

SUPREME COURT COPY

CASE NO. S172023

SUPREME COURT
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**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

Deputy

NIKKI POOSHS,

Plaintiff and Petitioner,

vs.

PHILIP MORRIS USA, et al.,

Defendants and Respondents.

On Review From the Ninth Circuit Court of Appeals
Certified Questions of California Law

**PETITIONER'S SUPPLEMENTAL BRIEF RE:
*BOEKEN V. PHILIP MORRIS USA, INC. (2010) 48 CAL.4TH 788***

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I.

INTRODUCTION

Petitioner, in accordance with California Rules of Court, Rule 8.520(d), respectfully submits this supplemental brief addressing this Court's decision in *Boeken v. Philip Morris USA Inc.* (2010) 48 Cal.4th 788, which was issued after Petitioner's reply brief was filed. Petitioner did not file a supplemental brief when the *Boeken* opinion was issued because it does not bear on the question before the Court in this matter. This brief is necessitated now by the supplemental brief filed by Respondents which mistakenly posits that *Boeken* supports the Respondents' position in this matter. In fact, *Boeken* does no such thing.

II.

FACTS

The question before the Court in this case is:

When **multiple distinct personal injuries** allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on a later injury?
(Emphasis added)

The question itself, as posed by the Court, demonstrates why the *Boeken* decision does not bear on this matter. In this case, the

plaintiff has brought suit for lung cancer caused by smoking defendants' cigarettes. The Federal District Court granted defendants' summary judgment motion on the ground that the claim was barred by the statute of limitations because Petitioner had earlier been diagnosed with separate smoking related injuries - chronic obstructive pulmonary disease and periodontal disease.

The *Boeken* facts are dramatically different. In that case,

In October 2000, while her husband was still alive, plaintiff filed a separate common law action against Philip Morris for loss of consortium, seeking compensation for the loss of her husband's companionship and affection. Plaintiff alleged that defendant's wrongful conduct had caused her husband's lung cancer and that as 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." Plaintiff further asserted that she had been "permanently deprived" of her husband's consortium. Specifically, plaintiff alleged that she suffered "the loss of love, affection, society, companionship, sexual relations, and support."

Boeken at 792-93.

Some months later that case was dismissed with prejudice. A year after dismissal of that action, Plaintiff's husband died. The Plaintiff then filed another case. "This time, plaintiff alleged that she had suffered 'loss of love, companionship, comfort, affection, society, solace, and moral support.'" *Id.* at 793. Defendant demurred,

asserting the prior dismissal as a *res judicata* bar to the second action. After the trial court sustained the demurrer, and the Court of Appeal affirmed, this Court granted review.

In affirming the decisions below, this Court analyzed the question of claim preclusion based on a prior action. The Court stated:

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. (citations omitted) As we explained in *Slater v. Blackwood*, *supra*, 15 Cal.3d at page 795: "[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant.

Boeken, supra, at 798

The decision went on to further clarify the concept: "Thus, under the primary rights theory, the determinative factor is the *harm suffered*. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." *Id.* (Emphasis added). The decision from there goes on to decide the availability of an action for future, post judgment loss of consortium in a pre-death claim. Deciding that California law permits such a claim, the Court emphasized the basis for such a decision.

The general rule is that a tort plaintiff may recover prospective damages, as long as it is sufficiently certain that the detriment will occur. . . . The Civil Code expressly provides that this amount includes compensation for prospective losses: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or *certain to result in the future.*" *Id.* at 799 (Italics in original)

The Court's entire rationale for finding claim preclusion in *Boeken* is that the plaintiff there had already suffered the harm she claimed and had previously filed and dismissed a tort action to recover compensation for that harm. Not only could she have claimed earlier for all of her harm, she already had.

III.

ARGUMENT

Neither of the Determinative Circumstances Which Existed in *Boeken* Exist Here

1. Nikki Pooshs Has Not Filed a Prior Case for Any Smoking Related Injury

It is essential to emphasize here that Petitioner has not filed any prior action for any type of tobacco related injury. The defendants' entire case is premised on its argument that when Pooshs suffered from chronic obstructive pulmonary disease and periodontal disease in 1989 her statute of limitations began to run and she should have filed a suit for her lung cancer within that

statutory time limit. The *Boeken* decision does not support that position. The plaintiff in *Boeken* had already suffered the harm — loss of consortium — for which she filed her initial claim. Her subsequent action, for the same harm, was barred by that earlier action.

That circumstance does not exist here. Pooshs has not filed a prior action for any harm attributable to her smoking. She has not filed any prior action against any of these defendants for any harm of any kind. The ultimate holding of *Boeken*, that the plaintiffs action was barred by claim preclusion, cannot apply here because there has been no prior claim.

2. Pooshs Had Not Suffered the Harm at the Time Respondents Claim Her Statute of Limitations Supposedly Ran

Respondents seek to have the Court apply the holding in *Boeken* to mean exactly the opposite of what the Court held. Respondents have taken the position throughout this case that Pooshs' lung cancer claim is barred because her "primary right," to be free of physical injury, was implicated when her peritoneal disease was diagnosed. Respondent's position is repeated in their supplemental brief. Respondent's Supplemental Brief (RSB) at 6.

But the argument is misleading and incorrect. As noted above, this Court clearly stated that the key factor which determines the cause of action is the **harm** suffered by the plaintiff. That harm here is Pooshs' lung cancer. There has been no prior claim for that harm and the action was filed well within the statute of limitations once the harm occurred. Petitioner's position is the one most supported by *Boeken*.

Moreover, the *Boeken* decision clearly indicates that an additional element of the Court's decision was the certainty and predictability of the damages claimed by the plaintiff at the time of her first loss of consortium claim. She knew then that her loss was permanent, that her husband would soon die, and that she would suffer damages as a result of that premature death. There is no such element in this case. Pooshs had no way to know that she would suffer lung cancer from her smoking, no way to predict the timing of that cancer, or the extent of her damage.

Respondents misstate the *Boeken* holding even further in their concluding paragraph. This Court affirmed that case because the permanent loss of consortium (harm) claimed by the plaintiff existed at the time of the first claim and thus barred the second. The legal

theory for her claims differed, but the Court concluded it was the same harm. In their closing, Respondents characterize this as losses of consortium which occurred at different times. But they were not losses of consortium which occurred at different times. "They" were, as the Court made clear, the same loss of consortium claimed two different times on two different theories of legal liability. The actual holding of the Court does not support Respondent's position.

CONCLUSION

Nothing in the *Boeken* decision bears on or is instructive regarding the certified question. This Court should answer the certified question in the negative.

Respectfully submitted,

Dated: January 25, 2011

BRAYTON ♦ PURCELL LLP

By: _____
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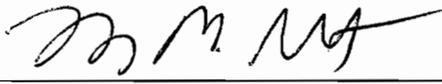
CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204 (c)(1)]

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Dated: January 25, 2011

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Case No. S172023

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I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 222 Rush Landing Road, Novato, California 94948-6169.

On January 26, 2011, I served the attached:

**PETITIONER'S SUPPLEMENTAL BRIEF RE:
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Executed this **January 26, 2011** at Novato, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



JANE EHNI

