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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HENRY DEARING, as Trustee, etc., Plaintiff and Respondent, v. JERRY DE MILLE, Defendant and Appellant.	B234769 (Los Angeles County Super. Ct. No. BC114545)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mitchell L. Beckloff, Judge. Affirmed.

Law Offices of Lee B. Ackerman and Lee B. Ackerman for Defendant and Appellant.

LaBowe, LaBowe & Hoffman, Mark S. Hoffman, Erika L. Mansky; Greines, Martin, Stein & Richland, Marc J. Poster and Alana H. Rotter for Plaintiff and Respondent.

To avoid paying a judgment to Citizens Business Bank (Citizens), Jerry De Mille (Jerry) disclaimed the interest he was entitled to receive from his father, Horace De Mille (Horace), through the Restated Trust of Horace and Betty De Mille (HBD Trust).[1] Pursuant to an amended petition filed by Citizens, the probate court found that the disclaimer did not apply to assets that Jerry was entitled to receive from Betty De Mille (Betty) through Trust B, a subtrust of the HBD Trust that came into being upon her demise. Jerry appeals from the order granting the petition, and also from the denial of his motion to vacate the order or grant a new trial. In addition, he challenges that probate court's interim order allowing Citizens to amend its petition. We find no error and affirm.

FACTS

The various probate proceedings

The parties litigated their rights in connection with the probate of the HBD Trust in case No. BP114545, the probate of the Revocable Living Trust of David E. De Mille and Lois De Mille (DLD Trust) in case No. BP084768, and the probate of the Horace De Mille Living Trust in case No. BP116110.

The judgment against Jerry in case No. BP084768

In connection with petitions involving the DLD Trust, a probate court removed Jerry as trustee and substituted Citizens in his stead. The probate court found that Jerry diverted trust assets and ruled that the trust could recover $656,000 pursuant to Probate

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[1] Citizens is the former trustee of the HBD Trust. During the pendency of this appeal, Henry Dearing became the successor trustee.

Code section 856.[2] In addition, pursuant to section 859,[3] Jerry was ordered to pay $1,312,000 in double damages. (*De Mille v. Citizens Business Bank* (Nov. 7, 2007, B190412) [nonpub. opn.] (*De Mille I*).)

Jerry appealed and we affirmed.

The judgment against Horace in case No. BP084768

In order to stay enforcement of the *De Mille I* judgment, Horace filed a $1 million bond. Though Jerry sold personal property he acquired with DLD Trust assets and transferred $656,000 to Citizens, he did not pay the double damages award. As a result, Citizens filed a motion to enforce the bond. Judge Aviva Bobb granted the motion and entered judgment. We affirmed in *Citizens Business Bank v. De Mille* (June 9, 2010, B209518) [nonpub. opn.] (*De Mille II*).)

The September 15, 2008, application for order of sale in case No. BP084768; Horace's death; the October 4, 2008, disclaimer; the petition

To satisfy the judgment against Horace, Citizens filed an application to sell an apartment building owned by Horace through "the De Mille Survivors Trust B Exempt dated 10/25/1983."

Horace died on October 4, 2008. That same day, Jerry executed a disclaimer (disclaimer) of his interest in any HBD Trust property which he was entitled to take as a beneficiary from Horace.

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[2] All further statutory references are to the Probate Code unless otherwise specified. Section 856 provides: "[I]f the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief."

[3] Section 859 provides: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a . . . trust, . . . the person shall be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section shall be in addition to any other remedies available in law to a trustee, guardian or conservator, or personal representative or other successor in interest of a decedent."

Jerry opposed the application. In his summary of facts, he explained that Horace and Betty transferred the apartment building into the HBD Trust. The trust provided that upon the death of either settlor, the trust estate would be divided so that the surviving settlor's share would go into Trust A and the predeceased settlor's share would, in part, go into Trust B. When Betty died in 2000, Trust B became irrevocable and the apartment building was transferred into it. Under the terms of the HBD Trust, the income of Trust B was to be paid to the surviving settlor for the remainder of his or her life. And when the surviving settlor died, the remainder of Trust B was supposed to be distributed to Jerry, if living.

Jerry argued that the apartment building was owned by an irrevocable trust and therefore could not be sold to satisfy Horace's debt.

In a footnote to his opposition, Jerry claimed that "[Citizens] cannot seek to subject the Property to the judgment it obtained against Jerry. According to the terms of the [HBD Trust] . . . , upon Horace's death, the income from the [apartment building] is to be paid to Jerry and upon his death, the [apartment building] is to go to [his son, Michael De Mille [(Michael)]. On October 4, 2008, Jerry executed a disclaimer as to any interest or right he may have had in and to the [apartment building] and, therefore, the [apartment building] passes to Michael, and cannot be subjected to [Citizen's] judgment lien against Horace."

Judge Bobb took Citizens's application for sale under submission and then issued the following order: "The Court orders [Citizens] to file a memorandum . . . on whether this petition seeks to enforce a judgment against Jerry DeMille as current owner of the DeMille Survivor's Trust B, and whether Jerry DeMille's disclaimer of his interest in the Trust is timely." [4]

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[4] Though Judge Bobb's order referenced the De Mille's Survivor Trust B, there was no such trust. Trust A was the survivor's trust. Trust B was the trust of the predeceased settlor.

In its responsive memorandum, Citizens argued that Horace or his successor-in-interest was judicially estopped from denying ownership of the apartment building because he listed it as security for the $1 million bond; Jerry's interest as beneficiary of Trust B can be used to satisfy the judgment in *De Mille I*; and Jerry's disclaimer was void because it was untimely, and also because he accepted the benefits of ownership and possession of the apartment building.

On the same day Citizens filed its memorandum, it also filed a petition alleging: Upon Betty's death in 2000, the HBD Trust was to be divided into subshares. One component of Betty's subshare is Trust B. It contains the apartment building. When Horace died, Jerry executed a disclaimer of interest. The disclaimer "is late and ineffective[] due to the interest given to [Jerry] having been formulated and irrevocably vested upon the demise of" Betty in 2000. In the alternative, the disclaimer is ineffective because Jerry accepted the benefits of ownership and possession of the apartment building when he refinanced it to create cash liquidity. Based on these allegations, Citizens requested the right to satisfy the *De Mille I* judgment through a sale of the apartment building.

Judge Bobb denied the petition without prejudice on the grounds that it should be heard in case No. BP114545, the probate of the HBD Trust.

The January 16, 2009, petition in case No. BP114545; the second disclaimer; the ruling on the timeliness of the first disclaimer

Citizens filed a petition seeking a determination that Jerry's disclaimer of his interest in the HBD Trust was void, and that his interest in the HBD Trust may be applied to satisfy the *De Mille I* judgment. According to the petition, Jerry's disclaimer was void because it was untimely, and also because he accepted the benefits of ownership and possession.

On March 11, 2009, Jerry executed a second disclaimer (second disclaimer). It stated: "I, JERRY DE MILLE, hereby disclaim any and all interest, whether contingent

or remainder, or otherwise, in, and to any property of, the Horace De Mille Living Trust to which I may have any right or entitlement."

The next day, Jerry opposed the petition. In part, he asserted that when Betty died, the HBD Trust was divided into Trust A, Trust B and Trust C, with Trust B and Trust C becoming irrevocable. Betty's one-half share of the HBD Trust was transferred to Trust B and Trust C, and Horace's one-half share was transferred to Trust A. On May 17, 2006, Horace "revoked Trust A in its entirety and transferred the assets of Trust A to a restated version of Trust A, namely the Horace De Mille Living Trust and on November 8, 2006, Horace amended said [Horace De Mille] Living Trust to provide that upon his death the trustee is to distribute $1,000,000 to Horace's grandson, [Michael], with the remainder of the [Horace De Mille] Living Trust to be distributed to [Jerry], if then living (and if not then living, then to [Michael]), which interest and/or entitlement was disclaimed by Jerry."

On April 16, 2009, Judge Bobb ruled: "[Jerry's] disclaimer of his interest in Trust B is timely under Probate Code [section] 279[, subsection (c)] because his interest did not indefeasibly vest until [Horace's] death" on October 4, 2008. Additionally, Judge Bobb ordered an evidentiary hearing regarding whether Jerry accepted the benefits of the apartment building for purposes of section 285.

The petitions in case No. BP116110

In the probate of the Horace De Mille Living Trust, Citizens filed a petition to declare the second disclaimer void on the grounds that it was untimely and Jerry had accepted the benefits of ownership and possession. A petition was also filed by American Contractors Indemnity Company (ACIC), a surety that was liable for certain acts and omission of Jerry while he was trustee of the DLD Trust. ACIC also sought to nullify the second disclaimer.

Case Nos. BP114545 and BP116110 were consolidated.

The July 1 2010, joint trial statement in case Nos. BP114545 and BP116110

Citizens and ACIC submitted a joint trial statement to Judge Mitchell Beckloff and stated: "This matter involves two (2) trust proceedings, one in the [HBD] Trust (Case No. BP114545) and the other in the Horace De Mille Living Trust (Case No. BP116110), because [Jerry] has attempted to disclaim his property, both in Trust B of the [HBD] Trust and in the Horace De Mille Living Trust." They identified two contested issues: "Did . . . Jerry actually or by implication accept benefits of Trust B property of the [HBD] Trust by use of refinance funds from Trust B property of the [HBD] Trust?" and "Did . . . Jerry accept benefits of each Trust by failing to give adequate consideration for the benefit of residing in the Trust property which is owned by the [HBD] Trust?"

ACIC's August 20, 2010, Trial Brief in case Nos. BP114545 and BP116110

In the trial brief filed by ACIC, it identified a new issue to be litigated: "Is [Jerry's] disclaimer as to Trust B and Trust C of the [HBD] Trust ineffective because his purported disclaimers did not adequately describe the interest to be disclaimed?" It argued that the "language of [the] disclaimer specifically refers to what [Jerry] would inherit from [Horace], not from [Betty's] portion of the [HBD] Trust (Trust B and Trust C). It does not state that he is disclaiming his interest in the entire trust as a result of [Horace's] death."

The joint motion to amend in case Nos. BP114545 and BP116110

Citizens and ACIC filed a motion for leave to file amended petitions alleging that the October 4, 2008, disclaimer did not disclaim Jerry's interest in Betty's portion of the HBD Trust, Trust B and Trust C.

Jerry and Michael opposed on two grounds: (1) Judge Bobb's ruling that the disclaimer was timely contained an implicit finding that the disclaimer applied to Trust B, and it had res judicata effect that prevented a different judge from effectively overruling her decision. (2) Jerry and Michael would be prejudiced if an amendment was allowed because (a) they incurred substantial legal fees and costs litigating the petitions to have the disclaimer declared invalid, and (b) if the issue had been raised in any of Citizens's

petitions, Jerry's second disclaimer could have included a specific reference to Trust B.

Judge Beckloff allowed Citizens to amend.

The ruling on the disclaimer in case Nos. BP114545 and BP116110

After the parties filed briefs regarding the meaning of the disclaimer, Judge Beckloff held a hearing on December 15, 2010, and then took the matter under submission. In his subsequent order, Judge Beckloff determined that the disclaimer did not apply to Trust B.

Posttrial motions

Jerry, joined by Michael, filed a motion to vacate and enter a new order denying Citizens's petition based on estoppel, waiver and forfeiture due to its delay in raising the issue of whether the disclaimer applied to Trust B. In the alternative, they moved for a new trial. They argued that Judge Beckloff's interpretation of the disclaimer was erroneous, and that the evidence supported a finding that Citizens was estopped from raising the Trust B issue.

The motions were denied.

This appeal followed.

DISCUSSION

I. Amendment of the Petition.

Jerry contends that Judge Beckloff erred when he allowed Citizens to amend the petition. We disagree.

A. Applicable law; standard of review.

A court may, in its discretion, allow an amendment to a pleading upon any terms that may be just. (Code Civ. Proc., § 473, subd. (a)(1).) "The court's discretion will usually be exercised liberally to permit amendment of the pleadings. [Citations.] The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified. [Citation.] 'Leave to amend should be denied only where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but under substantive law, no liability exists and no amendment would change the result.'

[Citation.]" (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) Accordingly, a court's decision to allow a party to amend a pleading will be upheld unless there has been a gross abuse of discretion. (*Central Concrete Supply Co. Inc. v. Bursak* (2010) 182 Cal.App.4th 1092, 1102; *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

B. Delay and prejudice.

According to Jerry, Judge Beckloff had no discretion to grant leave to amend because Citizens always believed the disclaimer did not apply to Trust B but engaged in extensive discovery and law and motion practice before seeking leave to amend on the eve of trial. He suggests that leave to amend must be denied in cases of unreasonable delay or when the opposing party will suffer prejudice. The problem with this argument is that Jerry has not cited a single case—and we are aware of none—reversing an order granting leave to amend when, as here, the amendment presented a cognizable claim that was not time-barred. In other words, a court always has the discretion to allow leave to amend so that a valid claim can be decided on the merits, even if there was unwarranted delay or prejudice. In any event, Jerry failed to establish the unwarranted delay or prejudice that he intimates.

It is unclear whether unreasonable delay is sufficient grounds to deny leave to amend. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 [in the absence of prejudice, unreasonable delay is not grounds for denying leave to amend]; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486 [unreasonable delay may be enough by itself to deny leave to amend].) Assuming for the sake of argument that unreasonable delay suffices to thwart an amendment, the question is whether Citizens was guilty of such delay. That answer is no. Jerry provided no record citations in the argument section of his opening brief to support his contention, so the issue is waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) "As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.' [Citations.] It is the duty of counsel to refer the

reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived.' [Citation.]" (*Ibid*.)

Despite this waiver, Citizens infers that Jerry relies on the motion for leave to amend as evidence that Citizens knew about the Trust B issue from the inception. In the motion, Citizens explained that ACIC's counsel discovered the issue when preparing for trial and notified Citizens' counsel. Per the motion, "[c]ounsel for Citizens did not raise this issue previously or seek to amend its Petitions . . . prior to commencement of Trial because counsel was of the belief that Citizens had given sufficient notice to [Jerry and Michael] . . . of the defects in the October 4, 2008 Disclaimer and had voiced general objections to the Disclaimer, and that based upon the liberal pleading requirements, no further particularity was required. However, when [ACIC's counsel] raised the issue in her Trial Brief, [ACIC's counsel] and counsel for Citizens brought the issue to the Court's attention at the first opportunity."

Statements in a motion do not qualify as evidence unless they are admissions of some sort. Jerry did not brief this issue. Filling the gap, we surveyed the law on our own and found that "[a] judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.]" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.) Because Citizens's motion does not contain an unequivocal concession that it knew about the Trust B issue from the inception but waited to assert it at the last possible moment, we cannot conclude that the motion contains judicial admissions.

To be complete, we note that Judge Beckloff rejected Jerry's suggestion that Citizens knew about the Trust B issue and intentionally delayed. Judge Beckloff stated: "I don't think it's a calculated move and I think there was probably a mistake made or just wasn't recognized earlier." This factual finding must be upheld if it is supported by substantial evidence. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1180.) In connection with the motion to amend, counsel for Citizens declared that it raised the

Trust B issue after it was raised in ACIC's trial brief. That declaration supports the inference that Citizens did not know about the issue sooner and its delay was reasonable. Jerry does not suggest to the contrary. Thus, we are barred from second guessing Judge Beckloff's finding.

In brief, we turn to prejudice. Neither in his opening brief nor reply brief did Jerry discuss whether he was prejudiced by the amendment. Because he did not apply the law of prejudice to the facts of this case, we deem the issue is waived. "'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]'" (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) And it "is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

C. Equitable estoppel.

In Jerry's view, Judge Beckloff should have found that Citizens was estopped from challenging the applicability of the disclaimer to Trust B. When this finding should have been made, Jerry never says. Should it have been made in connection with the motion for leave to amend, the trial on the meaning of the disclaimer or the posttrial motions to either vacate the prior order or grant a new trial? Jerry's argument is a "general assertion, unsupported by specific argument." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) He "apparently assum[es] this court will construct a theory supportive of his" appeal, but that "is not our role." (*Ibid.*) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. [Citation.]" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

For the sake of being complete, we offer the following analysis.

We have consulted the standard of review section in Jerry's opening brief to infer the proceeding that he wants us to focus on. He discussed the standard of review for orders granting leave to amend and for the interpretation of a writing. Equitable estoppel does not involve the interpretation of a writing, so he must consider equitable estoppel a

bar to Citizen's amended petition. An insurmountable problem immediately rears its head. In his opposition to Citizens motion for leave to amend its petition, Jerry stated the motion was "barred by res judicata and, second, to permit the amendment would result in significant prejudice to Jerry." His opposition contained argument on those two issues and never raised equitable estoppel. And he did not attach any evidence to his motion to prove his claim. Then, at the hearing, Jerry's counsel once again did not raise the issue. The equitable estoppel issue is waived. To permit a party to raise a new issue in connection with an appeal would not only be unfair to the trial court, but manifestly unjust to the opposing party. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

Regarding the merits, Jerry has an uphill battle. "To establish a defense of equitable estoppel, four elements must ordinarily be proved: '"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury." . . .' [Citation.]" (*Nicolopulos v. Superior Court* (2003) 106 Cal.App.4th 304, 311.) Jerry has not adverted to sufficient evidence to support these elements.

Jerry contends that by not amending its petition sooner, Citizens induced him not to execute a new disclaimer that covered Trust B. But there is no evidence that Citizens intended to lull Jerry into a false sense of security by waiting until the eve of trial to argue that Trust B was not disclaimed. Nor is there evidence that Jerry was ignorant of the content of the disclaimer that he signed. If Jerry harbored a flawed interpretation of the disclaimer (he believed it covered Trust B when it did not), that is not ignorance of the facts. (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 379 ["[appellant] cites no authority, and we are aware of none, that would support the proposition that a party's belief about the legal validity of a contract constitutes a fact, for purposes of the doctrine of equitable estoppel"].)

D. Waiver.

Like with equitable estoppel, Jerry argues waiver without specifying when Judge Beckloff was supposed to make a finding. For the same reasons discussed in connection with equitable estoppel, the waiver argument is not properly developed. As a result, our analysis could stop here.

As to the merits, we note that Jerry cites *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1275 (*Boys Club*) in support of this statement: "The failure to assert the inapplicability of the disclaimer to Trust B at the earliest available opportunity resulted in a waiver of the right to later do so by means of leave to amend the petition." A quick reading of *Boys Club* defeats Jerry's reliance on it. The issue was whether delay in requesting arbitration resulted in a waiver. The court explained that "[a] waiver is the intentional relinquishment of a known right. [Citation.]" (*Ibid*.) Then it noted that "[u]nreasonable delay in asserting a right does not, in itself, warrant a finding of waiver of the right. In addition, it must appear that the delay amounted to laches [citation], which requires a showing of some prejudice to defendant caused by the delay. [Citation.] 'To show prejudice for the purpose of laches the party asserting the defense must show he did or omitted to do something which detrimentally altered his position with regard to the claim or right asserted.' [Citation.]" (*Ibid*.) *Boys Club* does not apply to motions for leave to amend. Even if it did, it would not matter because Jerry has not offered argument or evidence regarding prejudice.

Neither can Jerry find help in *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 Cal.App.3d 260, 273 (*California Concrete*). The defendant was involved in the case for over two years. In connection with a motion for summary judgment, the defendants raised an affirmative defense that it did not plead in its answer. The opposing party objected. Instead of withdrawing its motion and seeking leave to amend its answer, the defendant "chose to stand upon its answer as pled and force [the plaintiff] to undertake the time and expense involved in responding to the motion for summary judgment and later prosecuting an appeal." (*Ibid*.) Given those facts, the court

held that the plaintiff "waived the defense." (*Ibid*.) There can be no analogy to *California Concrete* because it does not apply to motions for leave to amend, and Citizens did in fact amend its petition.

E. Res judicata.

Last, Jerry argues that Judge Bobb's ruling that the disclaimer was timely has res judicata effect that barred Judge Beckloff's "order." We do not know which order Jerry means. One more time, we take our cue from the standard of review section in Jerry's opening brief. It appears that this argument is aimed at the order granting leave to amend. Because the issue was raised in Jerry's opposition to the motion to amend, the issue is properly raised on appeal.

The term "res judicata" "applies to both a previously litigated cause of action, referred to as claim preclusion, and to an issue necessarily decided in a prior action, referred to as issue preclusion. [Citations.]" (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.) "[C]laim preclusion[] prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) "[I]ssue preclusion[] 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Ibid*.) Jerry does not indicate one way or the other whether he is relying on claim preclusion or issue preclusion.

Suffice it to say, claim preclusion does not apply. Judge Bobb did not render a final decision on the merits of Citizens' petition. Jerry contends otherwise and claims that "[s]uch orders, issued in a probate proceeding, . . . are considered to be the equivalent of a final judgment with res judicata effect." He cites *Estate of Wear* (1942) 20 Cal.2d 124 (*Wear*). But *Wear* is unavailing. In that case, the probate court entered a decree approving and settling a special administrator's final account of a decedent's estate. No appeal was taken from that decree. When the same person, now as executor of the decedent's will, filed an account of the estate, the legatees objected. An order sustaining those objections was reversed on appeal. At the second trial on the executor's

account, he argued for the first time that the order settling his final account as special administrator was res judicata as to the estate's interests. The *Wear* court agreed. (*Id*. at pp. 126–129.) At no point does *Wear* state or consider whether every probate order is the equivalent of a final judgment. Because the petition was not finally decided, Citizens was not precluded from amending its petition to allege that the disclaimer did not apply to Trust B.

We turn to issue preclusion. Courts have "'applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.] Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles. [Citation.]" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.) The issue before and decided by Judge Bobb was whether the disclaimer was timely. In contrast, the issue before and decided by Judge Beckloff was whether Citizens should be allowed to amend its petition to allege that the disclaimer did not apply to Trust B. The issues were not identical, so issue preclusion cannot apply. In any event, the scope of the disclaimer was not necessarily decided by Judge Bobb.

II. The Disclaimer.

Jerry claims that Judge Beckloff's interpretation of the disclaimer must be reversed because extrinsic evidence establishes that the disclaimer applies to Trust B. This claim lacks merit.

A. <u>The rules of interpretation; standard of review</u>.

"[P]arol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an

ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' [Citation.] [¶] The decision whether to admit parol evidence involves a two-step process. . . . [T]he court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*).)

"Different standards of appellate review may be applicable to each of these two steps, depending upon the context in which an issue arises. The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review. [Citation.] [¶] The second step—the ultimate construction placed upon the ambiguous language—may call for differing standards of review, depending upon the parol evidence used to construe the contract. When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence. [Citation.] However, when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]" (*Winet*, *supra*, 4 Cal.App.4th at pp. 1165–1166.)

B. Interpretation.

Jerry maintains that Judge Beckloff erred by failing to provisionally accept extrinsic evidence and consider whether the disclaimer was reasonably susceptible to the

interpretation that it applied to Trust B. In other words, Jerry suggests that Judge Beckloff did not follow the law. The record does not support reversal on that ground. In his ruling, Judge Beckloff stated: "The operative language of the document is not fairly susceptible to more than one interpretation. As the document is not ambiguous, extrinsic evidence may not be used by the court to interpret the document." This ruling shows nothing more than Judge Beckloff's conclusion that extrinsic evidence could not be used in the second *Winet* step.

Next, Jerry impliedly suggests that the Judge Beckloff erred when he failed to find the disclaimer ambiguous based on extrinsic evidence.

The disclaimer stated:

"DISCLAIMER
RESTATED TRUST OF HORACE AND BETTY DEMILLE (ALSO REFERRED TO AS TRUST OF HORACE DEMILLE)

"I, JERRY DEMILLE, hereby disclaim all of my interest in the property in the above referenced Trust and Estate, which I am entitled to take as a beneficiary/distributee of the above reference Trust and Estate from Decedent HORACE DEMILLE."

As extrinsic evidence, Jerry relies on the following.

One. At the time the disclaimer was executed on October 4, 2008, Citizens and ACIC held judgments against him. He knew that he would receive from the HBD Trust whatever property remained as of the time of Horace's death, which included the assets of Trust B. He also knew that Citizens had filed an application for an order permitting it to sell a major asset of Trust B. Thus, he knew that unless he disclaimed his interest in all the property of the HBD Trust, including each of the subtrusts, his interest could be used to satisfy the judgment against him. The purpose of the disclaimer was to allow the property to go to Michael.

Two. Citizens and ACIC understood that Jerry intended to disclaim his interest in the entirety of the HBD Trust, including Trust B.

Three. Judge Bobb believed that the disclaimer was intended to apply to Trust B. In her October 28, 2008, minute order, she ordered Citizens to file a memorandum on

whether its petition sought to enforce a judgment against Jerry as the current owner of Trust B of the HBD Trust. She later ruled that Jerry's disclaimer of his interest in Trust B was timely.

Four. At the time Jerry executed the disclaimer, he knew that the first $1 million of the Horace De Mille Living Trust would go to Michael. Given the judgments against Jerry and Horace, it had to be known that there was very little likelihood that Jerry would receive any property or assets from Horace's trust. Thus, if the October 4, 2008, disclaimer was limited solely to Jerry's interest in assets flowing to him from Horace, the disclaimer would be contrary to Jerry's intent.

Based on this extrinsic evidence, Jerry argues: "Even if not apparent on its face, when considered in light of the circumstances surrounding its execution, the disclaimer contains a latent ambiguity that required the court to consider the extrinsic evidence as to its intended meaning. This latent ambiguity arises from the references to both the Restated Trust of Horace and Betty De Mille, which includes each of the subtrusts A, B and C[,] and to the reference to the Horace De Mille Trust, which would be Trust A only. While such ambiguity might itself be deemed to be patent, it is more probably a latent ambiguity since extrinsic evidence is necessary to know that the statement 'Also known as Horace De Mille Trust' means a reference to a trust that is not the same as the Restated Trust."

Assuming for the sake of argument that the evidence was admissible and presented to Judge Beckloff, it fails to establish ambiguity. The disclaimer, by its clear terms, disclaims Jerry's interest in property that he was entitled to receive from Horace. No other interpretation is permissible. Even if there was an ambiguity as to which trust the disclaimer applied to, the point would be moot. There is no indication that Jerry disclaimed any interest that he was entitled to receive from Betty. Moreover, the law provides that a "disclaimer shall be in writing, shall be signed by the disclaimant, and shall: [¶] (a) Identify the creator of the interest. [¶] (b) Describe the interest to be disclaimed. [¶] (c) State the disclaimer and the extent of the disclaimer." (§ 278.)

Limiting the disclaimer to the interest that Jerry was entitled to receive from Horace is consistent with the statutory requirement to describe the interest being disclaimed and specify the extent of the disclaimer.

Jerry contends that Judge Beckloff's decision violates section 21120. Section 21120 provides: "The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer." In Jerry's view, limiting the disclaimer to an interest from Horace makes the reference to the "Restated Trust of Horace and Betty DeMille" meaningless. We cannot concur. By referencing the HBD Trust, the disclaimer identifies the source of the interest being disclaimed.

Moving on, Jerry invokes section 21121. It provides: "All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (§ 21121.) He argues: "If [he] intended to limit the disclaimer only to the Horace De Mille Trust, a trust that was in existence on October 4, 2008, then the disclaimer would not have referred to the entire Restated Trust which includes subtrust B. As established by both Jerry's declaration and that of Vikram Brar, the attorney who drafted the disclaimer, it was Jerry's intent to disclaim the entirety, or 'all,' of his interest in the property of the 'above-referenced Trust,' a disclaimer that was general in nature and specifically not limited to the Horace De Mille Living Trust as the trial court concluded." This argument is infirm. The two trusts identified in the disclaimer were equated with one another. And, in any event, Jerry only disclaimed the interest that he was going to receive from Horace. Contrary to Jerry's urging, the way Judge Beckloff interpreted the disclaimer established a consistent whole.

All other arguments raised by Jerry are insufficiently developed and therefore not worthy of consideration.

III. The Posttrial Motions.

To the extent that Jerry appeals from the denial of the posttrial motions, his appeal is waived. Nowhere in his briefs did he discuss the standard of review or relevant law applicable to posttrial motions.

On top of finding waiver, we wish to highlight a flaw in Jerry's reliance on equitable estoppel.

The court in *Estate of Hafner* (1986) 184 Cal.App.3d 1371, 1395 explained, "The foundation of estoppel is justice and good conscience. Estoppel applies to prevent a person from asserting a right where his conduct makes it unconscionable for him to assert it; it is a bar to stating the truth when it would be unfair to state it. Estoppel is an equitable doctrine. It acts defensively only. It operates to prevent one from taking an unfair advantage of another, but not to give an unfair advantage to one seeking to invoke the doctrine. [Citations.] Estoppel should be employed to prevent or mitigate injustice, not to create or aggravate it."

In Jerry's brief regarding the interpretation of the disclaimer, he wrote: "Petitioner [Citizens] obtained its judgment against [Jerry] on February 23, 2006. To avoid having to pay this judgment, [Jerry] decided to disclaim all that he was entitled to receive from the Trust, in favor of [Michael]."

Given Jerry history's of dodging Citizens's judgment and his unequivocal concession regarding his intent to stymie its collection efforts, it would be inappropriate to allow Jerry to rely upon equitable estoppel as a shield. "Estoppel is an equitable remedy and, as such, will only be applied to avoid injustice." (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 33.)

DISPOSITION

The judgment is affirmed.

Henry Dearing shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD