SUPREME COURT COPY

No. S162029

IN THE

Supreme Court of California

JUDY BOEKEN,

Plaintiff and Appellant,

v.

PHILIP MORRIS USA INCORPORATED,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Five,
Case No. B198220, Affirming the judgment of the
Los Angeles County Superior Court, No. BC 353365,
The Honorable David Minning, Presiding

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October 14, 2008

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Restatement (Second) of Torts (1979) 4-5, 8

Boeken's Reply Brief

In her opening brief, Judy Boeken argued that the lower courts' dismissal of her wrongful death lawsuit based on res judicata must be reversed on two independent grounds: (1) Boeken could not have recovered, on the loss-of-consortium action she filed and dismissed while her husband was still alive, damages for her husband's anticipated death, because California law permits such damages to be sought only through a wrongful death action filed after death; and (2) even if Boeken could have recovered such damages earlier, a loss-of-consortium claim filed before death and a wrongful death claim filed after death are simply not the same "cause of action" for res judicata purposes.

Rather than offering a straightforward response to Boeken's points in the order they were presented, Philip Morris has filed an answer brief ("PM Br.") which relies on an incomplete and, in places, inaccurate view of the record, PM Br. at 1-8, and which splits up and shuffles the discussion of Boeken's two distinct points. Philip Morris addresses Boeken's first point in the middle of its argument, PM Br. at 16-28, 34-36, and at the very end. PM Br. at 39. It addresses Boeken's second point at the beginning of its argument, PM Br. at 8-15, and near the end. PM Br. at 29-33, 36-39. This scattershot approach is confusing and it masks Philip Morris's failure to refute much of Boeken's brief.

For simplicity, this reply brief covers Boeken's argument, and Philip Morris's responses, under exactly the same argument headings set forth in Boeken's opening brief, canvassing as needed the portions of Philip Morris's brief which appear relevant to each heading. First, however, we respond to several incomplete or inaccurate statements made in the introductory portions of Philip Morris's brief.

Response to Introductory Points

No "same injury" finding. In its summary of the holdings of the lower courts, Philip Morris asserts that the trial court's holding (affirmed by the Court of Appeal) was that Judy Boeken's earlier loss-of-consortium action and her wrongful death action "both arise out of the same injury to her (i.e., interference with her marital relationship) . . . ." PM Br. at 2 (citing App. at 205-06).[1] In fact, the trial court made no "same injury" holding. Nor could it have: the injury from which Judy Boeken's earlier action arose was her husband's disability; the injury from which her later action arose was her husband's death. On one of the pages cited by Philip Morris, the trial court merely stated that the damages Boeken was seeking "for the loss of her husband's love, companionship etc." were "the same damages as would have been addressed in the prior action." App. at 211 (emphasis added).

Similarly, as previously noted (Boeken Br. at 5-6) and as Philip Morris does not dispute, the Court of Appeal affirmed on the basis that "[t]he elements of damage recoverable in a loss-of-consortium action arising from a nonfatal injury to one's spouse are essentially the same as the elements of noneconomic loss recoverable in a wrongful death action arising from a fatal injury." Pet. App. A at 9 (emphasis added). This holding, based on the type of damages sought, not the type of injury involved, is what dissenting Justice Turner identified as "[t]he fundamental flaw" in the majority's opinion: its "focus on the similarity in the available remedies" sought in the two actions, not on "the particular injury and the ability to pursue the cause of action in the first lawsuit." Pet. App. A, Dissent at 2. Given the Court of Appeal's focus, noted by Justice Turner, on the recoverable damages, Philip Morris is plainly mistaken in its

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[1] As with Boeken's opening brief, references styled "App. at __" are to Appellant's Appendix in the Court of Appeal.

assertion that the Court of Appeal "held that the injury Boeken sought to remedy in each action was the same." PM Br. at 7 (citing Pet. App. A at 11).

No "clear" precedent. Philip Morris suggests "the California courts have clearly held" that a wife's loss-of-consortium action filed before her husband's death and a wrongful death action filed after his death "seek to remedy the same injury." PM Br. at 3. As Boeken has already shown, in its trial court briefs Philip Morris candidly conceded that "there was no authority directly on point . . . ." Boeken Br. at 4 (citing App. at 79-82, 197-98). E.g., App. at 80 ("As [Philip Morris] admitted in federal court, there appears to be no California case that has directly addressed whether for res judicata purposes, a loss of consortium action invokes the same primary right as a wrongful death action."); App. at 197 ("there is no California case that squarely addresses the issue").

No Boeken complaint reference to death or post-death period. Philip Morris asserts that Judy Boeken "did seek," in her loss-of-consortium action filed while her husband was still alive, "all of her future damages," including damages which would only occur upon her husband's death (if he ended up dying due to Philip Morris's wrongdoing). PM Br. at 3. See also PM Br. at 4-5 (quoting App. at 160). However, in Boeken's earlier complaint, she merely alleged that Philip Morris's wrongdoing had caused disability to her husband in the form of lung cancer, which she alleged had prevented her husband from performing normal marital functions and would prevent him from performing them "in the future," which she alleged was a permanent injury. There was no allegation that the wrongdoing would cause his death (not even a reference to death), nor any demand for damages for the period after death, nor even a reference to that period. App. at 160.

Argument

I. The Judgment Should Be Reversed Because It Rests on the Incorrect Premise That a Wife May Recover, Through a Loss-of-Consortium Claim Filed Before Her Husband's Death, Damages Which She Alleges She Will Later Suffer Due to His Anticipated Wrongful Death

To win this appeal, Philip Morris must convince this Court, first, that under the common law of California, a wife is permitted to obtain damages for the wrongful death of her husband without any resort to the wrongful death statute — indeed, that the common law permits her to do so without even waiting for him to die. This theory surely would have startled the members of the Legislature that enacted the wrongful death statute in 1862 for the purpose of altering the common law, which afforded no remedy to any person (not even a spouse) based on the death of another person. In her opening brief, Boeken demonstrated that: (a) this theory is unsupported by California precedent and contrary to the Restatement approach, indeed, contrary to the history of the common law dating back to 1619, Boeken Br. at 8-14; (b) this theory conflicts with the operation of the wrongful death statute, id. at 14-16; and (c) given the absence of any pre-2001 California precedent (or any California precedent) in support of its theory, for this Court to rely on this theory to extinguish Judy Boeken's lawsuit would violate due process. Id. at 16-18. We address Philip Morris's responses to each point in turn.

A. The "Damages for Death First, Death Afterwards" Theory Lacks Support in Common-Law Authority

Philip Morris devotes eight pages of its brief to Boeken's analysis of the common law. PM Br. at 16-23. It fails to dispute the salient points made by Boeken, and the main additional point it raises is unavailing.

Common-Law History Back to 1619. The opening brief established that common-law authority dating back to 1619 has not afforded any remedy for harm arising after an injured person's death and that neither Philip Morris nor the Court of Appeal had cited a single case in which a spouse litigated both pre-death and post-death damages in a lawsuit filed before death. Boeken Br. at 8-10. Philip Morris does not disagree with this basic point. Philip Morris has not offered any California authority in support of its theory. Indeed, it has come up with only one case decided in the entire history of the United States which departs from the tradition of the common law stretching back centuries: an intermediate appellate court decision from Minnesota decided in 1992, but not followed by any other court in the decade and a half since then. See note 2, infra.

Restatement. Philip Morris's "damages for death first, death afterwards" theory is explicitly rejected by the relevant Restatement provisions. Boeken Br. at 11-13. Philip Morris's response? That despite the explicit language of the provisions quoted by Boeken, applying to all tort actions involving harm to the marital relation, these provisions in fact apply to only some tort actions — specifically, cases "where a death follows immediately or closely upon the heels of the tortfeasor's actions, and the spouse brings claims for pre- and post-death damages in a single post-death action." PM Br. at 22. Philip Morris cites no court decision (other than the decision below) discussing the Restatement and then declining to apply it to lawsuits filed before death. By contrast, the case law and the scholarly authority cited by Boeken both corroborate the clear rule set out in the Restatement. Boeken Br. at 12-13.

Usage Note for CACI 3920. Boeken pointed out that Philip Morris's citation of the usage note for CACI 3920 is unavailing because the note is unsupported by any California precedent and was not even in effect when Boeken's loss-of-consortium action was dismissed in 2001. Boeken Br. at

13. Philip Morris's renewed reliance on the usage note, PM Br. at 19-20, adds nothing.

Analogy to Future Damages for "Lost Years". Finally, Philip Morris argues that a spouse can use a loss-of-consortium action to pursue a "damages for death first, death afterwards" theory based on an analogy to the "lost years" doctrine. Citing cases like Fein v. Permanente Medical Group (1985) 38 Cal.3d 137, 153, Philip Morris argues that just as a personal injury plaintiff can seek an award for lost wages for an injury which shortens his or her life, with the calculation based on his or her pre-injury life expectancy (in effect recovering for wages which would have been earned during the "lost years," those lost due to a premature death), so too a wife is entitled to damages for injury to the marital relation calculated based on the husband's pre-injury life expectancy (in effect recovering for injuries due to a premature death). PM Br. at 17-19.

The analogy is flawed. The common law has always permitted an injured person to obtain damages as compensation for his or her injury, and in such a context use of the "lost years" doctrine is a simple application of damages principles embodied by Cal. Civ. Code § 3283. The common law has never permitted a wife to obtain damages as compensation for a husband's death; that has only been permitted pursuant to statute, so that the application of the "lost years" doctrine in this context would involve a fundamental change in the common law. It is hardly surprising that Philip Morris has found only one decision in the entire history of the United States in which a court has made the mistake of relying on this flawed analogy to apply the "lost years" doctrine to a pre-death lawsuit filed by a spouse.[2]

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[2] Roers v. Engebretson (Minn. Ct. App. 1992) 479 N.W.2d 422 (cited in PM Br. at 23 n. 12). Philip Morris does not identify any court decision in the decade and a half since Roers citing Roers in support of permitting a spouse to obtain both pre-death and post-death damages in a pre-death lawsuit, sidestepping the need to file a wrongful death action

B. The "Damages for Death First, Death Afterwards" Theory Conflicts With the Wrongful Death Statute

Philip Morris has comparatively little to say about Boeken's point that for this Court to construe the common law to permit a wife to obtain post-death damages on a pre-death suit would interfere with the Legislature's design for wrongful death litigation which has been in place since 1862. Boeken Br. at 14-16.

As the predicate of its argument, Philip Morris appears to assume that Boeken is invoking only the joinder clause of the wrongful death statute, which it insists is purely procedural in nature and irrelevant to the issue in this case. PM Br. at 24-25. In fact, Boeken relies not just on the joinder clause, but on the wrongful death statute as a whole, by which the Legislature occupied the field regarding which persons can obtain damages for the death of another person, and how. The conflict between Philip Morris's theory and the wrongful death statute is made plain by Philip Morris's own brief, in which it explicitly asks this Court to construe the common law to permit a wife to seek "all of her future damages in a pre-death action under a theory independent of the statute." PM Br. at 25 n.13.

Again, the common law has never offered anyone any remedy for damage caused by the death of another person, and such remedies have been created only by statute. Philip Morris's proposed "theory independent of the statute" would, by definition, constitute a wholesale invasion of a

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(Hall ex rel. Hall v. Rodricks (2001) 340 N.J.Super 264 (cited in PM Br. at 23 n.12), cited Roers, but there is no indication the defendant argued that a wrongful death lawsuit is the exclusive vehicle for obtaining post-death damages, and the court did not analyze the issue). Indeed, a LEXIS search reveals that Roers has been cited a total of only five times on any point, and never in support of permitting a spouse to use a pre-death lawsuit to circumvent the mechanism for obtaining post-death damages set out in a wrongful death statute.

traditionally accepted legislative prerogative. Philip Morris urges that to reject its theory would be to "arbitrarily limit a loss-of-consortium plaintiff to seeking only pre-death damages," PM Br. at 26, but it would hardly be arbitrary for this Court to adhere to a common-law rule for dividing authority between courts and legislatures which has been followed for centuries, and to require plaintiffs seeking post-death damages to avail themselves of the remedies which the Legislature has chosen to supply.

Philip Morris argues that public policy considerations weigh in favor of this Court permitting spouses to circumvent the wrongful death statute and use pre-death lawsuits to obtain damages covering the post-death period. According to Philip Morris, it would be more efficient to allow "all future noneconomic damages from harm to the marital relationship to be covered in a pre-death consortium action," PM Br. at 34 — to "prohibit a spouse from recovering all of the damages she is likely to suffer from her injury in her first action, and force her to bring a subsequent action," it urges, would undermine the objective of minimizing litigation. Id. at 35. To our knowledge Philip Morris is the first to express any concerns about the efficiency of the traditional common-law rule. If the traditional rule reflected in the Restatement and defended by Boeken — that pre-death damages to the marital relation may be recovered by the uninjured spouse only on a common-law claim, and post-death damages may be recovered only under a wrongful death statute — is somehow inefficient, we submit that is a matter for the Legislature to address.

C. For This Court to Affirm Based on Philip Morris's Novel "Damages From Death First, Death Afterwards" Theory Would Violate Due Process of Law

Independent of the above, given the absence of any authority circa 2001 (when Boeken dismissed her lawsuit) to support the theory that under California law she could have and therefore should have litigated post-death

damages on her common-law claim filed and dismissed during her husband's life, it would violate due process to rely on such a theory to dismiss her current lawsuit. Boeken Br. at 16-18. Philip Morris does not dispute the logic of this argument; it merely asserts (without foundation, see above) that there was authority circa 2001 putting Boeken on notice of her ability to seek such damages. PM Br. at 39.

II. Independently, the Judgment Should Be Reversed Because It Rests on the Incorrect Premise That a Wife's Loss-of-Consortium Claim Filed Before Her Husband's Death is Part of the Same Cause of Action as a Wrongful Death Claim Filed After His Death

Even if Philip Morris could surmount all three of Boeken's arguments as set out above, it also needs to convince this Court that Judy Boeken's loss-of-consortium claim filed during her husband's life, and her wrongful death claim filed after his death, are part of the same "cause of action" for res judicata purposes. Philip Morris has offered little basis for such a conclusion.

A. Analysis Under the "Primary Right" Test

As Boeken set forth in her opening brief, the analysis in Justice Turner's dissenting opinion is clearly correct. Under the "primary right" test which has long prevailed in California, Boeken's claim based on her husband's disability while alive, and her later claim based on his death, involve entirely distinct "injuries," and hence are not part of the same "cause of action." Boeken Br. at 18-22. Philip Morris addresses this argument in two separate sections of its brief. PM Br. at 8-15, 29-33.

Philip Morris agrees with Boeken that only where two claims involve the same "injury" are they part of the same "cause of action" (indeed, it cites additional authority on this point beyond that cited by Boeken, in its summary of the background law). PM Br. at 8-11. Philip

Morris asserts that when a spouse is <u>disabled</u> due to allegedly tortious conduct, the "harm to the plaintiff's 'marriage relationship' resulting from the injuries suffered by the plaintiff's spouse" is the relevant "injury," and that when a spouse <u>dies</u> as a result, the relevant "injury" is exactly the same — the relevant "injury" is the harm done to the marital relationship, viewed in abstract. PM Br. at 12-13. But this is merely another way of articulating the Court of Appeal majority's theory that two claims are part of the same "cause of action" if the <u>damages</u> they provide by way of a remedy are similar. We submit that Justice Turner was correct in his dissent in concluding that, regardless of the amount of factual overlap in the damages sought on the two claims, as a matter of law the injury inflicted by the <u>disability</u> of a spouse is distinct from the injury inflicted by the <u>death</u> of a spouse (as to which a cause of action does not even accrue until death). Boeken Br. at 6, 19-21.

B. Analysis Under the "Transactional" Test

Finally, Boeken has suggested that if this Court were inclined to view her earlier claim and her current claim as involving the same "cause of action" under the "primary right" test, or if this Court wished to revisit the status of that test in general, this Court could readily resolve this case in Boeken's favor under the more modern "transactional" test which is followed in the vast majority of jurisdictions. Boeken Br. at 22-26. Philip Morris does not disagree with Boeken's analysis of the outmoded nature of the "primary right" test. It merely disputes Boeken's analysis of why she would prevail if the "transactional" test were applied to the record of this case.

Under the "transactional" test, the relevant "transaction" is determined pragmatically, based on what ordinary people would intuitively regard as part of a single basic dispute. Boeken Br. at 24-25. Ordinary

people would view a wife's claim that she suffered damages because of her husband's death as quite different from a wife's claim that she suffered damages because her husband merely became disabled. Although such matters are not frequently litigated, the decisions in which a family member's own claim for injuries caused by an accident has been held to involve a "transaction" separate from that family member's claim for the wrongful death of another family member resulting from the same accident, support that conclusion. Boeken Br. at 25 & n.11. Philip Morris does not concur, but its brief discussion of the cases cited by Boeken, PM Br. at 37-38, leaves the basic point in Boeken's brief undisturbed.[3]

In sum, if this Court were to reach the issue, under either the "primary right" test or the "transactional" test, it can and should hold that Boeken's earlier claim for loss-of-consortium damages, filed and dismissed while her husband was alive, is not part of the same "cause of action" as her current wrongful death claim.

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[3] Philip Morris cites an out-of-state case, Stutsman v. Kaiser Found. Health Plan (D.C. App. 1988) 546 A.2d 367, 370, which it asserts held "that a loss-of-consortium action brought while the injured spouse is still alive bars a subsequent wrongful death action . . . ." PM Br. at 38. In fact, Stutsman involved a husband who, after his wife died as a result of alleged medical malpractice, sought to amend his then-pending loss-of-consortium claim to add a wrongful death count. 546 A.2d at 369. Unlike Boeken's case (which involved a claim for pre-death damages filed and dismissed before death), in relevant respect Stutsman was a lawsuit pursued by the husband after his wife's death, seeking both pre-death loss of consortium and post-death wrongful death damages. The result of the case turned not on res judicata principles, but on law-of-the-case principles (the husband sought to amend his complaint to add a wrongful death count, was denied, and then failed to appeal from that holding). Id. at 369-70.

Conclusion

The judgment below should be reversed, and the trial court should be directed to reject Philip Morris's res judicata defense.

Respectfully submitted,

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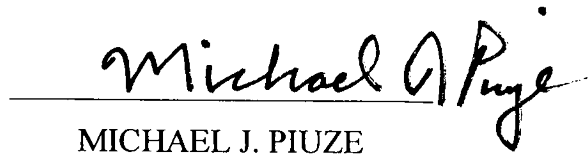
Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Boeken's Reply Brief** contains 3,595 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: October 14, 2008



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Boeken v. Philip Morris, USA, Inc. **No. S162029**
Court of Appeal No. 198220, Second Appellate District, Division Five
Superior Court Case No. BC 353 365

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11755 Wilshire Boulevard, Suite 1170, Los Angeles, California 90025.

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