SUPREME COURT COPY

No. S162029

IN THE

Supreme Court of California

JUDY BOEKEN,

Plaintiff and Petitioner,

v.

PHILIP MORRIS, USA, INC.

Defendant and Respondent.

SUPREME COURT
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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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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May 5, 2008

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Table of Contents

Table of Authorities ii

Introduction 1

Argument 1

I. This Court Should Grant Review to Prevent Disruption of the Legislature's Explicit Objective of Ensuring That All Damages From a Wrongful Death Suffered by All Statutory Heirs Are Litigated in a Single Lawsuit 1

II. This Court Should Grant Review to Ensure the Decision Below Does Not Force Spouses to Bear the Burden of Filing Loss-of-Consortium Lawsuits Within Two Years of a Potentially Fatal Injury to Their Spouse, and Does Not Result in Spouses Being Barred From Pursuing a Wrongful Death Claim 5

Conclusion 8

Statement of Compliance With Word Limit 9

Table of Authorities

<u>CASES</u>: PAGE:

Agarwal v. Johnson (1979) 25 Cal.3d 932 7

Allen v. Toldeo (4th Dist. 1980) 109 Cal.App.3d 415 3

Lamont v. Wolfe (2d Dist. 1983) 142 Cal.App.3d 375 6

Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888 7

People v. Morales (2001) 25 Cal.4th 34 3

Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382 4-5

Truhitte v. French Hospital (5th Dist. 1982) 128 Cal.App.3d 332 2-3

STATUTE AND JURY INSTRUCTIONS:

Code Civ. P. § 335.1 6

BAJI 14.40 4

2 Judicial Council of Cal., Civil Jury Instructions (2008 ed.) 3

Introduction

According to Philip Morris, "innumerable cases demonstrate" that a wife's claim for loss-of-consortium damages filed while her husband is alive, and a wrongful death claim filed after her husband's death, involve the same "primary right" for res judicata purposes — so that this is an "easy" case, unworthy of review. Answer at 2. Philip Morris's position below was exactly the opposite: in a trial court brief it noted that "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." Appellant's Appendix at 80.

As Philip Morris's own inconsistency illustrates, obviously this issue is hardly an "easy" one on which jurists cannot disagree. If it were, the Court of Appeal would not have divided in a 2-to-1 decision. Philip Morris's answer opposing review is a thinly veiled merits argument predicated on its misguided assertion that this is an "easy" case in which its position is supported by "innumerable cases" (although it cites none). Given the uncertainty in the law created by the divided decision issued by the Court of Appeal, a grant of review is plainly warranted.

Argument

I. This Court Should Grant Review to Prevent Disruption of the Legislature's Explicit Objective of Ensuring That All Damages From a Wrongful Death Suffered by All Statutory Heirs Are Litigated in a Single Lawsuit

Part I of the petition demonstrated that the Court of Appeal's decision rests on a legal theory, unsupported by precedent, which is seriously disruptive of the Legislature's plan that wrongful death litigation is to proceed in a unified fashion with all claims by all statutory heirs joined in one civil action. The majority's theory is that the common law of

California permits a wife to litigate, in a lawsuit brought after an injury to her husband but before his death, not just the damages she has incurred or is likely to incur during his lifetime, but damages she expects to incur after an early death which she alleges the defendant will likely cause — a theory in support of which the majority was unable to cite any California case, and one contrary to the Restatement approach, under which post-death damages may be recovered only through a wrongful death action. Boeken Pet. at 7-8 and note 1. Based on its starting premise that Boeken could have sought loss-of-consortium damages covering the period after her husband's early death as part of the lawsuit she dismissed in 2001 (a year before his death), in the majority's view it ineluctably follows that res judicata bars the wrongful death lawsuit she filed after his death seeking damages caused by his death. Boeken Pet., App. A at 11-12.

Philip Morris does not dispute that the theory upon which the majority's decision rested is contrary to the approach of the Restatement, as analyzed in the leading multi-volume treatise in the field of torts. Boeken Pet. at 8, note 1. Its answer does not even cite the Restatement. Nor does Philip Morris dispute that the majority was unable to cite any California case actually holding that a wife may litigate, before her husband's death, a claim for loss-of-consortium damages which she alleges she will incur in the future due to the tortiously premature death of her husband. At the outset of its analysis, Philip Morris represents that "innumerable cases" support the majority's decision, Answer at 2, but Philip Morris does not cite even one case on this point.[1]

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[1] Philip Morris does not even try to defend the majority's citation of Truhitte v. French Hospital (5th Dist. 1982) 128 Cal.App.3d 332, 352-53, in support of its contention that under California law, "in cases of permanent injury" a wife "may recover damage to . . . her marital relation . . . from the date of her spouse's injury to the end of [her husband's] expected lifespan, as measured from just prior to the spouse's injury." Boeken Pet., App. A at 17. Truhitte is doubly irrelevant to the theory espoused by the majority.

Instead, in support of the theory relied on by the majority, Philip Morris cites only a suggested jury instruction, CACI No. 3920. Answer at 2 (citing 2 Judicial Council of Cal., Civil Jury Instructions No. 3920 (2008 ed.), at 757). Suggested jury instructions "are not themselves the law, and are not authority to establish legal propositions or precedent." People v. Morales (2001) 25 Cal.4th 34, 48 n.7. Still, if the CACI instruction's

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First, the alleged wrongdoing involved in the case did not shorten the lifespan of the injured spouse: the medical negligence at issue (a sponge left in the wife's abdominal cavity after surgery) caused the wife only intermittent bowel problems which, while painful, were not life threatening. 128 Cal.App.3d at 338-43. Second, even if the alleged wrongdoing had somehow shortened the wife's life, at trial it was uncontested that the life expectancy of the husband was eight years shorter than that of the injured wife, so that the husband was by definition unharmed by any wrongful shortening of the injured wife's life. Id. at 343.

Nor does Philip Morris try to defend the majority's citation of Allen v. Toldeo (4th Dist. 1980) 109 Cal.App.3d 415, 424, in support of its description of the "damages available" under California law, "in a loss-of-consortium action adjudicated prior to the injured spouse's death," as including "loss-of-consortium damages for the amount of time that the plaintiff is deprived by the injured spouse's death of the spouse's consortium — that is . . . until the end of the injured spouse's expected lifespan, as measured from just prior to the spouse's injury." Boeken Pet., App. A at 18. Allen is even further off the mark than Truhitte. Allen did not even involve a spousal action; it was a lawsuit filed by four minor children for the injures they suffered on account of an auto accident between the defendants and their mother — the mother's husband (if any) was not even a party to the lawsuit. 109 Cal.App.3d at 418. Nor did Allen involve any issue of whether a common-law tort action filed during an injured family member's life can be used to recover post-death damages typically recovered through a wrongful death lawsuit. Quite the contrary: Allen was solely a wrongful death lawsuit, in which the mother was killed by a teenager driving a pickup truck, while pulling her car out of a driveway. Allen merely reaffirmed settled law that the mother's minor children, as statutory heirs under the wrongful death statute, were entitled to recover for their future damages for the period of their mother's life expectancy. Id. at 424. As with Truhitte, Allen in no way supports the proposition for which the majority cited it, so that the majority is left with no California case actually supporting its theory — a point which Philip Morris concedes by its silence.

"Directions for Use" relied on by Philip Morris set forth a synthesis of the law on this point and actually cited precedent for its suggestion that "it may be appropriate" to instruct the jury that damages for harm the uninjured spouse "is reasonably certain to suffer in the future" can be "'measured by the life expectancy that [name of injured spouse] had before [his/her] injury,'" it might supply useful guidance. But, like the majority decision below, the CACI instruction cites no California cases adopting the suggested approach, even though it is contrary to the Restatement approach. Tellingly, the analogous BAJI instructions which were in effect in 2001 when Judy Boeken dismissed her lawsuit (the CACI instructions did not take effect until September 1, 2003), and which had been supplemented and revised over many years, contain no such suggestion. See BAJI 14.40.

In sum, Philip Morris's defense of the Court of Appeal majority's res judicata theory hinges on a sentence contained in the "Directions for Use" section of a CACI instruction which was promulgated two years after Judy Boeken dismissed her lawsuit — an instruction contrary to both the Restatement and the prior BAJI instructions, and unsupported by any California precedent. This is an exceedingly thin reed on which to justify the conflict between the Court of Appeal's decision and the framework for wrongful death litigation long ago set out by the Legislature. When the Legislature first enacted a wrongful death statute, back in 1862, the common law afforded a spouse no claim for loss of consortium, so that no conflict such as that created by the Court of Appeal decision was possible — a statutory wrongful death action was the only conceivable means by which a spouse could obtain post-death damages.

As Philip Morris itself points out, this Court "created the common law right to sue for loss of consortium long after the wrongful death statute was enacted," in 1974. Answer at 7 (citing Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 398). Yet Philip Morris avoids addressing an

obvious point: in recognizing a spouse's common-law remedy for loss of consortium suffered during the injured spouse's lifetime, did this Court in Rodriguez intend that this remedy would permit a spouse to litigate, in a common-law claim brought before death, anticipated post-death damages? The framework established by the Legislature for litigation of post-death injuries cannot be downplayed as carrying only "procedural" implications. Answer at 6. Could this Court really have intended for lower courts to extend Rodriguez so that the common-law remedy would embrace post-death damages, even though the Legislature had provided a statutory remedy addressing that subject more than a century earlier? We respectfully submit that the obvious answer is "no." The Court of Appeal's reading of Rodriguez is supported by neither precedent nor sound principle. This Court should grant review to reverse that court's decision interpreting the common law loss-of-consortium remedy so expansively that it conflicts with a statute, in force since 1862, governing what remedies a spouse (and other statutory heirs) may recover for wrongful death.

II. This Court Should Grant Review to Ensure the Decision Below Does Not Force Spouses to Bear the Burden of Filing Loss-of-Consortium Lawsuits Within Two Years of a Potentially Fatal Injury to Their Spouse, and Does Not Result in Spouses Being Barred From Pursuing a Wrongful Death Claim

Part II of the petition added to the case for review by suggesting that for this Court to leave the novel decision of the Court of Appeal in place would disrupt settled conventions in the area of personal injury litigation, potentially burdening uninjured spouses in uncertain ways. Boeken Pet. at 9-14. This concern is a real one despite Philip Morris's best efforts to minimize the amount of any uncertainty involved.

Prior to the Court of Appeal decision, one could assume that under the Restatement approach, which apparently no California appellate court decision had questioned, someone whose spouse was tortiously injured in a

way which <u>might</u> ultimately result in death could safely wait to see if death occurred and, if it did, only at that point consider filing for both loss-of-consortium damages (at least for the post-death period) and economic damages within two years following death. The Court of Appeal decision casts doubt on the safety of this assumption.

As Philip Morris does not dispute, the same "primary right" doctrine used to define a "cause of action" has long been used to define what claims must be filed within the limitations period to avoid a later statute-of-limitations bar — indeed, the Court of Appeal majority's decision, as advocated by Philip Morris, in ruling against Boeken relied on the "primary right" analysis in statute-of-limitations cases. Boeken Pet., App. A at 9-10 (citing <u>Lamont v. Wolfe</u> (2d Dist. 1983) 142 Cal.App.3d 375). If all claims alleging past or future injury to a relationship with a spouse are part of the same "cause of action" under the "primary right" doctrine, then it would seem to follow that a spouse must file a common-law claim for <u>all</u> loss-of-consortium damages within two years of the date of initial injury, and may not wait for death to occur to file a wrongful death lawsuit seeking these damages. Boeken Pet. at 9-10.

Philip Morris responds by noting that under Code Civ. P. § 335.1, "[t]he Legislature has expressly granted plaintiffs pursuing claims under the wrongful death statute a two-year window for filing suit after the decedent's death." Answer at 8. Its argument, apparently, is that the Court of Appeal decision cannot be construed as denying a plaintiff this time window for seeking post-death damages for loss of consortium. But Philip Morris simply begs the question. In addition to requiring that wrongful death claims be filed within two years of death, the Legislature has also required in Section 335.1 that personal injury actions be filed within two years of the initial injury. As to an uninjured spouse's claim for both past and future loss of consortium caused by an injury which may lead to death, when does

the two-year time period start to run? From the date of initial injury, or from the date of death? Does the law force the uninjured spouse to choose between, on the one hand, suing for relatively small injuries at the risk of later being denied compensation for potentially very large injuries (if death occurs) and, on the other hand, playing it safe and giving up the right to legitimate compensation for smaller injuries in order to preserve the right to pursue compensation for potentially very large injuries later?

Under the Court of Appeal's decision holding that claims for pre-death and post-death damages are all part of the same "cause of action" under the "primary right" doctrine which also informs what is a "cause of action" for statute-of-limitations purposes, defendants will presumably argue that the earlier event starts the two-year period running, and that once an injury accrues and the uninjured spouse is on notice of a loss-of-consortium claim, the failure to file the claim within two years triggers a statute-of-limitations bar to any later lawsuit (even under the wrongful death statute) for loss-of-consortium damages traceable to that injury.

There is something unseemly (at the risk of understatement) about the prospect of the Court of Appeal's "primary rights" analysis being applied to require uninjured spouses to preemptively file for wrongful death damages while the injured spouse is alive — while the body is not merely warm, but still functioning. Beyond the inherent unseemliness, the very existence of uncertainty in this area created by the Court of Appeal decision is likely to cause spouses confusion, and to lead prudent counsel to make protective filings which will consume the resources of the lower courts and of opposing parties. All these considerations weigh in favor of an immediate grant of review of the "primary right" ruling of the Court of Appeal.

As to the "primary right" doctrine itself, Philip Morris correctly notes that in the nearly three decades since this Court addressed the doctrine

in Agarwal v. Johnson (1979) 25 Cal.3d 932, this Court has applied it in only one case, Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, and in Mycogen it saw no occasion to revisit the status of the doctrine. Answer at 12. Still, the scholarly arguments advanced by Professor Heiser for taking a fresh look at the doctrine, Boeken Pet. at 13-14, note 4 (ignored by Philip Morris), and the confusing nature of the doctrine as illustrated by the split decision of the Court of Appeal below, also supply additional considerations weighing in favor of a grant of review.

Conclusion

For all the reasons stated, the petition for review should be granted.

Respectfully submitted,

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May 5, 2008

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Statement of Compliance With Word Limit

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 Petition for Review contains 2,593 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: May 5, 2008

MICHAEL J. PIUZE

PROOF OF SERVICE

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.

On May 5, 2008, I served the foregoing document described as: Plaintiff and Petitioner's **Reply In Support of Petition for Review** dated May 5, 2008, on the parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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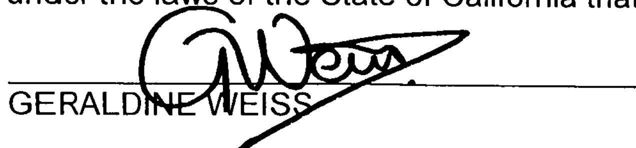

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