JOHN G. VORIS ET AL. *v.* PETER M. MOLINARO
(SC 18435)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Vertefeuille and Harper, Js.*

Argued January 14—officially released November 22, 2011

Paul L. Bollo, for the appellant (named plaintiff).

J. Kevin Golger, for the appellee (defendant).

Kathryn Calibey filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Jack G. Steigelfest and *Rachel J. Fain* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Linda L. Morkan and *Wystan M. Ackerman* filed a brief for the Insurance Association of Connecticut et al. as amici curiae.

Opinion

McLACHLAN, J. The dispositive issue in this appeal is whether a claim for loss of consortium is barred by the settlement of the underlying negligence claim.[1] We conclude that it is. The plaintiff[2] John G. Voris appeals from the judgment of the trial court granting the motion to strike by the defendant, Peter M. Molinaro.[3] The plaintiff contends that: (1) a claim for loss of consortium may be maintained independently of the underlying injury claim; and (2) a settlement of the underlying injury claim does not bar the related claim for loss of consortium. We disagree, and affirm the judgment of the trial court.

The complaint alleges the following facts: On May 10, 2004, the plaintiff was driving his motor vehicle, while his wife, Joan Voris (Voris), rode in the passenger seat. The defendant, who was driving his motor vehicle, struck the plaintiff's vehicle on the passenger side. As a result of the collision, Voris sustained severe injuries to her back and spine. She has been bedridden for extended periods of time, unable to walk long distances, and unable to complete her household duties. She requires epidural/faucet block treatments for the pain from her injuries. In addition, the plaintiff sustained severe injuries to his neck, back and spine. He has been experiencing pain and has difficulty completing household chores. The plaintiff and Voris brought this action together, each asserting two counts—one for negligence, in connection with their direct injuries, and one for loss of consortium due to the other's injuries.

On September 8, 2008, Voris executed a release pursuant to a settlement agreement that she had entered into with the defendant. Consistent with that agreement, on January 30, 2009, she withdrew both of her claims against the defendant. On the same day, the plaintiff withdrew his negligence claim, leaving his claim for loss of consortium as the sole remaining count of the complaint. The trial court granted the defendant's motion to strike the remaining count, relying on *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 494, 408 A.2d 260 (1979), to conclude that the plaintiff's loss of consortium claim was barred by the settlement of Voris' negligence claim.[4] The trial court rendered judgment for the defendant and this appeal followed.

The plaintiff contends that a loss of consortium claim is a separate cause of action that may be maintained independently of the direct injury claim on which it is based. The defendant responds that the consortium claim is derivative of the direct injury action and therefore is barred by settlement of that action. The defendant relies on our statement in *Hopson* that "because a consortium action is derivative of the injured spouse's cause of action, the consortium claim would be barred when the suit brought by the injured spouse has been

terminated by settlement . . . .” Id. Contending that our statement in *Hopson* is dicta and lacks precedential value, the plaintiff urges us to rely on case law from other jurisdictions to conclude that the consortium claim survives the settlement of the predicate action. Because we conclude that our subsequent decisions that have consistently applied the principle that we first expressed in *Hopson* are controlling, legally binding precedent, we agree with the defendant and affirm the judgment of the trial court.

In *Hopson*, we reversed our long-standing rule, set forth in *Marri* v. *Stamford Street Railroad Co.*, 84 Conn. 9, 24, 78 A. 582 (1911), that had precluded the recognition of claims for loss of consortium. In overturning our prior precedent and articulating the new rule, we defined consortium as “encompassing the services of the wife, the financial support of the husband, and the variety of intangible relations which exist between spouses living together in marriage. [W.] Prosser, Torts (4th Ed. 1971) § 124, pp. 881–82. These intangible elements are generally described in terms of affection, society, companionship and sexual relations. . . . These intangibles have also been defined as the constellation of companionship, dependence, reliance, affection, sharing and aid which are legally recognizable, protected rights arising out of the civil contract of marriage.” (Citation omitted; internal quotation marks omitted.) *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 487. As we ordinarily do when we recognize a new cause of action, we outlined its contours, in light of our reconsideration of the relevant public policies. Id., 490–94. One of the public policy concerns that weighed against recognizing the cause of action was the risk of double recovery. Id., 492. We rejected that concern as a basis for not recognizing the new cause of action, in part because of our conclusion that a “consortium claim would be barred when the suit brought by the injured spouse has been terminated by settlement or by an adverse judgment on the merits.” Id., 494.

Although we subsequently have characterized that statement as dicta, we consistently have relied on it in deciding subsequent cases. In *Ladd* v. *Douglas Trucking Co.*, 203 Conn. 187, 190–91, 523 A.2d 1301 (1987), we concluded that in a wrongful death action a surviving spouse may recover for antemortem loss of consortium, but may not recover for postmortem loss of consortium. Id., 197. Relying both on *Hopson*'s characterization of a loss of consortium action as derivative and on our statement in *Hopson* that a loss of consortium claim is barred by the settlement of the predicate cause of action, we rejected the plaintiff's contention that our decision in *Hopson* would support the recovery of damages for postmortem loss of consortium. Id., 195.

In *Jacoby* v. *Brinkerhoff*, 250 Conn. 86, 735 A.2d 347 (1999), we again relied on the principle first expressed

in *Hopson*. In *Jacoby*, the plaintiff sought damages for loss of consortium in connection with his allegations that the defendant, a psychiatrist, had committed medical malpractice in treating the plaintiff's former wife. Id., 87. The plaintiff's former wife had not initiated an action on her own behalf and refused to join in the plaintiff's action. Id., 89. We rejected the plaintiff's claim that joinder should be excused because his former wife's refusal to join had rendered joinder impossible. Id., 90. We considered the question of whether joinder of the consortium claim with the predicate claim should be required, and found that question to be inextricably linked to the question of whether the settlement of a predicate action would bar the derivative consortium action.[5] Id., 91. We explained that the public policy concerns implicated by both questions are the same, namely, limiting the risk of multiple actions or double recoveries stemming from the same transaction. Id. We observed that we could "discern no viable distinction between precluding a consortium claim when the injured spouse has settled with the alleged tortfeasor and precluding it when the injured spouse, as in this case, has declined altogether to sue the alleged tortfeasor." Id. Both rules result from the derivative nature of a claim for loss of consortium. Id., 91–92. We concluded, therefore, that the dicta in *Hopson* regarding the settlement of the predicate claim functions as a "*roadblock* to the plaintiff's claim for recovery . . . ." (Emphasis added.) Id., 91.[6] Our consistent reliance in both *Ladd* and *Jacoby* on the principle articulated in *Hopson*—that the settlement of the predicate claim extinguishes the derivative claim for loss of consortium—makes clear that this rule is the governing law in Connecticut. Therefore, the trial court properly granted the defendant's motion to strike in the present case.[7]

Although we repeatedly have articulated and relied on the principle that the settlement of the underlying injury claim bars the derivative action for loss of consortium, we recognize that neither *Hopson*, *Jacoby*, nor *Ladd* had a procedural posture identical to the present one. Accordingly, we take this opportunity to articulate the strong policy reasons that support the application of this rule to claims such as the plaintiff's. The same rationale that mandates the joinder of loss of consortium claims with the claims of the directly injured party also should apply to bar a claim for loss of consortium once the predicate action has been settled.[8]

First, when the claims are not resolved together, there is a greater probability of overlapping damages awards. The concept of marital consortium encompasses services, support "and the variety of intangible relations which exist between spouses living together in marriage." *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 487. Consortium has been described variously as "affection, society, companionship and sexual relations" or "the constellation of companionship, depen-

dence, reliance, affection, sharing and aid . . . .” (Internal quotation marks omitted.) Id. Because the experiences comprising consortium are not specific to either party to a marriage, “damages to a marital relationship are frequently inextricably intertwined with the harm sustained by the injured spouse. . . . [M]arital interests are in reality . . . interdependent [and] injury to these interests is . . . essentially incapable of separate evaluation as to the husband and wife.” (Internal quotation marks omitted.) *Oaks* v. *Connors*, 339 Md. 24, 37, 660 A.2d 423 (1995). Given that interdependence, “there is some risk that a jury hearing the [injured spouse's] claim will consciously or not, include something in the verdict for the [deprived spouse's] loss as well, and vice versa.” W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 125, p. 933. In *Hopson*, we recognized this danger and, therefore, acknowledged the wisdom of trying both claims together “before a single trier of fact.” *Hopson* v. *St. Mary's Hospital*, supra, 494. Allowing a loss of consortium claim to proceed alone following the settlement of the injured spouse's claims would ignore this important safeguard.[9]

Second, “[i]t is inherent in the nature of a derivative claim [such as loss of consortium] that the scope of the claim is defined by the injury done to the principal.” *Jacoby* v. *Brinkerhoff*, supra, 250 Conn. 93. Accordingly, the loss of consortium claim “is lost, diminished or barred when the injured person's claim is so affected.” 2 D. Dobbs, Law of Remedies (2d Ed. 1993) § 8.1 (5), p. 401. When the claims become untethered from each other, inconsistent outcomes may occur. Thus, the claims are not necessarily resolved on the basis of the sequela of the principal's injury.

Third, requiring both claims to be resolved simultaneously promotes efficiency and conserves judicial resources by protecting against the repeated litigation of the same underlying issues. *Buckley* v. *National Freight, Inc.*, 220 App. Div. 2d 155, 158, 644 N.Y.S.2d 809 (1996), aff'd, 90 N.Y.2d 210, 681 N.E.2d 1287, 659 N.Y.S.2d 841 (1997). This is because, “[i]n order to subject a defendant to liability to a deprived spouse for illness or bodily harm done to the impaired spouse, all of the elements of a tort action in the impaired spouse must [be proven to] exist, including the tortious conduct of the tortfeasor, the resulting harm to the impaired spouse and the latter's freedom from such fault as would bar a recovery by him or her, as for example, contributory negligence.” 3 Restatement (Second), Torts § 693, comment (e) (1977). By negotiating and settling their claims, both an injured party and a tortfeasor hope to avoid the expense and uncertainty of litigating the tort action at trial and to resolve their dispute once and for all. Allowing the loss of consortium claim to proceed following the settlement of the injured party's claim undermines these goals.[10] Additionally, because only a single “ ‘per person’ ” liability insurance

policy limit may be available to satisfy both the direct injury and the accompanying loss of consortium claim; see *Izzo* v. *Colonial Penn Ins. Co.*, 203 Conn. 305, 312–13, 524 A.2d 641 (1987); fairness dictates that both claims should be evaluated and resolved together. Specifically, if, as happened in *Izzo*, the insurance carrier settled for the full per person limit with the primary plaintiff, the insurance policy would provide no coverage for the consortium claim.[11] If we were to adopt the plaintiff's advocated rule and allow a consortium claim to proceed following the settlement of the predicate action, whenever a claim has been settled for the per person limit with the directly injured person, an insured would be left without coverage for the remaining consortium claim.[12]

The judgment is affirmed.

In this opinion NORCOTT, ZARELLA and HARPER, Js., concurred.

* This case originally was argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Palmer, Zarella, McLachlan and Vertefeuille. Thereafter, Justice Harper was added to the panel, and he has read the record and briefs and has listened to the recording of the oral argument.

[1] Following oral argument on January 14, 2011, the Connecticut Trial Lawyers Association, the Connecticut Defense Lawyers Association, the Insurance Association of Connecticut, the National Association of Mutual Insurance Companies and the American Insurance Association submitted amicus briefs in response to our invitation to do so.

[2] Joan Voris also is a plaintiff in this action, but she withdrew her claims against the defendant prior to trial pursuant to a settlement agreement. For convenience, all references to the plaintiff in this opinion are to John G. Voris.

[3] The plaintiff appealed from the decision of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] The trial court did not issue a written memorandum of decision on the defendant's motion, but instead, handwrote a brief summary of the basis of its decision on the order granting the motion. The court then denied the plaintiff's motion to reargue, in which the plaintiff had argued that the court's cursory note did not clarify whether the court had considered the arguments and authorities relied on by the plaintiff in its objection to the motion to strike. In denying the motion, the court simply reiterated that *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494, controlled.

[5] Stating that "even if we were persuaded that the absence of joinder might be excusable sometimes," we were not so persuaded under the facts of *Jacoby*, and we left open the question of whether "joinder may be excused if intervening events have made it impossible . . . ." That question is not before us in this appeal. See generally 3 Restatement (Second), Torts § 693 (2) (1977).

[6] Although dicta is not binding precedent; see, e.g., *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008); we may look to dicta as persuasive authority, and, by relying on it in subsequent decisions, convert it to binding precedent. That is precisely what happened to the *Hopson* dicta. "[Dicta] includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not [dicta] [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009). To support our conclusions in both *Ladd* and *Jacoby*, we relied on the principle articulated in *Hopson*, that the settlement of the predicate action precludes an action for loss of consortium by the spouse. In *Jacoby* in particular, we intentionally took up and discussed the principle that we had articulated in *Hopson*, and relied on it as an essential part of our rationale. At that point, the principle ceased to be dicta.

[7] Because we conclude that our later decisions that cite to and rely on the principle articulated in *Hopson* are binding, it is unnecessary for us to address the plaintiff's reliance on case law from other jurisdictions as interpretive aids for understanding the import of our statement in *Hopson*. As we have explained in this opinion, we already have interpreted that statement as setting forth a legally binding rule of law—termination of the predicate action by settlement bars the derivative consortium claim.

For that same reason, the plaintiff's reliance on the Appellate Court's decision in *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 783 A.2d 36, cert. denied, 258 Conn. 938, 786 A.2d 426 (2001), is unavailing. Moreover, even if we were to look to *Musorofiti* as persuasive authority, that decision is consistent with and relies on our existing precedent in its analysis. In *Musorofiti*, the Appellate Court reversed the judgment of the trial court in favor of the defendants on the plaintiff wife's loss of consortium claim, concluding that the trial court improperly had refused to instruct the jury on the claim. Id., 367. The court rejected the wife's claim, however, that, because of the nature of the two claims as " 'inextricably intertwined,' " the proper remedy was a retrial on both her loss of consortium claim and her husband's predicate claim, and instead determined that the remand should be limited to a hearing in damages on the wife's claim for loss of consortium. Id., 369. In so concluding, *Musorofiti* recognized the derivative nature of a claim for loss of consortium and also recognized our established rule that "if an adverse judgment or a settlement bars the injured spouse's cause of action, any claim for loss of consortium necessarily fails as well." Id., 376, citing *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494. The court in *Musorofiti* further stated: "A new trial in the present case solely on the issue of damages as to the loss of consortium claim does not implicate any of the concerns for which courts have determined that the underlying impaired spouse's claim must accompany the deprived spouse's claim. The defendants presented no evidence of comparative responsibility. The . . . husband neither lost in his action nor settled his claim, so neither settlement nor adverse judgment bars the . . . wife's claim. Furthermore, no reason exists for concern that the jury will improperly award damages to the . . . wife for the husband's injuries or vice versa." *Musorofiti* v. *Vlcek*, supra, 381. Accordingly, *Musorofiti* is not only consistent with our holding today, it provides persuasive support for our conclusion that the rule we apply is an established one, supported by our legal precedent.

[8] The applicable Restatement (Second) rule requires the joinder of a loss of consortium claim with the underlying tort claim "[u]nless it is not possible to do so"; 3 Restatement (Second), Torts § 693 (2), p. 495 (1977); for example, when the injured spouse has "settled and released the claim for bodily harm without the knowledge of the deprived spouse." Id., comment (g), p. 498. In the present matter, it is clear that the plaintiff was aware of Voris' settlement of her claims.

[9] The risk of overlapping awards is exacerbated in cases such as the present one, in which the injured spouse's settlement consists of an undifferentiated lump sum award, making it impossible to discern the purposes at which the compensation may have been directed.

[10] There may be cases in which spouses are unable to agree on the wisdom of accepting an offer of settlement on the injured party's claim if no acceptable offer to settle the loss of consortium claim is included as part of the offer. It is true that, in such cases, the injured party may unilaterally agree to settlement of his or her claim, thereby extinguishing the deprived party's right to pursue recovery on the loss of consortium claim. Although this potential outcome is not ideal, it is preferable to an outcome that could result from permitting the consortium claim to remain viable. Namely, a tortfeasor who otherwise would agree to a settlement with a willing injured party would decline to do so because the benefits of settlement—finality and the avoidance of trial—would be eliminated by the potential, continued pursuit of the consortium claim. In other words, the deprived spouse effectively could force the injured spouse to continue participating in litigation against his or her will, perhaps requiring him or her to be deposed, submit to medical examinations and testify at trial. When the interests of the directly injured spouse and the deprived spouse diverge, the wishes of the injured spouse, who may be in need of the immediate financial relief that a settlement offers, ought to control. See, e.g., *Pugh* v. *Super Fresh Food Markets, Inc.*, 640 F. Sup. 1306, 1308 (E.D. Pa. 1986).

[11] The question of whether the settlement of the predicate claim barred the consortium claim was not before us in *Izzo*. See *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 308 n.3 ("[a]s part of the settlement, the defendants

waived any argument that the settlement of the claim [of the plaintiff's wife] acted to extinguish the loss of consortium claim of the plaintiff").

[12] We do not speculate as to whether a defendant would have any claim against his carrier for settling the direct injury claim.