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California Supreme Court Rules Spouse's Wrongful Death Case Barred by Prior Loss of Consortium Suit Seeking Identical Recovery

By Aramide Fields

A recent decision by the California Supreme Court sheds light on the similarities between statutory wrongful death claims and common law loss of consortium claims brought by a wrongfully injured person's spouse. Last week in *Boeken v. Philip Morris*, 2010 Cal. LEXIS 4257, the California Supreme Court ruled in a 4-3 decision that a woman was barred by the doctrine of *res judicata* from filing a wrongful death action claiming damages for loss of companionship and affection, based on the dismissal with prejudice of an earlier loss of consortium suit that sought the same type of damages. The voluntarily dismissal with prejudice of the earlier consortium suit constituted a final judgment on the merits, thus barring her later wrongful death suit on principles of *res judicata*. The Court's discussion of the common law origins of loss of consortium claims, the statutory origins of wrongful death claims, and the nature of damages compensable under each claim provides interesting insights into California's tort system.

FACTS AND PROCEDURAL BACKGROUND OF *BOEKEN V. PHILIP MORRIS*

In March 2000, Richard Boeken sued Philip Morris, claiming the cigarette manufacturer's products wrongfully caused his lung cancer. A jury awarded Mr. Boeken several billion dollars in combined compensatory and punitive damages and the award was later reduced to a total of more than \$80 million in March 2006. Mr. Boeken died from cancer while the appeal of the damages award was pending. Before Mr. Boeken passed away, his wife, Judy Boeken, sued Philip Morris in October 2000 for common law loss of consortium, seeking compensation for being "permanently deprived" of her husband's companionship and affection. Mrs. Boeken voluntarily dismissed the case with prejudice for unknown reasons four months after filing. After her husband died, she filed a new lawsuit against Philip Morris under the California wrongful death statute, again seeking compensation for the loss of companionship and affection. Her second attempt at recovering damages for loss of consortium was tied to her husband's wrongful death, rather than the loss of love, companionship, comfort, and other benefits she experienced while he was still alive.

Philip Morris sought to have the case thrown out and argued that Mrs. Boeken's wrongful death action was barred by the doctrine of *res judicata* because her previous lawsuit involved the same primary right asserted against Philip Morris. The trial court agreed with Philip Morris and terminated the case. Mrs. Boeken appealed the decision and a Court of Appeal affirmed, concluding that her wrongful death suit attempted to recover for losses that were at issue in the loss of consortium claim she dismissed with prejudice. The court reasoned that the loss of consortium claim covered Mrs. Boeken's loss of her husband's society, care, and comfort while her husband was alive *and* future losses based on the life expectancy of her husband had he not died prematurely due to the wrongful conduct of Philip Morris.

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ANALYSIS BY THE SUPREME COURT

The California Supreme Court granted Mrs. Boeken's petition for review to address the issues raised by the divided Court of Appeal. The Court held for Philip Morris and agreed with the lower courts in ruling that Mrs. Boeken's wrongful death claim was barred. The Court's opinion begins with a discussion of the origins of wrongful death and loss of consortium claims. At common law, tort causes of action terminated after the death of an injured party; family members of a wrongfully killed person did not have a cause of action, and the spouse of a wrongfully injured person who survived his or her injuries did not have a cause of action for loss of companionship, affection, or other noneconomic losses. In the mid-1800s, the California Legislature addressed the lack of remedy for these types of injuries by enacting statutes for both wrongful death and survival actions. Decades later, California courts began recognizing a common law cause of action for survivors who filed wrongful death suits claiming loss of society and comfort. California allowed causes of action for loss of consortium as a result of a spouse's injury (but not death) in *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382 (1974). But the Supreme Court noted in the *Boeken* decision that *Rodriguez* did not address whether a loss of consortium claim can be brought after a spouse's premature death, or whether a loss of consortium claim is only available for "pre-death damages" – a distinction the Court stated was essential for determining the proper outcome in Mrs. Boeken's case.

The Court explained that a prerequisite for the application of the *res judicata* doctrine is that a claim raised in the present action must be identical to the claim litigated in a prior proceeding. Courts determine whether two causes of action are identical by application of a "primary rights" theory. The Court explained that the term "cause of action" is frequently given a broad meaning by California courts, but in relation to the *res judicata* doctrine it means "the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced."

Mrs. Boeken claimed in her original lawsuit for loss of consortium that she had been "permanently deprived" of her husband's companionship and affection. The Court noted that the primary right at issue was her right not to be wrongfully deprived of her husband's companionship and affection, Philip Morris had a duty not to wrongfully deprive Mrs. Boeken of companionship, and Philip Morris breached that duty by inducing Mr. Boeken to smoke its cigarettes to her husband's injury. The Court concluded that Mrs. Boeken's original complaint for loss of consortium covered this primary right, and that a later claim seeking a recovery for injury to the same primary right based on a new theory of wrongful death was barred by the *res judicata* doctrine. The Court rejected Mrs. Boeken's argument that her prior action intended to compensate her for losses during her spouse's lifetime, while the subsequent wrongful death action was for recovery of post-death losses. The Court noted that prospective damages are recoverable under a California statute if harm is sufficiently certain to occur in the future. The Court also stated that in a common law loss of consortium action, a plaintiff may recover for both pre-death damages and post-death damages based on the decedent's life expectancy but for the injury.

The dissenting opinion stressed that statutory wrongful death claims and common law loss of consortium claims implicate different primary rights, as demonstrated by differences in (1) the elements; (2) the damages that are recoverable (e.g., funeral expenses and loss of economic support can be claimed for wrongful death but not loss of consortium); (3) the relationship of plaintiffs to the injured party (e.g., spouses and children can bring wrongful death claims, but only spouses can bring loss of consortium claims); and (4) the date of accrual for purposes of statutes of limitation. Contrary to the majority's opinion, the dissent stated that a spouse's injury can give rise to two distinct claims: (1) loss of consortium for nonfatal injuries, and (2) wrongful death if the spouse dies.

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IMPLICATIONS OF *BOEKEN*

As the dissent noted in *Boeken*, one of the practical effects of the case is that parties who seek to resolve a loss of consortium claim without barring a later wrongful death action will avoid a dismissal with prejudice. Conversely, defendants who want to dispose of future wrongful death claims should seek dismissals with prejudice of loss of consortium claims. If a plaintiff files a loss of consortium claim while an injured spouse is alive and later files a wrongful death claim after the spouse dies, the defendant should consider whether the action is barred by *res judicata*. It is important to note that in *Boeken* the plaintiff's second action was prohibited because she sought compensation for loss of consortium in both cases; however, the Court did not address whether the wrongful death action would have been barred if the plaintiff had asked for damages that were not available in her earlier loss of consortium action (e.g., funeral expenses). Given the divided court in *Boeken*, it remains to be seen how lower courts would treat a second claim that involves damages that are not recoverable under loss of consortium but could be recoverable for wrongful death.

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