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NO. 67305-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL TIDIMAN, individually,
Respondent,

vs.

ALLSTATE INSURANCE COMPANY,
Appellant.

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STATE OF WASHINGTON
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APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

REED McCLURE

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I. INTRODUCTION

Allstate Insurance Company (“Allstate”) offers this brief in reply to the Brief of Respondent.

II. ARGUMENT

A. RESPONDENT FAILED TO PLEAD FOREIGN LAW SO CANADIAN LAW COULD NOT BE APPLIED.

Respondent argues that he was entitled to pursue a loss of consortium claim because under the laws of British Columbia, Michael Tidiman and Viola Lentz¹ were married. Respondent fails to provide any legal authority or argument to support his position. Therefore, this Court should decline to consider the discussion. “We need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).” *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).

This Court need not consider a contention which is not supported by citation to authority. *City of Bremerton v. Sesko*, 100 Wn. App. 158, 162, 995 P.2d 1257, *rev. denied*, 141 Wn.2d 1031 (2000).

¹ For ease of reference, Michael Tidiman and Viola Lenz are referred to by their first names only.

If this Court chooses to consider the discussion, the Court should conclude that Michael utterly failed to plead foreign law. It is undisputed that only married persons have standing to pursue loss of consortium claims if the persons were married on the date of the spouse's injury. *Green v. American Pharmaceutical Co.*, 86 Wn. App. 63, 68, 935 P.2d 652 (1997) ("Courts in this country have unanimously held that a spouse can bring a loss of consortium action only when a marriage exists at the time of the tortious conduct and the resultant injury."), *aff'd*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998). It is undisputed that Michael and Viola were not married at the time of the accident. In an effort to avoid the application of Washington law, Michael argued that the court should recognize and apply law from another country, British Columbia.

It is undisputed that Washington's court rules unambiguously provide that a party must plead foreign law. CR 9(k); RCW 5.24.040. It is undisputed that Michael did not plead foreign law. If a party fails to plead foreign law, then the court will apply Washington law. CR 9(k)(4); 5 Tegland, WASHINGTON PRACTICE § 201.14 (2007). It was error for the trial court to recognize and apply unpleaded foreign law and allow Michael to present a loss of consortium claim to the jury.

Michael does not offer any argument as to why he was excused from following these clear provisions of Washington law. Michael

apparently concedes the rules to plead foreign law applies because he does not even offer a response to the argument. The only justification Michael asserts is that “[n]one of the theories presented at trial . . . 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.” (Resp. Br. at 10) Michael’s position is illogical. If the court is asked to recognize foreign law, then the court is also being asked to apply foreign law.

Michael cites to *In re Warren*, 40 Wn.2d 342, 243 P.2d 632 (1952) for the proposition that Washington courts recognize common law marriages. Notably, *In re Warren* involved a child custody matter, not a suit for bodily injury. And the common law marriage referenced in the *Warren* case was from another state. The case does not offer authority that excuses Michael from the mandatory requirements of CR 9(k) and RCW 5.24.040.

The trial court erred in permitting Michael to assert a loss of consortium claim. Michael and Viola were not married at the time of the accident and therefore, Michael did not have standing to bring a loss of consortium claim. If Michael wanted the trial court to apply and give effect to foreign law, he was required to plead foreign law and he admittedly did not. Finally, the loss of consortium claim was extinguished

as a matter of law as further discussed below. The trial court's error was prejudicial and requires a remand for a new trial on damages.

B. ALLSTATE TIMELY ASSERTED AND PRESERVED ALL ERRORS.

Allstate timely asserted and preserved its objections to the introduction of evidence about Viola's injuries and evidence of loss of consortium. There was no gambling on the verdict.

Allstate moved in limine to exclude evidence about Viola's injuries because they were irrelevant. (CP 260-62, 476-78) During trial, Allstate objected on grounds of relevance to questions asking about Viola's injuries and their effect on Michael and whether Viola had changed in any way since the accident. (RP 234-35, 251-52, 263, 268, 272, 299, 301) Outside of the presence of the jury, counsel extensively argued the loss of consortium issue. (RP 314-16, 323-24, 375-76) Finally, Allstate objected to the loss of consortium paragraph of jury instruction no. 9. (RP 617-18) Allstate timely and repeatedly asserted its objections and preserved the errors.

The published decisions cited by Michael are distinguishable. *Robbins v. Wilson Creek State Bank*, 5 Wn.2d 584, 105 P.2d 1107 (1940), concerned the prior procedures of general and specific demurrers. *Casey v. Williams*, 47 Wn.2d 255, 287 P.2d 343 (1955), involved a new trial motion based on a juror falling asleep during trial. Counsel noted the

incident during trial but did not seek a mistrial. *Spratt v. Davidson*, 1 Wn. App. 523, 463 P.2d 179 (1969) involved plaintiff's new trial motion based on the juror being temporarily excused and defense counsel becoming ill. The appellate court confirmed the denial of plaintiff's new trial motion because plaintiff had not moved for a mistrial.

Citing *Browning v. Johnson*, 70 Wn.2d 145, 422 P.2d 314, 430 P.2d 541 (1967), Michael argues this Court should not consider Allstate's arguments because they were not raised at the superior court. The *Browning* case actually held that the appellate court will not consider a party's new theory on appeal. *Browning* involved a breach of contract case which was tried on a theory of lack of consideration. On appeal, the appellant argued another theory, mutual mistake. Here, Allstate did make all of the arguments presented in this appeal at the superior court. (CP 14-19, 320-33; 5/20/11 RP 3-9) There has been no waiver.

Michael argues that Allstate waived the right to challenge loss of consortium because Allstate introduced evidence regarding loss of consortium. (Resp. Br. at 15)² Michael points particularly to the testimony of expert, Dr. Brook Thorne, the psychologist who conducted a

² Michael is mistaken when he states that the opening statement of Allstate's counsel discussed Viola's pre-accident injuries. The record reference is RP 47 which is the opening statement of Michael, not Allstate. Michael's opening statement is at RP 42-52.

CR 35 examination for Allstate. Dr. Thorne testified after the trial court had already ruled on the loss of consortium issue. (RP 18, 317-74) A party is allowed to adopt tactics to mitigate the effects of an erroneous trial court ruling. *State v. Thang*, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002); *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641, 806 P.2d 766, *rev. denied*, 117 Wn.2d 1015 (1991).

C. INCLUSION OF LOSS OF CONSORTIUM WAS PREJUDICIAL ERROR.

Error is prejudicial if it materially affects the outcome of the case. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).³ “[W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010), *quoting*, *Thomas v. French*, 99 Wn.2d at 105. In *Salas*, the plaintiff’s immigration status had been admitted in his work site injury case. He appealed and the Washington Supreme Court held the evidence was erroneously admitted.

³ Michael’s parenthetical summary of the case of *American Oil Co. v. Columbia Oil Co.*, 88 Wn.2d 835, 567 P.2d 637 (1977), is incorrect. (Resp. Br. at 17) The *American Oil* court stated: “Error relating solely to the issue of damages is harmless when a proper verdict reflects **nonliability**.” 88 Wn.2d at 842 (emphasis added). The Supreme Court held any error in the damages evidence was harmless because the jury had not found for the party on that claim and therefore the jury did not reach the damages which would have been recoverable on that claim.

The *Salas* court also held the error was prejudicial because the Court could not say the error had no effect on the jury. The Court explained:

We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury. Consequently, we cannot hold that it was harmless to admit Salas' status, and we conclude that Salas is entitled to a new trial.

168 Wn.2d at 673.

Admission of the loss of consortium evidence and claim to the jury obviously affected the jury here. Michael made the loss of consortium the theme of his case. His entire presentation emphasized how much Viola's condition affected his life.

The jury clearly heard the steady drum beat of loss of consortium. The jury was particularly attentive to how Viola's injuries affected Michael. After he testified, they asked about it. (RP 516) During deliberation, the jury again asked about loss of consortium. (CP 400) The jury wanted definitions of "services" and "assistance" in paragraph 5 of instruction no. 9—the paragraph addressing loss of consortium damages. The jury's award of excessive noneconomic damages, combined with the questions during trial and deliberation, demonstrate that the jury's award was affected by the loss of consortium evidence. The error in its admission was prejudicial.

Michael argues that the jury could easily have reached the same or similar verdict without the loss of consortium evidence. (Resp. Br. at 18) Yet that is not the legal test for prejudicial error. As set forth above, the error is prejudicial if it materially affected the outcome. And in circumstances where the court cannot conclude it did not affect the outcome, prejudice is presumed. Prejudice here is not only presumed, it is established by the jury's questions and award.

D. MICHAEL CONCEDES HIS CLAIM IS LIMITED TO THE TERMS OF THE INSURANCE CONTRACT.

In an attempt to avoid the fact that Michael's loss of consortium claim was not pursued within the three-year statute of limitations, Michael argues the six-year statute of limitations period applies. (Resp. Br. at 20) Michael thus concedes that his claim is controlled by the terms of the insurance contract. The insurance contract provides that Michael will recover damages for "bodily injury" he would have legally been entitled to recover from Mr. Hilton, the uninsured driver. (CP 368, 458, 463) Loss of consortium is not a bodily injury. *Greene v. Young*, 113 Wn. App. 746, 754, 54 P.3d 734 (2002). Loss of consortium is a category of damages in negligence which a husband may recover for the effect his wife's bodily injury has on him. Damages for loss of consortium are proper when a spouse suffers loss of love, society, care, services, and assistance due to a

tort committed against the impaired spouse. *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d 226 (1984); *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 852-53, 728 P.2d 617 (1986).

Michael has ignored the *Greene v. Young* case. He cites only to *Grange Ins. Ass'n v. Morgavi*, 51 Wn. App. 375, 753 P.2d 999, *rev. denied*, 111 Wn.2d 1009 (1988), and seems to argue that the *Morgavi* holding was changed by the Supreme Court's decision in *Oltman v. Holland America Line USA Inc.*, 163 Wn.2d 236, 178 P.3d 981, *cert. dismissed*, 129 S. Ct. 24 (2008). The *Oltman* case did not alter the *Morgavi* holding. In *Oltman*, the Supreme Court, citing *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998), simply reaffirmed the established tort law in Washington that a spouse has a separate claim for loss of consortium. The *Oltman* court did not hold that a loss of consortium claim is a claim for bodily injury.

The rules for insurance claims established in *Morgavi* and *Greene v. Young* remain the law of Washington. A husband's claim for loss of consortium is not a bodily injury claim. The husband's claim for loss of consortium due to his wife's injury is subject to the per person bodily injury limit for his wife's bodily injury claim.

For the first time on appeal, Michael argues that the rule established in *Morgavi* and *Greene v. Young* is unfair and bad public

policy. (Resp. Br. at 21-22). This Court should not consider this argument because it is not supported by any legal authority, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), and it is raised for this first time on appeal. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). In any event, the argument should be rejected. As discussed above, the insurance contract provides for payment up to per person policy limits for damages for bodily injury. (CP 368-69) The contract is entirely consistent with the UIM statute which requires carriers to offer UIM coverage for bodily injury. RCW 48.22.030(2).

III. CONCLUSION

Allstate was denied a fair trial by the improper inclusion of loss of consortium at trial. The inclusion of the evidence, argument, and instruction on loss of consortium was prejudicial and reversible error. This Court should reverse and vacate the jury's verdict and remand for a new trial.

DATED this 30th day of April, 2012.

REED McCLURE

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DATED this 30~~th~~ day of April, 2012.



JESSICA PITRE-WILLIAMS

SIGNED AND SWORN to (or affirmed) before me on

APRIL 30, 2012

by JESSICA PITRE-WILLIAMS.



Print Name: Rebecca C. Barrett

Notary Public Residing at Lynnwood, WA

My appointment expires 4-9-2014

