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No. 63679-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TESSA ENGLER,

Appellant

v.

CORP. OF THE ARCHBISHOP OF SEA., d/b/a THE ARCHDIOCESE
OF SEA.,

Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

Tessa Engler filed a complaint for lost consortium damages against the Seattle Archdiocese. Her claim stems from the sexual abuse of Ms. Engler's father, John Engler, by Father Desmond McMahon (hereinafter "McMahon") and Father James J. McGreal (hereinafter "McGreal"). As a result of this sexual abuse, John Engler suffered severe psychological injuries which affected his ability to serve as a father to his daughter. The injuries suffered by her father prevented Ms. Engler from having a normal, healthy relationship with him. Ms. Engler seeks compensation from the Corporation of the Catholic Archbishop of Seattle, d/b/a The Archdiocese of Seattle (hereinafter "Seattle Archdiocese") for her consortium losses.

The trial court improperly granted a CR 12(b)(6) motion to dismiss Ms. Engler's complaint. From its comments, it appears the trial court believed that no claim for loss of consortium could be brought if no father-daughter relationship existed at the time Mr. Engler was molested by the named priests. The court erred by misbelieving that a consortium claim necessarily accrues at the time the acts of sexual abuse are committed against the parent. Since Mr. Engler's claim did not accrue until he knew or should have known of the harm caused by the abuse, and since that time was after the birth of Tessa Engler, Ms. Engler's consortium claim could only have accrued at that time or later. Ms. Engler asks this Court to

reverse the trial court's order of dismissal and remand the case so that it may proceed.

II. STATEMENT OF THE CASE

A. Factual Background

In the 1960s, when Ms. Engler's father was a student in St. Catherine's parish, he was sexually molested and abused by Fathers McMahon and McGreal. In 2005 Mr. Engler brought his own action against the Archdiocese (*John Engler v. Corporation of the Catholic Archbishop of Seattle*, 05-2-26692-9 SEA). Fr. McGreal, one of the two priests who molested and raped John Engler, has been the subject of over thirty other cases against the Seattle Archdiocese. John Engler's case against the Archdiocese was previously settled. CP 49. No consortium claim on behalf of Ms. Engler was brought in that action. It was not feasible to include Ms. Engler's claim in that action since she had had no contact with her father since 2001. CP 31.

The settlement agreement in Mr. Engler's case included language confirming that resolution of Mr. Engler's claim was not resolution of his daughter's claim: "[t]his release relates solely to claims of John Engler, individually, and has no effect upon and does not address in any way claims of any kind which could be or could have been made by his ex wife, Meri Greive, or his daughter, Tessa Engler." CP 24.

B. Procedural History

Ms. Engler filed this action against the Seattle Archdiocese on July 9, 2008. She asserted causes of action for negligent supervision, breach of fiduciary duty, fraudulent concealment, and negligent infliction of emotional distress. CP 5-7. On March 10, 2009, Ms. Engler filed an amended complaint for negligence, removing most of the causes of action pleaded in her original complaint. CP 8-10. The Archdiocese filed a motion to dismiss plaintiff's complaint under CR 12(b)(6) on March 11, 2009. CP 12-19. The motion was set for hearing on April 17, 2009. CP 20. The motion to dismiss filed by the Archdiocese addressed Ms. Engler's original complaint, not her amended complaint. CP 14-19. Ms. Engler opposed the Archdiocese's motion to dismiss. CP 23-36.

Believing that no consortium claim could be brought because Mr. Engler was a school boy when he was molested, since at that time Ms. Engler was not then alive, (as argued by the Archdiocese) on May 27, 2009 the trial court granted the Archdiocese's motion for dismissal pursuant to CR 12(b)(6). CP 42-43. The Court's order granting the Archdiocese's motion dismissed Ms. Engler's suit "with prejudice." *Id.*

On June 5, 2009, Ms. Engler filed a motion for reconsideration of the order granting the Archdiocese's motion to dismiss. CP 47-56. On

June 8, 2009 the trial court denied Ms. Engler's motion for reconsideration. CP 58. This appeal followed.

III. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error

1. The trial court erred in entering its order of May 27, 2009, granting the Archdiocese's motion to dismiss the action pursuant to CR 12(b)(6).

2. The trial court erred in entering its order of June 8, 2009, denying Plaintiff's motion for reconsideration of the order of May 27 granting Seattle Archdiocese' motion for dismissal of all claims pursuant CR 12(b)(6).

B. Issues Pertaining to Assignments of Error

1. Does Engler's First Amended Complaint state a claim for loss of consortium? (Assignment of Error 1).

2. Did the trial court err in denying plaintiff's motion for reconsideration? (Assignment of Error 2).

IV. ARGUMENT

A. Standard And Scope Of Review

1. Motion for CR 12(b)(6) Failure to State a Claim

This Court applies a *de novo* standard when reviewing a trial court's decision on a motion brought under CR 12(b)(6) for failure to state

a claim on which relief can be granted. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

B. Engler Has Stated A Claim For Relief Against The Seattle Archdiocese For Loss Of Consortium

1. A Party Seeking Dismissal Pursuant to CR 12(b)(6) Bears The Heavy Burden of Showing Beyond Doubt That There Are No Facts, Even Hypothetical Ones, Which Could Support The Claims Of The Non-Moving Party.

Under CR 12(b)(6), dismissal for failure to state a claim is appropriate only where it appears beyond doubt that the plaintiff cannot prove any set of facts consistent with the complaint which would justify recovery. *Burton*, 153 Wn.2d at 422. CR 12(b)(6) motions should be granted sparingly and with care in order to make certain that the plaintiff is not improperly denied a right to have his claim adjudicated on the merits. *Fondren v. Klickitat County*, 79 Wn.App. 850, 854, 905 P.2d 928 (1995).

Further, for purposes of deciding a CR 12(b)(6) motion, *all* of the factual allegations in the complaint will be accepted as true. *Dennis v. Heggen*, 35 Wn.App. 432, 434, 667 P.2d 131 (1983). The court may *also* consider any hypothetical facts conceivably raised by the complaint. A CR 12(b)(6) motion must be denied if hypothetical facts legally sufficient to support plaintiff's claim exist. *Bravo v. Dolsen Companies*, 125 Wn.2d

745, 750, 888 P.2d 147 (1995). Indeed, even hypothetical facts alleged for the first time on appeal may be sufficient to defeat a motion under CR 12(b)(6):

We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule. [citing *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978)] Neither prejudice nor unfairness is deemed to flow from this rule, because the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.

Bravo, 125 Wn.2d at 750.

Thus, the issue in this case is not whether Ms. Engler has actual “evidence” in her possession to support every single allegation in her complaint as if acting under a summary judgment standard. Rather, under CR 12(b)(6) the issue is whether it appears beyond doubt that she can prove no set of facts in support of her claim against the Archdiocese for loss of consortium. In conducting this analysis, the court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding sufficiency of the claim in favor of Ms. Engler. See, *Woodrome v. Benton County*, 56 Wn.App. 400, 403, 783 P.2d 1102 (1989), *rev. denied*, 114 Wn.2d 1013 (1990).

Modern civil rules require only that a complaint contain a short and plain statement of the claim -- showing that the pleader is entitled to

relief -- and a demand for the relief claimed. See, CR 8(a). Pursuant to Washington State's "liberal rules of procedure," a complaint is sufficient so long as it provides notice "of the general nature of the claim asserted." *Lightner v. Balow*, 59 Wash.2d 856, 858, 370 P.2d 982 (1962); See also *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); *Berge v. Gorton*, 88 Wash.2d 756, 762, 567 P.2d 187 (1977).

2. Ms. Engler's First Amended Complaint Alleged Facts Sufficient To State A Claim For Loss of Consortium.

Under Washington law, childhood sexual abuse claims are treated differently than all other tort claims. The applicable statute provides:

- (3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.
- (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs

See RCW 4.16.340. Ms. Engler's father was a victim of childhood sexual abuse. The harm done to him predictably harmed his adult marital and parent/child relationships. During her early life with her father, Ms. Engler suffered harm which resulted from the prior abuse of her father by parish priests at St. Catherine's. Mr. Engler's case was filed in 2005. One inference from that fact is that his cause of action accrued less than three

years prior to the date he filed his suit. At the time his claim accrued, his daughter was a minor.

a. Engler's First Amended Complaint Stated A Cognizable Claim Upon Which Relief May Be Granted

The Archdiocese repeatedly, and incorrectly, argued that Ms. Engler's claim for loss of consortium is not cognizable, and thus she failed to plead a valid claim as a matter of law. CP 14. The Archdiocese argued that unless the person who lost consortium with the victim of abuse was alive at the time of the acts of abuse, no consortium claim exists. But Washington does not require that the relationship upon which a claim for loss of consortium is based be in existence at the time the abuse occurs.

A claim for lost consortium with a sexual abuse victim is not ripe or actionable until the time when the victim of sexual abuse becomes aware of the connection between abuse and his injury. The claim has then 'accrued.' In cases involving sexual abuse, it is well established that the victim's claim may accrue years or even decades after the actual abuse took place, as occurred here and as occurs in many similar cases. The Legislature recognized this delayed connection in enacting RCW 4.16.340, which essentially tolls the statute following the abuse until the victim knows, or should know, not only that events of sexual abuse occurred but also knows what harm the abuse caused:

2. Washington's Discovery Rule in Cases Based on Childhood Sexual Abuse

Our Legislature has determined that a victim of childhood sexual abuse may know he was abused, but be unable to make a connection between the abuse and emotional harm or damage until many years later. He may also be aware of some injuries, but not discover more serious injuries until many years later. This is because of the insidious nature of childhood sexual abuse-it is a traumatic experience causing long-lasting damage. Laws of 1991, vol. 1, ch. 212. Accordingly, our Legislature enacted RCW 4.16.340(1) under which a victim of childhood sexual abuse may sue the abuser for damages suffered as a result of the abuse within the later of (1) 3 years of the abusive act; (2) 3 years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the abusive act; or (3) 3 years of the time the victim discovered that the abusive act caused the injury for which the claim was brought. The statute further provides that the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen.

Cloud ex rel. Cloud v. Summers, 98 Wn.App. 724, 733-734 991 P.2d 1169 (1999). Washington law permits claimants outside the sexual abuse arena to make loss of consortium claims when a spouse or parent is injured, and Washington cases have never distinguished between loss of consortium claims based on a sexual abuse claim and those based upon other types of harm to a parent or spouse.

In *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d (1987), the plaintiff was exposed to asbestos during his work as an Occupational Health and Safety Administration inspector. He developed

asbestosis as a result of the exposure, but did not realize for many years that Johns-Manville had legal liability to him as a result of the exposure. Defendants in *Reichelt* sought to dismiss plaintiff's wife's claim for loss of consortium on the basis that her claim accrued when her husband's products liability claim accrued, and was thus barred by the statute of limitations. The court ruled that "[l]oss of consortium is a separate claim that does not necessarily accrue when the impaired spouse's claim accrues." *Id.* Indeed, the court noted that the statute of limitations governing a claim for loss of consortium should begin to run when the deprived spouse, parent or child experienced her injury, rather than when the directly injured party knew of the harm done to him. *Id.*

Ms. Engler's first amended complaint alleges that her father was sexually abused by priests in the employ of the Archdiocese, and that such abuse caused her to lose the consortium she would otherwise have had with her father during her childhood. The complaint alleges that if Frs. McGreal and McMahan had not sexually abused Mr. Engler, Ms. Engler would have been able to have a healthy, functional, and happy relationship with her father. As in *Reichelt*, Mr. Engler was aware that he had been injured by virtue of sexual abuse by the two priests. However, he was unaware until the period three years or less before 2005 that the abuse had

caused harm to his private relationships with his former wife and daughter and to their relationships with him.

b. Washington Law Recognizes Loss of Consortium Claims Based Upon Negligent Conduct Which Occurs Prior to the Existence of the Relationship Upon Which A Consortium Claim is Based.

The Washington Supreme Court has recognized that children have a cause of action when a parent is injured through the negligence of another. *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). The Archdiocese alleges that the loss of consortium claim recognized in *Ueland* is unavailable to Ms. Engler because her parent/child relationship with her father did not exist when Mr. Engler suffered sexual abuse as a schoolboy in St. Catherine's parish.

This precise argument was first rejected in *Stager v. Schnieder*, 494 A.2d 1307 (D.C.App. 1985). In *Stager*, the defendant physician failed to inform a woman of a spot or shadow he saw on her lung x-ray. At the time the x-ray was misread the plaintiff was unmarried. *Id.* at 1310. Three months later, the plaintiff married. Six months after the wedding, the woman was diagnosed with lung cancer and she later filed a malpractice claim. Her husband brought a claim for loss of consortium. He claimed that since his wife's cause of action did not accrue until her

diagnosis of lung cancer, which occurred after their marriage, he had a viable claim for loss of consortium. The court agreed:

A spouse's claim for loss of consortium generally could not accrue until the other spouse's cause of action for negligence accrued. We see no reasons of sufficient merit which counsel against viewing the marital status at the time the cause of action accrues as being the relevant time... [N]either the wrongful conduct nor the fact of injury was known prior to marriage.

(*Id.* at p. 1316, footnotes omitted). This same reasoning was approved by the Washington Supreme Court in *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998).

In *Green*, plaintiff's mother, Joanne McCutchen, had been prescribed and had taken DES while pregnant with plaintiff. *Id.* at 92. As early as age 14, Ms. Green was aware that she was a 'DES daughter.' *Id.* at 92. She was aware that certain gynecological problems she experienced were related to her mother's ingestion of DES while her mother was pregnant with her. *Id.* After marrying, Ms. Green and her husband learned that DES may have caused other damage, including damage to her reproductive capability. *Id.* at 92-93. Ms. Green underwent diagnostic tests which showed that she had a T-shaped uterus, which she learned was caused by her mother's ingestion of DES. *Id.* Ms. Green filed a claim for damages against the maker of DES for her misshapen uterus, and her husband brought a loss of consortium claim. *Id.* at 93.

Defendants argued that Mr. Green could not claim loss of consortium “[b]ecause Kathleen Green’s injury resulted from her mother’s ingestion of DES while Kathleen was *in utero*, the injury occurred prior to her marriage to Joshua. Thus, Joshua arguably ‘married into’ the injury, and ought not to have a cause of action for loss of consortium.” *Id.* at 101. This directly tracks the contention of the Archdiocese here that Ms. Engler should be prohibited from bringing a loss of consortium claim since she was ‘born into’ her father’s injury.

In *Green*, the Supreme Court rejected APC’s argument, and held that Mr. Green had a cognizable loss of consortium claim without regard for his status at the time the of the injury-causing event. *Id.* The Washington Supreme Court reasoned: (1) the husband could not have married into a lawsuit if his wife did not yet know of her injury; (2) the husband could not assume a risk of which he had no knowledge; and (3) it is foreseeable that a future spouse or close relative of an injured person might suffer loss of consortium damages. *Id.* at 101-102. The court concluded:

The best argument for rejecting the majority rule, however, is its fundamental unfairness in the toxic exposure context: loss of consortium damages should be available for a premarital injury if the injured spouse either does not know or cannot know of the injury. Although still a distinct minority, several courts have recognized this principle in toxic tort cases. *Stager*, 494 A.2d 1307; *Kociemba v. G.D. Searle & Co.*, 683 F.Supp. 1577 (D.Minn.

1988); *Aldredge v. Whitney*, 591 So.2d 1201 (La.App. 1991); *Furby v. Raymark Indus., Inc.*, 154 Mich.App. 339, 397 N.W.2d 303 (1986). We now join those courts and hold that Joshua Green's claim for loss of consortium accrued when he knew or should have known the essential elements of his claim. Because we decline to apply an absolute bar to premarital injuries if the spouse seeking a loss of consortium claim could not know of the harm, we remand the case to the trial court where Mr. Green will have the burden of proving both when he first experienced the loss and what damages he suffered.

Id. at 102. The holdings in and the rationale of both *Green* and *Stager* are instructive here. In both cases, applying the discovery rule meant that plaintiff's claim accrued long after the injury-causing conduct occurred. RCW 4.16.340 protects such claims in the childhood sexual abuse arena.

Here, the injury to Mr. Engler occurred when he was a child, long before he married, and later fathered Ms. Engler. However, like many childhood sexual abuse claims, Mr. Engler's claim did not accrue until long after he was a child, at a time three years or less prior to the date he filed his case in 2005. The only difference between the loss of consortium claims in *Stager* and *Green* and the claim in the present case is that Ms. Engler is a child and not a spouse, which has no bearing on this analysis. At the time of Ms. Engler's birth, certainly she and her father were unaware of his claim which would not accrue for years after her birth. She occupies a position no different than Mrs. Reichelt, or Mr. Green, in that regard.

c. Washington Recognizes The Validity Of And Importance Of A Child's Loss of Consortium Claim.

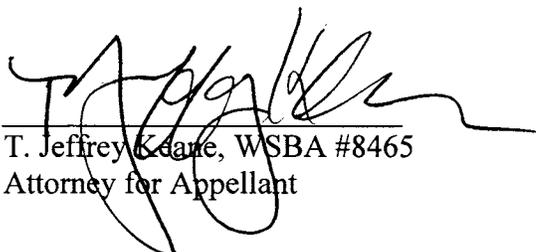
The Supreme Court first announced in *Ueland* that Washington recognizes a child's claim for loss of consortium: "It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence. This is surely a genuine injury, and a serious one, which has received a great deal more sympathy from the legal writers than from the judges." *Ueland* at 103 Wn.2d 135. Ms. Engler should not be deprived of making such a claim.

V. CONCLUSION

Ms. Engler respectfully requests that this Court reverse the order of dismissal and remand the case for further proceedings.

Respectfully submitted this 14 day of October, 2009.

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 CORPORATION OF THE CATHOLIC)
 ARCHBISHOP OF SEATTLE d/b/a)
 THE ARCHDIOCESE OF SEATTLE, a)
 Washington Corporation,)
)
 Respondent.)
 _____)

**CERTIFICATE OF
SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on October 15, 2009 I sent via facsimile and U.S. Mail a true and correct copy of the Brief of Appellant to:

Michael Patterson
Patterson, Buchanan, Fobes, Leitch & Kalzer
2112 Third Avenue, Suite 500
Seattle, WA 98121

Signed at Seattle this 15th day of October, 2009.



Donna M. Pucel