

03679-1

63679-1

NO. 63679-1

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

TESSA ENGLER, a single person,

Appellant,

v.

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE,
d/b/a THE ARCHDIOCESE OF SEATTLE, a Washington Corporation,

Respondent.

Respondent's Brief

Karen A. Kalzer, WSBA No. 25429
Of Attorneys for Defendant

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., PS

2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 DEC 30 PM 2:49

ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION and STATEMENT OF THE CASE.	1
II. ARGUMENT	1
1. No independent special relationship duty applies.....	1
2. Loss of parental consortium is not cognizable here.....	4
3. Proximate cause is too tenuous as a matter of law	12
III. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Bravo v. Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995).....13

C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999).... 2-4

Cloud ex rel. Cloud v. Summers, 98 Wn. App. 724, 991 P.2d 1169 (1999).....6

Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 728 P.2d 617 (1986)4

Green v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998) passim

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985).....12

Lund v. Caple, 100 Wn.2d 739, 744, 675 P.2d. 226 (1984)4

Lynn v. Labor Ready, 136 Wn. App. 295, 308, 151 P.3d 201 (2006) 12-13

Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997)2, 4

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530 (1987).....5, 6, 11

Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 951 P.2d 749 (1998).....12

Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 691 P.2d 190 (1984).....5, 9-11, 14-15

STATUTES and COURT RULES

Civil Rule 12(b)(6).....1, 11, 14

RCW 4.16.3406, 8, 10, 14

OTHER AUTHORITIES

RESTATEMENT OF TORTS (SECOND) § 315 (1965).....2

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 15.01, at
181 (2005).....12

I. INTRODUCTION and STATEMENT OF THE CASE

The trial court correctly dismissed Plaintiff's cause of action for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6), and this court should affirm that decision. CP 42-43, 58. The Court may assume that the Statement of the Case in the Brief of Appellant is accurate. *See* Brief of Appellant at 2-3. Nevertheless, Plaintiff's unduly broad version of loss of consortium has never been recognized in Washington; it is not workable in practice or supported by statute or precedent; and certain material facts essential to Plaintiff's case cannot be accurately determined by a fact-finder.

II. ARGUMENT

Defendant Archdiocese does not owe Plaintiff any independent duty to protect her from conduct occurring before her birth to her father. Further, any separate claim for loss of consortium has no support under these circumstances: no Washington case has recognized a loss of consortium claim based on a parent's childhood abuse. Research has not indicated any case recognizing such a claim anywhere. This court should not allow a loss of consortium claim in circumstances where parental consortium in its common understanding has never actually been "lost." The court should affirm.

A. No independent special relationship duty extends to Plaintiff.

No Washington case has held that a child abuse victim's potential children born decades later are within the class of foreseeable victims

subject to a duty to control a third party or protect an individual from a third party. According to the common law, there is no duty to prevent a third party from intentionally harming another unless a “special relationship” exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (discussing RESTATEMENT OF TORTS (SECOND) § 315 (1965)). Thus, a “special relationship” of a defendant with either the third party or his or her foreseeable victim acts as a recognized exception to the rule that one is under no obligation to control another’s conduct. Plaintiff is not within either special relationship.

Our state’s supreme court has recognized the limited nature of special relationship duties. In *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), the court held that a church had a special relationship duty of reasonable care “as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.” *Id.* at 722. The court then turned to the “more difficult question [of] whether the harm sought to be prevented fell within the scope of any duty,” because the intentional actor’s conduct occurred outside the premises of the church and outside any protective custody of the church. *Id.* Although the court eventually determined that harms caused by conduct in such a scenario were within the scope of the church’s special relationship duty owed to potential victims, it stressed

that its holding “is limited.” *Id.* at 727. Thus, even with respect to *actual victims*, special relationship duties are limited in their reach.

Even if read in the broadest possible terms, nothing in *C.J.C.* or *Niece* indicates that a defendant in such a scenario owes any duty to control or protect a third party with respect to individuals who are (1) not born or even conceived at the time of the intentional tortious conduct, (2) unknowable in any sense by the defendant at any time, or (3) not in any way personally subject to, or affected by, the intentional actor’s conduct. Plaintiff at least implicitly compares a duty to control a particular human being to a duty related to a toxic chemical in hopes of expanding the reach of common law parental loss of consortium claims to children of child abuse victims through a strained application of the discovery rule. Brief of Appellant at 11-12 (discussing *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998)). Aside from any holes in Plaintiff’s analysis regarding the discovery rule, however, that comparison essentially eschews any “difficulty” noted by the *C.J.C.* court in balancing the common law rule against having a duty to control another’s conduct with the scope of that rule’s special relationship exceptions.

Thus, for example in John Engler’s case (Plaintiff’s father), and assuming the facts as stated in Brief of Appellant, Mr. Engler himself had a special relationship with the Archdiocese, as did his alleged abusers. Both forms of special relationship gave rise to the Archdiocese’s legal duty to control and/or protect. Neither applies here, as Plaintiff had not been born at the time of the predicate conduct. Thus, the Archdiocese

does not owe any independent duty to Plaintiff for the alleged acts of abuse against her father that occurred decades prior to her birth.

A “limited” scope of the special relationship duty as understood by the *Niece* and *C.J.C.* courts cannot simultaneously embrace a preternaturally broad scope extending to all future unborn family members of all potential abuse victims. This may explain why Plaintiff amended her Complaint to hone in on her separate consortium claim. *See* Brief of Appellant at 3. In any event, combined with the fact that, as explained below, Plaintiff has produced no loss of consortium case from Washington or anywhere else based on childhood sexual abuse suffered by a parent, this court should affirm the trial court’s decision that Plaintiff had no claim for which relief could be granted.

B. Loss of consortium is a separate cause of action; parental consortium is not a cognizable claim in these circumstances.

1. Application of statute of limitations here would go against precedent and be unworkable and unpredictable.

Washington recognizes loss of consortium generally “as a separate, not derivative, claim.” *Green*, 136 Wn.2d at 101. There is a derivative *element*, however, of a loss of consortium claim, i.e., the underlying tort occurring with respect to an “impaired” spouse. *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 853, 728 P.2d 617 (1986) (citing *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d. 226 (1984)). Children may pursue separate loss of consortium claims in Washington and, to prevent unnecessary multiple actions, joinder must be pursued “whenever

feasible.” *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 136-37, 691 P.2d 190 (1984) (“A child may not bring a separate consortium claim unless he or she can show why joinder with the parent’s underlying claim was not feasible.”).

Even if this court were to analogize to the present matter the spousal loss of consortium reasoning of *Green* in dealing with latent injuries to an “impaired” spouse, the *Green* court corrected the appellate court in that case and pointed out the separate nature of a claim for loss of consortium:

The Court of Appeals held “a spouse’s loss of consortium claim cannot accrue until the other spouse’s claim, on which the loss of consortium depends, has also accrued.” This is incorrect. **The spouse’s loss of consortium claim accrues when the spouse first suffers injury from loss of consortium, regardless of when the other spouse’s injury claim accrues.**

136 Wn.2d at 102 n.9 (internal citations omitted, emphasis added).

Interestingly, Plaintiff also notes this requirement in her attempt to effectively extend *Green* to include parental loss of consortium claims: “[T]he 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.” Brief of Appellant at 10 (discussing *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987)). Thus, *Green* necessarily stands for the proposition that Plaintiff’s claim accrued when

she first experienced her injury of “loss” of consortium with her father and *not* when *he* brought a claim against the Archdiocese in a separate lawsuit.

It is difficult to reconcile *Green* and *Reichelt* with any possible set of facts in the present matter. Consistent with these spousal loss of consortium claims, for purposes of the statute of limitations, Plaintiff’s claim accrues when injury *first* occurs. Plaintiff’s brief discusses RCW 4.16.340, the statute of limitations for *victims*: RCW 4.16.340 sets the period of limitations for actual child abuse victims to bring a cause of action. *See id.*; *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 733-34, 991 P.2d 1169 (1999); *see also* Brief of Appellant at 9. According to *Cloud*, a child abuse *victim* may not make the “connection” between childhood abuse and resultant emotional harm or damage until many years have passed. *Cloud*, 98 Wn. App. at 733 (discussing RCW 4.16.340).

Here, Plaintiff is not subject to RCW 4.16.340 as she is not the victim of childhood sexual abuse, her father is. Plaintiff’s father’s “connection” establishes the end of the tolling period for initiating *his* potential cause(s) of action under the limitations statute. The injury of her father is not her injury: loss of consortium would be a separate and distinct cause of action personal to Plaintiff. *See Reichelt*, 107 Wn.2d at 773. An expansion of RCW 4.16.340 beyond its plain terms to include loss of consortium actions by victims’ family members who have experienced an injury of “loss” of consortium that spans basically their entire lives, or even those individuals unlike Plaintiff who were alive at the time of the relative victim’s abuse, is unsupported by any Washington precedent.

Presumably, Plaintiff's claim is based on her father's poor parenting over the course of her life; and not just during the period since *he* discovered the "connection" between *his* life's problems and his childhood abuse. It is difficult to envision a workable statute of limitations for these circumstances consistent with spousal loss of consortium claims involving accrual: at what point would a child first *experience* loss of consortium for less than ideal parenting? Although an adult child of a victim may learn of her father's childhood abuse long after the fact, an adult child does not "discover" after-the-fact an *injury* that an ongoing relationship with one's parent (or absence thereof) is other than what it could or should be. In other words, Plaintiff cannot prove that she never actually knew until recently that her father did not provide her with a "healthy, functional, and happy relationship" or that she just realized that she missed out on a happy parental relationship. Brief of Appellant at 10. There is nothing discernible that has "accrued" here because there is nothing Plaintiff has "discovered" *about her own personal relationship with her father* that has any bearing on a cause of action against the Archdiocese.

Green, even if read in the broadest terms possible such that it extends to a *parental* loss of consortium claim, stands for the proposition that an undiscovered injury occurring to one spouse prior to the marital relationship does not impact the tolling period of the other spouse's later related loss of consortium claim if neither spouse had reason to know of the particular injury until after the marriage. *Green* would certainly have

been decided differently if the injury was of a type such that it would have been experienced on an ongoing basis by both spouses continually from the beginning and throughout the course of the marital relationship. In other words, through the open-ended mechanism of RCW 4.16.340 the Legislature recognized the difficulty childhood abuse victims sometimes have in fully recognizing within three years of abuse the impact of that abuse on their lives. Plaintiff conflates her ongoing longstanding experience of injury with not being able to recognize that injury's causes (or effects). But Plaintiff is not subject to RCW 4.16.340 and no logically coherent version of a statute of limitations can exist where an alleged loss of consortium "injury" spans over an indefinite and indefinable period of time such that "accrual" becomes conceptually meaningless.

Furthermore, the post-marital discovery of a pre-marital injury cannot reasonably be compared to Plaintiff's claim because Plaintiff herself is not reasonably comparable to the non-injured spouse in *Green*. Unlike the spouse's later discovery of his wife's latent injury in *Green*, at no earlier time has Plaintiff been unaware of the unsatisfactory nature of the relationship she has had with her father, so that she could later discover this particular "injury." Plaintiff's "discovery" of her father's lawsuit or of possible factors in *why* her parent may have difficulties in raising her or relating to her is not analytically similar to a spouse's discovery of a latent premarital injury, and is therefore not analytically similar to any recognizable form of a loss of consortium claim. *See id.* at 92-94 (discussing facts of case).

Here it would be impossible to determine the applicable limitations period of a family member's cause of action for loss of consortium. The common law on parental loss of consortium understandably can provide no consistent or predictable uniform analysis if a child, of his or her own volition, independently breaks contact with a less-than-ideal parent due to that parent's inability to provide a "healthy, functional, and happy" relationship, and does not find out about the parent's childhood abuse or related lawsuit until many years (or in some cases decades) after a parent does. This court should affirm the trial court's dismissal of this lawsuit.

2. Loss of consortium cannot apply to Plaintiff's situation.

Plaintiff's claim is actually for *less than ideal* consortium, not *loss* of consortium. *Ueland* expanded *loss* of consortium to minor children of living parents with reasoning that makes the nature of the injury at issue apparent: in that case, the parent "suffered *severe and permanent* mental and physical disabilities when struck by a metal cable during the course of employment as a lineman for Seattle City Light." 103 Wn.2d at 132 (emphasis added). The court defined loss of consortium in the "parent-child relationship as the "*loss* of a parent's love, care, companionship and guidance." *Id.* at 132 n.1 (internal quotes omitted and emphasis added). The court noted that, when the parent suffers an injury leaving him or her in a vegetative state, "[s]urely the child's *loss* of the parent's love, care, companionship and guidance is *nearly the same* in both situations." *Id.* at 134 (emphasis added). At no point was the court tasked with determining

the *quality* of the individual's parenting as compared to some standardized variant of "functional" relationships, as a court and fact-finder would necessarily be tasked with here.

If the typical injury suffered by a childhood abuse victim were as obvious and completely debilitating as a *Ueland* sort of physical injury, RCW 4.16.340 would not exist, because the extent and immediacy of the injury would be apparent to all. As traumatic as child abuse can be, it simply is not equivalent to being permanently brain-dead or the like as the result of another's negligence, at least certainly with respect to the parental role. Child abuse victims are not foreclosed from being functional parents as are vegetative parents—*Ueland's* reasoning cannot feasibly apply to Plaintiff's attempted claim.

Furthermore, in *Ueland*, of course, the minor children *already* had some form of parental consortium, or legally-recognized interest, that was at least subject to be lost and therefore could be the sort of interest which could warrant some form of compensation if lost via negligence. Here, Plaintiff's father suffered injury long before she existed. Plaintiff's difficult or rocky relationship with her father is not a loss of consortium in the sense contemplated by the *Ueland* court because (1) she at no point entirely "lost" the ability to communicate and engage with a parent because of Respondent's alleged negligence, and (2) the law has not recognized a legal duty to insure an idealized relationship with an imagined parent as opposed to the real relationship, however ultimately unsatisfactory it may be. Quantifying the imagined value to one's life of

essentially a different parent than the parent one has always had and known is impossible to formulate or measure in legal terms. Any examination of this subject is of a completely different nature than more fundamental assumptions regarding the impact on a minor child of the outright *loss* of consortium of a parent previously alert and aware as discussed in *Ueland*.

Aside from *Ueland*, Plaintiff's cited cases do not stand for the proposition that a child of a childhood sexual abuse victim may pursue a loss of consortium claim for a poor relationship with her father. Unlike *Green*, as explained above, Plaintiff's "injury" of the lack of a healthy, functional relationship with her father has never been "latent and unknown." 136 Wn.2d at 101. Unlike *Reichelt*, Plaintiff cannot point to a time in her life, consistent with the necessary rationale for making her limitations period dependent on her father's, a precise moment where her relationship with her father was *not* "functionally limit[ed] with regard to his society and services." 107 Wn.2d at 777.

In sum, this court should affirm the trial court's dismissal of Plaintiff's claim under CR 12(b)(6) because Plaintiff's cause of action: is prohibited by *Green* and is unworkable with respect to any conceivable statute of limitations; is not feasibly comparable to a true parental *loss* of consortium claim as explained in *Ueland*; and is not apparently supported by any precedent in Washington or elsewhere.

//

C. Proximate cause is too tenuous as a matter of law; policy considerations support dismissal.

There are endless variations from parent to parent and child to child, and endless variations between parents in how they relate to their children, and countless reasons of how and why parents have troubled relationships with children. These variations make establishing proximate cause in this proposed cause of action impossible.

Proximate cause is grounded in policy determinations about how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). Proximate cause consists of two elements: cause-in-fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

“Cause-in-fact is ‘a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] complained of and without which such [injury] would not have happened.’” *Lynn v. Labor Ready*, 136 Wn. App. 295, 308, 151 P.3d 201 (2006) (quoting 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (2005)). This court should hold as a matter of law that Plaintiff simply cannot establish a direct sequence, unbroken by any independent factor, between her father's abuse when he was a child and her claimed consortium loss. Similarly, this court should hold as a matter of law that Plaintiff cannot establish that without her father's having suffered his childhood injury their relationship would necessarily have been happy, functional and healthy. It is impossible to discern factually what sort of

father Mr. Engler would have been absent the abuse, it is mere hypothesis; there is nothing for a fact-finder to do with regard to Plaintiff's allegation and there are no hypothetical "facts" to be mulled over on these impossible-to-answer questions. *See Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) ("Hypothetical facts may be introduced to assist the court in establishing the 'conceptual backdrop' against which the challenge to the legal sufficiency of the claim is considered.").

A human life and the numerous factors that go into one's personal approach to being a parent or one's style of parenting, discipline, or interaction with a child are beyond the scope of any fact-finder's mission in a civil courtroom. Factual inferences in proving cause-in-fact cannot be remote and unreasonable. *Lynn*, 136 Wn. App. at 310. Plaintiff's father is not a chemical or faulty machine—there are innumerable and remote inferences necessary to fully describe a person, that person's history, and how that person functions as a parent or relates to their children. Plaintiff simply cannot present any reasonable chain of causation here.

As for the legal causation prong of proximate cause analysis, courts view it as a question of policy and determine "whether . . . the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Id.* at 311-12. As a matter of policy, and related to the inherent problems with Plaintiff's cause-in-fact element, a court of law cannot effectively litigate this cause of action, where the reasons and factors for any strain in the relationship between a

father and daughter, as a matter of common sense and experience, plainly involve multitudinous facts and circumstances beyond specific incidents of abuse suffered by the father long before Plaintiff was born and long before he engaged in his own volitional adult relationships and life choices.

In addition, policy considerations of judicial economy as recognized by the *Ueland* court require dismissal pursuant to CR 12(b)(6). *Ueland* recognized that even though children should be allowed to recover for genuine *loss* of consortium with a parent, there was a potential problem of multiplicity of actions. 103 Wn.2d at 137. This recognition is why the *Ueland* court required a parental loss of consortium claim to be joined with “with the injured parent’s claim whenever feasible.” *Id.*

If claims such as Plaintiff’s are allowed, *Ueland* would effectively be moot—but solely in “loss” of consortium claims based on predicate conduct of child abuse suffered by a parent. Even a child who suffered from the wrongful death of a parent would have less apparent leeway than Plaintiff seeks with respect to the meaning of “feasible.” The *Ueland* court’s concern over multiplicity of actions is particularly stark here—even though Mr. Engler’s claims have been settled, he will have the opportunity to effectively relitigate his cause of action and assist a family member with seeking further damages.

Aside from the strain of the Archdiocese being potentially liable for actions taken by individuals and administrators decades prior pursuant to the open-ended RCW 4.16.340, Plaintiff’s type of claim would have

that liability extended indefinitely to all family members of all former victims, even those future family members who are decades from being born. It is difficult to envision how school districts, for example, who have settled claims with child abuse victims will be able to withstand this overbroad and neverending liability. Taking Plaintiff's asserted claim to its logical end, if recognized, would force these institutions and other organizations to be potentially liable years and decades from now for "less than ideal" consortium claims from people who do not presently exist, even where the future parent's separate claim for individual damages caused by abuse would be pursued today. This unending and ever-expanding liability simply does not exist in genuine parental loss of consortium claims where the parent has suffered debilitating permanent injury, and it is not remotely close analytically or analogically to *Ueland's* requirement for joinder whenever feasible. 103 Wn.2d at 137.

Because Plaintiff cannot as a matter of law show proximate cause here and because policy considerations do not support judicial creation of an unworkable less than ideal parental consortium claim, the trial court correctly dismissed Plaintiff's lawsuit. This court should affirm.

III. CONCLUSION

Based on the foregoing, Respondent respectfully requests that this court affirm the trial court's order dismissing Plaintiff's cause of action for failure to state a claim upon which relief can be granted.

RESPECTFULLY SUBMITTED this 30 day of December, 2009.

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, PS

By: 

Karen A. Kalzer, WSBA No. 25429
Of Attorneys for Respondent

DECLARATION OF SERVICE

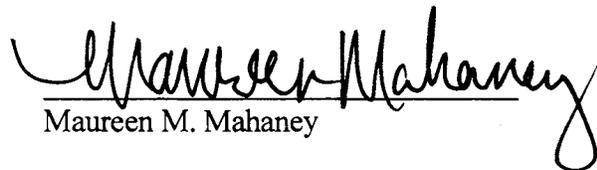
I hereby declare on the date provided below, I caused to be delivered via Legal Messenger the following documents:

RESPONDENT'S BRIEF to the following individual:

Mr. T. Jeffrey Keane
Keane Law Offices
100 NE Northlake Way, Suite 200
Seattle, WA 98105

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

Executed at Seattle, Washington, on December 30, 2009.


Maureen M. Mahaney