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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSHUA HAVER et al., Plaintiffs and Appellants, v. BNSF RAILROAD COMPANY, Defendant and Respondent.	B229415 (Los Angeles County Super. Ct. No. BC435551)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Reversed.

Waters Kraus & Paul, Paul C. Cook, Michael B. Gurien for Plaintiffs and Appellants.

Sims Law Firm, Selim Mounedji for Defendant and Respondent.

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Joshua Haver, Christopher Haver, Kyle Haver, and Jennifer Morris appeal from the judgment entered in favor of respondent BNSF Railway Company, after BNSF's demurrer to their complaint was sustained without leave to amend. We reverse.

Facts

Appellants' complaint was for wrongful death, and arose from the death of their mother, Lynne Haver. Lynne Haver had earlier sued BNSF, and BNSF's demurrer in this action was made on the theory that appellants' claim was barred by the doctrine of collateral estoppel. We begin by summarizing each of the two lawsuits.

1. The first lawsuit

In March of 2008, Lynne Haver was diagnosed with mesothelioma. In June of 2008, she sued BNSF and others. As to BNSF, the complaint alleged that from 1972 to 1974, Lynne Haver's former husband Mike Haver was employed by the Atchison Topeka and Santa Fe Railroad Company (BNSF is the Atchison Topeka and Santa Fe Railroad Company's successor in interest), that Mike Haver was exposed to asbestos from locomotive repairs during that employment, and that Lynne Haver's illness was caused by exposure to the asbestos fiber he brought home on his clothes and his body.

BNSF moved for summary judgment, contending, inter alia, that the claim was preempted by the Locomotive Boiler Inspection Act. Lynne Haver conceded the point, but argued that Mike Haver had had additional asbestos exposures at work, from sources other than locomotive repair, while working at BNSF.

The trial court found that allegations concerning non-locomotive exposures could not defeat summary judgment because they were not in the complaint. The court granted the motion for summary judgment and entered judgment for BNSF. The Court of Appeal affirmed.

2. This lawsuit

Lynne Haver died in April 2009. Her children filed this complaint for wrongful death.[1] This complaint alleged that Mike Haver was employed by BNSF, and that Lynne Haver's illness was caused by exposure to asbestos Mike Haver brought home from BNSF on his clothes and his body. However, instead of allegations concerning exposure from locomotives, the complaint alleged, in a premises liability cause of action, that Mike Haver was exposed to asbestos from pipe insulation and other products while working at BNSF.

BNSF demurred, contending that the wrongful death cause of action was barred by the doctrine of collateral estoppel.[2] The trial court agreed, sustained the demurrer without leave to amend, and entered judgment for BNSF.

Standard of Review

On review of judgment dismissing a complaint after a ruling granting a demurrer without leave to amend, we assume the truth of the complaint's properly pleaded or implied factual allegations and we give the complaint a reasonable interpretation, and read it in context. If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion

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[1] There was also a survivor cause of action, brought by Joshua Haver, Lynne Haver's personal representative and successor in interest. BNSF successfully demurred to that cause of action on the ground that it was barred under the doctrine of res judicata. The trial court agreed, and appellants do not challenge that ruling on appeal.

[2] As appellants note in their brief, the demurrer also included the contention that each cause of action was uncertain, but the contention seems to have been pro forma. BNSF made no argument on the point, and the trial court did not rule on the contention, if that is what it was. We thus agree with appellants that the judgment cannot be affirmed on the ground of uncertainty.

and we reverse; if not, no abuse of discretion has occurred. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"[T]he facts determining whether the trial court properly applied collateral estoppel are uncontested, and thus application of the doctrine is a question of law to which we apply an independent standard of review." (*Roos v. Red* (2005) 130 Cal.App.4th 870, 878.)

Discussion

"Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Collateral estoppel applies "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. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

The identical issues requirement

First, we agree with appellants that BNSF did not bear its burden of showing that the issue which it sought to preclude is identical to the issue decided in Lynne Haver's lawsuit.

BNSF's theory is that the issue is its tort liability for Lynne Haver's illness. We do not think that for purposes of collateral estoppel, "issue" has so broad and loose a meaning. If "issue" meant only that the defendant's liability was at stake, the doctrine of collateral estoppel would know no limits. Our Supreme Court has adopted a narrower definition, that "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings . . . ." (*Lucido v. Superior Court, supra*,

51 Cal.3d at p. 342.) Factual allegations concerning non-locomotive exposures were not at stake in Lynne Haver's lawsuit, and the issues in the two lawsuits are not identical, even though both lawsuits allege tort liability.

We are not persuaded otherwise by BNSF's citation to *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202. In *Sutphin*, which concerned res judicata and not collateral estoppel, the plaintiff, Sutphin, had a royalty interest in oil wells on certain land. He sued for unpaid royalties and prevailed, obtaining in the judgment a finding that under the royalty agreement, he was entitled to royalties from production from all wells on the land. He later sued the same defendant for royalties accrued after judgment was entered in the first lawsuit. Defendant argued that one of the wells was not producing oil from the land, but was a "whipstock" well drilled diagonally onto sand under the ocean. Sutphin again prevailed, based on a trial court finding that res judicata applied and that his right to royalties from wells on the land had been conclusively determined.

On appeal, the defendant attacked the factual findings of the first judgment and contended that the right to royalties from the whipstock well was a new issue. The Court of Appeal found that the first judgment covered all wells, and was res judicata, an unsurprising and unexceptional ruling.

BNSF cites the court's comments on rehearing. In response to the defendant's argument that the decision meant that in a second lawsuit, "*any issue* which could have been raised in the first suit is *res judicata* in the second, even though not actually determined in the first," the court wrote, "This is not our holding, and the opinion must be read in connection with the facts of this case, and with an understanding of the issue which was, in fact, decided in the former action." (*Sutphin v. Speik, supra,* 15 Cal.2d at p. 204.)

The court then reiterated that the first judgment had determined rights to all wells on the land, so that the defendant's "asserted 'new issue,'" was not a new issue. Instead, "[d]efendant has simply offered another legal theory by which the *same issue* might be differently decided." (*Sutphin v. Speik, supra,* 15 Cal.2d at p. 205.)

Thus, in *Sutphin*, in the second lawsuit, the party to be precluded merely advanced a new legal theory based on the same facts. Here, appellants have advanced a new set of facts, not just a new way of looking at facts adjudicated in the first lawsuit. We see nothing in *Sutphin* which adopts the very broad meaning of "issue" which BNSF seeks or which would indicate that collateral estoppel applies here.

BNSF also cites *Evans v. Celotex Corp*. (1987) 194 Cal.App.3d 741, and *Secrest v. Pacific Elec. Ry. Co.* (1943) 60 Cal.App.2d 746, and seems to contend that those cases hold that a judgment in a personal injury action will necessarily be collateral estoppel in a subsequent wrongful death action filed by the original plaintiff's heirs. We cannot see that either case means that collateral estoppel applies here. Instead, in both those cases, the facts, defenses, and legal theories were identical in the wrongful death and personal injury cases, and it was for that reason collateral estoppel. An identity of facts, defenses, and theories may be the usual situation when a wrongful death action follows a personal injury action, but it is not the situation here.[3]

The actually litigated requirement

Nor do we see that BNSF bore its burden of showing that its liability, if any, arising from Lynne and Mike Haver's exposure to asbestos from non-locomotive sources was actually litigated in Lynne Haver's lawsuit. To the contrary, the trial court's decision

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[3] In *Evans*, *supra*, 194 Cal.App.3d 741, Evans brought a personal injury action against Celotex and others contending that he developed asbestosis as a result of occupational exposure to asbestos products manufactured by the defendants. The action ended in a general verdict for the defendants. The wrongful death action brought by Evans's heirs also alleged that Evans had been injured by asbestos containing products manufactured by the defendants. The trial court found that the wrongful death action was barred by collateral estoppel, and the Court of Appeal agreed, finding that the issues in the two actions (intentional and negligent tortious conduct, strict liability, comparative negligence and causation) were identical. (*Id.* at pp. 744-745.) In *Secrest*, *supra*, 60 Cal.App.2d 746, the personal injury lawsuit arose from a car accident. The defense was contributory negligence, and the jury found for the defendant. The wrongful death action which arose from that same accident also alleged general negligence, again with a defense of contributory negligence. The Court of Appeal found that the issues, facts, and circumstances of both suits were identical.

on summary judgment and the Court of Appeal's decision tell us quite clearly that the issue was not litigated.

"'When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated . . . .'" (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 400.) In the personal injury lawsuit, the issue of BNSF's liability for Lynne Haver's exposure to non-locomotive sources of asbestos was not raised by the pleadings or submitted for determination, and was not actually litigated.

BNSF argues, however, that "actually litigated" means both "actually litigated" and "could have been litigated." We do not so read the law.

Consistent and controlling Supreme Court authority holds that while res judicata will apply to issues which could have been litigated, when the issue is collateral estoppel, a threshold question is whether the issue was "actually litigated." (See, i.e., *Sutphin v. Speik, supra,* 15 Cal.2d at pp. 201-202; *Clark v. Lesher* (1956) 46 Cal.2d 874, 880; *Busick v. Workers' Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974; *Lucido v. Superior Court, supra,* 51 Cal.3d at p. 341; *Mycogen Corp. v. Monsanto Co., supra,* 28 Cal.4th at p. 896.) To define "actually litigated" to mean "could have been litigated" simply departs from that authority, and, indeed, the English language.

We are not compelled to another result by BNSF's citation to *Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481 or *Murphy v. Murphy* (2008) 164 Cal.App.4th 376. Neither case departs from the rule that one collateral estoppel threshold requirement is that the issue to be precluded in the second action was actually litigated in the first. Instead, the cases hold that where an issue was litigated in the first action, it is binding in the second even if there are some legal theories or factual matters which could have been presented but were not. (*Carroll, supra,* 77 Cal.App.3d at p. 490; *Murphy, supra,* 164 Cal.App.4th at p. 401.)

Under BNSF's theory, of course, the issue in both lawsuits was its liability, and the question of non-locomotive exposures is simply additional factual matters. As we have already explained, we do not agree with BNSF's definition of "issue," and instead find

that the issue in the personal injury litigation was BNSF's liability based on asbestos exposures from locomotives, and that the issue in the wrongful death lawsuit is BNSF's liability for asbestos exposures from other products, and that those are separate issues.

The facts of *Carroll, supra,* and *Murphy, supra,* support our conclusion.

The lawsuits in *Carroll, supra,* arose from guarantees: Doris Carroll guaranteed her then-husband's obligations on equipment leases he had with the Puritan Leasing Company. Carroll and her husband failed to perform their obligations. Puritan sued and prevailed, obtaining a judgment which specified that recovery could be against Carroll's separate property. Puritan accordingly executed on Carroll's separate property. Carroll then filed a quiet title action in which she sought to have the property declared free of liens. In her complaint, she alleged that under specified sections of the Civil Code, her separate property could not be held liable for the debt which arose from the guarantees. Puritan demurred, raising res judicata.

The Court of Appeal first found that res judicata applied, rejecting Carroll's argument that the two lawsuits were different because the first concerned her liability under the contract and the second concerned the liability of her real property. (*Carroll v. Puritan Leasing Co., supra,* 77 Cal.App.3d at pp. 487-489.)

The court then turned to collateral estoppel, apparently concerned that res judicata might be inapplicable because the quiet title action raised a different cause of action.[4]

The court recited the rule that collateral estoppel applies to issues actually litigated, and added that "'the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination.' (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 724-725; [citation].) [¶] This does not mean that issues not litigated and determined are binding in a subsequent proceeding on a new cause of

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[4] The court wrote, "Even if we assume that which we do not assume -- that this quiet title action is based upon a distinct cause of action -- it would nevertheless be necessary to determine if the demurrer was properly sustained under the doctrine of collateral estoppel." (*Carroll v. Puritan Leasing Co., supra,* 77 Cal.App.3d at p. 489.)

action. Rather, it means that once an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise matters for or against it which if asserted might have produced a different outcome." (*Carroll v. Puritan Leasing Co., supra*, 77 Cal.App.3d at p. 490.)

As to the case before it, the court found that "The liability of appellant's separate property interests under the debt was a component of the ultimate issue which the prior action determined." (*Carroll v. Puritan Leasing Co., supra*, 77 Cal.App.3d at p. 490.)

Murphy, supra, 164 Cal.App.4th 376 concerned a substituted judgment under a section of the Probate Code which authorizes a conservator to take necessary actions concerning estate planning. The substituted judgment proceeding was the first lawsuit, and resulted in a living trust and pour-over will which, pursuant to the conservatee's wishes, disinherited a son. The second lawsuit was filed by the son after his father's death. The defendant was his sister, a trustee of the living trust and beneficiary of the will. The lawsuit alleged breach of contract, undue influence, and fraud. The son prevailed.

The Court of Appeal found that the second lawsuit was barred by collateral estoppel, analyzing the identical issues and actually litigated threshold requirements. As to the actually litigated requirement, the court noted that the collateral estoppel claim was that the issue could have been litigated, and quoted Witkin on civil procedure: "'Clearly, a former judgment is not a collateral estoppel on issues which might have been raised but were not; just as clearly it is a collateral estoppel on issues which were raised, even though some factual matters or legal arguments which could have been presented were not. [Citations.]'" (*Murphy v. Murphy, supra,* 164 Cal.App.4th at p. 401.)

Applying those rules, the court found that the claim raised in the second proceeding, that the will was invalid because it conflicted with a prior testamentary agreement, was barred. The court explained that "[a]mong the issues necessarily resolved in a substituted judgment proceeding is whether 'the proposed action is what a reasonably prudent person in the conservatee's position would have done.' [Citation.]

Evidence of a prior conflicting testamentary agreement would have been relevant to a resolution of that issue." (*Murphy v. Murphy, supra,* 164 Cal.App.4th at p. 402.)

Public Policy

"Collateral estoppel is an equitable concept based on fundamental principles of fairness." (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941.) In determining the application of collateral estoppel, "a court must consider the public policies underlying the doctrine to determine if the facts of the case merit its application." (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 694.) Those policies include preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation. (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 343.) In our view, public policy indicates that collateral estoppel should not apply here. BNSF has litigated nothing but the preemptive effect of the Locomotive Boiler Inspection Act. It is not "harassed" by this litigation, which will be the first time factual allegations, and legal theories based on those allegations, concerning Mike and Lynne Haver's non-locomotive exposures are litigated. For the same reason, we cannot see that allowing the wrongful death litigation to go forward harms the integrity of the judicial system. Perhaps Lynne Haver's attorney should have pled non-locomotive exposures in the complaint in the personal injury lawsuit, but we do not see that this wrongful death lawsuit should be precluded by that lawyer's failure to do so.

Disposition

The judgment is reversed. Appellants to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.