IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL TIDIMAN, individually,	)	NO. 67305-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
ALLSTATE INSURANCE COMPANY,	)	
	)	
Appellant.	)	FILED: October 15, 2012
	)	

Leach, C.J. — Allstate appeals a jury verdict for its insured, Michael Tidiman, on his uninsured motorist insurance claim. Allstate challenges trial court evidentiary rulings, instructions on Tidiman's loss of consortium claim, and the denial of its motion for a new trial. Because Allstate failed to preserve the first two claims for appellate review and the trial court acted within its discretion to deny a new trial, we affirm.

FACTS

On June 5, 2004, Michael Tidiman and Viola Lentz were involved in a car accident with an uninsured motorist. Both Tidiman, the driver, and Lentz, his passenger, sustained significant injuries. At the time of the accident, they maintained uninsured motorist coverage (UIM) through Allstate Insurance, with UIM policy limits of $100,000 per person and $300,000 per accident. On October 22, 2004, Lentz settled her claim against Allstate for $100,000 and

signed a release discharging Allstate from any further liability arising out of her injuries.

In June 2008, after failing to settle his claim, Tidiman sued Allstate to recover uninsured motorist benefits, as permitted by Allstate's policy. His complaint requested monetary damages for pain and suffering, emotional distress and loss of enjoyment of life, physical disability and disfigurement, lost wages and loss of earning capacity, past and future medical expenses, property damage, "[o]ther economic and noneconomic damages to be presented at the time of trial," attorney fees and expenses, and "such other and further relief as the Court feels may be deemed just and equitable."

Before trial, both parties filed motions in limine. The trial court granted Tidiman's motions to exclude evidence of both the amount of Lentz's settlement and Allstate's policy limits. Allstate filed a supplemental motion in limine, seeking to exclude evidence of Lentz's injuries, claiming it was irrelevant and unfairly prejudicial. The court denied that motion, permitting Tidiman to introduce evidence of the fact of Lentz's injuries and their effect on Tidiman.

During the March 2011 trial, Tidiman presented evidence of his own physical injuries and their impact on his life. Additionally, he presented evidence of the impact of Lentz's injuries on his own life. During the trial, Allstate objected on grounds of relevance to testimony regarding whether Lentz had changed

following the accident. Tidiman stated that this evidence was relevant to loss of consortium, and the court overruled the objection. Allstate renewed its objection on the ground that Tidiman and Lentz were not married at the time of the accident.

Outside the jury's presence, the court requested briefing about Tidiman and Lentz's marital status to determine whether to submit a loss of consortium claim to the jury. Tidiman provided a copy of a British Columbia statute, the British Columbia Family Relations Act. Under that statute, a couple becomes married by living together continuously in a marriage-like relationship for at least two years. Allstate does not dispute that before the accident, Tidiman and Lentz had lived in British Columbia in a marriage-like relationship for three and one-half years. Therefore, they fulfilled the requirement for a common law marriage under British Columbia law.

Over Allstate's objection, the court instructed the jury to consider loss of consortium as an element of damages. The jury awarded Tidiman a total of $300,475 in damages, including $20,075 for past economic damages, $7,400 in future economic damages, and $273,000 in general damages.

Following the trial, Allstate moved to reduce the judgment to the $100,000 per-person UIM policy limit. The court granted the motion. Allstate then moved for a new trial, arguing that the court abused its discretion in permitting the loss

of consortium claim. The court denied the motion, and Allstate appeals.

ANALYSIS

Allstate challenges three trial court decisions: (1) the admission of evidence of Lentz's injuries, (2) the inclusion of a loss of consortium claim in the damage instruction to the jury, and (3) the denial of its request for a new trial. Allstate failed to preserve the first two issues for appellate review, and the trial court did not abuse its discretion in denying Allstate's motion for a new trial.

We generally refuse to consider an issue raised for the first time on appeal.[1] To preserve an evidentiary issue for appellate review, the specific objection made at trial must be the basis of a party's assignment of error on appeal.[2] This allows the party presenting the evidence an opportunity to cure any defects and make an adequate record for appellate review. Because Allstate did not object at trial to the challenged evidence on the grounds asserted on appeal, we decline to consider these claims.

Allstate contends that Tidiman's failure to specifically plead a loss of consortium claim or describe such a claim in his discovery responses precluded him from pursuing this claim at trial. Allstate asserts that the evidence and argument for this claim were "a surprise" that "substantially affected the jury's

---

[1] RAP 2.5(a); see also Kroenert v. Falk, 32 Wash. 180, 182, 72 P. 1010 (1903).

[2] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

verdict." Additionally, Allstate argues that if the evidence was relevant, the trial court should have excluded it under ER 403 because its probative value was substantially outweighed by its prejudicial effect. Because the jury's questions during trial and deliberation focused on Lentz's injuries and the loss of consortium claim, Allstate asserts the evidence might have affected the outcome of the trial and therefore its admission was unfairly prejudicial.

Allstate failed to preserve these objections for appeal. Although Allstate now argues that the loss of consortium claim surprised and unfairly prejudiced it, Allstate did not make these objections in the trial court. Instead, Allstate moved in limine to exclude evidence of Lentz's damages on relevance grounds. When the court asked Allstate why the damages were not relevant, Allstate replied, "[I]t makes this trial much more difficult than it needs to be." The court ruled that while the extent of Lentz's injuries was not relevant, the fact of her injuries was relevant to show their effect on Tidiman. Allstate's response to the court's decision was "[a]ll right."

We now turn to Allstate's claim of instructional error. Allstate's instruction claim turns on whether Tidiman and Lentz were married at the time of the accident, whether the trial court properly considered Canadian law to decide this question, the applicable statute of limitations, and whether the settlement with Lentz precludes this claim.

A spouse may bring an action for loss of consortium based on an injury to the other spouse.[3] Loss of consortium includes the "loss of the 'society, affection, assistance and conjugal fellowship' of one's spouse."[4] Generally, a claim for loss of consortium may not be based upon an injury to the plaintiff's spouse that occurred before marriage.[5]

Allstate argues that the couple was not married under Washington law until 2006, two years after the accident. Allstate further argues that the trial court could not consider the British Columbia statute cited by Tidiman because he did not plead it as required by CR 9(k)(4) and chapter 5.24 RCW. Although Tidiman and Lentz formally married in Oregon in 2006, Tidiman contends that at the time of the accident, the couple was married under British Columbia law. Allstate responds that Tidiman was required to plead foreign law in order to make such a claim and that the court should have applied Washington law, which does not recognize common law marriage.[6]

Although the record reveals Allstate had the opportunity to object at trial to Tidiman's citation to the British Columbia statute, based upon his failure to

---

[3] Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 773, 733 P.2d 530 (1987).

[4] Hatch v. Tacoma Police Dep't, 107 Wn. App. 586, 587-88, 27 P.3d 1223 (2001) (internal quotation marks omitted) (quoting Ueland v. Pengo Hydra-Pull Corp., 103 Wn.2d 131, 132 n.1, 691 P.2d 190 (1984)).

[5] Green v. A.P.C., 136 Wn.2d 87, 101, 960 P.2d 912 (1998).

[6] Allstate makes no claim that the trial court incorrectly applied the British Columbia statute.

plead foreign law, Allstate failed to do so. Instead, it raised this claim for the first time in its motion for a new trial, which was too late.[7] Therefore, Allstate failed to preserve this claim for appeal.[8]

Allstate also argues that the three-year statute of limitations for tort actions bars Tidiman's loss of consortium claim. However, Allstate did not plead the statute of limitations as an affirmative defense, so it could not assert it for the first time in a motion for a new trial. Allstate claims that it had no basis to assert the affirmative defense "because there was nothing in the complaint from which Allstate would have had notice that plaintiff would assert a loss of consortium." However, as noted by the trial court, Allstate had adequate notice of the claim.[9] Accordingly, Allstate had a fair opportunity to assert the statute of limitations as an affirmative defense, but it did not do so. Furthermore, the six-year statute of limitations applicable to actions on a written contract[10] applies to an insured's action against his or her insurer for benefits under the uninsured motorist provisions of an automobile policy.[11]

---

[7] Collins v. Fid. Trust Co. of Seattle, 33 Wash. 136, 142, 73 P. 1121 (1903).

[8] See RAP 2.5(a).

[9] Burchfiel v. Boeing Corp., 149 Wn. App. 468, 495-96, 205 P.3d 145 (2009) (although original complaint did not specifically plead loss of consortium, it provided adequate notice of this claim with its prayer for damages, "'including, but not limited to' wage loss and emotional distress, and further prayed generally for 'such other and further relief as deemed just, lawful, and equitable by the Court'").

[10] RCW 4.16.040.

Citing Greene v. Young,[12] Allstate contends that its settlement with Lentz for the per-person policy limit extinguished any loss of consortium claim that Tidiman otherwise might have been able to make. Allstate notes that under Greene, Tidiman's consortium claim is derivative and subject to the single injury limit applicable to Lentz's claim. Because Lentz's recovery exhausted this limit, no benefits remained available to be applied to Tidiman's consortium claim. But Allstate raises this claim for the first time on appeal, and we decline to review it.[13]

Over Allstate's objection, the court instructed the jury to consider loss of consortium as an element of damages. Allstate objected, maintaining that Tidiman did not plead loss of consortium in the complaint or include it in his discovery responses and that no Washington authority recognized a common law marriage from a foreign country. As stated above, the trial court concluded that Allstate had adequate notice of the consortium claim. Allstate has not identified any prejudice to it caused by Tidiman's failure to expressly assert a consortium claim in his complaint. Allstate makes no claim on appeal that Washington would not recognize the validity of Tidiman's marriage under British

[11] Safeco Ins. Co. v. Barcom, 112 Wn.2d 575, 579-80, 773 P.2d 56 (1989).

[12] 113 Wn. App. 746, 754, 54 P.3d 734 (2002).

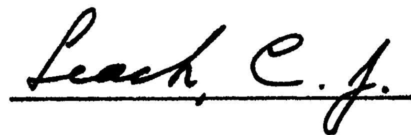
[13] RAP 2.5(a). In Allstate's motion for a new trial, it argued for the first time that Lentz's settlement "extinguished" Tidiman's consortium claim. This argument also came too late.

Columbia law. Therefore, the trial court did not err in instructing the jury to consider Tidiman's loss of consortium as an element of his damages.

Finally, Allstate contends the trial court should have granted its motion for a new trial. Allstate sought this relief on the grounds that Tidiman had failed to plead a consortium claim, Tidiman was not married at the time of the collision, Tidiman could not rely upon foreign law to establish his marital status, the statute of limitations barred his consortium claim, and Lentz's settlement "extinguished" this claim. We have addressed either the timeliness or merits of each of these arguments. The trial court acted within its discretion in denying the motion for a new trial.

CONCLUSION

Because Allstate did not raise timely challenges to the trial court's evidentiary and instructional rulings and the trial court appropriately exercised its discretion in denying Allstate's motion for a new trial, we affirm.



WE CONCUR: