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NO. 67305-0-1

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

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MICHAEL TIDIMAN, individually,  
Respondent,

vs.

ALLSTATE INSURANCE COMPANY,  
Appellant.

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

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BRIEF OF APPELLANT

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## **I. NATURE OF CASE**

Michael Tidiman was injured in an a motor vehicle accident with an uninsured motorist. Viola Lentz, a passenger, sustained more serious injuries. They submitted uninsured motorist ("UM") claims to Allstate. Viola's claim was settled and she signed a release. Two years after the accident, Michael and Viola were married.

Allstate and Michael were unable to settle his UM claim. He filed this lawsuit. For the first time at trial, Michael argued he was claiming loss of consortium. Over Allstate's objection, Michael was allowed to present testimony, evidence, and argument about loss of consortium. Michael's case emphasized how Viola's injuries adversely affected him. The jury awarded an excessive amount for general damages. Allstate was denied a fair trial because loss of consortium was not a permissible basis for Michael's recovery.

## **II. ASSIGNMENTS OF ERROR**

The superior court erred in denying Allstate's motion in limine seeking to exclude evidence regarding the extent of the injuries to Viola Lentz Tidiman. (CP 476-78; RP 14-18)

The superior court erred in including loss of consortium in the damages instruction, jury instruction no. 9. (CP 412-13)

The superior court erred in denying Allstate's motion for new trial.  
(CP 13)

The superior court erred in entering the judgment based on the jury verdict. (CP 331-32)

### **III. STATEMENT OF ISSUES**

1. Was Allstate denied a fair trial when the court denied Allstate's motion in limine regarding Viola's injuries and allowed testimony, evidence, and argument about her injuries and Mr. Tidiman's loss of consortium when (a) Mr. Tidiman had not asserted a loss of consortium claim in his complaint or discovery responses; (b) there is no loss of consortium claim because the Tidimans were not married at the time of the accident; (c) loss of consortium based on Canadian law was not permitted because plaintiff had not pled foreign law; (d) any loss of consortium was barred by the statute of limitations; and (e) even if the court were to recognize a loss of consortium claim based on the Tidimans' common law marriage, any consortium claim was extinguished when Viola settled her UM claim?

2. Was Allstate denied a fair trial when the jury was instructed on loss of consortium in the damages instruction no. 9?

#### IV. STATEMENT OF FACTS

This case arises from a June 5, 2004, accident between an uninsured motorist, Russell Hilton, and a vehicle driven by Michael Tidiman. (CP 463) Michael was injured in the accident. (RP 468) Viola Lentz was a passenger in the vehicle. She was seriously injured. (RP 479-81, 484, 495) At the time of the accident, Michael and Viola were not married. They married two years later in the summer of 2006. (RP 403)

At the time of the accident, Michael and Viola were entitled to coverage under an automobile insurance policy issued by Allstate Insurance. (CP 347-85) The policy included UM benefits with limits of \$100,000 per person/\$300,000 per accident. (CP 351)

Viola Lentz submitted a UM claim and policy limits were paid. (CP 263) She settled her claim and signed a Release on October 22, 2004. (CP 266) The Release says she:

[F]orever releases and discharges Allstate from any and all liability and from any and all contractual obligations whatsoever under the coverage designated above of Policy No. 087787173 issued to Viola Lentz by Allstate and arising out of bodily injuries . . . sustained by Viola Lentz due to an accident on or about the 5<sup>th</sup> day of June, 2004.

(CP 266)

In June 2008, Michael Tidiman sued Allstate Insurance Company under Whatcom County Superior Court Cause No. 08-2-01563-3. Plaintiff's complaint sought benefits under the uninsured motorist

coverage of Viola Lentz's insurance policy. The complaint sought monetary damages. It did not include any claim for loss of consortium. (CP 462-65)

Plaintiff did not provide any indication to Allstate that he intended to pursue a loss of consortium claim. (CP 72-73). During the course of discovery, Allstate served plaintiff Michael Tidiman with interrogatories and requests for production. (CP 73, 82-93) Plaintiff's answers did not refer at all to a loss of consortium claim, nor did the discovery responses mention anything about how the injuries of Viola Lentz (now Tidiman) had affected plaintiff's life. (CP 95-118, 109)

Plaintiff moved in limine to exclude evidence of the amount for which Viola (fka Lentz) settled her claim. Plaintiff also moved to exclude evidence of the policy limits. The court granted the motion. (RP 5-6)

Because the injuries of Viola were serious, in an abundance of caution, Allstate filed a supplemental motion in limine asking the court to exclude reference to her injuries because they were irrelevant and any relevance was outweighed by the prejudicial effect. (CP 260-62, 476-78) Allstate's counsel argued that the extent of Viola's injuries was not relevant. "She is not a party to this case either or for loss of consortium." (RP 14). The court denied Allstate's motion in limine to exclude evidence about Viola's injuries. (RP 18)

During trial, Allstate's counsel objected to a question asking whether Viola had changed in any way since the accident. (RP 299) Allstate's counsel objected on relevance. Plaintiff's counsel stated the testimony was relevant to loss of consortium. Allstate's counsel asked to make an offer of proof that Michael and Viola were not married at the time of the accident. The court overruled the objection. (RP 299-300)

Robert Symons, owner of a concrete company who sold concrete to Mr Tidiman, was asked about how Viola's post-accident pain and injuries adversely affected Michael. (RP 219-20, 234-35) Allstate's objection was overruled. (RP 234) Mr. Symons testified that post-accident dinners were not as enjoyable as dinners before the accident because Viola was in pain and jumpy. She would leave the table and Michael would have to leave to check on her. (RP 234-35)

When Ms. Strachan, who had known the Tidimans since about 2000 (RP 285-86), testified that they had lived together as husband and wife, Allstate's counsel renewed the objection to the line of questioning of about how the Tidimans acted after the accident when compared to before the accident. (RP 301) Allstate's counsel stated that a loss of consortium claim is only applicable to married persons. The court overruled the objection. (RP 301-02)

After Ms. Strachan's testimony, and outside the presence of the jury, the attorneys and the court discussed the matter of the marriage and how it related to the loss of consortium issue. Plaintiff's counsel stated that he had been told that in Canada, where the Tidimans resided, a common law marriage exists after a couple has lived together for one year. (RP 314-16) The court asked for briefing on the subject so a decision could be made about how to address loss of consortium in the jury instructions. (RP 315)

Plaintiff argued that under the full faith and credit clauses of the U.S. and Washington constitutions and under various cases, a Washington court should give full faith and credit to the laws of Canada. Under a Canadian statute and law, when two people live together the government treats them as being married. Plaintiff's counsel apparently provided the court with a copy of a Canadian statute. (RP 618-19)

The court noted that the complaint did not specifically plead loss of consortium. Plaintiff's counsel argued that plaintiff sought damages and those damages included his loss of enjoyment of life. Plaintiff argued he was not required to specifically plead loss of consortium and the issue had been a part of the case from the beginning as part of the discovery that was done. The term loss of consortium was not used, but the concept was addressed. (RP 620-22) Plaintiff also argued that no objection had been

made in the case and that the pleadings could be amended under CR 15 to conform to the evidence. (*Id.*)

The trial court was provided a copy of the interrogatory requests and responses. The discovery requests do not specifically ask about loss of consortium nor do the responses specifically address loss of consortium. (RP 623-24) *See also* CP 82-93, 95-244, 246-58. Allstate's counsel argued: "[T]he trial was really the first notice that I received [that plaintiff was pursuing a loss of consortium claim.]" (CP 72; RP 627 The court overruled Allstate's objection and added the loss of consortium claim to instruction no. 9. (RP 628-30; CP 412-13)

During trial, plaintiff repeatedly emphasized how his life had been affected by Viola's injuries. (CP 73-74) Although Viola had been disabled from work because of a back injury that restricted her lifting, she had no injuries and was able to do many things. (RP 401, 548-49, 589) Both Michael and Viola testified that prior to the accident, Viola had done all the household chores. (RP 400-01, 586) Before the accident, Viola did the cleaning, washed their vehicles, mowed the lawn, and did the gardening. (*Id.*) Before the accident, they hiked, fished, swam, and rode bikes. (RP 597-98) Viola was always happy. She had no depression. She did not cry. (RP 440-41) They had a close sexual intimate

relationship. (RP 453) There was no stress about Viola's disability. (RP 445)

Things changed dramatically after the accident. Michael had to care for Viola for one year after the accident. (RP 495-96) Since the accident, Viola cries a lot. (RP 595) Since the accident, Viola cannot perform any of the household chores. (RP 503, 505-06, 509-10) Their sexual relationship has diminished. (RP 453-54)

Michael testified that it has been an ongoing ordeal for him because of Viola's situation. "[S]he can't do for me like she wants to, not even close." (RP 580:20) They planned to spend their retirement having fun together. (RP 442-43) Viola does not feel competent to be his wife. (RP 510-11) She feels bad that Michael has to do so much. (RP 595) Viola left Michael a note saying that he did not need to stay married to her. (RP 595)

Viola sobbed throughout her testimony. When Viola was done testifying and was leaving the courtroom, she was so emotionally distraught that her husband had to assist her in leaving the courtroom. (CP 74)

Michael was 60 at the time of the accident. (RP 406) Although he had a physical job as a concrete finisher, he planned to continue working until he was 63 and then consider whether he could retire. (RP 407; 409-

418) He acknowledged he had back surgery after an injury from an early 1990s motor vehicle accident. (RP 384, 386) He claimed that he had made a full recovery from the surgery and was physically fit. (RP 388)

In the June 2004 accident, Michael injured his shoulder. (RP 448-49) He received treatment from Dr. Gill from June 7, 2004, to July 11, 2004. (RP 485, 527) Michael had physical therapy from August 30, 2004, to November 4, 2004. (RP 529-31) He later had one counseling session with Dr. Groesbeck. (RP 517-18, 536-37) He testified that after the accident he was able to perform only 10 percent of the work he did before the accident. (RP 463)

Allstate objected to including loss of consortium in the damages instruction (no. 9):

For the record, we do object to the loss of consortium claim. [Number one], it was not pled in the complaint for damages. It was not pled as an item of damages in the interrogatory responses or supplemental interrogatory responses, so therefore, the item of damages, our position is that it should – that cannot properly be pled at this point.

Secondly, the law in Washington is clear that common-law marriage is not recognized in Washington. However, if it's valid in another state, then our state can consider that common-law marriage.

However, there's no case law whatsoever. I've checked everywhere, the Washington Appellate Reports and Washington 2d Reports, of any – there's no authority at all stating that a foreign country common-law marriage would be considered valid in the State of Washington.

So I think for lack of authority on that, and coupled with the lack of pleading, I would submit that loss of consortium cannot properly be instructed in this case, and we would object for the record and voice a continuing objection for purposes of appeal. Thank you.

(RP 617-18)

Over Allstate's objection, the jury was instructed to consider loss of consortium as an element of damages. (RP 617-18; CP 412-13)

Instruction No. 9 states in relevant part:

It is the duty of the court to instruct you as to the measure of damages. You must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

...

In addition you should consider the following noneconomic damages elements:

...

The loss of consortium experienced and with reasonable probability to be expected in the future.

...

The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

(CP 412-13)<sup>1</sup>

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<sup>1</sup> A copy of the complete Instruction No. 9 is attached at Appendix A.

Michael's attorney argued in closing that this case was a love story. (RP 656-60; 720) The case was about how the accident had changed Michael and Viola's lives forever. (*Id.*) Michael's attorney stated that "[l]oss of consortium is very important in this case." (RP 671:3) The phrase loss of consortium was mentioned at least six times during Michael's closing argument. (RP 668, 670, 671, 679, 686, 688)

Michael's attorney specifically referred to instruction no. 9 and the loss of consortium section of the instruction. (RP 679-681) He argued that Viola's injury had a lasting effect on Michael. (RP 673) Michael's attorney asked the jury to award \$638,750 in general damages. (RP 690)

During its deliberation, the jury submitted a question to the judge regarding the instruction no. 9, the damages instruction. (CP 400) The question asked about loss of consortium paragraph. It stated:

Could we have definitions of "services" and "assistance" pertaining to their use in paragraph 5 of jury instruction 9?

(*Id.*)

The jury reached a verdict and awarded plaintiff a total of \$300,475. Over three-quarters of the award was allocated to noneconomic, general damages. The award was allocated as follows:

Past economic damages	\$20,075
Future economic damages	\$7,400
Noneconomic damages	\$273,000

(CP 399)

Allstate moved for a new trial based on the inclusion of loss of consortium. (CP 320-30) Allstate argued that loss of consortium should not have been introduced or allowed at trial because (a) Mr. Tidiman had not asserted a loss of consortium claim in his complaint or discovery responses; (b) there is no loss of consortium claim because the Tidimans were not married at the time of the accident; (c) loss of consortium based on Canadian law was not permitted because plaintiff had not pled foreign law; (d) any loss of consortium was barred by the statute of limitations, and (e) even if the court were to recognize a loss of consortium claim based on the Tidimans' common law marriage, any consortium claim was extinguished when Viola settled her UM claim. (CP 326-30)

Plaintiff opposed the motion. (CP 23-71) Allstate filed a reply in support of its motion. (CP 14-19) The superior court denied Allstate's motion for new trial. (CP 13)

The superior court did grant Allstate's motion to limit the judgment to the policy limits of \$100,000. (CP 386-88, 331-32) Allstate paid the judgment and obtained a satisfaction of judgment. (CP 10-11) Allstate timely filed this appeal. (CP 4-9)

## V. ARGUMENT

### A. 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, 572, 719 P.2d 569, *rev. denied*, 106 Wn.2d 1009 (1986). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Id.* An error is prejudicial when it affects, or presumptively affects, the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Here the inclusion of the evidence about Viola's injuries and how Michael was affected was prejudicial error which affected the outcome of the trial.

Errors in jury instructions are reviewed de novo. *Blaney v. International Association of Machinists*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004); *Keller v. City of Spokane*, 104 Wn. App. 545, 551, 17 P.3d 661 (2001), *aff'd*, 146 Wn.2d 237, 44 P.3d 845 (2002). An erroneous instruction given on behalf of a party who received a favorable verdict is presumed prejudicial and is reversible error unless the error is harmless. *Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 659, 794 P.2d 554, 803 P.2d 1329 (1990). An error is harmless if it is trivial and in no way affected the outcome of the case. *Id.*

**B. THE LOSS OF CONSORTIUM CLAIM, EVIDENCE, ARGUMENT, AND INSTRUCTION WAS PREJUDICIAL ERROR.**

Including the loss of consortium claim in the case and the introduction of evidence about how Viola's injuries affected Mr. Tidiman's life was an irregularity and an error of law which substantially prejudiced Allstate's ability to have a fair trial. The inclusion of the loss of consortium claim was a surprise to Allstate because the claim had not been plead. The claim was not included in the discovery responses. Admitting the evidence about Viola's injuries and the effect on Michael was an error of law and substantial justice was not done. The loss of consortium evidence and argument substantially affected the jury's verdict. The verdict should be vacated and Allstate should receive a new trial.

Plaintiff's case emphasized Viola's injuries and the devastating fact it had on their marriage. Plaintiff unabashedly acknowledged that his case was about how the Tidimans' life was substantially and adversely altered because of Viola's injuries. (RP 656-60, 720) Plaintiff's emphasis did not go unnoticed. It was reflected in the jury's high general damages award, the question to the court during deliberation, and questions during testimony.

The loss of consortium claim, evidence, and instruction were an irregularity in the proceeding. Loss of consortium also came as a surprise to Allstate because plaintiff had not plead the claim. Plaintiff did not disclose the claim in his responses to discovery.

It is settled that a claim for loss of consortium may not be based on a spouse's injury that occurred prior to marriage. 16 DeWolf & Allen, WASHINGTON PRACTICE, *Tort Law and Practice*, § 5.34 (2006). Michael sought loss of consortium based on Viola's injuries from the June 2004 accident. It is undisputed that the Tidimans did not get married until 2006, two years after the accident. Therefore, under Washington law, Michael had no loss of consortium claim.

Plaintiff argued that Michael had standing to pursue loss of consortium because at the time of the accident, the Tidimans had lived together in British Columbia, Canada, for two years. Plaintiff argued that under a British Columbia statute, the Tidimans were in a common law marriage and therefore, Michael had standing to pursue his loss of consortium claim for Viola's June 2004 injuries.

Not only was the plaintiff's claim for loss of consortium a surprise to Allstate, plaintiff's reliance on foreign law was also a surprise because plaintiff had not plead foreign law in his complaint or at any time in the case. CR 9(k); CR 44.1. In the absence of pleading foreign law, the court

is to presume that the foreign law is the same as Washington law and thus the rule of Washington law will apply. *International Tracers v. Hard*, 89 Wn.2d 140, 144, 570 P.2d 131 (1977). It was an irregularity, a surprise, and an error of law to permit plaintiff to assert a loss of consortium claim.

At trial, plaintiff urged the court to apply British Columbia law under the doctrine of full faith and credit and/or comity. The full faith and credit clause of the U.S. Constitution, art. IV, § 1, only applies to judgments but specifically does not apply to foreign judgments. *Aetna Life Ins. v. Tremblay*, 223 U.S. 185, 190, 32 S. Ct. 309, 56 L. Ed. 398 (1912).<sup>2</sup> Foreign law and judgments are only recognized under the principle of comity. *Slessinger v. Secretary of Health & Human Services*, 835 F.2d 937, 940 n.1 (1<sup>st</sup> Cir. 1987). Comity is a matter of discretion; it is not mandatory. *MacKenzie v. Barthol*, 142 Wn. App. 235, 240, 173 P.3d 980 (2007). It was unreasonable as a matter of law for the court to give judicial notice to the law of a foreign nation where plaintiff has failed to plead foreign law. Loss of consortium should have been excluded entirely from the trial.

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<sup>2</sup> Washington law is consistent with the U.S. Constitution. RCW Chapter 5.24 provides that Washington courts shall take judicial notice of the laws of the United States, its states, and its territories. If a party wants the court to take notice of foreign law, foreign law must be specifically pled. RCW 5.24.040.

To the extent this Court concludes the testimony was relevant, the probative value of the evidence was outweighed by its unfair prejudicial effect. ER 403. Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly an emotional basis. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (quoting 1 J. Weinstein & M. Berger, EVIDENCE, 403[.03] at 403-33 (1985)). Error in admitting or restricting evidence is prejudicial if it affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). It is clear from the jury's questions during trial and deliberations that they were concerned about the loss of consortium issue. When there is no way to determine the value the jury placed upon improperly admitted evidence, a new trial is necessary. *Smith v. Ernst Hardware Co.*, 61 Wn.2d 75, 80, 377 P.2d 258 (1962).

After Michael's testimony, the jury asked questions which focused on Viola's injuries and the effect on their lives. (RP 516). The jury asked: "Specifically what parts of your wife's body does she feel pain that interferes with her activities with you? Have you ever suggested or encouraged her to seek treatment for her physical pain or emotional injury after the accident?" The superior court's admission of the testimony was unfairly prejudicial. This Court should reverse and remand for a new trial.

**C. PLAINTIFF'S FAILURE TO PLEAD FOREIGN LAW MEANT WASHINGTON LAW HAD TO BE APPLIED.**

It is undisputed that Michael and Viola were not married pursuant to Washington law at the time of the June 2004 accident. Thus to pursue a loss of consortium claim, plaintiff had to establish that non-Washington law applied and that the non-Washington law treated Michael and Viola as spouses. Plaintiff admittedly did not plead foreign law in his complaint as required by CR 9(k) and RCW Chapter 5.24. Plaintiff first asserted the British Columbia law in the middle of trial.

Plaintiff argued he was not required to plead foreign law because the court can take judicial notice pursuant to ER 201 of British Columbia law. (CP 15, 26) ER 201 limits judicial notice to adjudicative facts. An adjudicative fact is the sort of fact that normally is determined by the jury. 5 Tegland, WASHINGTON PRACTICE § 201.2 (2007). Evidence rules do not govern judicial notice of law. *Id.* at § 201.10, p. 176. The superior court was not allowed to take judicial notice of 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). Plaintiff tried to shift the burden of pleading foreign law to Allstate. (CP 15, 28) Plaintiff was the party who sought to rely on foreign law. He, not Allstate, had the burden of pleading and proving foreign law.

*Id.* Plaintiff failed to do so. The trial court erred in permitting plaintiff to rely on foreign law for the first time during the course of the trial.

**D. ASSUMING MR. TIDIMAN HAD A LOSS OF CONSORTIUM CLAIM, IT WAS BARRED BY THE STATUTE OF LIMITATIONS.**

Assuming for sake of argument that Mr. Tidiman had standing to pursue a loss of consortium claim, the claim was barred under the statute of limitations. A loss of consortium claim would be classified as a claim “for any other injury to the person or rights of another not hereinafter enumerated.” RCW 4.16.080(2). Such claims must be brought within three years. *Id.* Because any loss of consortium claim is premised on Viola’s injuries from the June 2004 accident, a loss of consortium claim had to be filed no later than June 2007. Plaintiff’s lawsuit was not filed until June 2008. Therefore, any loss of consortium claim was barred by the statute of limitations. Because the loss of consortium claim was barred, it was reversible error to admit evidence on the issue and to submit the issue to the jury.

**E. ASSUMING MR. TIDIMAN HAD A LOSS OF CONSORTIUM CLAIM, IT WAS EXTINGUISHED WHEN VIOLA LENTZ SETTLED HER UM CLAIM.**

Under tort law, Washington treats loss of consortium as a separate, not a derivative, claim. *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998). In the insurance context, however, loss of consortium is a derivative claim. Loss of consortium derives from the bodily injury claim

of the spouse. Once the injured spouse settles her bodily injury claim, the other spouse's loss of consortium claim is extinguished. *Greene v. Young*, 113 Wn. App. 746, 754, 54 P.3d 734 (2002).

In *Greene*, Division I recognized the established insurance law in Washington that a loss of consortium claim is limited to the injury spouse's per person policy limits. The *Greene* court cited to *Grange Ins. Ass'n v. Morgavi*, 51 Wn. App. 375, 753 P.2d 999, *rev. denied*, 111 Wn.2d 1009 (1988). There the court explained:

It has long been settled in this state that, absent different policy provisions, insurance indemnity for a claim for loss of consortium is restricted to the same single person limit of the policy available to indemnify for the spouse's injuries that occasioned the claim. See *Zoda v. Mutual of Enumclaw Ins. Co.*, 38 Wn. App. 98, 684 P.2d 91, *review denied*, 102 Wn.2d 1018 (1984). See also *Hutton v. Martin*, 43 Wn.2d 574, 262 P.2d 202 (1953); *United Pac. Ins. Co. v. Edgecomb*, 41 Wn. App. 741, 706 P.2d 233 (1985).

*Morgavi*, 51 Wn. App. at 376. In *Morgavi*, the policy limits were \$50,000 per person and \$100,000 per occurrence. The wife was injured in an accident. The insurance company paid her the \$50,000 per person limit. The husband argued that he was entitled to his own \$50,000 recovery. The trial court entered judgment for the husband. The Court of Appeals reversed.

The *Morgavi* court explained:

Although both *Reichelt* and *Lund* held that loss of consortium was the basis for an independent claim on the part of the person suffering the loss, neither purported to alter settled insurance law. *Christie*, decided by the same court that decided *Zoda*, also dealt with the characteristics of a claim for loss of consortium. It distinguished *Zoda* by pointing out the difference between questions having to do with the *claim*, and those concerning *insurance*. *Christie*, 40 Wn. App. at 45 n.3. Mr. Morgavi fails to take this vital distinction into account.

*Morgavi*, 51 Wn. App. at 377 (italics in original).

Here there is no question that Viola Tidiman settled her UM claim for the single person limits of \$100,000. When she settled her claim, she released Allstate from any liability and obligation arising out of her bodily injuries. (CP 266) Her release and settlement extinguished any claim for loss of consortium. Thus, assuming Mr. Tidiman had standing to assert loss of consortium, his claim for loss of consortium under the Allstate insurance policy was extinguished in October 2004. The inclusion of loss of consortium during the trial and submitting it to the jury was reversible error. This Court should reverse and remand for a new trial.

The fact that discovery revealed that plaintiff had emotional distress related to Viola's injuries did not provide notice to Allstate that plaintiff was pursuing a loss of consortium claim. Plaintiff's emotional distress with objective symptomatology as a result of witnessing Viola's injuries at the accident scene and his memories about the accident would

support a claim for negligent infliction of emotional distress (“NIED”).

The Supreme Court has explained:

The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member a recovery for “foreseeable” intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.

*Colbert v. Moomba Sports*, 163 Wn.2d 43, 49, ¶ 10, 176 P.3d 497 (2008).

The essence of a NIED claim is the “shock resulting from an especially horrendous event.” *Id.* at 62, citing, *Hegel v. McMahon*, 136 Wn.2d 122, 130, 960 P.2d 424 (1998). An NIED claim requires objective symptomatology that is (a) susceptible to medical diagnosis and (b) proved through medical evidence. *Hegel v. McMahon*, 136 Wn.2d at 135.

Plaintiff’s emotional distress from viewing Viola at the scene of the accident and from his memories about the accident would also qualify as a bodily injury for purposes of UM benefits. *Trinh v. Allstate Ins. Co.*, 109 Wn. App. 927, 936, 37 P.3d 1259, *rev. denied*, 147 Wn.2d 1003 (2002). Thus, the information revealed in discovery provided notice that plaintiff might have an NIED claim and a bodily injury claim for purposes of UM benefits. This category of information is distinguishable from information and evidence on a loss of consortium claim. The information did not provide Allstate with notice that plaintiff had or was pursuing a loss of consortium claim.

Plaintiff's emotional distress related to the post-accident effects of Viola's injuries falls into a different legal category. That emotional distress does not relate to either an NIED claim or a bodily injury to plaintiff. Plaintiff's emotional distress related to the post-accident effects of Viola's injuries was only relevant to a loss of consortium claim which he had no legal basis to pursue. Thus, the discovery was not notice to Allstate that plaintiff would pursue a loss of consortium claim. It was a surprise, irregularity, and an error of law to permit plaintiff to argue a loss of consortium claim to the jury. Allstate is entitled to a new trial because of this surprise and irregularity.

Plaintiff's lawsuit sought recovery of UM benefits based on an insurance policy. Washington law is well established that plaintiff in the UM insurance context can only recover for his bodily injury. *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734 (2002). Any loss of consortium claim that plaintiff had was extinguished when Viola Lentz's UM claim was settled for the per person limits. *Greene v. Young*, 113 Wn. App. at 754.

Plaintiff's lawsuit sought UM benefits. (CP 462-65) The insurance policy for UM benefits provides: "**We** will pay damages for bodily injury . . . which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle." (CP 368)

The term "bodily injury" includes emotional injuries that are accompanied by physical manifestations. *Trinh v. Allstate*, 109 Wn. App. at 936. As explained above, plaintiff's emotional distress from seeing Viola in the accident and his memories of the accident can constitute an NIED claim and/or a bodily injury claim for purposes of UM. Bodily injury for purposes of the insurance policy, however, does not include loss of consortium. Plaintiff's recovery in this lawsuit was limited to the contractual provisions of the insurance policy. It was error to have the loss of consortium evidence presented to the jury and submitting the claim to the jury. This Court should reverse and remand for a new trial.

#### VI. 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 21<sup>st</sup> day of December, 2011.

REED McCLURE

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JURY INSTRUCTION NO. 9

It is the duty of the court to instruct you as to the measure of damages. You must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

You should include the following past economic damages elements:

The reasonable value of necessary medical care, treatment, and services received to the present time;

The reasonable value of earnings lost to the present time; and

The reasonable value of substitute domestic services that have been required to the present time.

In addition you should consider the following future economic damages elements:

The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; and

The reasonable value of substitute domestic services that will be required with reasonable probability in the future.

**APPENDIX A**

In addition you should consider the following noneconomic damages elements:

The nature and extent of the injuries;

The pain and suffering, both mental and physical, experienced and with reasonable probability to be expected in the future;

The loss of consortium experienced and with reasonable probability to be expected in the future;

The disability experienced and with reasonable probability to be expected in the future; and

The loss of enjoyment of life experienced and with reasonable probability to be expected in the future.

The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.