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## ***Digest: Boeken v. Philip Morris USA, Inc.***

*Whitney M. Zantias*

Opinion by Kennard, J., with Baxter, Chin, and Corrigan, JJ.  
Dissenting opinion by Moreno, J., with George, C.J. and Werdegar, J.

### Issue

Does a common law action for loss of consortium bar a subsequent wrongful death action for loss of consortium under *res judicata*?

### Facts

Judy Boeken's (Boeken) now deceased husband, Richard, was diagnosed with lung cancer in 1999, after smoking cigarettes for forty-two years.<sup>1</sup> In October 2000, while Richard was still alive, Boeken filed an action against Philip Morris USA, Inc. (Philip Morris) for loss of consortium, "seeking compensation for the loss of her husband's companionship and affection."<sup>2</sup> In her complaint, Boeken specifically "alleged that she suffered 'the loss of love, affection, society, companionship, sexual relations, and support.'"<sup>3</sup> Approximately four months after Boeken filed her complaint, she dismissed it with prejudice.<sup>4</sup>

Richard died one year after Boeken dismissed her action for loss of consortium.<sup>5</sup> Subsequently, Boeken filed a wrongful death action under California Code of Civil Procedure section 377.60 against Philip Morris for the loss of her husband's companionship and affection.<sup>6</sup> In this complaint, Boeken specifically alleged that she had suffered "loss of love, companionship, comfort, affection, society, solace, and moral support."<sup>7</sup>

Philip Morris then demurred on the complaint, claiming that Boeken's wrongful death action was barred by *res judicata*, since her earlier loss of consortium claim involved the same primary

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<sup>1</sup> Boeken v. Philip Morris USA, Inc., 230 P.3d 342, 344 (Cal. 2010).

<sup>2</sup> *Id.* at 345.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

right.<sup>8</sup> The trial court sustained the demurrer without leave to amend, and Boeken appealed.<sup>9</sup> The Court of Appeal affirmed, concluding that Boeken's initial loss of consortium action against Philip Morris "covered claims for lost companionship and affection between the time of her husband's actual death from lung cancer and the time when he would have died of natural causes if defendant's cigarettes had not wrongfully injured him."<sup>10</sup> Therefore, Boeken's dismissal with prejudice of her loss of consortium claim acted as a res judicata bar, which prevented her "from relitigating the same injury—loss of consortium—a second time in her current wrongful death action."<sup>11</sup> Boeken petitioned to the California Supreme Court for review.<sup>12</sup>

### Analysis

The court examined the history of wrongful death and survival actions. At common law, there was no recovery for the wrongful death of a spouse; however, in 1862, the Legislature created a wrongful death cause of action.<sup>13</sup> Until *Rodriguez v. Bethlehem Steel Corp.*,<sup>14</sup> courts did not recognize a cause of action for loss of consortium for the wrongful injury of a spouse.<sup>15</sup> However, the *Rodriguez* court failed to answer whether recovery for loss of consortium damages are limited to predeath damages.<sup>16</sup> The *Rodriguez* holding created a significant distinction between a common law action for loss of consortium and a statutory wrongful death action.<sup>17</sup> Since "loss of consortium is a civil action sounding in tort," punitive damages are available, whereas punitive damages are not available in the statutory wrongful death action.<sup>18</sup>

Next, the court examined the precise meaning attached to the phrase "cause of action" within the context of res judicata: "The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced."<sup>19</sup> Thus, the determinative factor, under the primary rights theory, is the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 346.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974).

<sup>15</sup> *Boeken*, 230 P.3d at 347.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 348.

harm suffered.<sup>20</sup> Generally, the same primary right is involved in actions between the same parties seeking compensation for the same harm.<sup>21</sup> In this case, “[t]he primary right was the right not to be wrongfully deprived of spousal companionship and affection, and the corresponding duty was the duty not to wrongfully deprive a person of spousal companionship and affection.”<sup>22</sup> Therefore, Boeken could not sue for the same breach of duty based on a new legal theory in the second lawsuit.<sup>23</sup>

Under section 3283 of the California Civil Code, “[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or *certain to result in the future*.”<sup>24</sup> Thus, a plaintiff is entitled to recover for both the loss of companionship and affection during the trial and in the future for a common law action for loss of consortium.<sup>25</sup> In Boeken’s initial complaint, she sought recovery for the loss of her husband’s consortium both now and in the future: “[A]s a result of the cancer he was ‘unable to perform the necessary duties as a spouse’ and would ‘not be able to perform such work, services, and duties *in the future*.”<sup>26</sup> Boeken also alleged in her complaint that she had been “‘*permanently* deprived’ of her husband’s consortium,” which further illustrates Boeken’s anticipation of her husband’s impending premature death.<sup>27</sup>

The court also determined that its findings were supported by *Justus v. Atchison*,<sup>28</sup> despite Boeken’s claim “that one may not recover at common law damages of a type . . . made the subject of a statutory scheme that occupies the field.”<sup>29</sup> The *Justus* court clearly acknowledged that the right to recover in a wrongful death cause of action solely exists under the statute, and was not part of common law.<sup>30</sup> Here, the court agreed and found no parallel development for wrongful death at common law.<sup>31</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 349 (emphasis omitted).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting CAL. CIV. CODE § 3283 (West 2010)).

<sup>25</sup> *Id.* at 349.

<sup>26</sup> *Id.* at 350.

<sup>27</sup> *Id.*

<sup>28</sup> *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977).

<sup>29</sup> *Boeken*, 230 P.3d at 351.

<sup>30</sup> *Id.* (citing *Justus*, 565 P.2d at 127–29).

<sup>31</sup> *Id.* at 351.

Boeken's reliance on a comment in the Restatement Second of Torts<sup>32</sup> was also rejected by the court.<sup>33</sup> This section in the Restatement applies to situations where the loss of consortium claim is subsequently joined with a wrongful death claim after the spouse has died.<sup>34</sup> Here, Boeken sued for loss of consortium prior to her husband's death, and so the Restatement was not applicable. If the court were to limit "loss of consortium claims to the lifetime of the injured spouse," as Boeken suggested, it would lead "to multiple proceedings and the possibility of a double recovery or an inadequate recovery."<sup>35</sup> Instead, the problems are minimized by allowing spouses to recover damages under loss of consortium after the death of the spouse.<sup>36</sup>

### Holding

The court affirmed the Court of Appeal's decision.<sup>37</sup> The court held that res judicata barred Boeken's wrongful death action for loss of consortium.<sup>38</sup> Since Boeken brought a prior common law action for loss of consortium, both claims involved the same primary right.<sup>39</sup> The dismissal with prejudice of the common law action for loss of consortium is the equivalent of a final judgment on the merits, and therefore the action may not be relitigated.<sup>40</sup>

### Dissent

Justice Moreno dissented, explaining that a common law loss of consortium action involves a primary right different from a statutory wrongful death action.<sup>41</sup> Justice Moreno compared the holdings of *Justus v. Atchison*<sup>42</sup> and *Rodriguez v. Bethlehem Steel Corp.*<sup>43</sup> In *Justus*, the court held that the common law loss of

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<sup>32</sup> The Restatement provides:

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.

RESTATEMENT (SECOND) OF TORTS § 693 cmt. f (1977).

<sup>33</sup> *Boeken*, 230 P.3d at 351.

<sup>34</sup> *Id.* at 351–52.

<sup>35</sup> *Id.* at 352.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 353.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (Moreno, J., dissenting).

<sup>42</sup> *Justus v. Atchison*, 565 P.2d 122, 127 (Cal. 1977).

<sup>43</sup> *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 686 (Cal. 1974).

consortium action was allowed because it was different from the statutory wrongful death action, whereas in *Rodriguez*, the court held that a person may recover loss of consortium damages for a nonfatal injury of a spouse.<sup>44</sup> Justice Moreno believed that these two cases highlighted the differences between a common law loss of consortium action and a statutory wrongful death action.

Justice Moreno also noted the differences between the two causes of action: a common law loss of consortium action involves only a serious injury, but not death; wrongful death includes an action for loss of financial support, but loss of consortium does not; and loss of consortium applies only to spouses, but wrongful death extends to the children of the deceased.<sup>45</sup> Furthermore, the statute of limitations for a wrongful death action does not begin at the same time as a loss of consortium action, which it would if the two actions were a single action.<sup>46</sup> Since loss of consortium and wrongful death are different, Justice Moreno concluded that a loss of consortium action would not bar a wrongful death action.<sup>47</sup> Instead, Justice Moreno proposed that courts “look to accompanying settlement agreements [for the dismissal of loss of consortium claims] to determine precisely the extent to which the parties were also relinquishing wrongful death claims,” since there can be some overlap between the damages recovered for wrongful death and loss of consortium actions.<sup>48</sup>

#### Legal Significance

The court’s decision precludes, under *res judicata*, a spouse who has dismissed with prejudice a common law loss of consortium action from subsequently bringing a statutory wrongful death action. Now, parties seeking to resolve a common law loss of consortium action, but do not wish to bar recovery under a wrongful death action, will no longer use voluntary dismissal with prejudice as a way of doing so.

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<sup>44</sup> *Boeken*, 230 P.3d at 354 (Moreno, J., dissenting).

<sup>45</sup> *Id.* at 354–55.

<sup>46</sup> *Id.* at 355.

<sup>47</sup> *Id.* at 356.

<sup>48</sup> *Id.* at 357.