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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JODIE BULLOCK, Plaintiff-Appellee, v. PHILIP MORRIS USA INC., a corporation, Defendant-Appellant.	No. 16-55355 D.C. No. 2:14-cv-01258-DSF-JC MEMORANDUM*

JODIE BULLOCK, Plaintiff-Appellant, v. PHILIP MORRIS USA INC., a corporation, Defendant-Appellee.	No. 16-55407 D.C. No. 2:14-cv-01258-DSF-JC

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 7, 2017
Pasadena, California

Before: BERZON and WATFORD, Circuit Judges, and PAYNE,[**] District Judge.

The jury in Betty Bullock's 2002 products liability case determined that Philip Morris's conduct outside of the ten-year immunity period created by California law had caused Betty Bullock's cancer. *See Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 672 (Cal. Ct. App. 2008); *Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 847–48 (Cal. 2002).

1. The district court did not err in holding that issue preclusion foreclosed Philip Morris from relitigating whether its conduct caused Betty Bullock's lung cancer.[1]

The requirements for issue preclusion are met. The issue of causation was "actually litigated" and "necessarily decided" in the first proceeding, and the decision in that case was "final and on the merits." *Lucido v. Super. Ct. of Mendocino Cty.*, 51 Cal. 3d 335, 341 (Cal. 1990). Centrally, the causation question that the jury in Jodie Bullock's wrongful-death action would have determined—whether Philip Morris's conduct outside of the immunity period

[**] The Honorable Robert E. Payne, United States District Judge for the Eastern District of Virginia, sitting by designation.

[1] As the parties do not distinguish between Philip Morris's responsibility for Betty Bullock's lung cancer and its responsibility for her death, we do not either.

caused Betty Bullock's cancer—is "identical to that decided in [the] former proceeding." *Id.*; *see also* CAL. CIV. PROC. CODE § 377.60 (creating a "cause of action for the death of a person caused by the wrongful act or neglect of another"); *Evans v. Celotex Corp.*, 194 Cal. App. 3d 741, 745 (Cal. Ct. App. 1987) (holding that a defense verdict in a prior personal injury action was preclusive as to causation in a later wrongful death suit brought by heirs). The California Supreme Court's decisions interpreting the scope of the tobacco immunity and repeal statutes were issued before Betty Bullock's trial. *See Myers*, 28 Cal. 4th at 828; *Naegele v. R.J. Reynolds Tobacco Co.,* 28 Cal. 4th 856 (Cal. 2002). Since the 2002 verdict, there has been no intervening change in law or facts.

Whether Betty Bullock's cancer was caused *only* by the cigarettes she smoked outside the immunity period—what Philip Morris calls the "medical causation" argument—is not a new or distinct issue with regard to the causation question decided by the 2002 jury. The jury in the 2002 trial was instructed that it could "not find defendant liable on Plaintiff's claims of defective product, negligence, or fraud based upon conduct between January 1, 1988 and December 31, 1997." The contention that Philip Morris could not legally have caused the cancer unless Betty Bullock would have had the same illness had she not smoked during the immunity period is, at best, "simply . . . another legal theory by which

the same issue might [have been] differently decided." *Sutphin v. Speik*, 15 Cal. 2d 195, 205 (Cal. 1940) (emphasis omitted).

Regardless of the merits of the "medical causation" argument, Philip Morris may not be relieved of the preclusive effect of the already-litigated causation issue by offering new arguments or legal theories regarding that same issue. *See id.*; *Price v. Sixth Dist. Agric. Ass'n*, 201 Cal. 502, 511 (Cal. 1927); 7 WITKIN, CAL. PROC. § 419 (5th ed. 2008). The 2002 jury's causation determination was conclusive "as to that issue and every matter which might have been urged to sustain or defeat its determination." *Pac. Mut. Life Ins. Co. of Cal. v. McConnell*, 44 Cal. 2d 715, 724–25 (Cal. 1955). Even an erroneously determined issue carries preclusive effect. *See Martin v. Martin*, 2 Cal. 3d 752, 763 (Cal. 1970); RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

In short, Philip Morris could have pressed the "medical causation" theory more clearly in 2002, in an effort to persuade the court and jury that there was insufficient evidence that its conduct outside the immunity period had caused Betty Bullock's cancer. Philip Morris did not do so, however, and the jury's

determination in the earlier trial that the company's non-immunity period conduct caused the cancer forecloses it from doing so now.[2]

2. Bullock's contentions on cross-appeal are without merit. The trial decisions complained of were either not erroneous or an abuse of discretion, or were not prejudicial enough to warrant a new trial.

Advising the jury that Betty Bullock had previously been awarded a judgment against Philip Morris for her own injuries was not an abuse of discretion. The information about Betty Bullock's prior award accompanied the district court's instruction to the jury that it could not compensate Jodie Bullock for injuries sustained by Betty Bullock. Taken together, the jury instruction and information about Betty Bullock's award did not create a risk that the jury would penalize Jodie Bullock to avoid a "double recovery." To the contrary, the instruction clarified that the jury's award to Jodie Bullock had to be compensation for injuries distinct from her mother's.

The district court likewise did not abuse its discretion in impaneling Juror No. 10. The district court reasonably concluded that the juror's comments

[2] We express no opinion as to the validity of Philip Morris's theory that a plaintiff in a California tobacco case must establish that the plaintiff's cancer would not have occurred had Philip Morris not manufactured cigarettes and sold them during the immunity period.

reflected anxiety and a lack of desire to serve on the jury rather than bias against the plaintiff. Consequently, it was reasonable to find that Juror No. 10 did not hold an opinion or belief that would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998) (internal citations and quotation marks omitted). For the same reasons, the juror's post-voir dire comments to the court likewise did not evidence a "fail[ure] to answer honestly a material question on voir dire." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

The district court's damages instruction to the jury was not erroneous. Even though Philip Morris's liability was not at issue, damages remained an element of the wrongful death tort that Bullock bore the burden of proving. *See Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1263 (Cal. Ct. App. 2006); *Fields v. Riley*, 1 Cal. App. 3d 308, 313 (Cal. Ct. App. 1969). Instructing the jury that it must decide "how much money, *if any*," would compensate Bullock for her noneconomic losses reflected that burden and so did not misstate the law.

Philip Morris's argument that Bullock could have suggested a damages amount to the jury was not improper. Plaintiffs may offer through counsel suggested damages amounts in tort actions. *See Beagle v. Vasold*, 65 Cal. 2d 166,

181–82 (Cal. 1966). On the other hand, Philip Morris's argument that Bullock could have adduced expert testimony as to the value of her losses was legally questionable. It is unclear whether such evidence would have been relevant or admissible in this or any case. *Compare Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 767 (Cal. Ct. App. 1998), *with Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1195 (9th Cir. 2005). Regardless, what likely affected the jury award, and what Philip Morris's argument identified, was Bullock's failure to denominate and explain a specific or mathematically determinable damages amount in any manner. Flagging this gap was not improper. Any questionable proposition of law made in advancing it was unlikely to have independently influenced the jury, and so did not render the trial "fundamentally unfair," *Draper v. Rosario*, 836 F.3d 1072, 1082 (9th Cir. 2016). A new trial is not warranted.

Because each of Bullock's contentions lacks merit individually, her claim of cumulative error fails. *See United States v. Liu*, 538 F.3d 1078, 1089 (9th Cir. 2008).

Finally, Bullock is not entitled to a new trial on the ground that her damages award was inadequate. In California, a new trial will not be granted for inadequate damages unless the district court is "convinced" after reviewing the entire record that the "jury clearly should have reached a different verdict." CAL. CIV. PROC.

CODE § 657; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 (1996).

The jury heard substantial testimony from Bullock's witnesses attesting to the close bond she shared with her mother, and was properly instructed on the determination of damages. Bullock has not demonstrated that the loss of her mother's companionship was improperly accounted for by her award. Citation to awards in other wrongful death actions—without context, comparison, or discussion—is not persuasive; mechanical recitation of higher or lower jury verdicts in other cases cannot establish the inappropriateness of the award here. *See Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 65 n.12 (Cal. 1974) (disapproving this argument). While Bullock's award was lower than those in the other cases relied upon, it was far from nominal. The district court did not abuse its discretion in concluding that it was not clear the jury should have reached a different result. *See Gasperini*, 518 U.S. at 435–36.

The judgment is **AFFIRMED.**