

Case Number: 68205-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

F/V PREDATOR, INC.,

Plaintiff and Appellant/Cross-Respondent,

v.

HOLMES, WEDDLE & BARCOTT, PC, a Washington professional service corporation;

Defendant and Respondent/Cross-Appellant

APPELLANT'S REPLY BRIEF

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ARGUMENT AND AUTHORITIES

I. The F/V Milky Way was not a constructive total loss upon sinking.

A constructive total loss (“CTL”) occurs when the costs of raising and repairing a vessel exceed its insured agreed value. (CP 1548, ¶9.b). Based upon the calculations performed by expert witness, Andrew Blair, the F/V Milky Way was not a CTL upon sinking—the cost to raise and repair the F/V Milky Way did not exceed its insured value. (CP 1523-1524, ¶ 78-79);(CP 1549-1550, ¶ 12). Furthermore, Predator’s insurers *never* made an affirmative determination that the F/V Milky Way was in fact a CTL upon sinking. In fact, two days after the sinking, on September 16, 2005, an ROV survey of the vessel clearly indicated that the F/V Milky Way was upright, that its hull was intact, and that no damage to the vessel could be seen. (CP 1315-1320).

On September 18, 2005, Predator’s insurance pool, Coastal Marine Fund (“Coastal”), contacted Global Diving & Salvage, Inc. (“Global”) to notify them that the decision had been made by Coastal and Predator to “attempt to *salvage* the vessel.” (emphasis added)(CP 1309-1313). Since the F/V Milky Way was not a CTL, a salvage attempt was the proper course of action, as Predator was obligated under its Hull & Machinery insurance policy to sue and labor to prevent any damage to the vessel for

which its underwriters would have been liable. (CP 1212, lines 144-157); (CP 1548-1549, ¶ 11); *See Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2^d 500, 503 (5th Cir. 1972); *Quigg Brothers-Schermer, Inc. v. Commercial Union Ins. Co.*, 223 F.3^d 997, 1000 (9th Cir. 2000).

II. Because the F/V Milky Way was not a CTL upon sinking, Predator's salvage attempt triggered its Sue and Labor coverage.

Under the Sue and Labor clause of Predator's Hull policy, Predator was *required* to do everything reasonably necessary, with the highest degree of diligence, to protect the F/V Milky Way from further damage or loss. (CP 1548-1549, ¶11);(CP 1535-1536, ¶6(g)). Since no CTL determination was ever made, Predator's salvage attempt through Global constituted Predator's reasonable mitigation of further damage and/or loss to the F/V Milky Way, triggering Sue and Labor coverage pursuant to its Hull policy. (CP 1521, ¶ 43);(CP 1553, ¶ 16);(CP 1536-1537, ¶ 6(i)).

Predator's Hull policy mandated that, in return for Predator's salvage efforts, Coastal and its underwriter, Federal Insurance Company, would pay Sue and Labor expenses equal to the limits of that policy, totaling an additional \$700,000 of insurance coverage. (CP 1212, lines 144-157);(CP 1553, ¶ 16). Even Coastal admitted that Sue and Labor coverage is available in place of wreck removal coverage if a vessel is

salvageable, which the F/V Milky Way clearly was. (CP 1361 46:14-24). Standing alone, the fact that Global's first salvage effort should have been paid pursuant to Predator's Sue and Labor coverage creates a genuine issue of material fact as to whether the Sue and Labor clause was triggered. (CP 1535-1538, ¶(g)-(l));(CP 1553, ¶16).

III. Holmes Weddle committed malpractice by failing to identify and procure available Sue and Labor insurance proceeds on Predator's behalf.

Holmes Weddle's negligent failure to recognize and secure Predator's available Sue and Labor coverage proximately caused Predator to lose supplemental insurance proceeds with which it could have raised the F/V Milky Way. (CP 1526, ¶84). To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction. *Hizey v. Carpenter*, 119 Wn.2d 251, 261 (Wash. 1992). By overlooking Predator's available Sue and Labor insurance proceeds, Holmes Weddle's representation of Predator fell below the requisite standard of care for lawyers in this jurisdiction, causing Predator to suffer significant financial damage, thereby constituting malpractice. (CP 1595, ¶4).

CONCLUSION

Even without an analysis of the conflict of interest that existed between Predator and Coastal, or of Holmes Weddle's multiple breaches of professional conduct, Holmes Weddle's failure to identify, analyze, and obtain Predator's available Sue and Labor insurance proceeds is enough to constitute a genuine dispute of material fact sufficient to defeat Summary Judgment regarding Holmes Weddle's malpractice. As a result, it was error for the Trial Court to award Summary Judgment in this case.

The Trial Court admittedly reviewed and took into account all of Predator's exhibits and expert declarations, including Predator's Supplemental expert Declarations, when making its ruling on Summary Judgment. Viewing all submitted evidence in the light most favorable to Predator, it was in complete error for the Trial Court to rule that no genuine issue of fact existed when it was quite clear that the key facts in this case were entirely in dispute.

For the foregoing reasons, Appellant F/V Predator, Inc. respectfully requests this Court reverse the Trial Court's December 13, 2011 Order Granting Holmes Weddle's Motion for Summary Judgment, and remand this case for consideration of issues still to be resolved by the Trial Court.

Respectfully submitted,

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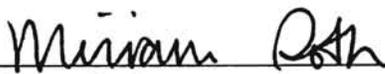
DATED this Friday, May 25, 2012.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing
Appellant's Reply Brief has been made this Friday, May 25, 2012 by
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