

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

2/11/08

### **Res judicata; Primary right doctrine; Loss of consortium compared to wrongful death general damages**

Plaintiff's spouse sued defendant in March 2000, alleging its cigarettes caused his terminal lung cancer. He prevailed in the suit, and was awarded a large damages judgment. While the husband lawsuit was pending, *plaintiff brought a separate action for loss of consortium* in October of 2000. In February 2001, plaintiff voluntarily dismissed her loss of consortium claim with prejudice. In January 2002, plaintiff's spouse died.

In June 2006, *plaintiff filed a wrongful death action* against the defendant. She sought funeral expenses and general damages for loss of companionship, love, comfort, affection, society, solace, and moral support she suffered as a result of her husband's death. Defendant demurred on the basis that plaintiff's earlier dismissal of her loss of consortium claim resulted in a **res judicata bar** of her wrongful death claim. The trial court sustained the demurrer without leave to amend.

Under the **doctrine of res judicata**, if a plaintiff prevails in an action, the cause is **merged** into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action. (*Mycogen Corp. v Monsanto Co.* (2002) 28 Cal. 4<sup>th</sup> 888). All claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.

**Res judicata applies if (1) the judgment in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties in the prior proceeding.** The doctrine of res judicata not only bars litigation of matters that actually were litigated in the prior action, but also those matters that *could have been* litigated in that action. (*Busick v Workmen's Comp. Appeals Bd.* (1972) 7 Cal. 3d 967)

Here plaintiff did not dispute that the dismissal with prejudice of her loss of consortium claim operated as a final adjudication of that claim. Nor did she dispute that the parties in the prior lawsuit were the same. The sole issue is whether the plaintiff's loss of consortium and wrongful death claims constitute the same cause of action.

The **primary right theory** provides that a cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most important

characteristic of a primary right is that it is **indivisible**, the violation of a single primary right gives rise to but a single cause of action. (*Slater v Blackwood* (1975) 15 Cal. 3d 791). A particular injury might be compensable under multiple legal theories and entitle a party to several forms of relief, but it will give rise to only one cause of action.

Loss of consortium damages compensate a plaintiff for the impairment to his or her marital life resulting from the spouse's injury. (*Rodriguez v Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382). The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home. It has been referred to as the loss of the non-economic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship.

A loss of consortium plaintiff may recover damages for the duration of the incapacity giving rise to the loss of consortium; in cases of permanent injury, the plaintiff may recover damage to his or her marital relation for the remainder of his or her married life—that is, from the date of the spouse's injury to the end of the injured spouse's expected lifespan, as measured from just prior to the spouse's injury.

California law permits a widow or widower, among others, to recover for what amounts to loss of consortium as an element of damages in a wrongful death action arising from the death of the plaintiff's spouse. (*Krouse v Graham* (1977) 19 Cal. 3d 59). Thus, 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 non-economic loss recoverable in a wrongful death action arising from a fatal injury.

Here the Second Appellate District found plaintiff's wrongful death action was an attempt to revive her prior loss of consortium claim. Plaintiff sought to recover against the *same* defendant for the *same* injury caused by the *same* conduct, as in her prior loss of consortium action. Plaintiff's wrongful death action was barred by the doctrine of res judicata. However, the Justices did not hold that the final adjudication of a loss of consortium claim arising from a spouse's injury would bar a subsequent wrongful death action to recover economic losses arising from the spouse's death.

The trial court's judgment of dismissal is affirmed. A brief dissenting opinion accompanies the case.