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NO. 67305-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL TIDIMAN,

Respondent,

v.

ALLSTATE INSURANCE COMPANY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY

THE HONORABLE JUDGE CHARLES SYNDER

AMENDED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED.....	1
B. STATEMENT OF THE CASE.....	1
1. SUBSTANTIVE FACTS	1
2. PROCEDURAL FACTS	2
C. ARGUMENT	4
1. STANDARD OF REVIEW	4
2. ALLSTATE KNEW OR SHOULD HAVE KNOWN OF MICHAEL’S LOSS OF CONSORTIUM CLAIM BECAUSE ALLSTATE RAISED THE ISSUE DURING MOTIONS IN LIMINE AND BECAUSE THE IMPACT THAT VIOLA’S INJURIES, DISABILITY, AND NEAR DEATH HAD ON MICHAEL WAS REVEALED THROUGHOUT INTERROGATORY ANSWERS, DEPOSITIONS, AND ALLSTATE’S CR 35 EXAM.....	5
3. ALLSTATE WAIVED ANY RIGHT TO A NEW TRIAL BY NOT REQUESTING A CONTINUANCE OR MISTRIAL AS SOON AS THE COURT ADMITTED EVIDENCE OF LOSS OF CONSORTIUM AND BY ELICITING EVIDENCE AT TRIAL DIRECTLY RELATING TO LOSS OF CONSORTIUM.....	12
4. EVEN IF ADMITTING EVIDENCE REGARDING LOSS OF CONSORTIUM WAS SOMEHOW IMPROPER, ALLSTATE WAS NOT SUBSTANTIALLY HARMED BECAUSE EVIDENCE AND DAMAGES PERTAINING TO LOSS OF CONSORTIUM LARGELY OVERLAP AND MERGE WITH MICHAEL’S OTHER SPECIFICALLY PLED AND ADMISSIBLE GENERAL DAMAGES.....	16
5. MICHAEL HAD STANDING TO BRING A LOSS OF CONSORTIUM CLAIM BECAUSE HE WAS MARRIED AT THE TIME OF THE ACCIDENT, VIOLA COULD NOT EXTINGUISH HIS CLAIM, AND THE STATUTE OF LIMITATIONS HAD NOT RUN.....	19
D. CONCLUSION.....	23

TABLE OF AUTHORITIES

Washington Cases

American Oil Co. v. Columbia Oil Co., 88 Wn.2d 835, 567 P.2d 637 (Wash. 1977).... 17

Beeson v. Atlantic-Richfield Co., 88 Wn.2d 499, 563 P.2d 822 (Wash. 1977)..... 5

Breckenridge v. Valley Gen. Hosp., 150 Wash.2d 197, 75 P.3d 944 (Wash. 2003) 23

Browning v. Johnson, 70 Wash.2d 145, P.2d 314 (Wash. 1967) 14

Capen v. Wester, 58 Wn.2d 900, 365 P.2d 326 (Wash. 1961)..... 17

Casey v. Williams, 47 Wn.2d 255, 287 P.2d 343 (Wash. 1955) 13

Cramer v. Pemco Ins. Co., 67 Wn.App. 563, 842 P.2d 479 (Wash.App. Div. 1 1992 .. 20

Davidson v. Municipality of Metropolitan Seattle, 43 Wn.App. 569, 719 P.2d
569 (Wash.App. Div. 1 1986)..... 4

Grange Ins. Assn. v. Morgavi, 51 Wn.App. 375, 753 P.2d 999
(Wash.App. Div. 2 1988) 20

Greene v. A.P.C., 136 Wash.2d 87, 960 P.2d 912 (Wash. 1998)..... 20

In re Warren, 40 Wash.2d 342, 243 P.2d 632 (Wash. 1952) 10

Johnson v. Dept. of Labor & Industries of the State of Wash., 46 Wash.2d 463,
281 P.2d 994 (Wash. 1955)..... 23

Kramer v. J.I. Case Mfg. Co., 62 Wn.App. 544, 815 P.2d 798 (Wash.App. Div. 1 1991) 5

Levea v. G.A. Gray Corp., 17 Wash.App. 214, 226, 562 P.2d 1276 (Wash. 1977) 4

Lund v. Caple, 100 Wn.2d 739, 675 P.2d 226 (Wash. 1984)..... 20

Oltman v. Holland America Line USA Inc., 163 Wash. 2d 236, 178 P.3d 981
(Wash. 2008)..... 20

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530 (Wash. 1987) 20

Robbins v. Wilson Creek State Bank, 5 Wn.2d 584, 105 P.2d 1107 (Wash. 1940) 13

Safeco Ins. Co. v. Barcom, 112 Wn.2d 575, 773 P.2d 56 (Wash. 1989)..... 19

Spratt v. Davidson, 1 Wash.App. 523, 526, 463 P.2d 179 (1969)..... 13

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 4

Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (Wash. 2010)..... 7

Other Jurisdictions

British Columbia Family Relations Act [RSBA 1996] Chapter 128 2

Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L.Ed. 95 (1894)..... 10

Statutes

RCW § 4.16.040..... 19

RCW § 4.16.080(2) 19

RCWA § 4.36.240 16

Rules and Regulations

CR 9 7

CR 15 (b)..... 12

Other Authorities and Sources

41 Am. Jur. 2d Husband and Wife § 212..... 8

A. ISSUES PRESENTED

1. Whether it was prejudicial reversible error for the trial court to admit evidence about loss of consortium when Michael was married at the time of the accident, Allstate had notice of his loss of consortium claim, Allstate failed to request a continuance or a mistrial, Michael's claim was not extinguished by Viola's settlement, Allstate elicited evidence at trial pertaining to loss of consortium, and there is no way to separate which damages were awarded exclusively for loss of consortium and which were awarded for Michael's other specifically pled general damages?

2. Whether it was prejudicial reversible error of law for the trial court to instruct the jury on loss of consortium?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

The underlying case involved a serious head-on collision caused by an unlicensed, intoxicated, and uninsured driver on June 5, 2004. (RP 479). The high-speed nearly fatal accident was an extremely traumatic event for the Respondent Michael Tidiman and his wife via the common law of British Columbia, Viola Tidiman, who was a front-seat passenger. (RP 479). Both Michael and Viola sustained serious injuries in this accident. (RP 483). Viola almost lost her life and the "jaws of life" were required to rescue the couple from the wreckage. (RP 479). Michael sustained serious injuries including a permanent shoulder injury that forced

him into an early retirement, and caused him severe emotional and psychological harm relating to his wife's injuries, disability, and her near death. (RP 485).

At the time of the accident Michael had uninsured motorist coverage with Allstate with limits of \$100,000 per person and \$300,000 per accident. (CP 351). On October 22, 2004 Viola, without the assistance of an attorney, settled her claim against Allstate for the full per person policy limits of \$100,000. (CP 263). Michael was not party to that settlement, nor did he ever sign any settlement documents or release papers.

Under British Columbia law, a couple is considered married if they live together continuously in a marriage-like relationship for at least two years. British Columbia Family Relations Act [RSBA 1996] Chapter 128. Before the accident, Michael had lived with Viola in British Columbia in a marriage-like relationship for approximately three and a half years. (RP 396-97, 404). Because they met the standard for common law marriage under British Columbia law, Michael was "married" to Viola before this accident. This fact would eventually become relevant to Michael's subsequent loss of consortium claim.

2. PROCEDURAL FACTS

Unable to settle his claim against Allstate, Michael hired Tario & Associates, P.S. and filed a UIM lawsuit against Allstate in Whatcom County Superior Court in June 2008. Michael sought damages under the uninsured motorist provisions of his contract with Allstate for economic damages, including lost wages and medical expenses, loss of enjoyment of life, physical injuries, emotional and psychological

harm, and “for such other and further relief as the court deemed just and equitable.” (RP 629).

Before trial Allstate filed various motions in limine. (RP 14). In Allstate’s Motion in Limine Number 13, Allstate sought to exclude any mention of Viola’s injuries and disability. (RP 14). After hearing argument from both sides and considering the evidence, the court ruled that Michael could present evidence at trial about loss of consortium and the effect that Viola’s injuries, disability, and near death had on him. (RP 17-18).

As authorized by the court, during the March 2011 trial, Michael presented evidence about his physical injuries, including his permanent shoulder injury and disability, and how his injuries impaired his ability to work, forced him into an early retirement, and limited his ability to play golf or exercise as he could before the accident. (RP 464, 473, 553, 599, 601). Michael also presented evidence about loss of consortium, loss of enjoyment of life, and the emotional and psychological damages and symptoms of Post-Traumatic Stress Disorder (PTSD) that he suffers from due to the traumatic nature of this car crash and Viola’s injuries, disability, and her near death. (RP 257, 293, 334, 479, 509).

At the conclusion of trial, the court instructed the jury on loss of consortium in Jury Instruction No. 9. (CP 412-13). The jury returned a verdict of \$300,475 in favor of Michael. (RP 399). The verdict included \$20,075 in past economic damages, \$7,400 in future economic damages, and \$273,000 in general damages. (RP 399).

After trial Allstate moved to limit the judgment to Michael's per person policy limits of \$100,000. (RP 331-32, 286-88). The superior court granted this motion and reduced the judgment in favor of Michael from the \$300,475 the jury awarded to the per person policy limits of \$100,000 (CP 386-88. 331-32).

Allstate then moved for a new trial alleging that the court abused its discretion by permitting evidence of loss of consortium and evidence showing the impact that Viola's injuries had on Michael. For the first time, Allstate argued that it did not have notice of loss of consortium because that claim was not specifically pled and the discovery process did not put them on notice. (RP 617-18). The trial court denied Allstate's motion for a new trial. (CP 13). Allstate filed this appeal. (CP 4-9).

C. ARGUMENT

1. STANDARD OF REVIEW

A trial court's evidentiary rulings are reviewed for abuse of discretion. Davidson v. Municipality of Metropolitan Seattle, 43 Wn.App. 569, 719 P.2d 569 (Wash.App. Div. 1 1986). Discretionary rulings will not be disturbed on review without a clear showing of abuse of discretion. "When the claimed grounds for a new trial involve the assessment of occurrences during the trial and their potential effect on the jury, we courts will accord great deference to the considered judgment of the trial court in ruling on [a] motion [for a new trial]." Levea v. G.A. Gray Corp., 17 Wash.App. 214, 562 P.2d 1276 (Wash. 1977) at 226. (brackets added). A trial court abuses its discretion only when it is manifestly unreasonable, or when it acts on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482

P.2d 775 (Wash. 1971). An appellate court will not ordinarily substitute its judgment for that of the trial court even though it might have ruled differently. Beeson v. Atlantic-Richfield Co., 88 Wn.2d 499, 563 P.2d 822 (Wash. 1977). Trial court rulings on the issue of surprise are left to the court's discretion and will only be reversed upon a showing of abuse of discretion. Kramer v. J.I. Case Mfg. Co., 62 Wn.App. 544, 815 P.2d 798 (Wash.App. Div. 1 1991).

2. ALLSTATE KNEW OR SHOULD HAVE KNOWN OF MICHAEL'S LOSS OF CONSORTIUM CLAIM BECAUSE ALLSTATE RAISED THE ISSUE DURING MOTIONS IN LIMINE AND BECAUSE THE IMPACT THAT VIOLA'S INJURIES, DISABILITY, AND NEAR DEATH HAD ON MICHAEL WAS REVEALED THROUGHOUT INTERROGATORY ANSWERS, DEPOSITIONS, AND ALLSTATE'S CR 35 EXAM

Allstate now alleges that it did not have notice of Michael's loss of consortium claim (RP 4). However, the fact that Allstate raised the issue of loss of consortium during pre-trial motions in limine clearly proves that Allstate had notice of that claim before trial. During pre-trial motions in limine, Allstate asked the court to exclude reference to Viola's injuries, claiming they were irrelevant. (CP 260-62, 476-78). When the court asked why loss of consortium was irrelevant, counsel for Allstate simply replied, "It makes this trial much more difficult than it needs to be." (RP 17). After reviewing the evidence and listening to argument from both sides, the court ruled that Michael could present evidence of loss of consortium and the effect that Viola's injuries and disability had on Michael. (RP 18).

In denying Allstate's pre-trial motion in limine to exclude evidence about Viola's injuries, the court stated that "loss of consortium is a personal claim . . . [and that] in his testimony [Michael may present evidence about] what the consequences of this

accident have been upon her [Viola] and how that affects him [Michael]. . . .” (RP 18) (brackets added). The court went on to say that, “the fact of her injury and how . . . the change in her ability to function has impacted Mr. Tidiman . . . are relevant issues.” (RP 18). Instead of immediately requesting a continuance, counsel for Allstate replied, “All right” and moved on with other motions in limine. (RP 18). Thus, before trial, Allstate had actual notice that Michael would introduce evidence at trial regarding loss of consortium.

During opening statement, counsel for Michael explicitly stated that Viola “will talk about her injuries and what happened to her” and how “before this accident, she was getting along well. She was mowing the lawn. . . . She cooked. She cleaned. She would do the housework.” (RP 44). During opening statement, counsel for Michael told the jury that Viola “has substantial disabilities from this accident that have affected their marriage, affected their life, [and] forced Mr. Tidiman into an early retirement.” (RP 47) (brackets added). Thus, Allstate had actual notice of loss of consortium during motions in limine and during opening statement. That is why, in rejecting Allstate’s lack of notice argument, the court stated during the post-trial hearing on Allstate’s motion for a new trial that “the complaint along with the discovery . . . was sufficient [to put Allstate on notice of loss of consortium]” and, the court continued, “for anybody to think that it wasn’t going to be a claim in this case would have been, I think, to have ignored the realities of what the case was about.” (Supplemental Verbatim Report of Proceedings, 17) (brackets added).

During the hearing on Allstate's motion for a new trial, counsel for Allstate even admitted they had actual notice of the loss of consortium claim:

Now, the court, obviously did have notice, because during the course of the trial, this issue did come up and Your Honor had an opportunity to rule on it.

(Supplemental Report of Proceedings, 5).

Although Allstate had actual notice of loss of consortium before trial, Allstate now claims that it did not have notice of loss of consortium during discovery and that this lack of notice somehow unfairly prejudiced it on the merits at trial. (RP 4). Even before pre-trial motions in limine, Allstate clearly knew about the obvious connection between Viola's injuries, disability, and her near death and Michael's general damages claim that encompasses loss of consortium, such as his claim for damages for loss of enjoyment of life and emotional and psychological harm.

Washington State is a notice pleading state. Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (Wash. 2010). A plaintiff is not required to specially plead loss of consortium under CR 9, which lists the claims that require special pleading. The pleadings, deposition testimony, and other discovery provided Allstate with adequate notice of the interrelatedness between Michael's emotional and psychological damages claim, loss of enjoyment of life, loss of consortium, and the harm associated with his wife's injuries, disability, and her near death.

In his Complaint, Michael asked for damages for loss of enjoyment of life, pain and suffering, emotional distress, psychological harm, and for such other and further relief the court deems just and equitable. (RP 629). The language of the Complaint was broad enough to encompass loss of consortium because that claim is subsumed

under the broader damages categories of emotional and psychological harm and loss of enjoyment of life, all of which were specifically pled. 41 Am. Jur. 2d Husband and Wife § 212 (“Although loss of consortium may have physical consequences, it is principally a form of mental suffering.”)

The lengthy discovery process also put Allstate on notice of the clear connection between his wife’s injuries, disability, and her near death, and Michael’s general damages. In his interrogatory answers, Michael stated under oath that he “suffers from PTSD now because of being hit head-on by an impaired driver and the severity of my wife’s injuries in this accident.” (CP 49, 51).

Months before trial, Michael provided Allstate with supplemental discovery responses, stating, “I still suffer from anxiety any time I drive, and I still suffer emotionally every time I see how my wife needs assistance with many small tasks that she never needed help with before the incident.” (CP 54-55).

Several weeks before trial, Allstate deposed Michael’s psychological damages expert, Henry Levine, MD. Dr. Levine testified during his deposition that Michael suffered from physical manifestations associated with his PTSD-like symptoms and “was primarily concerned with intrusive negative recollections about th[e] accident and the events that stemmed from it, mainly the injuries that his wife suffered and his fear that she had died in the accident.” (CP 61). (brackets added).

Prior to trial, Allstate’s psychological expert, Brooke Thorner, MD, performed a CR 35 examination on Michael. In her report to Allstate, Dr. Thorner recorded how Michael described the accident as “the worst moment of his life” because “[h]e

remember[ed] regaining consciousness and looking at his wife and cradling her” and thinking she was dead. (CP 64, Defendant’s Supp. ER 904 Submission, 12) (brackets added). Dr. Thorner described how when “[h]is wife did regain consciousness . . . he remained very worried about her condition. He recalled watching the men ripping the doors off his vehicle and noted that it was very ‘dramatic.’” (CP 64) (brackets added). Michael “was going through a lot of turmoil as he saw his wife suffering in pain on a daily basis.” (CP 65).

Dr. Thorner reported that “Mr. Tidiman several times stated that the accident had significantly changed both his wife and his lives” [sic] and that he “remains angry and upset about the accident [that] clearly was a traumatic event in his life.” (CP 69) (brackets added). In her report to Allstate, Dr. Thorner described in detail how Michael was depressed because “he should have been coming into his twilight years in a good frame of mind” but since the accident, “remains very focused on caring for his wife.” (CP 64). Dr. Thorner noted how “[p]rior to the accident he described his wife as a very active, vibrant woman [but] now describe[d] her as slower in her actions.” (Defendant’s Supp. ER 904 Submission, 12) (brackets added).

Since the accident Michael “would look at his wife daily and see how the accident affected her and note[] how it would affect him and that would bring the accident back to him every single day.” (Defendant’s Supp. ER 904 Submission, 12) (brackets added). When “his wife [would] become[] tense in the car, he would get a picture of the accident, a vision in his mind.” (Defendant’s Supp. ER 904 Submission, 13) (brackets added). Viola “continued to have pain, still cries, and misses things that

she would do for [Michael] and now could not do. He will make the bed, vacuum, dust, and do dishes.” (Defendant’s Supp. ER 904 Submission, 13) (brackets added). Dr. Thorner recorded how Viola “described her husband as appearing to be in *emotional* pain when he did tasks that she used to do.” (Defendant’s Supp. ER 904 Submission, 14) (emphasis added).

Thus, it was abundantly clear throughout the discovery process that Viola’s injuries were relevant not only to loss of enjoyment of life, emotional and psychological harm, and PTSD, but also to loss of consortium. Therefore, Allstate knew or should have known that evidence about Viola’s injuries, disability, and near death would be integral to Michael’s general damages claim.

Allstate contends that Michael was required to plead foreign law and that his failure to plead foreign law deprived it of notice of his loss of consortium claim. None of the theories presented at trial, however, had anything to do with the application of foreign law; rather, Michael merely asked the court to recognize his pre-accident common law marriage to Viola under British Columbia statutory law.

In recognizing Michael’s pre-accident marriage, the court applied the principle of comity, which is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L.Ed. 95 (1894). Although Washington state does not recognize common law marriages if originally contracted and consummated in Washington, Washington courts recognize common law marriages that were valid in the

jurisdiction where they were contracted and consummated. In re Warren, 40 Wash.2d 342, 243 P.2d 632 (Wash. 1952).

When counsel for Michael asked during trial whether Viola had changed in any way since the accident, Allstate objected on the grounds of relevance, as opposed to lack of notice. (RP 299). Michael's counsel properly responded by pointing out that the testimony was relevant to various issues including loss of consortium. (RP 299). Then, for the first time, Allstate argued that evidence pertaining to loss of consortium was inadmissible because Michael was not married to Viola. (RP 300). Responding to this new objection from Allstate, the Court asked for a briefing on loss of consortium with regard to the common law marriage statutes in British Columbia. (RP 315). Counsel for Michael provided the court with a brief with supporting case law and British Columbia Statutes verifying to the court that, under the common law of British Columbia, Michael was "married" to Viola before the accident occurred and therefore had standing to bring a loss of consortium claim. (RP 618). Allstate did not dispute the substance of these statutes or Michael's interpretation of them.

The court independently researched and verified these British Columbia Statutes and exercised its discretion in recognizing that at the time of the accident Michael was "married" to Viola under the common law of British Columbia. (RP 619). Because the court's recognition of Michael's pre-accident marital status in British Columbia did not require the application of foreign law, and because Michael did not ask the court to apply foreign law, he was not required to plead foreign law.

Even if Michael was required to plead foreign law, and even if the court did in fact apply foreign law in recognizing Michael's pre-accident common law marriage, Allstate waived any right to a new trial by not immediately asking for a continuance upon this ruling or when the court previously ruled during pre-trial motions in limine that evidence regarding loss of consortium was admissible. Allstate further waived any right to a new trial by not asking for a continuance or a mistrial later on in trial when the court ruled that Michael was "married" to Viola under the common law of British Columbia. (RP 619-20).

3. ALLSTATE WAIVED ANY RIGHT TO A NEW TRIAL BY NOT REQUESTING A CONTINUANCE OR MISTRIAL AS SOON AS THE COURT ADMITTED EVIDENCE OF LOSS OF CONSORTIUM AND BY ELICITING EVIDENCE AT TRIAL DIRECTLY RELATING TO LOSS OF CONSORTIUM

Even if permitting evidence regarding Viola's injuries and Michael's loss of consortium claim was prejudicial reversible error and an abuse of the trial court's broad discretion, Allstate waived any right to a new trial by not requesting a continuance immediately after the court ruled during motions in limine that loss of consortium was admissible.

Instead, after pre-trial motions in limine, Allstate tactically elected to move forward with trial and play "wait and see" with the jury's verdict before deciding whether to appeal. Under Washington law, a party waives the right to a new trial by playing "wait and see" and deferring its decision to seek a remedy until after the jury returns an unfavorable verdict. For instance, CR 15 (b) provides that:

[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Per CR 15 (b), “the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

In Spratt v. Davidson, 1 Wash.App. 523, 526, 463 P.2d 179 (Wash. 1969), following an unfavorable verdict, the complaining party requested a new trial alleging that substantial justice had not been done due to an irregularity in the proceedings and an error of law. The appellate court reversed the trial court’s decision to grant a new trial holding that:

[T]he aggrieved party must request appropriate court action to obviate the prejudice before the case is submitted to the jury. [The complaining party] is not permitted to speculate upon the verdict by awaiting the result of the trial and then complain of the irregularity or misconduct in case the verdict is adverse.

(brackets added).

Similarly, in Robbins v. Wilson Creek State Bank, 5 Wn.2d 584, 105 P.2d 1107 (Wash. 1940), the court held that a new trial is not an available post-trial remedy when a continuance would have sufficed and no request for a continuance was made. The Robbins court held that a “mere objection . . . unaccompanied by a request for a continuance will not be enough to afford a basis for finding error in the overruling of the objection.” *Id* at 594.

Likewise, in Casey v. Williams, 47 Wn.2d 255, 287 P.2d 343 (Wash. 1955), the court held that an aggrieved party “with knowledge [of some perceived unfairness] must seek

relief at that time. He cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him.” *Id.* at 257. (brackets added).

While the facts differ from case to case, the principle is the same: a party cannot simply object to some perceived unfairness at trial and then gamble on the verdict; instead, parties must seek appropriate relief as soon as they perceive unfairness. If the loss of consortium claim truly was a “surprise” as Allstate contends, the appropriate response was to timely move for a continuance because a continuance would have given Allstate more time to meet this allegedly unexpected cause of action, thereby eliminating the element of surprise.

Allstate argues that a continuance was not the appropriate remedy because a continuance would not have changed how it would have prepared for trial. However, Allstate’s claim that a continuance was not an appropriate remedy contradicts its argument that it was harmed by Michael’s “surprising” loss of consortium claim. Usually, when a party complains about being surprised by a claim, their complaint is based on the harm caused by not having the opportunity to prepare for an unexpected claim. In such cases, the usual remedy is to request a continuance for more time to meet the unexpected claim. If Allstate did not need more time to meet the loss of consortium claim, then any “surprise” was clearly not harmful to Allstate’s case on the merits, and Allstate cannot now claim to be the victim of unfair prejudice by virtue of Michael’s “surprising” loss of consortium claim.

Furthermore, an Appellate court will not ordinarily reverse a trial court on a theory different from the one argued at trial. Browning v. Johnson, 70 Wash.2d 145, 422 P.2d

314 (Wash. 1967). During the pre-trial hearing on motions in limine, Allstate's only grounds in support of its objection to loss of consortium evidence was that "it makes the trial harder than it has to be." (RP 17). Allstate's theories on appeal are completely different from the "it makes the trial harder" theory it argued during the pre-trial motions in limine. Likewise, Allstate never argued during trial that Viola's settlement extinguished Michael's loss of consortium claim or that the statute of limitations had expired until it filed this appeal. Because Allstate did not properly raise these objections during motions in limine or during trial, it waived the right to raise them on appeal.

Allstate also waived any right to a new trial based on the court's admission of evidence regarding loss of consortium by eliciting testimony during trial directly relating to loss of consortium. For example, during opening statement, counsel for Allstate stated that the evidence would show that Viola's pre-accident injuries were not related to the accident. (RP 47).

During direct examination, Allstate elicited testimony from its own psychological damages expert, Brooke Thorner, MD, directly bearing on loss of consortium. Counsel for Allstate asked Dr. Thorner whether it was significant "when Mr. Tidiman looks at his wife [and] thinks about the accident." (RP 340) (brackets added).

In response to Allstate's questions during direct examination, Dr. Thorner testified about "how [Michael] had to help [Viola] around the house doing chores" (RP 334) and how Michael "described looking at his wife daily, and noting . . . how the accident had affected her, and this [how] would affect him, and [how] he would think about the accident on a daily basis because of this." (RP 329) (brackets added).

Dr. Thorner testified about how Michael “is concerned about his wife and doing all the heavy lifting and all the chores and all that and taking care of her, and I think he worries about her physically as well.” (RP 341).

Allstate also elicited testimony about Viola’s injuries by asking Dr. Levine during cross-examination about her pre-existing injuries, her worker’s compensation pension, and the activities and trips the couple did together since the accident. (RP 198).

Allstate further elicited testimony bearing directly on loss of consortium when counsel for Allstate asked Michael’s lay witnesses during cross-examination about Viola’s injuries in this accident, her pre-accident condition, and how she changed after the accident. (RP 238, 277). Counsel for Allstate asked Michael’s lay witnesses questions about who did the majority of the cooking before and after the accident. (RP 308).

During cross-examination, counsel for Allstate asked Michael questions about Viola’s ability to cook for him before and after the accident. (RP 566-67), about who mowed the lawn (RP 549), and about Viola’s injuries in this accident (RP 550).

During closing argument, counsel for Allstate argued that Viola “still does all the cooking.” (RP 715).

By eliciting testimony at trial directly relating to loss of consortium, Allstate waived any right to contest on appeal the court’s admission of evidence regarding loss of consortium.

4. EVEN IF ADMITTING EVIDENCE REGARDING LOSS OF CONSORTIUM WAS SOMEHOW IMPROPER, ALLSTATE WAS NOT SUBSTANTIALLY HARMED BECAUSE EVIDENCE AND DAMAGES PERTAINING TO LOSS OF CONSORTIUM LARGELY OVERLAP AND MERGE WITH MICHAEL'S OTHER SPECIFICALLY PLED AND ADMISSIBLE GENERAL DAMAGES

To be entitled to a new trial, Allstate must demonstrate that the alleged irregularity or error of law was substantially harmful. RCWA § 4.36.240 provides that:

The Court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

An appellate court will not reverse because of an erroneous decision in the trial court, even when the error is clear, unless the error materially affects the outcome.

Capen v. Wester, 58 Wn.2d 900, 365 P.2d 326 (Wash. 1961) (error without prejudice is not grounds for reversal); American Oil Co. v. Columbia Oil Co., 88 Wn.2d 835, 567 P.2d 637 (Wash. 1977) (error relative to the issue of damages is harmless when there is a proper verdict on liability).

Allstate argues that admission of evidence regarding loss of consortium was harmful because Michael could eventually bring a bad faith claim. This general complaint does not prove prejudicial reversible error or abuse of discretion. First, no substantial harm occurred because there has been no bad faith action, so that claim is not ripe. Second, Allstate may defend itself in any subsequent bad faith trial by offering evidence about its knowledge and state of mind regarding loss of consortium. (This appeal does not have any preclusive effect regarding Allstate's state of mind, only whether the court abused its discretion by admitting evidence regarding loss of consortium). Third, Allstate's state of mind is a factual issue that any bad faith jury would have to resolve; that issue is not

properly before this court. Fourth, the issue on appeal is not whether admission of this evidence might affect a subsequent bad faith claim but whether the trial court abused its discretion. In making an evidentiary ruling, a trial court judge should not be required to contemplate the potential ramifications of his or her ruling upon possible bad faith litigation. To hold otherwise would establish an untenable precedent because it would place an impossible burden on judges.

Allstate also failed to prove harmful error because the jury could have easily reached a substantially similar verdict with or without loss of consortium. If Allstate would have had to pay its uninsured motorist limits of \$100,000, with or without the loss of consortium claim, the Court's admission of evidence regarding loss of consortium, even if erroneous, was harmless.

In light of the interrelatedness between Michael's physical, emotional, and psychological damages, and his claims for PTSD and loss of enjoyment of life, the jury had a rational basis for its general damages award with or without loss of consortium. In fact, Michael could not describe his emotional and psychological damages without referring to his wife, who was seriously injured and nearly killed in this accident.

For example, during her IME report to Allstate, Dr. Thorner recorded how Viola "described her husband as appearing to be in *emotional* pain when he did tasks that she used to do." (Defendant's Supp. ER 904 Submission, 14) (emphasis added).

During trial, Dr. Thorner testified that Michael will "look at his wife, and he'll think about the accident, and he'll think about [it] . . . particularly when he's driving." (RP 337) (brackets added).

During trial, Dr. Levine testified (without objection) about the clear connection and interrelatedness between Michael's psychological damages, emotional harm, and loss of enjoyment of life and Viola's injuries:

[E]very day since the accident when he has looked over at her and seen all the things she can't do and how restricted she is by her injuries, and particularly, when they're driving together, and he looks over at her in the passenger seat, he has vivid recollections and visual images of the accident, itself [*sic*], that these things serve as triggers, seeing her unable to do her housework, seeing her in the passenger seat when they go somewhere, seeing her unable to use her hands very well. These triggers . . . set off . . . intrusive, distressing pictures . . . in his mind of being trapped, [*sic*] in the car.

(RP 178) (brackets added).

Dr. Levine testified at trial that immediately after the accident Michael "looked over, and he thought his wife was dead, and that image was etched on his consciousness and he hasn't been able to put that behind him." (RP 172). Dr. Levine testified about how Michael told him that "the most traumatic thing that happened that day was looking over and thinking that his wife was gone," and "being trapped in the vehicle and being unable to help her or do anything for her, that was the horror for him." (RP 172). Dr. Levine testified about how "Mr. Tidiman . . . is reminded of this accident every single day. . . . When he looks over at his wife and thinks of her as the woman he married. . . . She was doing the cooking, the cleaning, the housekeeping while he was at work, and she was a functional person who shared a recreational life with him." (RP 177-178).

Such overlapping and interrelated evidence should not be inadmissible simply because Allstate contends that there was no insurance available to indemnify Michael for one of his general damage claims (loss of consortium).

5. MICHAEL HAD STANDING TO BRING A LOSS OF CONSORTIUM CLAIM BECAUSE HE WAS MARRIED AT THE TIME OF THE ACCIDENT, VIOLA COULD NOT EXTINGUISH HIS CLAIM, AND THE STATUTE OF LIMITATIONS HAD NOT RUN

For the first time, Allstate now contends that Michael's loss of consortium claim is barred by the three-year Statute of Limitations for torts (Allstate did not raise this defense during motions in limine or during trial). See RCW § 4.16.080(2). Michael's claim against Allstate seeks compensation under his insurance contract with Allstate. Therefore, the applicable statute of limitations is the six-year Statute of Limitation for breach of written contracts. Safeco Ins. Co. v. Barcom, 112 Wn.2d 575, 773 P.2d 56 (Wash. 1989); RCW § 4.16.040. Per RCW § 4.16.040 a six-year Statute of Limitations applies for "action[s] upon a contract in writing, or liability express or implied arising out of a written agreement." (brackets added). Because Michael filed suit before the applicable six-year Statute of Limitations expired, his claim is not time-barred.

Damages for loss of consortium are proper when a spouse suffers loss of love, society, care, services, and assistance due to damages caused to the other spouse due to a tort. Lund v. Caple, 100 Wn.2d 739, 675 P.2d 226 (Wash. 1984).

Michael had standing to bring a loss of consortium claim because, at the time of the accident, he was "married" to Viola under the common law marriage statutes of British Columbia. (RP 396-97, 404).

Relying on two cases, Greene v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998) and Grange Ins. Ass'n v. Morgavi, 51 Wn.App. 375, 753 P.2d 999 (Wash.App. Div. 2 1988), Allstate contends that Viola "extinguished" Michael's loss of consortium claim when she settled her uninsured motorist claim for her per person policy limits.

These assertions, however, run directly counter to Washington law, including the recent 2008 Supreme Court Oltman case that provides that in Washington State loss of consortium is the freestanding, non-derivative, separate claim of the deprived spouse. Oltman v. Holland America Line USA Inc., 163 Wash. 2d 236, 178 P.3d 981 (Wash. 2008); Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530 (Wash. 1987); Cramer v. Pemco Ins. Co., 67 Wn.App. 563, 842 P.2d 479 (Wash.App. Div. 1 1992).

Under Washington law, loss of consortium is the separate, non-derivative claim of the deprived spouse. Oltman, 163 Wash. 2d 236 at 250. The Washington State Supreme Court's 2008 Oltman decision, which was decided after Allstate's purported "extinguishment" line of cases, explicitly states that a "loss of consortium claim is separate and independent rather than derivative." *Id.* at 250. Allstate is not exempted from the Supreme Court's explicit definition of loss of consortium as a non-derivative claim. Under Washington law, loss of consortium is a non-derivative claim and therefore, Viola's settlement could not extinguish his loss of consortium claim by settling for her per person policy limits. If Viola could unilaterally extinguish Michael's separate loss of consortium claim, loss of consortium cannot be considered his separate claim in any meaningful sense.

Besides running directly counter to the recent and controlling case law, Allstate's extinguishment argument makes bad policy. To accept Allstate's extinguishment argument is to embrace a fundamentally unfair policy. For example, if both spouses have claims for their per person policy limits, but only one spouse has a loss of consortium claim (the deprived spouse), the spouse without the loss of consortium

claim (the impaired spouse) must reduce his or her per person policy limits by an amount equal to the other spouse's loss of consortium claim if the deprived spouse settles first (because the deprived spouse would, according to Allstate, have to seek compensation for loss of consortium out of the impaired spouse's per person policy limits).

On the other hand, in cases where the spouse without the loss of consortium claim (the impaired spouse) settles for policy limits before the other spouse settles, the other spouse's (the deprived spouse) consortium claim is, according to Allstate, "extinguished," regardless of whether both spouses signed the settlement documents.

In either event, the result is unfair because, depending on who settles first, one of two outcomes occurs: either one spouse is forced to reduce his or her policy limits to pay for the other spouse's loss of consortium claim, or one spouse must accept the extinguishment of their loss of consortium claim by virtue of the other spouse's unilateral settlement.

In the per person policy limits insurance context, it is simply not fair to reduce the compensation available to one spouse in order to pay the other spouse's claim, and it is simply not fair to allow one spouse to unilaterally extinguish the other spouse's loss of consortium claim without an express agreement and joinder by both spouses. The whole point of obtaining per person insurance is to ensure that each claimant has a guaranteed amount of insurance for all of their claims covered under the policy. Allstate's extinguishment argument, if accepted, would frustrate this purpose and undermine the reasonable expectations of the insured.

Assuming for the sake of argument that Viola's per person policy limits settlement somehow exhausted the funds available to compensate Michael for loss of consortium, lack of available insurance for one particular claim should not preclude him from introducing evidence at trial about the effect that Viola's injuries had on him. If it did, Michael would be unfairly denied the right to present evidence of his many other damages that largely coincide and merge with proving loss of consortium, such as evidence regarding PTSD, emotional and psychological damages, and loss of enjoyment of life caused by his wife's injuries, disability, and her near death in this traumatic accident.

Allstate concedes that Michael had standing to bring various claims for loss of enjoyment of life and for psychological and emotional harm. Considering the tremendous overlap and interrelatedness between Michael's psychological and emotional damages, his loss of enjoyment of life, and his loss of consortium claim, any attempt to go back now and try to dissect the jury's verdict to determine what general damages were awarded solely for loss of consortium and what were awarded exclusively for loss of enjoyment of life, emotional harm or psychological harm would improperly invade the province of the jury. The jury's general damages award inheres in their verdict and any attempts to pierce their verdict after the fact are improper and prohibited. Johnson v. Dept. of Labor & Industries of the State of Wash., 46 Wash.2d 463, 281 P.2d 994 (Wash. 1955) ("it is not within the competency of [a court] to invade the province of the jury in weighing the evidence.") (bracket added); Breckenridge v.

Valley Gen. Hosp., 150 Wash.2d 197, 75 P.3d 944 (Wash. 2003) (“Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict.”).

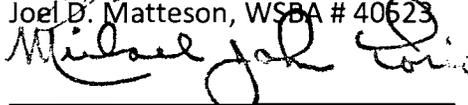
D. CONCLUSION

For the foregoing reasons, Michael respectfully requests that this Court deny Allstate’s appeal to reverse the trial court’s ruling and vacate the jury’s verdict.

DATED this 8 day of March, 2012.

Respectfully submitted,



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Michael J. Tario, WSBA # 10845
Of Attorneys for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marilee Erickson, the attorney for the Appellant, at Reed McClure, Two Union Square, 601 Union Street, Suite 1500, Seattle, Washington 96101-1363, containing a copy of the Amended Respondent's Brief, Tidiman v. Allstate, Cause No. 67305-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Name Glen N. Bristow
Done in Bellingham, Washington

03-09-12

Date