

68205-9

68205-9

Case No. 68205-9

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

F/V PREDATOR, INC.,

Appellant,

v.

HOLMES WEDDLE & BARCOTT, P.C., an Alaska Professional  
Corporation, and PHILIP W. SANFORD,

Respondents.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR 25 PM 1:39

---

BRIEF OF RESPONDENTS

---

Matthew C. Crane, WSBA No. 18003  
Mark A. Krisher, WSBA No. 39314  
Attorneys for Respondents Holmes Weddle  
& Barcott, P.C., and Philip W. Sanford  
BAUER MOYNIHAN & JOHNSON, LLP  
2101 Fourth Avenue, Suite 2400  
Seattle, Washington 98121  
Telephone: 206-443-3400  
Facsimile: 206-448-9076  
E-mail: mccrane@bmjlaw.com  
E-mail: makrisher@bmjlaw.com

**TABLE OF CONTENTS**

**I. INTRODUCTION . . . . . 1**

**II. ASSIGNMENT OF ERROR . . . . . 1**

**III. STATEMENT OF THE CASE . . . . . 2**

    A. Predator’s Insurance . . . . . 2

    B. Sue and Labor and Wreck Removal Coverage . . . . . 3

    C. The Sinking and Global’s First Wreck Removal Effort . . . . . 4

    D. The Vessel Was a Total Loss; Predator Was Paid \$700,000 . . . . . 6

    E. Predator Hired Counsel, J.D. Stahl . . . . . 8

    F. Global’s Lawsuit and Predator’s Third-Party Complaint . . . . . 8

    G. The Second Wreck Removal Effort . . . . . 11

    H. The Second Federal Litigation . . . . . 11

    I. The Malpractice Lawsuit . . . . . 12

**IV. ARGUMENT . . . . . 14**

    A. Summary of Argument . . . . . 14

    B. Standard of Review . . . . . 15

    C. Predator Failed to Raise a Genuine Issue of Material Fact as to Whether Sanford and HWB Breached Their Duty of Care . . . . . 18

    D. Predator Failed to Raise a Genuine Issue of Material Fact as to Whether Sanford and HWB Breached Their Fiduciary Duties . . . . . 29

**TABLE OF CONTENTS (CONT.)**

E. Predator Failed to Raise a Genuine Issue of Material Fact and Failed to Make a Showing Sufficient to Establish Causation . . . . .	35
F. Predator Failed to Raise a Genuine Issue of Material Fact and Failed to Make a Showing Sufficient to Establish it Incurred Damages . . . . .	39
G. Predator’s Claims are Barred by the Statute of Limitations . . . . .	41
<b>V. CONCLUSION . . . . .</b>	<b>45</b>

## TABLE OF AUTHORITIES

### Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 202, 11 P.3d 762 (2000) . . . . .	2
<i>Am. Marine Ins. Group v. Neptunia Ins. Co.</i> , 775 F. Supp. 703 (S.D.N.Y. 1991), <i>aff'd</i> , 961 F.2d 372 (2d Cir. 1992) . . . . .	6
<i>Am. Title Ins. Co. v. Lacelaw Corp.</i> , 861 F.2d 224 (9th Cir. 1988) . . . . .	20
<i>Anderson v. Petridge</i> , 45 Wn.2d 299, 274 P.2d 352 (1954) . . . . .	20
<i>Blasser Brothers, Inc. v. Northern Pan-American Line</i> , 628 F.2d 376 (5th Cir. 1980) . . . . .	19
<i>Brill v. Swanson</i> , 36 Wn.App. 396, 674 P.2d 211 (1984) . . . . .	15
<i>Burkheimer v. Thrifty Inv. Co., Inc.</i> , 12 Wn.App. 924, 533 P.2d 449 (1975) . . . . .	40
<i>Burns v. McClinton</i> , 135 Wn. App. 285, 143 P.3d 630 (2006), <i>rev. den.</i> , 161 Wn.2d 1005 (2007) . . . . .	44, 45
<i>Burt v. Heikkala</i> , 44 Wn.2d 52, 265 P.2d 280 (1954) . . . . .	2
<i>Carr v. Northern Beneficial Ass'n</i> , 128 Wn. 40, 221 P. 979 (1924) . . . . .	31, 32
<i>Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.</i> , 129 Wn. App. 810, 120 P.3d 605 (2005), <i>rev. den.</i> , 157 Wn.2d 1004 (2006) . . . . .	45
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) . . . . .	15
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987) . . . . .	2

## TABLE OF AUTHORITIES (CONT.)

### Cases (cont.)

<i>Continental Food Prod., Inc. v. Ins. Co. of North America</i> , 544 F.2d 834 (5th Cir. 1977) . . . . .	19
<i>Continental Ins. v. Lone Eagle Shipping</i> , 952 F. Supp. 1046 (S.D.N.Y. 1997), <i>aff'd</i> 134 F.3d 103 (2d Cir. 1998) . . . . .	19
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986) . . . . .	16, 17, 39
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992) . . . . .	29
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998) . . . . .	15, 17, 39
<i>Glesener v. Balholm</i> , 50 Wn. App. 1, 747 P.2d 475 (1987) . . . . .	17
<i>Griswold v. Kilpatrick</i> , 107 Wn. App. 757, 27 P.3d 246 (2001) . . . . .	16, 24, 31, 37
<i>Guntheroth v. Rodaway</i> , 107 Wn.2d 170, 727 P.2d 982 (1986) . . . . .	38
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978) . . . . .	43
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 735 P.2d 675 (1986), <i>rev. den.</i> , 108 Wn.2d 1008 (1987) . . . . .	33, 34
<i>Hill v. Dep't of Labor &amp; Indus.</i> , 90 Wn.2d 276, 580 P.2d 636 (1978) . . . . .	43
<i>Hines v. Data Line Sys., Inc.</i> , 114 Wn.2d 127, 787 P.2d 8 (1990) . . . . .	16
<i>Hipple v. McFadden</i> , 161 Wn. App. 550, 255 P.3d 730 (2011) . . . . .	44

**TABLE OF AUTHORITIES (CONT.)**

**Cases (cont.)**

<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992) . . . . .	18
<i>Huff v. Roach</i> , 125 Wn. App. 724, 106 P.3d 268, <i>rev. den.</i> , 155 Wn.2d 1023 (2005) . . . . .	41, 43
<i>In re Kennedy</i> , 80 Wn.2d 222, 492 P.2d 1364 (1972) . . . . .	32
<i>Jacqueline's Washington, Inc. v. Mercantile Stores Co.</i> , 80 Wn.2d 784, 498 P.2d 870 (1972) . . . . .	40
<i>Kim v. Budget Rent A Car Sys., Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001) . . . . .	36
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 588 P.2d 1346 (1979) . . . . .	13
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295, 151 P.3d 201 (2006) . . . . .	17, 36, 39
<i>Marks v. Benson</i> , 62 Wn. App. 178, 813 P.2d 180 (1991) . . . . .	38
<i>Martin v. Northwest Washington Legal Services</i> , 43 Wn. App. 405, 717 P.2d 779 (1986) . . . . .	35
<i>Melville v. State</i> , 115 Wn.2d 34, 793 P.2d 952 (1990) . . . . .	16, 24, 31, 37
<i>Meryhew v. Gillingham</i> , 77 Wn. App. 752, 893 P.2d 692 (1995), <i>rev. den.</i> , 128 Wn.2d 1012 (1996) . . . . .	41
<i>Micro Enhancement Int'l, Inc. v. Coopers &amp; Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002) . . . . .	29
<i>Minahan v. W. Wash. Fair Ass'n</i> , 117 Wn. App. 881, 73 P.3d 1019 (2003) . . . . .	36

**TABLE OF AUTHORITIES (CONT.)**

**Cases (cont.)**

*Perez v. Pappas*,  
98 Wn.2d 835, 659 P.2d 475 (1983) . . . . . 29

*Peters v. Simmons*,  
87 Wn.2d 400, 552 P.2d 1053 (1976) . . . . . 41

*Quigg Bros.-Schermer, Inc. v. Commercial Union Ins. Co.*,  
223 F.3d 997 (9th Cir. 2000) . . . . . 22

*Reliance Ins. Co. v. The Escapade*,  
280 F.2d 482 (5th Cir. 1960) . . . . . 4, 19

*Richardson v. Denend*,  
59 Wn. App. 92, 795 P.2d 1192 (1990),  
*rev. den.*, 116 Wn.2d 1005 (1991) . . . . . 41, 42

*Ruff v. County of King*,  
125 Wn.2d 697, 887 P.2d 886 (1995) . . . . . 17

*Sailor Inc. F/V v. City of Rockland*,  
324 F. Supp. 2d 197 (D. Me. 2004),  
*aff'd*, 428 F.3d 348 (1st Cir. 2005) . . . . . 41

*Schmidt v. Coogan*,  
162 Wn.2d 488, 173 P.3d 273 (2007) . . . . . 35

*Seaboard Shipping v. Jocharanne Tugboat Corp.*,  
461 F.2d 500 (2d Cir. 1972) . . . . . 4, 18, 19

*Seven Gables Corp. v. MGM/UA Entm't Co.*,  
106 Wn.2d 1, 721 P.2d 1 (1986) . . . . . 16, 24, 31, 37

*Sherry v. Diercks*,  
29 Wn. App. 433, 628 P.2d 1336,  
*rev. den.* 96 Wn.2d 1003 (1981) . . . . . 35

*Smith v. Preston Gates Ellis, LLP*,  
135 Wn. App. 859, 147 P.3d 600 (2006) . . . . . 35

*Standard Fin. Co. v. Townsend*,  
1 Wn.2d 274, 95 P.2d 786 (1939) . . . . . 20

**TABLE OF AUTHORITIES (CONT.)**

**Cases (cont.)**

*State v. Lee*,  
144 Wn. App. 462, 182 P.3d 1008 (2008),  
*rev. den.*, 165 Wn.2d 1017 (2009) . . . . . 17, 39

*State v. Young*,  
89 Wn.2d 613, 574 P.2d 1171 (1978) . . . . . 32

*Strom v. M/V WESTERN DAWN*,  
698 F. Supp. 212 (W.D. Wash. 1986) . . . . . 31, 32

*Vacova Co. v. Farrell*,  
62 Wn. App. 386, 814 P.2d 255 (1991) . . . . . 17

*Van Dam v. Gay*,  
280 Va. 457, 699 S.E.2d 480 (2010) . . . . . 42

*Walsh v. Zusei Kaiun*,  
606 F.2d 259 (9th Cir. 1979) . . . . . 31, 32

*Walters v. Hampton*,  
14 Wn. App. 548, 543 P.2d 648 (1975) . . . . . 36

*William G. Hulbert, Jr. and Clare Mumford Hulbert  
Revocable Living Trust v. Port of Everett*,  
159 Wn. App. 389, 245 P.3d 779,  
*rev. den.*, 171 Wn. 2d 1024 (2011) . . . . . 24

*Young v. Key Pharmaceuticals, Inc.*,  
112 Wn.2d 216, 770 P.2d 182 (1989) . . . . . 15, 16

**Statutes**

RCW § 4.16.080(3) . . . . . 41

RCW § 48.01.050 . . . . . 30

**Court Rules**

FRCP 11 . . . . . 34

CR 36 . . . . . 23

**TABLE OF AUTHORITIES (CONT.)**

**Court Rules (cont.)**

CR 56 . . . . .	15, 16, 37, 38
LCR 56 . . . . .	13
RAP 2.4 . . . . .	2
RAP 3.1 . . . . .	2

**Washington Rules of Professional Conduct**

RPC 1.1 . . . . .	29, 32, 33, 34
RPC 1.4 . . . . .	29, 33, 34
RPC 1.7 . . . . .	29, 34
RPC 3.1 . . . . .	29, 34
RPC 8.4 . . . . .	29, 34

**Washington Rules of Evidence**

ER 801 . . . . .	16, 37
ER 802 . . . . .	16, 37

**Other Authorities**

3 Am. Jur. 2d Agency § 273 . . . . .	43
29A Am. Jur. 2d Evidence § 787 . . . . .	20
Leslie L. Buglass, <i>Marine Insurance and General Average in the United States</i> (3d ed. 1991) . . . . .	4, 6, 18, 19
Martin J. Norris, <i>The Law of Salvage § 2</i> (1958) . . . . .	21

## **I. INTRODUCTION**

Summary judgment for defendants Philip W. Sanford and Holmes Weddle & Barcott, P.C. (HWB) was properly granted because the Superior Court correctly concluded that after more than a year of litigation, plaintiff-appellant F/V Predator, Inc. (Predator) was unable to show it could make out a prima facie case. At bottom, Predator's claims of legal malpractice and breach of fiduciary duty are based on the factually and legally meritless contention that Sanford and HWB should have made a "sue and labor" claim under Predator's Hull and Machinery policy.

Predator failed to show it had any admissible evidence of breach of duty, causation, or damages, each of which is an essential element of its claims. Predator's submission of unsupported allegations, speculation, and hearsay statements also failed to raise a genuine issue of material fact. Finally, Predator failed to file its lawsuit prior to the expiration of the statute of limitations. Summary judgment should be affirmed.

## **II. ASSIGNMENT OF ERROR**

Sanford and HWB assign error to the Amended Order Granting Motion for Summary Judgment, CP 1646-1647, insofar as the court below considered inadmissible and/or improperly submitted evidence, including two declarations that Predator moved to admit which the court expressly denied. Such inadmissible evidence should not have been considered in

ruling on the summary judgment motion and should not be considered by this Court on appeal.<sup>1</sup>

### III. STATEMENT OF THE CASE

#### A. **Predator's Insurance.**

For its vessel MILKY WAY, Predator had three marine insurance coverages (with limits in parentheses) relevant to this case: (1) Hull and Machinery (\$700,000) through Federal Insurance Company (FIC), covering physical loss or damage to the vessel; (2) Protection & Indemnity (P&I) (\$1,000,000), also through FIC, covering liability for wreck removal; and (3) Pollution (\$1,000,000) through Great American Insurance Company (GAIC), covering liability for actual or threatened pollution. CP 962-979; CP 1250-1287; App. Br. at 4-5.

Predator was a member of Coastal Marine Fund (CMF), an unincorporated association of fishing vessel owners organized to “create and maintain a fund for the reimbursement of marine losses suffered by members occasioned by those perils specified in the By-laws.” CP 1106.

---

<sup>1</sup> Sanford and HWB were granted summary judgment in their favor, therefore they are not “aggrieved” and have no standing to bring a cross-appeal. RAP 3.1; *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). Nevertheless, as respondents, they may assign error to the trial court’s findings, so long as they do not seek additional relief. RAP 2.4(a); *Burt v. Heikkala*, 44 Wn.2d 52, 54, 265 P.2d 280 (1954) (“Plaintiff may urge the error of a theory or finding of the trial court, in support of a judgment, without cross-appealing.”) (citation omitted); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000) (“A successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court[.]”) (citation omitted).

Under the applicable policies from FIC, both CMF and Predator were identified as insureds. CP 967; CP 962. Predator's \$700,000 Hull and Machinery coverage was subject to a \$500,000 per-occurrence deductible, paid by CMF. CP 970; App. Br. at 5.

As a member of CMF, Predator agreed that "[a]ll parties acknowledge that C.M.F. is not an insurance organization as defined by relevant laws," CP 1106, and that "[a]ll current members are entitled to participate in any meeting of the members." *Id.* Within CMF, each member gets one vote at any membership meeting, whereby members elect a Board of Directors which in turn elects and controls the Manager of the fund. CP 1107. Members contribute to the fund at designated percentages, based on vessel value. CP 1108.

Predator's owner and president, Andrew Blair, was a founding member of CMF in 1993, and Predator paid dues to CMF for the MILKY WAY as well as two other vessels. CP 1024; App. Br. at 4. Accordingly, Predator, as a member of CMF, was entitled to the rights and privileges, including voting power, that all other members of CMF enjoyed.

**B. Sue and Labor and Wreck Removal Coverage.**

Of central importance to this case, Predator's Hull and Machinery coverage contained a particular and ancient marine insurance clause called the "Sue and Labor Clause." CP 973. In marine insurance, sue and labor

charges are expenses incurred by the vessel owner “to minimize or avert a loss” that has occurred and results from a peril covered by the Hull and Machinery policy. Leslie L. Buglass, *Marine Insurance and General Average in the United States* at 354-55 (3d ed. 1991); *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500, 503 (2d Cir. 1972) (“sums spent by the insured or its representative in an effort to mitigate damage and loss once an accident has occurred”). To be payable under the Sue and Labor Clause, the expenses must also be “made primarily for the benefit of the underwriter either to reduce or eliminate a covered loss altogether.” *Reliance Ins. Co. v. The Escapade*, 280 F.2d 482, 488 (5th Cir. 1960).

In comparison, a P&I policy provides liability coverage for removal of a wreck as ordered by the government, but excludes coverage provided by the Hull and Machinery policy. CP 977; CP 1074.

**C. The Sinking and Global’s First Wreck Removal Effort.**

On September 14, 2005, the MILKY WAY was fishing four miles off the Washington coast near La Push and sank in nearly 200 feet of water in the Olympic Coast National Marine Sanctuary. CP 946; CP 948; App. Br. at 5. Diesel fuel oil spilled from the vessel during the sinking, and another 2,500 gallons threatened to spill into the marine sanctuary. CP 946; CP 948. One day after sinking, September 15, 2005, the vessel

was ordered to be removed from sanctuary waters by the federal agency responsible for protecting the marine sanctuary, the National Oceanic and Atmospheric Administration (NOAA). CP 946.

Predator admitted in its Complaint and Amended Complaint that “since the vessel went down in Marine Sanctuary Waters, it was necessary to try and raise the vessel.” CP 2; CP 906. Predator also admitted in a complaint that it filed in the United States District Court in 2009 that the “principal reason” it needed to raise the MILKY WAY “was the actual or potential pollution of Marine Sanctuary Waters.” CP 1030; *see also* CP 1029 (“Since the vessel went down in Marine Sanctuary Waters, an effort to raise the vessel was necessary.”). Predator’s initial counsel, J.D. Stahl, further confirmed that both NOAA and the U.S. Coast Guard had ordered the vessel removed. CP 1055. Those very orders triggered coverage for the wreck removal and pollution abatement efforts under the P&I and Pollution policy provisions for which those insurers settled and paid. *Id.*

On September 19, 2005, Predator entered into a “Wreck Removal Agreement” with Global Diving & Salvage (Global). CP 948-960. The agreement provides that mobilization costs alone would be \$309,000, with an additional estimated charge of \$46,400 per day, with a two day minimum. CP 958. Predator has admitted that prior to entering into this contract, it made no written calculations and obtained no written estimates

for the cost of repairing the vessel. CP 991. Global mobilized and worked from October 1 to October 3, 2005 in an attempt to raise the wreck, but was unable to do so before the weather and seas turned too difficult to continue. App. Br. at 7. After demobilization, Global invoiced Predator \$641,717 for its attempt to remove the MILKY WAY wreck. CP 1348. When Global was not paid, it sued Predator in U.S. District Court on February 6, 2006. CP 1347-1350.

**D. The Vessel Was a Total Loss; Predator Was Paid \$700,000.**

In marine insurance, an actual total loss occurs when a vessel no longer exists or is irretrievably sunk. *Am. Marine Ins. Group v. Neptunia Ins. Co.*, 775 F. Supp. 703, 706 (S.D.N.Y. 1991) *aff'd*, 961 F.2d 372 (2d Cir. 1992). By contrast, a constructive total loss occurs when the cost to raise the vessel, tow it to a repair yard, and repair it exceeds the insured or agreed value of the vessel. Buglass, *supra*, at 109. In this case, the insured and agreed value of the vessel was \$700,000. CP 962. FIC claims adjuster Edgar Rochelson determined that the vessel was a total loss prior to Global beginning its work under the Wreck Removal Agreement:

Q. Now, as you sit here today, based on your knowledge of the loss and your experience as a claims adjuster, would a sue and labor claim have been properly made under the policy?

[Objection from counsel]

A. It would have had to been made rather quickly and promptly, considering that it did not take us long to figure out that this was, in fact, a total loss.

Q. ... Okay. Why would a sue and labor claim have to have been made rather promptly?

A. Once we determined that the vessel was a total loss and that there was no economic way to bring it up and repair it, there would have been nothing to sue and labor over.

Q. Why do you say that?

A. There was no way to mitigate the loss.

Q. Going back to my questions earlier about the wreck removal, were the Global Diving Salvage invoices paid pursuant to the wreck removal provision of the P&I policy?

A. Yes.

Q. Okay. Only that provision of the policy?

A. I don't recall exactly, but I would see no reason where -- what other portion of the policy they would be paid under.

Q. Okay. Not sue and labor.

A. No.

Q. And why not sue and labor?

A. They were hired to remove the wreck. We knew by that time it was a total loss.

CP 985. Following Rochelson's determination that the vessel was a total loss, \$700,000 was paid to Predator for that total loss. CP 981-983; CP 987-988; CP 1054; CP 1368 ("By the time Andy got to me [October 18, 2005], my recollection is that he had already been told that the vessel had

been declared a total constructive loss.”). Of the \$700,000 paid to Predator for the total loss, \$500,000 was paid by CMF, its deductible, and \$200,000 was paid by FIC. CP 981-983. Predator was paid in three separate checks, the first of which arrived on November 4, 2005, 30 days after Global’s attempt to raise the MILKY WAY. CP 981. The \$200,000 check sent by FIC indicated it was “IN SETTLEMENT OF: Hull claim, F/V Milky Way, less ded[uctible].” CP 982. Predator cashed these checks, the last of which was dated January 26, 2006. CP 983.

**E. Predator Hired Counsel, J.D. Stahl.**

Shortly after the sinking, on October 18, 2005, Predator hired attorney J.D. Stahl, an experienced maritime attorney and litigator, to provide advice on the claim, including the insurance coverages that were available. App. Br. at 10-11. Stahl represented Predator from October 18, 2005 until February 7, 2006. CP 1382; App. Br. at 10; 14. Stahl later resumed his representation of Predator on the claim in March 2007. CP 1054. At no time during Stahl’s representation did he object to Predator’s receipt of \$700,000 for the total loss of the MILKY WAY or make or recommend a sue and labor claim. CP 995-996.

**F. Global’s Lawsuit and Predator’s Third Party Complaint.**

After Global sued Predator in federal court for its unpaid invoices, Stahl tendered the defense to Mike Williamson of HWB, who suggested

Predator retain Sanford and HWB to defend it. CP 1347-1350; CP 1382; CP 1054. By that time, the \$700,000 in Hull and Machinery total loss proceeds had already been fully paid to Predator with no claim having been made by Predator or Stahl for sue and labor. CP 981-983. According to Stahl, Predator agreed to HWB's representation notwithstanding Stahl's belief and notification to Predator that Sanford and HWB potentially had a conflict, CP 1054, although, as shown below, no such conflict actually existed.

On Predator's behalf, Sanford and HWB filed a Third-Party Complaint against FIC and GAIC, the insurers for the P&I and Pollution coverages, to enforce payment for Global's invoice: FIC, up to \$1,000,000 for wreck removal under the P&I coverage; and GAIC, up to \$1,000,000 to avoid or mitigate oil pollution from the sunken vessel under the Pollution coverage. CP 1414-1421. Sanford and HWB named as a defendant, but never served, CMF, and made no allegations of any wrongdoing against it, *id.*, as CMF was simply named in the event it was deemed a necessary party. CP 1291; CP 1297.

Because FIC and GAIC could not agree which of their two policies was primarily responsible to pay Global's bills, both denied liability for Predator's third-party claims. Ultimately Sanford and HWB prevailed for Predator and the P&I and Pollution insurers paid all of Global's invoices.

CP 1442-1443; CP 1096-1102. Global then dismissed its lawsuit against Predator, but Sanford and HWB continued to litigate Predator's third-party claims against FIC and GAIC, seeking to enforce the obligations of FIC and GAIC to fund a second effort at wreck removal in an effort to comply with NOAA's removal order. *Id.*; CP 1055.

In a December 20, 2006 mediation, Predator, represented by Sanford and HWB, and personally attended by Blair, Predator's owner, preliminarily settled with FIC and GAIC. CP 1016-1018. Sanford and HWB secured coverage from FIC and GAIC for a second attempt to remove the MILKY WAY wreck, plus an additional \$25,000 in attorney's fees beyond policy limits. CP 1054-1055.

Approximately three months later, J.D. Stahl resumed his representation of Predator independent of Sanford and HWB and unbeknownst to them. CP 1054-1056. Stahl met with Blair, and prepared an e-mail the following day to his law partner, Joe Sullivan. *Id.* In that e-mail, Stahl analyzed the transcript of the December 2006 mediation and settlement details. *Id.* Nowhere in Stahl's analysis did he conclude there was any sue and labor coverage for the first wreck removal effort or any failure on the part of Sanford and HWB to assert a sue and labor claim.

The final settlement document was not executed until May 25, 2007. CP 1096-1102. Under the terms of the final settlement, both FIC

and GAIC agreed to fund the future wreck removal efforts as required by NOAA and the Coast Guard up to the remaining limits of \$1,000,000 for each policy and, in addition, pay \$25,000 of Predator's attorneys' fees. CP 1096-1102. Predator released all claims that accrued or arose as of December 20, 2006 against FIC and GAIC. CP 1096. The third-party lawsuit and all of Predator's claims for coverage against FIC and GAIC were dismissed with prejudice on June 12, 2007. CP 1020-1021.

**G. The Second Wreck Removal Effort.**

In August 2007, Predator began a second wreck removal attempt led by Titan Salvage. App. Br. at 18-19. After spending approximately \$1,300,000, this second effort was once again unsuccessful, and the remaining policy limits for both FIC and GAIC became exhausted. *Id.* On behalf of Predator, Sanford and HWB persuaded NOAA and the Coast Guard to allow the MILKY WAY wreck to remain on the bottom of the marine sanctuary if the vessel's fuel vents were fully sealed to prevent fuel leaking. CP 1483. After the vents were sealed, the wreck removal operations were halted and the wreck was allowed to remain on the bottom. *Id.* At no time since August 2007 has NOAA or the Coast Guard ever required Predator to remove the wreck from the marine sanctuary.

**H. The Second Federal Litigation.**

When FIC and GAIC could not agree who had the obligation to

pay Titan under the terms of their May 2007 settlement agreement, in February 2008 Sanford and HWB again filed suit against FIC and GAIC in U.S. District Court to enforce their settlement obligations. CP 1487-1492. After Predator refused to pay Sanford and HWB's bills totaling over \$30,000, CP 765-767, and a sanctions order was issued against Predator for initial disclosures which the court deemed inadequate (paid in full by Sanford and HWB at no cost to Predator), CP 1499-1500; CP 1495-1496, Sanford and HWB withdrew from their representation of Predator, CP 1502-1507. Sanford and HWB were replaced by Gary Shockey, the former law partner of famed trial lawyer Gerry Spence, who was later replaced by Predator's malpractice counsel in this case, Harris & Moure. CP 1026-1047. Ultimately, the second federal court lawsuit was dismissed in December 2009 for lack of jurisdiction. CP 1049-1052. The court found, among other reasons, that Predator could not show it had any damages, let alone the jurisdictional minimum of \$75,000. CP 1052.

#### **I. The Malpractice Lawsuit.**

Predator filed its malpractice lawsuit against Sanford and HWB on December 2, 2010, more than three years after Predator dismissed all of its coverage claims. CP 1-9. The complaint was subsequently amended. CP 905-913. Predator asserted claims of professional negligence and breach of fiduciary duty against Sanford and HWB. The gravamen of Predator's

complaint was that Sanford and HWB allegedly failed to make, and advised that Predator release, a sue and labor claim under Predator's Hull and Machinery Policy. CP 908-909. Predator also alleged that Sanford and HWB had a conflict of interest with CMF. CP 907.

Sanford and HWB moved for summary judgment on October 24, 2011, demonstrating there was no genuine issue of material fact and that judgment should be granted for Sanford and HWB as a matter of law, as Predator had failed to show the breach of any duty, causation or damages, and failed to bring its claims within the three-year statute of limitations. CP 917-941; App. Br. at 22. In accordance with King County Local Rule 56(e) and *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979), Sanford and HWB objected to the extensive inadmissible evidence that Predator submitted in an effort to avoid summary judgment. CP 1575-1581. Predator thereafter sought a ruling from the Superior Court to specifically admit as evidence supplemental declarations two days before the hearing date. App. Br. at 22.

Following oral argument, the court below granted summary judgment for Sanford and HWB, CP 1626-1627, and denied Predator's motion to admit its supplemental declarations, CP 1644-1645. The court later entered an Amended Order granting summary judgment, merely stating that it "considered" all documents submitted, including Predator's

supplemental declarations for which the court had expressly denied Predator's motion to admit. CP 1644-1647; CP 1628-1629; CP 1641-1642.

#### IV. ARGUMENT

##### A. **Summary of Argument.**

The gravamen of Predator's lawsuit is that Sanford and HWB should have asserted or not advised Predator to release a claim for sue and labor for the first attempt to raise the MILKY WAY in October 2005. As a matter of law, however, there was no valid claim for sue and labor.

The first wreck removal effort was admittedly not undertaken to mitigate or avert a loss to the MILKY WAY, as required for a valid sue and labor claim. Predator's own insurance expert also agreed with Sanford and HWB's expert that Global's bill for the first wreck removal effort could not be included as part of the \$700,000 total loss which was paid to Predator *and* separately claimed as sue and labor.

Additionally, because CMF had already fully paid its \$500,000 obligation and under Washington law there was a unity of interest between Predator and CMF, Sanford and HWB had no conflict of interest and they did not breach any fiduciary duty owed to Predator. Predator also failed to submit any admissible evidence of causation or damages in response to the

summary judgment motion, only inadmissible hearsay, conclusory statements, and speculation.

Finally, plaintiff's claims for malpractice and breach of fiduciary duty related to the Global lawsuit and sue and labor are time barred, Predator having missed the statute of limitations by more than five months. Summary judgment for Sanford and HWB should be affirmed.

**B. Standard of Review.**

An order granting summary judgment is subject to *de novo* review. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (en banc). Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A fact is only "material" if the outcome of the litigation depends on it in whole or in part. *Brill v. Swanson*, 36 Wn. App. 396, 399, 674 P.2d 211 (1984).

A party moving for summary judgment may meet its burden simply by pointing out that the nonmoving party lacks sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case, all other facts are rendered immaterial. *Id.*;

*Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). In that case, summary judgment is appropriate, because it would be “unjust to subject defendants to a trial in the absence of a showing that the plaintiff can make out a prima facie case.” *Young*, 112 Wn.2d at 230.

Supporting and opposing declarations must be made “on personal knowledge, [and] shall set forth such facts as would be admissible in evidence[.]” CR 56(e). “A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.” *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (en banc). When opposing summary judgment, “[a] nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value[.]” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (en banc). A “hearsay affidavit does not meet the requirement of CR 56(e).” *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990); ER 801; ER 802. Similarly, “[a]n opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.” *Id.* at 41; *Griswold v. Kilpatrick*, 107 Wn. App. 757, 762, 27 P.3d 246 (2001) (in a legal malpractice case, “speculative and conclusory” expert opinions are “inadmissible to create an issue of material fact.”).

This Court reviews “a trial court’s decision[s] on the admissibility of evidence in a summary judgment proceeding de novo.” *State v. Lee*, 144 Wn. App. 462, 466, 182 P.3d 1008 (2008), *rev. den.*, 165 Wn.2d 1017 (2009) (citing *Folsom*, 135 Wn.2d at 663-64). “Like the trial court, in deciding whether summary judgment was proper, [this Court] consider[s] only admissible evidence.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006) (citing *Dunlap*, 105 Wn.2d at 535–36). “Inadmissible evidence is surplusage which cannot support or defeat a motion for summary judgment,” *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991), and the Court of Appeals presumes the trial court disregarded improper evidence. *Glesener v. Balholm*, 50 Wn. App. 1, 4, 747 P.2d 475 (1987). When reasonable minds can reach but one conclusion from the evidence, issues of fact may be resolved as a matter of law, and summary judgment is properly granted. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (citation omitted).

Sanford and HWB made timely objections to Predator’s submitted evidence, including the supplemental declarations of Charles Davis and Andrew Blair. CP 1575-1581; CP 1628-1629; CP 1641-1642. Applying these standards of review to the admissible evidence submitted to the Superior Court, summary judgment should be affirmed.

**C. Predator Failed to Raise a Genuine Issue of Material Fact as to Whether Sanford and HWB Breached Their Duty of Care.**

For its claim of malpractice, Predator must prove four elements:

(1) existence of an attorney-client relationship creating a duty of care by the attorney to the client; (2) breach of the duty of care by act or omission; (3) damage to the client; and (4) proximate causation between the alleged breach and the alleged damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). On summary judgment, Predator failed to set forth any admissible evidence of breach, causation, or damages.

In a legal malpractice case, the duty of care is one of a “reasonably prudent lawyer,” *i.e.*, an “attorney in the same or similar circumstances.” *Id.* at 261. Predator claims Sanford and HWB breached their duty of care based on the meritless contention that they should have advised Predator that Global’s bills for the first wreck removal effort should have been paid out as sue and labor costs. CP 908-909. As a matter of law, however, no sue and labor claim could have validly been made.

As shown above, sue and labor charges are expenses incurred by the vessel owner to minimize or avert a covered loss. CP 1000 (Buglass, *Marine Insurance and General Average in the United States* at 354-55 (3d ed. 1991)); *Jocharanne Tugboat Corp.*, 461 F.2d at 503 (sums spent “to mitigate damage and loss”). The purpose of the Sue and Labor Clause “is

to reimburse the insured for those expenditures which are made primarily for the benefit of the insurer to reduce or eliminate a covered loss.”

*Blasser Brothers, Inc. v. Northern Pan–American Line*, 628 F.2d 376, 386 (5th Cir. 1980); *Continental Food Prod., Inc. v. Ins. Co. of North America*, 544 F.2d 834, 837 (5th Cir. 1977); *The Escapade*, 280 F.2d at 488. Moreover, “[a]n insured is not entitled to sue and labor costs if it fails to show that the costs were incurred in an effort to avoid the total loss or CTL of the vessel due to an insured peril.” *Continental Ins. v. Lone Eagle Shipping*, 952 F. Supp. 1046, 1071 (S.D.N.Y. 1997), *aff’d* 134 F.3d 103 (2d Cir. 1998). The purposes of the expenses incurred after a vessel casualty are central to a determination whether they are sue and labor expenses. *See Jocharanne*, 461 F.2d at 503 (“Jocharanne, in incurring towing and removal charges was seeking to protect the hull, save the cargo, and prevent explosion and resultant disaster.”); CP 999 (Buglass, *supra*, at 122 (“In considering such claims, it is necessary to know the exact reason for the removal at the time the task is undertaken.”)).

Predator admitted both in the Superior Court and in U.S. District Court that the reason it attempted to raise the hull was not to mitigate any damage to the MILKY WAY, but rather to remove the wreck from the National Marine Sanctuary because NOAA ordered Predator to do so:

On or about September 14, 2005, the F/V Milky Way sank in the National Marine Sanctuary off the coast near La

Push, Washington. Since the vessel went down in Marine Sanctuary Waters, it was necessary to try to raise the vessel.

CP 906; CP 2; CP 1029 (“Since the vessel went down in Marine Sanctuary Waters, an effort to raise the vessel was necessary.”); CP 1030 (“the principal reason necessitating removal of the Milky Way was the actual or potential pollution of Marine Sanctuary Waters”). Predator’s repeated admissions in its pleadings are binding:

We recognize the rule that a pleading is construed most strongly against the pleader, and that an express admission in a pleading should control, and exclude testimony tending to show the contrary, until the inconsistency was removed or obviated by an amendment.

*Standard Fin. Co. v. Townsend*, 1 Wn.2d 274, 276, 95 P.2d 786 (1939) (citation omitted); *Anderson v. Petridge*, 45 Wn.2d 299, 306, 274 P.2d 352 (1954) (allegations of complaint could be treated as admissions); 29A Am. Jur. 2d Evidence § 787 (“A party’s assertion of fact in a pleading, including a statement in an answer, is a judicial admission, provided the party making the assertion fails to amend it or withdraw it.”); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (“Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.”). Predator’s repeated admissions unequivocally demonstrate that the true purpose of Global’s effort was wreck removal, not sue and labor. Therefore, no sue and labor claim could have properly been made.

Sanford and HWB met their standard of care by not making or recommending such a claim.

Predator attempts to avoid its own admissions and create issues of fact in several ways. Predator alleges, without citation to authority, that “[n]o formal removal order for the F/V Milky Way ever issued from either NOAA or the U.S. Coast Guard.” App. Br. at 6. But it is undisputed that an express written order did issue from NOAA, requiring Predator to remove the MILKY WAY and threatening Predator with civil penalties and damages for failing to do so because the boat sank in a marine sanctuary and was actively discharging fuel into those waters. CP 946. Predator also alleges its purpose for attempting to raise the MILKY WAY was to “salvage” it. CP 1519-1523; App. Br. at 2; 6-10. But “salvaging” a vessel has nothing to do with minimizing or averting a loss for the benefit of the Hull and Machinery underwriter. *See* Martin J. Norris, *The Law of Salvage* § 2, at 2 (1958) (“With reference to aid rendered to distressed property on navigable waters the word ‘salvage’ is often used indifferently to describe the salvage operation and the salvage award -- the latter being the compensation granted for the services rendered.”). Incorrectly calling wreck removal “salvage” says nothing about any motivation or effort to mitigate or avoid a loss; it is nothing

more than a conclusory assertion by Predator failing to raise a genuine issue of material fact.

Predator also cites extensively to *Quigg Bros.-Schermer, Inc. v. Commercial Union Ins. Co.*, 223 F.3d 997 (9th Cir. 2000). App. Br. 26-27. *Quigg Bros.* does not help Predator. In *Quigg Bros.*, two barges became stranded on the beach of the Quileute Indian Reservation on the Washington coast. *Id.* at 998. The owner acted immediately to secure the barges, towed them off the beach before they became further damaged, and repaired them. *Id.* Because the owner did not have Hull and Machinery insurance for the barges, it argued that its efforts in securing the barges should really be considered “wreck removal” under its P&I policy, *id.* at 1001, since the barges “*might* wash back into the sanctuary or discharge oil” and/or require removal by the government, *id.* at 998 (emphasis added). No order for wreck removal issued from any government agency. Without any valid basis to allege wreck removal coverage under the owner’s P&I policy, the Ninth Circuit held that the costs incurred were “clearly... sue and labor expenses.” *Id.* at 1000. The facts in *Quigg Bros.* are inapplicable to this case. Unlike the barges in *Quigg Bros.*, the MILKY WAY sank within the Olympic Coast National Marine Sanctuary, discharged diesel fuel into sanctuary waters, and NOAA ordered its removal.

Predator also attempts to create an issue of material fact by alleging it received “written and verbal estimates” to raise and repair the MILKY WAY for less than the insured and agreed value of \$700,000. CP 1523-1525; App. Br. at 11-14. The documents Predator cites for support are not in the record and there is no evidence they were generated before Global began its wreck removal work on October 1, 2005. CP 1356. Furthermore, Predator failed to provide any evidence from where the estimates originated, who provided them, or what they contained. Predator’s claim also directly contradicts its binding CR 36 admission that it obtained no written estimates before December 2006 -- a contradiction for which it provides no explanation. CP 991.

In addition, Predator’s claimed repair costs lack any basis in law or fact. First, as part of the calculation, Predator’s owner, Blair, stated he believed that the Global contract provided that the MILKY WAY could be raised in a *single day* for \$309,000. CP 1520; App. Br. at 9. In fact, the Wreck Removal Agreement was clear that the \$309,000 figure was for mobilization only, while the additional daily rate to raise the vessel was, at a minimum, \$46,400 for a minimum of two days on site, an “estimated project duration” that was “subject to change for a variety of reasons.” CP

958.<sup>2</sup> It is black letter law that “extrinsic evidence of a party's subjective, unilateral intent as to the contract's meaning is not admissible.” *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011), *rev. den.*, 171 Wn. 2d 1024, 257 P.3d 662 (2011) (affirming summary judgment). Second, Predator provided no support for its figures. CP 1524-1526. Its repair costs are ostensibly based on “market prices from the fall season of 2005... [plus] self-repair contributions and discount parts” for which there is no supporting evidence whatsoever. *Id.* Predator does not even attempt to describe to which category of repair costs it applied the alleged “self-repair contributions” or “discount parts,” apparently taking just enough off its estimate to fit it conveniently under \$700,000. Predator’s figures are the quintessential *ipse dixit* opinion. Predator is not entitled to have the unsupported factual assertions in its declaration taken at face value, and such assertions are insufficient to raise an issue of material fact on summary judgment. *Seven Gables*, 106 Wn.2d at 13; *Melville*, 115 Wn.2d at 41; *Griswold*, 107 Wn. App. at 762. No sue and labor could validly be claimed.

---

<sup>2</sup> That fact alone brings Blair’s unsupported estimate up to \$672,851 (\$309,000 + \$46,400 x 2 + \$271,051), which for any realistic underwriter would be a total loss, considering that if the wreck removal effort took even one more day than estimated, costs for removal would exceed the insured and agreed value of \$700,000.

Even if Predator could avoid its own binding admissions and have the unsupported allegations in its declarations deemed admissible, sue and labor still would not have been recoverable. As stated above, the Hull and Machinery claims adjuster determined the vessel was a total loss *prior* to the first effort to raise the vessel. CP 985 (“A. They [Global] were hired to remove the wreck. We knew by that time it was a total loss.”). \$700,000, the limits of Predator’s Hull and Machinery coverage, was then paid and accepted by Predator as a total loss. CP 981-983; CP 987-988. This all occurred *prior* to Sanford and HWB commencing their representation of Predator. There was no sue and labor claim for Sanford and HWB to make, because the total loss which Predator accepted prior to their commencing representation had been determined prior to Global’s first removal effort. It is also undisputed that Predator’s own counsel, J.D. Stahl, never made a sue and labor claim, and Predator fails to allege that he breached his duty of care. Sanford and HWB clearly met their duty of care.

In an attempt to create an issue of material fact, Blair alleged in his declaration that he did not agree with Rochelson’s total loss determination. CP 1520; App. Br. at 9. But, it is not in dispute that Predator accepted the total loss payments for the MILKY WAY prior to Sanford and HWB commencing their representation and while Stahl was

representing Predator. Rochelson testified he made the total loss determination *prior* to Global beginning its work. Consequently, Blair's *post-facto* disagreement with Rochelson is irrelevant, because it does not create a genuine issue of material fact with regard to Rochelson's *contemporaneous* determination that the vessel was a total loss.

In addition, Predator cites a number of e-mails from Rochelson, App. Br. at 7, in an attempt to sow doubt as to *when* Rochelson determined the vessel was a total loss. Predator's efforts fail again. Rochelson indicated that on September 16, 2005, one day after the sinking, vessel "seemed like it would be" a total loss "considering where it sank," though no final determination had been made at that time. CP 1327-1328. The last e-mail cited by Predator is from September 23, 2005, eight days before Global began work. CP 1345. That e-mail does not say Rochelson had not determined the vessel to be a total loss, but that when FIC pays a total loss, Predator must buy its boat back from FIC if raised. *Id.* Even if this e-mail indicated that Rochelson had not yet determined the MILKY WAY was a total loss at that time, Predator submits no evidence that Rochelson did not do so in the interim between September 23, 2005 and October 1, 2005, when Global began its first lift attempt. Accordingly, Rochelson's testimony that the vessel was determined to be a total loss prior to Global beginning its work is not in dispute. CP 985.

There was no sue and labor claim for Sanford and HWB to make because the total loss, which Predator accepted prior to their commencing representation, had been determined prior to Global's first removal effort.

Predator tries another tack to create an issue of material fact on this point, submitting the declaration of Donald Roinestad to argue that Rochelson's testimony is "flawed and without merit." CP 1551-1552; App. Br. at 7. In Roinestad's opinion, the vessel should not have been a "total loss" because the September 2005 ROV survey (unauthenticated, inadmissible hearsay) of the vessel showed little immediately visible outward damage (notably, the unauthenticated/hearsay survey says nothing about the internal condition of the vessel, its machinery, its electronics, etc.). Rochelson testified:

Q ...Now, when you say the MILKY WAY was an actual total loss as it sank, why do you say that?

A There was nothing left of it. It went down in 187 feet of water... *The fact that it sank in 187 feet of water made any attempt at hoping to raise the vessel and economically repair it -- made it in fact, a total loss...* I was the one who made the actual determination.

CP 1323-1324 (emphasis added). Roinestad, who is completely unqualified in the area of marine insurance, does not present any evidence that indicates Rochelson did not make this determination, but merely states that Rochelson did not follow proper claims practices and his

conclusion is therefore “flawed and without merit.” Roinestad’s opinions do not create an issue of material fact that a total loss was determined prior to Global’s first effort to raise the vessel, was then paid, and then accepted by Predator. There was no sue and labor claim for Sanford and HWB to make. Summary judgment was appropriate.

Equally fatal to Predator’s claims, both parties’ experts *agree* that under Predator’s Hull and Machinery policy, because Predator never tendered abandonment of the hull, “sue and labor expenses either could not be claimed separately” from a total loss “or the expenses could not be included in assessing a constructive total loss.” CP 1059-1060; CP 1536. Thus, all experts agree that even if a total loss were determined *after* Global’s first effort to raise the vessel, Global’s bill for \$641,717.94 could only be considered either (a) as sue and labor or (b) as part of the determination that the vessel was a total loss. There is no dispute that a total loss was paid and accepted after Global’s \$641,000 effort to raise the wreck, as those efforts clearly established that the total cost to raise, tow, and repair the MILKY WAY exceeded \$700,000. Because the wreck was never towed or repaired (or written estimates for repairs obtained), the \$700,000 total loss that was paid *per force* included Global’s charges of \$641,717. Thus, when Predator accepted the total loss payment, Global’s

\$641,000 could not qualify as sue and labor. CP 1059-1060; CP 1536.

Sanford and HWB did not breach their duty of care.

**D. Predator Failed to Raise a Genuine Issue of Material Fact as to Whether Sanford and HWB Breached Their Fiduciary Duties.**

A fiduciary relationship arises as a matter of law in certain contexts, including attorney and client. *Perez v. Pappas*, 98 Wn.2d 835, 839-40, 659 P.2d 475 (1983). The elements of a breach of fiduciary duty claim are (1) existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) the claimed breach proximately caused the injury -- essentially the same as elements for legal malpractice. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 434, 40 P.3d 1206 (2002).

Predator claims Sanford and HWB breached their fiduciary duties when they allegedly violated Washington Rules of Professional Conduct 1.1, 1.4, 1.7, 3.1 and 8.4. App. Br. at 34. Whether an attorney's conduct violates an RPC is a question of law. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). Predator's breach of fiduciary duty claim centers on the allegation that Sanford and HWB had a conflict of interest, but there is no evidence in the record to support this allegation.

RPC 1.7 governs conflicts, preventing a lawyer from representing a client if the lawyer's representation is adverse or if there is a significant risk that his/her representation will be materially limited as to one client.

CMF is an unincorporated association of fishing vessel owners organized to pool their funds to protect against marine casualties. CMF was responsible only for paying the Hull and Machinery deductible of \$500,000. CP 970; App. Br. at 6. CMF is not an “insurer” under Washington law, as Predator concedes. RCW § 48.01.050; CP 1106; CP 1530. There is no dispute that CMF paid and Predator accepted CMF’s \$500,000 deductible for the total loss of the MILKY WAY *prior* to Sanford and HWB commencing their representation of Predator. CP 981-983; CP 1382. Once this \$500,000 was paid there was no additional sum recoverable from CMF, period, for this loss.

Predator attempts to create an issue of material fact through its expert, Davis, who stated that “it was Coastal’s responsibility to negotiate such a claim [*i.e.*, sue and labor] with Federal/Chubb,” that “Predator’s potential sue and labor claim was against Coastal’s interests ... to negotiate with Federal/Chubb to pay all or part of such a claim,” and that “[i]t was also against Coastal’s interests to ... request sue and labor claims be paid since it would negatively affect both the return of member rebates and insurance rate settings for future coverage of hull insurance.” CP 1538-1539. CMF is not an insurance broker or adjuster and has no duty to negotiate claims. In fact, USI Northwest is the broker on Predator’s Hull and Machinery policy, CP 967, and Northwest Adjusting Services,

Inc. is the designated adjuster, CP 970. Any such alleged duties would fall to those companies. Thus, Davis' statements, for which he cited neither any policy language nor any legal authority, are pure legal conclusions and speculation which do not rise to the level of admissible evidence in opposing summary judgment. *Seven Gables*, 106 Wn.2d at 13; *Melville*, 115 Wn.2d at 41; *Griswold*, 107 Wn. App. at 762.

Predator's claims based on a conflict of interest with CMF also fail under Washington law. It is undisputed that CMF is an unincorporated association of commercial fishing vessel owners of which Predator was a member with equal membership and voting rights. In Washington, there is an identity of interest between the members of an unincorporated association and the association itself. *Carr v. Northern Beneficial Ass'n*, 128 Wn. 40, 221 P. 979 (1924). In *Carr*, the Supreme Court ruled that a member of an unincorporated association, with equal rights to membership, could not sue the association. *Id.* at 41-45. Doing so, the Court reasoned, would be tantamount to allowing the plaintiff to sue himself. *Id.* at p. 44-45. *Carr* has been applied consistently by courts construing Washington law since 1924. *See Walsh v. Zusei Kaiun*, 606 F.2d 259, 264 (9th Cir. 1979) (“[*Carr*] is the law of Washington”); *Strom v. M/V WESTERN DAWN*, 698 F. Supp. 212, 213-14 (W.D. Wash. 1986) (same).

Accordingly, Predator was precluded from bringing a suit against CMF -- in effect, suing itself. *Carr; Walsh; Strom*. Naming CMF in the Third-Party Complaint is of no moment, as there were no operative allegations of liability against CMF, and CMF was never served and therefore never “sued.” App. Br. at 19. Thus, Sanford and HWB cannot be held liable for “failing” to do what was a legal impossibility. Predator has also failed to address this dispositive issue in its brief, and thus has waived any opposition to it. *In re Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) (“Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits.”) (citation omitted); *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after search). As a matter of law, there was no conflict.

Similarly, there was no violation of RPC 1.1. RPC 1.1 requires attorneys to provide competent representation. Predator’s sole basis for alleging a violation of RPC 1.1 is its contention that Sanford and HWB filed the second federal lawsuit “in the wrong court.” CP 911. The U.S. District Court was not the wrong court, but rather Predator failed to establish, after its current malpractice counsel, Harris & Moure, had taken over representation and had sought to further amend the complaint, that it had damages in excess of \$75,000 as required for diversity jurisdiction.

CP 1052. If Predator truly believed it had filed in the wrong court, it and its current malpractice attorneys, who represented Predator in the federal district court, should have voluntarily dismissed its case and filed in state court. Instead, Predator only sought leave to amend its complaint. *Id.* There is no evidence of any violation of RPC 1.1.

RPC 1.4 requires attorneys to reasonably consult with their client. Predator's bases for alleging a violation of RPC 1.4 are that Sanford and HWB did not (1) advise Predator of the severity of the alleged conflict, (2) advise Predator they did not serve CMF, (3) litigate any insurance claims against CMF before releasing it, or (4) notify Predator of the sanctions order. CP 912-913. Deciding not to serve CMF or litigate any claims against CMF, an unincorporated association which had no obligation to pay any additional funds beyond the already-paid \$500,000 deductible, was fully within Sanford and HWB's litigation judgment, not to mention the law, and did not require notifying Predator. Additionally, the sanctions order was paid by Sanford and HWB at no cost to Predator. CP 1495-1496. (Notably, Predator has failed to show, or even allege, any prejudice resulting from this discovery sanction.). "[M]ere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986), *rev. den.*, 108 Wn.2d 1008 (1987). As long as an attorney

conducts reasonable research and makes an informed judgment, he or she is immune from liability. *Id.* at 718. Sanford and HWB had no conflict of interest, they legally could not litigate any claim against CMF, and they paid the sanctions order in full. They did not violate RPC 1.4.

RPC 3.1 concerns not filing frivolous actions or claims. The only allegation Predator makes is that the second federal district court lawsuit was somehow frivolous. CP 912-913. Predator's malpractice attorney were also its attorneys when it filed its Second Amended Complaint in federal court and sought leave to amend. CP 1030; CP 1049-1052. Therefore, Predator and its current malpractice counsel must have concluded the second federal lawsuit was not frivolous, otherwise they were in clear violation of FRCP 11. Predator's citation to the deposition testimony of HWB partner Michael Barcott, App. Br. at 20, does not indicate that the lawsuit was frivolous, but merely that "[Predator] was never going to be satisfied with the litigation, and it was leading inevitably to dissatisfaction with [its] representation." CP 1497. There is no evidence of any violation of RPC 3.1.

RPC 8.4 concerns not violating RPCs, a circular rule. As there is no evidence of any violation of RPC 1.1, 1.4, 1.7, or 3.1, there is also no evidence of any violation of RPC 8.4. Because Predator cannot show a

breach of any fiduciary duties, it cannot, as a matter of law, maintain any action for them. Summary judgment should be affirmed.

**E. Predator Failed to Raise a Genuine Issue of Material Fact and Failed to Make a Showing Sufficient to Establish Causation.**

Predator's lawsuit finally disintegrates on the issues of causation and damages. The controlling rule of causation is that a "plaintiff in a malpractice suit is required to prove that, *but for* the attorney's negligence, [it] *probably* would have prevailed on the underlying claim." *Schmidt v. Coogan*, 162 Wn.2d 488, 492, 173 P.3d 273 (2007) (emphasis added). The plaintiff in a legal malpractice action can sustain its burden of establishing causation only if it shows it "would have prevailed or achieved a better result if [its] attorney had performed competently." *Martin v. Northwest Washington Legal Services*, 43 Wn. App. 405, 409, 717 P.2d 779 (1986) (citing *Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336, *rev. den.* 96 Wn.2d 1003 (1981)). "To complete a *prima facie* case for legal malpractice and survive summary judgment, [plaintiff] needs to show the deficiencies caused the harm." *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864-65, 147 P.3d 600 (2006). Failure to show that Predator would have had a better result warrants summary judgment. *Id.*

Summary judgment is also appropriate as to factual "but for" causation if "proof of ... factual causation require[s] inferences that [are]

remote or unreasonable.” *Lynn*, 136 Wn. App. at 310 (citing *Walters v. Hampton*, 14 Wn. App. 548, 556, 543 P.2d 648 (1975)).

Predator must also prove legal causation. “Legal causation is a question of law.” *Lynn*, 136 Wn. App. at 311 (citing *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001)). For legal causation, the court must decide “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Id.* at 311 (quoting *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003)).

Predator failed to set forth any admissible evidence that it would have achieved a better result and therefore it failed to satisfy an essential element of its claim -- “but for” causation. In addition, because it merely introduced inadmissible speculation and hearsay to support a string of spurious contingencies in response to summary judgment, it also failed to show any legal causation.

As demonstrated above, there was no valid sue and labor claim to be made. Yet, even if a sue and labor claim could somehow have been made, Predator would also have had to show that any such sue and labor claim would have been accepted and paid by FIC, for which there is no evidence whatsoever. On top of such conjecture, it is rank speculation that if there was sue and labor coverage for Global’s effort in October 2005,

*any* additional insurance coverage would have resulted in the MILKY WAY *actually being raised*. A multitude of factors outside of anyone's control are involved in an effort to raise a sunken, wrecked vessel four miles off the Washington coast, in 200 feet of ocean water: weather, seas, current, sand filling up the hull, equipment or personnel unavailability or breakdown, and diver difficulties, among many others. \$2,000,000 was spent trying to raise the wreck over a period of two years with no success. It is pure speculation that another \$641,000 or even \$700,000 spent *probably* would have raised the MILKY WAY.

The only "evidence" Predator musters on this issue is that Blair claims in his declaration that on the last day of the second lift attempt, an unidentified Global representative told him that with an additional \$700,000 -- which just happens to exactly match Predator's Hull and Machinery coverage limit -- the MILKY WAY "could" have been raised. CP 1526; App. Br. at 19. This is pure, inadmissible hearsay and unsupported speculation which fails to raise a genuine issue of material fact. ER 801; ER 802; *Seven Gables*, 106 Wn.2d at 13; *Melville*, 115 Wn.2d at 41; *Griswold*, 107 Wn. App. at 762. A "hearsay affidavit does not meet the requirement of CR 56(e)." *Melville*, 115 Wn.2d at 36.

In an attempt to get around the fatal hearsay rule, Predator submitted the late-filed supplemental declaration in which Blair stated that

he had an “understanding” that Global could raise the MILKY WAY for another \$700,000. CR 56(c); CP 1606-1607. The supplemental Blair declaration still failed to raise an issue of fact, because a declarant’s “‘understanding’ of a fact is similar to his being ‘aware’ of it. It says nothing about personal knowledge and is inadmissible.” *Marks v. Benson*, 62 Wn.App. 178, 182-83, 813 P.2d 180 (1991) (quoting *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178, 727 P.2d 982 (1986) (en banc)). The supplemental Blair declaration says nothing about his personal knowledge or experience with diving, the costs of each dive, the equipment or number of dives needed, or the progress of the recovery operation, let alone the likelihood of success. It is no more than a rephrasing of the inadmissible hearsay statement of the mystery Global representative. In short, Predator was unable to provide a single admissible fact showing that had another \$700,000 in insurance coverage been available, it *probably* would have raised the MILKY WAY from the bottom of the ocean two years after it sank.

Predator takes its misguided arguments a step further, arguing that by virtue of the Superior Court “considering” Predator’s late-submitted declarations, those declarations must therefore create an issue of fact. App. Br. at 22-24. However, this Court reviews “a trial court’s decision[s] on the admissibility of evidence in a summary judgment proceeding de

novo.” *Lee*, 144 Wn. App. at 466 (citing *Folsom*, 135 Wn.2d at 663-64). “[The Court] consider[s] only admissible evidence.” *Lynn*, 136 Wn. App. at 306 (citing *Dunlap*, 105 Wn.2d at 535–36). Predator’s late-submitted supplementary declarations still failed to raise a genuine issue of material fact. The trial court’s “consideration” of these late-filed documents did not transform them into admissible evidence, and it explicitly denied Predator’s motion to admit them as evidence. CP 1644-1645.

Predator submitted no proof whatsoever that it would have achieved a better result had the alleged breaches of fiduciary duty not occurred. Without any admissible evidence of any violation of the RPCs there is no basis for Predator’s breach of fiduciary duties claim. Summary judgment was appropriate and should be affirmed.

**F. Predator Failed to Raise a Genuine Issue of Material Fact and Failed to Make a Showing Sufficient to Establish it Incurred Damages.**

Predator also failed to come forward on summary judgment with any evidence of damages. Predator merely asserted its damages were \$700,000 in additional funds to raise the MILKY WAY, three seasons of lost fishing profits, and catch histories. CP 1527; App. Br. 19; 30.

As conclusively demonstrated above, sue and labor could never have been properly claimed, and there was no evidence that any such claim would have been accepted or paid. Even if such a claim were paid,

the \$700,000 Predator seeks would not have been a cash payment to it, but would have come in the form of an *indemnity* payment, covering further efforts to raise the MILKY WAY that never occurred. CP 1055. Even if the wreck had miraculously been raised, Predator was still required to show the wreck remains that it allegedly lost had *any* value, after first having to pay FIC for them as it admittedly would have been required to do. *Id.* There was no such evidence or proof of any such loss.

Predator also failed to submit *any* evidence of lost fishing profits or catch histories or the value of such items -- no fish tickets, no profits earned, no evidence of gross or net revenue, no description of the licenses it held or allegedly lost, *nothing*. Predator's speculative damage claims are insufficient to survive summary judgment. See *Burkheimer v. Thrifty Inv. Co., Inc.*, 12 Wn. App. 924, 928, 533 P.2d 449 (1975) ("The evidence of damage... must be sufficient to afford a reasonable basis for estimating loss so that speculation and conjecture do not become the basis.") (citing *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 498 P.2d 870 (1972)).

Regardless, the agreed value of the MILKY WAY was \$700,000, which Predator was promptly paid and which it accepted prior to Sanford and HWB commencing their representation. The purpose of the total loss payment was to compensate Predator for the agreed value of the MILKY

WAY, allowing it to purchase a replacement vessel and return to fishing. *Sailor Inc. F/V v. City of Rockland*, 324 F. Supp. 2d 197, 200 (D. Me. 2004), *aff'd*, 428 F.3d 348 (1st Cir. 2005). Predator elected not to obtain a replacement vessel or return to fishing for more than three years. Predator has failed to show that Sanford or HWB caused it to suffer any damages.

**G. Predator's Claims Are Barred by the Statute of Limitations.**

Predator's malpractice and alleged conflict of interest claims are further barred by the applicable statute of limitations. The statute of limitations for legal malpractice actions and breaches of fiduciary duty is three years. RCW § 4.16.080(3); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268, *rev. den.*, 155 Wn.2d 1023 (2005); *Meryhew v. Gillingham*, 77 Wn. App. 752, 755, 893 P.2d 692 (1995), *rev. den.*, 128 Wn.2d 1012 (1996); App. Br. at 36. The statute of limitations begins to run when the client discovers, or in the exercise of reasonable diligence should have discovered, the *facts* that give rise to its cause of action. *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976) (en banc).

However, for a malpractice action, if an attorney's errors or omissions occur during the course of litigation, "as a matter of law the client is deemed to possess knowledge of all the facts that give rise to his cause of action *upon entry of judgment.*" *Richardson v. Denend*, 59 Wn. App. 92, 96-97, 795 P.2d 1192 (1990), *rev. den.*, 116 Wn.2d 1005 (1991)

(emphasis added); *Van Dam v. Gay*, 280 Va. 457, 462, 699 S.E.2d 480, 482 (2010) (upholding dismissal for failure to file suit for malpractice within the statute of limitations period after a settlement agreement was entered by the trial court).

Predator knew all material facts of any malpractice or alleged conflict of interest claim more than three years before suit was filed. As of May 25, 2007, when Predator settled with FIC and GAIC and released all possible claims that arose as of December 20, 2006 related to the MILKY WAY, and June 12, 2007 when judgment was entered dismissing the case, Predator is deemed to know, as a matter of law, all of the facts that that occurred during that lawsuit, including any sue and labor claim or any alleged conflict of interest. This occurred more than three years before this lawsuit was filed on December 2, 2010. *Richardson; Van Dam*.

Moreover, it is undisputed that by November 8, 2005, Stahl, as Predator's counsel, considered sue and labor as a potential source of recovery for the first effort to remove the wreck of the MILKY WAY:

[C]ertainly by the time I had reviewed the hull policy and marked it up [on November 7-8, 2005]... by that point in time, I think I certainly had identified sue and labor coverage as potentially a source of coverage for the first salvage effort[.]

CP 994.

In February 2006, Stahl tendered the defense of the Global lawsuit to Sanford and HWB, and Predator's owner, Blair, was counseled by Stahl about a potential conflict:

After we tendered that lawsuit to Coastal Marine Fund for defense and indemnity, Mike Williamson... had another litigator at the firm, Phil Sanford... represent [Predator] in the Global lawsuit. [Predator] agreed to this, notwithstanding my discussions [sic] with him at the time that Holmes Weddle had a conflict due to their representation of Coastal.

CP 1054-1056. Thus, in February 2006, Stahl was aware of and believed there was potential coverage for Global's bills under the sue and labor clause, and Predator explicitly knew there was a potential conflict of interest. Knowledge of the attorney is imputed to the client. *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978) (en banc); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). Stahl's knowledge is therefore Predator's. *See also* 3 Am. Jur. 2d Agency § 273.

Therefore, even assuming *arguendo* that a sue and labor claim could have validly been made or that an alleged conflict of interest existed, it is undisputed that Predator knew of these issues by June 12, 2007 when the first federal court litigation was settled and dismissed. Washington strictly applies the statute of limitations. *Huff*, 125 Wn. App. at 732. Predator had, at the very latest, until June 12, 2010, to file suit before the statute of limitations expired on those claims. Predator missed

that statute of limitations by more than five months when it waited to file suit until December 2010.

Predator argues that the statute of limitations is tolled by the “continuous representation” rule until February 2012, three years after Sanford and HWB withdrew from representing Predator in the *second* federal court lawsuit. App. Br. at 36-37 (citing *Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011)). But Predator concedes that under *Hipple* the rule only “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.*” App. Br. at 36 (emphasis added).

Predator also admits that the rule only applies until “the representation of the specific subject matter concluded.” *Id.*

Predator’s admissions mandate summary judgment on the alleged malpractice and conflict of interest claims. In *Burns v. McClinton*, Burns alleged that attorney McClinton had overcharged her for legal fees during ongoing legal representation over a period of many years. 135 Wn. App. 285, 290, 143 P.3d 630 (2006), *rev. den.*, 161 Wn.2d 1005 (2007). The trial court found that McClinton’s ongoing representation was a sufficient basis for tolling the statute of limitations based on the “continuous representation” rule. *Id.* The Court of Appeals, however, reversed:

[T]he wrong occurred during the general course of an ongoing professional relationship, *not* in continued

representation with respect to a *particular* undertaking or *specific* transaction in which McClinton had committed a professional error.

*Id.* at 299 (emphasis added). This limitation was also confirmed in *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 120 P.3d 605 (2005), *rev. den.*, 157 Wn.2d 1004 (2006):

When we adopted the rule, we made it clear that “the rule does not toll the statute of limitations until the end of the attorney-client *relationship*, but only during the lawyer’s representation of the client in the *same matter*...” we must decline to broaden the definition of “continuing representation” to include Chicha’s overall representation[.]

*Id.* at 819-20 (emphasis in original).

Predator knew of any potential conflict and knew of the release of the sue and labor claim by the time the “specific subject matter” ended on June 12, 2007, when Predator signed the settlement agreement and the first lawsuit was dismissed with prejudice. Predator’s attempt to apply the “continuous representation” rule to the facts of this case fails. Predator missed the statute of limitations by more than five months. Those claims are barred as a matter of law.

## V. CONCLUSION

Predator has failed to show any evidence or raise a genuine issue of material fact on the elements of breach, causation, or damages. Predator’s malpractice and conflict of interest claims were also not filed within the applicable statute of limitations. To the extent the Superior

Court “considered” Predator’s inadmissible evidence, it erred. However, the Superior Court’s entry of summary judgment for Sanford and HWB was appropriate, and it should be affirmed.

Respectfully submitted this April 25, 2012.

BAUER MOYNIHAN & JOHNSON LLP

A handwritten signature in black ink, appearing to read "Matthew C. Crane", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Matthew C. Crane, WSBA No. 18003

Mark A. Krisher, WSBA No. 39314

Attorneys for Respondents Philip W.

Sanford and Holmes Weddle & Barcott, P.C.

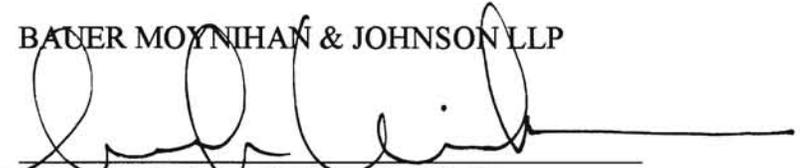
**CERTIFICATE OF SERVICE**

Undersigned counsel for Respondents hereby certifies that on April 25, 2012, a copy of the Brief of Respondents in this case was served on counsel for Appellant by legal messenger:

Charles P. Moure  
Daniel P. Harris  
Hilary V. Bricken  
Harris & Moure, PLLC  
600 Stewart Street, Ste. 1200  
Seattle, Washington 98101

Dated this 25th day of April, 2012.

**BAUER MOYNIHAN & JOHNSON LLP**

A handwritten signature in black ink, appearing to read 'Matthew C. Crane', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Matthew C. Crane, WSBA No. 18003  
Mark A. Krisher, WSBA No. 39314  
Attorneys for Respondents Holmes Weddle &  
Barcott, P.C. and Philip W. Sanford