

68205-9

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Case Number: 68205-9

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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 BRIEF

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INTRODUCTION

F/V Predator, Inc. (“Predator”) sued the law firm of Holmes, Weddle & Barcott and attorney Philip Sanford (“Sanford”) (collectively referred to as “Holmes Weddle”) on the basis of negligent representation and breach of fiduciary duty committed during Holmes Weddle’s representation of Predator in relation to the 2005 sinking of one of Predator’s commercial fishing vessels, the F/V Milky Way. Namely, Holmes Weddle overlooked available Sue and Labor insurance proceeds, through a Hull & Machinery policy issued to Predator by its insurance pool Coastal Marine Fund (“Coastal”), with which Predator could have raised the sunken vessel. Those insurance proceeds totaled approximately \$700,000.

After the sinking of the F/V Milky Way, Predator contracted with Global Diving & Salvage (“Global”) to raise the vessel. Global was unsuccessful in its attempt to raise the F/V Milky Way. Nonetheless, that salvage attempt generated a bill for approximately \$620,000. Predator’s insurers, including Coastal, disputed amongst themselves which company would be responsible for that bill and, in February 2006, Global sued Predator on the basis of that unpaid bill. Thereafter, Coastal directed Predator to retain Holmes Weddle as Predator’s counsel against Global.

In addition to overlooking Predator's available Sue and Labor coverage, Holmes Weddle simultaneously represented Predator and Coastal despite the existing conflict of interest therein. And, at a 2006 mediation resulting from Predator's third-party lawsuit against its insurers, Holmes Weddle counseled Predator to release Coastal from any and all claims arising from the sinking of the F/V Milky Way, including any and all Sue and Labor claims.

After that settlement, Predator again contracted with Global to attempt to raise the F/V Milky Way. Again, Global was unsuccessful in its efforts to raise the vessel. Nonetheless, Predator's principal, Andrew Blair, who had been present during the entire two-week secondary salvage operation, observed and was informed by Global that, in fact, an additional \$700,000 would have allowed Global to pursue its salvage efforts to raise the vessel on that attempt.

Predator sued Holmes Weddle in December 2010. Holmes Weddle filed for Summary Judgment on October 24, 2011. On January 9, 2012, presiding King County Superior Court Judge Theresa Doyle granted Holmes Weddle's Motion for Summary Judgment.

Judge Doyle's Summary Judgment order is unsustainable and incorrect because the key facts in this case – whether Sue and Labor insurance proceeds were available to Predator, whether a conflict of

interest existed between Predator and Coastal, and whether the F/V Milky Way could have been raised with an additional \$700,000 – are clearly in dispute.

ASSIGNMENTS OF ERROR

A. The Superior Court erred in granting Summary Judgment when it failed to view all facts in the light most favorable to Predator, even though the Superior Court reviewed and took into consideration all exhibits and Declarations, including those Supplemental Declarations, submitted by Predator in Response to Holmes Weddle’s Motion for Summary Judgment.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the Superior Court err in granting Holmes Weddle’s Motion for Summary Judgment, despite the key facts in this case – the availability of Sue and Labor coverage, the conflict of interest between Predator and Coastal, and whether the F/V Milky Way could have been raised with additional insurance proceeds – clearly being in dispute and despite the fact that there was a genuine issue of material fact?

B. Did the Superior Court erroneously apply applicable Sue and Labor case law and commit prejudicial error by granting Holmes Weddle’s Motion for Summary Judgment?

C. Did the Superior Court err in granting Holmes Weddle's Motion for Summary Judgment where, even after taking into account all of Predator's evidentiary submissions, the Superior Court determined that no genuine issues of material fact exist?

D. Did the Superior Court commit reversible error in misinterpreting and misconstruing the evidence of the case, including, but not limited to, the Hull & Machinery policy between Predator and Coastal, and the Declarations and Supplemental Declarations of Predator's expert witnesses?

STATEMENT OF THE CASE

1. Predator's Insurance

From 1993 until 2005, Predator was a member of Coastal, an unincorporated insurance pool for commercial fisherman, managed by Peter Evich. (CP¹ 1519, ¶ 20). Predator was the named insured pursuant to American Institute Hull Clauses (1977) Hull & Machinery and Protection & Indemnity (P&I) insurance policies issued to it by Coastal, underwritten by Federal Insurance Company through Chubb Group ("Federal"). (CP 1196-1248). Predator also maintained pollution insurance through Great American Insurance Company ("GAIC"). (CP 1249-1287).

¹ References to "CP ___" are to the Clerk's Pages.

Predator's Hull policy limits totaled \$700,000 wherein Coastal was responsible for a \$500,000 deductible and Federal was responsible for the remaining \$200,000. (CP 1196-1222). Predator's P&I and Pollution policy limits each totaled \$1,000,000. (CP 1223-1287).

Predator's Hull policy contained an industry standard Sue and Labor provision that obligated Predator to "sue and labor" to save or minimize damage to the F/V Milky Way in case of a loss. (CP 1212, lines 144-157); (CP 1548-1549, ¶ 11). Predator's P&I policy required Federal to cover expenses incurred for compulsory wreck removal unless such costs were covered by Predator's Hull policy. (CP 1225, line 7(b)).

Holmes Weddle was listed as Coastal's attorneys of record in Coastal's "Special Forms and Conditions & Warranties" issued to its members. (CP 1289). Mike Williamson, a former attorney at Holmes Weddle, routinely represented Coastal. (CP 1291).

2. Sinking of the F/V Milky Way

Predator was the owner of the vessel the F/V Milky Way. (CP 1519, ¶ 24). On September 14, 2005, the F/V Milky Way sank off the coast of La Push, Washington, in a national marine sanctuary. (CP 1519, ¶ 25). Soon after the sinking, Williamson, acting on Predator's behalf through Coastal, contacted the National Oceanic Atmospheric Administration ("NOAA") to notify the agency that the F/V Milky Way

had sunk in a national marine sanctuary. (CP 1293). On September 15, 2005, NOAA attorney, Craig O'Connor, emailed Williamson notifying him that NOAA expected the F/V Milky Way to be removed from the marine sanctuary. (*Id.*) No formal removal order for the F/V Milky Way ever issued from either NOAA or the U.S. Coast Guard. (CP 1295, 54:10-15);(CP 1303, 22:18-20).

On September 15, 2005, Coastal contacted Global regarding salvaging the F/V Milky Way. (CP 1309-1313). On September 16, 2005, Global performed an ROV survey of the vessel. (*Id.*) That survey determined that the F/V Milky Way's hull was only "sanded in to the bottom [by] approximately 1 [foot]," and that "the [vessel's] hull and keel appear to be intact." (CP 1315-1320). That survey also indicated that "[n]o damage [to the F/V Milky Way could] be visually seen." (*Id.*)

By September 16, 2005, the F/V Milky Way had not been deemed a CTL. (CP 1327, 24:18-22);(CP 1550-1552, ¶13). On September 18, 2005, Coastal contacted Global to notify them that the decision had been made to "attempt to *salvage* the vessel." (CP 1309-1313). On September 19, 2005, Predator's principal owner, Andrew Blair, along with the assistance of Williamson, executed a contract with Global to salvage the F/V Milky Way. (CP 1521, ¶ 44);(CP 1304, 45:2-4);(CP 1331-1343). Global's contract estimated it would cost \$309,000.00 per day to raise the

F/V Milky Way. (CP 1343). Predator was under the impression that Global could raise the F/V Milky Way in a single day for a total of \$309,000. (CP 1521, ¶43). On September 21, 2005, Global issued to Predator and Williamson its salvage plan of the F/V Milky Way. (CP 1315-1320).

By September 23, 2005, the F/V Milky Way had not yet been deemed a CTL. On September 23, 2005, Edgar Rochelson, Federal's claims adjuster, emailed Williamson writing that "[r]egarding the salvage of the vessel, [Federal] understand[s] the owners of the vessel are interested in buying the wreck and repairing it...If we pay a CTL loss on the vessel it would be our responsibility to dispose of the wreck." (CP 1345);(CP 1552, ¶13(e)). From October 1 through October 3, 2005, Global attempted to raise the F/V Milky Way, but was unsuccessful due to inclement fall weather. (CP 1309-1313). Global's salvage attempt generated a bill of approximately \$641,000. (CP 1347-1350).

3. No Evidence of Actual Total Loss or CTL

Rochelson's analysis of the F/V Milky Way as an actual total loss is flawed and without merit. (CP 1551-1552, ¶ 13.c.1). An actual total loss occurs when a vessel has been completely destroyed or when an insured has been deprived of a vessel without hope of recovery. (CP 1551-1552, ¶ 13.c.1). The very fact that Coastal contacted Global to salvage the

F/V Milky Way indicates that the vessel had not sunk to a depth precluding recovery. (CP 1551-1552, ¶ 13.c.1). In fact, if it had not been for an untimely change in fall weather conditions, the vessel would have been successfully raised during the first attempt in October 2005. (*Id.*) Additionally, Global's initial ROV survey clearly indicated that the F/V Milky Way was relatively undamaged and salvageable. (CP 1309-1320). At a minimum, it is a disputed fact that the F/V Milky Way was ever an actual total loss since the vessel was clearly salvageable.

A CTL occurs when the costs of raising and repairing a vessel exceed its insured agreed value. (CP 1548, ¶9.b). Rochelson testified that, in the case of a CTL, "from a claims perspective, [the insurer's responsibility] would be to collect all the documents necessary to substantiate the loss and the insured value and any loss payee, if there is one, and settle the claim." (CP 1323, 15:9-18). Nonetheless, Holmes Weddle failed to provide any evidence that Coastal, Federal, or Chubb ever hired a surveyor, or calculated the F/V Milky Way's costs of repairs, in order to determine whether the vessel was a CTL either upon sinking or prior to Global's salvage attempt. (CP 1548-1552, ¶ 11; ¶ 13);(CP 1533-1535, ¶6(e)-(f)).

It is in dispute that "all parties involved" agreed that the F/V Milky Way was a CTL upon sinking or before Global's salvage attempt. (CP

1552, ¶ 13.f.1.-f.2);(CP 1536-1537, ¶6(i)). Predator never agreed with its insurers that the vessel was a CTL. (CP 1520, ¶36). In fact, in anticipation of its raising, Mr. Blair obtained both written and verbal repair estimates for the F/V Milky Way. (CP 1352-1359). As a career commercial fisherman, Mr. Blair was accustomed to performing self-repairs on the F/V Milky Way. (CP 1518-1519, ¶17; ¶19). The majority of the F/V Milky Way's repair costs would have been greatly reduced by virtue of Mr. Blair's self-repairs. (CP 1523, ¶75). As a result, the F/V Milky Way could have been raised and repaired for \$580,051, \$119,949 less than the vessel's insured agreed value. (CP 1523-1524, ¶ 78-79);(CP 1549-1550, ¶ 12). Since no CTL determination ever issued from Predator's insurers, whether the F/V Milky Way was a CTL either upon sinking or before Global's first unsuccessful salvage attempt creates, at the least, a genuinely disputed issue of fact.

4. 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)). It is a disputed fact that Predator hired Global strictly to remove its vessel from the marine sanctuary. Predator contracted with Global solely to salvage its sunken

vessel. (CP 1521, ¶ 43);(CP 1536-1537, ¶6(i)). Since no CTL determination was made by Predator's insurers either upon sinking or prior to Global's salvage attempt, that salvage attempt constituted Predator's reasonable mitigation of further damage and/or loss to the F/V Milky Way, triggering Sue and Labor coverage under Predator's 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 Federal 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. (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).

5. J.D. Stahl's Representation of Predator

Predator ultimately looked to its insurers for payment of Global's salvage bill. (CP 1521, ¶ 53). On October 18, 2005, Predator contacted its corporate counsel of record at Mundt MacGregor, LLP, about Global's salvage bill. (CP 1521, ¶ 55);(CP 1368-1369, 32:20-33:3). Predator was

put in contact with maritime litigator, J.D. Stahl. (CP 1521, ¶ 55). On October 25, 2005, Mr. Stahl made introductory phone calls to Williamson and Evich to find out “the status of the salvage and the bills pertaining to the salvage.” (CP 1366-1367 28:25-29:5). Mr. Stahl never made any claims on Predator’s behalf for any insurance payments. (CP 1370, 35:11-13).

On November 7, 2005, Mr. Stahl obtained a copy of Predator’s Hull policy. (CP 1364, 23:17-20). After reviewing that policy and the case of *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2^d 500, 1972 AMC 2151 (5th Cir. 1972), in anticipation of a meeting with Williamson and Evich, Mr. Stahl prepared hand-written notes in which he identified Sue and Labor coverage as a source of payment for Global’s salvage bill. (CP 1380). Mr. Stahl concluded that:

“[Predator] thought if you can get this boat up quickly before, you know, it sits and has the things that saltwater does to engines, that it could be reclaimed...[Predator’s] hope, initially, was to have the vessel raised and rehabilitated..[Predator] thought [the vessel could be raised for less than the agreed value of the hull]...my impression was that [Predator] thought [it] could rehabilitate the vessel. And once I started looking at the insurance side of this, it struck me that until and unless it was clear that it could not be rehabilitated for more than the agreed value, there was some chance that that first salvage effort could legitimately be deemed sue and labor.”

(CP 1374-1376, 93:25-95-25)

On November 8, 2005, Mr. Stahl met with Evich and Williamson. (CP 1365, 26:9-25). In regards to that meeting, Mr. Stahl testified that:

“the basic pitch that both Evich and Williamson had for me, and indirectly for [Predator], was ‘Don’t worry. You’ve got coverage for this bill, but we’re not going to just roll over and write a check to Global for \$600,000 when they only ought to be getting three something, so you’ve got to be patient and let us go through the process of having the adjuster do the adjusting thing’...and that’s what I thought was happening here.”

(CP 1371-1373, 36:12-37:1)

Mr. Stahl failed to inform Predator of the Sue and Labor coverage available to it because he was being told by Evich and Williamson that “[t]here is no coverage dispute. [Predator] does have coverage for this bill.” (CP 1373, 37:16-20). Mr. Stahl “presumed that meant that kind of like me in my very superficial review of is there coverage for this under Sue and Labor, they shared that view...” (*Id.*). Mr. Stahl believes he informed Predator that “having obtained [Predator’s] insurance policies, reviewed them for myself, and then followed up and met with Mr. Evich and Mr. Williamson, that it appeared to me, and was being represented to me by the manager of [Predator’s] insurance fund, that [Predator] had coverage for the Global bill.” (CP 1372, 41:11-16).

Contrary to the assurances of Evich and Williamson, Predator’s insurers disputed responsibility for payment of Global’s salvage bill and

failed to issue payment to Global on Predator's behalf. (CP 1522, ¶ 60). On February 6, 2006, Predator was sued by Global for non-payment of that bill. (CP 1522, ¶ 61). Predator then notified Coastal of the Global lawsuit. (CP 1522, ¶ 62). Evich instructed Predator that, if it wanted to continue communicating with Coastal, Predator must retain Holmes Weddle as its counsel. (CP 1522, ¶63);(CP 1377-1378, 78:24-79:4). Predator agreed to retain Holmes Weddle and, on February 7, 2006, Mr. Stahl tendered defense of Global's claims against Predator to Williamson and Coastal. (CP 1522, ¶ 64);(CP 1532, ¶6(b));(CP 1382).

6. Hull Payment Failed to Terminate Predator's Sue and Labor Coverage

133 days after Global initial's ROV survey of the F/V Milky Way, Predator received full payment from its insurers for an alleged CTL pursuant to its Hull policy. (CP 1384-1388). Pursuant to Predator's Hull policy's "Total Loss" provision, once Predator received the full value of the Hull pursuant to a "Total Loss," that provision terminated. (CP 1248). Nonetheless, Predator never agreed with its insurers that the F/V Milky Way was either an actual total loss or a CTL, nor did it ever tender abandonment of the vessel. (CP 1520, ¶34);(CP 1390-1395). Upon its receipt of full Hull payment, Predator never signed a release of any potential Sue and Labor claims it had against Coastal or Federal. (CP

1522, ¶ 66). Moreover, even if Predator's Hull policy terminated in its entirety upon full Hull payment, that termination only precluded *future* Hull claims generated after that payment. (CP 1538, ¶ 6 (m)-(p)). Absent any accord and satisfaction, and because Predator's salvage effort took place before it received full Hull payment, Sue and Labor coverage was available to Predator when Holmes Weddle assumed representation. (*Id.*). Holmes Weddle's failure to identify, analyze, and investigate Predator's Sue and Labor coverage fell below the standard of care Holmes Weddle owed Predator. (CP 1595, ¶4).

7. Williamson and Sanford

Williamson testified that he did not directly represent Coastal in relation to the sinking of the F/V Milky Way. (CP 1307, 23:1-24). However, Evich has testified that Williamson represented Coastal in regards to the sinking and the record is replete with documentation evidencing Williamson's full representation of Coastal on the matter through June 2008. (CP 1362);(CP 1397-1399).

There were even times during Holmes Weddle's representation of Predator where Sanford and Williamson contemporaneously represented Predator. For example, on October 13, 2006, both Sanford and Williamson appeared on Predator's behalf at a Unified Command meeting with the U.S. Coast Guard regarding the Milky Way's removal. (CP 1401).

Additionally, Sanford and Williamson both submitted their F/V Milky Way billing to Federal for payment with Rochelson refusing to pay Sanford's legal bills since those bills were not incurred by Williamson through Predator's policies with Coastal. (CP 1403-1404). Rochelson testified that he had never seen two lawyers from the same firm represent both the insured and its insurance pool and that Holmes Weddle's representation was "unusual." (CP 1329, 52:7-12). Contrary to Holmes Weddle's assertions below, Williamson represented Coastal regarding the sinking of the F/V Milky Way and this also creates a genuinely disputed fact.

8. Conflict of Interest

Before tendering to Williamson and Coastal, Mr. Stahl informed Predator that, should it retain Holmes Weddle, a potential conflict of interest existed because Holmes Weddles, through Williamson, also represented Coastal. (CP 1406, 122:1-11). The conflict of interest between Predator and Coastal stemmed from the fact that Coastal, as Predator's insurance pool, was liable to Predator for non-payment of Global's salvage bill, and/or because Coastal was obligated to negotiate with Predator's insurers for payment of that bill. (CP 1538-1539, ¶ 6(l),(q)-(s)).

Holmes Weddle argued below that it was somehow absolved from Washington Rule of Professional Conduct (RPC) 1.7 because Mr. Stahl

verbally notified Predator of the potential conflict between Predator and Coastal. However, it was Holmes Weddle's ethical responsibility, not Mr. Stahl's, to appraise Predator of that conflict. (CP 1532-1533);(CP 1538-1539, ¶ 6(c)-(d),(l),(q)-(s)). It was also Holmes Weddle's ethical responsibility to obtain from Predator a written waiver of that conflict. (CP 1538-1539, ¶ 6(c)-(d),(l),(q)-(s)). In breach of its fiduciary duties to Predator, Holmes Weddle admitted that it never advised Predator about the conflict of interest and that it failed to obtain a written and signed waiver of that conflict from Predator.(CP 1408-1412);(CP 1523, ¶69-70).

The conflict of interest between Predator and Coastal fully manifested itself when, without advising Predator, Sanford failed to serve Coastal as a Holmes Weddle in Predator's third-party lawsuit against its insurers for non-payment of Global's salvage bill, even though Coastal was a named Holmes Weddle.(CP 1414-1421);(CP 1523, ¶71);(CP 1532-1533);(1538-1539, ¶ 6(c)-(d), (l), (q)-(s)). Though Williamson testified he never discussed naming Coastal as a Holmes Weddle with Sanford, Sanford (who is now retired from the practice of law) admits that he directly consulted with Williamson about that litigation decision. (CP 1296, 59:19-21);(CP 1305, 39:1-8). In fact, when Sanford asked Williamson about suing Coastal, Williamson advised Sanford that "...it doesn't hurt to name [Coastal]. Peter Evich sure isn't going to care if you

have to name them. He won't care one bit." (CP 1297, 60:16-18). It should go without saying that conflicts of interest exist when two attorneys from the same firm knowingly agree with each other to represent both sides of "the v" for their own financial advantage.

Since Holmes Weddle brought claims on behalf of Predator against Coastal (while at the same time representing Coastal) it is a disputed fact as to whether there was a conflict of interest therein.

9. Holmes Weddle's Breach of Duty of Care

Holmes Weddle admits it never discussed with Predator Sue and Labor coverage as a source of payment for Global's salvage bill. (CP 1428). Holmes Weddle was obligated to notify Predator that additional coverage was available to it under Sue and Labor coverage. (CP 1532); (CP 1533-1536);(CP 1538);(CP 1539, ¶ 6(c),(e)-(g),(l),(s)). Despite this, the record is clear that, while trying to obtain payment for Global's salvage bill and asserting third-party claims against Predator's insurers, Sanford never investigated whether the F/V Milky Way was in fact a CTL upon sinking. (*Id.*) There is no evidence that Sanford ever investigated or obtained estimates for the costs to raise and repair the F/V Milky Way. (*Id.*) Even though Predator's salvage effort took place before full Hull payment, there is absolutely no evidence that Sanford *ever* even

considered Sue and Labor as a source of payment for Global's salvage bill. (CP 1532);(CP 1533-1536);(CP 1538);(CP 1539, ¶ 6(c),(e)-(g),(l),(s)).

The lawsuit between Global and Predator settled in June 2006, with Federal and GAIC both contributing payment to satisfy Global's salvage bill from Predator's P&I and Pollution coverage. (CP 1442-1443). On December 20, 2006, mediation occurred between Predator, Federal, and GAIC in Predator's third-party lawsuit. (CP 1445-1452). At that mediation, Sanford negligently advised Predator to release its insurers from any and all claims arising from the sinking of the F/V Milky Way, including any potential Sue and Labor claims it may have had against Coastal. (CP 1523, ¶73). Sanford breached his duty of care to Predator by negligently advising Predator to release its Sue and Labor claims against Coastal, ultimately resulting in Predator's loss of additional insurance proceeds it could have used to raise the F/V Milky Way. (CP 1595, ¶4).

10. Second Salvage Effort

The resulting Settlement Agreement between Predator and its insurers mandated that Federal and GAIC contribute to a second effort to raise the F/V Milky Way until Predator's policy limits were exhausted. (CP 1445-1452). Predator's insurers hired Meredith Management Group (MMG) to coordinate the second salvage effort of the F/V Milky Way. (CP 1445-1452). MMG contracted with Titan Salvage Co. (Titan) and

Global to raise and remove the vessel from the marine sanctuary. (CP 1454-1470). Global performed another ROV of the vessel in May 2007 and operations to remove the F/V Milky Way began in August 2007. (CP 1472-1475);(CP 1477-1485). Before that second salvage effort was completed, Federal and GAIC's policy limits were exhausted and Predator was held liable for the resulting cost overruns. (CP 1299-1301, 73:2-75:15). Most importantly, on August 24, 2007, the last day of Global's and Titan's removal effort, Mr. Blair was informed by a Global representative that, if Global would have had an additional \$700,000, Global could have in fact raised the F/V Milky Way. (CP 1526, ¶84);(CP 1592-1593, ¶3- 7); (CP 1483). Ultimately, Global and Titan sealed the F/V Milky Way's fuel vents and the vessel was left to sit in the marine sanctuary. (CP 1483).

Predator eventually purchased a replacement vessel, the F/V Lisa Marie, for approximately, \$1,000,000. (CP 1527, ¶92). As a result of not being able to raise the F/V Milky Way, Predator lost three fishing seasons' worth of revenue, in addition to losing valuable catch histories and licenses by not having used the F/V Milky Way to fish. (CP 1527, ¶ 93).

11. Sanford's Second Lawsuit against Predator's Insurers

On February 8, 2008, Sanford filed suit against Federal and GAIC for bad faith, breach of fiduciary duties, and violations of Washington's Consumer Protection Act, all resulting from the second salvage attempt of

the F/V Milky Way. (CP 1487-1492). In that Complaint, Sanford again alleged that Coastal, Federal, and GAIC were obligated to pay Global's outstanding salvage bill. (CP 1489, ¶ 3.6). Michael Barcott, one of Holmes Weddle's managing partners, has testified that this was a frivolous lawsuit since "[Predator's]...desire was...to have [its] boat back, and that was never going to be accomplished. And [Predator] was never going to be satisfied with the litigation, and it was leading inevitably to dissatisfaction with [Sanford's] representation." (CP 1497, 112:19-24). Sanford's filing of a frivolous lawsuit is a direct violation of RPC 3.1.

On November 21, 2008, the Court assessed a \$4,880 Discovery violation against Sanford and Predator for failing to make timely Initial Disclosures to Federal and GAIC. (CP 1499-1500). Holmes Weddle never notified Predator of that Discovery sanction. (CP 1527, ¶90-91);(CP 1494-1496, 92:23-94:1). Holmes Weddle's failure to inform Predator of that sanction constitutes a violation of RPC 1.4.

On January 29, 2009, Sanford filed a Motion to Withdraw from his representation of Predator. (CP 1502-1504). On February 12, 2009, the Court granted Sanford's Motion to Withdraw. (CP 1506-1507). On December 30, 2009, Judge Ronald B. Leighton dismissed Predator's lawsuit against Federal and GAIC, explaining in that Dismissal Order that the case had been filed in the wrong Court because Predator's claims were

actually tort claims as alleged by Sanford, and not maritime in nature. (CP 1509-1512). Sanford's filing in the wrong court constitutes a violation of RPC 1.1.

On March 9, 2010, Predator notified Holmes Weddle via letter that Holmes Weddle had committed malpractice during their representations of Predator. (CP 119). On April 2, 2010, Barcott characterized Sanford's professional negligence in an email to the other partners, ultimately concluding that:

[Sanford] has had his share of problems in the last year and it appears to me that he continues to make very stupid mistakes. I would like to have a meeting to talk about inviting him to move up his timetable [for departure from the firm]... We are to the point where the associates are "ratting" him out.

(CP 135)

In September 2010, Sanford left Holmes Weddle and stopped practicing law altogether.

12. Superior Court Proceedings

On December 2, 2010, Predator sued Holmes Weddle, alleging professional negligence and professional misconduct, seeking its lost Sue and Labor proceeds and damages as a result of the loss of the F/V Milky Way. Predator's Complaint (CP 1-9).

a. Summary Judgment Proceedings

On October 24, 2011, Holmes Weddle filed for Summary Judgment, alleging, among other things, that the alleged Sue and Labor proceeds were never available to Predator because the F/V Milky Way was a CTL upon sinking. (CP 917- 941). On November 28, 2011, Predator responded to Holmes' Weddle Motion for Summary Judgment. On December 7, 2011, Predator filed with the Court the Supplemental Declarations of Andrew Blair and Charles Davis. (RP vol. 16, pp. 1589-1595). On December 9, 2011, oral argument was held on Holmes Weddle's Motion. (CP 1172-1195). At oral argument, Holmes Weddle objected to the Court's review of Predator's Supplemental Declarations, but the Trial Court did not address at oral argument whether it would consider Predator's Supplemental Declarations when making its ruling. On December 13, 2011, Predator filed a Motion to Admit and Consider the Supplemental Declarations of Andrew Blair and Charles Davis in Support of Predator's Opposition to Holmes Weddle's Motion ("Motion to Admit and Consider"). (CP 1597-1620).

On December 13, 2011, Judge Doyle granted Holmes Weddle's Motion for Summary Judgment. (CP 1626-1627). Judge Doyle entered Holmes Weddle's proposed order but left blank the section detailing all of the documents and exhibits she took into account when ruling on the Motion. (CP 1626-1627).

b. Motion for Amended Order

On December 19, 2011, Holmes Weddle filed with the Court a Motion for Presentation of Amended Order on Summary Judgment (“Motion for Amended Order”). (CP 1632-1635). In its Motion for Amended Order, Holmes Weddle argued that, in its Amended Order, the Trial Court should not include as documents it reviewed and considered certain of Predator’s submissions including, but not limited to, Predator’s Supplemental Declarations and various exhibits. (CP 1633-1634).

On January 3, 2012, Predator responded to Holmes Weddle’s Motion for Amended Order. (CP 1636-1640). In its Response, Predator requested that the Trial Court enter an Amended Order indicating that it reviewed and considered all of Predator’s evidentiary submissions, including its Supplemental Declarations, when the Trial Court ruled in favor of Holmes Weddle. (CP 1636-1640). Predator submitted with its Response a Proposed Order that included all of its submissions to the Court, including its Supplemental Declarations (“Predator’s Proposed Amended Order”).

On January 3, 2012, Judge Doyle denied Predator’s Motion to Admit and Consider. (CP 1644-1645). On January 4, 2012, Holmes Weddle filed its Reply in Support of its Motion for Amended Order, again emphasizing to the Trial Court that it should not enter an Amended Order

memorializing that it took into consideration all of Predator's evidentiary submissions when ruling on Summary Judgment. (CP 1641-1643). Specifically, Holmes Weddle implored the Trial Court to omit from its Amended Order any review of Predator's Supplemental Declarations. (CP 1641). However, on January 9, 2012, Judge Doyle entered Predator's Proposed Amended Order, itemizing those documents, exhibits, and submissions reviewed when ruling on Summary Judgment, including all of Predator's expert witness Declarations, Supplemental Declarations, and exhibits. (CP 1646-1647).

On January 11, 2012, Holmes Weddle filed a Motion for Correction of Amended Order on Summary Judgment ("Motion for Correction"). (CP 1650-1653). In its Motion for Correction, Holmes Weddle requested that the Trial Court strike from its Amended Order on Summary Judgment those entries reflecting that the Trial Court reviewed the Supplemental Declarations of Andrew Blair and Charles Davis. (CP 1652). On January 11, 2012, Predator filed a Notice of Appeal with this Court. (CP 1652-1658). On January 20, 2012, Predator responded to Holmes Weddle's Motion for Correction, arguing that, pursuant to CR 60(a), the Trial Court could not make a substantive amendment to its Amended Order. (CP 1659-1664). On February 1, 2012, the Trial Court denied Holmes Weddle's Motion for Correction, affirming its review of

all of Predator's evidentiary submissions regarding its ruling on Summary Judgment.

STANDARD OF REVIEW

The standard of review for an appeal from the grant of summary judgment is de novo, with the appellate court to engage in the same inquiry as the trial court, viewing the evidence and all reasonable conclusions and inferences drawn from it in the light most favorable to the nonmoving party. *City of Spokane v. County of Spokane*, 2006 Wn.2d (Docket Number 77723-3 filed November 16, 2006) (Summary Judgment denied, requiring new transfer agreement to support creation of a new city municipal court under RCW 3.46.150); *Grimsrud v. State of Washington*, 63 Wn. App. 546, 549; 821 P.2d 513 (1991); *Cascade Auto Glass, Inc. v. Progressive Casualty Ins. Co.*, 2006 Wn. App. (33780-1-II); *Heather Anderson, et al v. King County, et al*, 158 Wn.2d 1, 13; 138 P.3d 963 (2006); *Kenneth McClarty v. Totem Electric*, 157 Wn.2d 214; 137 P.3d 844, 847 (2006).

ARGUMENT AND AUTHORITIES

I. PREDATOR'S SALVAGE ATTEMPT TRIGGERED SUE AND LABOR COVERAGE

Predator contracted with Global to salvage the F/V Milky Way and, regardless of a post-salvage CTL determination and NOAA's

removal expectations, Predator's effort to save the F/V Milky Way triggered Predator's Sue and Labor coverage under its Hull policy. It was error for the Trial Court to rule that no genuine issue of material fact existed regarding the availability of Predator's Sue and Labor coverage and, as a result, that Court's order should be reversed.

Claims payable under an insured's Hull policy are exempt from being paid pursuant to the insured's P & I policy. *Quigg Brothers-Schermer, Inc. v. Commercial Union Ins. Co.*, 223 F.3^d 997 (9th Cir. 2000). Sue and Labor expenses are part of the Hull coverage and are excluded from P&I coverage. *Id.* "Sue and labor expenses...are sums spent by the insured...in an effort to mitigate damage and loss once an accident has occurred; and the insurance company pays them *even where...the ship is ultimately declared a total loss, in order to encourage diligence in the prevention of excessive liability or loss.*" See *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2^d 500, 503 (5th Cir. 1972); *Quigg Bros.* at 1000 (Emphasis added). However, the subjective intent of the insured does not control determination of coverage. *Quigg Bros.* at 1001.

In *Quigg Bros.*, Quigg Brothers-Schermer, Inc. ("Quigg Brothers") owned two vessels that broke from their moorings and stranded on a beach adjoining waters of a marine sanctuary. *Id.* at 998. The vessels'

positions created environmental threats punishable by fines and penalties from the Federal government. *Quigg Bros.* at 998. Quigg Brothers acted quickly to secure and tow the barges back to its yard for repair. *Id.* Even though Quigg Brothers tried to construe their salvage efforts as wreck removal expenses payable pursuant to their P&I policy, the Appeals Court determined that:

“[w]here...costs are essential to any attempt to save the vessel, any benefit to the P & I underwriter is incidental and the hull coverage exclusion is effective to avoid P & I coverage...”

Quigg Bros. at 1001 (Emphasis Added).

Predator’s salvage effort is no different than that in *Quigg Bros.* where “[a]lthough the recovery of [the vessel] avoided potential liability for [governmental] fines and penalties, the recovery expenses qualified as sue and labor, which are excluded from the P & I policy.” *Quigg-Bros.* at 1001. Regardless of NOAA’s expectation of removal, Predator’s good-faith effort to save the F/V Milky Way triggered the Sue and Labor provision under Predator’s Hull policy, exempting Federal from paying for that salvage effort pursuant to its compulsory wreck removal obligations under Predator’s P&I policy. (CP 1225, line 7(b));(CP 1533-1535, ¶ 6(e)-(f)). *See Quigg Bros.* at 997; *see also Seaboard Shipping* at 500.

Even though Predator’s insurers deemed the F/V Milky Way a CTL sometime after Global’s salvage attempt, and even though NOAA

desired the vessel to be removed from the marine sanctuary, a genuine issue of material fact exists where Predator's effort to save the F/V Milky Way triggered Predator's Sue and Labor Coverage for payment of that effort. It was incorrect and a misapplication of applicable case law and Predator's Hull policy for the Trial Court to determine that no genuine issue of material fact existed regarding Predator's Sue and Labor coverage.

II. HOLMES WEDDLE COMMITTED MALPRACTICE

Holmes Weddle's negligent failure to recognize and procure Predator's available Sue and Labor coverage, coupled with Holmes Weddle's negligent instruction to Predator to release its insurers from any Sue and Labor claims, proximately caused Predator to lose supplemental insurance proceeds with which it could have raised the F/V Milky Way. It was error for the Trial Court to determine that no genuine issue of material fact existed regarding Holmes Weddle's negligent misrepresentation of Predator. To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage

incurred. *Lavigne v. Chase, Haskell*, 112 Wn. App. 677, 682 (Wash. Ct. App. 2002). It is undisputed that Holmes Weddle maintained an attorney-client relationship with Predator that gave rise to a duty of care.

a. Holmes Weddle Breached Their Duty of Care to Predator

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). Even though Holmes Weddle entirely failed to recognize it, Mr. Stahl, a 20-year Washington State practitioner, easily identified Sue and Labor coverage as a source of payment for Global's salvage bill. The only reason J.D. Stahl failed to make a Sue and Labor claim is because he was being told by Evich and Williamson that enough coverage existed for payment of Global's salvage attempt. The Trial Court erred in awarding Summary Judgment to Holmes Weddle where a genuine issue of material fact exists, since Holmes Weddle breached their duty of care to Predator, by negligently failing to identify and procure available Sue and Labor coverage resulting from Predator's effort to save the F/V Milky Way.

Holmes Weddle again breached their duty of care to Predator when they negligently advised Predator to release its insurers from any

and all claims resulting from the sinking, including any Sue and Labor claims Predator had against Coastal. Furthermore, Holmes Weddle's emphasis in their Summary Judgment Motion on the fact that lawyers for the insurance companies failed to identify Sue and Labor is entirely irrelevant, since they were not Predator's counsel and it was clearly not in those lawyers' interests to advocate on Predator's behalf. It is an entirely disputed fact that Holmes Weddle met the requisite standard of care during their representation of Predator since Holmes Weddle negligently advised Predator to release its insurers from available Sue and Labor claims. Accordingly, the Trial Court erred in awarding Summary Judgment to Holmes Weddle.

b. Holmes Weddle's Negligence Proximately Caused Predator to Lose Supplemental Insurance Proceeds

Holmes Weddle's negligence proximately caused Predator to lose an additional \$700,000 of insurance proceeds with which it could have raised the F/V Milky Way. Proximate cause consists of two elements: cause in fact and legal causation. *Lavigne v. Chase, Haskell*, 112 Wn. App. 677, 682 (Wash. Ct. App. 2002). "Cause in fact refers to the 'but for' consequences of the act, that is, the immediate connection between an act and an injury." *Id.* at 683. As a determination of what actually occurred, cause in fact is generally left to the jury...such questions of fact are not

appropriately determined on summary judgment unless but one reasonable conclusion is possible. *Hartley v. State*, 103 Wn.2d 768, 778 (Wash. 1985). “Legal causation depends on the mixed considerations of logic, common sense, justice, policy, and precedent.” *Id.* at 779. In the legal malpractice context, proximate cause boils down to whether the client would have fared better but for the attorney's negligence. *Lavigne* at 683.

Predator's salvage effort triggered its Sue and Labor coverage and, but for Holmes Weddle's negligence, Predator would have obtained an additional \$700,000 with which it could have raised the F/V Milky Way. (CP 1526, ¶84). In fact, Global notified Mr. Blair that an additional \$700,000 would have raised the F/V Milky Way on Global's final attempt to salvage that vessel. (*Id.*). Equity and logic demand that Holmes Weddle be held accountable for their negligence because Holmes Weddle allegedly possessed the knowledge and skills necessary as attorneys to procure all available insurance proceeds on Predator's behalf, which Holmes Weddle entirely failed to do. Holmes Weddle's negligence proximately caused Predator to lose additional insurance proceeds and Holmes Weddle arguing otherwise, at a minimum, creates a genuinely disputed fact and it was error for the Trial Court to determine otherwise.

c. Predator Incurred Substantial Damages as a Result of Holmes Weddle's Malpractice

Holmes Weddle's negligence proximately caused Predator to lose \$700,000 of insurance proceeds under its Hull policy with which it could have raised the F/V Milky Way. The Trial Court was incorrect to rule that no genuine issue of material fact existed regarding damages Predator suffered as a result of Holmes Weddle's negligence misrepresentation. The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson v. Weidenkopf*, 101 Wn. App. 472, 484 (Wash. Ct. App. 2000). Holmes Weddle's reference to Rochelson's testimony that Federal would have not paid out on a Sue and Labor claim is a disputed fact—Sanford has boasted his efforts to achieve payment from Predator's other insurers for not only his own attorneys fees, but for a second effort to raise the F/V Milky Way. (CP 1298, 70:10-14). As Predator's attorney, Sanford was obligated to perform the same negotiations with Coastal and/or Federal regarding Predator's Sue and Labor coverage, which he negligently failed to do, ultimately resulting in a loss to Predator of an additional \$700,000 with which it could have subsequently raised the F/V Milky Way. After admittedly reviewing all exhibits and declarations submitted by Predator, it was improper for the Trial Court to rule in favor of Holmes Weddle on Summary Judgment regarding Predator's damages.

III. HOLMES WEDDLE BREACHED THEIR FIDUCIARY DUTIES TO PREDATOR

The Trial Court erred in ruling that no genuine issues of material fact remain wherein Holmes Weddle breached their fiduciary duties to Predator by simultaneously representing Predator and Coastal, and by routinely violating multiple RPCs during Predator's representation. Breach of fiduciary duty is based upon: 1) the existence of a duty owed; 2) breach of that duty; 3) resulting injury; and 4) that the breach proximately caused the injury. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 434 (2002).

In much of their daily work, lawyers act as a fiduciary for the client, in that they have a duty to act in and for the client's best interests at all times and to act in complete honesty and good faith to honor the trust and confidence placed in them. These duties require full communication and candor, as well as performance meeting professional standards. A review of the Washington Rules of Professional Conduct suggests that most cases of proven legal malpractice will involve a breach of one or more fiduciary duties. The attorney-client relationship is a fiduciary one as a matter of law, and, thus, the attorney owes the highest duty to the client.

Kelly v. Foster, 62 Wn. App. 150, 154-155 (Wash. Ct. App. 1991).

Holmes Weddle breached their fiduciary duties to Predator when, without obtaining a written signed waiver from Predator, in violation of RPC 1.7, they simultaneously represented Predator and Coastal despite

the existing conflict of interest. Even before naming Coastal as a defendant, Sanford consulted with Williamson, and the two flew in the face of their ethical obligations by agreeing to represent Predator and Coastal while pitting the two against each other for Holmes Weddle's own financial benefit. Holmes Weddle's arguments about Predator's and Coastal's legal identities are all rendered moot by virtue of Holmes Weddle's admissions that Coastal was liable to Predator for payment of Global's salvage bill. (CP 1414-1421);(CP 1487-1492).

Disputed facts are also created by Holmes Weddle's violations of RPCs 1.1, 1.4, 3.1, and 8.4., wherein: Holmes Weddle's incompetently failed to recognize and obtain Sue and Labor coverage on Predator's behalf; Holmes Weddle failed to communicate with Predator regarding naming Coastal, but failing to serve Coastal; Holmes Weddle failed to communicate to Predator that Sanford and Predator incurred a Discovery sanction during Predator's representation; Holmes Weddle negligently filed a frivolous lawsuit in the wrong court; and where Holmes Weddle routinely violated the RPCs. Holmes Weddle's ethical violations ultimately caused Predator to lose supplemental insurance proceeds and at least \$90,000 in legal fees.

In their Motion for Summary Judgment, Holmes Weddle attempted to argue that they should be held to a higher standard of

malpractice than that applied to civil litigators. (CP 934). However, the malpractice standard set out in *In re pers. Restraint of Lord*, 123 Wn.2d 296 (1994) applies only in a criminal context in which:

[in order to show that counsel's assistance was so defective as to require reversal of a conviction or death sentence], a convicted Holmes Weddle [must show] two components[:] First, the Holmes Weddle must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the Holmes Weddle by the Sixth Amendment. Second, the Holmes Weddle must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Holmes Weddle of a fair trial, a trial whose result is reliable. Unless a Holmes Weddle makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (U.S. 1984).

It is clear that the civil malpractice burden of proof is much more relaxed than that of the criminal standard of "ineffective assistance of counsel," and that criminal standard is entirely inapplicable to Holmes Weddle's professional misconduct in this case. *Halverson v. Ferguson*, 46 Wn.App.708 (1986) is also inapplicable to Holmes Weddle's malpractice because principles of Sue and Labor are well-settled by both maritime insurance and by applicable case law. Furthermore, no arguable

interpretations of unsettled law were required for Holmes Weddle to be able to identify available Sue and Labor coverage.

The very essence of Holmes Weddle's malpractice and ethical misconduct is that they entirely failed to investigate and make informed judgments regarding the possibility of Predator's available Sue and Labor coverage while committing various ethical violations during Predator's representation. The Trial Court was ultimately wrong in ruling that no genuine issue of material fact exist regarding Holmes Weddle's ethical violations during their representation of Predator.

IV. PREDATOR TIMELY FILED ITS CLAIMS

Predator filed its malpractice claims against Holmes Weddle approximately two years before the applicable statute of limitations and, therefore, Predator's claims are not time-barred. In Washington State, malpractice claims have a three-year statute of limitations. RCW 4.16.080(3). The "continuous representation" rule tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred. *Hipple v. McFadden*, 161 Wn. App. 550, 557 (Wash. Ct. App. 2011). In general, the determinative event for the continuous representation rule is when the representation ended. *Hipple* at 558. The inquiry is not whether an attorney-client relationship ended but when the representation of the

specific subject matter concluded. *Id.* Termination does not require formally withdrawing as counsel; de facto termination can be implied from circumstantial evidence. *Id.* As there is no bright-line rule for determining when representation ends, particular circumstances most often present an issue of fact. *Id.* Sanford withdrew from Predator’s representation on February 12, 2009, but representation of the underlying subject matter did not end until December 30, 2009. Therefore, at the earliest, Predator had until February 12, 2012, to file its claims. Using the continuous representation rule, Predator’s claims are timely as they were filed on December 2, 2010, and it was error for the Trial Court to rule otherwise.

In addition to the continuous representation rule, “[t]he discovery rule has consistently been applied to toll the statute of limitations until the predator discovers, or should have discovered, his injury resulting from professional malpractice. *Richardson v. Denend*, 59 Wn. App. 92, 96; 795 P.2d 1192 (1990), review denied, 116 Wn.2d 1005 (1991). According to the discovery rule, “upon entry of an *adverse judgment at trial* a client is charged with knowledge, or at least is put on notice, that his or her attorney may have committed malpractice in connection with the representation.” *Richardson* at 98 (Emphasis added). The application of

the discovery rule is generally a factual question. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482, 3 P.3d 805 (2000).

It is a disputed fact that Predator became aware of Holmes Weddle's malpractice as early as June 12, 2007, since litigation over the F/V Milky Way did not fully conclude until well into 2009. Predator received its first adverse judgment in the F/V Milky Way litigation on December 30, 2009, when Judge Leighton dismissed Predator's second lawsuit against its insurers as a result of Sanford's failing to file in the correct court. It is insincere for Holmes Weddle to argue that Predator received an adverse judgment on June 12, 2007, since that mutual voluntary dismissal was the result of a settlement between the parties for a second salvage effort. Therefore, as a matter of law, pursuant to the discovery rule, Predator knew or should have known of Holmes Weddle's malpractice by December 30, 2009, giving it until December 30, 2012, to file its claims. Since Predator filed this lawsuit on December 2, 2010, Predator's claims are timely under the discovery rule.

V. BECAUSE THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT, THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT

Summary judgment is appropriate only when the pleadings, affidavits, and depositions show there are no issues of material fact and that the moving party is entitled to judgment as a matter of law. *Ruff v.*

County of King, 125 Wn.2d 697, 703; 887 P.2d 886 (1995). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194; 1197 (9th Cir. 1996); *Kenneth McClarty v. Totem Electric*, 157 Wn.2d 214; 137 P.3d 844, 847 (2006). A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact finder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* at 251-252. The moving party bears the burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Hash v. Children's Orthopedic Hospital and Medical Center*, 49 Wn. App. 130; 741 P.2d 584, 585 (1987) Once the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue for trial. *Anderson* at 250.

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. Moreover, the Trial Court had the opportunity, based

on Holmes Weddle's Motion for Amended Order, to notify this Court that it had excluded Predator's evidentiary submissions when ruling on Summary Judgment, an opportunity it affirmatively rejected when it entered Predator's proposed order rather than Holmes Weddle's. Pursuant to the Summary Judgment standard, the Trial Court should have viewed all evidence in the light most favorable to the non-moving party and should have drawn all reasonable inferences in that party's favor. 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 – the existence of Sue and Labor coverage, whether a conflict of interest existed between Predator and Coastal, and whether the F/V Milky Way could have been raised with an additional \$700,000 -- were entirely in dispute.

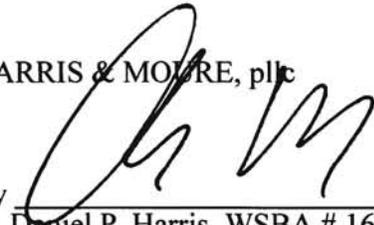
CONCLUSION

For the reasons stated above, 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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By



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DATED this Monday, April 16, 2012

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of Appellant's Brief has been made this Monday, April 16th, 2012, by sending a copy thereof via hand-delivery to:

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Signed at Seattle, Washington this Monday, April 16, 2012.


Brittany Benson