No. S162029

IN THE

Supreme Court of California

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

BOEKEN'S OPENING BRIEF

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Issue on Which Review Has Been Granted

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.

Introduction and Summary of Argument

This case presents an issue of first impression: whether a wife's loss-of-consortium claim which was filed and then voluntarily dismissed, with prejudice, during her husband's lifetime creates any res judicata bar to the wife filing a wrongful death claim against the same defendant following her husband's death. This issue involves two subsidiary questions, each of which independently justifies reversal of the judgment below.

First, as addressed in **Part I** of the argument, is whether the common law of California affords a wife in this situation any option to litigate, while her husband is still alive, damages which she alleges she will suffer only after his anticipated death from the defendant's wrongdoing. Only if such an option exists could a res judicata bar be asserted in this situation, on the theory that the wife could have litigated these damages in her pre-death suit. The traditional common-law rule dating back as far as 1619 is that a spouse bringing a loss-of-consortium claim may only recover damages for harm occurring before the other spouse's death, and that damages for harm caused by the death may be recovered only through a wrongful death suit (if permitted by statute). This view is supported by the Restatement (Second) of Torts and by the leading multi-volume treatise on torts. Neither the

Court of Appeal, nor defendant-respondent Philip Morris, USA, Inc., has cited any case holding otherwise. This Court can resolve this case, and reverse the judgment below, by relying on the traditional common-law rule and holding that a spouse may recover damages for the death of the other spouse only through a wrongful death statute filed in compliance with the Legislature's directives.

Alternatively, if it prefers this Court can skip over the threshold common-law issue (perhaps deferring it for another day) and reverse the judgment below on the basis that a wife's loss-of-consortium claim filed before her husband's death simply does not involve the same cause of action as a wrongful death claim filed after his death — and hence the entry of judgment on the earlier claim does not pose any res judicata bar to litigation of the latter claim. As explained in **Part II** of this brief, the Court of Appeal majority justices erred as a matter of law in holding that these claims involve the same cause of action. As Presiding Justice Turner correctly concluded, pursuant to the "primary right" doctrine which has long been applied in California to define what constitutes a cause of action, the relevant injury under the wrongful death statute "is the decedent's death," so the cause of action does not even accrue until death, and is distinct from any earlier cause of action. Pet. App. A,[1] Dissent at 1 (quoting Cal. Code Civ. P. § 377.60(a)). The same result follows under the modern-day consensus approach to defining a cause of action, the "transactional" approach, which this Court might elect to adopt in this case as a means of bringing greater clarity to the law of California. Under either approach, the Court of Appeal erred in holding that a wife's loss-of-consortium claim filed before her husband's death, and a wrongful death claim filed after her husband's death, involve the same cause of action.

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[1] "Pet. App." references are to the appendices attached to the Petition for Review.

Statement of Facts

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

On October 20, 2000, plaintiff-petitioner Judy Boeken ("Boeken") filed a civil complaint for damages against defendant-respondent Philip Morris, USA, 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. CA App. at 159-61.[2] See also Pet. App. A at 2.

On February 23, 2001, Boeken voluntarily dismissed, with prejudice, her loss-of-consortium lawsuit. CA App. at 162; see also Pet. App. 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). CA App. at 88-92; see also Pet. App. A at 3.[3] Following defendants' ultimately unsuccessful effort to remove the case to federal court, see CA App. at 146-48, she filed an amended wrongful death complaint. CA App. at 149-56.

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[2] "CA App." references are to Appellant's Appendix in the Court of Appeal, filed June 14, 2007.

[3] Prior to dying, Richard Boeken filed his own, entirely separate, lawsuit, which ultimately resulted in a final judgment in his favor. 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) 547 U.S. 1018. See also Pet. App. A at 2. Judy Boeken's lawsuit was timely filed on June 2, 2006, pursuant to defendants' agreement to extend the statute of limitations for a wrongful death action until 90 days after litigation over Richard Boeken's lawsuit became final. CA App. at 3, ¶ 11.

C. Philip Morris's Res Judicata Motion, and the Trial Court 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 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. CA 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. CA App. at 190, 193.

Noting that "[t]his is a case of first impression" with "no case directly on point," Pet. App. B at 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. Pet. App. C at 1; CA 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." Pet. App. B at 4; see also Pet. App. A at 3.

D. The Court of Appeal Ruling

Boeken timely appealed. CA App. 217-19. See also Pet. App. 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 14, 2007, at 7-8; Reply Brief of Appellant Judy Boeken, filed Oct. 10, 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 a 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 at 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. Pet. App. 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, analogously to that common-law remedy, California's wrongful death statute permits a spouse "to recover for 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, lay in 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." Pet. App. 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 injury for res judicata purposes 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. On March 24, 2008, Boeken timely filed a petition for review, which this Court granted on May 21, 2008.

Argument

I. The Judgment Should Be Reversed Because It Rests on the Incorrect Premise That a Wife May Recover, Through a Loss-of-Consortium Claim Filed Before Her Husband's Death, Damages Which She Alleges She Will Later Suffer Due to His Anticipated Wrongful Death

The starting premise of the res judicata argument made by Philip Morris in its brief below, one adopted by the Court of Appeal majority, is that common-law remedies permit a wife to obtain damages for the wrongful death of her husband without any resort to the wrongful death statute. According to Philip Morris, Judy Boeken could have and should have fully litigated her damages from her husband's 2002 death as part of her common-law loss-of-consortium claim which was resolved (though her voluntary dismissal of that claim) in 2001. Philip Morris argued that the common law provided Boeken with a complete remedy for the damage to the marital relation caused by her husband's death, with no need for her to invoke the wrongful death statute — indeed, with no need for her even to wait for him to die. Respondent's Brief, filed Aug. 30, 2007, at 11-13, 16-17. The Court of Appeal accepted this critical premise in ruling against Boeken on the res judicata defense. Pet. App. A at 7-9, 16-20.

There is something unseemly (at the risk of understatement) about the idea that an uninjured spouse may preemptively file for wrongful death damages while the injured spouse is alive — while the body is not merely warm, but still functioning. The concept is sufficiently bizarre that it seems apt to describe Philip Morris as advocating an "Alice in Wonderland" theory of res judicata. "Sentence first — verdict afterwards" was the Queen

of Hearts's view of the proper order of trial.[4] "Jury verdict of damages for husband's death first — death afterwards" is Philip Morris's view as to how a wife supposedly may obtain common-law damages for the wrongful death of her husband without bothering to wait for him to die.

Our analysis of this critical premise proceeds in two steps. In Part I-A we show that it lacks support in common-law precedent and other authority. In Part I-B, we show that it conflicts with the Legislature's wrongful death statute.

A. The "Damages for Death First, Death Afterwards" Theory Lacks Support in Common-Law Authority

In terms of common-law authority, Philip Morris's creative premise is fundamentally misconceived. To permit the spouse of an injured person to obtain post-death, loss-of-consortium damages on a common-law claim — so that no wrongful death claim need be filed to obtain such damages — ignores the historical context underlying the wrongful death statutes. The reason wrongful death statutes were enacted in the first place was that the

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[4] The Queen's dictate was announced while the Knave of Hearts was on trial for allegedly stealing the Queen's tarts:

> . . . "Let the jury consider their verdict," the King said, for about the twentieth time that day.
>
> "No, no!" said the Queen. "Sentence first — verdict afterwards."
>
> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"
>
> "Hold your tongue!" said the Queen, turning purple.
>
> "I wo'n't!" said Alice.
>
> "Off with her head!" the Queen shouted at the top of her voice. . . .

Lewis Carroll, "Alice's Adventures in Wonderland," in Alice in Wonderland (Donald J. Gray ed, Norton Critical 2d ed. 1992) (rev. ed. 1897), 96-97.

common law, although it afforded pre-death damages for loss of consortium as far back as 1619,[5] was widely recognized as not affording any remedy to anyone (neither the decedent nor the decedent's family members) for the harm arising after the injured person's death.[6]

We are unaware of any California precedent supporting Philip Morris's theory. None has been cited by Philip Morris to date.[7] As pointed out in Boeken's petition (and as Philip Morris so far has not disputed), the Court of Appeal majority decision did not "cite any California case in which a spouse litigated both pre-death and post-death damages in a lawsuit filed before death . . . ." Petition for Review at 7, note 3 (citing Pet. App. A at 16-20). See also Answer to Petition for Review at 5-11; Reply in

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[5] Prosser and Keeton on the Law of Torts (5th ed. 1984) (W. Page Keeton ed.), § 125, at 931.

[6] E.g., Prosser and Keaton, supra note 5, § 127, at 945-47; 2 Dan B. Dobbs, The Law of Torts (2001), § 294, at 803-04; 4 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, Harper, James and Gray on Torts (3d ed. 2006), § 24.1, at 535-38; Justus v. Atchison (1977) 19 Cal.3d 564, 571-75.

[7] The only case cited by Philip Morris in its brief below (Respondent's Br. at 13) in which one spouse obtained damages for a future loss of consortium caused by injuries to the other spouse involved an award limited to the period of the injured spouse's remaining normal life expectancy; the award did not cover any post-death period. In Atkins v. Strayhorn (4th Dist. 1990) 223 Cal.App.3d 1380, a wife whose husband had his leg amputated due to medical negligence was awarded $32,000 for past loss of consortium and $30,976 for future loss of consortium, but the jury based the award of future damages on its finding that the husband "had a life expectancy of six years"; there was no finding that the negligence had shortened his life, and no award for future damages covering post-death losses. Id. at 1386-87. In the same paragraph Philip Morris also cited a case involving a husband and wife injured in the same automobile accident, Ponce v. Tractor Supply Co. (1st Dist. 1972) 29 Cal.App.3d 500, but it does not appear that any loss-of-consortium damages were involved. Id. at 503-06.

Support of Petition for Review at 2-3 & note 1. The decisions cited by Court of Appeal in support of its holding are simply inapposite.[8]

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[8] Philip Morris has offered no defense of the majority's citation of Truhitte v. French Hospital (5th Dist. 1982) 128 Cal.App.3d 332, 352-53, in support of its view that under California law, "in cases of permanent injury" a wife "may recover damage to . . . her marital relation . . . from the date of her [husband's] injury to the end of the injured [husband's] expected lifespan, as measured from just prior to [his] injury." Pet. App. A at 17. Truhitte is doubly irrelevant to the theory espoused by the majority. First, the alleged wrongdoing involved in the case did not shorten the lifespan of the injured spouse: the medical negligence at issue (a sponge left in the wife's abdominal cavity after surgery) caused the wife only intermittent bowel problems which, while painful, were not life threatening. 128 Cal.App.3d at 338-43. Second, even if the alleged wrongdoing had somehow shortened the wife's life, at trial it was uncontested that the life expectancy of the plaintiff husband was eight years shorter than that of his injured wife, so that the husband was by definition unharmed by any wrongful shortening of the life of his wife. Id. at 343.

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

Where, as here, there is a dearth of case law on point, this Court has indicated that the relevant Restatement is entitled to great weight. Canfield v. Security-First Nat. Bank of Los Angeles (1939) 13 Cal.2d 1, 30-31 ("in the absence of a contrary statute or decision in this state" the Restatements, although not "binding authority," are "entitled to great consideration as an argumentative authority," as the purpose behind their drafting is "to state the general and better rule on any given subject."). Thus, the Restatement's summary of the common-law rule is of special importance here.

The Restatement view directly contradicts the theory argued by Philip Morris that an uninjured spouse may use a common-law loss-of-consortium claim to obtain damages flowing from the injured spouse's wrongful death. The Restatement analysis pertaining to this case is set forth in §§ 693 and 925 of the Restatement (Second) of Torts. Section 693, after setting out the general proposition that "[o]ne who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse," § 693(1), then specifically notes, in cmt. f, that the damages thereby awarded cannot cover the period after the injured spouse's death:

> *f. Damages.*
>
> * * *
>
> In case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this Section 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.

Section 925, in turn, makes clear that the claim allowed under a wrongful death statute for loss of spousal consortium does not apply to any

pre-death injuries, and that the spouse's sole remedy for those injuries is his or her separate, common-law loss-of-consortium claim. Cmt. j states:

> *j. Recovery by husband or parent for expenses before death of spouse or child.* The amount recoverable by a spouse or a parent for injury to a spouse or child, aside from the death action, includes an amount for the expenses and loss of services or society of the spouse or loss of services of the child to the time of death, and neither the death nor a survival statute impairs this right of the spouse or parent to recover for those items since they are not included within the provisions of any of the types of death statutes.

Restatement (Second) of Torts (1979), § 925.

The Restatement could hardly be more explicit in rejecting the novel argument being made by Philip Morris. In adherence to the Restatement position, the sharp division between pre-death and post-death damages has been followed by courts even where the pre-death period is very short. E.g., Warrick Hospital, Inc. v. Wallace (Ind. App. 1982) 435 N.E.2d 263, 265, 269 (holding that even though a wife's wrongful death action was time barred, the wife could maintain her timely suit for damages on a common-law claim for her loss of consortium during the 12 days her husband remained alive following the alleged medical malpractice).

In its briefing below, Philip Morris boldly asserted that "no statute, case, or principle of logic limits a spouse's consortium claim to pre-death damages." Respondent's Br. at 13. Its assertion ignores not just the Restatement, but the leading multi-volume treatise in the field of torts, which summarizes the settled law on the relationship between a spouse's common-law loss-of-consortium claim and a spouses's entirely distinct wrongful death claim, with specific reference to California law, as follows:

> In most jurisdictions, accordingly, where a defendant negligently or intentionally injures the wife, or is subject to strict liability for having injured her, 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, Harper, James and Gray on Torts (3d ed. 2006), § 8.9, at 654-56 (footnotes omitted) (part of footnote 17 lifted into text). See also note 6, supra.

Faced with an absence of case law and academic authority to support its theory, Philip Morris has cited a usage note for CACI 3920. Answer at 2 (citing 2 Judicial Council of Cal., Civil Jury Instructions No. 3920 (2008 ed.), at 757). Of course, jury instructions "are not themselves the law, and are not authority to establish legal propositions or precedent." People v. Morales (2001) 25 Cal.4th 34, 48 n.7, cert. denied 534 U.S. 857. Still, if CACI 3920's usage note relied on by Philip Morris set forth a synthesis of the law on this point and cited precedent for its suggestion that "it may be appropriate" to instruct the jury that damages for harm the uninjured spouse "is reasonably certain to suffer in the future" can be "'measured by the life expectancy that [name of injured spouse] had before [his/her] injury,'" it might supply useful guidance. But, like the majority decision below, the CACI instruction cites no California cases adopting the suggested approach, even though it is contrary to the Restatement approach. Tellingly, the analogous BAJI instructions which were in effect in 2001 when Judy Boeken dismissed her lawsuit (the CACI instructions did not take effect until September 1, 2003), and which had been supplemented and revised over many years, contain no such suggestion. See BAJI 14.40.

In sum, Philip Morris's defense of the Court of Appeal majority's res judicata theory hinges on a sentence contained in the "Directions for Use" section of a CACI instruction which was promulgated two years after Judy Boeken dismissed her lawsuit — an instruction contrary to both the

Restatement and the prior BAJI instructions, and unsupported by any California precedent.

B. The "Damages for Death First, Death Afterwards" Theory Conflicts With the Wrongful Death Statute

Aside from the total absence of common-law authority to support Philip Morris's theory that a wife may litigate damages from her husband's wrongful death before he even dies, this Court should reject that theory to prevent disruption of the Legislature's statutory objective of ensuring that all damages from a wrongful death suffered by all statutory heirs are litigated in a single lawsuit.

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, and which Philip Morris itself has emphasized in this very case.[9] 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

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[9] Philip Morris relied on this doctrine in a motion in the trial court in this case (in which the wrongful death claim filed on behalf of Richard Boeken's son, Dylan, remains pending) in successfully moving for a stay of the proceedings while the parties await the outcome of Judy Boeken's appeal of her res judicata dismissal. In the reply brief it filed on its stay motion, Philip Morris, citing Corder, emphasized the "black-letter rule that one jury renders one lump-sum verdict for all wrongful death heirs, and that the court — as expressly required by statute — apportions those damages." Reply Memorandum in Support of Defendant Philip Morris USA Inc.'s Motion to Stay Trial Court Proceedings Pending the Outcome of Judy Boeken's Appeal at 1-2, filed Aug. 17, 2007, in Judy Boeken, as Guardian Ad Litem for Dylan Boeken v. Philip Morris USA Inc. (Los Angeles Sup. Ct.) (No. BC353365). The seven-page reply brief was reproduced in an appendix to the Reply Brief of Appellant Judy Boeken, filed Oct. 10, 2007.

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).

The framework established by the Legislature for litigation of post-death injuries cannot be downplayed as carrying only "procedural" implications, as Philip Morris has suggested. Answer at 6. By its very existence, this legislative framework sharply limits the opportunities for the judicial fashioning of remedies which duplicate or otherwise overlap with statutory remedies. When the Legislature first enacted a wrongful death statute, back in 1862, the common law afforded a spouse no claim for loss of consortium, so that no conflict such as that created by the Court of Appeal decision was possible — a statutory wrongful death action was the only conceivable means by which a spouse could obtain post-death damages. As Philip Morris itself points out, this Court "created the common law right to sue for loss of consortium long after the wrongful death statute was enacted," in 1974. Answer at 7 (citing Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 398).

In recognizing a spouse's common-law remedy for loss of consortium suffered during the injured spouse's lifetime, could this Court in Rodriguez have meant to create a remedy overlapping with the existing wrongful death statute, by permitting a spouse to litigate, through a common-law claim brought before death, anticipated post-death damages? Is it reasonable for the lower courts to extend Rodriguez to expand the common-law remedy so broadly that it embraces post-death damages, even though the Legislature provided a statutory remedy addressing that subject more than a century earlier? We respectfully submit that the obvious answer is "no." The Court of Appeal's reading of Rodriguez is supported by neither precedent nor sound principle. This Court should reverse that court's decision interpreting the common law loss-of-consortium remedy so

expansively that it conflicts with a statute, in force since 1862, governing what remedies a spouse (and other statutory heirs) may recover for wrongful death.

Philip Morris has cited Cal. Civ. Code § 3283 as supporting its theory. Answer at 2, 11. Section 3283 merely provides that, in general, once a plaintiff has filed a common-law claim, the plaintiff is not limited to recovering only damages which occurred before the filing, or before the trial, but may obtain damages covering harms that will occur after the trial. Cal. Civ. Code § 3283 ("Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."). However, on the specific matter of any "cause of action for the death of a person caused by the wrongful act or neglect of another," Cal. Code Civ. P. § 377.60, the Legislature has provided — against the backdrop of the common law which afforded no compensation for the harm caused by the death of another — that such damages can be obtained only through compliance with the specific requirements of the wrongful death statute. Id. §§ 377.60, 377.61, 377.62.

It follows from a consideration of the relevant statutes that the only means of fulfilling the Legislature's 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 the Court of Appeal decision is incompatible with the relevant statutory framework, and disruptive of the Legislature's policy choice. This Court should reject that premise.

C. For This Court to Affirm Based on Philip Morris's Novel "Damages From Death First, Death Afterwards" Theory Would Violate Due Process of Law

Even if some common-law authority could be found in support of the "damages from death first, death afterwards" theory, and even if there was

some basis for holding that this theory does not conflict with the Legislature's wrongful death statute, it could not provide a satisfactory basis for affirming the decision of the Court of Appeal in Judy Boeken's particular case. We respectfully submit that to affirm the decision below it would not be enough for this Court to declare that, in abstract, it is acceptable for an uninjured spouse to use a common-law loss-of-consortium claim to seek damages from the anticipated death of the injured spouse — and to rely on such abstract analysis, circa 2008, to hold that Boeken's wrongful death lawsuit filed in 2002 is precluded by res judicata.

Boeken's claim, once it accrued in 2002, became a species of "property" which is constitutionally protected against arbitrary deprivation.[10] It would be arbitrary to dismiss Boeken's current lawsuit based on the theory that in 2001 she could have, and therefore should have, litigated post-death damages on a common-law claim even though under the common-law authority cited above no such remedy was available, and Philip Morris has not cited a single pre-2001 case (or any other case) holding that such a remedy then existed. This constitutional consideration

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[10] The due process clause of the federal Constitution protects against the arbitrary deprivation of property, including a cause of action, e.g., Tulsa Professional Collection Services, Inc. v. Pope (1988) 485 U.S. 478, 485; Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 426-32; see also Jenkins v. County of Los Angeles (2d Dist. 1999) 74 Cal.App.4th 524, 537; Church of Scientology v. Wollersheim (2d Dist. 1996) 42 Cal.App.4th 628, 647-48, rev. den. (May 22, 1996), and as an application of the due process protection afforded causes of action, the U.S. Supreme Court has in a long line of cases applied "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." Richards v. Jefferson County (1996) 517 U.S. 793, 804. See also Katzberg v. Regents of University of California (2002) 29 Cal.4th 300, 318-19 (sketching parallel due process guarantee under Cal. Const. art. I, § 7(a)); Calvert v. County of Yuba (3d Dist. 2006) 145 Cal.App.4th 613, 622 (same).

requires that any doubt be resolved in Boeken's favor. E.g., People v. Navarro (2007) 40 Cal.4th 668, 675.

II. Independently, the Judgment Should Be Reversed Because It Rests on the Incorrect Premise That a Wife's Loss-of-Consortium Claim Filed Before Her Husband's Death is Part of the Same Cause of Action as a Wrongful Death Claim Filed After His Death

Alternatively, this Court can reverse the judgment below on the basis that a wife's loss-of-consortium claim filed before her husband's death simply does not involve the same cause of action as a wrongful death claim filed after his death — and hence the entry of judgment on the earlier claim does not pose any res judicata bar to litigation of the latter claim. Res judicata, of course, "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 896. Where, as here, the plaintiff did not prevail in the earlier action, "a judgment for the defendant serves as a bar to further litigation of the same cause of action." Id. at 897. We submit that whether analyzed under the "primary right" test long followed in California, or under the "transactional" test now followed in the vast majority of jurisdictions (which this Court might at this juncture choose to adopt), Boeken's wrongful death claim cannot be considered as involving the same cause of action as was involved in her earlier loss-of-consortium claim which was filed and resolved prior to her husband's death.

A. Analysis Under the "Primary Right" Test

Whether two claims are part of the same cause of action has long been decided in California under the "primary right" theory which originated under the system of code pleading in the 1800s. Id. at 904; Crowley v. Katleman (1994) 8 Cal.4th 666, 681; Slater v. Blackwood

(1976) 15 Cal.3d 791, 795; Federation of Hillside and Canyon Associations v. City of Los Angeles (2d Dist. 2004) 126 Cal.App.4th 1180, 1202-03, rev. den. (Feb. 15, 2005); Branson v. Sun-Diamond Growers (3d Dist. 1994) 24 Cal.App.4th 327, 340-42. See generally Walter W. Heiser, California's Unpredictable Res Judicata (Claim Preclusion) Doctrine (1998) 35 San Diego L. Rev. 559, 571-76.

Whether two claims both "seek to vindicate the same primary right" and thus comprise the same cause of action turns on whether both claims arise "from the same injury . . . ." Mycogen, 28 Cal.4th at 904-05. If the injury suffered is not the same, a mere similarity in the facts supporting each claim does not make the claims part of the same cause of action. E.g., Crowley, 8 Cal.4th at 681 ("As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered."); Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc. (2d Dist. 1994), 29 Cal.App.4th 1828, 1837, rev. den. (Feb. 2, 1995) ("cases involve distinct and separate primary rights where the injuries and wrongs associated with the two cases differ, regardless of the theories of recovery pleaded.").

Here, the claim for injury that Judy Boeken alleged in her loss-of-consortium lawsuit (which was resolved while her husband was still alive), and the claim for injury which she alleges in her current wrongful death lawsuit, are quite distinct. Each claim of injury involves a different "primary right" under controlling California law, so that the earlier dismissal of her loss-of-consortium claim constitutes no res judicata bar to her wrongful death claim. Presiding Justice Turner was correct in his dissent in noting that the key issue in a "primary right" analysis "is the particular injury and the ability to pursue the cause of action in the first lawsuit." Pet. App. A, Dissent at 2. "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.

The injury done to Judy Boeken which underlies her current lawsuit is the death of her husband on January 16, 2002, as the result of wrongdoing by Philip Morris. This injury has been recognized under California law since 1862, when the Legislature created a statutory cause of action for wrongful death. See Justus v. Atchison (1977) 19 Cal.3d 564, 572; Krouse v. Graham (1977) 19 Cal.3d 59, 67. Judy Boeken's cause of action is not derivative of any cause of action which existed prior to her husband's death, because the wrongful death statute "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." Horwich v. Superior Court (1999) 21 Cal.4th 272, 283 (quoting 6 Witkin, Summary of Cal. Law (9th ed. 1988), Torts, § 1197, at 632-33); see also Wilson v. John Crane, Inc. (1st Dist. 2000) 81 Cal.App.4th 847, 861, rev. den. (Aug. 16, 2000); Dominguez v. City of Alhambra (2d Dist. 1981) 118 Cal.App.3d 237, 243.

By contrast, the injury done to Judy Boeken which was the predicate of her earlier loss-of-consortium lawsuit involved the debilitating illness of her husband in the form of his lung cancer which was diagnosed on October 21, 1999, App. at 160 — something quite distinct from what is involved with her wrongful death lawsuit. California appellate precedent has long "emphasize[d] the legal distinctness and independence of wrongful death, loss of consortium, and personal injury claims." Wilson, 81 Cal.4th at 862. As this Court "has pointed out, the cause of action for loss of consortium does not resemble wrongful death because it has no statutory foundation but is entirely of judicial origin." Lantis v. Condon (1st Dist. 1979) 95 Cal.App.3d 152, 158 (citing Justus, 19 Cal.3d at 572). It did not achieve judicial recognition until 1974, Rodriguez v. Bethlehem Steel Corp. (1974)

12 Cal.3d 382, more than a century after the cause of action for wrongful death was legislatively created in 1868.

Contrary to the conclusion reached by the Court of Appeal, under the "primary right" doctrine, even where two successive lawsuits have substantial factual overlap, if they allege separate injury involved in each lawsuit they do not involve the same "primary right." See p. 19, supra. For example, in Agarwal v. Johnson (1979) 25 Cal.3d 932, this Court considered two separate lawsuits brought by an Asian engineer who allegedly was fired on pretextual grounds after being the victim of racial slurs. Id. at 941-43. The lawsuits were based on the same facts, but alleged distinct injuries, based on different sources of law.

In federal court, the plaintiff sued based on his economic injury, invoking a federal statute to seek back pay he alleged he had lost due to racial discrimination. Id. at 954-55. He lost. In state court, the plaintiff sued for common-law tort damages, alleging defendants had caused him emotional distress, defamed him, and interfered with his future business relationships. Id. at 944. The defendants argued that plaintiff's state court lawsuit was barred by res judicata because both lawsuits arose from the same set of operative facts. This Court rejected that argument:

> While the federal action was based on the same underlying facts as the instant case, it does not follow that the federal judgment is res judicata.
>
> * * *
>
> Under the "primary rights" theory adhered to in California, it is true there is only a single cause of action for the invasion of one primary right. But the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive.

Id. at 954 (citations omitted). Before concluding that res judicata did not bar the second lawsuit, this Court noted that the plaintiff's Title VII employment discrimination remedy in his federal court lawsuit was limited

to a recovery of back pay, and that "in the present action he was awarded damages for harm distinct from employment discrimination." Id. at 955.

Similarly, while presenting the same sort of significant factual overlap involved in Argarwal, Boeken's earlier loss-of-consortium lawsuit and her current wrongful death lawsuit involve distinct injuries, and draw on distinct bodies of law, and thus do not involve the same "primary right" and are not part of the same cause of action for res judicata purposes.

B. Analysis Under the "Transactional" Test

Even if this Court were to hold that Boeken's current wrongful death lawsuit and her earlier loss-of-consortium lawsuit involve the same cause of action under the "primary right" test, the issue then would be whether this Court should jettison the "primary right" test in favor of the more modern "transactional" test for what constitutes a claim or cause of action. The "transactional" test is followed in the vast majority of jurisdictions and it more coherent and more easily administerable than the "primary right" test. Indeed, assuming this Court finds that Boeken wins under the "transactional" test, this Court may wish to skip over analysis of the "primary right" test and use this case as a vehicle for ending use of the "primary right" test in all cases (so that its application to this case is irrelevant).

There is ample reason to revisit the status of the "primary right" test for defining a claim or cause of action. It 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, 28 Cal.4th at 904; Crowley, 8 Cal.4th at 681; Slater, 15 Cal.3d at 795. See generally Heiser, 35 San Diego L. Rev. at 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 claim or cause of action should be replaced with the more pragmatic and more readily understandable "transactional" approach of the Restatement. 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. Just three years after this Court's 1979 decision in Agarwal setting forth a detailed analysis of the "primary right" test, the American

Law Institute adopted the transactional approach to defining a claim or 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) ("Wright & Miller), § 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; Comment, Robin James, Res Judicata: Should California Abandon Primary Rights? (1989) 23 Loy. L.A. L. Rev. 351, 353 n.11. By contrast, in the aftermath of Agarwal there has been significant confusion in the lower courts concerning the proper application of the "primary right" test on res judicata (that is, claim preclusion) issues. Heiser, 35 San Diego L. Rev. at 584-601 — confusion most recently illustrated by the split decision of the Court of Appeal in this case.

If this Court wishes to consider adopting the Restatement approach to claim preclusion (as it has done on matters of issue preclusion, e.g., Lucido v. Superior Court (1990) 51 Cal.3d 335, 341 n.3; see also Heiser, 35 San Diego L. Rev. at 559 n.2), this is an appropriate case in which to do so because under the Restatement's "transactional" test for a claim or cause of action, Judy Boeken's current wrongful death lawsuit involves a different claim or cause of action than her earlier lawsuit, brought and dismissed before his death, for common-law loss-of-consortium damages. Under the Restatement, a prior judgment extinguishes "the plaintiff's claim," with "claim" defined to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement, § 24(1). The relevant "transaction," in turn, is "determinated pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit,

and whether their treatment as a unit conforms to the parties' expectations or business understandings or usage." Id. § 24(2). See also id., § 24, cmt. b ("transaction" test "is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. . . . In general, the expression connotes a natural grouping or common nucleus of operative facts."). Simply put, under the Restatement test a "transaction" covers "all matters that ordinary people would intuitively count part of a single basic dispute . . . ." Wright & Miller, § 4407, at 160.

Ordinary people do not count a wife's claim for damages resulting from an injury to her husband, filed and resolved while her husband is alive, as involving the same basic dispute as would be involved if the husband later died, and the wife then filed a wrongful death lawsuit. Ordinary people do not expect the wife in such a situation to seek money for her husband's anticipated death while he is still alive. If anything, ordinary people would recoil from a wife "jumping the gun" in such a fashion. Although apparently the issue is very seldom litigated, courts in other jurisdictions have had little difficulty holding, based both on pragmatic factors and on parties' expectations, that a lawsuit filed by a family member pursuant to a wrongful death statute which seeks damages caused by a death, and a separate lawsuit filed by the family member which may rely on a subset of the facts but which does not involve the death (e.g., only injuries to the surviving family member), do not involve the same claim or cause of action for purposes of res judicata.[11] If this Court agrees that in this case

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[11] E.g., Rajnowski v. St. Patrick's Hosp. (La. App. 2000) 768 So.2d 88, 89-90; Fountas v. Breed (Ill. App. 1983) 455 N.E.2d 200, 203-04; Bowie v. Reynolds (Fla. App. 1964) 161 So.2d 882, 883-83; Burns v. Brickle (Ga. App. 1962) 126 S.E.2d 633, 635-36; Chamberlain v. Mo.-Ark. Coach Lines (Mo. 1945) 189 S.W.2d 538, 539-40; Marcus v. Huguley (Tex. App. 1931) 37 S.W.2d 1100, 1104. See also J. B. Glen, Annotation, Right of one to recover for personal injury to himself and for death of another

that result is warranted under the "transactional" test, this case would be an appropriate vehicle for jettisoning the "primary right" test and adopting the "transactional" test of the Restatement.

Of course, this Court need not reach this issue to rule for Boeken. Both the analysis of the common-law authority set forth in Part I, and the analysis of the application of the "primary right" test to this case set forth in Part II-A, independently support reversal of the judgment below.

Conclusion

The judgment below should be reversed, and the trial court should be directed to reject Philip Morris's res judicata defense.

Respectfully submitted,

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killed in the same accident as giving rise to a single cause of action or to separate cause of action (1946) 161 A.L.R. 208, 208 ("A majority of the reported decisions . . . support the rule that the right of a person to recover for his own personal injuries received in an accident and for the death of another resulting from the same accident are based on separate causes of action.").

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 **Boeken's Opening Brief** contains 8,538 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: July 21, 2008

Michael J. Piuze

MICHAEL J. PIUZE

PROOF OF SERVICE

Boeken v. Philip Morris, USA, Inc. **No. S162029**

Court of Appeal No. 198220, Second Appellate District, Division Five

Superior Court Case No. BC 353 365

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11755 Wilshire Boulevard, Suite 1170, Los Angeles, California 90025.

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