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No. 68445-1-I

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE**

ROGER E. HAMMETT, JR. and ANITA M. HAMMETT,
Respondents/Cross-Appellants,

v.

RESIDUAL ENTERPRISES CORPORATION, as successor in
interest to SEA-LAND SERVICE, INC.,
Appellant/Cross-Respondent.

**REPLY BRIEF IN SUPPORT OF RESPONDENTS/CROSS-
APPELLANTS' CROSS-APPEAL**

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I. REPLY ARGUMENT ON CROSS-APPEAL

Defendant's response to Mrs. Hammett's cross-appeal ignores the landmark United States Supreme Court decision upon which the cross-appeal is based, *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S.Ct. 2561 (2009). And in *Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 3516061 (W.D. Wash. Aug. 11, 2011), the only case cited to this Court that was decided *after Townsend*, the court held that post-*Townsend*, a loss of consortium claim is available under general maritime law. Following *Townsend* and Judge Pechman's careful and sound analysis in *Barrette*, this Court should reverse the trial court's dismissal of Mrs. Hammett's loss of consortium claim and reinstate that claim under general maritime law.

A. Mrs. Hammett Has Not Waived Her Right to Cross-Appeal.

After the trial court granted Defendant's motion to dismiss Mrs. Hammett's loss of consortium claim, Plaintiffs had no reason to continue to pursue a general maritime law claim, so they elected to try the case solely under the Jones Act. RP 12/6/11 at 13:15-14:18 (colloquy between counsel and the trial court). Defendant suggests,

without overtly making the argument, that Mrs. Hammett somehow waived her right to appeal the trial court's dismissal of her loss of consortium claim because Plaintiffs did not try what remained of the general maritime law claim after dismissal of her loss of consortium claim. *See* Defendant's Brief at 2. Plaintiffs' decision to take a voluntary nonsuit before trial on their *remaining* claims under general maritime law had no effect, however, on Mrs. Hammett's loss of consortium claim under general maritime law, which had already been dismissed on summary judgment from which Plaintiffs timely cross-appealed. *See* CP 144-146 (October 21, 2011 summary judgment order); CP 612-614 (March 7, 2012 notice of appeal); Supp. CP 1192-1200 (March 19, 2012 notice of cross-appeal).

Where, as here, a trial court grants partial summary judgment, the order is appealable upon the disposition of the remaining issues in the case, even when a plaintiff later takes a nonsuit on the remainder of the claim upon which the partial summary judgment was based. *E.g., Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 655-56 (Tex. 1998) (holding that court of appeals erred in failing to review merits of partial summary judgment order, despite plaintiff's

subsequent failure to prosecute the remainder of the claim on which the partial summary judgment was based).

B. Under the Principles Set Forth in *Townsend*, this Court Should Reinstate Mrs. Hammett's Loss of Consortium Claim.

The law on whether general maritime law authorizes a loss of consortium claim after enactment of the Jones Act admittedly is in flux. The *per curiam* decision in *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993), held that general maritime law does not authorize a loss of consortium claim after enactment of the Jones Act, relying on *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317 (1990). In responding to Mrs. Hammett's cross-appeal, Defendant dutifully relies on *Miles* and its progeny, all of which pre-date the United States Supreme Court's more recent decision in *Townsend*. See Defendant's Brief at 2-4. Defendant does not even mention *Townsend*, even though *Townsend* is the crux of Mrs. Hammett's cross-appeal.

Following *Townsend*, this Court should reverse the trial court's dismissal of Mrs. Hammett's loss of consortium claim, and reinstate that claim under general maritime law. Judge Pechman's

recent careful examination of *Townsend*, which led her to hold that general maritime law authorizes a loss of consortium claim, is the better-reasoned approach under current law. *See Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 3516061 (W.D. Wash. Aug. 11, 2011); *see also* 14AA C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3677 at 103-04 (2011) (discussing *Townsend* and the Court's refusal to "give greater preemptive effect to the Jones Act than was required by its text").

In *Townsend*, the United States Supreme Court clarified the reach of its decision in *Miles*. In *Townsend*, a seaman sought punitive damages under general maritime law. The defendants argued that because the Jones Act precluded a claim for punitive damages, under *Miles* such a remedy also was precluded under general maritime law. *Townsend*, 557 U.S. at 418-19. The *Townsend* Court held that such a reading of *Miles* was "far too broad." *Id.* at 419. It "directly rejected" the notion "that *Miles* precludes *any* action for personal injury beyond that made available under the Jones Act." *Id.* at 421 (emphasis original; citing *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818, 121

S.Ct. 1927 (2001)). The *Townsend* Court explained that the Jones Act “was remedial, for the benefit of seamen” and that “[i]ts purpose was to enlarge that protection, not to narrow it.” *Id.* at 417 (emphasis added). The *Townsend* Court thus held that because punitive damages were a common law remedy under general maritime law at the time the Jones Act was enacted, such recovery was available under general maritime law without contravening the Jones Act. *Id.* at 421-22.

In *Barrette v. Jubilee Fisheries*, Judge Pechman applied *Townsend* in the specific context of a general maritime law loss of consortium claim. First, Judge Pechman observed that a loss of consortium remedy was available under general maritime law before enactment of the Jones Act. *Barrette*, 2011 WL 3516061 at *4 & *7 (citing *New York & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3d Cir. 1912), *Schooner Robert Lewers Co. v. Kekauoha*, 114 F. 849 (9th Cir. 1902), *The E.B. Ward, Jr.*, 23 F. 900 (E.D. La. 1885), and other cases). Defendant does not even contest this point.

Second, Judge Pechman observed that allowing the pre-existing common law remedy of loss of consortium would not

contravene the Jones Act, which was remedial in its purpose.

Barrette, 2011 WL 3516061 at *4 (“Because the then-accepted remedies for injured seamen arose from the general maritime law, it necessarily follows that Congress was envisioning the continued availability of those common-law causes of action.”) (quoting *Townsend*, 557 U.S. at 416).

Third and finally, while Judge Pechman acknowledged that the *per curiam* decision in *Smith v. Trinidad Corp.* (which was decided before *Townsend*) held that the Jones Act precluded a “loss of consortium” claim under general maritime law, she thoughtfully concluded: “[T]his Court is not allowed to disregard the Supreme Court's reasoning in *Townsend*. Principles of *stare decisis* compel this Court to apply not only the holding of a case, but also the ‘mode of analysis’ used.” *Barrette*, 2011 WL 3516061 at *6 (citations omitted). Accordingly, Judge Pechman held that a loss of consortium claim under general maritime law was available and not preempted by passage of the Jones Act, and that she was not bound by the *per curiam* decision in *Smith* in light of the later-decided controlling decision in *Townsend*. *Id.* at *7.

Defendant has no response *Townsend* or to Judge Pechman's reasoned analysis except to rely upon outdated case law that should not influence this Court in reaching the same conclusions as Judge Pechman in *Barrette*, taking into account the controlling precedent of *Townsend*.

II. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Cross-Appeal and reinstate Mrs. Hammett's loss of consortium claim under general maritime law.

DATED this 9 day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused to be delivered a true and correct original and one copy of the foregoing with this Certificate of Service upon:

Washington Court of Appeals – Division One
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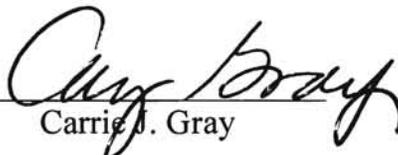
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SIGNED at Seattle, Washington, this 9th day of November,

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