95282-5

Supreme Court No. 91974-7

Court of Appeals No. 76092-1

IN THE WASHINGTON SUPREME COURT

JESSICA VANCE, and JUSTIN VANCE, husband and wife,

and their marital community,

Plaintiff/Appellant/Petitioner,

v.

MEHMET SOLAK and JANE DOE SOLAK, husband and wife, and their marital community, if any, and GABRIELLE MCMAUGH and JOHN DOE MCMAUGH, husband and wife, and their marital community, if any, and JUSTIN VANCE, a married person, and MAHLET A. GETACHEW and JOHN DOE GETACHEW, husband and wife, and their marital community, if any and JASON SMITH and JANE DOE SMITH, husband and wife, and their marital community, if any,

Defendants/Respondents.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner in this matter is Justin Vance (Justin), a plaintiff in the trial court and the appellant at the Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW

Whether persons engaged in a committed intimate relationship (CIR) may claim a loss of consortium when one of the partners suffers injury as a result of the negligence of a third party?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In January 2008, Justin and Jessica Vance (Jessica) met and began dating. It was love at first sight. CP 374. As a part of their relationship, Justin and Jessica would swim, kayak, float a river, hike, snowboard/ski at Stevens Pass and had an active sex life. CP 29.

In June of 2010, they began to live together. CP 375-376. At the time they began living together, and while they did not maintain a joint bank account, they lived like a "married couple" enjoying each other's emotional support and sharing the financial load. CP 377-378.

Later in 2010, Justin and Jessica moved to Renton. CP 373. And prior to any of the collisions described herein, Justin and Jessica became engaged to be married.

On November 6, 2010, the first collision occurred. First, Mehmet Solak rear-ended Jessica's car. Gabrielle McMaugh then rear ended Mr. Solak's car (1st Collision). Immediately after the accident, Jessica called Justin to tell him what had happened and for support. CP 381. As a result of the 1st Collision, Jessica was injured. Her right side was bruised, she had tenderness and soreness in her shoulders, and her right hip and right knee were injured. Jessica also suffered chronic pain, depression and shock. She had a difficult time "doing normal things around the house" like chores such as laundry, general cleaning of the house and cooking. CP 382. Further, after the 1st Collision, their outdoor activities together ceased. CP 383-384. The housework fell to Justin. CP 383-384. Further, the couple was required to deal with depression which affected both of them. CP 385-386. In addition, because of the fatigue that Justin suffered, he was "written up" at work. CP 386-387.

As Jessica healed from her injuries from the 1st Collision, she and Justin began planning their wedding. CP 384-385. They

eventually settled on a May 27, 2011 wedding day and booked an "all in one" trip to Puerta Vallarta, Mexico (Wedding Trip). CP 384-385. The cost of the wedding trip was $7,000.00. CP 384, 389, 402.

On May 7, 2011, Justin and Jessica were T-boned by defendant Mahlet Getachew (2nd Collision). Jessica's injuries from the 1st Collision, from which she was still suffering, were aggravated. CP 388.

As a result of the 2nd Collision, Justin and Jessica cancelled their Wedding Trip as Jessica was not able to travel. CP 390. Further, after the 2nd Collision, Justin and Jessica sought couples counseling through a family counselor. CP 391-392. Justin further described the situation as follows:

> Right. I was just – I was really taxed at the time with taking the responsibility of a lot of the household day-to-day things and on top of that work and to see her kind of start to get a little bit better and then get thrown back into the state that she got thrown back into after the accident it was very demoralizing and I just didn't quite put myself in her shoes. I was thinking more of, like how, you know, my situation and not hers and it kind of affected, it affected our relationship.

CP 394; 404. Justin also testified:

> Sexually, we weren't able to be sexual in the ways that we once were. It's difficult to be in a relationship like that and it affected our relationship. Because when we tried to have intercourse, she was in a lot of pain and it was not enjoyable for her or me and it was just something that we kind of had to live without.

CP 375-380.

The summer of 2011, Justin returned to his outdoor activities without Jessica, instead going with his friends. CP 395-396. Further, the couple found a friend to help with household chores. CP 396.

On November 21, 2011, the third collision occurred when Defendant Jason Smith collided with the vehicle Jessica was driving (3rd Collision). Justin described Jessica's injuries after this 3rd Collision as follows:

> She was just sore. Had a really difficult time getting to sleep that night. Just in pain. I really didn't – she really didn't want to discuss it too much with me so I didn't really pry. She seemed pretty angry. She was just angry in general and just didn't want to talk.

CP 397. Jessica was again injured, this time in her left arm. By the time of the 3rd Collision, Justin and Jessica had paid for a second trip for their wedding scheduled on May 8, 2012. CP 363, 393, 397. They married on May 8, 2012 in St. Lucia.

B. PROCEDURAL FACTS

This action was filed on November 5, 2013. Jessica settled her claims with all defendants after a mediation. Justin resolved his claims only with Defendant Solak. CP 346.

In January, 2015, the trial court denied Justin's motion for summary judgment on his loss of consortium claim. CP 182-185. In June 2015, the court heard the Defendants/Respondents motion for summary judgment seeking to dismiss Justin's loss of consortium claim and granted it. CP 518-520. It also denied Justin's second motion for summary judgment on the issue. CP 521-523.

Justin made a motion for direct review to this court which was denied. The matter was transferred to Division One of the Court of Appeals which issued its decision affirming the trial court on October 30, 2017. *Appendix A.* This motion follows.

IV. GROUNDS FOR DISCRETIONARY REVIEW

RAP 13.4(b)(4) provides for review by this court if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." When offering this portion of RAP 13.4(b) as a basis for review in this court, "the petitioner should point out any evidence in the record or information capable of judicial notice which demonstrates that the issue is recurring in nature or impacts a large number of persons." WASHINGTON APPELLATE PRACTICE DESKBOOK, Sec. 27.11, p. 27-11 (Wash. State Bar Assoc. 3d ed. 2005).

Additionally, when this court is asked to overrule itself as it is in this case, a consideration of *stare decisis* is appropriate.

> Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. The true doctrine of stare decisis is compatible with this function of the courts. The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned.

In re Stranger Creek & Tributaries, 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970). As is shown below, this standard is met in this case.

A. THE PRESENT RULE: THOSE IN A CIR MAY NOT CLAIM LOSS OF CONSORTIUM WHEN THEIR PARTNER IS INJURED BY THE NEGLIGENCE OF A THIRD PARTY

This case asks this Court to hold that a person engaged in a CIR [1] may claim a loss of consortium when the other person in the

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[1] Committed intimate relationships were once referred to as "meretricious" relationships, which term has been disapproved of given its negative connotations. *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 247 n.5, 778 P.2d 1022 (1989). The term "committed intimate relationship" has been described as less derogatory and a more accurate description. *Olver v. Fowler*, 131 Wn. App. 135, 140 n.9, 126 P.3d 69 (2006) *affirmed* 161 Wn.2d 655, 168 P.3d 348 (2007) (We share earlier courts' distaste for the antiquated term [meretricious] with its negative connotations, and substitute the phrase "committed intimate relationship.)

relationship is injured by a negligent third party. More specifically, this case asks this Court to reverse *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998) and *Christie v. Maxwell*, 40 Wn. App. 40, 47-48, 696 P.2d 1256 (1985) and hold that persons who are involved in a CIR as first recognized in *In re Marriage of Lindsey,* 101 Wn.2d 99, 678 P.2d 328 (1984), and acknowledged *In re Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), *Connell v. Francisco,* 127 Wn.2d 339, 898 P.2d 832 (1995) and *In re Marriage of Byerley*, 183 Wn. App. 677, 334 P.2d 108 (2014) (among many other cases), may claim a loss of consortium when one party to the CIR suffers a personal injury as a result of the negligence of a third party. By this request, this Court is asked to adopt the approach set forth in *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003) which allows for a person involved in a CIR to claim a loss of consortium when the other is injured.

A. THE *GREEN* RULE IS A WINDFALL TO NEGLIGENT PERSONS

Negligent persons are the beneficiaries of the *Green* rule. Non-negligent persons and their families suffer under it. This windfall to wrongdoing defendants is inconsistent with Washington law.

1. Washington Law Already Prohibits Windfalls to Tortfeasors

Washington law does not favor windfalls to tortfeasors such as the *Green* rule provides. One example is the collateral source rule which prevents the introduction of evidence to the jury of insurance payments to an injured person.

> Generally, plaintiffs who receive payments from their insurers covering all or part of their loss are not precluded from suing their tortfeasors. The purpose of this rule is to prevent the wrongdoer from avoiding liability merely because the plaintiff's loss was covered by insurance. **In keeping with this policy of giving the victim rather than the tortfeasor any "windfall" in the recovery of damages**, the collateral source rule forbids consideration of payments received by the plaintiff from sources wholly independent of and collateral to the wrongdoer which have a tendency to mitigate the consequences of the injury to reduce damages otherwise recoverable.

(Citations omitted; emphasis added) *Meyer v. Dempcy*, 48 Wn. App. 798, 801-02, 740 P.2d 383, 384-85 (1987).

In *Ciminski v. Sci Corp.*, 90 Wn. 2d 802, 805, 585 P.2d 1182, 1183-84 (1978), this court adopted the collateral source rule and decided that the rule did not require that it be applied only to policies for which the injured person had paid. It stated:

> We agree with the majority of courts that application of the collateral source rule need not be conditioned on some payment by the plaintiff for the benefit received. To so limit the doctrine would be contrary to the policy that the wrongdoer should not benefit from collateral payments made to the person he has wronged.

Id. at 805. In *Cox v. Spangler*, 141 Wn. 2d 431, 5 P.3d 1265, 1269 (2000), this court also stated:

> Accordingly, "as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall." *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993) (citing *Ciminski,* 90 Wn.2d at 804).

Id. at 439-40. The Court of Appeals has also recognized the prohibition against windfalls for tortfeasors in a case involving the Washington Insurance Guarantee Association Act (RCW 48.32). In *Gallagher v. Sidhu*, 126 Wn. App. 913, 919, 109 P.3d 840, 843 (2005), the court stated that applying an uninsured motorist credit to an insured of an insolvent insurer "is not to confer a windfall upon [the tortfeasors]," but rather it "merely protects them from the insolvency of their insurer."

This court has repeatedly disapproved of windfalls in other areas of the law. Given this, negligent persons are enjoying a windfall, something of which this Court has repeatedly disapproved. *E.g Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012) (windfall to State under then existing estate tax scheme invalidated); *Flanigan v. Dep't of Labor & Indus.,* 123 Wn.2d 418, 869 P.2d 14 (1994) (L&I not permitted to a share of the spouse's loss of consortium damages as to do so is a windfall to the State).

2. Primary Purpose of Formal Marriage Is For The Parties To The Marriage, Not Third Parties

In Washington, the purpose of a marriage license is regulatory only. In *State v. Denton,* 97 Wn. App. 267, 983 P.2d 693 (1999), Division One was asked whether the spousal privilege available under RCW 5.60.060 applied to two persons who lived together and held themselves out as married, had a religious ceremony but did not have a marriage license. The court concluded that

> ... Washington does not have a statue plainly making an unlicensed marriage invalid. Therefore, the purpose of the license requirement [in RCW 26.04.010] is purely regulatory. The regulatory purpose cannot be enforced by the 'radical process of rendering void and immoral a matrimonial union otherwise validly contracted and solemnized.'

(Citation omitted.) 97 Wn. App at 271.

Further, the court noted "But where there is no such statute, a marriage license is not integral to the creation of a valid marriage," citing *Feehley v. Feehley*, 99 A. 663, 129 Md. 565 (1916).

Rather, all a marriage license provides is one method of proof of the emotional commitment between two persons. *Koebke v. Bernardo Heights Country Club,* 36 Cal. 4th 824, 844-45, 31 Cal. Rptr. 3d 565, 578, 115 P.3d 1212 (2005). There are certainly others

as this court recognized in the acknowledgment of the CIR in its decisional law. The failure to allow for a loss of consortium by requiring a marriage is to prejudice only the parties to a CIR and their families, and benefit negligent persons. This is something this court should no longer allow.

B. A LARGE NUMBER OF WASHINGTONIANS ARE AFFECTED BY THE *GREEN* RULE

The available census information and societal data proves that adults are increasingly foregoing marriage and engaging in CIRs. Adults do this for a myriad of reasons not the least of which is companionship. More and more, children are raised in a two parent home without their parents actually being "married." The practice is so widespread that this court may take judicial notice of it. ER 201.

Professor Stephanie Coontz documents this exponential increase in cohabitation/committed intimate relationships in her recent work. In her 2016 update to *The Way We Never Were: American Families and the Nostalgia Trap*, (Basic Books 1992, 2016), Professor Coontz notes:

> In 1992, living together before marriage was not yet the norm. As of 1987, only one-third of women aged nineteen to forty-four had ever cohabited. By 2013 that had doubled, and most marriages now begin after the couple is already living together.

Id. p. x. The available sociological research supports the conclusion that exponentially more people are living in a committed intimate relationship now than they did 50 years ago. *E.g. Record Share of Americans Have Never Married*, Pew Research Center (September 24, 2014)[2]; Manning & Stykes, *Twenty Five Years of Change in Cohabitation in the U.S., 1987 – 2013*,[3] *Prevalence and Growth of Cohabitation*, Pew Research Center (June 27, 2011).[4] Further, in an article published by the Washington Post entitled *For the first time, there are more single American adults than married ones, and here's where they live*, [5] the author noted that over 50% of the adults in Washington State were unmarried. Because of this shift, third party tortfeasors enjoy a windfall as with the decreasing married persons and increasing cohabitants, their tort liability is reduced simply because of this shift.

> Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative

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[2] http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/
[3] https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and sciences/NCFMR/documents/FP/FP-15-01-twenty-five-yrs-cohab-us.pdf
[4] http://www.pewsocialtrends.org/2011/06/27/i-prevalence-and-growth-of-cohabitation/
[5] https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/15/for-the-first-time-there-are-more-single-american-adults-than-married-ones-and-heres-where-they-live/

> enactments that may have spoken to the area of law, but did so incompletely.

In re Parentage of L.B., 155 Wn.2d 679, 689, 122 P.3d 161 (2005).

In *Roth v. Bell*, 24 Wn. App. 92, 600 P.2d 602 (1979), a loss of consortium case, Division One commented on whether *stare decisis* should bar the development of the law when society changes. The court stated that while ultimately it did not have the authority to change the common law which prevented such a claim (such as in in this case), the following should be considered:

> ***Society changes*** and the common law must be re-evaluated and retested from time to time by the judiciary to determine if the law on a particular subject had kept pace with conditions. The common law must be rationale and compatible with present society if it is to be respected and upheld. When the reason for the law ceases, the law itself ceases.

(Emphasis in the original; citations omitted.) 24 Wn. App. at 100. Division One also noted:

> The legislature may legislate in areas dealing with facets of tort law involving familial relationships, but such legislative action does not divest courts of their authority to alter rules of law which had their genesis in the courts under the common law.

(Citations omitted.) 24 Wn. App. at 99. The time has come to change this outdated common law prohibition against loss of consortium claims for those in CIRs.

C. WASHINGTON SHOULD FOLLOW NEW MEXICO AND ALLOW PERSONS ENGAGED IN A CIR TO CLAIM LOSS OF CONSORTIUM DAMAGES

Justin asks this court to adopt the rule set forth by the New Mexico Supreme Court as stated in *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003).[6] *Lozoya* is factually similar to the present case. There, Mr. Ubaldo Lozoya and his partner, Sara, had a committed intimate relationship. Ubaldo was injured in a car accident in June 1999 in which he was injured. After this injury, Ubaldo and Sara married in November 1999. In April, 2000, Ubaldo was involved in another accident and he was injured again. The New Mexico Supreme Court allowed Sara to bring a claim for loss of consortium based on the injuries suffered by Ubaldo in the first accident. In so holding the New Mexico court stated:

> We must consider the purpose behind the cause of action for loss of consortium. A person brings this claim to recover for damage to a relational interest, not a legal interest. To use the legal status as a proxy for a significant enough relational interest is not the most precise way to determine to whom a duty is owed. Furthermore, the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse. Of course, the State has a continuing interest in protecting the legal interest of marriage as well. Allowing an unmarried partner to recover for loss of

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[6] *Lozoya* was overruled in part by *Heath v. La Mariana Apts.*, 143 N.M. 657, 180 P.2d 664 (2008) on an issue relating to standard of care and jury instructions. The points for which it is cited here are unaffected by *Heath*.

> consortium neither advances nor retracts from that interest. It is doubtful that anyone would choose to marry simply because they would not be allowed to bring a future loss of consortium claim otherwise.

(Emphasis in the original; footnote omitted.) *Lozoya,* at 586.

The Court went on to say:

> It is appropriate that the finder of fact be allowed to determine, with proper guidance from the court, whether a plaintiff had a sufficient relational interest with the victim of a tort to recover for loss of consortium.

Lozoya. at 586-87; *see also Williams v. Bd. of Regents of the Univ. of N.M.*, 20 F. Supp. 3d 1177, 2014 U.S. Dist. LEXIS 66741 (D.N.M, April 29, 2014) *as amended at* 2014 U.S. Dist. LEXIS 122203, Slip Op. p 49-50 (August 18, 2014) (if a sufficiently close relationship exists between the injured party and the claimant, it was reasonably foreseeable that consortium may be lost). Justin asks this Court to do the same.

D. WASHINGTON LAW SUPPORTS THIS SHIFT

1. Washington Law Already Recognizes the CIR; it is not the Meretricious Relationship of Old

Adults in the United States are increasingly entering into CIRs and foregoing marriage. As a result of this significant shift in society, negligent persons are enjoying a windfall based on 35 year old cases which describe such relationships as "nebulous,"

meaning "hazy, vauge, indistinct or confused."[7] *Sawyer v. Bailey*, 413 A.2d 165, 168 (Maine, 1980). In 2016, society does not consider a CIR as hazy, vague, indistinct or confused as shown by the enormous developed decisional law recognizing them starting with *In re Marriage of Lindsey* in 1984.

2. Loss of Consortium Is Compensation For Damage To A Relational Interest, Something Washington Law Already Recognizes

Washington law already imposes a number of benefits and obligations on persons engaged in CIRs as it is the relational interest creates a right in property by those engaged in a CIR. As to a residence in which a person engaged in a CIR, they may claim homestead protection under RCW 6.13 as such a claim is based on possession, not marital status. *E.g. Swanson v. Anderson*, 180 Wash. 284, 38 P.2d 1064 (1934).

Relative to children born to a CIR, unmarried parents have child support obligations to those children. RCW 26.18.030. Further, a non-biological parent (which could include a person engaged in a CIR) can be declared a *de facto* parent based on a relational (emotional interest) with the child thus enjoying all the

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[7] The term "nebulous" is so defined by Dictionary.com at http://dictionary.reference.com/browse/nebulous?s=t

benefits and obligations of a parent. *In re Parentage of L.B.*, 155 Wn.2d 679, 689, 122 P.3d 161, 166 (2005). Additionally, the income of those participating in a CIR may be considered in child support calculations. RCW 26.19.075.

Washington law also protects other relational interests. E.g. *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997) (attorney-client relationship and privilege); *Bond v. Indep. Order of Foresters*, 69 Wn.2d 879, 421 P.2d 351 (1966) (doctor-patient relationship and privilege); *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 364 P.2d 129 (2015) (Defamation is an impairment of a relational interest; it denigrates the opinion that others in the community have of the plaintiff and invades the plaintiff's interest in his or her reputation and good name.);[8] *State v. Martin*, 91 Wn. App. 621, 959 P.2d 152 (1998) (priest-penitent relationship and privilege).

V. CONCLUSION

Because of the shift of a large portion of society favoring the CIR prior to marriage, tortfeasors are enjoying a windfall. Our society is not what it was 40-50 years ago when the rule was established in the United States. In those days, as the members of

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[8] This opinion does not state that it is unpublished.

the court will remember, very few cohabitated prior to a marriage ceremony. In 2017, however, such cohabitation is increasingly the norm in advance of a marriage ceremony, that ceremony being the mere legal formalization of a committed relationship which already exists. The outdated *Green* rule should not prevent recovery for someone in Justin's position when his fiancée is injured through the negligence of a third party.

For the above stated reasons, this Court should accept review.

DATED this 29th day of November, 2017.

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DECLARATION OF SERVICE

The undersigned states under penalty of perjury under the laws of the State of Washington that service of this pleading by e-mail transmission was made this 29th day of November, 2017 on the following counsel of record:

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Dated this 29th day of November, 2017.

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JESSICA VANCE and JUSTIN VANCE, husband and wife, and their marital community, Appellants, v. FARMERS INSURANCE COMPANY, Respondent Intervenor, MEHMET SOLAK and JANE DOE SOLAK, husband and wife, and their marital community, if any; and GABRIELLE MCMAUGH and JOHN DOE MCMAUGH, husband and wife, and their marital community, if any; and AMANDA B. YATES and JOHN DOE YATES, husband and wife, and their marital community, if any; and JUSTIN VANCE, a married person; and MAHLET A. GETACHEW and JOHN DOE GETACHEW, husband and wife, and their marital community, if any; and DESTA WORKNEH and JOHN DOE WORKNEH, husband and wife, and their marital community, if any; and JASON SMITH and JANE DOE SMITH, husband and wife, and their marital community, if any, Defendants.	No. 76092-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 30, 2017

SCHINDLER, J. — As a general rule, a spouse cannot bring a claim for loss of consortium when injury to the spouse that causes the loss occurs before marriage. Justin Vance appeals summary judgment dismissal of his claim for loss of consortium. Justin cites an out-of-state case to argue that because he and his spouse Jessica Vance were in a committed intimate relationship before the marriage, he should be allowed to bring a claim for loss of consortium. We adhere to the Washington Supreme Court decision in Green v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998), and affirm summary judgment dismissal of his loss of consortium claim.

Justin Vance and Jessica King began dating in January 2008. Approximately six months later, they got engaged and were living together.

On November 6, 2010, Jessica was driving a rental car when a van rear-ended the car. Jessica got out of the car. The driver, Mehmet Solak, got out of the van. As Solak was giving his driver's license information to Jessica, the driver of another car, Gabrielle McMaugh, collided with Solak's van, injuring Jessica and Solak.

After the November 2010 car accident, Jessica and Justin decided to get married in Mexico on May 27, 2011.

On May 7, 2011, Justin was driving his BMW southbound on Aurora Avenue North. Jessica was in the front passenger seat. As Justin turned left into a driveway, a car hit the BMW on the passenger side. Mahlet Getachew was the driver of the car.

Jessica said the collision " 'reaggravated' " her right knee and bruised her arm. Justin and Jessica cancelled the May wedding and the trip to Mexico. They rescheduled the wedding for May 7, 2012 in Saint Lucia.

On November 21, 2011, Jessica was driving on Interstate 405. Jessica "T-boned" a truck with her car. The truck driver was Jason Smith.

Jessica and Justin got married in Saint Lucia on May 7, 2012.

On November 5, 2013, Justin and Jessica as husband and wife and on behalf of the marital community filed a complaint for damages against Solak and McMaugh for the car accident on November 6, 2010; Justin Vance and Getachew for the car accident on May 7, 2011; and Smith for the car accident on November 21, 2011.[1] The complaint alleged the negligence of the defendants caused "sevère" injuries to Jessica. Jessica sought medical expenses, lost earnings, property damage, and general damages. The defendants denied the allegations and asserted affirmative defenses.

In 2010 and 2011, Jessica was insured by Farmers Insurance Company (Farmers). The insurance policy included underinsured motorist coverage. On February 21, 2014, Farmers filed a motion to intervene in the lawsuit. The court granted the motion.

Justin filed a motion for summary judgment on loss of consortium. Justin argued the undisputed facts showed he suffered loss of consortium as a result of the car accidents. In opposition, the defendants and Farmers pointed out the complaint did not allege a claim for loss of consortium and Justin was not married

[1] Justin and Jessica also sued the registered owner of the car McMaugh was driving, Amanda Yates; and the registered owner of the car Getachew was driving, Workneh Desta.

to Jessica at the time of the car accidents. The court denied Justin's motion for summary judgment.

Justin filed a motion to file an amended complaint to add loss of consortium and negligent infliction of emotional distress. On February 10, 2015, the court entered an order granting the motion to file an amended complaint without prejudice to the defense filing motions "on legal sufficiency, relation back and the statute of limitations."

In answer to the amended complaint, Farmers asserted Justin cannot "state a claim upon which relief can be granted" because Justin and Jessica were not married when the car accidents occurred in 2010 and 2011.

> Plaintiff was not married to Jessica at the time Jessica Vance was involved in the accidents which form the bases for this matter. There is no cognizable legal claim in law or fact for loss of consortium and/or other damages claimed by Plaintiff Justin Vance.

Following a mediation on March 17, 2015, Jessica settled her claims against the defendants and Farmers.

On May 21, Farmers filed a motion for summary judgment dismissal of Justin's claim for loss of consortium and negligent infliction of emotional distress. Citing Green v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998), Farmers argued because Justin was not married to Jessica at the time of the car accidents, as a matter of law, he did not have a claim for loss of consortium.

> Mr. Vance's claims are based solely upon the injuries plaintiff Jessica Vance allegedly experienced as a result of the three separate motor vehicle accidents at issue in this lawsuit; Mr. Vance is not claiming that he suffered any personal injuries. However, Mr. Vance was not married to Jessica Vance at the time of any of the three accidents. As a result, he has no cognizable claims for loss

> of consortium, and thus his claims for loss of consortium should be dismissed with prejudice as a matter of law.

Farmers argued Justin could not establish negligent infliction of emotional distress because the undisputed evidence showed he was not present at the first car accident in 2010 or the third accident in November 2011, and he presented no evidence of "objective symptomology relating to the second accident" in May 2011.

Justin filed a cross motion for summary judgment. Justin conceded that in Washington, unmarried persons are not entitled to loss of consortium. Justin argued the court should follow the decision of the New Mexico Supreme Court, Lozoya v. Sanchez, 133 N.M. 579, 66 P.3d 948 (2003), abrogated on other grounds by Heath v. La Mariana Apartments, 143 N.M. 657, 180 P.3d 664 (2008), that recognizes loss of consortium for a partner in a committed intimate relationship (CIR).

In response, Farmers asserted the New Mexico Supreme Court decision in Lozoya "has not been adopted by any other jurisdiction." Farmers also asserted the evidence "does not warrant a finding that a 'committed intimate relationship' existed as a matter of law." In the alternative, Farmers argued there were material issues of fact on whether Justin and Jessica could establish a CIR.

At the hearing on the cross motions for summary judgment, Justin told the court he was not "necessarily seeking . . . summary judgment on whether or not a committed intimate relationship existed, but rather that we have the right to present that evidence at trial should you rule in our favor today." The court

denied Justin's motion for summary judgment. The court entered an order granting summary judgment dismissal of "all claims by plaintiff Justin Vance."

Jessica and Justin filed a notice of appeal to the Washington Supreme Court of the "Order Denying Plaintiff Justin Vance's Second Motion for Summary Judgment RE: Loss of Consortium & Related Claims" and the "Order Granting Intervenor Farmers Insurance Company's Motion for Summary Judgment to Dismiss All Claims of Plaintiff Justin Vance." The Supreme Court transferred the appeal to this court.

Jessica and Justin cite the New Mexico Supreme Court decision in Lozoya to argue unmarried persons in a CIR should have the right to assert a loss of consortium claim. Farmers contends the Washington Supreme Court decision in Green controls.

We review a trial court's decision on summary judgment de novo. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. Michak, 148 Wn.2d at 794-95.

Loss of consortium is a claim for loss of society, affection, assistance, and conjugal fellowship and loss or impairment of sexual relations in the marital relationship. Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 773, 733 P.2d 530 (1987); Ueland v. Pengo Hydra-Pull Corp., 103 Wn.2d 131, 132 n.1, 691 P.2d 190 (1984). A loss of consortium claim is an independent and separate

claim, not a derivative claim. Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 250, 178 P.3d 981 (2008).

In Christie v. Maxwell, 40 Wn. App. 40, 47-48, 696 P.2d 1256 (1985), we held the spouse in a marital relationship has the right to bring a loss of consortium claim, but "there would be no injury to [the wife's] consortium rights without the accompanying physical injury to her spouse, and the existence of the marital relationship."

In Green v. American Pharmaceutical Co., 86 Wn. App. 63, 68, 935 P.2d 652 (1997), we held the general rule in Washington and the majority of courts in other states is "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." (Citing Christie, 40 Wn. App. at 47-48; Stager v. Schneider, 494 A.2d 1307 (D.C. 1985); Sawyer v. Bailey, 413 A.2d 165 (Me. 1980); Tremblay v. Carter, 390 So.2d 816 (Fla. Dist. Ct. App. 1980)). But we concluded the general rule did not bar a claim for loss of consortium for an unknown latent toxic tort that the spouse could not have discovered before marriage. Green, 86 Wn. App. at 68. The Washington Supreme Court affirmed. Green, 136 Wn.2d at 103.

The Supreme Court agreed the rule in Washington and the majority of other states is that "a loss of consortium claim does not lie when the injury to the spouse that caused the loss of consortium occurred prior to the marriage."

Green, 136 Wn.2d at 101.[2] A person should not be permitted to "marry a cause of action" and "assumes . . . the risk of deprivation of consortium arising from any prior injury." Green, 136 Wn.2d at 101. The court in Green adopted a narrow exception to the rule where an unknown latent toxic injury to the affected spouse was "latent and unknown" at the time of the marriage. Green, 136 Wn.2d at 101-02. The court held, "[L]oss of consortium damages should be available for a premarital injury if the injured spouse either does not know or cannot know of the injury." Green, 136 Wn.2d at 102.[3]

Justin does not contend the exception in Green applies. Justin cites Lozoya to argue a person in a CIR should be allowed to assert a loss of consortium claim.

In Lozoya, the New Mexico Supreme Court held that "as a matter of first impression under New Mexico law . . . a claim for loss of consortium is not limited to married partners." Lozoya, 133 N.M. at 582. The New Mexico Supreme Court recognized the decision represented a minority view—"we note that no other

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[2] See also LeFiell Mfg. Co. v. Superior Court of Los Angeles County, 55 Cal. 4th 275, 284-85, 282 P.3d 1242 (2012) ("Such a claim at common law" includes " 'a valid and lawful marriage between the plaintiff and the person injured at the time of the injury.' ") (quoting Hahn v. Mirda, 147 Cal. App. 4th 740, 746 n.2, 54 Cal. Rptr. 3d 527 (2007)); Holmes v. Maimonides Med. Ctr., 95 A.D.3d 831, 831-32, 943 N.Y.S.2d 573 (N.Y. App. Div. 2012) (A " 'cause of action for loss of consortium does not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage.' ") (quoting Anderson v. Eli Lilly Co., 79 N.Y.2d 797, 798, 588 N.E.2d 66 (1991)); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142, 514 N.E.2d 1095 (1987) ("[T]hat value [of marriage] would be subverted by our recognition of a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage."); Gillespie-Linton v. Miles, 58 Md. App. 484, 495, 473 A.2d 947 (Md. Ct. Spec. App. 1984) ("[W]e hold that only injury to a marital relationship which exists at the time of the injury can support an action for loss of consortium.") (emphasis in original).

[3] We also note the legislature has created a right for a child, parent, or spouse to bring an action for wrongful death where loss of consortium is an element of the recovery, RCW 4.20.020, and a right for parents to recover for "loss of love and companionship" of their child, RCW 4.24.010, but has not allowed partners in a CIR to recover for loss of consortium.

State in the union currently allows unmarried cohabitants to recover for loss of consortium." Lozoya, 133 N.M. at 585.

The New Mexico court adopted an eight-factor test for the jury to determine "whether an intimate familial relationship exists for loss of consortium purposes" and is "significant enough to recover." Lozoya, 133 N.M. at 588.

> "That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."

Lozoya, 133 N.M. at 588[4] (quoting Dunphy v. Gregor, 136 N.J. 99, 112, 642 A.2d 372 (1994)).

Unlike in the New Mexico case, the CIR doctrine in Washington is equitable in nature. In re Marriage of Pennington, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). The equitable CIR doctrine in Washington evolved to protect unmarried parties who acquire property during their relationship. Pennington, 142 Wn.2d at 602. In determining the existence of a CIR, the court considers several factors that are neither exclusive nor hypertechnical. Pennington, 142 Wn.2d at 601-02. No one factor is more important than another and the court examines the particular circumstances of each case to determine if a CIR exists. Pennington, 142 Wn.2d at 605.

We adhere to the general rule in Washington that a spouse does not have a claim for loss of consortium when the injury to the spouse that causes the loss

[4] Alteration in original.

occurs before marriage, and affirm summary judgment dismissal of Justin's claim for loss of consortium.

Schindler, J.

WE CONCUR:

Leach, J.

Becker, J.

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