S162029 ORIGINAL

No. S

S162029

IN THE

Supreme Court of California

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk
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JUDY BOEKEN,

Plaintiff and Petitioner,

v.

PHILIP MORRIS, USA, INC.

Defendant and Respondent.

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

PETITION FOR REVIEW

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March 24, 2008

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Petition for Review

Petitioner Judy Boeken respectfully requests that the Court grant review of the published opinion of the Court of Appeal filed February 11, 2008 (Appendix A), which affirmed (over a dissent) a trial court order dismissing her wrongful death lawsuit for the death of her husband, based on the doctrine of res judicata (Appendices B and C).

Issue Presented for Review

Whether, under the long-applied "primary right" doctrine, the following are part of the same "cause of action": (1) a wife's common-law tort claim for loss of consortium filed before her husband's death; and (2) her statutory claim for the wrongful death of her husband, which she and other statutory heirs may file only after death, and which must be litigated as one unified proceeding.

Summary of the Case, and of Why Review Should Be Granted

The Court of Appeal held, over the dissent of Presiding Justice Turner, that a wife's loss-of-consortium claim filed and dismissed prior to her husband's death, and her wrongful death claim filed after her husband's death in which she is listed as one of the statutory heirs, are part of the same "cause of action" within the meaning of the "primary right" doctrine long followed in California for defining a "cause of action." This decision unsettles the definition of a "cause of action" under the wrongful death statute, enacted in 1862, which created a distinct cause of action not previously recognized at common law. As Presiding Justice Turner correctly concluded, pursuant to the primary right" doctrine the relevant injury, under the wrongful death statute, "is the decedent's death." Appendix A, Dissent at 1 (quoting Cal. Code Civ. P. § 377.60(a)). Any

similarity between "the available remedies" on a spouse's loss-of-consortium claim filed before death, and her wrongful death claim filed after death, "is irrelevant" to whether the claims are part of the same "cause of action" — instead, the dispositive point is the "separate injury" presented by the spouse's death. Id. at 2.

If left in place, the decision below will disrupt 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, because it will permit spouses to litigate their anticipated post-death injuries before death, on a common-law claim for loss of consortium. Further, once spouses have this option, defendants will presumably seek to burden them for not exercising it: where a spouse does not file suit within two years of learning of a potentially fatal injury caused by a defendant's tort, the defendant will seek to block any later-filed wrongful death lawsuit on statute-of-limitations grounds, arguing that the surviving spouse's unified "cause of action" for spousal injury accrued upon initial notice of the injury. This prospect may force spouses to file a loss-of-consortium claim while their spouse is still alive solely to head off a later statute-of-limitations defense to a wrongful death lawsuit. The decision below also imposes a related, but separate, burden on uninjured spouses: where the injured spouse is not expected to die of the injury, the injured spouse's recovery of a modest loss-of-consortium award might be deemed to bar any later wrongful death claim for post-death loss of consortium, if the spouse does die from the injury. Review is warranted to head off such disruptive developments, to address the confusing jurisprudence which has developed under the "primary right" doctrine, and to ensure conformance with this Court's decisions interpreting the wrongful death statute.

Statement of the Facts

The relevant facts upon which the decision below are uncontested.

A. Boeken's Loss-of-Consortium Lawsuit and Its Voluntary Dismissal With Prejudice

On October 20, 2000, plaintiff-appellant Judy Boeken ("Boeken") filed a civil complaint for damages against defendant Philip Morris, Inc., and other defendants, seeking loss-of-consortium damages on account of the debilitating lung cancer of her husband, Richard Boeken, which she alleged had been caused by the tortious conduct of the defendants. App. at 159-61.[1] See also Appendix A at 2.

On February 23, 2001, Boeken voluntarily dismissed, with prejudice, her loss-of-consortium lawsuit. App. at 162; see also Appendix A at 3.

B. Boeken's Wrongful Death Lawsuit

Richard Boeken died on January 16, 2002, after which Judy Boeken filed a wrongful death lawsuit against Philip Morris and other defendants (proceeding both in her individual capacity and in other capacities). App. at 88-92; see also Appendix A at 3.[2] Following defendants' ultimately unsuccessful effort to remove the case to federal court, see App. at 146-48, she filed an amended wrongful death complaint. App. at 149-56.

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[1] "App. at ___" references are to Appellant's Appendix in the Court of Appeal.

[2] Prior to dying, Richard Boeken filed his own, entirely separate, lawsuit, which ultimately resulted in a final judgment in his favor. See Boeken v. Philip Morris, Inc. (2d Dist. 2005) 127 Cal.App.4th 1640, reh. den. (Apr. 20, 2005), rev. den. (Aug. 10, 2005), cert. denied (2006) 126 S. Ct. 1567. See also Appendix A at 2. Judy Boeken's lawsuit was timely filed on June 2, 2006, pursuant to defendant's agreement to extend the statute of limitations for a wrongful death action until 90 days after litigation over Richard Boeken's lawsuit became final. App. at 3, ¶ 11.

C. Philip Morris's Res Judicata Motion, and the Trial Court's Ruling

Philip Morris then demurred to the first amended complaint arguing, in relevant part, that the voluntary dismissal, with prejudice, of Boeken's loss-of-consortium claim prior to her husband's death constituted a res judicata bar to her pursuing a wrongful death claim after his death. Philip Morris conceded there was no authority directly on point, but it argued by analogy to appellate authority regarding statutes of limitation that these two claims constituted the same "cause of action" within the meaning of California's "primary right" doctrine. App. at 79-82, 197-98. In opposing Philip Morris's res judicata motion, Boeken argued that prior California appellate authority recognizing the distinct nature of a loss-of-consortium claim as compared with a wrongful death claim pointed toward the proper resolution of the "primary right" issue, in her favor. App. at 189-90.

Noting that "[t]his is a case of first impression" with "no case directly on point," Appendix B at 3-4, the trial court accepted the approach suggested by Philip Morris based on the statute-of-limitations cases it cited, holding that res judicata applied, and sustaining the demurrer without leave to amend. Appendix C at 1; App. at 220-21. This holding was based on the trial court's legal conclusion that on her wrongful death claim, Judy Boeken was seeking "the same damages as would have been addressed in the prior action." Appendix B at 4; see also Appendix A at 3-4.

D. The Court of Appeal Ruling

Boeken timely appealed. App. 217-19. See also Appendix A at 4 & n.4. On appeal she invoked, among other points, the long line of decisions of this Court emphasizing the unique nature of the injury redressed by the wrongful death statute, the distinctiveness of a wrongful death claim compared to common-law claims, and the Legislature's objective that all claims arising from a wrongful death are to be consolidated in one

proceeding in which all statutory heirs are joined. Opening Brief of Appellant Judy Boeken, filed June 11, 2007, at 7-8; Reply Brief of Appellant Judy Boeken, filed Oct. 9, 2007, at 7-8. She also invoked this Court's decisions emphasizing that under the "primary right" doctrine, whether or not two claims are part of the same "cause of action" depends not on whether there is factual or remedial overlap between the claims, but on whether the injury suffered is the same. Opening Brief at 6; Reply Brief at 13-15.

By a 2-to-1 vote, the Court of Appeal rejected Boeken's arguments and upheld the trial court's dismissal of the case on res judicata grounds. In their opinion, the majority justices recognized that the sole issue was "whether plaintiff's loss-of-consortium and wrongful death claims constitute the same 'cause of action,'" and that this issue was controlled by the "primary right" doctrine. Appendix A at 6. In applying that doctrine, they noted that a common-law claim for loss of consortium compensates a spouse "for the impairment to his or her marital life resulting from the spouse's injury," id. at 7, and that, similar to that common-law remedy, California's wrongful death statute permits a spouse to recover "what amounts to a loss of consortium as an element of damages . . . ." Id. at 8. See also id. at 9 ("The elements of damage recoverable in a loss-of-consortium action arising from a nonfatal injury to one's spouse are essentially the same as the elements of noneconomic loss recoverable in a wrongful death action arising from a fatal injury."). The justices' ultimate conclusion that Boeken's wrongful death claim was part of the same "cause of action" as her earlier loss-of-consortium claim was explicitly based on the remedial overlap involved — that "the damages available to a wrongful death plaintiff for loss of consortium are a portion of the damages available in a common law loss-of-consortium claim adjudicated prior to the injured spouse's death." Id. at 18.

Presiding Justice Turner dissented. "The fundamental flaw" with the result reached by the majority, in his view, was its "focus on the similarity in the available remedies and legal theories underlying a common law consortium loss claim and a statutory wrongful death cause of action." Appendix A, Dissent at 2. Under this Court's decisions applying the "primary right" doctrine, he observed, "the availability of multiple legal theories or remedies is irrelevant — the issue is the particular injury and the ability to pursue the cause of action in the first lawsuit." Id. (citations omitted). The focus of the "primary right" doctrine, he emphasized, "is the plaintiff's right to be free from the particular injury suffered," and on Boeken's wrongful death claim the relevant injury "is the decedent's death." Id. at 1. In her original lawsuit, filed before her husband's death, Boeken "could not pursue her statutory wrongful death cause of action" — only when her husband died could she "pursue her claims arising from his death. Thus, plaintiff did not have the opportunity to litigate her statutory wrongful death cause of action when she dismissed her common law consortium loss claim or at any time prior to decedent's death." Id. at 2. Justice Turner concluded that although Boeken's dismissal of her loss-of-consortium claim might "bar any claim for pre-death losses," as to her "post-death claims, she may pursue them in her statutory wrongful death cause of action." Id. at 3.

The decision below was filed on February 11, 2008. Neither party sought rehearing. This petition follows.

Reasons for Granting Review

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

Review of the decision below is warranted, first and foremost, to prevent disruption of 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.

Under the majority's approach, if a spouse has suffered a tortiously caused injury which will shorten his or her life, the uninjured spouse can (and possibly must, see Part II, infra), within two years of the injury's manifestation file a common-law personal injury action for loss of consortium, seeking damages not just for the period between injury and the spouse's death, but also for reasonably anticipated post-death injuries. Appendix A at 7-9, 16-20. As a matter of the common law of torts, the majority's hypothesis that a spouse may litigate both pre-death and post-death damages from injury to the other spouse in an action filed before death seems quite open to question — itself an ample reason for review of the decision below.[3] But even if the majority's view of the common law is

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[3] The majority was unable to cite any California case in which a spouse litigated both pre-death and post-death damages in a lawsuit filed before death, Appendix A at 16-20, and the majority's hypothesis is contrary to the plain language of the Restatement, which notes the limited damages which may be sought on a loss-of-consortium claim filed before death: "In case of death resulting to the impaired spouse, the deprived spouse may recover [on a loss-of-consortium claim] only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse must recover, if at all, under a wrongful death statute. (See § 925)." Restatement (Second) of Torts (1977) § 693. (Where there is no binding authority on point, of course, the Restatement is entitled to great weight. E.g., Canfield v. Security-First Nat. Bank of Los Angeles (1939) 13 Cal.2d

correct, it fails to account for, and severely disrupts, the Legislature's clear directive as to wrongful death litigation.

The Legislature has carefully designed the wrongful death statute to ensure that 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 — a design this Court has reinforced in a recent decision. Corder v. Corder (2007) 41 Cal.4th 644, 651-52. As this Court long ago observed, particularly in light of the Legislature's not infrequent amendments to the wrongful death statute, it is clear "that the Legislature intends to occupy the field of recovery for wrongful death. For this reason the remedy remains a creature of statute in California." Justus v. Atchison (1977) 19 Cal.3d 564, 574-75 (citations omitted). It follows, therefore, that the only means of fulfilling the important objective that all post-death damages be litigated in a single trial is to require spouses to litigate such damages under the wrongful death statute, along with the other statutory heirs. The premise of

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1, 30-31; Standard Oil Co. v. Oil, Chemical and Atomic Workers Int'l Union (1st Dist. 1972) 23 Cal.App.3d 585, 588-89.)

The majority's effort in its opinion to justify its theory that there exists a unitary common-law cause of action covering both pre-death and post-death loss of consortium, as somehow consistent with the Restatement, see Appendix A at 19-20, cannot be squared with the view of the Restatement set forth in the leading multi-volume treatise in the field of torts. It states that "where a defendant negligently or intentionally injures the wife, the husband may bring his separate suit for the recovery of his damages. His recovery is limited to the loss of consortium and if the wife dies as a result of the wrong, only services calculated to the time of her death can be recovered. The action for her wrongful death is a distinct and different wrong. The death action may in some jurisdictions include a claim for loss of spousal consortium. See, e.g., Krouse v. Graham, 19 Cal.3d 59, 137 Cal.Rptr. 863, 562 P.2d 1022 (1977)." 2 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts (2d ed. 1986) § 8.9, at 553-54 & n.16 (footnotes and citations omitted; part of note 16 lifted into quotation of text).

the decision below is incompatible with the relevant statutory framework, and disruptive of the Legislature's policy choice. Review of the decision below is necessary to ensure compliance with well-settled law in this area.

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

Also warranting review is the prospect that leaving the decision below in place will create uncertainty in the law which will impose significant burdens on spouses whose spouses suffer injuries which are potentially fatal. Before the decision below, it appeared to be a legally safe option for the uninjured spouse simply to defer the matter of a lawsuit and consider legal options only if, and when, death occurred, through a wrongful death lawsuit filed within one year of death. The decision below very much changes this picture, in uncertain and potentially quite burdensome ways.

According to the decision below, where a spouse is tortiously injured in a manner which will likely shorten his or her life, a cause of action accrues in favor of the uninjured spouse for all future loss-of-consortium damages traceable to the tort (both those occurring before, and those occurring after, the death of the injured spouse). It follows from this analysis — or, at minimum, defendants as a class presumably will argue — that because a spouse can assert a unified cause of action for all future loss-of-consortium damages as soon as injury manifests itself, a spouse must assert that cause of action within two years of the injury, or else be barred from later seeking such damages through a wrongful death action.

After all, the same "primary right" doctrine which is used to define what constitutes a "cause of action" has long been used to define what claims must be filed within the limitations period to avoid a statute-of-

limitations bar, as illustrated by the reliance of the decision below on a statute-of-limitations case for its conclusion that Boeken's earlier loss-of-consortium claim, and her current claim which is restricted to post-death loss-of-consortium damages, are part of the same "cause of action." Appendix A at 9-10 (citing Lamont v. Wolfe (2d Dist. 1983) 142 Cal.App.3d 375). If "primary right" holdings in statute-of-limitations cases are good authority for res judicata cases, perhaps the converse is true. If each type of claim alleging injury to a relationship with a spouse is truly part of same "cause of action" for res judicata purposes, then arguably the statute of limitations within which a spouse must file suit for all loss-of-consortium damages (that is all past, pre-death, and anticipated post-death damages) is two years from the date of initial injury.

Even assuming there are good counter arguments to this conclusion, any hint that there might be a statute-of-limitations bar to the uninjured spouse seeking post-death damages if suit is not filed within two years of the initial injury will lead prudent plaintiffs' counsel to favor such filings, presumably resulting in a large number of lawsuits being filed which would not be filed if uninjured spouses were assured that they have a year following the death of their spouse to seek post-death loss-of-consortium damages by way of a wrongful death lawsuit. Uninjured spouses represented by such counsel may feel pressured to undertake litigation while their spouse is still alive solely to head off a later statute-of-limitations defense to a wrongful death lawsuit. Others, unrepresented by counsel, may end up seeing their right to substantial recoveries forfeited because they were unaware of a need to file suit prior to death.

The burdens just sketched are those facing spouses whose spouses suffer injuries which will likely lead to death (for example, Judy Boeken, whose husband Richard was diagnosed with lung cancer). The potential uncertainty facing other spouses could be far greater. Suppose a wife's

husband suffers an injury which is somewhat disabling, and conceivably fatal, but which is not regarded as greatly reducing his life expectancy. Suppose she brings a legitimate loss-of-consortium claim and wins a relatively modest $100,000 recovery for the impairment of her marital relations based on the assumption that her husband would have a normal life span (being unable to prove that early death is likely). Suppose that four years later her husband dies, concededly because of the original injury. Can the wife then seek loss-of-consortium damages for her husband's very early and rather unexpected death, through a wrongful death claim? The defendant would surely argue, based on the majority's analysis, that the wife has already litigated her unitary "cause of action" for loss of consortium, that her new claim involves the same "primary right," and thus that her new claim is barred by res judicata.

Under the law as it stood before the Court of Appeal decision, spouses were not faced with such uncertainties and burdens. Because the wrongful death statute was regarded as having created a new cause of action completely distinct from other causes of action, in which all statutory heirs are joined in one lawsuit which can be filed only after death, spouses could make decisions on litigation before the death of their spouse without having to worry about those decisions impacting on their ability to pursue wrongful death litigation. Now, with the Court of Appeal decision, on the one hand spouses must worry that if they do not file a loss-of-consortium lawsuit within two years of injury, they will face a statute-of-limitations bar to seeking such damages in any later wrongful death lawsuit. On the other hand, spouses must also worry that if they do file a loss-of-consortium lawsuit within two years of injury, and if their spouse later suffers an unexpected death from the injury, they may find themselves barred from seeking any loss-of-consortium damages flowing from the wrongful death. In effect, the Court of Appeal decision imposes a potential "Catch-22"

under which, whatever he or she decides to do, a spouse might be deprived of the legal rights the Legislature intended to confer under the wrongful death statute.

Of course, in such a situation, under the majority's analysis the uninjured spouse would not be left with no remedy under the wrongful death statute. Under the majority's analysis, apparently a spouse barred from seeking loss-of-consortium damages in a wrongful death lawsuit would still be able to file a wrongful death lawsuit for post-death economic damages, or for funeral expenses. Appendix A at 12 & n.12. But this analysis merely further highlights the oddity of the decision below, and the need for review by this Court to restore clarity and coherence to this area of the law. Certainly, there is nothing in the wrongful death statute to support such hair splitting. Prior to the majority's decision, it would have seemed safe to assume that however a "cause of action" is defined, the wrongful death statute conveyed a single "cause of action" on a spouse. The majority's hair-splitting analysis of the wrongful death statute, and its conclusion that that statute embodies two quite distinct "primary rights," illustrate the difficulties inherent in adapting the "primary rights" doctrine to the modern age, suggesting there might be good cause for this Court to take a fresh look at that doctrine.

The "primary right" doctrine for defining a "cause of action" originated under the system of code pleading in the 1800s, pioneered in large part by Professor John Norton Pomeroy of the Hastings College of Law, one of the leading equity and remedies scholars of the nineteenth century. Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 904; Crowley v. Katleman (1994) 8 Cal.4th 666, 681; Slater v. Blackwood (1976) 15 Cal.3d 791, 795. See generally Walter W. Heiser, California's Unpredictable Res Judicata (Claim Preclusion) Doctrine (1998) 35 San Diego L. Rev. 559, 571-76. The doctrine matched the historical era in

which it arose, being rooted both in the natural law thinking of the time, and in the seven specific categories governing permissive joinder of claims set out in Section 427 of the California Practice Act of 1851. Id. at 571 n.37, 572-73. See also Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules (1989) 89 Colum. L. Rev. 1, 27-29, 39-45, 51-53, 78-87.

However, as the decades passed, particularly with the broadening of joinder and pleading rules, the "primary right" doctrine came under substantial scrutiny, most prominently by Dean Clark of the Yale Law School (a principal drafter of the Federal Rules of Civil Procedure, and later a Second Circuit judge), who as early as 1924 noted the "elusive" nature of Pomeroy's code-based conception of a "primary right." Charles E. Clark, The Code Cause of Action (1924) 33 Yale L.J. 817, 826-27. See also Charles E. Clark, The Cause of Action (1934) 82 U. Pa. L. Rev. 354, 357 (noting reliance of "primary right" adherents on "old chance historical distinctions" under code pleading); id. at 361 (arguing that "Pomeroy's primary right" theory "acquires specific content only if identified with rights enforced in the old forms of action," and that there is no "compelling reason for such a reversion so foreign to modern procedural ideas.").

In recent decades, various commentators — most notably Professor Heiser of the University of San Diego — have suggested that this Court should take a fresh look at whether the "primary right" doctrine for defining a "cause of action" should be replaced with the more pragmatic and more readily understandable transactional approach of the Restatement.[4] The

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[4] Heiser, 35 San Diego L. Rev. at 602-03, 604 n.131, 605-08 & n.140, 610-11, 615-17. After all, the restrictions on permissive joinder on which the "primary right" categories were premised, were repealed effective 1972. Id. at 575-76. This Court's most recent decision applying the "primary right" doctrine to resolve a res judicata issue was three decades ago, in Agarwal v. Johnson (1979) 25 Cal.3d 932. Id. at 580-83; see also id. at 584-601 (summarizing the post-Agarwal confusion in the

difficulties inherent in the clear and efficient application of the "primary right" doctrine in the modern era are well illustrated by the divisions on the Court of Appeal panel in this case, and thus this case may supply a vehicle for reexamination of the "primary rights" doctrine itself. At minimum, the disruptive consequences inherent in decision below can and should be eliminated through a grant of review in this case.

Conclusion

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

Respectfully submitted,

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March 24, 2008

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lower courts). Three years after Agarwal, the American Law Institute adopted the transactional approach to defining a "cause of action," in the Restatement (Second) of Judgments (1982) § 24. See generally 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction (2d ed. 2002) § 4407, at 158-82 (explicating transactional approach). The Restatement's transactional approach long ago became the overwhelming majority rule for defining a "cause of action." Heiser, 35 San Diego L. Rev. at 569 n.27.

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 4,389 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: March 24, 2008

Michael J. Piuze

MICHAEL J. PIUZE

APPENDIX A

Court of Appeal Opinion

(February 11, 2005)

Filed 2/11/08

CERTIFIED FOR PUBLICATION IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JUDY BOEKEN, Plaintiff and Appellant, v. PHILIP MORRIS USA, INC., Defendant and Respondent.	B198220 (Los Angeles County Super. Ct. No. BC353365)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Law Offices of Michael J. Piuze, Michael J. Piuze; and Kenneth Chesebro for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet, Adam M. Flake; Shook, Hardy & Bacon, Lucy E. Mason and Patrick J. Gregory for Defendant and Respondent.

INTRODUCTION

In affirming the trial court's judgment of dismissal, we hold that the final adjudication on the merits of plaintiff's loss-of-consortium claim against defendant results in a res judicata bar of plaintiff's subsequent wrongful death action for loss-of-consortium damages against defendant arising from the same injury to plaintiff's spouse that was the basis of the adjudicated loss-of-consortium claim.

BACKGROUND

In March 2000, Richard Boeken (Mr. Boeken), the husband of plaintiff and appellant Judy Boeken (plaintiff), brought an action against defendant and respondent Philip Morris USA, Inc. (Philip Morris) alleging that cigarettes manufactured by Philip Morris caused Mr. Boeken's terminal lung cancer. Mr. Boeken prevailed in his lawsuit and obtained a judgment against Philip Morris for $5.5 million in compensatory damages and $50 million in punitive damages. (See *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640.) Philip Morris satisfied that judgment.

In October 2000, while Mr. Boeken's lawsuit was pending, plaintiff brought a separate action against Philip Morris seeking damages for loss of consortium. Plaintiff alleged that Mr. Boeken, as a result of his illness, was "unable to perform the necessary duties as a spouse" involving "the care, maintenance and management of the family home" and that plaintiff suffered a "loss of love, affection, society, companionship, sexual relations, and support . . . ." Plaintiff further alleged that Mr. Boeken "will not be able to perform such work, services, and duties in the future," and thus she was "permanently deprived and will be deprived of the consortium of Plaintiff's spouse . . . ."

In February 2001, for reasons not indicated in the record, plaintiff voluntarily dismissed her loss-of-consortium claim with prejudice.[1]

In January 2002, Mr. Boeken died of his cancer. In June 2006, plaintiff filed this wrongful death action against Philip Morris pursuant to Code of Civil Procedure section 377.60[2]—part of the California wrongful death statute. Plaintiff filed suit in her individual capacity; as trustee of the Richard and Judy Boeken Revocable Trust; and as the guardian ad litem of her minor son, Dylan Boeken. In her individual capacity, plaintiff sought to recover funeral expenses[3] for Mr. Boeken and "[g]eneral damages for the loss of love, companionship, comfort, affection, society, solace, and moral support" that she suffered as the result of Mr. Boeken's death. This appeal concerns only the claim asserted by plaintiff in her individual capacity.

Philip Morris demurred to plaintiff's complaint, arguing that because plaintiff's loss-of-consortium and wrongful death claims were both based on the same primary right, plaintiff's dismissal with prejudice of her loss-of-consortium claim resulted in the res judicata bar of her wrongful death claim. The trial court agreed, concluding that the loss-of-consortium and wrongful death actions sought essentially the same damages. The trial court reasoned that because plaintiff had the opportunity to litigate her right to such damages in her prior action, she was precluded from asserting a cause of action to recover those damages in this lawsuit. The trial court sustained the demurrer without leave to

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[1] The complaint and voluntary dismissal in plaintiff's loss-of-consortium action were before the trial court on Philip Morris's request for judicial notice. (Evid. Code, § 452, subd. (d).)

[2] All statutory references are to the Code of Civil Procedure, unless stated otherwise.

[3] Plaintiff has forfeited any claim regarding funeral expenses. (See fn. 12, *post*.)

amend as to the claim asserted by plaintiff in her individual capacity. Plaintiff timely appealed.[4]

DISCUSSION

A. Standard of Review

An appeal from a judgment dismissing an action after the trial court sustains a demurrer without leave to amend presents a question of law that we review de novo. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 71; *Morgan Creek Residential v. Kemp* (2007) 153 Cal.App.4th 675, 683.) We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We also consider matters that may be judicially noticed, for a complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective. (*Ibid.*; see § 430.30, subd. (a).) If the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer on that ground. (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 159; *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299; *Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 485.)

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[4] Plaintiff filed her notice of appeal on April 6, 2007, purporting to appeal from the trial court's order sustaining the demurrer. The trial court entered its judgment of dismissal on April 24, 2007. We treat plaintiff's notice of appeal as an appeal from the judgment. (Cal. Rules of Court, rule 8.751(c).)

B. Res Judicata and the Primary Rights Doctrine

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897, fn. omitted (*Mycogen*); see also § 1908, subd. (a)(2).) "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. '"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.] 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.)[5]

Res judicata applies if (1) the judgment in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties in the prior proceeding. (*In re Anthony H.* (2005) 129 Cal.App.4th 495, 503; *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202; see *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972; *Bernhard v. Bank of*

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[5] Res judicata is also known as "claim preclusion." (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. 3.) In contrast, the doctrine of collateral estoppel, or issue preclusion, bars parties from relitigating, in a second lawsuit on a different cause of action, issues that were litigated and determined in the first action. (*Mycogen, supra,* 28 Cal.4th at 896, fn. 7; *Gikas v. Zolin* (1993) 6 Cal.4th 841, 848-849; *Lucido v. Superior Court, supra,* 51 Cal.3d at p. 341, fn. 3.)

America (1942) 19 Cal.2d 807, 810-811.) The doctrine of res judicata not only bars litigation of matters that actually were litigated in the prior action, but also those matters that could have been litigated in that action. (*Busick v. Workmen's Comp. Appeals Bd., supra,* 7 Cal.3d at p. 975.)

Plaintiff does not dispute that the dismissal with prejudice of her loss-of-consortium claim operated as a final adjudication of the merits of that claim. (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1095-1096; *Rice v. Crow* (2000) 81 Cal.App.4th 725, 733-734.) Nor does plaintiff dispute that the parties in her prior and present lawsuits are the same.[6] Thus, the sole issue is whether plaintiff's loss-of-consortium and wrongful death claims constitute the same "cause of action."

For purposes of res judicata, the term "cause of action" refers neither to the legal theory asserted by a plaintiff nor to the remedy the plaintiff seeks. (*Mycogen, supra,* 28 Cal.4th at pp. 904; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-796 (*Slater*).) Instead, "California has consistently applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." (*Slater, supra,* 15 Cal.3d at p. 795.) As the California Supreme Court explained, "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] 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. [Citation.] . . . [¶] As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681; accord, *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 641; *Mycogen, supra,* 28 Cal.4th at p. 904; 4 Witkin, California

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[6] Philip Morris USA, Inc., the defendant in this action, was sued in plaintiff's prior action as Philip Morris, Inc. Plaintiff does not dispute that Philip Morris USA, Inc. and Philip Morris, Inc. are, in her words, "one and the same" entity.

Procedure (4th ed. 1997) Pleading, § 24, p. 85, quoting Pomeroy, Code Remedies (5th ed.), p. 528 ["'the *primary right and duty and the delict or wrong combined constitute the cause of action*'"]; see also Rest.2d Judgments, § 24, com. a, pp. 196-198 [distinguishing between the primary rights theory and the "transactional" theory adopted by Restatement].)[7] A particular injury might be compensable under multiple legal theories and might entitle a party to several forms of relief; nevertheless, it will give rise to only *one* cause of action. (*Crowley v. Katleman, supra,* 8 Cal.4th at pp. 681-682; see also Rest.2d, Judgments, § 24, com. c, pp. 199-200.)

C. Plaintiff's Wrongful Death Action Involves the Same Primary Right as Her Prior Loss-of-Consortium Action

The California Supreme Court in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382 (*Rodriguez*) recognized the right to recover for loss of consortium arising from tortious injury to one's spouse. Loss-of-consortium damages compensate a plaintiff for the impairment to his or her marital life resulting from the spouse's injury. (*Id.* at p. 404; *Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98 Cal.App.4th 26, 30; 2 Dobbs, The Law of Torts (2001) § 310, p. 842.) "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home. [Citations.]" (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633, disapproved on another ground in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277; see also *Borer v. American*

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[7] There have been other theories. (Note, Developments in the Law—Res Judicata (1952) 65 Harv.L.Rev. 818, 824-825; Rest.2d Judgments, § 24, com. a, p. 197; see also Heiser, California's Unpredictable Res Judicata (Claim Preclusion) Doctrine (1998) 35 San Diego L.Rev. 559, 570 [criticizing California's primary rights doctrine].) The result here would be the same under any of the theories.

Airlines, Inc. (1977) 19 Cal.3d 441, 443; *Rodriguez, supra,* 12 Cal.3d at p. 405; 2 Judicial Council of California, Civil Jury Instructions No. 3920 (2008 ed.) p. 757 (CACI); Rest.2d Torts, § 693(1), p. 495; *id.* § 693, com. *f*, p. 497; see generally 2 Harper et al., Harper, James and Gray on Torts (3d ed. 2006) § 8.9, pp. 651-652 (Harper).) Loss of consortium "has been referred to as the loss of 'the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship.' [Citations.]" (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1034.) Loss-of-consortium damages are defined as noneconomic damages for purposes of Proposition 51 (several liability for noneconomic damages). (Civ. Code, § 1431.2, subd. (b)(2); *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 863 (*Wilson*).)

California law permits a widow or widower, among others,[8] to recover for what amounts to a loss of consortium as an element of damages in a wrongful death action arising from the death of the plaintiff's spouse. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 68-70; see 2 Harper, *supra,* § 8.9 at p. 656, fn. 17.) Pursuant to California's wrongful death statute, a decedent's spouse may assert "[a] cause of action for the death of a person caused by the wrongful act or neglect of another . . . ." (§ 377.60.) The spouse may recover, with certain exceptions, "damages . . . that, under all the circumstances of the case, may be just . . . ." (§ 377.61.)[9] These include (1) direct pecuniary loss, such as loss of financial support from the decedent; (2) loss of services, advice or training; (3) funeral expenses; and (4) of particular relevance to this case, noneconomic loss consisting of the loss of the decedent's love, companionship, comfort, affection, society, solace or moral support. (*Krouse v. Graham, supra.* 19 Cal.3d at pp. 68-70; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614; 2 CACI No. 3921, *supra,* pp. 850-851; Haning

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[8] Section 377.60, subdivisions (a) through (c) specify those persons who have standing to bring a wrongful death action. A loss-of-consortium action in California is limited to the marital relationship. (*Borer v. American Airlines, Inc., supra,* 19 Cal.3d at pp. 451-452.)

[9] A decedent's personal representative or successor may recover damages incurred by the decedent before death in a survival action under section 377.34.

et al., California Practice Guide: Personal Injury (The Rutter Group 2007) Damages ¶¶ 3:302-3:308, pp. 3-318 to 3-320.)

The elements of damage recoverable in a loss-of-consortium action arising from a nonfatal injury to one's spouse are essentially the same as the elements of noneconomic loss recoverable in a wrongful death action arising from a fatal injury. The California Supreme Court recognized this fact in *Krouse v. Graham, supra,* 19 Cal.3d 59. There, a husband brought a wrongful death action after his wife was struck and killed by a motorist. The trial court instructed the jury that the husband could recover, as wrongful death damages, for "the loss of his wife's 'love, companionship, comfort, affection, society, solace or moral support, any loss of enjoyment of sexual relations, or any loss of her physical assistance in the operation or maintenance of the home.'" (*Id.* at p. 67.) The court held that the instruction was proper and that such nonpecuniary damages are recoverable by a spouse in a wrongful death action. (*Id.* at p. 70.) Citing *Rodriguez, supra,* 12 Cal.3d 382, the court stated, "We note that in California *those elements of recovery sought by [the husband] herein clearly would be available to him as 'consortium' damages in the usual personal injury action for his wife's injuries.*" (*Krouse v. Graham, supra,* 19 Cal.3d at p. 70, italics added.)

In *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375 (*Lamont*), a husband joined his loss-of-consortium claim with his wife's personal injury action arising from medical malpractice. (*Id.* at p. 377.) The wife died of her injuries while the action was pending. The husband delayed filing a wrongful death claim for more than a year, believing that amendment was unnecessary because his claim was already before the court. When the husband realized his error and amended his complaint to state a wrongful death claim, the one-year limitations period had expired. The trial court sustained the defendants' demurrer on limitations grounds. (*Id.* at p. 378.) The court of appeal reversed, holding that the husband's wrongful death claim related back to his original loss-of-consortium claim. "The injuries suffered by [husband] 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 p.

380.) The court rejected the defendants' argument that it was illogical to relate the wrongful death claim back to a loss-of-consortium action that was filed while the wife was still alive—that is, to a time before the wrongful death claim had accrued. "This argument," the court said, "ignores the fact that in both claims [husband] is seeking recovery for essentially the same loss. . . . [U]nder the circumstances of this case it [that is, the wrongful death claim] 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 pp. 381-382; see *Pesce v. Sumna Corp.* (1975) 54 Cal.App.3d 86, 92 [in applying maritime law the court said, "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"]; see also *American Export Lines, Inc. v. Alvez* (1980) 446 U.S. 274, 281 [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"[10] under general maritime law]; *Durham ex rel. Estate of Wade v. U-Haul Intern.* (Ind. 2001) 745 N.E.2d 755, 766 ["no significant distinction" between loss-of-consortium damages recoverable in a loss-of-consortium action, on the one hand, and in wrongful death action, on the other hand]; compare with *Brumley v. FDCC California, Inc.* (2007) 156 Cal.App.4th 312, 325 [wrongful death and loss-of-consortium claims of decedent's family members did not relate back to the filing of decedent's own personal injury claim for purposes of the rule barring actions not brought to trial within five years of the filing of the original complaint (§ 583.310) because, unlike in *Lamont*, the decedent's family members had not filed claims in the original lawsuit, but rather asserted their claims by

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[10] "'The term "society"'" includes loss of "'love, affection, care, attention, companionship, comfort, and protection.'" (*American Export Lines, Inc. v. Alvez, supra,* 446 U.S. at p. 275, fn. 1.) As recognized by the court in *Pesce v. Sumna Corp., supra,* 54 Cal.App.3d at page 90, there is no discernable difference between "loss of society" and "loss of consortium." (See *Krouse v. Graham, supra,* 19 Cal.3d at pp. 69-70.)

an amended complaint after the decedent died and for "a different type of injury than those that had been alleged by [the decedent] in the original complaint"].)

Plaintiff's wrongful death action is an attempt to revive her prior loss-of-consortium claim. In her complaint for loss of consortium, plaintiff alleged that she had been damaged by Philip Morris's tortious conduct in that it had rendered Mr. Boeken 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 . . . ." In her wrongful death action, plaintiff alleged that she was damaged by the same tortious conduct of Philip Morris in that she had been deprived of Mr. Boeken's "love, companionship, comfort, affection, society, solace, and moral support." Thus, plaintiff 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. Plaintiff's wrongful death action is therefore barred by the doctrine of res judicata.

Our conclusion is consistent with an authority dealing with the precise issue raised here. In *Richter v. Asbestos Insulating & Roofing* (Ind. App. 2003) 790 N.E.2d 1000 (*Richter*), a former worker suffering from lung cancer brought a personal injury action alleging that his cancer was caused by exposure to asbestos. (*Id.* at p. 1001.) His wife joined a loss-of-consortium claim in that action. (*Id.* at p. 1004.) After the worker and his wife settled their claims against some defendants, the worker and his wife consented to the dismissal with prejudice of their claims against other, nonsettling defendants. (*Id.* at p. 1001.) After the worker died, his widow brought wrongful death claims against some of the nonsettling defendants, both in her individual capacity to recover damages for loss of consortium and on behalf of her husband's estate to recover for his personal injuries. (*Ibid.*) The defendants moved to dismiss the complaint on the ground that the dismissal with prejudice of the prior personal injury claims was res judicata as to the widow's wrongful death claims. (*Id.* at pp. 1001-1002.)

The Indiana Court of Appeal agreed with the defendants. (*Richter, supra,* 790 N.E.2d at pp. 1001-1002.) The widow's wrongful death action involved the same claim

against the same defendants and arose from the same injury asserted in the prior personal injury action. (*Id.* at pp. 1003-1004.) The widow argued that the dismissal of the prior action could not be res judicata of her wrongful death claims because, as the husband was still alive at the time, the wrongful death claims had not yet accrued. The court rejected that argument, reasoning that each of the widow's claims "could have been litigated in the earlier court action. [The widow] is merely asserting those same claims in the subsequent action that she chooses to label as a wrongful death action. Permitting [the widow] to re-litigate those claims after [her husband's] death would effectively grant her a second bite at the apple." (*Id.* at p. 1004.) The court therefore concluded that the doctrine of res judicata barred the widow's wrongful death action.[11] (*Ibid.*)

In her wrongful death action, plaintiff did *not* seek to recover economic loss, such as the loss of Mr. Boeken's financial support. Presumably, any such injury to plaintiff in her individual capacity was compensated by Mr. Boeken's substantial recovery in his personal injury action.[12] We do *not* hold that the final adjudication of a loss-of-consortium claim arising from a spouse's injury would bar a subsequent wrongful death action to recover economic losses arising from the spouse's death.

Plaintiff contends that California courts have recognized in prior decisions that loss-of-consortium claims and wrongful death actions are distinct and separate causes of

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[11] Although the court's analysis in *Richter, supra,* 790 N.E.2d 1000, focuses primarily on the claim brought by the widow on behalf of her husband's estate, the court's discussion and disposition encompass the widow's individual loss-of-consortium claim. (*Id.* at p. 1004.) In a concurring opinion, one justice stated the doctrine of collateral estoppel (rather than the doctrine of res judicata) barred the widow from relitigating all of the pertinent issues other than the decedent's death. (*Id.* at pp. 1004-1005 [conc. op. of Sullivan, J.].)

[12] Plaintiff does not argue that her prayer to recover funeral expenses avoids the application of res judicata to bar her wrongful death claim. She therefore forfeits any such contention. We note that plaintiff sought to recover funeral expenses from Philip Morris in her capacity as trustee of the Richard and Judy Boeken Revocable Trust. The trial court granted plaintiff leave to amend to state that claim with the required certainty. The record does not indicate whether plaintiff has filed an amended complaint.

action. The cases cited by plaintiff, however, are inapposite. Those cases do not discuss res judicata or the primary rights doctrine, nor do they provide analogies useful here.

Plaintiff relies on *Wilson, supra*, 81 Cal.App.4th 847. In that case, a worker suffering from mesothelioma brought a personal injury action against manufacturers of products that contained asbestos; the worker's wife joined her own claim for loss of consortium. (*Id.* at pp. 850-851.) The worker and his wife settled their claims against various manufacturers for approximately $1.1 million. Those settlements allocated the settlement proceeds as follows: 60% for the worker's personal injury claim, 20% for the wife's loss of consortium claim, and 20% to potential wrongful death claims by the worker's heirs. With respect to the latter, the worker and his wife undertook to hold the manufacturers harmless from any wrongful death claims later brought against them by the worker's heirs. (*Id.* at p. 859.)

The worker and his wife proceeded to trial against only one defendant; they prevailed, with the jury allocating 2.5% of the fault to the defendant. (*Wilson, supra*, 81 Cal.App.4th at p. 851.) The worker was awarded $590,000 in economic damages and $3 million in noneconomic damages; his wife was awarded $1 million in damages for loss of consortium. (*Id.* at p. 851.) Pursuant to Civil Code section 1431.2, the damage awards against the defendant for noneconomic loss, including the wife's loss of consortium, were reduced to 2.5% of the total (that is, to $75,000 for the worker's noneconomic loss and $25,000 for the wife's loss of consortium) to reflect the defendant's proportional share of responsibility. (*Id.* at pp. 851-852.)

The defendant then sought to obtain credits against the worker's $590,000 award for economic damages for amounts the worker and his wife had received in settlement from other manufacturers. (*Wilson, supra*, 81 Cal.App.4th at pp. 859-860.) The court held that the defendant was not entitled to a credit for settlement amounts allocated to future wrongful death claims because the worker's personal injury claim belonged to the *worker*, but any future wrongful death claim would belong to the worker's *heirs* (including his three children) to compensate them for *their* loss if the worker eventually died of his injuries. (*Id.* at pp. 861-862.) The economic damages awarded to the worker

were to compensate the worker for damages suffered by him during his lifetime, and thus did not include a component for his heirs' future wrongful death claims. (*Id.* at p. 860.) The court stated that the heirs would not be entitled to obtain a double recovery in any future wrongful death action, if the heirs actually or constructively received settlement sums paid to the worker in settlement of those claims. (*Id.* at pp. 862-863.) The court also held that the defendant was not entitled to a credit for settlement sums allocated to his wife's claim for loss of consortium because such sums were noneconomic damages, and defendant was entitled to a credit only against the worker's award of economic damages. (*Id.* at pp. 863-864.) *Wilson*, which deals with credits for settlement payments, does not suggest that a spouse's loss-of-consortium claim arises from a primary right different than her wrongful death claim for harm to her marital relationship.

Dominguez v. City of Alhambra (1981) 118 Cal.App.3d 237 is not helpful to plaintiff. In that case, the court held that a survival action filed after the limitations period expired did not relate back to the filing of an earlier wrongful death action. The survival action was "wholly distinct" from the wrongful death action because the former was to recover for injuries suffered *by the decedent* prior to his death, whereas the latter was "*by the heirs* . . . and is for the loss of support, comfort and society suffered independently by the heirs . . . ." (*Id.* at p. 243, italics added; see also 2 Harper, *supra,* § 8.9 at pp. 658-659.)

Lantis v. Condon (1979) 95 Cal.App.3d 152 (*Lantis*), also relied upon by plaintiff, was a loss-of-consortium action arising from a traffic collision that injured the plaintiff's husband. (*Id.* at p. 154.) The defendant contended that the wife's recovery for loss of consortium should be reduced due to the contributory negligence of her husband. (*Id.* at p. 156). 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 loss-of-consortium damages. (*Id.* at p. 158.) The court rejected that analogy, holding that the wife's recovery for loss of consortium was not subject to reduction for the negligence of her spouse. The court said 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.*) When originally enacted in 1862, the wrongful death statute permitted a claim by the heirs only to the extent the decedent had a claim;[13] accordingly, courts construing the statute held that the decedent's contributory negligence was (as it was in all negligence actions at the time) a complete bar to recovery by the heirs. (*Ibid.*) Although the wrongful death statute was later amended to permit recovery "by the decedent's heirs for their own separate and distinct damages," courts continued to permit contributory negligence as a defense because the Legislature had been aware of, and had not expressly altered, the rule. (*Ibid.*; see *Buckley v. Chadwick* (1955) 45 Cal.2d 183, 200-201.) Unlike wrongful death actions, the court reasoned, 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 applicable in the wrongful death context. (*Lantis, supra,* 95 Cal.App.3d at p. 158.)[14] Accordingly, although the court in *Lantis* recognized the distinct origins of common law loss-of-consortium claims and statutory wrongful death actions, it did not differentiate between the primary right protected by the two legal theories. Accordingly, *Lantis* does not assist plaintiff here.

Plaintiff cites *Agarwal v. Johnson* (1979) 25 Cal.3d 932 (*Agarwal*), disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4. In *Agarwal*, a former employee brought a federal employment discrimination action against his former employer and a state court action against the employer and individual

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[13] Statutes 1862, chapter, 330, section 1, page 447. The wrongful death statute was modeled on Lord Campbell's Act. (*Buckley v. Chadwick* (1955) 45 Cal.2d 183, 190-191.)

[14] The comparative negligence doctrine now applies in wrongful death actions. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1400, pp. 823-824.) Although not relevant to the disposition of this case, the specific holding in *Lantis, supra,* 95 Cal.App.3d 152, was abrogated, in effect, by Proposition 51 (Civ. Code, § 1431.2). (See *Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309-1310.)

supervisors for defamation and intentional infliction of emotional distress. (*Agarwal, supra,* 25 Cal.3d at pp. 944, 954.) A jury found in favor of the former employee in his state court action, and the trial court entered judgment for the former employee. (*Id.* at p. 944.) While the appeal from the state court judgment was pending, the federal court entered judgment against the former employee on his discrimination claim. (*Id.* at p. 954.) The defendants in the state court action moved the state appellate court to dismiss the former employee's state action on the ground of res judicata. (*Ibid.*)

The California Supreme Court held that the federal judgment against the plaintiff did not bar his state court action. Although the two actions arose "from the same set of operative facts," the plaintiff had alleged that the employer had violated different primary rights. (*Agarwal, supra,* 25 Cal.3d at p. 954.) The federal action concerned the employer's "employment practices and the corresponding impact on racial minorities" in determining whether the employee's "federal statutory rights against discriminatory employment practices" had been violated. (*Id.* at p. 955.) The state action, in contrast, concerned "damages for harm distinct from employment discrimination"—that is, harms suffered from the employer's intentional torts of defamation and infliction of emotional distress. (*Ibid.*) "[T]he significant factor," the court said, "is the harm suffered; that the same facts are involved in both suits is not conclusive." (*Id.* at p. 954.) In contrast to *Agarwal*, plaintiff here asserted in her two actions not only the same operative facts, but the same injury.

Plaintiff argues that her loss-of-consortium claim could not be res judicata as to her wrongful death claim because she could not have recovered in her loss-of-consortium action "future" damages for the time period after Mr. Boeken's death. This assertion is incorrect. A tort plaintiff in California may recover damages to compensate "for all the detriment proximately caused" by the tortious conduct (Civ. Code, § 3333), including future damage proved with reasonable certainty. (Civ. Code, § 3283; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1552, p. 1026; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995, disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.) Plaintiff cites no authority that

these principles do not apply to a loss-of-consortium action adjudicated prior to the injured spouse's death.[15] A loss-of-consortium plaintiff may recover damages for the duration of the incapacity giving rise to the loss of consortium; in cases of permanent injury, the plaintiff may recover damage to his or her marital relation for the remainder of his or her married life—that is, from the date of her spouse's injury to the end of the injured spouse's expected lifespan, as measured from just prior to the spouse's injury.[16] (See *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 352-353; see also *Rodriguez, supra,* 12 Cal.3d at pp. 386, 409 [approving prayer for general loss-of-consortium damages for nonfatal permanent injury]; *Cody v. Peak* (Ga. App. 1966) 149 S.E.2d 521, 522 [because "the right of consortium exists only during the joint lives of the husband and wife, . . . evidence [of the age and life expectancy of both the plaintiff and the injured spouse] is essential to the jury's determination" of loss-of-consortium damages].)[17]

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[15] 2 CACI No. 3920, *supra,* page 757, on Loss of Consortium, states, "[*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.*" (Unbracketed italics added.) The "Directions for Use" following this instruction 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." (Unbracketed italics added.)

[16] If the plaintiff's life expectancy is shorter than the pre-injury lifespan of the injured spouse, then the damage would be determined as measured by the plaintiff's life expectancy. (*Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 353; see *Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424; Directions for Use to CACI No. 3920, *supra,* p. 757.) Life expectancy is a question of fact for the jury. (*Allen v. Toledo, supra,* 109 Cal.App.3d at p. 424.)

[17] Plaintiff's purported distinction between "pre-death" and "post-death" damages has no merit in the context of loss-of-consortium actions adjudicated *prior* to the injured spouse's death. Because the injured spouse's life expectancy is computed from just prior to his injury, it is unnecessary in such actions to calculate the diminution in the injured spouse's lifespan caused by the injury or to apportion loss-of-consortium damages to the injured spouse's "lost years."

The damages available in a loss-of-consortium action adjudicated prior to the injured spouse's death thus include the damages that would be available as loss-of-consortium damages in a future wrongful death action arising from the same injury. A wrongful death plaintiff may recover 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, from the date of the injured spouse's death (which must be at or after the time of injury) *until the end of the injured spouse's expected lifespan, as measured from just prior to the spouse's injury.* (See *Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424; see also 2 CACI No. 3921, *supra*, pp. 850-851.) Because the recoverable damage terminates at the end of the injured spouse's pre-injury lifespan in both loss-of-consortium actions involving permanent injury and wrongful death actions, the damages available to a wrongful death plaintiff for loss of consortium are a portion of the damages available in a common law loss-of-consortium claim adjudicated prior to the injured spouse's death.

Accordingly, as plaintiff in effect concedes, had plaintiff litigated her loss-of-consortium action to judgment and prevailed, she would have recovered all damages from the onset of Mr. Boeken's disability to the date of his expected death, as measured by his life expectancy from just prior to his injury. Thus, when Mr. Boeken subsequently died of his cancer prior to the end of his pre-injury lifespan, plaintiff, in her loss-of-consortium action, already would have been compensated for damage to her marital interests for the period between Mr. Boeken's premature death and the end of his pre-injury lifespan—that is, for the very damage plaintiff seeks in her wrongful death action. Contrary to the assumption implicit in plaintiff's argument, plaintiff would never be entitled to recover loss-of-consortium damages for a period *beyond* Mr. Boeken's expected lifespan, regardless of the legal theory under which she asserted her claim, for the obvious reason that plaintiff would have suffered no loss-of-consortium damage for any such period. (See *Durham ex rel. Estate of Wade v. U-Haul Intern., supra*, 745 N.E.2d at p. 766 [loss-of-consortium damages under wrongful death statute recoverable only to the extent that "the defendant's [tort] caused or accelerated the death of the [injured] spouse"]; see also *Abernathy v. Superior Hardwoods, Inc.* (7th Cir. 1983) 704

F.2d 963, 972 [a wrongful death plaintiff "cannot claim loss of consortium for a period after [the injured] spouse's death *unless the defendant's culpable acts accelerated his death*" (italics added)].)

Plaintiff refers to Restatement Second of Torts section 693, comment *f*, page 497, which includes the statement, "*In case of death resulting to the impaired spouse*, the deprived spouse may recover under the rule stated in this Section [Action By One Spouse For Harm Caused By Tort Against Other Spouse] only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse must recover, if at all, under a wrongful death statute." (Italics added.)

Contrary to plaintiff's assertion, the comment does not purport to limit recovery in an action—as plaintiff's prior loss-of-consortium action—brought and finally adjudicated *before* the injured spouse's death. In a case finally adjudicated *before* the injured spouse's death, the actual date of the injured spouse's death will be unknown when the judgment is rendered. Comment *f* appears to concern cases adjudicated *after* an injured spouse's death. (See *Hatch v. Tacoma Police Dept.* (Wash. App. 2001) 27 P.3d 1223, 1225 & fn. 11 [in action brought after injured spouse's death, plaintiff's common-law loss-of-consortium claim limited to damages prior to spouse's death]; *Bridges v. Van Enterprises* (Mo. App. 1999) 992 S.W.2d 322, 325-326 [in action brought after injured spouse's death, wrongful death plaintiff may assert separate common law claim for loss-of-consortium damages for period between spouse's injury and death when such damages not compensable under Missouri wrongful death statute]; *Novelli v. Johns-Manville Corp.* (Pa. Super. 1990) 576 A.2d 1085, 1087 [injured spouse died while loss-of-consortium action was pending; damages limited to period prior to injured spouse's death]; see also *Durham ex rel. Estate of Wade v. U-Haul Intern., supra,* 745 N.E.2d at pp. 764-765 [noting, in action brought after injured spouse's death, that "common law recovery for loss of consortium damages is limited to the period between the spouse's injury and the spouse's death," but loss of consortium due to injured spouse's premature death "is a proper element of damages in a wrongful death action"].) The rule limiting recovery to

pre-death damages in common law loss-of-consortium actions adjudicated after the injured spouse's death derives from the traditional common law rule extinguishing personal injury claims upon the injured party's death. (See *McLaughlin v. United Railroads of San Francisco* (1915) 169 Cal. 494, 495-496; 6 Witkin, Summary of Calif. Law, *supra*, § 1377, at p. 797 ["At common law, a right of action for injuries to the person did not survive the death of . . . the person injured"]; see also *Durham ex rel. Estate of Wade v. U-Haul Intern., supra*, 745 N.E.2d at p. 764; Rest.2d Torts, § 925, com. a, pp. 527-528.) That rule has no application when, as plaintiff's prior loss-of-consortium action, the claim is brought and adjudicated *prior* to the injured spouse's death.

Finally, plaintiff argues that applying res judicata to bar her wrongful death action would deprive her of due process because, when she dismissed her loss-of-consortium claim in 2001, she had no "tenable basis" to believe she could assert a claim for loss-of-consortium damages caused by Mr. Boeken's death. Civil Code section 3283, however, has authorized tort plaintiffs to recover prospective damages since 1872. Furthermore, plaintiff, in her loss-of-consortium complaint, alleged that Mr. Boeken would be unable "to perform [his] work, services, and duties in the future," and that she had been "permanently deprived" of his consortium. She thus not only had a "tenable basis" to assert a claim for loss-of-consortium damages for the remainder of Mr. Boeken's expected lifespan, but she in fact asserted such a claim.

DISPOSITION

The judgment is affirmed. Philip Morris is to recover its costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

I concur:

ARMSTRONG, J.

Turner, P.J.

I respectfully dissent. In my view, the demurrer should not have been sustained because the prior dismissal of the common law consortium loss claim of plaintiff, Judy Boeken, does not bar her from recovering any damages sustained *after* her husband's death. No doubt, there are res judicata consequences of plaintiff's dismissal of her prior common law consortium loss complaint. But I disagree with the assertion of defendant, Phillip Morris USA, Inc., that the dismissal of the prior common law consortium loss claim bars any recovery on plaintiff's statutory wrongful death cause of action.

As my colleagues explain: California's res judicata doctrine is based on the primary right theory; the primary right is the plaintiff's right to be free from the particular injury suffered; and one injury gives rise to only a single claim for relief. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) If the plaintiff has litigated, or had opportunity to litigate the same cause of action in the prior litigation, then the second lawsuit is barred on res judicata grounds. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 182; *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972.) Here the injury for res judicata purposes is the decedent's death. (Code Civ. Proc., § 377.60, subd. (a) ["A cause of action *for the death of a person* caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: [¶] (a) The decedent's surviving spouse . . ." (italics added)]; *Jackson v. Fitzgibbons* (2005) 127 Cal.App.4th 329, 335 ["Our holding is consistent with the purpose of the wrongful death statute, which is to compensate for the loss of companionship and for other losses to specified persons *as a result of the decedent's death*." (Italics added)].) As our Supreme Court explained in *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283: "Unlike some

jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 'creates a *new cause of action* in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived. [Citations.]' (6 Witkin, Summary of Cal. Law [(9th ed. 1988) Torts,] § 1197, pp. 632-633; see also *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 693-694; *Brown v. Rahman* (1991) 231 Cal.App.3d 1458, 1460-1461, fn. 3.)' Further, plaintiff could not pursue her statutory wrongful death cause of action when she dismissed her common law consortium loss claim. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 575, overruled on another point in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; see *People v. Giordano* (2007) 42 Cal.4th 644, 659.) Only when the decedent died could plaintiff pursue her claims arising from his death. Thus, plaintiff did not have the opportunity to litigate her statutory wrongful death cause of action when she dismissed her common law consortium loss claim or at any time prior to the decedent's death.

The fundamental flaw in defendant's approach is that all of its arguments focus on the similarity in the available remedies and legal theories underlying a common law consortium loss claim and a statutory wrongful death cause of action. Of course, the controlling issues in applying res judicata and primary right principles are those of a separate injury and the inability to pursue the cause of action in a second lawsuit. (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 904; *Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d at p. 182.) Our Supreme Court has explained that the availability of multiple legal theories or remedies is irrelevant—the issue is the particular injury and the ability to pursue the cause of action in the first lawsuit. (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 904; *Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d at p. 182.)

No doubt, plaintiff may be barred from pursuing any damages for pre-death injury. Her dismissal of her common law consortium loss claim may potentially bar any claim for pre-death losses. But as to plaintiff's post-death claims, she may pursue them in her statutory wrongful death cause of action.

TURNER, P.J.

APPENDIX B

Trial Court Rulings on Demurrers (Tentative)

(February 7, 2007)

CASE NAME:	Judy Boeken et al v. Philip Morris USA et al
CASE No.:	BC 353365
HEARING DATE:	February 7, 2007
DEPARTMENT:	61
CALENDAR No.:	7
NOTICE:	Okay
TRIAL DATE:	None Set
SUBJECT:	(1) Demurrer (2) Motion to Strike
MOVING PARTY:	Defendant Philip Morris USA
RESPONDING PARTY:	Plaintiffs Judy Boeken et al
SUBJECT:	(3) Demurrer
MOVING PARTY:	Defendant IHOP
RESPONDING PARTY:	Plaintiffs Judy Boeken et al

STATEMENT OF THE CASE

The Plaintiffs sue for the death of their husband/father, Richard Boeken who died of lung cancer as a result of smoking cigarettes. Defendant Philip Morris Manufactured the cigarettes and Defendant IHOP sold them. Richard Boeken previously sued Philip Morris USA and was successful. He obtained a $55 million judgment which has been paid.

CAUSES OF ACTION

First Amended Complaint

1. Wrongful Death/Personal Property Damages
2. Wrongful Death/Personal Property Damages

MOTION (1)

Defendant demurrers to the first cause of action, which is the sole action asserted against it. The Defendant says that the action is uncertain because the Plaintiffs have combined the wrongful death and property damage claims into one cause of action. It says that the Plaintiffs have based the cause of action on the theories of negligence, strict liability, negligent misrepresentation, intentional misrepresentation, concealment and false promise without pleading facts corresponding to those theories. Moreover, the Plaintiffs do not describe what property damages they have suffered. The Defendant also argues that Plaintiff Judy Boeken cannot maintain this action because it is barred by res judicata since she dismissed her loss of consortium claim with prejudice.

OPPOSITION

The Plaintiffs argue that the complaint is not uncertain because the Defendants know what the complaint is about since it was the Defendant in case where Richard Boeken was the plaintiff. They also say that the damages are sufficiently pled. Finally they argue that res judicata does not apply here because causes of action for wrongful death and loss of consortium are different.

REPLY (1)

The Defendant again argues that the complaint is improperly pleaded and thus fails to state a cause of action and is uncertain because it improperly combines two causes of action and it fails to state facts to constitute any of these causes of action. The Defendant also argues that the cases it presents on the issue of whether or not Judy Boeken is barred by res judicata are more compelling than the Plaintiffs' cases.

ANALYSIS (1)

A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (Picton v. Anderson Union High Sch. Dist. (1996) 50 Cal. App.4th 726, 732.) The court must treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law, and may consider exhibits attached to the complaint. (Id. at 732-33.) The complaint is to be construed liberally to determine whether a cause of action has been stated. (Id. at 733.)

Uncertainty/Failure to State Sufficient Facts

The Defendant argues that the first cause of action is uncertain because it improperly combines an action for personal property damages with an action for wrongful death. It also says that the action is uncertain because the action is based upon negligence, strict liability, negligent misrepresentation, intentional misrepresentation, concealment and false promise without pleading facts corresponding to those theories. Also the Plaintiffs don't state if those theories of liability apply to the wrongful death or property damage claim. Additionally, no facts are pled to correspond to any of the theories nor do the Plaintiffs specify what type of personal property damage they suffered.

The Plaintiffs plead at ¶14 that liability against the Defendant has already been established based on the case where Richard was the plaintiff. In that case, Richard prevailed on theories of fraud, strict liability and negligence. Here the theories of negligent misrepresentation, intentional misrepresentation and false promise are probably covered by the "fraud" theory posed in the Richard action. Therefore the theories of liability advanced here are the same as those advanced in the prior action. The Plaintiffs say that the only issue to determine here is the amount of damages. This is presumably why the Plaintiffs don't feel as if they need to plead all of the elements of these theories and facts to support their theories. The Plaintiffs say that the Defendant knows exactly what the facts are upon which this complaint is based because it was the defendant in the lengthy Richard action. Since this Court would be bound by collateral estoppel on the issue of liability, there appears to be no need to plead any facts to support the theories since the theories are now no more than an afterthought (because liability has already been determined.) However the Defendant is correct that there is no law cited by the Plaintiffs that excuse them from following the standard pleading requirements simply because the issue of liability may already be determined. In fact, the Plaintiffs go to great lengths to stress that this is an independent lawsuit, so it would make sense to make them conform to proper pleading standards.

The wrongful death and personal property damage actions appear to be improperly joined. It appears that Plaintiffs Judy and Dylan Boeken are the plaintiffs in the wrongful death action, while Plaintiff Judge Boeken as Trustee of the Richard and Judy Boeken Revocable Trust, is the plaintiff in personal property damage action. I see no reason why these actions should be joined into single cause of action, especially when the two actions seek different remedies. Judy and Dylan Boeken seek general damages for the loss of Richard as well as funeral and burial expenses. Judy as the Trustee seeks personal property damages, funeral and burial expenses and medical expenses. The Plaintiffs should state these causes of action separately.

Furthermore, the Plaintiffs are wrong when they argue that "damage to personal property" is specific enough. They say it is as specific as "funeral and burial expenses," "medical expenses," and "general damages." "Funeral and burial expenses" is clear. As to "general damages" the Plaintiffs plead at ¶15 that these are for loss of love, companionship etc of Richard. This is also clear. "Medical expenses" is a little more vague but we know that they have to deal with Richard's illness. However we have NO IDEA what the "damage to personal property" consists of. It could literally mean almost anything. The Plaintiffs have to provide the Defendant with some idea of what property they believe was damaged.

Finally the Defendant is correct that including a request for "medical expenses" incurred by Richard after the finding of liability, would be proper if this was a survival/personal injury action. But it is not.

Based on all of the foregoing, the first cause of action is uncertain and it fails to state sufficient facts to constitute a cause of action.

Statute of Limitations

The Defendant argues that Plaintiff Judy's prior dismissal with prejudice of her loss of consortium claim acts as res judicata to bar her from bringing this wrongful death claim. For res judicata to apply, there must be 1) a final judgment on the merits; 2) the same parties (or their privies); 3) the same cause of action/same claim. Here Judy and Philip Morris were the parties in her loss of consortium claim and Judy dismissed that claim with prejudice. Thus the only issue is whether a loss of consortium claim and a wrongful death claim are the same causes of action.

The Plaintiff cites to two cases which specifically state that loss of consortium and wrongful death are separate causes of action. The Court in Wilson v. John Crane, Inc., (2000) 81 Cal. App. 4th 847, 862 (Cal. Ct. App. 2000) said, "these authorities emphasize the legal distinctness and independence of wrongful death, loss of consortium, and personal injury claims." This case involved an asbestos case where the Defendant was trying to have prior settlements credited against its judgment. The Court said (that since wrongful death and loss of consortium are to two different causes of action), "It follows that the settlement of one such claim may serve as a credit only against a judgment on the same claim." The Court in Lantis v. Condon, (1979) 95 Cal. App. 3d 152, 158 said:

> Respondent's most telling argument is to analogize a wife's claim of loss of consortium to an action by heirs for the wrongful death of their decedent, pointing out that although the

cause of action is independent, California law still recognizes a decedent's contributory negligence as a valid defense to the claim of the heirs.

This case concerned a wife who appealed the reduction of her loss of consortium claim because the reduction was based upon her husband's contributory negligence.

The Defendant argues that neither of these cases are directly applicable to the issue at hand: whether or not the claims are the same for the purposes of res judicata. The Defendant relies heavily on the case of Lamont v. Wolfe, (1983) 142 Cal. App. 3d 375. This case dealt with the statute of limitations so it is not directly on point; it held that loss of consortium and wrongful death claims involve the same right. In this case, Mr. Lamont brought a loss of consortium claim and later on sought to amend the complaint to add a cause of action for wrongful death, after his wife had died. The Court said:

> The injuries suffered by Ronald Lamont 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.
>
> The identity of the parties and the injuries distinguishes the case at bar from cases such as *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237 [173 Cal.Rptr. 345] and *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66 [128 Cal.Rptr. 454], cited by defendants. In those cases one plaintiff sought to relate back his own independent cause of action to a complaint filed by another plaintiff for the violation of a different right. Here the plaintiff's wrongful death action like his claim for loss of consortium is personal to him. (Id. at 380, Emphasis added.)

The Court went on to say to it would apply relation back because the two actions arose out of the same right. The Court said:

> Defendants also argue that it is illogical to apply the relation back doctrine in this case because it would result in Mr. Lamont's wrongful death action relating back to a date before it ever existed. This argument ignores the fact that in both claims Mr. Lamont is seeking recovery for essentially the same loss. ... While 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 381-382, emphasis added.)

The Defendant argues that Lamont is more applicable to the facts here as opposed to Wilson and Lantis because both of the claims arise from the loss of her spouse. The Defendant says that had Judy litigated her loss of consortium claim and lost, she would not be allowed to bring a wrongful death claim because she would have already had the opportunity to litigate her personal rights that emanated from the Defendant's tortious conduct to her husband.

This Court is clearly faced with a split of authority amongst the Courts of Appeal and there is no case directly on point. This is a case of first impression. I am inclined to agree with the Defendant that the cause of action is barred against Judy. She had an opportunity to litigate her personal rights for loss of consortium. For whatever reason, she dismissed that action with prejudice. Now she seeks to bring an action for wrongful death that also seeks damages for the loss of her husband's love, companionship etc. These are the same damages as would have been addressed in the prior action. Thus I believe that she is precluded now.

TENTATIVE RULING (1)

The Defendant's Demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND** as to Plaintiff Judy Boeken and **SUSTAINED WITH LEAVE TO AMEND** as to the other Plaintiffs.

MOTION (2)

The Defendant asks the Court to strike certain portions of the complaint. First it asks that the entire first cause of action be stricken because of the improper pleading. It also asks that claim for Mr. Boeken's medical bills be stricken because this is not a survival action. It asks that the punitive damages claim and all references to the Trust be stricken.

OPPOSITION (2)

The opposition is the same as the opposition to the demurrer.

REPLY (2)

The Defendant essentially repeats the same arguments in a brief summary.

ANALYSIS (2)

Defendant brings this motion pursuant to CCP §436(a), which allows a judge to strike any irrelevant, false or improper matter in the pleadings. §431.10 defines an irrelevant matter:

> (b) An immaterial allegation in a pleading is any of the following:
> (1) An allegation that is not essential to the statement of a claim or defense.
> (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense.
> (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint.
> (c) An "immaterial allegation" means "irrelevant matter" as that term is used in Section 436.

The First Cause of Action

The Defendant brings the same arguments that it brought in the demurrer in connection with the deficient pleading of the first cause of action. As discussed above, the complaint appears to be improperly pleaded, but the Court should grant leave amend. The entire first cause of action should not be stricken.

Medical Expenses

The property damages claim in the first cause of action is where the medical bills are sought. Indeed medical expenses are not available in wrongful death actions. (Fitch v. Select Products Co. (2005) 36 Cal. 4th 812, 819.) The Defendant claims that the medical bills, such as they constitute personal property damages, are barred by the statute of limitations because under CCP §338(c) a 3 year limit applies to personal property damage. The bills were incurred in 2001-2002 and this action was not brought until 2006. Moreover medical expenses are usually brought for survival actions or personal injury actions and the Plaintiffs admitted in federal court (when

this case was temporarily removed) that their survival action was time-barred. The Plaintiffs fail to respond to this point in the opposition.

Personal Property Damage

The allegations for personal property damage are too vague, but as stated in the demurrer the Plaintiffs can cure this problem by amendment.

Punitive Damages

To the extent that the Plaintiffs seek punitive damages for the wrongful death action, such damages are barred. (CCP §377.61 and Ford Motor Co. v. Superior Court (1981) Cal.App.3d 748, 751.) To the extent that Plaintiffs seek punitive damages under the personal property damage action, as previously discussed the complaint is completely devoid factual allegations. Punitive damages must be specifically pleaded and a review of the complaint shows that such damages are definitely not specifically pleaded here. However Plaintiffs should get a change to amend.

Allegations of the Trust

The Defendant wants the Trust struck from this suit. The Trust is the party bringing the personal property damage claim. The Trust is Mr. Boeken's successor because it governs the $55 million dollars that he received in his lawsuit. As discussed above, the Trust's medical bills request should be struck. But, (irrespective of any pleading deficiencies) the Defendant did not explain in the motion why the Trust is not entitled to punitive damages for personal property damage and the Plaintiffs did not respond to the part of the motion. However in the reply, the Defendant states that the Trust should be stricken because the personal property damages should be stricken. As I have discussed already, the property damages should not be stricken but should be repled. Thus the Court should not strike the Trust entirely from the lawsuit.

TENTATIVE RULING (2)

The Defendant's Motion to Strike is **GRANTED** only with respect to medical expenses.

MOTION (3)

The Defendant IHOP demurrers to the second cause of action brought by Dylan Boeken as the sole plaintiff. The Defendant says that collateral estoppel bars Dylan's claim and it also argues that the Immunity Statute bars this action. The Defendant asks this Court to ignore the federal remand order.

OPPOSITION (3)

Plaintiff Dylan argues that collateral estoppel does not apply here and that Defendant is not immune from suit. He notes that the Defendant cites an unpublished federal court case and this citation must be disregarded.

REPLY (3)

The Defendant admits that wrongful death and personal injury cases are two different causes of action, but it says that collateral estoppel still applies to bar heirs from bringing a wrongful death suit on the same underlying issues as the personal injury suit. The Defendant argues that it does have immunity from liability based on the plain reading of Cal. Civ. Code §1714.45 and it says that when this statute was enacted the Legislature was aware that tobacco companies made adulterated product. It points out that the Plaintiff has manipulated the language of the Naegele decision to make it appear as if the Court's holding supports the Plaintiff's position.

ANALYSIS (3)

Collateral Estoppel

Richard Bocken sued the Defendants IHOP and Philip Morris for personal injury in CA state court in 2000. Defendant IHOP demurred to the complaint and Richard stipulated to a dismissal with prejudice of all of his claims against IHOP.

To determine whether collateral estoppel applies, the analysis in Horwich v. Superior Court, (1999) 21 Cal. 4th 272, 283-285 is particularly helpful:

> In the alternative, defendant argues he should be able to invoke section 3333.4 because "[a] wrongful death plaintiff is subject to any defenses which the defendant could assert against the decedent . . . ." Contrary to his assertion, this is not an "absolute" rule. Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 "creates a *new cause of action* in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived. [Citations.]" Although for some purposes the actions may be "inextricably linked" that is not categorical; each case must be examined in its context. (citations omitted.)
>
> ...Moreover, a defendant cannot assert res judicata against the heirs based on a decedent's prior successful personal injury action although, as discussed below, principles of collateral estoppel may apply.
>
> ...
>
> If the decedent had unsuccessfully prosecuted a personal injury action, the defendant may invoke collateral estoppel in a subsequent wrongful death suit. This defense arises from the identity of interests between the decedent and the heirs, i.e., the "[p]laintiffs' right to recovery, like the deceased's, depends on the liability of [the] defendant . . . ." This principle is not unique to wrongful death actions; all parties in privity with an antecedent litigant are subject to the application of collateral estoppel. (citations omitted.)

The Court in Brown v. Rahman, (1991) 231 Cal. App. 3d 1458, 1461 n. 3, relying on the Restatement (second) of Judgments said:

> When a wrongful death statute provides for an independent cause of action in the heirs, the heirs are not precluded from litigating their own damages if the injured party prevailed in the personal injury action. (Rest.2d Judgments, supra, § 46, com. c, p. 19.) In fact, in such an instance, the heirs may assert collateral estoppel against the defendant on the issue of liability. (Ibid.) But if the judgment was adverse to the decedent, the prior

action is usually deemed a bar to the heirs relitigating the issue of the defendant's liability.

The Brown Court made it clear that the holding of the 1922 case Blackwell v. American Film Co. (1922) 189 Cal. 689, only allowed for the heirs to bring a wrongful death action, when the decedent's prior personal injury suit was successful.

The Plaintiff's citation to Fitch v. Select Products Co. (2005) 36 Cal. 4th 812 is unhelpful because that Court merely quoted the same language of Horowitz, which I have set forth above.

It seems to me that collateral estoppel does apply to this case because Dylan is seeking to relitagate the same claims that his father unsuccessfully brought. According to Brown the decedent and heirs have a unity of interest such that is fair to bind the decedent's personal injury action on the heirs' wrongful death claim. Richard's personal injury action involved claims of negligence and strict liability, among other things, for IHOP's sale of cigarettes to him. Here Dylan is bringing a wrongful death action based upon negligence and strict liability also for IHOP's sale of cigarettes. Richard dismissed his negligence and strict liability claims against this Defendant with prejudice. This dismissal has the same effect as if Richard had taken the case to trial and lost and it was a judgment against Richard. Therefore under the caselaw set forth above, Dylan is collaterally estopped from bringing this suit. None of the cases cited by the Plaintiff contradict this conclusion.

Immunity

Cal. Civ Code §1714.45 is a statute that sets forth the liability of tobacco manufacturers and sellers. Subsection (a) provides immunity for those in tobacco industry in certain situations. Subsection (b) states:

> This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions, but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.

Subsection (c) says:

> For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

Both the Plaintiff and the Defendant cite to the CA Supreme Court in Naegele v. R.J. Reynolds Tobacco Co., (2002) 28 Cal. 4th 856. However the Plaintiff has improperly manipulated that case by adding words that do not belong and which alter the holding of the case. At page 864 the Court said:

> Accordingly, the statutory immunity does not shield a tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itself--that is, if some adulteration of the product made it unreasonably dangerous.

The clear language of the case does not include the words "or any other seller of cigarettes" as the Plaintiff has added into brackets after the word "tobacco company". Indeed the Naegele case did not address the liability of sellers of cigarettes. Thus even though the Plaintiff has conveniently pleaded that the Philip Morris cigarettes were adulterated, nothing in Cal. Civ. Code §1714.45 suggests that the immunity provided to sellers of tobacco is limited if the product

is adulterated. Indeed, Naegele held no such thing. Therefore under a plain reading of the statute, IHOP would be immune from liability.

[Since I conclude that the Plaintiff is barred by collateral estoppel from bringing this suit or in the alternative that IHOP is immune, there is no need to address the federal judge's remand order. Indeed it was not even relevant to this Court's ruling.]

TENTATIVE RULING (3)

Defendant IHOP's Demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND.**

APPENDIX C

Trial Court Rulings on Demurrers (Minute Order)

(February 13, 2007)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. 61

DATE: 02/13/07			
HONORABLE David L. Minning	JUDGE	T.R. DOTY	DEPUTY CLERK
HONORABLE #22	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

2:00 pm BC353365
JUDY BOEKEN, ET AL

VS.

PHILIP MORRIS USA, ET AL

Plaintiff Counsel: no appearances

Defendant Counsel:

NATURE OF PROCEEDINGS:

RULING ON DEMURRERS BY DEFENDANTS INTERNATIONAL HOUSE OF PANCAKES INC. and PHILIP MORRIS USA INC., TO PLAINTIFF'S FIRST AMENDED COMPLAINT, TAKEN UNDER SUBMISSION FEB. 7, 2007;

Defendants' Demurrers having been taken under submission 2/07/07 are ruled on as follows:

After reviewing plaintiff's Sur-Reply to defendant International House of Pancakes Inc.'s Demurrer, which was not available to the Court at the time of hearing, the Court adopts its tentative ruling given to counsel and discussed 2/07/07.

Defendant International's Demurrer is therefore SUSTAINED, WITHOUT LEAVE TO AMEND for the reasons set forth in the court's written ruling attached hereto and incorporated herein by reference.

Defendant Philip Morris USA's Demurrer is therefore SUSTAINED WITHOUT LEAVE TO AMEND as to plaintiff Judy Boeken, and SUSTAINED WITH LEAVE TO AMEND as to the remaining plaintiffs, for the reasons set forth in the court's written ruling attached hereto and incorporated herein by reference.
herein by reference.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/13/07			DEPT. 61
HONORABLE David L. Minning	JUDGE	I.R. DOTY	DEPUTY CLERK
HONORABLE #22	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

2:00 pm BC353365
JUDY BOEKEN, ET AL

Plaintiff Counsel: no appearances

VS.

Defendant Counsel:

PHILIP MORRIS USA, ET AL

NATURE OF PROCEEDINGS:

Defendant Philip Morris USA's Motion to Strike is therefore GRANTED as to medical expenses ONLY and DENIED as to the remainder.

Plaintiffs' Amended Complaint to be filed and served within the statutory time limits.

Notice by the court as indicated below.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 2/13/07 upon each party or counsel named below by depositing in the United States mail at the court-house in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: Feb. 13, 2007

MINUTES ENTERED
02/13/07
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/13/07			DEPT. 61
HONORABLE David L. Minning	JUDGE	I.R. DOTY	DEPUTY CLERK
HONORABLE #32	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

2:00 pm BC353365
JUDY BOEKEN, ET AL

VS.

PHILIP MORRIS USA, ET AL

Plaintiff Counsel: no appearances

Defendant Counsel:

NATURE OF PROCEEDINGS:

John A. Clarke, Executive Officer/Clerk

By: _____
I.R. MATTHEWS-DOTY

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MINUTES ENTERED
02/13/07
COUNTY CLERK

PROOF OF SERVICE

Boeken v. Philip Morris, USA, Inc.

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 March 24, 2008, I served the foregoing document described as: Plaintiff and Petitioner's **Petition for Review**, dated March 24, 2008, on the parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Supreme Court of California
350 McAllister Street,
San Francisco, CA 94102-4783
(original & 13 copies by Fed Ex)

California Court of Appeal
Second Appellate District
Ronald Reagan State Building
300 S. Spring Street, second floor,
Los Angeles, CA 90013
(1 copy by regular mail)

Los Angeles Superior Court
Judge David L. Minning
Department 61
Central District
111 North Hill Street
Los Angeles, California 90012
(1 copy by regular mail)

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PH (818) 995 0800
Fax (818) 995 3157
Attorneys for Defendant, Respondent, Philip Morris, USA Inc.
(1 copy by regular mail)

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on March 24, 2008, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.