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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MAXYLN CADLO et al.,
Plaintiffs and Appellants,
v.
METALCLAD INSULATION
CORPORATION,
Defendant and Respondent.

A118866

(San Francisco County
Super. Ct. No. 442639)

Maxlyn Cadlo and heirs of Anthony Cadlo, deceased, appeal from a summary judgment entered in favor of respondent Metalclad Insulation Corporation (Metalclad). Appellants contend that collateral estoppel dictates summary reversal of the judgment and an order directing the court to proceed to trial on the issue of damages only. We agree the judgment must be vacated and remand for further proceedings consistent with this opinion.

I. *Facts and Procedural History*

A. *The Prior Personal Injury Action (Cadlo 1)*

Anthony Cadlo sued Metalclad and others for personal injuries sustained as a result of exposure to asbestos (*Cadlo v. Metalclad Insulation Corp.* (Super. Ct. S.F. City and County, 2005, No. 41325) (*Cadlo 1*)). In March 2005, a jury returned a special verdict in Cadlo's favor, finding that: (1) there was a design defect in asbestos-containing products manufactured and/or sold by Metalclad, which was the legal cause of

harm to Cadlo; (2) there was a failure-to-warn product defect in Metalclad's asbestos-containing products, which was a legal cause of harm to Cadlo; and (3) Cadlo's injury was caused by a use of Metalclad's products that was reasonably foreseeable to Metalclad.

After the verdict, Cadlo died of his injury on March 24, 2005. Judgment was entered nunc pro tunc as of March 23, 2005.

Metalclad appealed, contending among other things that the evidence of causation was insufficient, because there was no foundation for the expert testimony of Charles Ay that Cadlo was exposed to Metalclad's insulation while onboard the USS Black, and Ay's percipient testimony of the presence of large quantities of Metalclad products was insufficient. In June 2007, we affirmed the judgment in *Cadlo 1*, ruling that Ay's percipient witness testimony was sufficient to raise an inference of causation. (See *Cadlo v. Metalclad* (2007) 151 Cal.App.4th 1311.)

B. *The Current Wrongful Death Action (Cadlo 2)*

After the judgment in *Cadlo 1* and Cadlo's death, but before the *Cadlo 1* judgment had become final, appellants filed the instant lawsuit against Metalclad and others (*Cadlo v. Metalclad Insulation Corp., et al.* (Super. Ct. S.F. City and County, 2005, No. 442639) (*Cadlo 2*)) in June 2005, alleging numerous causes of action for survival, loss of consortium, and wrongful death.

While the *Cadlo 1* appeal was pending, Metalclad moved for summary judgment on the ground there was insufficient evidence of causation. With the *Cadlo 1* appeal still pending, the court in *Cadlo 2* granted Metalclad summary judgment due to a lack of causation. Specifically, the court ruled that there was no foundation for Ay's testimony as an expert, and his percipient testimony that Metalclad supplies arrived at the workplace was *not* sufficient to raise a triable issue as to causation—specifically that Ay's percipient observations did not give rise to any inference that Metalclad-supplied insulation was used onboard the USS Black. This appeal followed.

C. *Cadlo's Motion for Summary Reversal*

As mentioned, we subsequently affirmed *Cadlo 1* in June 2007. Metalclad's petition for review was denied, and the judgment in *Cadlo 1* became final in September 2007.

Appellants then filed a motion in this court for an order granting summary reversal of the trial court's judgment in *Cadlo 2*, contending that Metalclad is collaterally estopped from relitigating the issue of the legal cause of Cadlo's disease and death. At this point in the appeal, no formal appellate briefs have been filed, but the parties have fully briefed appellants' request for summary reversal. Appellants elected to proceed by appendix, which has also not been filed, so the record in this appeal is limited to the attachments to counsel's declarations and the reporter's transcript.

II. *Discussion*

We consider first whether summary reversal is appropriate, and then discuss appellants' request for remand as to damages only.

A. *Summary Reversal*

We have authority to summarily reverse a judgment, without briefing, where the issue has been decided by another court or in a companion case. (*In re Marriage of Shapiro* (1974) 39 Cal.App.3d 460, 463; *Estate of Geltman* (1957) 152 Cal.App.2d 560, 561-562.) Here, appellants contend that the issue of causation in *Cadlo 2* was decided in *Cadlo 1*.

Collateral estoppel applies when (1) the party against whom it is raised was a party in the prior adjudication; (2) there was a final judgment on the merits in the prior action; and (3) the identical issue was necessarily and actually decided in the prior adjudication. Collateral estoppel may be raised for the first time on appeal when the judgment in the other action becomes final pending appeal. (*Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 941.)

The only dispute between the parties is whether the identical issue was decided in both cases. *Cadlo 1* established that Metalclad's design defect and failure to warn were

the legal cause of Cadlo's mesothelioma. This, appellants argue, is the same as the issue of whether Cadlo was exposed to asbestos from Metalclad's products and whether that exposure caused his mesothelioma, as alleged in *Cadlo 2*. We agree.

Metalclad contends that collateral estoppel does not apply because *Cadlo 1* and *Cadlo 2* involved different factual allegations and evidence. In *Cadlo 1*, Metalclad had argued unsuccessfully that Ay's percipient witness testimony was insufficient to establish Cadlo's exposure to Metalclad's product. In *Cadlo 2*, Metalclad supported its summary judgment motion with evidence not presented in *Cadlo 1*—extensive prior testimony from Ay, as well as his trial testimony in *Cadlo 1*—demonstrating that his testimony failed to establish Cadlo's exposure to its product.

Metalclad's argument is meritless. The point is not whether the decision on the causation issue in *Cadlo 1* was wrong, or whether a different result would be reached upon new and different evidence. The question is simply whether the issue of causation in *Cadlo 2* was the same as the causation issue in *Cadlo 1*. New evidence does not change the fact that the ultimate issue of causation was already decided, and collateral estoppel applies.

Metalclad also argues that *Cadlo 2* involves additional causes of action for claims that did not exist at the time of the personal injury action. Again, that in itself does not change the nature of the causation issue: all of the causes of action in *Cadlo 2* require proof that Metalclad's products, including its defects and failure to warn, were the proximate cause of Cadlo's mesothelioma, which in turn was allegedly the cause of Cadlo's death.¹ In short, the causation issue decided in *Cadlo 1* is also a causation issue in *Cadlo 2*.

¹ Conceivably, there could be a distinction between whether a defendant's product caused a plaintiff's *disease and injuries* and whether it caused his *death*. To date, Metalclad has not contended that Cadlo's death was caused by something other than mesothelioma, and its causation arguments in the trial court were based solely on the inadmissibility of Ay's expert opinion and the insufficiency of his percipient testimony. In any event, we hold only that the issue decided in *Cadlo 1*—as to causation of Cadlo's *mesothelioma*—has collateral estoppel effect in *Cadlo 2*.

Lastly, Metalclad refers us to *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407 (*Smith*). There, the trial court found the defendant liable in a wrongful death action by giving collateral estoppel effect to liability findings in an earlier personal injury action—essentially what appellants argue should happen in this case. On appeal in *Smith*, however, the judgment was reversed. The appellate court recognized that all of the requirements for collateral estoppel were met, but held that the doctrine could not be applied on equitable grounds: in the earlier case, the defendant, through no fault of its own, had not been able to obtain intended testimony from its retained expert on critical issues. The appellate court therefore concluded that it would be unfair for the plaintiff in the second case to use the earlier findings offensively against the defendant. (*Id.* at p. 1420.) The court declined to apply collateral estoppel only because of “unusual and compelling circumstances” that made it “impossible to say that the prior trial provided . . . a full and fair opportunity to present a defense.” (*Ibid.*)

No such circumstances exist here. While Metalclad suggests generally that the additional evidence was not available before *Cadlo 2*, it offers no explanation for its failure to obtain and submit the material in *Cadlo 1*. Indeed, part of the material Metalclad used to impeach Ay in *Cadlo 2* was his trial testimony in *Cadlo 1*. Certainly his trial testimony in *Cadlo 1* was available in *Cadlo 1*. Metalclad also attempted to impeach Ay in this case with deposition testimony he gave in other matters in September 2002, October 2003, September 2004, and February 2005. Opening statements in *Cadlo 1* did not begin until February 1, 2005, with no verdict returned until March 22, 2005. Metalclad had a full and fair opportunity to present its defense in *Cadlo 1*, and *Smith* is therefore inapposite.

In the final analysis, appellants are correct that collateral estoppel must be applied in *Cadlo 2* on the issue of the causation of Cadlo’s mesothelioma. Because the sole basis for the summary judgment in *Cadlo 2* was a lack of causation due to insufficient evidence of exposure, the order granting summary judgment must be reversed and the judgment must be vacated. Furthermore, the arguments raised by Metalclad in its opposition to appellants’ request for summary reversal make it very unlikely that we would benefit

from any further briefing.² Accordingly, we will grant appellants' request to summarily reverse the summary judgment order and vacate the judgment.

B. *Remand*

Appellants also request that we remand the case with directions to the trial court to proceed to trial on the issues of damages only, claiming that liability has been established as a matter of law. However, the fact that the causation of Cadlo's mesothelioma has been established by collateral estoppel does not mean that appellants have established all the elements of their causes of action. The record is insufficient for us to conclude that liability has been established as a matter of law. Therefore, we will not direct the trial court to proceed to trial only as to damages.

III. *Disposition*

The order granting summary judgment is reversed and the judgment is vacated. Appellants shall recover their costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

² At oral argument, Metalclad contended for the first time that the resolution of this issue should be delayed to permit a more complete record and further briefing. It has not explained, however, what material in the trial court record is missing from the material we have reviewed, why that material would make any difference to the issue we decide by this opinion, or why Metalclad neither raised such a concern earlier nor provided us with any additional documents or arguments.