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No. 63519-1-I

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

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Kirk R. Hogle, Appellant

v.

Arica Fishing Company, L.L.C., Respondent

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BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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## **I. Introduction**

This case involves a career ending knee injury to a chief engineer, and a vessel owner who took advantage of its long time employee. While the chief was still limping and not fully healed the owner got the chief to sign a release of claims while the chief was so medicated he didn't know what he was signing. The stated consideration for releasing this claim for a career-ending injury clearly caused by the employer was wages for two trips the chief had lost to date, but even that was illusory because the owner failed to disclose that the government had seized the catch from one of those trips. Although maritime law requires an owner negotiating a claim release with an injured seaman to meet the high standards of a fiduciary dealing with its beneficiary, the owner successfully argued that any problems with the release or its enforcement were excused by the chief's negotiation of a check he knew was deemed settlement consideration by the owner. The chief did not have all the material facts at the time he negotiated the

check and vows that he did not intend to ratify the settlement or relinquish his claims. This Court should reverse the dismissal and give this seaman his day in court.

## **II. Assignments of Error**

1. The trial court erred when it granted summary judgment of dismissal based on a seaman's Release where there were facts supporting issues for trial that
  - a. The Release was ineffective due to omission of material facts regarding consideration which could not be cured by parol evidence,
  - b. The seaman did not execute the Release freely, without deception or coercion and with full understanding of his rights, and
  - c. The seaman did not intend to ratify the settlement by accepting a payment without knowledge of relevant facts.
2. The trial court erred in striking a Surreply covering testimony of a key defense witness unavailable until after plaintiff's Opposition due to delays caused by the witness

3. The trial court erred in declining to reconsider summary judgment of dismissal where the seaman provided new evidence regarding his attorney's advice
  
4. It was error to tax the cost of a jury demand which had been stricken

#### **Issues Pertaining to Assignments of Error**

1. a. Did the evidence support an issue for trial that failure of the Release to mention the likely non-payment of half the stated consideration was a material omission rendering the Release ineffective, and which could not be cured by parol evidence?
  
- b. Did the evidence support an issue for trial that the Release should not be enforced because the owner failed to disclose the likely non-payment of much of the stated consideration, the seaman was not fully healed at the time of its execution, the seaman was unaware he had executed a release due to the effect of prescribed medications, and the

consideration was grossly inadequate to compensate the damages suffered?

- c. Does the fact that the seaman had counsel and knew of the release when he negotiated a final payment waive any issue over the effectiveness or enforceability of the Release and ratify the settlement, or does the owner's quasi-fiduciary relation to the seaman require further proof of intent to ratify the settlement and full knowledge of relevant facts, requiring that the issue be resolved at trial?
2. Where defendants' Reply cited liberally from Olson's deposition, which was taken too late to be used in plaintiff's Opposition due to delays caused by Ms. Olson, was it error for the trial judge to decline to consider plaintiff's Surreply material covering that deposition.
  3. Was it an abuse of discretion to decline to reconsider the dismissal where the seaman provided evidence that his attorney advised that accepting the final payment would have no effect on his legal position, contrary to what had been presumed by the trial court at summary judgment?

4. Where the Court struck defendants' jury demand was it error to award the cost of the jury demand as a taxable cost?

**I. Statement of the Case:**

**Procedural facts:** Plaintiff Kirk R. Hogle filed suit in King County Superior Court on 11/1/07. CP 1-6. Defendants Arica Fishing Company, LLC<sup>1</sup> answered on 12/4/07. CP 7-10. On 10/20/08 the undersigned counsel substituted for previous counsel. CP 14 . On 12/1/08 the trial court struck defendants' jury demand. CP 25-26.

On 3/20/08 the trial court granted defendants' Summary Judgment of dismissal. CP 567-569. At summary judgment plaintiff had declined to waive attorney client privilege (CP 291; RP 14-15) and although there was an issue over inadvertent waiver, the court indicated she was not relying on the allegedly waived material and made no finding that waiver had occurred. RP 49 In 22-23. Judgment with award of costs

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<sup>1</sup> Other defendants were named, but were later voluntarily dismissed.

was entered on 4/7/09, including \$500 for cost of jury demand. CP 661-663.

Plaintiff moved for Reconsideration on 3/30/09, arguing that defendants' had not adequately supported a finding of Ratification, and waiving attorney client privilege to provide testimony and emails regarding attorney advice inconsistent with that presumed by the trial court in her ruling. CP 601-610; 615-617; 619. Reconsideration of the dismissal was denied on 4/15/09. CP 664. Defendants did not cross-appeal the Order striking jury demand.

**The underlying claim and its value.** On 8/31/06 while temporarily serving as chief engineer on the F/T ARICA plaintiff injured his left knee when the foreman whose job it was to make sure a machine was not turned on while plaintiff was working on it accidentally turned on the machine. CP 313-314; 316. Plaintiff had meniscal repair surgery at the end of November 2006 and attempted to return to his job as chief engineer on F/T REBECCA IRENE on 2/13/07 and later in

May 2007. CP 264, para 17 and 18. Each time he had to leave after a short time due to problems with the left knee, but without suffering any new injury. CP 264, para 17.

After the second attempt his doctor placed physical restrictions on plaintiff that precluded return to his old job and plaintiff unsuccessfully attempted to negotiate an injury claim settlement with defendants. CP 264, para 20;265, para 24. Plaintiff then obtained counsel and filed suit in October 2007 claiming damages due to Jones Act Negligence and general maritime Unseaworthiness. CP 3-6.

Plaintiff had been the regular chief engineer on the F/T REBECCA IRENE since 2000, and earned \$124,899 in wages and unemployment compensation in 2005, his last full pre-injury year. CP 268, para 40. Plaintiff was 51 on the date of accident and intended to work until age 60-65 absent the injury. See CP 262, para 22-23.

An experienced maritime lawyer and mediator stated the opinion that plaintiff's economic losses due to the injury were between \$487,000 and \$732,000. CP 273, para 3, c.

**Plaintiff's physical and mental condition on 2/12/07**

Per his usual practice plaintiff visited defendants' Seattle office to sign his crew contract on 2/12/07 before going to Alaska to join the REBECCA IRENE for his first attempt to return to work after surgery. CP 14, 15, 17. While a Release dated 2/12/07 is alleged to have been executed by plaintiff in defendants' office on that date and appears to bear his signature, plaintiff remembers nothing about its execution. CP 265, para 25.

Plaintiff had no work hardening or physical therapy after the surgery so the 2/13/07 trip was the first real test of how his knee would perform doing hard work. CP 268, para 42. Plaintiff was limping during the days leading up to 2/12/07. CP 257 (Allenbach Decl.) para 5; CP 264 (Plf Decl.) para 15; CP 284 (Ruiz Decl.) para 5. The chief engineer he relieved

noticed plaintiff was limping and had a swollen knee on 2/13/07 when he arrived to take over the engineer position on the REBECCA IRENE. CP 547 p.16 line 7 and CP 548 p.41 lines 7-25 (excerpts C. Anderson dep.).

Defendants knew plaintiff had been prescribed vicodin after the surgery and. CP 589, Olsen dep p. 64 ln 8-15. Plaintiff was taking vicodin for knee pain while in Seattle and was also on an increased dosage of the blood thinner atenolol. CP 264 para 16 and CP 266 para 29-30; see also CP 258 (Allenbach Decl.) para 8. Another friend noticed plaintiff became spacey and impulsive when he upped his blood pressure dosage a few years earlier and that he was acting similarly in December 2006. CP 278 para 5-7. The chief engineer plaintiff relieved noted that plaintiff's face was puffy and he appeared medicated on 2/13/07 when he arrived to take over the engineer position on the REBECCA IRENE. CP 294 ln. 3-5; CP 546 p. 17 lines 5-11. An expert toxicologist testified that the combination of the vicodin and atenolol can

have mind altering side effects and can cause temporary memory loss which would explain plaintiff's lack of memory of signing the release. CP 280-282.

**Defendants' admission that there was an issue of fact re plaintiff's mental capacity on 2/12/07**

Defendants conceded at argument that plaintiff's evidence raised an issue of fact whether plaintiff had sufficient mental capacity under maritime law standards to execute an enforceable Release on 2/12/07, though arguing that this issue was waived by plaintiff's later acceptance of settlement consideration. RP 18 ln 19; RP 19 ln 3.

**Terms of the Release and stated Consideration**

The Release, dated 2/12/07, was drawn up by marine claim adjuster Anissa Olson on the morning of 2/12/07 at the request of defendant's HR person Jackie Little, who provided the amount of consideration and other relevant terms. CP 583-584 (dep. P. 34-38). The terms of the Release state that the consideration for the release of claims was

the amount of wages [plaintiff] would have earned on trips RI 07-01 + 07-02, if [plaintiff] had been [on] the 'REBECCA IRENE' in the position of Chief Engineer. These wages will be calculated and paid in the usual course as the trips settle and crewshare is determined.

CP 118. Trips RI 07-01 and 07-02 were the first two 2007 trips of the vessel REBECCA IRENE.

Before the Release was drafted defendants knew that "trip 1 probably won't be paid for a long time, if at all" because the federal government had seized REBECCA IRENE's trip 1 catch due to illegal fishing. CP 401. Olson's notes of pre-Release 2/12/07 conversation with Little. See also CP 583-584, Olsen dep p 34-38. Over objection defendants introduced testimony of Jackie Little claiming to have verbally explained this to plaintiff at the time of execution. CP 126 para 5; CP 301 (objection).

The government seizure case was resolved by a compromise settlement in June 2008, with defendants receiving about 37.6 % of the proceeds from the RI 07-01 catch. See CP

150, 152. At that point defendants opted to pay plaintiff a settlement based on the undiscounted value of the catch trip 1 catch. CP 128 para 11.

Plaintiff's experience of crew settlement paid in the usual course is that they are usually paid within a few months after the trip. CP 269 para 45.

#### **Other facts relevant to enforcement of Release**

**Lack of representation and negotiation.** Plaintiff did not have an attorney on 2/12/07. The consideration for the settlement was suggested by defendant and there was no negotiation over the amount. CP 307 ln 9-10; CP 409 ln 1-2; CP 50 (Little deposition p. 127 ln 17 to p. 128 ln 1)

**Inadequate consideration.** The \$22,193.42 plaintiff eventually received was about 17.8% of plaintiff's 2005 wages and unemployment compensation (\$124,899) and didn't include compensation for 45-60 days of shipyard work at \$250/d (\$11,250 - \$15,000) lost before 2/12/07. CP 268 para 40 and 41. An experienced maritime plaintiff and defense

lawyer and mediator stated the opinion that the settlement was “grossly inadequate” and opined that plaintiff’s economic losses alone would be \$487,000 - \$732,000 based on his work life to date and the assumption that he couldn’t continue. CP 273 para a, c.

Defendants admitted it was their the customary practice of providing funds to an injured crewmember as an advance against future settlement without any release. CP 538, Little dep. Pp.118-120, especially p. 119 ln 25 to p.120 ln 17. During the month and a half before 2/12/07 defendants discussed this and drew up settlement advance documents providing for advance to plaintiff of his lost wages from trips RI 07-01 and RI 07-02 as an advance against future settlement. CP 578 (Olson dep. Pp. 70-72); CP 600, 602, 604; CP 591 (Olson dep p. 70 ln 5-20). However there was no evidence these arrangements were ever brought up to plaintiff.

**Actions inconsistent with a valid binding Release.** On 6/14/07 Ms. Little, defendants’ HR person, and Ms. Olsen,

defendants' marine adjuster, discussed the likelihood that plaintiff might not be able to return to his old job and Ms. Little asked Ms. Olsen "to explore starting conversation about settlement as [Ms. Little] thinks [plaintiff will] look for a career ending one. CP 606. The notes of that conversation do not explain why in June 2007 the 2/12/07 Release would not have foreclosed any possibility of settlement of plaintiff's injury claims. Id.

Although defendants raised "prior settlement and release" among other affirmative defenses (CP 9), defendants did not immediately demand that the lawsuit be dropped based on the Release after they were sued and did not provide a copy of the release to plaintiff's counsel until on or about 2/12/08. CP 615-617. Defendants did not explain that the 7/11/08 check was consideration for a release until 9/8/08 after being asked twice for an explanation. See CP 182, 183, 185. Defendants did not demand that plaintiff acknowledge the validity of the settlement or sign a new release and dismiss his lawsuit as a

condition to cashing the 7/11/08 check and plaintiff did not do so.

Plaintiff wrote a lengthy email on 8/20/07 in which he attempted to negotiate a settlement, laying out his position that because his seagoing career had been ended due to the fault of defendants they should compensate him accordingly. CP 316. Plaintiff's email did not mention any Release. Plaintiff discussed with his close friends the fact that he couldn't go back to sea and needed to pursue a claim for compensation, but never mentioned a Release until it came out in the litigation. CP 278 (Rendon Decl.) para 8; CP 284-286 (Ruiz Decl.) para 9.

**Circumstances of plaintiff's acceptance of payments from defendants**

Although he had received trip 2007 trip 1 and 2 crew settlement checks plaintiff had understood these to be "unearned wages" paid as a matter of course rather than settlement consideration. CP 269 para 46. Plaintiff received a single handwritten check (CP 155), after he knew of the

claimed Release. The check, dated 7/11/08, was sent directly to plaintiff even though he had a case in suit with defendants involving the claim for which the check was purported settlement consideration. CP 471 (Hogle dep.) p.292 ln 12-21; CP 619. Plaintiff explained that because defendants had not demanded that he repudiate his lawsuit before cashing the check he considered it a down payment on a much larger claim. CP 269-270, para 47. He expressly disclaimed any intent by cashing the check to ratify and accept the inadequate settlement.

I admit I received the last [payment] after I had filed a lawsuit claiming substantial damages due to a career ending injury caused by defendant's breach of their duties under the Jones Act and General Maritime Law. However, before defendants made [that payment] they knew I repudiated their release of claims as invalid, and was proceeding with my lawsuit. By cashing the [check] written by defendants after I filed suit it was my intention to offset a small part of the substantial damages defendants caused me due to their fault. It was never my intention by cashing the [check] to ratify the disputed release and agree to the totally inadequate settlement it represented.

Id.

Plaintiff shed further light on this issue, including the advice he received from counsel, in his Motion for Reconsideration, discussed supra.

**Facts not known by plaintiff at time of acceptance of last payment**

Plaintiff received the last payment on 7/11/08 and cashed it on 9/19/08. CP 609 ln 24. Plaintiff's first attorney had not aggressively pursued discovery. See CP 29, ln 3-4. After receiving the release on 2/12/08 plaintiff's first lawyer basically did nothing until advising plaintiff in October 2008 that he would not continue to represent him due to the unanticipated Release defense. CP 270, para 49; see also CP 624.

It was not until after plaintiff's second counsel filed motion to compel discovery regarding the circumstances of the government seizure on 2/5/09 (CP 43-50) that defendants provided records related to that seizure. CP 195, 212,213,216. At that point plaintiff learned for the first time that the seizure had been compromised for ~ 37.6% of the catch value (CP 150)

in a settlement finalized on 6/17/08 (CP 152), but that after waiting 17 months after completion of trip one to issue trip settlement, defendants had apparently opted not to pass the discount along to plaintiff and other crewmembers.

Jackie Little and Anissa Olsen, the two persons involved in plaintiff's claim from the beginning through the Release and beyond, and the two Declarants supporting defendants' summary judgment, were not deposed until 3/3/09 and 3/9/09, long after plaintiff had received and negotiated the last settlement payment check.

#### **Circumstances of delay of Olsen deposition**

Ms. Olson's deposition could not be used in plaintiff's 3/9/09 Motion/Response papers because the deposition took place on the morning of 3/9/09 after being scheduled on 3/4/09 and delayed twice due to Ms. Olson's claim that she had the flu. Defendants' Reply cited liberally from the Olson deposition. Although the proposed Surreply was not limited to Ms. Olson's testimony, at argument plaintiff asked the court to limit its

consideration of the Surreply to those parts discussing Ms. Olson's testimony. RP 25 ln 5 to RP 26 ln 17. The trial court declined to consider the surreply on the basis that "[t]he rules don't provide for it, so I didn't consider it". RP 3 ln 14-16.

### **Trial court's stated basis for dismissal**

The trial court made the following oral ruling granting the motion:

I'm going to grant the motion for summary judgment. I think the ratification is the thing that this Court looked at. Most significantly, if there had not been the negotiation of that final settlement check, I don't think we would be here today. Even considering all the facts in the light most favorable to Mr. Hogle, there's no question he had advice of counsel for quite some time before that third and final check was issued. I don't think there was any deception. I don't think there was any coercion.

Mr. Bratz couldn't have been more straightforward in writing that letter, and certainly Mr. Stacey, a known maritime lawyer, is well aware of what that very concise paragraph meant, and I don't even think I need to get into attorney-client privileged communications. The facts speak for themselves. I'll sign the order.

RP 49 ln 7-24; see also RP 45 ln 11 to RP 49 ln 6.

### **Additional facts in Motion for Reconsideration**

Plaintiff opted to make a limited waiver of attorney client privilege in his Motion for Reconsideration to provide otherwise privileged testimony and documents explaining that contrary to the trial court's assumption, he had not been advised that acceptance of the last check would be deemed a ratification of the settlement and waiver of all defenses to the Release. CP 607 para 2; CP 571, ln 19-21.

Emails from 2/12/08 and 12/13/08 (CP 615-617) provided plaintiff's first knowledge of the release and discussed his lack of memory of signing and the pain medications he was taking at the time of execution. CP 617. The 7/25/08 email exchange (CP 619) documents that plaintiff didn't know what the \$7,738.19 check was for and sought clarification from Mr. Stacey, who advised in July, 2008, "Don't cash the check until we talk." Thereafter plaintiff waited for Mr. Stacey to advise whether he would hurt his case by depositing the \$7,738.19

check, and reminded Mr. Stacey in an 8/18/08 email (CP 625) that plaintiff was still waiting for an answer.

On 9/5/08 Mr. Stacey advised

If... the money equals what should have been paid for the Release, then this would be a big problem in defeating the release. In other words, we could beat the release because they did not pay what they recited as payment in the release. But, if they pay (albeit late), then they can now argue that there is nothing wrong with the release.

CP 625. Plaintiff responded that the check appeared to be the correct final crew wage payment for the delayed trip 1 and therefore (under Mr. Stacey's analysis) "I am probably screwed". CP 625.

In a 9/19/08 phone conversation Mr. Stacey reiterated that because the check appeared to fulfill the agreed settlement terms it "couldn't do any more harm" for plaintiff to deposit the check, and also expressed reluctance with proceeding with the case based on the new element of the release. CP 609, para 8, 9. Plaintiff deposited the check on 9/19/08 right after that conversation based on Mr. Stacey's advice. Id para 8, para 9 In

24. On 9/19/08 plaintiff was not desperate for funds and had over \$70,000 in his accounts. CP 624 para 10. Plaintiff would not have negotiated the check if he had been advised that doing so could impair his claim against defendant. CP 610.

On 10/8/08 Mr. Stacey emailed plaintiff that he was “no longer interested in pursuing” plaintiff’s case due to the Release, which he hadn’t known about when he took the case, and also due to the final payment which “makes the release issue that much more difficult”. CP 610 ln 1-6; CP 624. Plaintiff’s sworn statements are consistent with emails between himself and Mr. Stacey. Compare CP 607-612; CP 615-617, 619, 665.

In his Motion for Reconsideration plaintiff also offered to repay either the settlement consideration received after knowledge of the Release or all settlement consideration (i.e. to include payments received before he knew of the Release), plus interest. CP 617 para 13-16. Plaintiff provided evidence that the amount of the last payment was in his attorney’s trust

account, ready to be paid into the registry of the court to abide the outcome at trial of the Release issue. CP 640-641.

### **III. SUMMARY OF ARGUMENT**

Substantive maritime law requires that before a seaman's release will be enforced defendants must prove that their treatment of plaintiff in obtaining a release met the high standards applicable to a fiduciary dealing with a beneficiary. There were clear issues for trial whether defendant's release met these standards, including omission of material facts from the terms of the release, plaintiff's medicated state at the time of execution without counsel, plaintiff's physical unfitness to return to sea duty at the time of execution, defendant's arguable fiduciary breaches in failing to raise the possibility of advancing plaintiff the same lost wages against a future settlement without requiring a Release of claims, and the inadequacy of two trips consideration for a career ending injury to a high earning 51 year old chief engineer.

There was also an issue for trial over ratification. While there are no maritime precedents completely on point, an analogous maritime decision holds that there cannot be ratification unless the seaman understands all material facts at the time he accepts the payment, including the legal shortcomings of the Release. Similarly, under analogous state law precedents involving fiduciaries negotiating disputes with beneficiaries defendants had to prove that plaintiff accepted consideration with full knowledge and intent to ratify the settlement. Plaintiff's evidence at Summary Judgment created an issue for trial on both knowledge and intent, and the trial court erred in presuming knowledge and intent solely by virtue of defendants' letter to plaintiff lawyer and the fact that plaintiff had a lawyer at the time of the last payment.

Where the presumed advice of plaintiff's attorney was the only basis for a finding that plaintiff was fully informed of facts and legal consequences when he negotiated the last check, it was an abuse of discretion for the trial court to decline

reconsideration after plaintiff waived the privilege and submitted evidence of the actual legal advice which was at odds with the trial court's assumption.

## V. ARGUMENT

**(Issue 1 a.) The evidence supported an issue for trial that failure of the Release to mention the likelihood of non-payment of half the stated consideration was a material omission rendering the Release ineffective and which could not be cured by parol evidence.**

**Summary judgment standard of review.** Summary judgments are reviewed on a de novo standard, with the trial court's factual determinations entitled to no weight, and the appellate court reviewing the record de novo. All facts and all reasonable inferences therefrom must be viewed most favorably to the party resisting summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788 (2003); *Chelan County Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282 (1987)

**Substantive maritime law applies** Although the plaintiff chose to sue in state court as is his right under the

“savings to suitors” clause of 28 USC § 1333, substantive admiralty law applies to cases cognizable in admiralty which are brought in state court under the savings to suitors clause. *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205 (1917).

**Parol Evidence Rule applies.** The parol evidence rule is a substantive rule of law. *Guaranty Trust Co. v. York*, 326 U.S. 99, 115 (1945). Therefore if there is a federal maritime law rule on the subject it must be applied. There is a parol evidence rule in maritime jurisprudence which states that “plain terms of a contract may not be changed by recourse to extrinsic evidence”. *Agnew v. American President Lines*, 73 F. Supp. 944, 948(ND CA 1947) .

Applying the rule to the facts at bar, on its face the Release fully covers the consideration term, stating that the consideration is

the amount of wages [plaintiff] would have earned on trips RI 07-01 + 07-02, if [plaintiff] had been the “REBECCA IRENE” in the position of Chief Engineer. These wages will be calculated and

paid in the *usual course* as the trips settle and crewshare is determined.

CP 118. Defendants' admit that as of 2/12/07 they knew trip 1 was not expected to be paid in the usual course, and "probably won't be paid for a long time, if at all" due to the government seizure. CP 401. In other words, trip 1 would only be paid if defendants realized any return on the seized product and otherwise not at all, and any resolution will probably take a long time. This sets up an issue whether the failure to expressly elaborate this major contingency in the consideration term would be seen by a reasonable person as a material omission rendering the contract void. Plaintiff objected to defendants' attempt to introduce parol evidence to try to cure said omission. CP 301.

Defendants were the drafters of the Release and in a quasi-fiduciary relation toward plaintiff. To reiterate the above paraphrase of defendants' position, they were asking the trial court to allow extrinsic evidence to prove that "calculated and

paid *in the usual course*” was understood by plaintiff to mean “calculated and paid *after a substantial delay if defendants realize any return on seized product and otherwise not at all*”.

The beauty of this from defendants’ standpoint was that by the time they had to go on record about their alleged verbal explanation to plaintiff, he was on record that he didn’t recall anything from that morning<sup>2</sup>.

While parol evidence is sometimes allowed to explain indefinite terms, it should not be allowed to completely redefine basic contract terms which have a plainly understood meaning. To do so would render the law of contract meaningless, and open the door to parol evidence “ explaining” that the parties verbally agreed that “prompt” delivery meant “delivery at any time”; “reasonable shipping charges” means “whatever you want to charge”; “black” means “white” etc. While “paid in the usual course” may contain some wiggle room, most people

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<sup>2</sup> Plaintiff does not wish to create any misimpression that he accepts the testimony of Ms. Little on this point. See discussion at p. 39, *infra*.

would not understand it to include complete uncertainty about payment of the stated consideration.

**(Issue 1 b.) The evidence supported an issue for trial that the Release should not be enforced because the owner failed to disclose the likely non-payment of much of the stated consideration, the seaman was not fully healed at the time of its execution, the seaman was unaware he had executed a release due to the effect of prescribed medications, and the consideration was inadequate to compensate the damages suffered.**

The burden is on the defendant to show that a seaman's release of claims "was executed freely, without deception or coercion, and with full understanding of his rights." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942). *Garrett's* analysis was based in large part on seaman's special status as a "ward of admiralty," whose maritime employers owes him a fiduciary duty. *Id.* at 246. Necessarily, then,

[i]f there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and

that pro tanto the bargain ought to be **set aside** as inequitable.

Id. (internal citations and quotation marks omitted). *Garrett*

continues:

The analogy ...between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale, or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and ***his burden is particularly heavy where there has been inadequacy of consideration.***

Id at 248.

The above quoted passages from *Garret* provide the underpinnings of the leading Ninth Circuit decision, *Orsini v. O/S Seabrooke*, 247 F.3d 953 (9th Cir. 2001), which characterized the *Garret* test for upholding a release

*Garrett* establishes a two-part test in determining the enforceability of a seaman's release: (1) whether the release was executed freely, without deception or coercion; and (2) whether it was made by the seaman with full understanding of his

rights. To apply the second part of the test, we consider: (1) the adequacy of the consideration; (2) the nature of the medical advice available to the seaman at the time of signing the release; and (3) the nature of the legal advice available to the seaman at the time of signing the release.

Id at 959.

*Orsini* had many facts in common with the case at bar. Like *Orsini*, the consideration at bar seems rather small for a significant injury, which raised a red flag for the *Orsini* court based on the above language from *Garret*. Like *Orsini*, plaintiff did not have accurate medical information at the time the release was signed, since this was his first trial at hard work and his doctor's clearance proved premature. *Orsini* signed a release like the one at bar that recited that he was knowingly giving up all rights, and acknowledged that he was assuming the risk his injuries might be worse than anticipated. However, those recitations were given no weight compared to the actual facts bearing on whether the plaintiff was fully aware of his legal rights and medical situation.

A significant factor in *Schultz v. Paradise Cruises, Ltd*, 888 F. Supp. 1049 (D. HA 1994) was the lack of full medical information at the time of signing the release such that the “decision to sign the release cannot be characterized as an informed understanding with a full appreciation of the consequences.” The situation at bar is analogous, where plaintiff was making his first attempt at hard work post-surgery and therefore did not have an informed understanding of the consequences of signing a release at the time of signing.

Although the facts of coercion were somewhat stronger in *Orsini*, at bar there was a significant element of deception in defendant’s failure to clearly set forth in the release that as much as half of the stated consideration would not be “paid in the usual course” as stated in the release, but that “trip 1 probably won’t be paid for a long time, if at all”. Clearly any reasonable person would consider it important to know that half of the consideration for which they were trading something of great value “probably won’t be paid for a long time, if at all.”

Although plaintiff cannot remember signing the release, he has stated that he would have considered this a key fact. CP 269, para 44, 45.

If Ms. Little is allowed to testify that she explained these facts to plaintiff, plaintiff would dispute the truth of that testimony. Ms. Little is a principle of defendants and an interested party. Furthermore, she did make her assertion until after plaintiff had been deposed and testified that he didn't remember anything from that morning. Finally, Ms Olsen's testimony and notes don't support Ms. Little. Ms. Olson testified she didn't hear that discussion, even though she met with Ms. Little and plaintiff that morning. CP 583, dep p. 34-38. Also, Ms. Olson's notes don't mention plaintiff having been told about the seizure and problems with the trip 1 settlement, although they do mention Ms. Little's knowledge of these facts. CP 401. Most significantly, Ms. Olson admitted that it was she who drew up the release, and told Mr. Hogle what to fill in when he signed it, but couldn't explain why either the portion

she typed didn't mention the delay or why she didn't have had Mr. Hogle write something in about it. See CP 588, Olsen dep p. 59-60.

Finally, like *Orsini* plaintiff did not have the benefit of legal counsel and he certainly didn't understand his rights if the effects of the medications caused him to not know he was signing a Release. *Schultz v. Paradise Cruises, Ltd.*, 888 F. Supp. 1049 (Hawaii 1994) recognized that if the releasing party is on medications affecting mental state this adds to the burden on the party asserting the release to prove the release is fair and not the product of overreaching. *Schulz* cited *Borne v. A & PBoat Rentals No. 4, Inc.*, 780 F.2d 1254 (5th Cir. 1986) for the proposition that "Mental capacity is a question of fact that must be considered by the court before enforcing a settlement agreement between a seaman and a shipowner." *Schulz*, supra, at 1054.

At bar, as in *Orsini*, it can hardly be said beyond issue of fact that plaintiff relinquished his rights against defendant with

a full understanding of those rights, particularly given the evidence that plaintiff was impaired by the effects of medications, and the evidence that that defendants would arguably have provided the same consideration as an advance against future settlement without requiring a release if plaintiff has asked.

Plaintiff has found no appellate decision in this federal Circuit upholding summary judgment granting seaman's release defense, but has found Circuit cases denying release defense on summary judgment or after bench trial. See, e.g. *Schultz v. Paradise Cruises, Ltd.*, supra, (SJ by defendant based on release denied); *Resner v. Arctic Orion Fisheries*, 83 F.3d 271 (9th Cir. 1996) (release defense rejected after bench trial by J. Dwyer, upheld on appeal).

*Resner*, supra, bears similarities to the case at bar. In that case an unrepresented seaman released his claims for amputation of four fingers and attempted to return to work, but then found that his injuries prevented his return. A bench trial

resulting in judgment overturning the release was upheld in part because

The consideration paid, \$16,200, was plainly inadequate for the loss of four fingers. Although that factor standing alone cannot invalidate the release, the vessel owner's burden of proof becomes "particularly heavy where the consideration is inadequate." [citations omitted]

The manner in which the amount of consideration was determined is further evidence of Resner's lack of comprehension. Although Resner himself suggested the amount, he based his offer not on an informed evaluation of his damages

The court went on to cite the lack of any give and take negotiation over amount as a significant factor showing lack of full understanding. At bar defendant's HR person, Jackie Little, claims she suggested that the compensation would be 2 trips and that there was no negotiation. See Little dep p. 127 ln 14 – 128 ln 8 (quoted at p. 9 supra)

*Thorman v. American Seafoods Co.*, 421 F.3d 1090 (9th Cir. 2005) reaffirmed the continuing validity of the owner's fiduciary duty to disclose all relevant facts under *Garrett* though finding no fiduciary relation in the context of the non-injury contract dispute involved in *Thorman*.

**(Issue 1 c.) The fact that the seaman had counsel and knew of the release when he negotiated a final payment didn't waive issue over the effectiveness or enforceability of the Release and ratify the settlement, given the owner's quasi-fiduciary relation to the seaman. The owner's lack of conclusive evidence that plaintiff intended to ratify the settlement with full knowledge of his rights and all relevant facts requires that the issue be resolved at trial.**

Enforceability of a seaman's release is a matter of substantive maritime law, and cannot be limited or altered by state law contract ratification principles. In *Smith v. Pinell*, 597 F.2d 994 (5 Cir 1979). A review of the Ninth Circuit decisions overturning seamen's releases does not reveal any discussion of ratification, even where the claimant accepted the consideration. See *Orsini v. O/S Seabrooke*, supra; *Resner v. Arctic Orion Fisheries*, supra.

While plaintiff has found no maritime cases directly on point he has found one case that is closely analogous. In the trial decision in *Harrington v. Atlantic Sounding Co., Inc.* (E.D.N.Y. 9-11-2007) 06-CV-2900 (NG) (VVP) the trial court held an evidentiary hearing to determine the whether to enforce

an agreement to arbitrate in lieu of court action. The injured seaman had signed the arbitration agreement close to the time of surgery when he was on heavy medications, but had executed addendums months later, and as part of the agreement the seaman had accepted 6 months of compensation at 60% of his \$180/day rate (\$108/d) as an advance against future injury compensation.

The trial court found the Agreement was not enforceable based on federal laws applicable to arbitration agreements informed by the strict requirements for seamen's releases enunciated by *Garret* supra. The trial court rejected defendants' argument that the claimant's acceptance of substantial benefits over 6 months was a Ratification which waived any issues over initial validity, finding

During the six month period that plaintiff accepted these advance payments, however, he was unaware of his legal rights and the unconscionable nature of the Agreement. Therefore, there was no ratification. Accordingly, the Agreement is unenforceable.

Id at 10.

Washington non-maritime cases involving fiduciaries appear to set a similar high standard for ratification to that in *Harrington*, supra. Under Washington law a fiduciary generally cannot use ratification to validate an agreement with his ward or beneficiary where the agreement is otherwise flawed due to lack of disclosure. *Ward v. Richards & Rossano, Inc.*, 51 Wn. App. 423 (1988). (Modification of contingent agreement to increase contingency for appeal was not allowed); *State Ex Rel. Hayes v. Keypoint Oyster*, 64 Wn.2d 375 (1964) (corporation cannot ratify a breach of fiduciary duty absent full and complete disclosure is of all relevant facts by the fiduciary and an intentional relinquishment by the corporation of its rights *after* the full disclosure); *Simburg, Ketter v. Olshan*, 97 Wn. App. 901 (1999) (fee accommodation involved because fiduciary must prove full disclosure of all relevant facts before ratification established).

At bar there is an issue similar to that in *Harrington* whether plaintiff knew and understood the legal shortcomings of the Release at the time he accepted the payment. Because the Release was an affirmative defense plaintiff's relevant knowledge was defendants' burden to prove. Plaintiff denied any intention to ratify or accept the settlement. While defendants proved by their 9/8/08 letter that before he cashed the 7/11/08 check plaintiff had notice that defendants considered this a final settlement payment, they have provided no direct evidence that plaintiff was fully aware of all his rights including potential defenses to the release, and that he knowingly opted to waive these rights. Defendants only "evidence" on these points was the presumption flowing from plaintiff's legal representation at the time.

Apart from the legal points regarding defenses to the release, plaintiff didn't even have all the relevant facts at the time of his acceptance of the payment. The details of the government seizure and payment based thereon were only

revealed by defendants after plaintiff had changed lawyers and filed motion to compel discovery months after plaintiff negotiated the settlement check. Plaintiff also had not deposed Ms. Little and Ms. Olson at the time of negotiation of the check and had not learned important details about such issues as defendants prior knowledge of the problems with trip 1 consideration, and the likelihood that defendants would have paid the same consideration as an advance without a Release.

Based solely on plaintiff's Declaration there was an issue of fact whether plaintiff knowingly and intentionally relinquished his rights to challenge the settlement when he negotiated the check.

Note that defendants could easily have mooted these issues by requiring plaintiff to sign a new Release acknowledging the previous consideration plus the 7/11/08 check as full consideration for a settlement and Release. They did not do that, and have offered no explanation why not.

Plaintiff's explanation is simple. Defendants hoped to obtain ratification of what they knew to be an unenforceable release by unethically mailing a check directly to a plaintiff they knew was represented and hoping to trick him into taking the bait.

Plaintiff's evidence on reconsideration further strengthens the conclusion that he did not knowingly waive his defenses to the Release and ratify the settlement when he cashed the check, since his lawyer did not advise against cashing the check and did not advise there were substantial defenses to the release.

**(Issue 2) Where defendants' Reply cited liberally from Olson's deposition, which was taken too late to be used in plaintiff's Opposition due to delays caused by Ms. Olson, it was error for the trial judge to decline to consider plaintiff's Surreply material covering that deposition.**

Plaintiff established that Ms. Olsen was defendants' claim agent for this claim and that her testimony was important to various issues regarding the release. Due to her claimed illness (for which no medical evidence was ever provided)

plaintiff was not able to use her deposition while defendants could use both her Declaration and deposition, which they cited liberally in their Reply. CR 56 f) allows continuance of the motion if evidence is unavailable. Under the circumstances it was manifest error and an abuse of discretion to deny plaintiff the chance to use this evidence by admitting the portions of his Surreply and Declaration that concerned her deposition testimony.

**(Issue 3) It was an abuse of discretion to decline to reconsider the dismissal where the seaman provided evidence of his attorney's advice that accepting the final payment would have no effect on his legal position, contrary to what had been presumed by the trial court at summary judgment.**

**Abuse of discretion standard applies.** Under this standard the appellant must show discretion that was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carrol v. Junker*, 79 Wn. 2d. 12 (1971). The cases are more charitable toward reconsideration based on evidence that could not be considered

at the initial hearing or an incorrect legal standard. Compare *Kleyer v. Harborview Med. Center*, 76 Wn. App. 542 (1995) (affirmed denial of reconsideration, no new evidence or mistaken legal application) with *Marriage of Kinnan*, 131 Wn. App. 738 (2006) (reversal, incorrect legal standard and new evidence not considered).

**CR 59 a) 3) Accident or surprise**

Defendant argued that plaintiff's negotiation of the check waived claims that the Release was defective due to lack of competence/understanding at time of execution based on "hornbook law" without other authority. See RP 19 ln 4-9. Per King County Local Rule 7 b) 5) B) iv) "Any legal authority relied upon must be cited." This was a surprise which warranted Reconsideration.

**CR 59 a) 4) New evidence; a) 9) Manifest injustice**

Plaintiff's primary ground for Reconsideration was new evidence. In responding to defendant's motion plaintiff chose to attempt to preserve his statutorily protected attorney client

privilege. See RCW 5.60.060. Plaintiff had good reasons for this, including avoidance of the unseemly situation where former counsel could be called as a witness and placed in a conflicted position where telling the truth about privileged communications would expose him to potential criticism and even potential liability.

However, after being dismissed based on presumed attorney advice to him contrary to the actual advice plaintiff opted to waive his attorney client privilege to the limited extent necessary to get the actual facts before the court. The trial court's implication of plaintiff's informed acceptance and ratification of the settlement and waiver of defenses solely based on the fact that he had an attorney was a surprise which should warrant allowing plaintiff to introduce the actual evidence. Moreover allowing the new evidence was necessary to prevent a substantial injustice. Plaintiff was faced with a Hobson's choice regarding his former attorney's conflicted position and should be not be deemed to have waived his right

to change his mind about asserting the privilege under these facts

Plaintiff's evidence clearly created an issue of fact whether he waived his rights with full knowledge and understanding. Plaintiff testified that he was not advised that could be held to have waived the right to challenge the validity of the release if he negotiated the final part payment check. Instead he was told by an attorney who clearly had one foot out the door that because the check appeared to fulfill the agreed settlement terms it "couldn't do any more harm" for plaintiff to negotiate the check. There is also no evidence that the first attorney laid out the case for breaking the release or explained that such arguments could be deemed waived by negotiating the check.

"Hindsight" about admission of crucial matters of evidence can be the basis for granting new trial or reconsideration based on failure to do substantial justice. See *State v. Marks*, 71 Wn. 2d 295 (1967). While that case

involved child testimony that should have been excluded, the situation at bar where in hindsight the attorney client privilege should have been waived is not so very different. Attorney client privilege is a bedrock principle of our legal system, and not to be waived lightly. As explained above significant problems will be presented waiver in this case due to the conflicted position in which it will place plaintiff's former attorney. Under the circumstances the trial court should have considered the attorney client material in the reconsideration in fairness and to prevent manifest injustice.

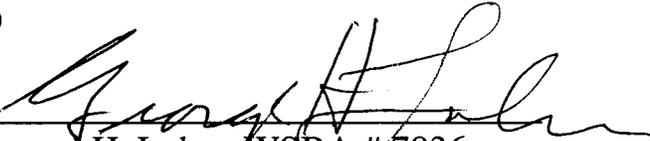
**(Issue 4) Where the Court struck defendants' jury demand it was error to award the cost of the jury demand as a taxable cost.**

Defendants did not reconsider, seek interlocutory appeal, nor cross appeal the trial court's Order striking jury demand. Therefore it was clear error to award the jury demand fee as a taxable cost.

**IV. Conclusion:**

Appellant having shown that the summary judgment and denial of reconsideration were in error, the case should be reversed and remanded for trial.

DATED November 3, 2009

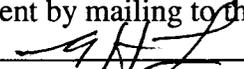
  
George H. Luhrs, WSBA # 7036  
Attorney for Appellant

**V. Appendix**

Appellant's Index to Clerk's Papers . . . . . i - v.

Certificate of Service

I certify that on 11/3/09, the undersigned served a copy of the foregoing document on David Bratz, LeGros Buchanan & Paul, 701 Fifth Avenue, #2500, Seattle, WA 98104 by depositing it in the US mail and filed the document by mailing to this Court on the same date.

  
George H. Luhrs