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IN THE
SUPREME COURT OF CALIFORNIA

JUDY BOEKEN,
Plaintiff and Appellant,

vs.

PHILIP MORRIS USA INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B196220

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Res judicata bars a plaintiff from suing twice to remedy the same injury.[1/] Here, the trial court and the Court of Appeal properly held that res judicata bars that portion of plaintiff Judy Boeken's wrongful death action which seeks to remedy the loss of her husband's love, companionship and support, because she already sued for the

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1/ Res judicata is a term often used to refer to both the doctrines of claim preclusion and issue preclusion (also known as collateral estoppel). (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; see also *Taylor v. Sturgell* (2008) __ U.S. __, __ [128 S.Ct. 2161, 2171, 171 L.Ed.2d 155].) For convenience, we use the term res judicata to refer only to claim preclusion in this brief.

permanent loss of her husband's love, companionship and support in an earlier negligence action for loss of consortium. This court should affirm.

In her first action, Boeken sued defendant Philip Morris USA Inc., alleging that as a result of defendant's conduct, her husband became unable to perform "work, services and duties in the future," and that she suffered a corresponding loss of his "love, affection, society, companionship, sexual relations, and support." (Appellant's Appendix 00160 (AA).) Accordingly, she alleged she was "permanently deprived and will be deprived of the consortium of [her] spouse." (*Ibid.*) Boeken later dismissed that action with prejudice. (AA 00162.)

After her husband's death, Boeken filed a second action, alleging that as a result of the same conduct by defendant at issue in her first action, she suffered a "loss of love, companionship, comfort, affection, society, solace, and moral support . . . ." (AA 00004.) Because her previous action and her present action both arise out of the same injury to her (i.e., interference with her marital relationship), the trial court sustained defendant's demurrer to Boeken's second action based on the doctrine of res judicata. (AA 00205-00216.) The Court of Appeal affirmed the trial court's decision. (Typed opn., 21.)

In her opening brief, Boeken asserts that in her first action, she could not have recovered the future damages she would suffer after her husband's anticipated premature death, so res judicata could not bar her wrongful death action. Not so. Like any tort plaintiff, Boeken

was able in her first action to seek all of the damages caused by defendant's wrongful conduct, including damages she was likely to suffer in the future as a result of that conduct. (Civ. Code, § 3283.) And indeed, she *did seek these damages*. (See AA 00160.) Res judicata prohibits her from suing again to recover the same damages for the same injury to the marital relationship that she could, and did, seek to remedy in her first action.

Boeken further contends that her two actions sought to remedy different injuries. But the California courts have clearly held that a pre-death loss-of-consortium action and that part of a post-death wrongful death action that is also based on the loss of a spouse's affection, companionship and support seek to remedy the same injury. They are therefore the same "cause of action" within the meaning of res judicata.

Boeken also asks this court to abandon California's primary rights approach to res judicata in favor of a "transactional" test. But she has identified no good reason for such a wholesale revision of California law. And, in any event, res judicata bars Boeken's second action regardless of which test the court applies.

Finally, Boeken argues that the application of res judicata in this case would violate her right to due process because she now says she was not aware that she needed to seek all of her future damages in her pre-death loss-of-consortium action. This argument is belied by the fact that Boeken *did* seek these damages in her first case. Moreover, she is charged with knowledge of the well established law, discussed below, that bars relitigation of the same claims in successive actions.

Therefore, Boeken cannot seriously contend that it would be unjust for the court to apply the doctrine of res judicata to prevent her from asserting claims in her second action that had previously been asserted in her fist action.

BACKGROUND

A. Boeken files her first action for loss of consortium and dismisses it with prejudice.

In March 2000, Boeken's husband Richard brought a personal injury lawsuit, alleging that defendant's wrongful conduct caused him to develop lung cancer. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1649 (*Boeken I*).) His complaint alleged that he was "dying and has suffered, and continues to suffer permanent injuries to his person." (Declaration of Adam M. Flake in support of defendant's concurrently filed request for judicial notice, exh. A, ¶ 25.) He also expressly claimed future damages. (See Flake Decl., exh. A, ¶¶ 25, 26, 28.)

While that personal injury action was pending, Boeken filed her own separate lawsuit against defendant, in which she claimed permanent losses and future damages based on the impact of defendant's wrongful conduct on her marital relationship. Specifically, Boeken alleged that due to her husband's personal injuries, she suffered a "loss of support and also the loss of love, affection, society,

companionship, sexual relations, and support for Plaintiff," and that her husband "will [not] be able to perform [his spousal] work, services, and duties *in the future.* By reason thereof, Plaintiff has been *permanently* deprived *and will be* deprived of the consortium of Plaintiff's spouse, including the performance of her spouse's necessary duties, all to Plaintiff's damage." (AA 00160, emphases added.)

A few months later, in February 2001, Boeken voluntarily dismissed her action with prejudice. (AA 00162.) Richard Boeken's action proceeded to trial, which led to a payment of over $80 million to Boeken as executrix of Richard Boeken's estate. (See *Boeken I, supra,* 127 Cal.App.4th at p. 1640.)[2/]

2/ The Court of Appeal modified the amount of punitive damages awarded by the trial court to $50 million, but left intact the trial court's award of $5,539,127. (*Boeken I, supra,* 127 Cal.App.4th at p. 1704; Flake Decl., exh. B [Judgment on Special Verdict in *Boeken I*].) The principal amount of Richard Boeken's $55,539,127 judgment accrued over $25 million in interest from June 2001, when the judgment was originally entered, until March 2006, when defendant satisfied the judgment after appeal. (See Flake Decl., exh. C [Satisfaction of Judgment in *Boeken I*]; Code Civ. Proc., §§ 685.010, subd. (a) [postjudgment interest accrues at 10 percent annually], 685.020, subd. (a) [interest begins to accrue on the date of entry of the money judgment], 685.030, subd. (b) [interest ceases to accrue on the date the judgment is satisfied in full].)

B. Again seeking consortium damages, Boeken files this second action, which the trial court finds is barred by res judicata.

After Richard Boeken died of lung cancer in January 2002, Boeken filed this second action for wrongful death. (AA 00088; see AA 00001-00008 [amended complaint].) As in her previous action for permanent loss of her husband's consortium, Boeken alleged in her operative complaint that defendant's conduct caused her husband to develop lung cancer and that as a result, Boeken sustained an injury to her marital relationship in the form of "loss of love, companionship, comfort, affection, society, solace, and moral support . . . ." (AA 00004.) Boeken's son Dylan also asserted wrongful death claims, and the Richard and Judy Boeken Revocable Trust asserted unspecified "personal property" damage claims. (AA 00004-00007.)

Defendant demurred, arguing that Boeken's wrongful death action was barred by res judicata. (AA 00075-00084.) The trial court agreed, and sustained the demurrer without leave to amend as to Boeken.[3/] (AA 00205-00216.)

3/ Defendant also asserted that the then operative first amended complaint was uncertain. (AA 00076-00079.) The trial court agreed and sustained the challenge to the first amended complaint on that basis, but gave the remaining plaintiffs (Dylan and the trust) leave to amend. (AA 00209-00210.) This appeal does not concern those plaintiffs' claims.

C. The Court of Appeal affirms.

On appeal, Boeken argued that in her original loss-of-consortium action, she could not have recovered all of the damages she sought in her second action, and that res judicata therefore should not bar her second action.[4/] (Typed opn., 16.) She also argued that res judicata should not apply because her second action did not seek to remedy the same injury as her first action. (Typed opn., 12.)

The Court of Appeal rejected both of Boeken's arguments. It held that in her first action, Boeken could have, and did, seek all of the future damages she was entitled to recover for the loss of her husband's consortium, including future damages that she would suffer after her husband's premature death. (Typed opn., 16-18.) The Court of Appeal also held that the injury Boeken sought to remedy in each action was the same. (Typed opn., 11.)

4/ In addition to alleging harm to her marital relationship, the operative complaint in Boeken's second action alleged that she incurred burial expenses as a result of Richard Boeken's death. (AA 00004.) Boeken did not contend in the trial court that such damages should be considered separately for res judicata purposes. The Court of Appeal held this claim was abandoned, and Boeken has not challenged that ruling in her opening brief on the merits. (See typed opn., 12, fn. 12.) It is important to note, however, that defendant does not argue that wrongful death damages distinct from harm to the marital relationship would be barred by a spouse's prior consortium action. (See, e.g., *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 643 (*Grisham*) [plaintiff's claim for purely economic injury is distinct from a claim for physical injury].)

Justice Turner dissented based on his view that Boeken's pre-death loss-of-consortium action and the loss-of-consortium elements of her wrongful death action were based on different injuries. (Typed dis., 1-3.)

LEGAL ARGUMENT

I.

BECAUSE BOEKEN COULD, AND DID, SEEK TO RECOVER ALL OF THE CONSORTIUM DAMAGES CAUSED BY DEFENDANT'S CONDUCT IN HER FIRST ACTION, RES JUDICATA BARS HER CLAIM FOR CONSORTIUM DAMAGES IN THIS SECOND ACTION.

A. Res judicata bars consecutive actions on a single primary right.

Under the doctrine of res judicata, a plaintiff may not pursue a cause of action in one proceeding, and then relitigate the same cause of action in a later action against the same defendant. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (*Mycogen*).) "Under this doctrine, all claims based on the same cause of action must be decided

in a single suit; if not brought initially, they may not be raised at a later date." (*Ibid.*)[5/]

In the context of res judicata, this court has explained that the "cause of action" is based on the harm suffered by the plaintiff, as opposed to the particular theory asserted by the plaintiff. (*Peiser v. Mettler* (1958) 50 Cal.2d 594, 605.) This court has often since repeated the rule that the term "cause of action" refers not to a specific legal theory, but to the primary right that a defendant's conduct has violated, and which a plaintiff seeks to vindicate: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-796 (*Slater*); accord, *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954 (*Agarwal*), overruled on another ground in *White v.*

5/ Res judicata applies only if the parties in the later proceeding were parties to, or in privity with parties to, the prior proceeding, and if the decision in the prior proceeding is final and on the merits. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.) Boeken previously admitted that the conditions for application of res judicata are met here. (AA 00129 [admitting, in opposition to defendant's motion to dismiss filed in federal court, that there is privity between the parties and that Boeken's decision to dismiss her loss-of-consortium action with prejudice constituted judgment on the merits].) She does not, and cannot, contend otherwise on appeal. Defendant and Boeken were both parties to the previous lawsuit (AA 00159), which Boeken ultimately dismissed with prejudice (AA 00162). Moreover, "'[t]he bar raised by a dismissal with prejudice is equal, under the doctrine of res judicata, to the bar raised by a judgment on the merits.'" (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820-821.)

Ultamar (1999) 21 Cal.4th 563, 574, fn. 4) [the significant factor in determining whether two claims are based upon the same cause of action is the harm suffered].)

In more recent years this court has not retreated from this basic proposition of California law. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682 (*Crowley*) [for res judicata analysis, injury must be distinguished from legal theory upon which liability is premised]; *Mycogen, supra,* 28 Cal.4th at p. 904 ["'the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on which liability for that injury is premised'"]; *Grisham, supra,* 40 Cal.4th at p. 642 [res judicata bars a later suit even "when that suit alleged a different theory of recovery for the same injury"].)

Moreover, although the cause of action is defined for res judicata purposes by the nature of the plaintiff's harm alleged in successive actions, "'"[t]he 'cause of action' is to be distinguished from the 'remedy' and the 'relief' sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right."'" (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1247.) "'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.'" (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)

Finally, res judicata bars not only claims that were actually litigated, but also all *potential* claims that arise out of the defendant's invasion of the primary right placed at issue in the first action: "'the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable'" in the prior proceeding. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975, emphasis omitted, quoting *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.)

B. Boeken's claim here is barred because pre-death loss-of-consortium actions and wrongful death actions by a spouse seeking consortium damages are based on the same primary right, namely, to be free from interference with the marital relationship.

Under the foregoing principles and authorities, Boeken's claim for noneconomic damages in this action is plainly barred. Boeken's pre-death loss-of-consortium action sought to remedy her "permanent" and "future" loss of her husband's "support . . . love, affection, society, companionship, [and] sexual relations." (AA 00160.) Boeken's post-death wrongful death action likewise sought to remedy "the loss of love, companionship, comfort, affection, society, solace, and moral support" she suffered as a result of defendant's actions. (AA 00004.) Boeken's own allegations therefore demonstrate her two actions were

based on the same injury—the permanent deprivation of her husband's consortium caused by defendant's wrongful conduct.

Boeken nonetheless argues that her prior loss-of-consortium action and her current wrongful death action alleged different injuries within the meaning of res judicata. (Opening Brief on the Merits 18-22 (OBOM).) This argument is without merit.

This court has explained that a loss-of-consortium action is based on harm to the plaintiff's "marriage relationship" resulting from injuries suffered by the plaintiff's spouse, embracing "'such elements as love, companionship, affection, society, sexual relations, solace and more.'" (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 404-405 (*Rodriguez*).) Under the umbrella term "loss of consortium," these damages include injury to "'conjugal society, comfort'" and "*moral* support" (*id.* at p. 405) as well as a wife's "deprivation of a husband's physical assistance in operating and maintaining the family home" (*id.* at p. 409, fn. 31).[6/]

Employing terms that parallel those used to outline the injury at issue in a loss-of-consortium action, courts have long held that a wrongful death action remedies the "deprivation of the society, comfort, care, and protection of the deceased, as well as of his support." (*Hale v. San Bernardino etc. Co.* (1909) 156 Cal. 713, 716; see

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6/ There is of course no distinction between a wife who brings an action for the loss of consortium she suffers as a result of her husband's injury, and a husband who brings an action for the loss of his wife's consortium he suffers as a result of his wife's injury. (See *Rodriguez, supra,* 12 Cal.3d 382.)

also *Krouse v. Graham* (1977) 19 Cal.3d 59, 68 (*Krouse*) [wrongful death actions remedy the loss of a spouse's "'society, comfort, and protection'" (quoting *Bond v. United Railroads* (1911) 159 Cal. 270, 286)]; *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200 [a wrongful death action allows recovery for "the loss of a decedent's society, comfort, protection, care, companionship, etc."].)

The congruence between a plaintiff's pre-death consortium action and that part of the plaintiff's wrongful death action based on loss of affection, companionship, support and so forth is clear from the foregoing authorities. Both seek recovery based on the defendant's invasion of a single primary right, which this court described as the primary right "to be free of the loss of consortium resulting from injury to a spouse caused by the tortious act of another." (*Krouse, supra,* 19 Cal.3d at p. 70 ["those elements of recovery sought by [a surviving spouse in a wrongful death action] clearly would be available to [the surviving spouse] as 'consortium' damages in the usual personal injury action for [the decedent's] injuries"]; *Budavari v. Barry* (1986) 176 Cal.App.3d 849, 854, fn. 7 ["To the extent that appellant here seeks recovery for loss of consortium, a wrongful death action affords compensation for *equivalent elements*: loss of support or services, and deprivation of love, companionship, affection, and the like" (emphasis added)]; *Pesce v. Summa Corp.* (1975) 54 Cal.App.3d 86, 90, fn. 1, 92 [finding the wife of an injured longshoreman is entitled to the same remedy for the same injury suffered by the widows of deceased longshoremen: "we can perceive no logical, sound or reasonable basis

to differentiate between the case where the husband is killed, as contrasted to injured, in respect to the wife's entitlement to recover for loss of consortium," and "there is a distinction without a discernible difference between loss of society and loss of consortium"]; see also *American Export Lines, Inc. v. Alvez* (1980) 446 U.S. 274, 281 [100 S.Ct. 1673, 64 L.Ed.2d 284] [plurality op. of Brennan, J.] ["there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society" under general maritime law].)

Consistent with the principle that a surviving spouse's consortium action and the portion of his or her wrongful death action seeking damages for harm to the marital relationship arise from the same injury, the Court of Appeal in *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375 (*Lamont*) allowed a husband to amend his complaint to add an otherwise time-barred wrongful death claim asserted in an amendment to a complaint that had originally been filed by the husband as a negligence action for consortium as a result of physical injuries suffered by his wife. The wrongful death action was deemed to be a "continuation" of the consortium action, rather than a wholly separate cause of action: "[t]he injuries suffered by [plaintiff] as husband suing for loss of consortium and as heir suing for wrongful death are personal to him and include the same elements of loss of love, companionship, affection, society, sexual relations, and solace." (*Id.* at pp. 380, 382.) The court rejected the defendant's argument that it would be somehow "illogical to apply the relation back doctrine in

this case because it would result in [the husband's] wrongful death action relating back to a date before it ever existed." (*Id.* at p. 381.) The court reasoned that such an argument ignores the fact that a loss-of-consortium action and a wrongful death action both seek "recovery for essentially the same loss." (*Ibid.*) The court concluded, "[w]hile Code of Civil Procedure section 377 creates a cause of action for wrongful death, under the circumstances of this case *it is not a wholly different cause of action* but more a continuation under a different name of *the original cause of action for loss of consortium.*" (*Id.* at p. 382, emphases added.)

These authorities all directly support the lower courts' conclusion in this case that Boeken's second action is predicated on the same primary right as her earlier consortium action, and is thus barred.

C. Nothing in California law supports carving out consortium damages suffered after a spouse's premature death as an injury distinct from pre-death consortium damages.

1. California law allows a wife who files a loss-of-consortium action to seek *all future damages*, including the harm to the marital relationship after the husband's anticipated premature death.

To avoid the routine application of res judicata in this case, Boeken highlights the fact that her wrongful death suit seeks damages based on a period of time—after her husband's death—that had not yet occurred when she filed her consortium claim. (OBOM 7-16 [arguing that the application of res judicata in this case would amount to a rule of "damages for death first, death afterwards," and that such a rule is "bizarre," "unseemly," and reminiscent of Alice in Wonderland.) But this court has explained that the application of res judicata does not turn on any distinction between past and future injuries: "it is no warrant for a second action that . . . all the damage may not then [at the time of the first action] have been actually suffered. [Plaintiff] is bound to prove in the first action not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to, for the judgment he recovers in such action will be a conclusive adjudication

as to the total damage on account of the breach." (*Abbott v. The 76 Land and Water Co.* (1911) 161 Cal. 42, 48.)

Boeken, however, argues that her first action cannot bar her second action because her first action gave her no opportunity to seek the damages she would suffer after her husband's premature death, and that a rule allowing her to seek all of the damages she was likely to suffer as a result of her injury—the loss of her husband's support and companionship—in her first action would be "bizarre" and "unseemly." (OBOM 7-16.) Her position is contrary to the most basic damages principles.

By statute, all tort plaintiffs may recover "for all the detriment proximately caused" by tortious conduct (Civ. Code, § 3333), including all of the damages they have suffered or are likely to suffer in the future as a result of their injuries (Civ. Code, § 3283 ["Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future"]). Accordingly, plaintiffs regularly seek, and are awarded, future damages. (See, e.g., *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995, disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [allowing a plaintiff to recover future damages for emotional distress that she was likely to suffer for the remainder of her life].)

Such future damages include those that will be incurred due to a person's anticipated premature death caused by the injury that is the subject of the lawsuit. For example, in *Fein v. Permanente Medical Group*

(1985) 38 Cal.3d 137, 153 (*Fein*), this court held that future economic damages include lost wages that would have been earned during the "lost years" period of the plaintiff's decreased life expectancy. Quoting the United States Supreme Court's decision in *Sea-Land Services v. Gaudet, Inc.* (1974) 414 U.S. 573, 594 [94 S.Ct. 806, 39 L.Ed.2d 9], this court explained that in a personal injury action, "'[u]nder the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury.*"'" (*Fein*, at p. 153, accord, *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171-174 (*Overly*) [allowing recovery for "lost years" damages].)

Consistent with these authorities, Richard Boeken himself, before his wife filed her consortium action, pled his anticipated death and sought such "lost years" damages in his prior action.[7/] Therefore, contrary to Boeken's contention (OBOM 7), there is nothing "bizarre"

7/ During the closing argument of Richard Boeken's case against defendant, Richard Boeken's attorney (who also represents Boeken in this case) argued: "Anyway, [you are to compensate Richard Boeken] for what he has been through since [he developed lung cancer] in October of 1999, and for what he is going to go through now, he can't even attend his own trial. And for what he is going through for however long he is, before the fatal disease slays him, *and for the last . . . 21.4 years in the future*, . . . it's like around 2022, '23, that's a long, long, long time that he is not going to have, with his wife, with his kid." (Flake decl., exh. D, pp. 6015-6016, emphasis added].)

or "unseemly" about allowing a plaintiff who has suffered some, but not all, of her damages at the time of her lawsuit to seek all of those damages in a single action.[8/]

This rule is no different for Boeken's loss-of-consortium claim. As with any other tort plaintiff, a plaintiff seeking to recover for loss of consortium may seek all future damages. California's model jury instruction on loss-of-consortium damages, CACI No. 3920 (2003) explicitly recognizes that future damages are available in a loss-of-consortium action: "[*Name of plaintiff*] may recover for harm [he/she] proves [he/she] has suffered to date and *for harm [he/she] is reasonably certain to suffer in the future.*" (Second emphasis added.)[9/]

8/ The new rule advocated here by Boeken, in contrast, would result in awkward trials where both the impaired spouse and the consortium spouse try their claims together. Under Boeken's proposed rule, a dying plaintiff like Richard Boeken could claim twenty-plus years of lost years damages, while his co-plaintiff spouse could ask the same jury for consortium losses only up to the date of anticipated death. That jury would likely be confused by applying different standards to the two plaintiffs, and the potential exists that lost years damages would seep into the consortium spouse's recovery, even if the jury was instructed to limit damages to the date of death. It makes far more sense for both plaintiffs to be able, as California law currently allows, to argue the same time frame for damages in a single lawsuit. And as discussed below, California public policy discourages the multiplicity of suits that would be generated by Boeken's proposed new rule.

9/ The BAJI model jury instruction on loss of consortium, BAJI No. 14.40 (2008), similarly makes clear that a loss-of-consortium plaintiff may recover future damages: "If you find that plaintiff [] is entitled to

(continued...)

Moreover, the "Directions for Use" following CACI No. 3920 directly refute Boeken's contention here, and confirm that Boeken could have obtained all her future damages "'as measured by the life expectancy that [Richard Boeken] had before [his] injury." They state: "Depending on the circumstances of the case, it may be appropriate to add after 'to be suffered in the future' either 'during the period of [*name of injured spouse*]'s disability' or 'as measured by the life expectancy that [*name of injured spouse*] had before [his/her] injury or by the life expectancy of [*name of plaintiff*], whichever is shorter.'" (CACI No. 3920.)

This measure of damages is in perfect harmony with the rule in *Fein,* allowing a physically injured plaintiff similarly to recover future damages for the years of life after the plaintiff's anticipated death, i.e., the years lost as measured by the plaintiff's *pre-injury* life expectancy. Moreover, the CACI Directions for Use properly reflect other California authority allowing future loss-of-consortium damages as measured by the physically injured spouse's *pre-injury* expected life span. (See, e.g., *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 353 (*Truhitte*) [the appropriate time period to measure a husband's damages for his future

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9/ (...continued)
a verdict against defendant[s] and that the act or omission upon which you base your finding of liability has caused plaintiff [] to suffer *or to be reasonably certain to suffer in the future* any of the following losses . . . ." (Emphasis added.)

loss of consortium due to an injury to his wife is the shorter of (a) his life expectancy or (b) his wife's life expectancy, if hers were shorter].)[10/]

In arguing to the contrary, Boeken relies on two comments from the Restatement Second of Torts in support of her theory that in her first action, she could have sought only the damages she would suffer up to her husband's anticipated premature death. (OBOM 11-14, citing Rest.2d Torts, §§ 693, com. f ["In case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this [loss-of-consortium] Section only for harm . . . between the injury and death"], 925, com. j ["The amount recoverable by a spouse or a parent for injury to a spouse or child, aside from the death action, includes an amount for the expenses and loss of services or society of the spouse or loss of services of the child to the time of death, and neither the death nor a survival statute impairs this right of the spouse or parent to recover for those items since they are not included within the provisions of any of the types of deaths statutes"].) If these comments suggested that a loss-of-consortium plaintiff may not seek all of the

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10/ In a footnote, Boeken seeks to distinguish *Truhitte* because it did not involve an injury that shortened the decedent's life expectancy, and because in that particular case, the plaintiff seeking loss-of-consortium damages had a shorter life expectancy than the spouse who was physically injured. (OBOM 10, fn. 8.) But neither *Truhitte* nor any other case cited by Boeken indicates that the damages a loss-of-consortium plaintiff may seek are limited in the way Boeken suggests. Instead, *Truhitte* recognizes that, like any other tort plaintiff, a loss-of-consortium plaintiff is allowed to recover all of the future damages he or she will suffer as a result of her spouse's injury.

damages she is likely to suffer from the defendant's wrongful conduct, the Restatement would not accurately reflect California law, as explained above. But as the Court of Appeal properly recognized (typed opn., 19-20), the Restatement is not actually in conflict with California law.

The Restatement's comments contemplate the procedural posture of the vast majority of wrongful death/loss-of-consortium 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.[11/] In such a situation, the date of death is certain. Pre-death consortium damages can be awarded concurrently with wrongful death consortium damages, without fear of over- or under-compensation, and without the need for duplicative litigation. The Court of Appeal therefore noted that these comments simply do not apply to the less common procedural posture of this case involving a fatal physical injury that does not result in death until some later time, affording the injured person's spouse an opportunity to sue for consortium *before* death occurs. (Typed opn., 19-20 [citing cases].)[12/]

11/ The same is true of the treatises cited by Boeken. (See OBOM 13.)

12/ In the out-of-state cases cited by Boeken, the courts distinguished between damages incurred before death and after death in the context of *post-death* law suits seeking both pre- and post-death damages. (*Warrick Hospital, Inc. v. Wallace* (Ind.Ct.App. 1982) 435 N.E.2d 263, 265,

(continued...)

In sum, although she does not explicitly admit it, Boeken asks this court to make a new rule, and hold that unlike other tort plaintiffs, a wife who suffers a loss of consortium due to her husband's injury may not recover all of her future damages, but is instead limited to recovering the damages she suffers between her husband's injury and the date of the expected *premature* death from his injury, and must file a second action later to collect post-death consortium damages. (See OBOM 7-16.) No California authority supports such a rule.

12/ (...continued)
269, overruled on another ground in *Community Hosp. v. McKnight* (Ind. 1986) 493 N.E.2d 775; *Hatch v. Tacoma Police Dept.* (2001) 107 Wash.App. 586 [27 P.3d 1223] [same]; *Bridges v. Van Enterprises* (Mo.Ct.App. 1999) 992 S.W.2d 322, 325-326 [same]; *Novelli v. Johns-Manville Corp.* (1990) 395 Pa.Super. 114, 148-149 [576 A.2d 1085, 1087] [same].)

Courts that have considered the question of pre-death claims for future consortium damages fall in line with California law. For example, in *Hall ex rel. Hall v. Rodricks* (2001) 340 N.J.Super. 264 [774 A.2d 551], the court held that loss of consortium should be measured by the physically injured spouse's pre-injury life expectancy rather than by his much shorter, post-injury life expectancy because the "majority rule in this country is that a tort victim suing for damages for permanent injuries is permitted to recover loss of earnings based on life expectancy at the time of the injury, *undiminished by any shortening of that expectancy as a result of the injury.*" (*Id.* at pp. 557-558, citing *Overly, supra,* 74 Cal.App.4th at pp. 172-173, emphasis added.) And in *Roers v. Engebretson* (Minn.Ct.App. 1992) 479 N.W.2d 422, the court explained that because "Minnesota is within a majority of jurisdictions that measure future loss by *pre-injury life expectancy* . . . [¶] . . . future loss of consortium due to death is recoverable at common law while the injured party is living." (*Id.* at pp. 423-424, emphasis added.)

2. Allowing loss-of-consortium plaintiffs to recover all future damages for harm to the marital relationship does not conflict with the wrongful death statute.

a. The wrongful death statute's procedure for joining heirs' post-death claims into one action is no basis for treating a spouse's pre- and post-death consortium claims as arising from separate primary rights.

Boeken argues the joinder clause in California's wrongful death statute justifies her decision to split her consortium claims into two actions. Specifically, she argues that, under the wrongful death statute, "all claims for damages alleged to have resulted from a wrongful death are to be treated as indivisible and joined together in one suit, with a verdict returned for one sum and then divided among the eligible claimants," and therefore, she says, she could not have earlier sought the consortium damages she now seeks in her wrongful death action. (OBOM 14-15, emphases in original.)

In other words, Boeken argues that, based on the compulsory joinder requirement of Code of Civil Procedure section 377.60, all heirs' statutory rights to recover for their various injuries in a wrongful death action necessarily comprise only one primary right, so that a damages claim that would be cognizable *independent* of the

wrongful death statute (such as a spouse's future loss-of-consortium claim) is effectively trumped by the statute, and cannot be tried separately before death.

This court long ago rejected the argument that section 377.60's joinder requirement means a wrongful death action is based on a single joint injury to all the statutory heirs: "Section 377 of the Code of Civil Procedure is a *procedural* statute establishing compulsory joinder and *not a statute creating a joint cause of action.*" (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692, emphases added.) Accordingly, "each heir should be regarded as having a personal and separate cause of action." (*Ibid.*) And nothing in the wrongful death statute indicates that, as Boeken would have it, a spouse's common law claim for future loss-of-consortium damages on a theory independent of that statute cannot be pursued until after the spouse's death.[13/] Indeed, this court created the common law right to sue for loss of consortium long *after* the wrongful death statute was enacted (*Rodriguez, supra,* 12 Cal.3d at p. 398), so the Legislature cannot have intended to extinguish a claim that did not even exist when it passed section 377.60 in 1872.

13/ Boeken's citation to *Corder v. Corder* (2007) 41 Cal.4th 644, 651-652 is unhelpful to her argument. Although *Corder* holds that all heirs asserting statutory wrongful death claims must join any claims they have under the statute in a single action (*id.* at p. 652), nothing in that case precludes a loss-of-consortium plaintiff from seeking all of her future damages in a pre-death action under a theory independent of the statute.

Boeken rhetorically asks whether this court, in approving consortium claims, could "have meant to create a remedy overlapping with the existing wrongful death statute, by permitting a spouse to litigate, through a common-law claim brought before death, anticipated post-death damages," and whether it would be reasonable to "expand" consortium remedies to embrace some damages that are available after death by statute. (OBOM 15.) She asserts that the answer is no. (*Ibid.*)

But the fact that the future damages available in a loss-of-consortium action may overlap with the statutory damages available to a spouse in a wrongful death action is no reason to arbitrarily limit a loss-of-consortium plaintiff to seeking only pre-death damages.[14/] This court has, in fact, already rejected an argument almost identical to the one Boeken makes here. In *Fein, supra,* 38 Cal.3d 137, the plaintiff suffered a life-shortening, but not immediately fatal, heart attack, which could have been prevented if he had been properly diagnosed

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14/ Allowing common law claims for post-death damages in no way undermines the statutory right to recover such damages in a wrongful death action. The wrongful death statute has a special accrual date and limitations period (Code Civ. Proc., § 335.1), so that one who chooses not to file a pre-death consortium claim may still file a wrongful death action after the death occurs. That choice is preserved under the rule properly applied by the lower courts here, under which claims on a single primary right may be governed by multiple limitations periods applicable to multiple legal theories of recovery, but may *not* be split into successive actions. Indeed, the "application of the statute of limitations does not depend on whether a prior action was brought, or on how it was resolved." (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1146.)

by defendant. (*Id.* at p. 145.) One of the elements of damages the plaintiff was allowed to recover was compensation for the wages he would have earned during the years of his life that he was likely to lose as a result of the heart attack (i.e., the years he would have lived but for defendant's failure properly to diagnose him). (*Ibid.*) As Boeken does in this case, the defendant in *Fein* argued that such damages could properly be recovered later in a wrongful death action, so the plaintiff should be prohibited from recovering the same "lost years" damages in his pre-death law suit. (*Id.* at p. 153.) This court disagreed, holding that he should be allowed to recover such future damages. (*Ibid.*) To avoid any duplicative recovery, the pre-death award for future lost wages would offset any economic damages his heirs might later seek in a wrongful death action. (*Id.* at pp. 153-154.)

The wrongful death statute no more prevented Boeken from recovering all her future damages than it prevented the plaintiff in *Fein* from recovering his.[15/] Boeken could, and did, assert in her first action

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15/ In arguing to the contrary, Boeken's reliance on *Justus v. Atchison* (1977) 19 Cal.3d 564, overruled on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171 (ABOM 14-15, 20) is misplaced. *Justus* stated that the Legislature intended to "occupy the field" of wrongful death recovery. (*Justus*, at pp. 574-575.) But *Justus* was addressing only the scope of the statutory right—this court used the "occupy the field" language in the context of noting that the Legislature did not specify the death of an unborn fetus as triggering accrual of a wrongful death claim, so the court chose not to read such language into the statute. The court did not say it construed the statute as limiting any *independent common law* theories of recovery. Thus, (continued...)

a claim for *all* of the consortium damages from the loss of her husband's love, companionship, affection, and society caused by defendant's conduct, without regard to whether the loss was or would be suffered before or after her husband's death. By operation of the doctrine of res judicata, her decision to bring that action was an election to seek her damages in that context rather than in a later accruing claim under a different legal theory on the same primary right. (See, e.g., *Williams v. Pacific Mutual Life Ins. Co.* (1986) 186 Cal.App.3d 941, 951-953 [statutory FEHA claim was not time-barred when filed within the statutory deadline after accrual, but was barred by res judicata where plaintiff had previously brought an earlier accruing action on the same primary right under a different legal theory].) Her present action—which seeks the same consortium damages for a second time—is thus barred.

15/ (...continued)
nothing in *Justus* forecloses a plaintiff from recovering future damages in a common law action before death. Indeed, as explained above, seven years after *Justus* was decided, this court specifically held that the wrongful death statute *did not* preclude damages in pre-death claims that overlap with those in a wrongful death action. (*Fein, supra,* 38 Cal.3d at p. 153.)

b. The other authorities Boeken cites do not support treating pre- and post-death loss of consortium as qualitatively different injuries within the meaning of res judicata.

Like the wrongful death statute itself, the cases Boeken cites touching on miscellaneous aspects of wrongful death claims offer no support for her arguments. Boeken quotes *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283 (*Horwich*), for the proposition that the wrongful death statute grants *heirs*, including a decedent's spouse, a "*new cause of action* . . . distinct from any *the deceased* might have maintained had he survived.'" (*Ibid.*, second emphasis added.) But *Horwich* gives no indication that a wrongful death action by a surviving spouse is based on a primary right distinct from the right at issue in that a loss-of-consortium action *by the same person*.

Dominguez v. City of Alhambra (1981) 118 Cal.App.3d 237 (*Dominguez*) is inapposite for the same reason. *Domiguez* holds that an estate's survival action filed after the statute of limitations has expired did not relate back to the filing of an earlier wrongful death action because the *estate's* action was "wholly distinct" from the *heirs'* wrongful death action in that it sought to remedy injuries *suffered by the decedent* prior to his death, while the wrongful death action was "for the loss of support, comfort and society suffered independently *by the heirs* . . . ." (*Id.* at p. 243, emphasis added.) It does *not* hold that a surviving spouse's wrongful death action for her own noneconomic harm seeks

to remedy an injury different from her pre-death loss-of-consortium action.[16/]

Wilson v. John Crane, Inc. (2000) 81 Cal.App.4th 847 is likewise inapposite. *Wilson* holds that settlement funds paid before a tort victim's death to foreclose heirs' anticipated future wrongful death claims against settling defendants cannot be used to offset a wife's consortium judgment against a severally liable *non*settling defendant. (*Id.* at pp. 861-862.) Of course, under Proposition 51, any pre-trial settlement by one defendant creates no offset against non-economic damages owed severally by a nonsettling defendant. (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276-277; *Wilson,* at p. 863.) *Wilson*

16/ These decisions reinforce the principle that the focus here must be on the harm to Boeken herself, and thus highlight the flaw in Justice Turner's dissent in this case. Justice Turner argued that "the injury for res judicata purposes is the decedent's death" (typed dis., 1), but the majority correctly rejected this reasoning. In determining whether res judicata bars Boeken's second action, the focus must be on the injury suffered by *her*, not her husband. (See *Lamont, supra* 142 Cal.App.3d at p. 380; *Lantis v. Condon* (1979) 95 Cal.App.3d 152, 157 (*Lantis*) ["Loss of her husband's consortium impairs a *wife's interests* which are *wholly separate and distinct* from that of her husband: " . . . 'the wife's loss is just as real as it is *distinct*. She can no longer enjoy *her* legally sanctioned and morally proper privilege of copulation or procreation, and is otherwise deprived of *her* full enjoyment of *her* marital state. These are *her rights*, not his.'" (quoting *Rodriguez, supra,* 12 Cal.3d at p. 405, emphases added)]; accord, *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1394.) Because the interference with the marital relationship Boeken sought to remedy in her prior loss of consortium action was the same harm to her that gave rise to the consortium claim in her wrongful death action, her second action is barred by res judicata.

therefore did not turn on distinguishing pre- and post-death consortium loss. And, as the Court of Appeal properly recognized, *Wilson* certainly does not indicate that the wife could pursue a separate wrongful death action after her husband's death, despite having previously filed an action for loss of consortium, as Boeken is attempting to do here. (Typed opn., 14 [*Wilson* "deals with credits for settlement payments, does not suggest that a [wife's] loss-of-consortium claim arises from a primary right different than her wrongful death claim for harm to her marital relationship"].)

Lantis, supra, 95 Cal.App.3d 152 is no more helpful to Boeken. In *Lantis,* the Court of Appeal was required to decide whether a husband's negligence in contributing to his own injury should be attributed to his wife in order to reduce her recovery of loss-of-consortium damages. (*Id.* at p. 158.) The defendant attempted to analogize to the wrongful death context, in which a decedent's contributory negligence could be asserted as a defense to a spouse's recovery of damages. (*Ibid.*) The court rejected this argument, and explained that the rule applying contributory negligence as a defense in wrongful death actions was "an anomaly and an anachronism resulting from the unique historical circumstances surrounding the development of a cause of action which was created entirely by statute." (*Ibid.*) Unlike wrongful death actions, the right of a spouse to recover for loss of consortium in cases of non-fatal injury was judicially created; the court therefore was not constrained by the historical rule that governs the wrongful death statute. (*Ibid.*) That is the backdrop

for the court's comment that "the cause of action for loss of consortium does not resemble wrongful death because it has no statutory foundation but is entirely of judicial origin."[17/] (*Ibid.*)

Although the court in *Lantis* recognized the distinct origins of common-law loss-of-consortium claims and spouses' statutory wrongful death actions seeking consortium, it did not differentiate between the primary rights at issue under the two legal theories. (*Lantis, supra,* 95 Cal.App.3d at p. 158) As explained above, the fact that the different claims may rest on different legal theories—common law and statutory law—is irrelevant to the application of res judicata. (See *ante,* pp. 9-10).

Boeken also claims that *Agarwal, supra,* 25 Cal.3d 932, supports her argument that loss-of-consortium actions and wrongful death actions are based on different primary rights because they "draw on distinct bodies of law. . . ." (OBOM 22.) But neither *Agarwal* nor any

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17/ The Court of Appeal's use of the term "cause of action" in the above quote does not support Boeken's argument. This court has noted that outside the context of res judicata, "the phrase 'cause of action' is 'often used indiscriminately to mean what it says and to mean counts which state differently the same cause of action." (*Slater, supra,* 15 Cal.3d at p. 796; accord, *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 81, fn. 6.) As discussed above, in the context of res judicata, the term is used much more discriminately. "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Crowley, supra,* 8 Cal.4th at p. 681.) Because *Lantis* did not address principles of res judicata, there is no indication that the *Lantis* court was using the term "cause of action" in this specialized sense.

other California case indicates that two claims arise from different primary rights because they draw on distinct bodies of law. Indeed, this court has recently reiterated that the opposite is true. (See *Mycogen, supra,* 28 Cal.4th at p. 904 [primary rights analysis does not turn on legal theory on which liability is premised].)

Finally, again citing *Agarwal, supra,* 25 Cal.3d 932 Boeken argues that mere factual overlap between her two actions does not mean that res judicata bars the second case. (OBOM 21-22.) But defendant has never claimed that mere factual overlap means that res judicata bars the second action. Instead, as explained above, res judicata bars Boeken's second action because the *injury* Boeken sought to remedy in each action arose from the alleged invasion of a single primary right. (See *ante,* pp 9-10.)[18/]

18/ In *Agarwal, supra,* 25 Cal.3d 932, this court held that employment discrimination was a different injury from defamation and intentional infliction of emotional distress. (*Id.* at pp. 954-955.) But that holding simply has no bearing on the issue in this case—whether a loss-of-consortium claim and that part of a spouse's wrongful death action for the loss of love and companionship seek to remedy the same or different injuries. And indeed, subsequent cases have distinguished *Agarwal* when, as here, the second lawsuit *was* based on the same injury as the first. (See, e.g., *Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 901 [second action for wrongful termination was founded on the same primary right as first action for discrimination in violation of title VII]; *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 992-993 [second action for breach of contract barred because it was founded on the same primary rights as the first action for discrimination under title VII, the right to employment].)

3. Boeken's proposal to require splitting consortium claims into two separate actions is contrary to public policy.

Public policy, like the precedent discussed above, supports California's rule allowing *all* future noneconomic damages from harm to the marital relationship to be covered in a pre-death consortium action, should a plaintiff choose to file such an action.

Res judicata serves the salutary goal of giving "certainty to legal proceedings, preventing parties from being unfairly subjected to repetitive litigation, and preserving judicial resources." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77.) Arbitrarily limiting the future damages recoverable in a loss-of-consortium action (as Boeken urges) and requiring a second action to be filed for post-death consortium damages would lead to the very uncertainty and risk of overlapping damages that the doctrine of res judicata seeks to prevent. One jury (the jury deciding the pre-death loss-of-consortium action) would have to guess how long the husband will survive after his injury and then estimate the value of the intangible benefits he would have provided during that limited time. After the death (whenever it actually occurs) a second jury (the jury deciding the post-death wrongful death action) would again have to guess how long the husband would have lived but for the injury, and once again estimate the value of a subset of intangible benefits lost by the wife. Needless to say, two different

juries making such estimates increase uncertainty and risk overlapping awards.

Given the difficulty in asking two juries to parse the surviving spouse's claim into pre- and post-death harm, it is fairer and more efficient to allow one jury in a consortium action to render one verdict accounting for a lifetime of lost companionship. (See *Baxter v. Superior Court* (1977) 19 Cal.3d 461, 464 [acknowledging "[t]he intangible character of the loss," "the difficulty of measuring [consortium] damages," and "the dangers of double recovery of multiple claims and of extensive liability"]; *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 447 [in developing rules for recovery of consortium, courts "take into account the cost of administration of a system to determine and pay consortium awards; since . . . the expense of settling or litigating such claims would be sizable"].)

By contrast, Boeken would have this court establish a rule that would 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. Such a rule would undermine "the public good that there be an end to litigation" (*Mueller v. Walker* (1985) 167 Cal.App.3d 600, 607) and further strain California's limited judicial resources (see *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 880 ["We dare say it takes no citation of authority to recognize that California's trial courts are limited public resources subject to overwhelming demand"]).

In short, Boeken's argument contradicts (1) decades of precedent on the primary rights test for res judicata, (2) numerous cases establishing that pre-death loss-of-consortium claims and spouse's consortium claims in wrongful death actions address the invasion of the same primary right, and (3) the public policy against multiple, inefficient, and confusing lawsuits. For all the above reasons, this court should affirm the Court of Appeal's decision.

II.

THE TRANSACTIONAL APPROACH TO RES JUDICATA WOULD ALSO BAR THIS ACTION.

Given the outcome of this case under California's well established primary rights analysis, Boeken asks this court to jettison primary rights analysis entirely in favor of the "transactional" approach, and argues that this approach would lead to the conclusion that res judicata does not bar her second action. (OBOM 22-26.)

In support of this argument, Boeken cites several out-of-state cases that, according to her, show other courts "have had little difficulty holding . . . that a lawsuit filed by a family member pursuant to a wrongful death statute which seeks damages caused by a death, and a separate lawsuit filed by the family member which may rely on a subset of facts but which does not involve the death (e.g., only injuries to the surviving family member), do not involve the same claim or cause of action for purposes of res judicata." (OBOM 25.) But each

of the cases Boeken relies upon is easily distinguished from the situation presented in this case, and none of them suggests that Boeken would prevail if this court applied the transactional approach to the facts presented here.

Boeken cites *Fountas v. Breed* (1983) 118 Ill.App.3d 669 [455 N.E.2d 200, 203] and *Rajnowski v. St. Patrick Hosp.* (La.Ct.App. 2000) 768 So.2d 88, 89-90 (OBOM 25, fn. 11), which hold that a wrongful death action is separate and distinct from the *personal-injury action that the decedent may have maintained.* California law on this point is identical (*Horwich, supra,* 21 Cal.4th at p. 283; *Dominguez, supra,* 118 Cal.App.3d at p. 243), but it does not help Boeken for the reasons explained in connection with the discussion of these cases above (see *ante,* pp. 29-30).

The remaining cases cited by Boeken (OBOM 25, fn. 11) hold only that the physical injury a survivor suffers in an accident is different from the injury he or she suffers as a result of the death of a family member killed in the same accident. (See *Bowie v. Reynolds* (Fla. App. 1964) 161 So.2d 882, 883; *Burns v. Brickle* (1962) 106 Ga.App. 150, 151-152 [126 S.E.2d 632, 634] [same]; *Chamberlain v. Mo.-Ark. Coach Lines* (1945) 354 Mo. 461, 465-466 [189 S.W.2d 538, 539-540] [same]; *Marcus v. Huguley* (Tex.Ct.App. 1931) 37 S.W.2d 1100, 1104 [same].) But the fact that a plaintiff's action seeking to remedy his or her own *physical injury* may not bar the plaintiff's later action based on the wrongful death of a family member has no bearing on the issue here.

One out-of-state case that does address the question presented by Boeken's argument under a transactional analysis holds, consistent with defendant's argument here, that a loss-of-consortium action brought while the injured spouse is still alive bars a subsequent wrongful death action: the husband's "claim for wrongful death arose out of precisely the same facts as the survival and loss of consortium actions; all of his theories of recovery stem from the same transaction." (*Stutsman v. Kaiser Found. Health Plan* (D.C.App. 1988) 546 A.2d 367, 370.) That would be the proper result in this case.

Finally, Boeken attempts to bolster her argument that the transactional approach would permit her second action by arguing that "[o]rdinary people do not expect the wife in [the situation presented by this case] to seek money for her husband's anticipated death while he is still alive. If anything, ordinary people would recoil from a wife 'jumping the gun' in such a fashion." (OBOM 25.) This *ipse dixit* assertion appears merely to rehash Boeken's prior argument that it would be "bizarre" for a wife to seek all of her future damages in her loss-of-consortium action. (OBOM 7.) As explained above, every plaintiff in every tort case is allowed to seek future damages. (See *ante*, pp. 16-20.) Boeken did so herself in her loss-of-consortium action. (See AA 001060.) Therefore, her assertion that an "ordinary person" would not have thought to do so is not even borne out by her own actions in this case.

Because res judicata bars Boeken's action under either primary rights analysis or the transactional approach, this court should affirm

the Court of Appeal's decision. (See *Mycogen, supra,* 28 Cal.4th at p. 909, fn. 13 [rejecting the request to abandon primary rights analysis in favor of the transactional approach because the result of that case "would be the same under either theory"]; typed opn., 7, fn. 7 [finding res judicata would bar Boeken's wrongful death action under the transactional approach or any other approach].)

III.

APPLYING RES JUDICATA TO BAR BOEKEN'S SECOND ACTION WILL NOT VIOLATE HER DUE PROCESS RIGHTS.

Boeken argues that requiring her to seek all of her damages, past and future, in a single action would violate her right to due process because "[i]t would be arbitrary to dismiss Boeken's current lawsuit based on the theory that in 2001 she could have, and therefore should have, litigated post-death damages on a common-law claim even though under the common-law authority cited above no such remedy was available . . . ." (OBOM 16-18.) There is, in fact, nothing arbitrary about it. As the Court of Appeal pointed out, Civil Code section 3283 "has authorized tort plaintiffs to recover prospective damages since 1872." (Typed opn., 20.) Not only could Boeken have sought all of her damages in her loss-of-consortium action, *but she actually did so.* (See *ante,* pp. 11-15.) Due process does not require that Boeken be given another chance to bring a second action on the same primary right.

CONCLUSION

For the foregoing reasons, this court should affirm the Court of Appeal's decision.

Dated: September 22, 2008

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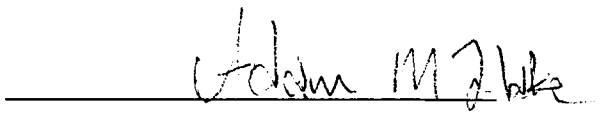
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 9,935 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: September 22, 2008



Adam M. Flake

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Robyn Whelan**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **September 22, 2008**, I served the within document entitled **ANSWER BRIEF ON THE MERITS** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

Counsel Name/Address/Telephone	Party(ies) Represented
Michael J. Piuze Geraldine Weiss Law Offices of Michael J. Piuze 11755 Wilshire Boulevard, Suite 1170 Los Angeles, CA 90025-1517	Counsel for Plaintiff and Appellant JUDY BOEKEN
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The Honorable David L. Minning Los Angeles County Superior Court Stanley Mosk Courthouse Department 61 111 North Hill Street Los Angeles, CA 90012-3117	[LASC Case No. BC353365]
Clerk, Court of Appeal Second District, Division Five 300 South Spring Street, 2nd Floor Los Angeles, California 90013-1213	[COA Case No. B198220]

and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **September 22, 2008,** at Encino, California.

Robyn Whelan

Robyn Whelan