SJC-13070

PAMELA LARAMIE[1] vs. PHILIP MORRIS USA INC.

Suffolk. May 3, 2021. - September 15, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

Tobacco. Wrongful Death. Warranty. Wilful, Wanton, or Reckless Conduct. Damages, Wrongful death, Punitive, Breach of warranty. Collateral Estoppel. Res Judicata. Practice, Civil, Wrongful death, New trial, Hearsay, Instructions to jury, Argument by counsel. Evidence, Relevancy and materiality, Hearsay.

Civil action commenced in the Superior Court Department on July 17, 2017.

The case was tried before Brian A. Davis, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William J. Trach for the defendant.
Celene H. Humphries, of Florida, for the plaintiff.
The following submitted briefs for amici curiae:
Maura Healey, Attorney General, & William W. Porter, Assistant Attorney General, for the Attorney General.

[1] Individually, and as personal representative of the estate of Fred R. Laramie.

Traci L. Lovitt, Christopher M. Morrison, & Kate Wallace, for R.J. Reynolds Tobacco Co.

Holly M. Polglase & Peter C. Netburn for Product Liability Advisory Council, Inc., & another.

Andrew Rainer & Meredith Lever for Public Health Advocacy Institute.

Douglas S. Brooks for Washington Legal Foundation.

WENDLANDT, J. In this case, we consider whether a 1998 settlement agreement between Philip Morris USA Inc. (Philip Morris) and the Attorney General precludes recovery of punitive damages against Philip Morris under the wrongful death statute, G. L. c. 229, § 2, for claims brought by the widow of a smoker who died from lung cancer after decades of smoking Philip Morris cigarettes. In 1995, the Attorney General filed a complaint against Philip Morris and other manufacturers of tobacco products and tobacco research institutes in the Superior Court, alleging, inter alia, that the companies had engaged in a conspiracy to mislead the Commonwealth and its citizens concerning the health risks of smoking. The Attorney General sought to recover the Commonwealth's costs for providing smoking-related medical assistance to Massachusetts residents under the Commonwealth's Medicaid and CommonHealth programs, see G. L. c. 118E, as well as injunctive relief, civil penalties, and punitive damages pursuant to the consumer protection act, G. L. c. 93A. The Attorney General asked that the companies be ordered to pay restitution and fund smoking cessation programs

and public information campaigns. The parties settled the case in 1998, as part of a nationwide settlement.

Nearly two decades later, in 2017, the plaintiff sued Philip Morris, pursuant to the wrongful death statute, G. L. c. 229, § 2; the plaintiff claimed that Philip Morris caused her husband's death in 2016 by, inter alia, selling defective and unreasonably dangerous cigarettes to him beginning in 1970. A jury awarded the plaintiff $11 million in compensatory damages and $10 million in punitive damages. On appeal, Philip Morris argues that while the 1998 settlement had no effect on the plaintiff's wrongful death claim insofar as it sought compensatory damages, the settlement precluded the plaintiff's recovery of punitive damages.

As the doctrine of claim preclusion does not apply in these circumstances, we disagree. Because Philip Morris was not prejudiced by the other asserted errors at trial, we affirm the judgment.[2]

1. Background. We recite the relevant facts in the light most favorable to the plaintiff. See Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 4, cert. denied, 522 U.S. 1015

[2] We acknowledge the amicus briefs submitted by the Attorney General and Public Health Advisory Institute in support of the plaintiff; Washington Legal Foundation, Product Liability Advisory Counsel, Inc., and Chamber of Commerce of the United States of America, in support of the defendant; and R.J. Reynolds Tobacco Co.

(1997) (facts are recited in light most favorable to party for whom jury found).

In the summer of 1970, when Fred Laramie was thirteen years old, he smoked his first cigarette; a salesman had handed him a free sample pack of Marlboro cigarettes, a Philip Morris brand. Within a year, Laramie was smoking every day. One or two years later, he was smoking a pack per day. Laramie smoked Marlboro cigarettes for much of the rest of his life. In December 2016, when he was fifty-nine years old, he died of lung cancer.

In July 2017, the plaintiff, Laramie's wife, brought a civil action against Philip Morris[3] pursuant to the wrongful death statute, G. L. c. 229, § 2. She alleged, among other things, that Philip Morris had committed a breach of the implied warranty of merchantability by manufacturing, selling, and distributing defectively designed cigarettes, and thereby causing Laramie's death.[4]

At trial, the plaintiff demonstrated that Marlboro cigarettes were defective and unreasonably dangerous to a person who was not yet addicted to smoking. The plaintiff's expert

---

[3] The plaintiff also filed claims against a distributor of cigarettes and a retail store; she voluntarily dismissed those claims prior to trial.

[4] The plaintiff also brought claims against Philip Morris for civil conspiracy and negligence. She dismissed the civil conspiracy claim prior to trial, and the jury found for Philip Morris on the negligence claim.

testified that Marlboro cigarettes were "highly engineered" to deliver nicotine and sustain addiction, that repeatedly smoking Marlboro cigarettes caused lung cancer, and that it would have been feasible for Philip Morris to create a safer, nonaddictive alternative.

The same expert testified that at the time Laramie began smoking in 1970, the public perceived smoking to be "desirable, socially acceptable, [and] pleasurable." This perception, according to the expert, was attributable largely to "pervasive" advertising by Philip Morris and the cigarette industry. Through testimony and documentary evidence, the plaintiff showed that Philip Morris had engaged in a sophisticated public relations campaign to foster doubt about the reported risks of smoking, and to assure the public that smoking was safe, while, internally, it understood the dangerousness and addictiveness of its cigarettes.

The evidence showed that Laramie was addicted to the nicotine in Marlboro cigarettes, and that once he was addicted, smoking became a "need" rather than a "choice." Although Laramie tried to quit smoking many times, he was unable to do so, until he was diagnosed with lung cancer in 2016. He died less than seven months thereafter.

In its defense, Philip Morris introduced evidence that there was no adequate, safer alternative design for Marlboro

cigarettes. An expert for Philip Morris testified that all cigarettes are dangerous, and that any proposed alternative design was not safer, not acceptable to consumers, or not technologically feasible. Philip Morris maintained that Marlboro cigarettes were not unreasonably dangerous to Laramie because Laramie understood the risks of smoking. Reports linking smoking to cancer had been published in the 1950s and 1960s, and people had recognized that tobacco was addictive "going back almost [one hundred] years." Moreover, there was testimony that every pack of Marlboro cigarettes sold between 1970 and 1984 contained a warning label from the Surgeon General that "cigarette smoking is dangerous to your health," and that every pack sold thereafter contained one of four warning labels that are still in use. Cigarette advertisements also were banned from television and radio beginning in January 1971, when Laramie was thirteen or fourteen years old. In addition, since January 1972, every print advertisement for cigarettes has been required to include a warning label similar to those on cigarette packs. In sum, based on this evidence, Philip Morris argued that Laramie caused his own death because, despite being adequately informed of the health risks of smoking, Laramie chose to smoke, and then chose not to quit smoking.

The jury found for the plaintiff on the breach of warranty claim and awarded her $11 million in compensatory damages and

$10 million in punitive damages. After Philip Morris's motion for a new trial was denied, it appealed to the Appeals Court, and we transferred the case to this court on our own motion.

2. Discussion. Philip Morris argues that the plaintiff is barred from recovering punitive damages because of the prior action resulting in the 1998 settlement agreement between it and the Attorney General. Philip Morris also contends that a new trial is required due to two evidentiary rulings, an asserted error in the jury instructions, and several alleged improper statements in the plaintiff's closing argument. We address each argument in turn.

a. The prior action and the 1998 settlement. In 1995, the Attorney General, "on behalf of the Commonwealth of Massachusetts including without limitation its Division of Medical Assistance," sued Philip Morris and other manufacturers of tobacco products, and certain tobacco research institutes. The Attorney General argued that the companies successfully had conspired to "mislead, deceive and confuse" the Commonwealth and its citizens regarding the health risks of smoking and the addictive qualities of nicotine. The Attorney General asserted multiple causes of action arising from this conspiracy, including fraud, breach of warranty, and violations of the consumer protection act, G. L. c. 93A. The Attorney General sought to recover the "millions of dollars" in costs the

Commonwealth had to spend each year to "provide medical and related services for Massachusetts citizens suffering from diseases caused by cigarette smoking," and also sought declaratory and equitable relief, civil penalties under G. L. c. 93A, § 4, and treble damages under G. L. c. 93A, § 9. The complaint asserted that the Attorney General had reason to believe that proceedings under G. L. c. 93A, § 4, would be in the public interest.

Around the same time, all fifty States, the District of Columbia, and five territories brought similar claims against Philip Morris and other manufacturers of tobacco products. See Lopes v. Commonwealth, 442 Mass. 170, 174 (2004). In 1998, most of those jurisdictions, including the Commonwealth, entered into a master settlement agreement with the companies.

In exchange for monetary and injunctive relief,[5] the settling States released the companies from liability for all "Released Claims" of "Releasing Parties." The agreement defined "Released Claims" as "Claims" for "past conduct . . . in any way

[5] The defendants agreed to pay approximately $240 billion to the settling States over twenty-five years, and to pay approximately $9 billion per year thereafter in perpetuity, subject to various adjustments. The agreement allocated approximately four percent of those payments to the Commonwealth. The defendants also agreed to restrict cigarette advertising and lobbying efforts, to permit public access to certain internal documents, and to fund youth education programs.

related . . . to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding Tobacco Products." In turn, "Claims" was defined as "liabilities of any nature including civil penalties and punitive damages . . . accrued or unaccrued, whether legal, equitable, or statutory." The agreement defined "Releasing Parties" to include "each Settling State" as well as, inter alia, "persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, . . . or any other capacity . . . (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public . . . as opposed solely to private or individual relief for separate and distinct injuries." Thus, the agreement released Philip Morris from liability for punitive damages to persons acting as private attorneys general seeking relief on behalf of the general public, but preserved claims for individual relief for separate and distinct injuries.

In December 1998, a judge of the Superior Court approved the agreement and entered a "Consent Decree and Final Judgment," which provided, "The Agreement, [and] the settlement set forth therein . . . are hereby approved in all respects, and all claims are hereby dismissed with prejudice as provided therein."

b. Claim preclusion. Philip Morris maintains that the doctrine of claim preclusion bars the plaintiff from pursuing punitive damages for her husband's wrongful death.[6] We review this question de novo. See DeGiacomo v. Quincy, 476 Mass. 38, 41 (2016).

"Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action" (citation omitted). O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259 (1998). "The doctrine is a ramification of the policy considerations that underlie the rule against splitting a cause of action, and is 'based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.'" Heacock v. Heacock, 402 Mass. 21, 24 (1988), quoting Foster v. Evans, 384 Mass. 687, 696 n.10 (1981). "Considerations of fairness and the requirements of efficient judicial administration dictate that an opposing party in a particular action as well as the court is entitled to be free from

[6] In motions for partial summary judgment and for a directed verdict, Philip Morris argued that claim preclusion barred the plaintiff from recovering punitive damages. A Superior Court judge denied the motion for partial summary judgment. At trial, a different Superior Court judge denied the motion for a directed verdict.

continuing attempts to relitigate the same claim." Wright Mach. Corp. v. Seaman-Andwall Corp., 364 Mass. 683, 688 (1974).

Three elements must be established to show claim preclusion: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001), quoting Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280 (1933). As the party invoking claim preclusion, Philip Morris bears the burden of proving that each element has been met. See Longval v. Commissioner of Correction, 448 Mass. 412, 416-417 (2007). The parties do not dispute that the consent decree constitutes a prior final judgment on the merits. See Kelton Corp. v. County of Worcester, 426 Mass. 355, 359 (1997). Their dispute centers on the other two elements.

i. Identity or privity of the parties. Philip Morris contends that the plaintiff stands in privity with the Attorney General with respect to their requests for punitive damages. Privity "represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." DeGiacomo, 476 Mass. at 43, quoting Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 95 (5th Cir.), cert. denied, 434 U.S. 832 (1977). Whether the plaintiff

and the Attorney General are in privity turns on (i) the nature of the plaintiff's interest, (ii) whether that interest was adequately represented by the Attorney General, and (iii) whether binding the plaintiff to the prior judgment is consistent with due process and common-law principles of fairness. See DeGiacomo, supra at 43-44, and cases cited.

Here, the plaintiff's interest in an award of punitive damages is rooted in the wrongful death statute, G. L. c. 229, § 2, itself. See International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 856 n.20 (1983) ("Under Massachusetts law, punitive damages may be awarded only by statute"). The statute creates an "action of tort," derivative of a decedent's personal injury claim, for the executor or administrator of a decedent's estate to recover damages stemming from the decedent's death. See GGNSC Admin. Servs., LLC v. Schrader, 484 Mass. 181, 185, 188 (2020).

General Laws c. 229, § 2, permits recovery of compensatory and punitive damages, and each award is tied directly to the decedent.[7] Punitive damages may be awarded where "the decedent's

[7] Compensatory damages under G. L. c. 229, § 2, are based on the "fair monetary value of the decedent to the persons entitled to receive the damages recovered," such as a spouse or a child, see G. L. c. 229, § 1, and the "reasonable funeral and burial expenses of the decedent." They "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant." G. L. c. 229, § 2.

Punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). As Philip Morris notes, punitive damages "are aimed at deterrence and retribution," State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (Campbell), and thus serve a public interest. See Bain v. Springfield, 424 Mass. 758, 767 (1997) (punitive damages are awarded where defendant's conduct "warrants condemnation"); Burt v. Meyer, 400 Mass. 185, 188 (1987) (punitive damages under G. L. c. 229, § 2, are meant "to punish the defendant, not to restore the plaintiff[]"). Nonetheless, they also serve to vindicate a personal right. See Gasior v. Massachusetts Gen. Hosp., 446 Mass. 645, 654-655 (2006) (recognizing that punitive damages vindicate "personal rights," as well as broader public interest). See also Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 670 (2002) ("the objectives of punitive damages . . . include compensating claimants for their legal costs and emotional injuries and punishing and deterring actual and potential wrongdoers" [citation omitted]).

To comply with due process, an award of punitive damages must be related to the "actual and potential" harm caused to a plaintiff by a defendant. See Philip Morris USA v. Williams, 549 U.S. 346, 353-354 (2007) (Williams); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-581 (1996). Punitive damages are not intended to punish a defendant for its unlawful conduct generally, but to punish a defendant for its unlawful conduct that caused a plaintiff's specific harm. See Williams, supra at 354. See also Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 414 (2013) (reprehensibility of defendant's conduct turns in part on whether harm inflicted on plaintiff was physical as opposed to economic). In fact, the Supreme Court has stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 425. An award of punitive damages also may not be used to punish a defendant for harm inflicted upon nonparties, or "strangers to the litigation." Williams, supra at 353. Because due process precludes a defendant from being punished without "an opportunity to present every available defense," id., quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972), permitting punishment based on harm to nonparties implicates due process concerns, including "arbitrariness, uncertainty, and lack of notice," Williams, supra at 354.

Thus, the plaintiff's interest in an award of punitive damages was not a general interest in punishing Philip Morris for selling defective Marlboro cigarettes or in recovering for harms to the public at large; rather, the plaintiff asserted a personal interest, tied to punishing Philip Morris for the harm its conduct specifically inflicted on the plaintiff's husband, Laramie. See Williams, 549 U.S. at 353.

This interest in punitive damages was not adequately represented by the Attorney General in the prior action. To be sure, where a State litigates on behalf of its citizens' "common public rights," judgments resulting from such litigation will bind the State's citizens and, as to those rights, will have preclusive effect. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979); Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-341 (1958). Such litigation does not, however, bar citizens from recovering for injuries to private interests. See Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1470 (10th Cir. 1993).

Here, as detailed supra, the plaintiff sought punitive damages for Laramie's death under the wrongful death statute, and her award was tethered to the harm the jury determined that Philip Morris had inflicted on Laramie. By contrast, the Attorney General's interest in punitive damages in the 1995

action stemmed from the consumer protection act, G. L. c. 93A,[8] and was tied to the harm Philip Morris had inflicted on the Commonwealth, in the form of increased medical expenditures incurred by the Commonwealth as a result of Philip Morris's unfair and deceptive trade practices. Specifically, the Attorney General sought civil penalties under G. L. c. 93A, § 4, and punitive damages under G. L. c. 93A, § 9.

General Laws c. 93A, § 4, permits the Attorney General to bring an action "in the name of the [C]ommonwealth" when he or she has reason to believe that a person is violating G. L. c. 93A, § 2, and that such proceedings would be "in the public interest." Civil penalties under G. L. c. 93A, § 4, which are limited to $5,000 per violation, thus serve the public's interest in punishing a defendant for violating the State's consumer protection act. Punitive damages under G. L. c. 93A, § 9, by contrast, are tied to the injury caused by a defendant's use of unfair or deceptive conduct, in violation of G. L. c. 93A, § 2. Punitive damages under this provision are limited to from two to three times the amount of compensatory damages

[8] General Laws c. 93A seeks to provide a "more equitable balance in the relationship of consumers to persons conducting business activities," see Commonwealth v. DeCotis, 366 Mass. 234, 238 (1974), and prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," G. L. c. 93A, § 2.

awarded. See Rhodes v. AIG Dom. Claims, Inc., 461 Mass. 486, 503 (2012).

In the 1995 action, the Attorney General did not seek damages for personal injuries suffered by Massachusetts residents. Rather, he sought compensatory damages for the increased medical expenditures the Commonwealth incurred because of the defendant cigarette manufacturers' unfair and deceptive trade practices in the marketing of cigarettes. Compare Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 600, 607 (1982) (State acting as parens patriae does not represent rights of private individuals but, rather, health and well-being of its citizens in general).

The punitive damages available to the Attorney General in the 1995 action thus comprised the civil penalties under G. L. c. 93A, § 4, as well as, under G. L. c. 93A, § 9, a maximum of three times the Commonwealth's compensatory damages. The Attorney General did not represent the plaintiff's interest in punitive damages under the wrongful death statute, which, while cabined by the requirements of due process, see Gore, 517 U.S. at 580-583, are not limited to civil penalties and treble the amount of the Commonwealth's compensatory damages.

In this case, by contrast, the plaintiff has a private interest in punitive damages under G. L. c. 229, § 2. Compare In re Exxon Valdez, 270 F.3d 1215, 1227-1228 (9th Cir. 2001)

(request for punitive damages, seeking to vindicate private harm due to oil spill, was not barred by prior judgment for punitive damages sought by State for public harm due to same oil spill). Indeed, the 1998 settlement agreement expressly preserved the rights of individual smokers to bring claims against the defendants for "private or individual relief for separate and distinct injuries." This reservation indicates that the Attorney General did not understand himself to be acting on behalf of any individual smoker, or as personal representative of a smoker, with respect to that interest. See DeGiacomo, 476 Mass. at 48, quoting Taylor v. Sturgell, 553 U.S. 880, 900 (2008) ("A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum . . . either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty"). Although Philip Morris contends that the so-called "carve-out" was limited to claims for compensatory damages, the settlement agreement contains no such limitation. It explicitly states the parties' intent to preserve personal rights, which, by statute, include an action under the wrongful death act for conduct causing the death, and if proved, to seek both compensatory and punitive damages.

Thus, the Attorney General did not adequately represent the plaintiff's personal interest in punitive damages, an interest

in punishing Philip Morris for Laramie's death. See Bullock v. Philip Morris USA, Inc., 198 Cal. App. 4th 543, 557-558 (2011) (under primary rights theory of res judicata, no preclusion where State sought to vindicate economic injuries while plaintiff sought to vindicate personal injuries); Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1260-1262 (Fla. 2006) (punitive damages settled by State pursuant to settlement agreement with manufacturers of tobacco products was distinct from punitive damages sought by class of plaintiffs who suffered or died from smoking-related diseases).[9]

[9] We recognize that appellate courts in New York and Georgia have taken a different view and have concluded that the master settlement agreement precludes their residents from seeking punitive damages in wrongful death claims against manufacturers of tobacco products. See Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 424 (2006) (Gault); Fabiano v. Philip Morris Inc., 54 A.D.3d 146, 151 (N.Y. 2008). These determinations, however, have been based on specific statutes or prior precedent in those States which differ markedly from Massachusetts precedent.

In New York, the court reasoned that punitive damages, "even when asserted in the context of a personal injury action, [do not] essentially relate to individual injury," and relied on New York precedent holding that the imposition of punitive damages for private purposes violates public policy. See Fabiano, 54 A.D.3d at 150, citing Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358 (1976). This court has explicitly declined to adopt New York's view that punitive damages serve only a public purpose, see Drywall Sys., Inc., 435 Mass. at 670, and we discern no reason to depart from that determination.

In Georgia, the court reasoned that Georgia law "limits the recovery of punitive damages in product liability cases to one award of punitive damages from a defendant . . . 'for any act or omission . . . regardless of the number of causes of action

To establish that the plaintiff and the Attorney General are in privity, Philip Morris also must show that the application of claim preclusion would not offend notions of fairness. See DeGiacomo, 476 Mass. at 43-44. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim . . . preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" Taylor, 553 U.S. at 892-893, quoting Richards v. Jefferson County, Ala., 517 U.S. 793, 798 (1996).

As stated, the plaintiff has a statutory right to bring a wrongful death action. See G. L. c. 229, § 2. That right, if proved, includes a right to punitive damages. See Aleo, 466 Mass. at 412 (statute sets minimum award of $5,000). Where the terms of the settlement agreement explicitly preserved the rights of individual smokers to bring their own personal injury claims, see Lopes, 442 Mass. at 177, it would be unfair to bind the plaintiff to the Attorney General's settlement agreement and to bar her from vindicating her statutory right. Accordingly,

---

which may arise from such act or omission,'" and seventy-five percent of the award goes to the State. See Gault, 280 Ga. at 422-423, quoting Ga. Code Ann. § 51-12-5.1(e)(1). Punitive damages in Massachusetts under G. L. c. 229, § 2, are not so limited, and the plaintiff, not the State, receives them. See Burt, 400 Mass. at 190.

Philip Morris has not met its burden of demonstrating that the Attorney General and the plaintiff are in privity.

ii. Identity of the cause of action. Philip Morris contends, similarly, that the plaintiff's request for punitive damages constitutes the same claim as the Attorney General's request, because both sought to punish Philip Morris for the same conduct.

In determining whether two causes of action are identical for purposes of claim preclusion, we ask whether the two actions arose from the same transaction or series of connected transactions. See Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005) and cases cited; Mackintosh v. Chambers, 285 Mass. 594, 596-597 (1934). Plaintiffs are "not entitled to pursue their claim[s] . . . through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first theory prove unsuccessful." Bagley v. Moxley, 407 Mass. 633, 638 (1990). "The statement of a different form of liability is not a different cause of action, provided it grows out of the same transaction, act, or agreement, and seeks redress for the same wrong." Mackintosh, supra at 596. A "transaction" generally "connotes a natural grouping or common nucleus of operative facts," see Restatement (Second) of Judgments § 24 comment b (1982), and a party may be precluded from requesting damages for

an injury flowing from conduct that has been dealt with fully by a prior judgment, see Dwight v. Dwight, 371 Mass. 424, 429-430 (1976).

The Attorney General's complaint in the 1995 action alleged, among other things, that Philip Morris had manufactured and sold defective and unreasonably dangerous cigarettes; so too does the plaintiff's. Indeed, both complaints assert breach of warranty claims against Philip Morris, and both complaints sought to punish Philip Morris based in part on that conduct.

The allegations in the complaints, however, differ in important respects. The "wrong" the plaintiff sought to remedy was the loss she and her daughter sustained due to Laramie's death, caused by Philip Morris's malicious, willful, wanton, reckless, or grossly negligent conduct, see G. L. c. 229, § 2. The "wrong" the Attorney General sought to remedy, by contrast, was the Commonwealth's increased medical expenditures caused by Philip Morris's commission of unfair or deceptive acts or practices in violation of G. L. c. 93A, § 2.

Indeed, Philip Morris acknowledges that the plaintiff's claim for wrongful death is not precluded to the extent that it sought recovery for compensatory damages based on Laramie's death. Philip Morris cites no Massachusetts authority, however, and we are aware of none, for the proposition that, for purposes of claim preclusion, a claim is not the "same claim" for one

type of recovery (such as compensatory damages) and yet is the "same claim" for a different type of recovery (such as punitive damages). Accordingly, Philip Morris has not met its burden of demonstrating that the two claims are the same, see Longval, 448 Mass. at 416-417, and the plaintiff's claim for punitive damages is not barred by the doctrine of claim preclusion.[10]

c. Other asserted errors at trial. Following the jury's verdict, Philip Morris's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, was denied. Aside from the issue of preclusion, Philip Morris maintains that a new trial is required due to several of the errors it asserted in that motion. We review the denial of a motion for a new trial for an abuse of discretion. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 377 n.2 (2019).

i. Internal documents. Philip Morris argues that the judge abused his discretion in allowing the plaintiff to introduce documents internal to Philip Morris and industry trade

[10] Philip Morris also argues that, under the terms of the 1998 settlement agreement, the plaintiff was a "Releasing Party" and therefore barred from recovering punitive damages. The plaintiff was not a "Releasing Party" within the meaning of the agreement. See Williams v. RJ Reynolds Tobacco Co., 351 Or. 368, 387 (2011) (estate seeking punitive damages was not releasing party under master settlement agreement). The plaintiff sought to punish Philip Morris for the harm that it inflicted on Laramie specifically; the plaintiff did not seek relief "on behalf of or generally applicable to the general public."

groups, which acknowledged the risks of smoking and outlined public relations strategies to create doubt about those risks and to retain and attract new smokers.[11] Philip Morris maintains that such evidence was not relevant to the plaintiff's claims for negligence or breach of warranty.

"Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." Mass. G. Evid. § 401 (2021). "To be relevant, '[e]vidence need not establish directly the proposition sought; it must only provide a link in the chain of proof.'" Commonwealth v. Scesny, 472 Mass. 185, 199 (2015), quoting Commonwealth v. Gordon, 407 Mass. 340, 351 (1990). "A judge has broad discretion to make evidentiary rulings," Gath v. M/A-Com, Inc., 440 Mass. 482, 488 (2003), and "substantial discretion" to determine whether evidence is relevant, Commonwealth v. Mason, 485 Mass. 520, 533 (2020), quoting Scesny, supra.

Here, the judge did not abuse his discretion in concluding that the internal documents were relevant to the jury's

[11] For example, one Philip Morris memorandum regarding a 1964 Surgeon General report linking smoking to cancer indicated that the company would need to "give smokers a psychological crutch and self-rationale to continue smoking." Another memorandum concerning the industry's efforts to fund research into smoking-related diseases stated, "Let's face it. We are interested in evidence which we believe denies the allegation that cigarette smoking causes disease."

consideration of consumer expectations in connection with the claim for breach of warranty,[12] or to counter Philip Morris's argument that Laramie caused his own death. The documents provided a link in the chain toward a conclusion, integral to the plaintiff's claim, that consumers did not comprehend fully that Marlboro cigarettes were dangerous. The documents outlined Philip Morris's extensive strategy to conceal the health risks of smoking and to pursue research that "denies the allegation that cigarette smoking causes disease." See Commonwealth v. Hinds, 487 Mass. 212, 219 (2021) ("The relevance threshold for the admission of evidence is low" [citation omitted]). Moreover, evidence that Philip Morris concealed information from the public and sought to persuade the public to continue smoking by, for example, providing "smokers a psychological crutch and

[12] "A seller breaches its warranty obligation when a product that is defective and unreasonably dangerous for the ordinary purposes for which it is fit causes injury" (quotations, citations, and alterations omitted). Haglund v. Philip Morris Inc., 446 Mass. 741, 746 (2006). A product may be defective and unreasonably dangerous due to a design defect. See Evans v. Lorillard Tobacco Co., 465 Mass. 411, 422 (2013). A product has a design defect "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design." Restatement (Third) of Torts: Products Liability § 2(b) (1998). In determining "whether an alternative design is reasonable and whether its omission renders a product not reasonably safe," a jury may consider a broad range of factors, including "the nature and strength of consumer expectations regarding the product." Restatement (Third) of Torts: Products Liability § 2 comment f (1998). See Evans, supra.

self-rationale to continue smoking" tended to negate Philip Morris's contention that Laramie caused his own death because he was adequately informed about the risks of smoking, freely chose to smoke, and could have quit smoking at any time.

In addition, the internal documents were relevant to the plaintiff's request for punitive damages under G. L. c. 229, § 2, which are available where a defendant's conduct that caused a decedent's death was "malicious, willful, wanton[,] . . . reckless[,] . . . or gross[ly] negligen[t]." Evidence that Philip Morris knew its cigarettes were dangerous and addictive, concealed that information from the public, and actively tried to persuade the public otherwise was relevant to the malicious, willful, wanton, reckless, or grossly negligent manner by which Philip Morris manufactured and sold those cigarettes.

ii. Federal Trade Commission reports. Philip Morris argues that the judge also abused his discretion in allowing the plaintiff's expert to read and display to the jury excerpts from two Federal Trade Commission (FTC) reports summarizing the results of a number of surveys on the effect of warning labels on cigarette packaging and advertising.[13] One report, from 1967, stated that "youngsters consider cigarette smoking to be an acceptable and socially desirable activity" because the health

[13] The parties stipulated that the reports themselves would not be admitted in evidence.

risks are not "brought home to them in a[n] effective and meaningful way," due in part to the "strong force" of cigarette advertising. The other report, from 1981, stated that "less than [three] percent of adults exposed to cigarette ads ever even read the warning," and that "few people ever notice or pay attention to [the warnings]."

The judge overruled Philip Morris's objection to the reports on grounds of relevancy and hearsay, because he concluded that they were admissible as ancient documents under Mass. G. Evid. § 803(16) (2021). "We review a trial judge's evidentiary decisions under an abuse of discretion standard. See Commonwealth v. Polk, 462 Mass. 23, 32 (2012). In applying that standard, 'we look for decisions based on "whimsy, caprice, or arbitrary or idiosyncratic notions,"' and do not disturb the judge's ruling "simply because [we] might have reached a different result; the standard of review is not substituted judgment."' Cruz v. Commonwealth, 461 Mass. 664, 670 (2012)." N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013).

A. Relevance. Philip Morris contends that the reports were not relevant to the plaintiff's claims because, as a matter of law, post-1969 warning labels on cigarette packaging are sufficient to warn the public about the risks of smoking. See Altria Group, Inc. v. Good, 555 U.S. 70, 79 (2008). As Philip

Morris asserts, Federal law preempts State law failure-to-warn claims based on post-1969 warning labels. In 1969, Congress preempted "any State law claim imposing liability based on a showing that a cigarette manufacturer's 'post–1969 advertising or promotions should have included additional, or more clearly stated, warnings.'" Evans v. Lorillard Tobacco Co., 465 Mass. 411, 440-441 (2013), quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992) (Stevens, J., plurality opinion). The plaintiff's breach of warranty claim, however, did not assert liability on the basis that Philip Morris should have included additional, or more clearly stated, warnings. Rather, the complaint alleged that Philip Morris was liable for the manufacturing and sale of unreasonably dangerous and defectively designed Marlboro cigarettes; as part of that claim, the plaintiff sought to demonstrate consumer expectations regarding Marlboro cigarettes around the time that Laramie began smoking. See Evans, supra at 422-428.

While warnings accompanying a product are relevant in determining whether the product is unreasonably dangerous, see Evans, 465 Mass. at 425, consumer expectations also may depend upon the manner in which the product is portrayed and marketed, see Restatement (Third) of Torts: Products Liability § 2 comment g (1998). Philip Morris argued at trial that Laramie fully understood the risks of smoking, in part due to the

presence of the warning labels. Evidence that consumers did not notice or read the mandated warnings thus was relevant, because it made it more likely that consumers formed opinions about cigarettes through sources other than the warning labels (such as Philip Morris's advertising) and thus that, despite the warnings, consumers believed that Marlboro cigarettes were safe.

To the extent that there was a risk that the jury might have used this evidence improperly, see Evans, 465 Mass. at 440-442, the judge mitigated that risk by providing multiple, contemporaneous limiting instructions informing the jury that the plaintiff was not claiming a failure to warn, and that the warnings were adequate as a matter of law to inform the public of the risks of smoking. Cf. Zucco v. Kane, 439 Mass. 503, 510 (2003).

B. Hearsay. Philip Morris also maintains that the FTC reports contained inadmissible hearsay. "The rule against hearsay bars admission of out-of-court statements offered for their truth." Hinds, 487 Mass. at 234, quoting Commonwealth v. Mendes, 463 Mass. 353, 367-368 (2012). The ancient documents exception to this rule permits the admission of a "statement in a document that is at least thirty years old and whose authenticity is established." Mass. G. Evid. § 803(16). See Langbord v. United States Dep't of the Treasury, 832 F.3d 170, 190 (3d Cir. 2016), cert. denied, 137 S. Ct. 1578 (2017)

(ancient document exception is based on rationale that authenticated ancient documents bear certain indicia of trustworthiness). While Philip Morris does not challenge the authenticity of the FTC reports, it argues that the statements in the reports constitute hearsay within hearsay because the statements came not from the FTC itself but rather from third-party responses to consumer surveys.

Generally, where multiple out-of-court statements are embedded in one, the combined statement is admissible only if "each out-of-court assertion falls within an exception to the hearsay rule." Commonwealth v. Rivera, 482 Mass. 259, 268 (2019), quoting Commonwealth v. Alcantara, 471 Mass. 550, 558 (2015). See Mass. G. Evid. § 805 (2021). While statements by the author of the document may be introduced under the ancient documents exception, "[i]f the document contains more than one level of hearsay, an appropriate exception must be found for each level." United States v. Hajda, 135 F.3d 439, 444 (7th Cir. 1998) (discussing analogous Federal rule). See Langbord, 832 F.3d at 190. Accordingly, because the FTC reports contained multiple levels of hearsay, the judge erred in concluding that the excerpts of the reports were admissible under the ancient documents exception.

This error, however, did not prejudice the defendant, as the improperly introduced evidence was cumulative of other,

properly introduced evidence. See Slater v. Burnham Corp., 4 Mass. App. Ct. 791, 791 (1976). The plaintiff introduced numerous advertisements and public statements from Philip Morris to demonstrate that the public perception of smoking around the time Laramie smoked his first cigarette was that smoking was not unreasonably dangerous. Cf. Kace v. Liang, 472 Mass. 630, 646 (2015).

iii. Jury instructions. In his final charge, the judge instructed:

> "[T]he plaintiff is not making any claim in this case that the Defendant failed to warn Mr. Laramie of the dangers associated with smoking or engaged in any fraud. As I told you during trial, the United States Congress has mandated since July 1 of 1969 what warning labels cigarette manufacturers such as the Defendant have been required to place on all cigarette packages and cigarette advertisements, and you must accept as true in this case that those congressionally mandated warnings were adequate as a matter of law to warn Mr. Laramie and other members of the public of the hazards associated with smoking. The law, however, does not permit a cigarette manufacturer through its statements or actions to mislead consumers or make misrepresentations about the risks or hazards associated with smoking."

Philip Morris argued during the charge conference, as it does before us, that the jury should not be instructed as to this last sentence because the statement invites the jury to impose liability based on theories of fraud, conspiracy, and failure to warn -- theories of liability that were not before the jury.

"In a civil trial, a judge should instruct the jury fairly, clearly, adequately, and correctly concerning principles that

ought to guide and control their action." Doull v. Foster, 487 Mass. 1, 5-6 (2021), quoting DaPrato, 482 Mass. at 383 n.11. We do not review an individual instruction in isolation, see Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 (2014); rather, "[j]ury instructions must be construed as a whole to prevent isolated misstatements or omissions from constituting reversible error where there is little chance that the jury would have misunderstood the correct import of the charge." Commonwealth v. Oliveira, 445 Mass. 837, 844 (2006), citing Commonwealth v. Owens, 414 Mass. 595, 607 (1993).

Here, the preceding instructions made clear that the plaintiff had not raised claims of failure to warn or fraud. The judge also twice instructed the jury that the warning labels were adequate, as a matter of law, and that the plaintiff had not raised a claim of failure to warn. The judge thereafter outlined the elements of the claims on which the jury permissibly could have found liability; those instructions did not invite the jury improperly to impose liability based on any misrepresentation Philip Morris might have made. In addition, the verdict slip, which the judge reviewed with the jury, explicitly specified the contested elements of the plaintiff's claims. The instructions, viewed as a whole, thus made clear to the jury which claims were before them.

iv. Closing argument. Philip Morris argues that a new trial is necessary due to improper statements by the plaintiff's counsel during closing argument. Philip Morris contends that counsel misstated the evidence, made arguments not based on the evidence, disparaged opposing counsel, and enflamed the jurors' emotions. We examine whether the challenged statements were improper and, if so, whether they were prejudicial.[14] See Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91, 112 (2009). We review the challenged remarks in the context of the entire argument, the evidence presented at trial, and the judge's instructions. See Santos v. Chrysler Corp., 430 Mass. 198, 213 (1999).

Philip Morris argues that the plaintiff's trial counsel misstated the evidence by telling the jury that Laramie would not have become addicted to low nicotine cigarettes (a "safer" alternative that the plaintiff claimed Philip Morris chose not to manufacture or market), and that there was no evidence that Laramie would have started smoking simply because his friends and parents smoked. In closing, a lawyer may argue fair inferences from the evidence introduced. See Back v. Wickes

[14] Appellate review of two statements challenged on appeal to which Philip Morris did not object at trial -- references to Laramie living "paycheck-to-paycheck" and characterizing Philip Morris's argument as "muck on the wall" -- has not been preserved. See Gath, 440 Mass. at 492.

Corp., 375 Mass. 633, 644 (1978); Mass. G. Evid. § 1113(b) (2021). That is precisely what the plaintiff's counsel did here. One of the plaintiff's experts testified that low nicotine cigarettes are unlikely to lead to persistent daily use or to cause addiction among young people. Another expert testified that "if you had a nonaddictive cigarette, people could choose to stop [smoking] whenever they wanted." Likewise, while the trial testimony indicated that Laramie's friends and parents smoked, it was not an unreasonable inference from the evidence that Laramie would not necessarily have followed their lead. See Commonwealth v. DeCaro, 359 Mass. 388, 391 (1971) (no error where prosecutor did not distort evidence before jury).

Philip Morris maintains that the plaintiff's counsel improperly disparaged Philip Morris's counsel by telling the jury that Philip Morris's counsel "want[s] to confuse you," and by accusing him of putting words in the mouths of witnesses through leading questions. Counsel may, within reason, be critical of an opposing counsel's tactics. See Commonwealth v. Fernandes, 436 Mass. 671, 674 (2002). It was not improper for the plaintiff's counsel to argue that Philip Morris was seeking to distract the jury from what the plaintiff viewed as the more relevant evidence.

Philip Morris also argues that the plaintiff's counsel made a number of remarks designed to enflame the jury's emotions,

such as mentioning Philip Morris's corporate revenues, telling the jury that they "can't punish [Philip Morris] for all the other people that they killed," and stating that "[r]egular lung cancer wasn't good enough . . . [Philip Morris] came up with a whole new different kind of cancer."

Counsel discussed Philip Morris's net revenues in the context of suggesting how the jury could calculate punitive damages. The statements were not improper, as the financial information was in evidence, and were relevant to the jury's determination of punitive damages. See Restatement (Second) of Torts § 908(2) (1979).

The statement that the jury could not punish Philip Morris "for all the other people that they killed," on the other hand, was improper and inflammatory. Nonetheless, a "certain measure of jury sophistication in sorting out excessive claims on both sides fairly may be assumed." Commonwealth v. Kozec, 399 Mass. 514, 517 (1987). In addition, the judge gave an immediate curative instruction. Following closing arguments, in response to Philip Morris's objection, the judge instructed the jury that "this case is not about what happened to anybody other than Fred Laramie." In his final charge, the judge again instructed the jury that they could not assess punitive damages against Philip Morris for any harm caused to persons other than Laramie and his

family.[15] See Gath, 440 Mass. at 492 (curative instruction may remedy any prejudice). See also Commonwealth v. Durand, 475 Mass. 657, 669 (2016). The curative instructions were sufficient to dispel any prejudice from the statement, which, absent such instructions, was not so inflammatory as to have required a new trial. See id.

The statement that Philip Morris had invented a new kind of cancer because "[r]egular lung cancer wasn't good enough" also was improper. Although the statement was loosely based on the evidence that adenocarcinoma, the type of lung cancer Laramie contracted, increased in prevalence following the emergence of filtered cigarettes, such as Marlboros, the remark nonetheless was clearly designed to arouse the jurors' passions and sympathies. In responding to Philip Morris's objection, the judge decided to "[l]eave it up to the jury to make [the] determination" whether the statement was based on the evidence. The judge had the discretion to decide whether any corrective action was necessary. See Santos, 430 Mass. at 214. While the remark should not have been made, considered in the context of

[15] The jury appears to have heeded the judge's instructions; they awarded the plaintiff an amount of punitive damages ($10 million) far less than that which counsel suggested would be reasonable ($410 million) for the plaintiff's own injuries, and in proportion to the amount of compensatory damages they awarded ($11 million).

the entire argument, it would have had no effect on the jury, and caused no prejudice.

Judgment affirmed.