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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. B198220

ANSWER TO PETITION FOR REVIEW

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
ADAM M. FLAKE (BAR NO. 231572)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
amflake@horvitzlevy.com

SHOOK, HARDY & BACON LLP
PATRICK J. GREGORY (BAR NO. 206121)
333 BUSH STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94104-2828
(415) 544-1900 • FAX: (415) 391-0281
pgregory@shb.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
PHILIP MORRIS USA, INC.

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INTRODUCTION

This case raises no issue requiring review because the Court of Appeal merely applied well-settled principles of res judicata in a way that creates no conflict with any other decision, and that flows naturally from decades of case law refining the primary rights doctrine. The Court of Appeal applied this law to a case where plaintiff had pled a permanent and future loss of consortium in one case and then tried to recover for the same injury in a second case. Noticeably absent from plaintiff's petition here is any discussion or reference to the precise injury she pled in both cases.

Plaintiff's question presented to this court is whether (1) a wife's common law tort claim for loss of consortium filed before her husband's death, and (2) her post-death claim for loss of consortium filed pursuant to the wrongful death statute arise out of the same primary right. Because innumerable cases demonstrate that both claims stem from the same injury—impairment of the wife's marital relationship—the easy answer is yes, as the Court of Appeal properly held.

During her husband's life, plaintiff Judy Boeken sued Philip Morris USA, Inc., alleging that the company caused her husband's lung cancer, and that she therefore suffered a loss of her husband's "'love, affection, society, companionship, sexual relations, and support,'" so that she was "'permanently deprived and will be deprived of [his] consortium.'" (Typed opn., p. 2.) In that action, she was free to seek all present and future damages, including loss of consortium damages anticipated to occur after his death. (2 Judicial Council of Cal., Civil Jury Instructions No. 3920 (2008 ed.) p. 757 [measure of future damages in pre-death consortium action includes post-death loss caused by shortened life expectancy from injury]; see also Civ. Code, § 3283 [authorizing recovery of future damages].) Boeken later dismissed the action with prejudice. Then, after her husband died of lung cancer, she brought this wrongful death action, again alleging that as a result of the same wrongful conduct by Philip Morris, she suffered a "'loss of love, companionship, comfort, affection, society, solace, and moral support . . . .'" (Typed opn., p. 3.) The trial court and Court of Appeal both

correctly held that Boeken's claim was barred by res judicata. The Court of Appeal explained that Boeken "sought in her wrongful death action to recover against the same defendant for the same injury caused by the same conduct, as in her prior loss-of-consortium action. [Boeken's] wrongful death action is therefore barred by the doctrine of res judicata." (Typed opn., p. 11.)

Boeken argues the Court of Appeal's analysis raises questions requiring resolution by this court. First, Boeken argues that this court should address whether the purely procedural joinder requirement in the wrongful death statute—that all heirs must bring their claims in a single action—precluded her from suing for future damages as part of her pre-death loss-of-consortium claim. But nothing in law or logic would support such a conclusion. Code of Civil Procedure section 377 simply requires joinder of any heir's claims that may exist at the time of the decedent's death in a single action, but it is *"not a statute creating a joint cause of action."* (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692 (*Cross*), emphasis added.)

Second, Boeken argues that this court should revisit basic principles of res judicata because, she says, under the Court of Appeal's decision, spousal plaintiffs will be unduly burdened by a prematurely triggered limitations period for pursuing consortium claims under the wrongful death statute. This argument is also unavailing. Contrary to Boeken's assertion, the Court of Appeal's opinion will not support an argument by defendants in future wrongful death cases that the statute of limitations on a wrongful death claim expires any sooner than two

years after the decedent's death. The Legislature has created a separate statute of limitations for post-death claims, starting anew the period for filing suit on such claims (assuming they have not previously been asserted so as to be barred by res judicata), and this decision in no way alters that limitation.

Boeken also argues that it is unfair to require a spouse to seek all of the loss-of-consortium damages she may suffer when she brings her first lawsuit. This argument is likewise unavailing. Every case raising the prospect of future damages creates some amount of uncertainty, but that does not allow a plaintiff to take a wait-and-see approach, filing successive lawsuits for the plaintiff's continuing injury. Boeken's proposed rule is contrary to common sense and principles of judicial economy because it would force the spouse of an injured person to file two lawsuits for loss of consortium rather than seeking all damages in one action based on a physical injury that is likely to lead to death.

Finally, Boeken proposes that this court abolish the primary rights doctrine. Contrary to Boeken's contention that this court has not applied primary rights analysis to resolve a res judicata issue for three decades (PFR 13, fn. 4), this court engaged in this very analysis six years ago in *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888 (*Mycogen*). Furthermore, as the Court of Appeal correctly noted, res judicata would bar Boeken's second claim regardless of which analysis the court applied. This case offers no basis for revisiting the basic primary rights principles that bar plaintiff's action.

WHY REVIEW SHOULD BE DENIED

I.

THE WRONGFUL DEATH STATUTE'S PROCEDURAL JOINDER REQUIREMENT DOES NOT VITIATE THE BASIC PROPOSITION THAT ALL CLAIMS BASED ON A SINGLE PRIMARY RIGHT MUST BE PURSUED IN A SINGLE LAWSUIT.

The doctrine of res judicata prohibits a plaintiff from suing twice for the same injury to the same primary right. (*Mycogen, supra,* 28 Cal.4th at p. 897.) Because the injury Boeken alleged she suffered in her pre-death consortium action is the same injury she asserts in seeking post-death consortium in this action, the Court of Appeal unsurprisingly held the first action bars the second under the doctrine of res judicata. (Typed opn., p. 11.)

Boeken does not attempt to refute the Court of Appeal's recitation of many of the cases describing pre-death consortium claims and post-death consortium claims in virtually identical terms, both arising out of "impairment to [the plaintiff's] marital life resulting from the spouse's injury." (Typed opn., pp. 7-11.) Instead, she advocates a departure from basic rules of res judicata in the specific context of this case because, she says, the Court of Appeal's decision will disrupt "the Legislature's requirement that wrongful death litigation proceed in a unified fashion, in one forum, with all statutory heirs joined in one civil

action." (PFR 7.) She argues that because Code of Civil Procedure section 377.60 mandates joinder of any heir's claims under that 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, . . . and then divided among the eligible claimants . . . ." (PFR 8.) In effect, Boeken urges that based on the compulsory joinder requirement of section 377.60, all heirs' statutory rights to recover for their various injuries in a wrongful death action comprise only one primary right, and a claim based on one injury that would be compensable independent of the wrongful death statute (i.e., a spouse's loss-of-consortium claim) 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, supra,* 60 Cal.2d at p. 692, emphasis added.) Accordingly, "each heir should be regarded as having a personal and separate cause of action." (*Ibid.*) The Court of Appeal here thus correctly held a defendant's wrongful conduct can invade more than one of an heir's primary rights, including a spouse's loss of consortium, a spouse's economic loss due to funeral expenses, and heirs' loss of financial support. (Typed opn., p. 12 & fn. 12.) And nothing in the wrongful death statute indicates that, as Boeken would have it, a claim for future loss-of-consortium damages on a theory independent of that statute cannot be pursued until after the spouse's

death. Indeed, this court created the common law right to sue for loss of consortium long *after* the wrongful death statute was enacted (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 398), so the Legislature cannot have intended to extinguish a claim that did not even exist when it passed section 377.60.

II.

THE COURT OF APPEAL'S DECISION DOES NOT CREATE UNCERTAINTY OR PLACE AN UNDUE BURDEN ON FUTURE PLAINTIFFS.

Boeken argues the Court of Appeal's decision creates uncertainty because (1) future defendants will argue the statute of limitations on a wrongful death action begins to run when the decedent was injured, and (2) spousal plaintiffs will unfairly be forced to seek all their loss-of-consortium damages in a single claim. Notably, she does not argue that either of these hypotheticals in any way affect the Court of Appeal's decision in this case. Nor could she. As the Court of Appeal correctly noted, Boeken did bring a timely loss-of-consortium claim after her husband's injury, and she did seek all of the damages to which she would have been entitled in that consortium claim. (Typed opn., p. 11.)

To illustrate some supposed uncertainty from the Court of Appeal's opinion, Boeken posits two hypotheticals. (PFR 9-12.) In the first, a husband is injured and a wife suffers a loss of consortium, but

unlike Boeken, the hypothetical wife does not bring an action prior to her husband's death. (PFR 9-10.) The husband dies as a result of his injuries several years later and the wife files a wrongful death action within two years of her husband's death. (PFR 9-10.) Boeken fears that in such a case, the defendant will try to use the Court of Appeal's opinion to argue that the statute of limitations on the statutory wrongful death claim for impairment to the marital relationship began to run when the husband was injured. (PFR 9-12.)

For at least two reasons, this hypothetical does not warrant review of the decision here. First, the hypothetical does not comport with the facts of this case because Boeken *did* bring an action prior to her husband's death. Second, as Boeken in effect concedes (PFR 10), the statute of limitations argument in this hypothetical is simply wrong. Statutes of limitations are creatures of legislative creation, and the courts are bound to apply them as they are written by the Legislature. (*Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1364.) The Legislature has expressly granted plaintiffs pursuing claims under the wrongful death statute a two-year window for filing suit after the decedent's death. (Code Civ. Proc., § 335.1.) Accordingly, the Court of Appeal's opinion holding that the spouse of an injured person may sue for all consortium damages before death sets up no statute of limitations defense in the event that the plaintiff waits until after her husband's death to sue for post-death consortium damages.

Boeken posits a second hypothetical in which a wife brings a pre-death action based on an injury to her husband that is disabling, but "is

not regarded as greatly reducing his life expectancy,"only to have her husband prematurely die a few years later as a result of his injury. (PFR 10-11.) Boeken asserts that prior to the Court of Appeal's decision, a wife in such circumstances could have kept all the future consortium damages that the jury awarded based on the assumption that the husband would live a "normal life span" (i.e., damages extending long beyond the actual date of death), and yet could still have brought a second action seeking additional loss-of-consortium damages that began to accrue after her husband's premature death. (*Ibid.*)

This hypothetical likewise does not help Boeken for two reasons. First, it is not based on the facts of this case. In her first action, Boeken alleged that Philip Morris' wrongful conduct "had rendered [her husband] permanently 'unable to perform the necessary duties as a spouse' involving 'the care, maintenance and management of the family home' and that she suffered a 'loss of love, affection, society, companionship, sexual relations, and support . . . .'" (Typed opn., p. 11.) The Court of Appeal properly held that if Boeken had "litigated her loss-of-consortium action to judgment and prevailed, she would have recovered all damages" to which she would have been entitled in any future wrongful death action based on injury to her marital relationship. (Typed opn., p. 18.)

Second, this argument is simply incorrect. No plaintiff is allowed to split a claim in the way Boeken requests. Instead, "'"res judicata precludes piecemeal litigation by splitting a single cause of

action or relitigation of the same cause of action on a different legal theory or for different relief. [Citation].'" (*Mycogen, supra,* 28 Cal.4th at p. 897.) *All* plaintiffs are required to seek all of their damages, past or future, resulting from the invasion of a primary right the first time they seek to vindicate that right. (*Abbott v. The 76 Land & Water Co.* (1911) 161 Cal. 42, 48 ["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 . . . 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 . . ."].)[1/]

This rule reflects the careful balance struck between the uncertainty of future damages and the many problems that would be caused by allowing successive actions based on the same injury to the

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1/ This is equally true in the case of injuries that may ultimately lead to death—an injured plaintiff may sue for his present *and future* medical costs, and his present *and future* lost wages, including wages that would have been earned during the "lost years" period of his decreased life expectancy. (See, e.g., *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171-174; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153.) If the plaintiff dies from his injuries earlier than the jury anticipated, the defendant may have paid a great deal more in future medical costs than hindsight shows were actually incurred. Similarly, if the plaintiff does not die from his injuries as anticipated and is able to return to work, the defendant will have paid for "lost years" earnings that were never actually lost. Either way, both parties must simply do their best to help the jury predict future events and award damages accordingly.

same primary right. As this court has recognized, "[a] predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.' [Citation.]" (*Mycogen, supra,* 28 Cal.4th at p. 897.) Furthermore, there is no unfairness in requiring Boeken to seek all of the damages arising from the invasion of a primary right the first time she sought to vindicate that right. As the Court of Appeal correctly noted, California has provided for future damages since 1872, and Boeken in fact asserted a claim for all future damages based on the "permanent" impairment of her marital relationship. (Typed opn., p. 20, citing Civ. Code, § 3283.)[2/]

2/ Justice Turner's dissent reaches a different conclusion because it focuses on *Mr.* Boeken's injury, concluding that for purposes of res judicata, his lung cancer and his death are two distinct injuries, and the death thus creates a new primary right. (See typed dissent, p. 1 ["Here the injury for res judicata purposes is the decedent's death"].) On the contrary, for purposes of whether *Mrs.* Boeken's claim is barred, the focus must be on *her* injury, consisting of continuing impairment of the marital relationship as a result of Philip Morris' wrongful act toward her husband. (See *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375, 380 [personal injury plaintiff has "his own *independent* cause of action" distinct from the spouse's consortium claim].)

III.

THIS COURT SHOULD NOT ABANDON PRIMARY RIGHTS ANALYSIS.

Boeken invites the court to completely abandon primary rights analysis and adopt the "transactional" approach of the Restatement. (PFR 12-14.) Boeken asserts that "[t]his Court's most recent decision applying the 'primary right' doctrine to resolve a res judicata issue was three decades ago . . . ." (PFR 13, fn. 4.) This is false. In 2002, this court applied primary rights analysis to hold that res judicata barred a plaintiff's claim. (See *Mycogen, supra*, 28 Cal.4th at pp. 904, 909, fn. 13.) In *Mycogen*, this court was asked to adopt the transactional approach of the Restatement, but it declined to do so because the result of that case "would be the same under either theory." (*Id.* at p. 909, fn. 13.) Because the same is true here, as the Court of Appeal correctly noted (typed opn., p. 7, fn. 7), this court should reject Boeken's request that it grant review in this case to revisit and abandon well-established California law.

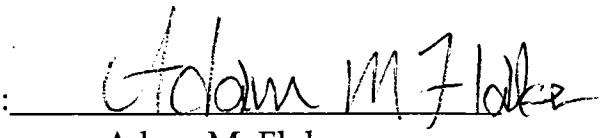
CONCLUSION

For the reasons explained above, this court should deny Boeken's petition for review.

Dated: April 14, 2008

HORVITZ & LEVY LLP
LISA PERROCHET
ADAM M. FLAKE

SHOOK, HARDY & BACON, LLP
PATRICK J. GREGORY

By: 
Adam M. Flake

Attorneys for
Defendant and Respondent
PHILIP MORRIS USA, INC.

CERTIFICATE OF WORD COUNT
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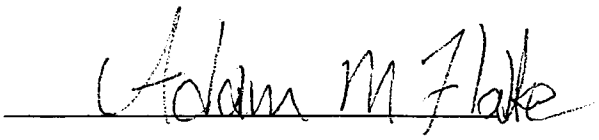
The text of this brief consists of 2,931 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: April 14, 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 **April 14, 2008**, I served the within document entitled **ANSWER TO PETITION FOR REVIEW** 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
Kenneth Chesebro Post Office Box 381070 Cambridge, MA 02238-1070	Counsel for Plaintiff and Appellant JUDY BOEKEN
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 **April 14, 2008**, at Encino, California.

_____

Robyn Whelan