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HIGH COURT OF AMERICAN SAMOA

Clerk's Office

IN THE HIGH COURT OF AMERICAN SAMOA

File Time:

1:19 pm

TRIAL DIVISION

9/18/20

Terry S. Fielding, CLERK OF COURTS

MONA M. KING and NICHOLAS F. )	CA No. 08-20
KING JR., )	
Plaintiffs, )	ORDER DENYING DEFENDANT'S
v. )	MOTION TO DISMISS
THE AMERICAN SAMOA GOVERNMENT, )	
Defendant. )	

Before SUNIA, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiffs, Thomas B. Jones, Jr.  
For Defendant, Anthony R. Valdivia, Assistant Attorney General

On April 1, 2020, this action commenced pursuant to the Complaint filed by Mona M. King ("Mrs. King") and Nicholas F. King ("Mr. King") (collectively, the "Plaintiffs") against the Defendant American Samoa Government ("ASG") alleging negligent medical care. ASG moved to dismiss the Plaintiffs' Complaint on April 20, 2020. See Mot. to Dismiss Pursuant to T.C.R.C.P. 12(b)(6) ("Mot. to Dismiss") 2. The Court heard the motion on July 24, 2020. ASG's motion is denied.

**Background**

The Plaintiffs, a married couple, assert in their Complaint a negligence cause of action and a claim for loss of consortium. The Complaint alleges that Mrs. King became incapacitated after

suffering a back infection that stemmed from and originated in her left hand, which several Lyndon Baines Johnson Tropical Medical Center ("LBJ") doctors negligently failed to diagnose and treat. As a consequence of his wife's condition, Mr. King claims that he lost his wife's "love, companionship, comfort, care, assistance, protection, affection, society, and moral support," along with "enjoyment of marital relations." Pl.'s Compl. ¶ 32.

ASG contends that Mr. King's loss of consortium claim should be dismissed under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim and lack of specificity. Primarily, ASG argues that in this jurisdiction, a loss of consortium claim is available only in: (1) a parent-child relationship where either party dies; or (2) a wrongful death action under Am. Samoa Code Ann. § 43.5001. And, ASG avers that Plaintiffs' claim does not fall in either category because it arises in a spousal context where Mrs. King did not die as a result of the alleged negligent care. Alternatively, ASG claims that dismissal is warranted because Plaintiffs' complaint contains insufficient detail regarding when and how Mr. King suffered his alleged losses.

#### Discussion

T.C.R.C.P. 12(b)(6) authorizes dismissal of a complaint if it fails to state a claim upon which relief may be granted. Dismissal under T.C.R.C.P. 12(b)(6) is proper if a complaint lacks a

cognizable legal theory or lacks sufficient allegations to establish a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). When considering a 12(b)(6) motion, the Court takes all material allegations of a complaint as true, construes the allegations liberally, and draws all inferences in favor of the plaintiff. *Haleck v. Agaoleatu*, 7 A.S.R.3d 203, 204 (Trial Div. 2003).

Enacted in 1961, A.S.C.A. § 1.0201(4) declares that "so much of the common law of England as is suitable to conditions in American Samoa and not inconsistent with this section" is in full force and effect in American Samoa. The "common law of England means that body of jurisprudence as applied and modified by the courts of the United States at the time the statute was adopted and since construed." *Tung v. Ah Sam*, 4 A.S.R. 764, 768 (Trial Div. 1971). "In defining the common law, and where not bound otherwise by prior decision of this Court, it is ordinarily appropriate that the Restatement of the Law be followed in order to more nearly effect uniformity of decision." *Id.*

A husband's right of action for loss of consortium against a person who negligently injures his wife existed at common law.<sup>1</sup> See 41 Am. Jur. 2d *Husband and Wife* § 245 (1995). Eventually, the

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<sup>1</sup> "Consortium has been described in general terms as 'affection, society, companionship[,] and sexual relations.'" *Mist v. Westin Hotels*, 738 P.2d 85, 89 (Haw. 1987) (quoting *Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 261 (Conn. 1979)).

common law recognized the same right for a wife. See *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 260-61 (2nd Cir. 1963). The Restatement of Torts phrases the spousal cause of action for loss of consortium as follows:

One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.<sup>2</sup>

Restatement (Second) of Torts § 693(1) (Am. Law. Inst. 1977).

Clearly, a spousal common law claim for loss of consortium exists, regardless of whether the corresponding injured spouse is alive or dead. By operation of A.S.C.A. § 1.0201(4), a loss of consortium claim became part of this jurisdiction's common law. Absolutely nothing in ASG's motion shows that recognizing this loss of consortium tort here is unsuitable or inconsistent with the law. This tort, however, is not freestanding; it derives from an underlying negligence tort. See, e.g., *London-Marable v. Boeing Co.*, 357 Fed. Appx. 61, 64 (9th Cir. 2009) (claim for loss of consortium "is derivative and can only exist if the directly injured spouse can establish the elements of an underlying cause

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<sup>2</sup> In its motion, ASG, without any legal authority, stated that "today at common law, virtually no claim exists for [a] loss of consortium claim where the injured spouse remains alive." Mot. to Dismiss 2. The Restatement (Second) of Torts Section 693 clearly shows the falsity of this statement. ASG's counsel is hereby noticed of T.C.R.C.P. 11 and its consequences.

of action.") (citing *Barnes v. Outlaw*, 964 P.2d 484, 487 (Ariz. 1998)); *Mist*, 738 P.2d at 90 ("[T]here must be a tort which gives rise to a cause of action that must be maintained by the injured spouse in order for the non-injured spouse to claim a loss of consortium."). Here, if Mrs. King prevails on her negligence cause of action, then it can serve as the required underlying tort for Mr. King's claim.

ASG's argument that A.S.C.A. § 43.5001 limits loss of consortium claims to wrongful death actions is inaccurate and spurious. Although A.S.C.A. § 43.5001 plainly creates a wrongful death cause of action, including the damages that may be recovered, the statute in no manner precludes any other available common law right of action for loss of consortium. Indeed, the statute nowhere abolishes recovery for loss of consortium in cases not involving death.

We likewise reject ASG's alternative contention that the loss of consortium claim should be dismissed for lack of specificity. T.C.R.C.P. 8(a) merely requires that a complaint provide "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." Having originated from Rule 8(a) of the Federal Rules of Civil Procedure, the underlying theory of T.C.R.C.P. 8(a) is notice pleading. See *Starr v. Baca*, 652

F.3d 1202, 1212 (9th Cir. 2011) (discussing federal Rule 8(a)). To satisfy T.C.R.C.P. 8(a), a pleading's allegations must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The court liberally construes a pleading so as to do substantial justice. *Morgan v. Am. Samoa Gov't*, 24 A.S.R.2d 164, 165 (Trial Div. 1993).

Upon review of the Complaint, we find that its assertions outlining a loss consortium claim satisfy the pleading standards of T.C.R.C.P. 8(a). The Complaint's short and plain allegations state that ASG's negligence caused Ms. King's back injury, which, in turn, resulted in Mr. King's loss of his wife's consortium. These allegations fairly notify ASG of Mr. King's loss of consortium claim and its basis, notwithstanding that specifics as to how and when the loss occurred were not pled.

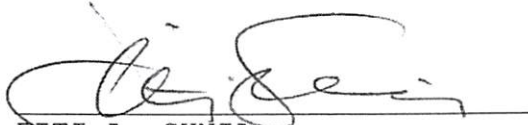
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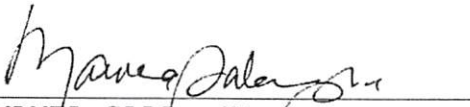
Order

ASG's Motion to Dismiss Pursuant to T.C.R.C.P. 12(b)(6) is denied.

It is so ordered.

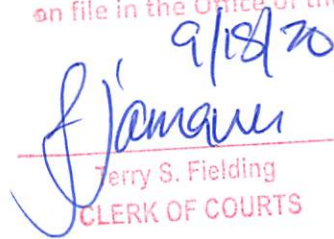
DATED: September 17, 2020

  
FITI A. SUNIA  
Associate Justice

  
MAMEA SALA, JR.  
Chief Associate Judge

  
TUNUPOPO ALAALAFAGA TUNUPOPO  
Associate Judge

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9/18/20  
  
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