S192759

IN THE

SUPREME COURT OF CALIFORNIA

LeFIELL MANUFACTURING COMPANY,
Petitioner and Defendant,

vs.

O'NEIL WATROUS and NIDIA WATROUS,
Real Parties-in-Interest and Plaintiffs.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B226240

ANSWER BRIEF ON THE MERITS

Christopher E. Purcell (SBN 145483)
Christina D. Bennett (SBN 251842)
PURCELL LAW
1539 E. Fourth Street
Santa Ana, CA 92701
Tel: (714) 884-3006
Fax: (714) 884-3007
ATTORNEYS FOR REAL PARTY IN INTEREST AND PLAINTIFFS
O'Neil Watrous and Nidia Watrous

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

Loss of consortium is an independent cause of action that an injured party's spouse or registered domestic partner might have for the loss of support, services, love, companionship, society, affection, sexual relations and solace. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382). It is, however, dependent upon the injured party's claim. A loss of

consortium claim can not exist without an injury to the other spouse. (See *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991).

Here, the trial court and the Court of Appeal properly held that Real-Party-In-Interest and Plaintiff, Nidia Watrous may plead a cause of action for loss of consortium claim against Petitioner and Defendant LeFiell Manufacturing Company. This Court should affirm.

In her action, Ms. Watrous is alleging that as a result of Petitioner's conduct, her husband was severely injured and became "unable to perform the necessary duties as a husband and the work and services usually performed in the care, maintenance, and management of the family home and family" and that he "will be unable to perform such work, services and duties in the future." In addition, she "has been deprived and will be deprived of the consortium of her spouse" that includes "the performance of his necessary duties" all to her damages. (Petitioner's Exhibits to Writ of Mandate, Exhibit A).

In the opening brief, Petitioner asserts that there has been no authority to permit the recovery of general damages at law by the spouse of an injured worker. (Opening Brief on the Merits "OBOM"). This assertion is misleading in that it does not fully address the issue at hand. It does not address that the injured worker is making a claim for a Labor Code Section 4558 violation, which allows the worker to file a civil action outside of worker's compensation. It is not barred by Section 3600's exclusivity rule. Thus, the more succinct and correct issue is whether that injured worker's spouse can then bring a loss of consortium claim in civil court since the

injured worker's claim is not barred by the exclusivity rule.

Further, the Petitioner asserts that Labor Code Section 4558 protects a spouse of an injured employee by permitting a spouse to bring an action under Section 4558 in the event the employee-spouse dies. (OBOM). As Petitioner accurately points out, death was not the result in this matter and therefore, Ms. Watrous will not be bringing the Section 4558 claim. Petitioner, however, is describing a survival action in which the decedent's estate is the claimant. A survival action is completely different from a loss of consortium claim and therefore, Petitioner is simply trying to further confuse and/or dilute the issue at hand.

Petitioner then asserts that the Court of Appeal expanded the jurisdiction of Labor Code Section 3600 without legislative authority for such an expansion. To support this assertion, Petitioner cites case law that discusses Section 3600 only and does not provide any guiding revelations and/or opinions with regard to Section 4558.

The court of appeal rightfully denied the petition for writ of mandate as to Ms. Watrous' claim for loss of consortium allowing her to pursue that claim in civil court.

BACKGROUND

Mr. and Mrs. Watrous are a young married couple with three young children. In 2008, Mr. Watrous was an employee of LeFiell Manufacturing Company in Santa Fe Springs, California as a machine operator. On or about February 12, 2008, Mr. Watrous was assigned to operate the FENN 5f swaging machine, a machine that uses a die designed for the manufacturing

of other products and which constitutes a punch press and/or power press type of machine at LeFiell Manufacturing. While operating the machine, Mr. Watrous was suddenly and violently struck by a piece of material, knocking him to the ground and causing serious injuries. "Defendants failed to properly provide guarding so as to prevent material from flying up into or out of the machine and into the operator/Plaintiff." (See Exhibit A, 000005).

Mr. Watrous sustained severe injuries and was taken to the hospital via ambulance. He was admitted into intensive care, was in a coma and did not regain consciousness for several days. Their young lives and family unit were shattered by this terrible incident.

Mr. Watrous has not returned to work because he is not capable of working and he will never work as a machine operator again due to his life altering injuries. Additionally, his role and responsibilities in his household and to his wife and children have been greatly diminished due to his injuries and his ongoing medical issues, which in turn causes Ms. Watrous great injury.

Ms. Watrous is a constant witness to his pain, physical limitations, sadness, and frustration. In short, O'Neil's life has been ruined by this incident and Petitioner's actions and/or omissions, and as his wife and partner in life, Nidia's life has been ruined as well.

LEGAL ARGUMENT

I.

BECAUSE MR. WATROUS CAN, AND IS, SEEKING RECOVERY OUTSIDE WORKER'S COMPENSATION, THE EXCLUSIVITY RULE IS NOT CONTROLLING HERE.

A. Petitioner's Simple Assertion That Ms. Watrous' Claim Should Be Barred Because of the Exclusivity Rule Misses the Mark.

Petitioner wrongly asserts that "the sole remedy of the employee or his dependents" is through Worker's Compensation. (OBOM). Mr. Watrous has a claim under an exception, Labor Code Section 4558, to the exclusivity rule so he is not bound or restricted by it; thus, Worker's Compensation cannot be the "sole remedy" here. Additionally, Petitioner continues to rely on cases that are about "a different matter not involving section 4558" to support its simplistic and mis-guided position that even though the exclusivity rule ***does not bar*** a Section 4558 claim, a spouse's claim for consortium damages in relation to that violation is still barred. (*Id.*)

Defendant once again cites a case that is not on point with this matter. The court in *Williams v. Schwartz* (1976) 61 Cal.App.3d 628 analyzed the provisions of Labor Code Sections 3600 and 3601 ***only***. The "sole issue" in *Williams* was "whether the provisions of the Labor Code, making workers' compensation proceedings the exclusive remedy for work-

connected injuries or fatalities, bar a cause of action for emotional distress suffered by a relative who witnesses a fatal injury to an employee covered by the workers' compensation law." (*Id.* at 630).

The court cited *Dixon v. Ford Motor Co.* (1975) 53 Cal.App.3d 499: " 'It has been consistently held, without exception, that section 3601 means precisely what its terms imply. It is said that: 'When an employee's injuries or death are compensable under the Workman's Compensation Act, the right of the employee or his dependents, as the case may be, to recover such compensation is the exclusive remedy against the employer.'" (*Id.* at 633).

Labor Code Section 3600 does provide that liability for compensation is "in lieu of any other liability whatsoever to any person," and Section 3601 provides that compensation is "the exclusive remedy for injury or death of an employee against the employer or against any other employee." (*Cole v. Fair Oaks Fire Prot. Dist.* (1987) 43 Cal.3d 148, 162-63).

In more recent years, this Court in *Torres v. Parkhouse Tire Serv., Inc.* (2001) 26 Cal.4th 995 explained that the exclusivity rule is based on the "presumed compensation bargain," wherein the employer assumes liability for work-related injury or death without regard to fault in exchange for limitations on the amount of that liability. In exchange, the employee is supposed to be afforded relatively "swift and certain payment of benefits to cure or relieve the effects" of his/her injury without having to prove fault but gives up the wider range of damages possible available to him/her. (*Id.* at 1001).

In this current matter, however, the employee's action for physical or mental injury is ***not barred*** by the exclusive remedy provisions because Mr. Watrous is alleging a claim - in which LeFiell Manufacturing has conceded has been properly plead to overcome a demur - under an exception, Labor Code Section 4558. Therefore, Petitioner's contention that the Court should conclude that a spouse's loss of consortium is barred by the exclusive remedy provisions is off-the-mark and without merit. Sections 3600 and 3601 are not acting as a barrier here, but have opened the gate to allow Mr. Watrous to prove liability as well as for damages in a civil action outside of the "presumed compensation bargain" against his employer. The case law Petitioner uses to support its contention that a loss of consortium claim is barred, is irrelevant because again, ***here at the heart of this matter***, the employee-spouse's claim is not barred and neither should Ms. Watrous' claim.

B. Petitioner's Interpretation of the Survival Right in Section 4558 Is Simply Wrong.

Petitioner asserts that the legislature already protects a spouse's right to damages by including that an employee, "or his or her dependents in the event of the employee's death," may bring a Section 4558 claim. Petitioner contends that the "legislature protected the right to damages that might be awarded to the marital community by permitting a widowed spouse to stand in the shoes of a deceased employee spouse." (OBOM). This interpretation

is incorrect in that the legislature was in fact protecting the employee's estate claim in the event the employee died. The verbiage and intent are analogous to California Code of Civil Procedure Section 377.20. It seems that Petitioner must agree to this comparison since it specifically states that a dependent would "stand in the shoes" of the decedent.

Code of Civil Procedure Section 377.20 states in part:

> (a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.

A personal injury action which "survives" goes to decedent's estate for the purposes of recovering damages that would have been awardable personally to decedent had he or she lived. These two statutes are in concert with each other to protect an injured individual's rights by allowing those rights to transcend death so his/her estate still recovers. Petitioner attempts to define this survival action as an independent cause of action that an injured party's spouse might have. Petitioner is wrong in this assessment of Section 4558. In addition, Petitioner is being speculative in that the "dependent" in Section 4558 is not limited to a spouse and therefore, it may or may not award the marital community. Also, the decedent's estate may or may not involve the "marital community" either.

II.

THE COURT OF APPEAL DOES NOT EXPAND THE JURISDICTION OF SECTION 3600, BUT RATHER, RECOGNIZES THE FACT THAT A SINGLE ACT CAN HARM TWO PEOPLE BY VIRTUE OF THEIR RELATIONSHIP TO EACH OTHER.

A. No Case Law On The Issue Here Is Not Controlling or Determinative.

Petitioner has noted that there is no case law supporting a spouse's right to claim a loss of consortium in relation to an employee-spouse's claim for a violation of Section 4558; however, Ms. Watrous counters that there is also ***no case law precluding her claim***. (See *Walgreens v. W.C.A.B. (Carreau)* (2009) 3 Cal. WCC 372). But, there is case law that supports the Court of Appeal's position that its holding does not broaden the exception, "but rather permits the recovery of full relief" under Section 4558. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382).

Petitioner obviously underestimates this Court's abilities and this Court's jurisdiction. Judge-made law is the cornerstone of our legal system. This Court has the authority to affirm the Court of Appeal's ruling her.

The Court of Appeal opined that since Mr. Watrous' claim is outside the workers' compensation bargain, his spouse's dependent claim also falls outside the workers' compensation bargain of Section 3600. The Court of Appeal was not hindered or concerned with the fact that no case law was

directly on point to guide its opinion. In fact, the loss of consortium cause of action was judge-made law and still stands strong today. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382).

B. Because Mr. Watrous Can, and is, Seeking Recovery Outside the Exclusivity Rule for His Injuries, His Spouse May Bring a Claim for Consortium Damages.

Labor Code Section 4558, subdivision (b), the exception to the exclusivity remedy rule applicable to this case, provides:

"An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (See *Award Metals, Inc. v. Superior Court of Los Angeles County* (1991) 228 Cal.App.3d 1128)

The purpose of Section 4558, as explained in *Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, "is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. [Citation removed]. These sorts of machines are difficult to

stop while they are in their sequent of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*Id.* at 1377).

The Court of Appeal opined that Ms. Watrous' loss of consortium cause of action is not barred, but is "legally and causally dependent" upon [Mr.] Watrous' power press injury and claim. (See *Cole v. Fair Oaks Fire Protection Dist.*, *supra*, 43 Cal.3d at pp. 162-163).

In *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, this Court was "called upon to decide whether California should continue to adhere to the rule that a married person whose spouse has been injured by the negligence of a third party has no cause of action for loss of 'consortium,' *i.e. for loss of conjugal fellowship and sexual relations.* (*Id.* at 385)[Italics added.]. As the Court noted, ***"the pathway to justice is not always smooth"*** because there was an obstacle to allowing recovery to a spouse for losses he/she personally suffered by reason of injury to the other spouse. The obstacle was a "prior decision of this court" and the "responsibility for removing the obstacle, if it should be done, rests squarely upon [this Court]." (*Id.* at 386-387). It was removed and born from that decision is the cause of action for loss of consortium. Loss of consortium, however, is dependent upon the other spouse's injury, and that claim can not exist without an injury to the spouse. (See *Snyder v. Michael's Stores,*

Inc., supra, 16 Cal.4th 991).

The rule which this Court overruled in *Rodriguez* and vehemently disagreed with was that only in a "wrongful death case a widow can recover damages for the loss of her deceased husband's society, comfort, and protection." (*Id.* at 387 (discussing *Deshotel v. Atchison T. & S.F. Ry. Co.* (1958) 50 Cal.2d 664). This Court agreed with the lower court's criticism of that rule when it came to a spouse severely injured but had not died: " 'I have never been able to justify the law which permitted a widow to be compensated for the detriment suffered as a result of loss of companionship and so forth, but at the same time won't compensate her for the loss, together with the burden, of somebody made a vegetable as a result of something happening to her husband I can't see it." (*Id.*)

As discussed above, Petitioner reasons that under worker's compensation "[a]ny statutory remedies for a spouse occur when death has occurred to the injured worker." (OBOM). Here, Mr. Watrous, as a result of the incident, will never be the same husband to Ms. Watrous. She has and will continue to be both husband and wife as well as father and mother to their three children due to his ongoing and severe injuries. Due to her loss and her burden, she should be compensated. For Petitioner to stand squarely behind the antiquated logic that the spouse isn't dead so therefore no compensation for the surviving spouse, is for Petitioner to stand squarely in contradiction to this Court's ground-breaking opinion that birthed loss of consortium in California. Also, within that holding, this Court soundly dealt with and rejected the contention that when deciding on whether to

allow loss of consortium or not that the "matter should be left to the Legislature because that body is better equipped to define the scope of liability and resolve various related procedural problems. The argument fell on deaf ears." (*Id.* at 395).

As it is, the Court of Appeal opined that its holding "in this case does not broaden the exception, but rather permits the recovery of full relief to those injured employees who plead and prove a power press injury. This result does not further expose the employer to tort liability." This echoes the position this Court took in *Rodriguez*.

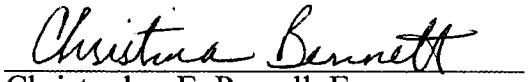
" '...the danger of double recovery is not real for presumably the husband is recovering for his own injuries and she is recovering for injury done to herself by the loss of his companionship. There is no duplication, instead, this is an example of a single tortuous act which harms two people by virtue of their relationship to each other.' " (*Id.* at 406 (citing *General Electric Company v. Bush* (1972) 498 P.2d 366, 371.

Here, the matter involves a wilful act(s) by the employer that causes great injury to an employee. This employee is married. He is young and so is his wife. They have three young children. His injuries are life altering and permanent. He is unable to perform the necessary duties, services, support, love, companionship, society, affection, sexual relations and solace as a husband performs for his wife. In turn, this wilful act that injured her husband is injuring her. She suffers. Therefore, she should be compensated for her loss and burden.

CONCLUSION

For all of the reasons set forth herein, this Court should affirm the Court of Appeal's opinion.

DATED: August 15, 2011 **PURCELL LAW**

By: 

Christopher E. Purcell, Esq.
Christina D. Bennett, Esq.
Attorneys for Real Parties In Interest and
Plaintiffs O'NEIL WATROUS and
NIDIA WATROUS

CERTIFICATION

This opposition brief has been prepared using 13 point typeface. Counsel relies on word processing software to determine the word count of this brief. As determined by that software, this brief consists of 3,081 words.

DATED: August 15, 2011 **PURCELL LAW**

By: Christina Bennett

Christopher E. Purcell, Esq.
Christina D. Bennett, Esq.
Attorneys for Real Parties In Interest and
Plaintiffs O'NEIL WATROUS and
NIDIA WATROUS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am a resident of the State of California and over the age of eighteen years. My business address is 1539 E. Fourth Street, Santa Ana, CA 92701.

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MAILING LIST

CALIFORNIA SUPREME COURT (Original + 13 copies)
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

COURT OF APPEAL (1 copy)
Second Appellate District

Division Three
300 South Sprint Street
2nd Floor
Los Angeles, CA 90013

Hon. Yvonne T. Sanchez (1 copy)
Judge of the Superior Court
LOS ANGELES SUPERIOR COURT
Southeast District, Norwalk Courthouse
12720 Norwalk Blvd.
Norwalk, CA 90650

Hon. Raul A. Sahagun (1 copy)
Judge of the Superior Court
LOS ANGELES SUPERIOR COURT
Southeast District, Norwalk Courthouse
Department SE-F
12720 Norwalk Blvd.
Norwalk, CA 90650

Nicholas C. Rowley, Esq. (1 copy)
Tiffany Chung, Esq.
CARPENTER, ZUCKERMAN & ROWLEY
8827 West Olympic Boulevard
Beverly Hills, CA 90211
(310) 273-1230 telephone
(310) 858-1063 facsimile
Attorneys for Plaintiffs
O'Neil Watrous and Nidia Watrous

Sandra L. Malek (1 copy)
Jeffrey L. Malek
MALEK & MALEK
3625 Del Amo Boulevard, Suite 350
Torrance, California 90503
(310) 540-5100
Attorneys for Defendant and Petitioner
LeFiell Manufacturing Company

Timothy J. Watson, Esq. (1 copy)
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP
701 B Street, Suite 1900
San Diego, CA 92101
(619) 233-1006 telephone
(619) 233-8627 facsimile
Attorneys for Defendant SPX Corporation