

SUPREME COURT COPY

No. S172023

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NIKKI POOSHS,
Plaintiff-Appellant,

vs.

**PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO
COMPANY; LORILLARD TOBACCO COMPANY;
BROWN & WILLIAMSON TOBACCO CORP.; AND
HILL & KNOWLTON, INC.**

Defendants-Respondents.

SUPREME COURT
FILED

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On Request from the U.S. Court of Appeals for the Ninth Circuit for
Answers to Certified Questions of California Law

**RESPONDENTS' SUPPLEMENTAL BRIEF RE: *BOEKEN V.*
PHILIP MORRIS USA, INC. (2010) 48 Cal.4th 788**

[Cal. Rules of Court, Rule 8.520(d)]

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| INTRODUCTION..... | 1 |
| ARGUMENT | 1 |
| I. This Court’s Decision in <i>Boeken</i> | 1 |
| II. <i>Boeken</i> Supports Reaffirmation of the First-Injury Rule Here | 4 |
| CONCLUSION | 8 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|---------|
| CASES | |
| <i>Boeken v. Philip Morris USA Inc.</i> (2010) 48 Cal.4th 788 | passim |
| <i>DeRose v. Carswell</i> (1987) 196 Cal.App.3d 1011 | 7 |
| <i>Grisham v. Philip Morris U.S.A. Inc.</i> (2007) 40 Cal.4th 623 | 4 |
| <i>Miller v. Lakeside Village Condo. Assn.</i> (1991) 1 Cal.App.4th 1611 | 4, 7 |
| <i>Mycogen Corp. v. Monsanto Co.</i> (2002) 28 Cal.4th 888 | 7 |
| <i>Sonbergh v. MacQuarrie</i> (1952) 112 Cal.App.2d 771 | 7 |
| <i>Spellis v. Lawn</i> (1988) 200 Cal.App.3d 1075 | 7 |

STATUTES AND RULES

| | |
|---------------------------------------|---------|
| Cal. Rules of Court, rule 8.520 | 1 |
| Civ. Code, § 3283 | 5 |
| Code of Civ. Proc., § 377.60..... | 2, 5, 6 |

INTRODUCTION

Pursuant to rule 8.520(d) of the California Rules of Court, Respondents respectfully submit this supplemental brief addressing this Court's decision in *Boeken v. Philip Morris USA Inc.* (2010) 48 Cal.4th 788 (*Boeken*), which was issued after Respondents filed their answer brief on the merits. *Boeken's* holding that there is only a single cause of action for loss of consortium caused by the same wrongdoing—regardless of *when* the losses occur—confirms that there is likewise only a single cause of action for *physical injury* caused by the same wrongdoing, even if there are multiple injuries occurring over time. (48 Cal.4th at pp. 798-799.) Because the statute of limitations on that single cause of action for physical injury begins to run upon the occurrence of the first injury, Plaintiff's suit is time-barred. (*Post*, section II.) Accordingly, *Boeken* confirms that the certified question, as reformulated, should be answered in the affirmative.

ARGUMENT

I. This Court's Decision in *Boeken*

In *Boeken*, plaintiff Judy Boeken ("Boeken") initially filed a "common law action against Philip Morris for loss of consortium," alleging that her husband Richard's lung cancer had been wrongfully caused by Philip Morris and had left him "unable to perform the necessary duties as a spouse." (48 Cal.4th at p. 792.) Boeken alleged "that she had been 'permanently deprived' of her husband's consortium," and she sought "compensation for the loss of her husband's companionship and affection." (*Ibid.*) Approximately four months later, however, Boeken dismissed her action with prejudice. (*Id.* at p. 793.) Meanwhile Richard had brought his own tort action against Philip Morris, which ultimately resulted in a judgment (with interest) of over \$80 million. (*Id.* at p. 792.)

Richard subsequently died from his lung cancer while the judgment

in his case was on appeal. (*Boeken, supra*, 48 Cal.4th at p. 792.) Boeken then filed a “wrongful death action under Code of Civil Procedure section 377.60, again seeking compensation from Philip Morris for the loss of her husband’s companionship and affection.” (*Id.* at p. 793.) Philip Morris demurred, arguing that in light of the voluntary dismissal of her common law action for loss of consortium, Boeken’s statutory wrongful death action was barred by res judicata. (*Ibid.*) The trial court granted the demurrer, and the Court of Appeal affirmed, with one Justice dissenting. (*Ibid.*)

This Court affirmed. The Court held that “two proceedings involve identical causes of action for purposes of claim preclusion” (i.e., res judicata) if they involve the same “primary right.” (*Boeken, supra*, 48 Cal.4th at p. 797, citation omitted.) Under the primary rights theory, a “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.” (*Id.* at p. 798.) Because “the determinative factor is the harm suffered,” two actions that involve the same parties and “seek compensation for the same harm ... generally involve the same primary right.” (*Ibid.*)

Applying these standards, the Court held that “the primary right at issue in plaintiff’s current wrongful death action for loss of consortium is the same as the primary right at issue in her previous common law action for loss of consortium, and therefore the res judicata doctrine bars the wrongful death action insofar as it concerns loss of consortium.” (*Boeken, supra*, 48 Cal.4th at p. 804.) With respect to Boeken’s current claim for “postdeath loss of consortium,” the Court concluded that “the two actions concern the same plaintiff seeking the same damages from the same defendant for the same harm, and to that extent they involve the same primary right.” (*Ibid.*) In both actions, the “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.” (*Id.* at p. 798, original italics.)

The Court rejected Boeken’s argument that “in her previous action for loss of consortium, she was *legally barred* from recovering damages for *postdeath* loss of consortium.” (*Boeken, supra*, 48 Cal.4th at p. 799, italics altered.) The Court held that this argument failed because its premise was wrong: “a plaintiff in a common law action for loss of consortium can recover prospective damages for the period *after* the injured spouse’s death, based on the life expectancy that the injured spouse would have had if the injury had never occurred.” (*Id.* at p. 800.) Moreover, Boeken’s argument that such damages were legally unrecoverable was belied by the fact that she “did in fact seek such damages” in her “previous common law action for loss of consortium.” (*Ibid.*)

Finally, the Court also rejected the view of “the dissenting Court of Appeal justice,” who had “asserted that a primary right is in essence the right to be free of a *particular* injury” and that here the particular injury was “the death of the decedent.” (*Boeken, supra*, 48 Cal.4th at p. 803, italics altered.) The death of the decedent did not give rise to a new primary right, but merely to a new “legal theory of recovery.” (*Id.* at p. 804, italics omitted.) The relevant primary right remained “the right not to be permanently and wrongfully deprived of spousal companionship and affection.” (*Ibid.*) A violation of that one primary right “could be litigated on a common law theory [citation] or on a statutory wrongful death theory [citation], but irrespective of the legal theory employed, there is only one cause of action.” (*Ibid.*)

II. *Boeken* Supports Reaffirmation of the First-Injury Rule Here

This case presents the question whether “two or more different injuries, manifesting at different times” and resulting from the *same wrongdoing*, are “invasions of two different primary rights,” such that “two different injuries arising out of the same wrongdoing can give rise to two separate lawsuits.” (*Grisham v. Philip Morris U.S.A. Inc.* (2007) 40 Cal.4th 623, 642-643 (*Grisham*)). As set forth below, *Boeken* supports the view that the successive physical ailments allegedly experienced by Plaintiff as a result of Defendants’ pre-1988 conduct all involve an alleged invasion of a *single* primary right, giving rise to only a single cause of action for physical injury. (*Grisham*, at p. 641 [“violation of a single primary right gives rise to but a single cause of action”].) Because, in Plaintiff’s case, that single cause of action accrued upon the occurrence of the first appreciable injury in 1989 (or, at the latest, in 1991), the statute of limitations on any claim for personal injury has already run. (*Miller v. Lakeside Village Condo. Assn.* (1991) 1 Cal.App.4th 1611, 1622 (*Miller*); see also *Grisham*, *supra*, 40 Cal.4th at p. 642 [describing *Miller*’s holding as resting on the “intersect[ion]” of the “rule against splitting a single cause of action” and the rule that appreciable harm “will commence the running of the statute of limitations”] [citation and internal quotation marks omitted].)

In addressing whether the single course of tortious conduct at issue in *Boeken* gave rise to an invasion of more than one primary right, the Court properly focused on whether the *category* of harm was the same, and not on whether particular instances of that category of harm occurred at disparate times. Thus, in analyzing whether *Boeken*’s two suits involved different primary rights, the Court stated that “the determinative factor is the harm suffered”; if the “same harm” is at issue in two situations, then there is only a single primary right. (*Boeken*, *supra*, 48 Cal.4th at p. 798.) But in evaluating whether the “same harm” was at issue, the Court

expressly rejected the dissenting Court of Appeal Justice’s position “that a primary right is in essence the right to be free of a *particular injury*,” such that postdeath damages must be treated as a separate harm giving rise to a separate primary right. (*Id.* at p. 803, italics added.) Instead, the Court concluded that the “same harm” was at issue in the two cases because the *type* of harm claimed to have been caused by the alleged wrongdoing was the same: the “primary right was the right not to be deprived of *spousal companionship and affection*, and the corresponding duty was the duty not to wrongfully deprive a person of *spousal companionship and affection*.” (*Id.* at p. 798, italics altered.) *Boeken* thus held that, even though the same alleged wrongful conduct in that case gave rise to “loss of consortium” at different times (i.e., both predeath and postdeath), there was only a single primary right to be free from the infliction of that *category* of harm. (*Id.* at p. 804.) In short, *Boeken*’s single primary right “not to be wrongfully deprived of spousal companionship and affection” gave rise to a *single* cause of action for whatever loss-of-consortium damages could be proved at the time of suit, including damages occurring before suit, damages occurring after suit but before judgment, and prospective damages that were “sufficiently certain to occur” in the future. (*Boeken, supra*, 49 Cal.4th at pp. 798-799, citing Civ. Code, § 3283.)¹

¹ The dissent argued that *Boeken*’s predeath and postdeath suits were based on distinct primary rights because it was “indisputable that the statute of limitations for a wrongful death claim does not begin to run until the death of the spouse or other relative at the earliest.” (*Boeken, supra*, 48 Cal.4th at p. 807 (dis. opn.)) This argument, however, overlooks the fact that the Legislature may, and sometimes does, create by statute a *second* window to sue for the invasion of a *single* primary right. (Respondents’ Answer Brief on the Merits (RB) at pp. 14-16 [Legislature can alter first-injury rule].) By expressly creating a special right to sue upon the occurrence of a wrongful death (Code Civ. Proc., § 377.60), the Legislature effectively created two windows in which to sue for loss of consortium caused by tortious conduct

Application of that same analysis here confirms that the primary right at issue is the right not to have *physical injury* wrongfully inflicted, and the corresponding duty is the duty not to wrongfully inflict *physical injury*. Even though, as in *Boeken*, particular instances of that harm were experienced at different times, only a single cause of action arises from the same invasion of that single primary right to be free from that category of harm. (*Boeken, supra*, 48 Cal.4th at p. 798.) Thus, once an appreciable physical injury has occurred and the plaintiff has reason to know that wrongful conduct is to blame, then the plaintiff's *one* cause of action accrues, and he or she may bring suit for any past or present injuries or any future injuries that are reasonably certain to occur. (RB at pp. 11-13.) Where, as in this case, the same type of harm (physical injury) and the same alleged wrongful conduct are at issue, the primary right is the same, and the single cause of action associated with that one primary right accrues upon the occurrence of the first injury. (RB at pp. 11-16, 20-21.)

Nothing in *Boeken* suggests that, when a right to sue for a category of damage arises, a *factual* difficulty in proving future damages would give rise to a separate primary right with respect to additional, previously unforeseen damages that may later occur. Instead, the plaintiff in *Boeken* argued only that recovery of postdeath damages was “legally barred” in a predeath suit, and she argued that this categorical legal prohibition

that eventually causes death. (*Boeken, supra*, 48 Cal.4th at pp. 802-803 [loss of consortium claims may be asserted both predeath and postdeath].) As *Boeken* indicates, however, the damages that may be available in a postdeath suit may depend upon whether a common-law claim for loss of consortium can be paired with the statutory postdeath claim. (*Id.* at p. 803.) When the period of predeath incapacitation is lengthy, a common-law theory directed at predeath loss of consortium may be time-barred, leaving only the statutorily created new window to sue “for the death of [the] person”—a statutory theory of recovery that, by its terms, cannot extend to predeath injuries. (Code Civ. Proc., § 377.60.)

demonstrated that two primary rights were at issue. (*Boeken, supra*, 48 Cal.4th at p. 799, italics added.) Because the Court found that no such legal bar existed (*id.* at pp. 799-801), the Court had no occasion directly to address whether Boeken was correct in contending that, *if* such a legal bar existed, it would suffice to establish two separate causes of action. But nothing in the Court’s discussion suggests that, where appreciable harm has occurred and a right to sue has attached, a *factual* inability to prove future injuries means that later-occurring injuries would then give rise to a distinct primary right. Accordingly, *Boeken* does not disturb the settled rule that a cause of action accrues upon the occurrence of the first appreciable injury and that it is “not material that all of the damages resulting from the act” have not been sustained at that time. (*Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, 1080-1081 [citations and internal quotation marks omitted]; see also *Miller, supra*, 1 Cal.App.4th at p. 1622 [“[I]f the statute of limitations bars an action based upon harm immediately caused by [the] defendant’s wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing” is also barred]; *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1021 [because childhood sexual abuse caused immediate harm, suit for later-occurring injuries in adulthood was time-barred]; *Sonbergh v. MacQuarrie* (1952) 112 Cal.App.2d 771, 773-774 [action for assault was time-barred even though plaintiff’s brain injuries only became substantial several years later]; cf. also *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 907 [“[I]t is no warrant for a second action that the party may not be able to actually prove in the first action all of the items of the demand, or that all the damage may not then have been actually suffered.”] [citation omitted].)

In sum, *Boeken*’s core holding—that losses of consortium that were caused by the same wrongdoing, *but that occurred at different times*,

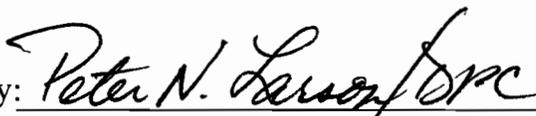
involve the same primary right and give rise to only a single cause of action (*Boeken, supra*, 48 Cal.4th at pp. 798-799)—supports the comparable conclusion that Plaintiff's claim of physical injuries resulting from Respondents' alleged tortious conduct gives rise to only a *single* cause of action involving a single primary right. Because the statute of limitations on Plaintiff's single cause of action has already run, the certified question, as reformulated, should be answered in the affirmative.

CONCLUSION

This Court should answer the certified question in the affirmative.

DATED: January 13, 2011

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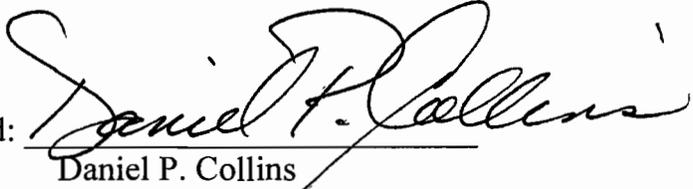
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.520(d)(2) of the California Rules of Court, that the enclosed "Respondents' Supplemental Brief Re: *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788" is produced using 13-point Roman type (including footnotes) and contains approximately 2,415 words, which is less than the 2,800 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 13, 2011

Signed: _____


Daniel P. Collins
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PROOF OF SERVICE VIA FEDERAL EXPRESS

Poosh v. Philip Morris USA Inc., et al.
No. S172023

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1. I am over the age of 18 and not a party to the within cause. I am employed by Munger, Tolles & Olson LLP in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California 90071-1560.

2. On January 14, 2011, I served the attached document entitled

**RESPONDENTS' SUPPLEMENTAL BRIEF RE:
*BOEKEN V. PHILIP MORRIS USA, INC. (2010) 48 Cal.4th 788***

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 14, 2011, at Los Angeles, California.



Laurie E. Thoms

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S172023

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