural life. Lee Blackshire subsequently died. On September 21, 1994, appellant Ray Blackshire was appointed sole administrator of the estate of Earl Blacksher.

By court order in 1994, appellant Reed was to receive $3,321.93 for her attorney fees for services rendered to the estate. Appellant Ray Blackshire was to receive $2,321.93 in executor's fees. However, there was no money in the estate to pay these fees.

After Earl Blacksher's death in 1990, McQueen continued to live in the family home with assistance from caregivers. In early 2000, McQueen was placed in a skilled nursing facility due to medical complications. Despite McQueen's desire to return to the family home once her physical condition stabilized, she was unable to do so due to severe

habitability problems in the home as well as lack of wheelchair access. In May 2001, McQueen moved into Gerrylaide Manor, a community care facility in the Cherryland area of unincorporated Alameda County, with the assistance of the Regional Center of the East Bay (Regional Center).

On February 9, 2000, appellant Reed and her brother, attorney Richard K. Veres, visited McQueen in the skilled nursing facility in order to have her to sign a power of attorney, which they had prepared, appointing appellant Earline Drumgoole to act on McQueen's behalf. No one at the skilled nursing facility or the Regional Center was notified in advance of their visit to McQueen, so McQueen had no one with her to help her understand the purpose of the document. McQueen signed the power of attorney by making a mark on the document. The power of attorney was witnessed by appellant Reed and Richard K. Veres and notarized by Richard K. Veres. Afterward, McQueen told a worker at the skilled nursing facility that some people visited her and had her sign something, but she did not know the people or what she had signed.[4]

On October 5, 2004, appellant Ray Blackshire, acting in his capacity as trustee, executed a document selling the family residence to a third party, Phillip Edwards, under a grant deed, which was then recorded on October 26, 2004. The sale price paid for the subject property was $240,000. The sale was completed without McQueen's consent and without authorization from the probate court. The money from the sale was held in appellant Reed's general attorney/client trust account. Appellant Reed eventually distributed the sale proceeds among family members including appellant Ray Blackshire, appellant Earline Drumgoole, Earl Blacksher, Jr., Burt Blacksher, Alonzo Blacksher (son of Arthur Blacksher) and the children of Earl Blacksher's deceased daughter Geraldine Blacksher Kane. Appellants Reed and Ray Blackshire were paid their court-ordered

[4] Whether the power of attorney was ever used to McQueen's detriment was a highly disputed issue at trial. Respondents claimed the power of attorney was used to convince skeptical family members that the sale of the family residence was legal, while appellants claim it was never used because no document was produced "that was ever signed by Earline Drumgoole, signing Ida McQueen's name."

probate fees that they were owed from years earlier. Appellant Drumgoole was repaid for money she spent to keep the family residence out of foreclosure.

In November 2004, the Regional Center first learned that McQueen's home had been sold without her knowledge or consent, and that she had not received any proceeds from the sale of the house. On December 16, 2005, Fessha Taye was appointed limited conservator of the estate of Ida McQueen.

A lawsuit was eventually brought by the conservator naming, among other individuals, the five defendants who proceeded to trial: (1) McQueen's sister Earline Drumgoole; (2) McQueen's uncle Ray Blackshire, (3) attorney Carol Veres Reed, (4) Reed's brother Richard K. Veres, and (5) McQueen's nephew Alonzo Blacksher. The operative complaint alleged causes of action for financial elder abuse, fraud and concealment, conversion, breach of fiduciary duty and negligence. The principal allegation underlying this lawsuit was that defendants "prepared and fraudulently obtained a power of attorney from Ida McQueen, fraudulently and secretly executed documents to wrongfully transfer title and sell the Subject Property, and thereafter wrongfully converted the cash proceeds from such sale to themselves for their own use and to the exclusion of Trust Beneficiary, Ida McQueen." It was alleged that these actions were in direct contravention of the terms of the trust that was set up for McQueen by her father, Earl Blacksher.

At trial, appellants were represented by appellant Reed's husband, James E. Reed.[5] In a pretrial ruling, the court held as a matter of law that there was no ambiguity with regard to the intent of the testator, Earl Blacksher, that in creating a life estate in the family home for McQueen, he intended for her to hold this interest for the duration of her life and that interest "doesn't extinguish just because it's sold." Consequently, even though McQueen could no longer reside in the family home, she was entitled to any income that might result from the sale of the house.[6]

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[5] James E. Reed also represents appellants in this appeal.

[6] In appellants' briefs in this court, they have not challenged the lower court's interpretation of the testator's intent.

At trial, appellants were allowed to argue that they had a good faith reasonable belief that McQueen's life estate had ended, despite the fact that the trial court had made a legal ruling resolving that issue against appellants. Appellants also claimed that McQueen could never have benefitted from the sale of the family home and, in fact, she would have been harmed because if she had received any of the sale proceeds, her SSI and Medi-Cal benefits would have been reduced and possibly lost altogether.

The jury heard conflicting expert testimony on this hypothesis. Respondent's expert witness, Kevin Urbatch, testified that with appropriate financial planning, such as the creation of a special needs trust for McQueen's benefit, the testator's intent could have been carried out and the proceeds from the sale of the family home could have been preserved for McQueen while her SSI and Medi-Cal benefits were protected. In rebuttal, appellants' expert witness, Stephen Dale, testified that while there presently is a way to create a special needs trust under these circumstances, this option did not really exist in California during the relevant time frame.

The jury was given a separate verdict form for each defendant for each theory of liability. Before the case was submitted to the jury, the court entered nonsuit in favor of defendant Alonzo Blacksher. Appellant Ray Blackshire was found liable for conversion, breach of fiduciary duty, and concealment. Appellant Earline Drumgoole was found liable for negligence, conversion, breach of fiduciary duty, and concealment. Appellant Carol Veres Reed was found liable for financial elder abuse, breach of fiduciary duty as an attorney, and conversion. The jury exonerated Richard K. Veres for all causes of action alleged against him.

Appellants were ordered to pay McQueen $99,900 in compensatory damages. Appellant Reed was the only defendant who was found liable under the elder abuse statute, which contains an attorney fees and costs provision. (Welf. & Inst. Code, § 15657.5, subd. (a).) She was ordered to pay attorney fees and costs in the amount of $320,748.25. This appeal followed.

III.

DISCUSSION

A. Were McQueen's Disability Benefits Subject to the Collateral Source Rule?

The jury was instructed that the government benefits received by McQueen based on her long-standing disabilities and financial need could not be considered in awarding damages.[7] This instruction was based on the court's pretrial ruling that McQueen's SSI payments were collateral source benefits that could not be used to offset any damages that the jury might award McQueen as a result of any alleged breach of fiduciary duty, financial elder abuse, conversion, or negligence.

Under the collateral source rule, "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor. [Citation.]" (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6, fn. omitted (*Helfend*).) The court ruled that "to allow the jury to consider the SSI payments in connection with damages would be in violation of the collateral source rule, would be prejudicial, confusing and misleading under Evidence Code section 352, and against public policy."[8]

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[7] The court instructed the jury as follows: "You shall not consider or deduct SSI payments or other government benefits paid to Ida McQueen in determining or calculating Ida McQueen's damages."

[8] It is important to point out the limited nature of the court's ruling. At a hearing on respondent's motion in limine to exclude evidence of McQueen's SSI benefits, the court found the evidence of McQueen's receipt of governmental assistance in the form of SSI benefits was probative of appellants' defense that they held a good faith belief—whether accurate or not—that they were protecting McQueen's SSI eligibility by not giving her any of the proceeds from the sale of the family residence. In accordance with the court's ruling, the jury heard extensive evidence, including conflicting expert testimony, regarding appellants' belief that if they had distributed any of the proceeds from the sale of the house to McQueen, they would have jeopardized McQueen's government assistance. Consequently, the only limitation the court placed on the evidence of McQueen's receipt of SSI was in its use as a mitigating factor in assessing damages.

Appellants assert that the trial court erred when it restricted use of evidence of McQueen's SSI payments pursuant to the collateral source rule. Appellants emphasize that the collateral source rule typically applies "in tort cases in which the plaintiff has been compensated by an independent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement." (*Helfend, supra*, 2 Cal.3d at pp. 13-14.) "This rule embodies a judicially created policy, firmly embedded in California jurisprudence, encouraging prudent investment in insurance and ensuring that victims are made whole." (*Kardly v. State Farm Mut. Auto Ins. Co.* (1989) 207 Cal.App.3d 479, 485.) Appellants argue that the collateral source rule "has never applied in California to benefits—public, gratuitous, or otherwise—that were already being paid to the injured party before the injury occurred."

While we are not aware of any published case in California that has specifically addressed the situation where the plaintiff has received preexisting payments from the federal government, California courts have used the collateral source rule to exclude evidence of payments to the plaintiff from a gratuitous source. In *Arambula v. Wells* (1999) 72 Cal.App.4th 1006, the plaintiff was physically injured necessitating that he miss work from his family-owned business. (*Id.* at p. 1008.) Nevertheless, he continued to receive his weekly salary. (*Ibid*.) Defendant moved in limine to exclude all evidence and testimony regarding the plaintiff's lost wages on grounds he was not receiving payment through insurance, pension or by using accrued sick time or vacation time, nor had he submitted evidence that he would have to reimburse the wages he continued to receive. (*Id.* at pp. 1008-1009.) The trial court granted the motion but the appellate court reversed. After reviewing the existing law in California and in other jurisdictions with regard to gratuitous sources, the appellate court found that the rationale for the collateral source rule "favors sheltering gratuitous gifts of money or services intended to benefit tort victims . . . ." (*Id.* at p. 1014.) When explaining the reasons for imposing the rule in this context, the *Arambula* court stated, "Just as the Supreme Court . . . 'expresses a

policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities' [citation], so too we adhere to the rule to promote policy concerns favoring private charitable assistance." (*Id.* at p. 1012.)

The court in *Smock v. State of California* (2006) 138 Cal App.4th 883, another gratuitous wage case, concurred: "The cases that discuss application of the collateral source rule do not find a critical distinction between situations where the victim receives a gratuitous payment or benefit and those where the benefit or payment arises from some obligation. Under California law, it makes no difference. [Citations.]" (*Id*. at p. 887.)

We further note that in a listing of the collateral benefits that generally are not subtracted from the plaintiff's recovery, the Restatement Second of Torts includes "[s]ocial legislation benefits," such as "Social security benefits" and "welfare payments." (Rest. 2d Torts, § 920A, com. c, p. 515.) The Restatement explains: "If the benefit was a gift to the plaintiff from a third party or *established for him by law*, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him." (*Id.* at com. b, p. 514, italics added.)

Moreover, courts from outside this jurisdiction have used the collateral source rule to exclude evidence of payments to the plaintiff from a governmental agency. (See, e.g., *Ray v. Department of Social* Services (156 Mich.App. 55 1986) 401 N.W.2d 307 [lower court properly refused to offset the plaintiff's gratuitous public welfare benefits against the judgment]; *Roundhouse v. Owens-Illinois, Inc.* (6th Cir. 1979) 604 F.2d 990 [receipt of federal funds in partial reimbursement of plaintiff's loss did not bar recovery of the full amount of damages caused by defendant's conduct]; *Town of East Troy v. Soo Line R. Co.* (7th Cir. 1980) 653 F.2d 1123, 1132 [collateral source rule prevented evidence of town's receipt of federal development grant in assessing damages]; *Bonnet, etc. v. Slaughter* (La.Ct.App. 1982) 422 So.2d 499, 502 [plaintiff's recovery not reduced by welfare payments received during period the plaintiff did not work]; *Buckley Nursing Home v. Com'n. Against Discrim.* (Mass.App. 1985) 478 N.E.2d 1292, 1299-1300 [court refused to offset welfare payments received by the plaintiff against the defendant's

liability for damages]; *Gatlin v. Methodist Medical Center, Inc.* (Miss. 2000) 772 So.2d 1023, 1032-1033 [imposed the collateral source rule on funeral payments made by a victims' rights fund]; *Wheatland Irrigation Dist. v. McGuire* (Wyo. 1977) 562 P.2d 287, 302 ["the fact that benefits have been received from governmental sources does not preclude application of the [collateral source] rule"].)

Accordingly, we conclude that the rationale underlying the utilization of the collateral source rule in the aforementioned cases, where the plaintiff received funds from the government, applies to the present case. As expressed by the Fifth Circuit, "[t]he collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor." (*Davis v. Odeco, Inc.* (5th Cir. 1994) 18 F.3d 1237, 1243, fn. omitted.) McQueen's SSI payments were entirely independent of (or collateral to) appellants, and therefore, were properly excluded from consideration by the collateral source doctrine.

B. Was Carol Veres Reed Properly Found Liable for Financial Elder Abuse and Breach of Fiduciary Duty?

Using a multifaceted attack, appellant Reed[9] argues that the jury's verdict finding her liable for financial elder abuse and breach of fiduciary duty must be reversed, because: (1) the jury held her to a different and higher standard than her codefendants—specifically, the standard of care of an attorney as opposed to a reasonable person, (2) the court's preclusion of evidence on the standard of care of an attorney combined with the jury instructions on the Rules of Professional Conduct created prejudicial error, (3) the court erred in curtailing her testimony about the legal precedent she had relied upon to support her opinion that McQueen's life estate had terminated, and (4) no reasonable trier of fact could have concluded that she owed McQueen a fiduciary duty as an attorney at the time the family residence was sold and the sales proceeds distributed; therefore, the trial court should never have submitted the issue to the jury.

[9] Appellant Reed is the only appellant making this argument. Consequently, she will be referred to as Reed in this section of the opinion.

Reed argues that the trial court committed error in not allowing expert testimony to offer guidance on an attorney's standard of care because the jury found her liable for financial elder abuse because they held her "to a higher standard because she was an attorney." Reed bases this conclusion on the fact that she was the only defendant found liable for financial elder abuse; thus, according to her brief, "it can be assumed that the jury held [her] to a higher standard because she was an attorney, and that on the basis of her being an attorney, she 'knew or should have known' that [McQueen] had a right to the property."[10]

To the contrary, the jury was specifically instructed that to find a defendant liable for financial elder abuse "it would have been obvious to a *reasonable person* that Ida McQueen had the right to have the property transferred or made readily available to her." (Italics added.) Reed's apparent assumption that the jury ignored this directive and held her to a different standard than her codefendants, is nothing more than rank speculation belied by the actual language used in the jury instructions. There is nothing in the record suggesting that the jury misunderstood or misapplied the reasonable person standard as set out in the jury's instructions.

In making this argument, Reed fails to acknowledge the evidence on which the jury could base a finding that she took or assisted in taking McQueen's property for a

[10] Under the Elder Abuse and Dependent Adult Civil Protection Act, " '[f]inancial abuse' of an elder . . . occurs when a person or entity . . . [¶] . . . [t]akes, secretes, appropriates, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a)(1).)

wrongful use under a reasonable person standard.[11] Viewed in the light most favorable to respondents and with all conflicts resolved in their favor, this evidence included Reed's role in preparing the final order of distribution, which contained all of the terms of Earl Blacksher's trust, thus proving that Reed had knowledge of the will and life estate provisions critical to this case. Despite this knowledge, Reed advised family members that McQueen's life estate had ended and the house could be sold. Reed told the title company to deposit the proceeds from the sale of the family residence into her trust account, and she alone took responsibility for deciding how the proceeds should be distributed. Reed further admitted that she did not discuss the sale with McQueen nor did she ever inform the probate court that she was taking these actions. She also acknowledged it was her idea to have McQueen sign a power of attorney "because all kinds of things can come up." For all the above reasons, the jury could find that Reed appropriated or assisted in appropriating McQueen's property for a wrongful use while relying on the reasonable person standard.

Switching approaches, Reed argues that because she was a licensed attorney, expert testimony was necessary to prove the reasonableness of her actions as an attorney. However, it was appellants themselves who made the strategic decision, in pretrial motions in limine, to argue that standard of care evidence proffered by respondents

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[11] An appellate practice guide instructs: "Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly 'undo' an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case! [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 9:27, p. 9-8 (rev. #1 2010), italics omitted.) Despite the fact that appellant's claims of error must be viewed in light of *all* the evidence presented at trial, viewed in the light most favorable to the jury's verdict, one can read appellant's brief and never learn that there was any evidence supporting the jury's findings or any rationale supporting the trial court's rulings. (See *Hasson v. Ford Motor* Co. (1982) 32 Cal.3d 388, 398-399 [appellant's "elaborate factual presentation is but an attempt to re-argue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review"].)

should be precluded because there was no cause of action alleged for legal malpractice. The record reflects that the court granted the motion in limine to preclude standard of care testimony, agreeing with appellants as to that issue. Accordingly, Reed cannot now complain that the court improperly denied the introduction of such evidence. (*Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121 [under the invited error doctrine, a party may not challenge a trial court finding made at his or her counsel's urging].)

Reed also claims she was deprived of her right to present a defense to the charge of financial elder abuse when the court placed overly strict limitations on her testimony. When Reed testified and was asked whether she was familiar with other cases in which a life estate had ended, the court sustained respondents' objection to this line of questioning based on relevance. Reed claims the court abused its discretion by barring her from testifying to this point because "[w]ithout allowing [appellant] the chance to explain the reasoning behind her conclusion that [McQueen's] life estate had ended, the jurors had little choice but to conclude she acted unreasonably."

The trial court has wide latitude in determining the relevance of proffered evidence. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901.) We review the trial court's evidentiary rulings for abuse of discretion (*id.* at p. 900), and here we perceive none. To complain now that Reed was not permitted to explain her actions or her state of mind is disingenuous. First, the court allowed Reed to testify extensively that it was her opinion as an experienced probate attorney, who was a certified specialist in the areas of probate and estate planning and served as a judge pro tem in probate court, that McQueen's life estate had terminated prior to sale because McQueen had stopped paying taxes on the property and had no ability to pay taxes, and because she could no longer reside in the subject property, among other reasons. The jury was instructed on applicable sections of the Probate Code and the Civil Code as requested by Reed in this regard Reed was also allowed to testify as to her good faith belief and opinion that if the defendants distributed any of the proceeds from the sale of the house to McQueen (cash or rental income) they would be jeopardizing McQueen's government assistance benefits. Reed's expert witness was allowed to testify that, in his opinion, setting up a special

needs trust to avoid McQueen's governmental assistance benefits from being depleted was not feasible nor advisable in this case.

In view of this record, the trial court's reluctance to delve into the specifics of legal cases that ostensibly supported appellant's opinion that McQueen's life estate had terminated, was not an abuse of discretion. Even if these cases had some tangential relevance to the issues at trial, the probative value of this evidence would have been vastly outweighed by the probability that it would have required an undue consumption of time to review the relevance and materiality of each proffered case, and to compare each case to the fact pattern of this case. Furthermore, it was fair for the trial court to implicitly conclude that this line of inquiry was likely to confuse the issues and to mislead the jury. (Evid. Code, § 352.) We find no abuse of discretion in the trial court's exclusion of the evidence.

Reed next argues that she was unfairly surprised when, after disallowing expert testimony on the standard of care for an attorney, the court instructed the jury on certain provisions of the State Bar's Rules of Professional Conduct in connection with the cause of action for breach of fiduciary duty. In connection with respondent's claim for breach of fiduciary duty,[12] Reed testified that in advising McQueen about executing a power of attorney in favor of appellant Earline Drumgoole, she was acting *both* as Drumgoole's attorney and as McQueen's attorney. Thus, there was an issue, potentially confusing to the jury, as to a lawyers' duty of loyalty when representing two or more clients at the same time with potentially conflicting interests. At respondent's request, the jury was instructed on certain provisions of the Rules of Professional Conduct, specifically, rule 3.310 (relating to the representation of an adverse interest) and rule 3-500 (an attorney's duty to keep the client informed of significant developments). The jury was

[12] The breach of a fiduciary duty is a cause of action in tort separate from professional negligence. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 (*Stanley*).) Whereas negligence is a breach of the attorney's duty to exercise due care, a breach of fiduciary duty is a breach of the attorney's duty of " 'undivided loyalty and confidentiality.' " (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102.)

instructed that, in considering the state of mind and reasonableness of Reed's actions, the Rules of Professional Conduct could be considered if they applied.

Reed claims that it was error to instruct the jury in the language of the Rules of Professional Conduct, over counsel's objection, because they "have no application to the evidence in the case . . . ." While the Rules of Professional Conduct do not give rise to a separate cause of action,[13] they can inform the scope of an attorney's duties in an action for breach of fiduciary duty. As the court stated in *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, "It is well established that an attorney's duties to his client are governed by the [Rules of Professional Conduct] . . . . Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client. [Citation.]" (*Id.* at p. 45.) As such, rules 3.310 and 3-500 of the Rules of Professional Conduct were relevant because they helped to define the duty component of Reed's fiduciary duty to her clients. (Accord, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1032.)

Reed next claims that "no reasonable trier of fact could conclude that [appellant] owed [McQueen] a fiduciary duty as an attorney at the time that house was sold and the sales proceeds distributed and the trial court should never have let such a question go to the jury." To the contrary, the jury was properly instructed as to when a fiduciary duty is owed by an attorney, and what constitutes its breach. The jury's responses on the special verdict form reflected its conclusion that Reed was acting on behalf of McQueen as her attorney, that Reed breached her duty as an attorney to act with "utmost good faith"

[13] Rule 1-100, subdivision (A) states in relevant part: "These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." Thus, "a violation of the Rules of Professional Conduct does not, in and of itself, render an attorney liable for damages. [Citations.]" (*Stanley, supra,* 35 Cal.App.4th at p. 1097.)

toward McQueen who was her client and/or the trust beneficiary, that McQueen was harmed, and that Reed's conduct was a substantial factor in causing McQueen harm.[14]

Reed next argues that even if the instructions were legally correct, there was "no legal basis" for the jury to conclude that she owed McQueen a fiduciary duty in either her capacity as McQueen's attorney or as the drafter of the trust in which McQueen was a beneficiary. " ' "[F]iduciary" and "confidential" have been used synonymously to describe " '. . . any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent. . . .' ' [Citations.]" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270.) Of pertinence to this case, "the law of trusts, a great deal of which is statutory, defines the nature of the fiduciary duties arising out of that particular fiduciary relationship with considerable precision. [Citation.]" (*Id.* at p. 272.)

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[14] Reed claims error because the special verdict form failed to distinguish whether she breached her fiduciary duty to McQueen in her capacity as McQueen's attorney or as the attorney who drafted the trust. She argues that "[f]rom the Special Verdict Form, there is no way of knowing if the jury concluded that [appellant] breached her duty to act with the utmost good faith in [McQueen's] best interest in only one of her capacities but not the other." When a special verdict form or its questions are ambiguous, an objection must be made in the trial court. (See *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 [failure to object to the verdict before the jury is discharged is frequently held a waiver].) Here, Reed's attorney certainly knew of the verdict form before the jury was discharged, even if he did not prepare or approve it. (Cal. Rules of Court, rule 3.1580 [special verdict form must be served on all parties].) Reed made no objection to the verdict form until the new trial motion, after the jury was discharged. Common sense dictates that the objection must ordinarily be made before the verdict form is submitted to the jury or, at the very latest, before the jury is discharged. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131.)

It was alleged in respondent's first amended complaint that Reed breached her fiduciary duty to McQueen because "[a] trustee's attorneys are bound to act in the highest good faith toward all beneficiaries, and may not obtain any advantage over the latter by misrepresentation, concealment, threat or adverse pressure of any kind. When an attorney undertakes a relationship as advisor to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary."

Under this theory, Reed could clearly be held liable for breaching a fiduciary duty. (*City of Atascadero v. Merrill Lynch Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445; 464 ["trust beneficiaries may sue third parties who participated with a trustee in alleged breaches of trust, as long as the third parties' participation was both active and for the purpose of advancing their own interests or financial advantage"]; *Pierce v. Lyman, supra*, 1 Cal.App.4th at p. 1106 [allegations "demonstrate[d] that [the attorneys] are accused of active participation in breaches of fiduciary duty by the former trustees" and these allegations were "sufficient to state a cause of action for breach of fiduciary duty"]; *Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1040 [holding that a beneficiary had standing to sue a trustee's attorneys where the attorneys were alleged to have actively concealed the dissipation of trust assets].)

C. Did Respondent State a Cause of Action for Conversion?

All appellants finally claim that the trial court erred in allowing the jury to decide the cause of action for conversion arguing that the proceeds from the sale of the family residence could not form the basis of a conversion action. They rely on the general proposition that a "generalized claim for money [is] not actionable as conversion. [Citation.]" (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.)

A cause of action for conversion requires "(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Burlesci v. Peterson* (1998) 68 Cal.App.4th 1062, 1066.) It is clear that legal title to property is not a prerequisite to maintaining an action for damages in conversion. To establish a conversion action "it is not essential that plaintiff shall be the absolute owner of the property converted but she

must show that she was entitled to immediate possession at the time of conversion. [Citations.]" (*Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 236, italics omitted; *Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598.)

The court ruled that McQueen had a life estate interest in the subject property. As the trial court found, there was no ambiguity with regard to the intent of the testator, Earl Blacksher—that in creating a life estate in the family home, he intended McQueen to hold the interest for the duration of her life, including an interest in any income that might result from the house, with the residue to be distributed to the indicated remaindermen after her death. Therefore, when the property was sold, the proceeds should have remained in trust for McQueen's use, including the generation of income. Instead, when appellants sold the family home, without McQueen's knowledge or consent, they distributed the proceeds among themselves. Courts have enforced conversion claims in similar circumstances.

"Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]" (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491.) Accordingly, "California cases permitting an action for conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others. [Citations.]" (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 396.) The case of *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, is particularly relevant. In *Fischer*, corporate officers were held liable for taking the plaintiffs' funds, held in trust by the corporation, and using those funds for the corporation's general expenses. The court explained that "an agent, with knowledge of another's right to receive a specific amount of money, can be liable for conversion when he applies it for his own use." (*Id.* at p. 1073; see also *Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 543 [plaintiff stated a cause of action for conversion where bank allegedly took funds from trust account to pay the trustee's personal indebtedness].)

Appellants' use of funds received in connection with the sale of the family residence for their own benefit, impairing McQueen's right to the proceeds of the sale under the terms of the trust, constituted conversion since, as a matter of law, appellants had the obligation to use the money they received for McQueen's benefit during her lifetime.

D. Were the Attorney Fees and Costs Awarded Respondent Excessive?

Having been found liable for financial elder abuse, appellant Reed acknowledges that under Welfare and Institutions Code section 15657.5, subdivision (a), she is liable for reasonable attorney fees and costs, including reasonable conservator's fees. (See *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1189 [attorney fees and costs are mandatory when a defendant is found liable for financial abuse of an elder].) However, she claims the amount awarded ($320,748.25) was excessive. She argues that much of the lawsuit related to the other defendants and other causes of action such as conversion, negligence, and breach of fiduciary duty, which do not have a right to attorney fees. Consequently, she claims the court erred in not requiring respondent's counsel to apportion the fee award between financial elder abuse and nonfinancial elder abuse claims.

In *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, this court stated the general rule with respect to apportionment of attorney fees: "When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. [Citation.] When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required. [Citation.]" (*Id*. at p. 1133.)

In considering Reed's argument that attorney fees should be apportioned, the trial court determined "[i]n this case, the evidence developed by plaintiffs' counsel to prove the elder abuse claim is overlapping, if not the same, evidence introduced to prove plaintiffs' claims of fraud, breach of fiduciary duty, and conversion. That body of evidence was introduced against all defendants, who were alleged agents of each other." The trial court determined that the causes of action in this case were "based upon a common core of facts and course of conduct that involved all named defendants, and the issues on them inextricably intertwined as to preclude reasonable apportionment of plaintiff's attorney fees."

"Where fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion. [Citation.] A trial court's exercise of discretion is abused only when its ruling ' " ' "exceeds the bounds of reason, all of the circumstances before it being considered." ' " [Citation.]" (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555.) Furthermore, "[t]he trial court, having heard the entire case, [is] in the best position to determine whether any further allocation of attorney fees was required or whether the issues were so intertwined that allocation would be impossible. [Citation.]" (*Id.* at p. 556.)

Given the deferential standard of review, we conclude Reed has failed to show the trial court's ruling constituted an abuse of discretion. In *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, the court said: "Attorney fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories. [Citations.]" (*Id.* at p. 493.) This is such a case. Respondent's first amended complaint shows that each cause of action arose from a common factual nucleus—that the family residence in which McQueen held a life estate was sold without her consent and without court authorization and the sale proceeds distributed to others "without payment of any cash or benefit to Ida McQueen," in violation of the terms of the trust set up for her benefit. Here, the trial court could reasonably find that appellants' various claims were "factually intertwined" making it "impracticable, if not impossible, to separate the multitude of conjoined activities into

compensable or noncompensable time units." (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227.)

IV.

DISPOSITION

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

_____
SEPULVEDA, J.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Jo-Lynne Lee
Counsel for Appellants:	James E. Reed
Counsel for Respondent:	Law Offices of Daniel D. Murphy, Daniel D. Murphy