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STATE OF WASHINGTON No. 79529-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN,

Plaintiffs/Petitioners,

vs.

HOLLAND AMERICA LINE U.S.A., INC., a Delaware corporation, and
HOLLAND AMERICAN LINE, INC., a Washington corporation,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress under the civil justice system.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves a number of issues surrounding the enforceability of a forum selection clause in a cruise ship contract governed by federal maritime law. This amicus curiae brief only addresses two of these issues: (1) whether the forum selection clause was waived in this case, due to an untimely answer raising the defense of improper venue; and (2) whether the non-traveling spouse of the passenger spouse may pursue a claim for loss of consortium based upon a maritime tort against the passenger spouse. The underlying facts are drawn from the published Court of Appeals opinion and briefing of the parties. See Oltman v. Holland Am. Line, 136 Wn.App. 110, 148 P.3d 1050 (2006), *review granted*, 161 Wn.2d 1001 (2007); Oltman Supp. Br. at 3, 12 & ns. 14-15; HAL Supp. Br. at 1, 6; Oltman Pet. for Rev. at 3-5; HAL Ans. to Pet. for Rev. at 1-5; Oltman Br. at 3-7; HAL Br. at 1-4; Oltman Reply Br. at 1-2.

For purposes of this brief, the following facts are relevant: The plaintiffs/petitioners are Jack Oltman and his mother Bernice Oltman, and Jack's wife Susan Oltman. Jack and Bernice Oltman contracted with defendants/respondents Holland America Line-USA, Inc./Holland America Line, Inc. (Holland America or HAL) to travel on the cruise ship *Amsterdam* from Valparaiso, Chile to San Diego, California (USA). During the cruise, Jack and Bernice Oltman each experienced a severe gastrointestinal infection. As a result, they filed a complaint in King County Superior Court, alleging their illness was due to Holland America's negligence.¹ Susan Oltman joined in the complaint, seeking recovery for loss of consortium under state law.

Holland America did not file its answer under CR 12(a)(1) until 31 days after service of the summons and complaint. In its answer, Holland America asserted the forum selection clause in its cruise ship contract as an affirmative defense. The contract provides in relevant part:

THIS DOCUMENT IS A LEGALLY BINDING CONTRACT BETWEEN YOU AND US. THE WORD "YOU" REFERS TO ALL PERSONS TRAVELING UNDER THIS CONTRACT INCLUDING THEIR HEIRS, SUCCESSORS IN INTEREST AND PERSONAL REPRESENTATIVES. THE WORDS "WE" AND "US" REFER TO THE OWNER, HAL AND THE OTHER HAL COMPANIES, ALL OF WHICH ARE DESCRIBED IN CLAUSE A.1 BELOW.

* * *

ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISE TOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE SHALL BE LITIGATED, IF AT ALL, IN AND

¹ The briefing is unclear whether the tort occurred on the high seas or in territorial waters. This brief assumes the tort occurred on the high seas. See text *infra*, at 15 n.8

BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, OR, AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS.

HAL Ans. to Pet. for Rev. at 3-4 (emphasis removed; footnote omitted).

The cruise ship contract also contains a limitation period requiring that suit be commenced against Holland America within one year of injury.

See Oltman, 136 Wn.App. at 114.

Holland America moved for summary judgment of dismissal of the Oltmans' complaint based upon improper venue, urging that under its contract the action must be brought in the federal court for the Western District of Washington. Oltmans moved to strike the affirmative defense, contending it was waived because it was not raised in a timely answer and, as a result, Oltmans were prejudiced. See Oltman Br. at 5. They argue that had Holland America filed a timely answer under CR 12 and raised the affirmative defense, they would have commenced a timely action in the federal district court. See Oltman Br. at 11-12; Oltman Supp. Br. at 7-8.² Holland America disputes whether Oltmans established actual prejudice under the circumstances. See HAL Br. at 8-9 & n.4; HAL Supp. Br. at 2-3. The superior court denied Oltmans' motion to strike the

² Oltmans did commence an action in the Federal District Court for the Western District of Washington based upon the same facts and circumstances. The action was dismissed as untimely under the cruise ship contract 1-year limitation period, and an appeal from that dismissal is pending in the Ninth Circuit Court of Appeals. See Oltman Supp. Br. at 14; HAL Supp. Br. at 11 & n.7; HAL Ans. to Pet. for Rev. at 5 n.6.

affirmative defense and granted Holland America's motion for summary judgment of dismissal.

The Court of Appeals, Division I affirmed. See Oltman, 136 Wn.App. at 113. The court held the waiver issue was not preserved because Oltmans had not claimed prejudice below. Id. at 115. However, in dicta it rejected Oltmans' argument, concluding they had failed to provide supporting legal authority, and that it was enough that Holland America had set forth the affirmative defense in its answer, as required by CR 12(h). See Oltman at 116 & n.8. Regarding Susan Oltman's loss of consortium claim, the Court of Appeals concluded:

[T]he trial court did not err in dismissing Susan's consortium claim. Loss of consortium is a separate, not a derivative claim. *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998). But "an element of this cause of action is the 'tort committed against the "impaired" spouse.'" *Conradt v. Four Star Promotions, Inc.*, 45 Wn.App. 847, 853, 728 P.2d 617 (1986) (quoting *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d 226 (1984)). The cruise ship contract provides that it applies to "ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE" Susan Oltman's claim is not separate from the alleged injury her husband suffered while on the cruise. Her claim both arises under and in connection with the cruise. Therefore, the contract, including the valid forum selection clause, applies to her.

Oltman at 126.

This Court granted Oltmans' petition for review, which raises the waiver and loss of consortium issues. See Oltman Pet. for Rev. at 1-2.

III. ISSUES PRESENTED

- 1) Is Holland America deemed to have waived its defense based upon the contract forum selection clause because it failed to file a timely answer under CR 12(a),(b)?

- 2) Is Susan Oltman bound by the contract forum selection clause and, if not, does she have a cognizable claim for loss of consortium?

IV. SUMMARY OF ARGUMENT

Re: Failure to Timely Answer Under CR 12

A defendant's claim of improper venue based upon a contract forum selection clause is an affirmative defense under CR 12, and must be raised in an answer (or by motion). A defendant's failure to timely answer and raise an improper venue defense under CR 12(b) & (h) should waive the defense, when the failure prejudices the plaintiff and the defendant knew or should have known that prejudice would occur. This result is required by the teachings of this Court in Lybbert v. Grant County, 141 Wn.2d 29, 39, 49, 1 P.3d 1124 (2000), reflecting, under substantially similar circumstances, this Court's intolerance for tactical use of the civil rules at the expense of disposition on the merits.

Re: Loss of Consortium Claim

Susan Oltman's loss of consortium claim is not subject to the limitations of the cruise ship contract because it does not apply to her. Under Washington law, her loss of consortium claim is a separate and free-standing claim, based upon the predicate general maritime tort committed against her husband.

In the absence of a federal maritime statute that forecloses recovery under state law for loss of consortium, Susan Oltman's state-based loss of consortium claim should be allowed, based upon the predicate tort against her husband. The opinion in Chan v. Society

Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994), is not persuasive, as Susan Oltman's claim is grounded in state law, rather than general maritime law, and the trend in U.S. Supreme Court jurisprudence favors state remedies when not specifically prohibited by federal maritime law.

V. ARGUMENT

Introduction: Assumptions Regarding Governing Law

This brief assumes Washington state law is relevant to resolving both the procedural and substantive issues addressed in this brief. Whether an affirmative defense has been waived is a question of state procedural law. See CR 1. Further, in the absence of any indication in the briefing that Susan Oltman's loss of consortium claim is based upon another state's law, Washington law applies. See CR 9(k)(1),(4). (The full texts of CR 1 and CR 9 are reproduced in the Appendix to this brief.)

This brief otherwise assumes that general maritime law applies to interpretation of the cruise ship contract, and that Jack Oltman's negligence claim is governed by general maritime law under a "choice of law" analysis. See Wallis v. Princess Cruises, Inc., 306 F.3d 827, 840-41 (9th Cir. 2002) (applying general maritime law under location/connectedness choice of law test). Similarly, it is assumed general maritime law governs the loss of consortium claim, Wallis at 840-41, although this does not answer the question discussed infra - whether

general maritime law may be supplemented by state law regarding loss of consortium.³

A. Under *Lybbert*, The Failure To Timely Answer And Raise An Improper Venue Defense Waives The Defense When It Causes Prejudice To The Plaintiff And The Defendant Knew Or Should Have Known Prejudice Would Occur.

The parties and Court of Appeals have overlooked the teachings of this Court in Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000). Lybbert should control with respect to both the sensibilities that govern interpretation of the civil rules generally, and resolution of the claim of waiver presented here.⁴

The conceptual underpinnings of Lybbert are traceable to the Court's landmark decision in Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corporation, 122 Wn.2d 299, 858 P.2d 1054 (1993), which rejected the long-standing litigation culture of procedural gamesmanship, and the so-called "sporting theory of justice." See Lybbert, 141 Wn.2d at 39-40 (citing Fisons, and noting "[o]ur holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants"); see generally Bryan P. Harnetiaux, Mary Ellen Gaffney-Brown, Gary N. Bloom, & Halleck H. Hodgins, Harnessing Adversariness

³ State law may be found to govern Susan Oltman's loss of consortium claim in the first instance, if her claim is not sufficiently connected to maritime commerce or traditional maritime activity. See Wallis at 840. This question is not addressed in this brief.

⁴ WSTLA Foundation assumes for purposes of argument that this issue is properly before the Court on review. In Oltmans' motion for reconsideration at the Court of Appeals, they disputed the court's conclusion that they had not preserved this issue below. See text supra at 4; Oltman Motion for Reconsideration at 4-5 (reproduced as attachment to Oltmans' reply to answer to petition for review.)

in Discovery Responses: A Proposal for Measuring the Duty to Disclose After Physicians Insurance Exchange & Ass'n v. Fisons Corporation, 29 Gonz. L. Rev. 499, 505, 507-12 (1993/94) (chronicling the litigation culture before Fisons, and this Court's rejection of procedural gamesmanship driven by misguided adversarial instincts). While Fisons dealt with discovery abuses involving deceptive acts, this Court has carried forward the principles underlying Fisons in circumstances less egregious in nature. See Burnet v. Spokane Ambulance, 131 Wn.2d 484, 496-99, 933 P.2d 1036 (1997) (reversing sanction limiting evidence regarding civil claim for non-compliance with scheduling order, in the absence of willfulness, and because of severity of injury to plaintiff and preference under CR 1 for determination of cases on the merits).

The Court's decision in Lybbert represents application of the Fisons principles under the most ordinary of circumstances. In Lybbert, the plaintiffs brought an action against Grant County for personal injuries. The summons and complaint was properly filed, but was not properly served upon the county. Thereafter, the parties engaged in discovery. While the county made no inquiry regarding the sufficiency of service of process, the Lybberts directed an interrogatory to the county asking whether it would rely on the affirmative defense of insufficiency of process. The county did not timely answer the interrogatory. Lybbert, 141 Wn.2d at 42. The county also filed an untimely answer asserting, for the first time, an affirmative defense of insufficiency of service of process.

By the time the answer was filed the applicable statute of limitations had expired. Id. at 33-34, 42. The superior court granted the county's motion for summary judgment of dismissal based on the statute of limitations, and dismissed the action with prejudice. This Court reversed. Id. at 31-32.

In a 6-3 opinion, the Court determined that under the circumstances the county waived the affirmative defense of insufficiency of service of process as a matter of law. Id. at 38-45. The majority opinion by Justice Alexander announced the following rule, regarding when an affirmative defense is waived by a defendant as a matter of law:

Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. It can also occur if the defendant's counsel has been dilatory in asserting the defense.

Id. at 38-39 (citations omitted). In adopting this rule the Court explained:

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy and inexpensive determination of every action." CR 1. If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind procedural rules may be compromised.

* * *

We are satisfied, in short, that the doctrine of waiver compliments our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed.

Id. at 39, 40.

The majority in Lybbert concluded that waiver of the affirmative defense resulted because the county had been both dilatory in filing its

answer and engaged in conduct inconsistent with asserting the affirmative defense. Id. at 41-45. The majority did not require that the defendant's failure to timely raise the affirmative defense in the answer be "purposeful or misleading." Compare Lybbert at 42, with id. at 46 (Madsen, J., dissenting). Instead, the majority only required that the defendant county "knew or should have known that the defense of insufficient service of process was available to it." Id. at 42 (footnote omitted). The majority found sufficient constructive knowledge based upon the defendant county's receipt of the process server's affidavit of service, which showed the mistake in service. Id. at 42; see also id. at 49 (Madsen, J., dissenting). Further, the majority applied waiver even though Lybberts had not moved for default in order to force the county to answer the complaint. See id. at 50-51 (Madsen, J., dissenting); cf. Fisons, 122 Wn.2d at 344-45 (concluding motion to compel not prerequisite to award of sanctions for discovery abuse).

The rule announced in Lybbert regarding waiver of affirmative defenses was revisited by this Court in King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2002). Justice Madsen, writing for a unanimous Court, reconfirmed both the rule and its purpose:

We have held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). See also French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991). In Lybbert we explained, "the doctrine of waiver is sensible and consistent with ... our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" Lybbert, 141 Wn.2d at 39

(quoting CR 1). The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. *Lybbert*, 141 Wn.2d at 40.

King, 146 Wn.2d at 424.

The dilatory defense prong of the Lybbert rule should apply here, and Holland America should be deemed to have waived its improper venue defense if its delayed answer resulted in actual prejudice to Oltmans. Like the defense of insufficiency of service of process, improper venue must be asserted in an answer, or by motion. See CR 12(b)(3) (improper venue) & (5) (insufficiency of service of process). (The full text of CR 12 is reproduced in the Appendix to this brief.) These defenses are waived if not set forth in an answer or motion. See CR 12(h).⁵ Whether assertion of a contract forum selection clause is subject to CR 12(b) & (h) was answered in Voicelink Data v. Datapulse, 86 Wn.App. 613, 622-25, 937 P.2d 1158 (1997), which held that an improper venue defense includes one based upon a contract forum selection clause.

While it is true that the briefing in this case does not suggest that the delayed answer was coupled with inconsistent behavior on the part of Holland America, the rule established in Lybbert and King is stated in the alternative – *either* dilatory conduct *or* misleading and inconsistent behavior suffice. See Lybbert, 141 Wn.2d at 39; King, 146 Wn.2d at 424.

⁵ The briefing does not suggest Holland America raised the improper venue defense by motion before it served and filed its answer.

Further, the requirement under Lybbert that the defendant have actual or constructive knowledge of the potential prejudice appears to be met here, because Holland America is invoking its own forum selection clause. Again, under Lybbert it does not matter whether Oltmans are also deemed to know of the provision.

Lastly, whether Oltmans have established actual prejudice as a matter of law, or at least demonstrated a genuine issue of material fact, is disputed by the parties. See text supra, at 3-4. This is a matter for the litigants to address and the Court to resolve. The Oltmans correctly argue that if prejudice is shown, it should not matter whether the answer was eleven days or eleven hundred days late. See Oltman Ans. to Pet. for Rev. at 7.⁶

B. Susan Oltman's State-Based Loss Of Consortium Claim Is Unaffected By The Cruise Ship Contract And Is Cognizable Under Maritime Law.

1) The Cruise Ship Contract Does Not Foreclose Susan Oltman's Loss Of Consortium Claim.

The cruise ship contract, by its very language, does not apply to Susan Oltman. When interpreting the meaning of contractual terms, courts apply the plain language of the contract. See Flores v. American Seafoods Co., 335 F.3d 904, 910 (9th Cir. 2003) (noting "whenever possible, the plain language of the contract should be considered first")

⁶ For a variety of reasons, defendants frequently do not file answers within the 20-day period provided by CR 12(a)(1). The rule in Lybbert does not require every defendant to serve an answer in every case within twenty days or risk forfeiting a defense – it only requires this to occur when the defendant is deemed to know that the failure to do so will deprive the plaintiff of an opportunity to cure a correctible deficiency.

(citation omitted). The cruise ship contract defines the parties bound by its provisions as follows:

THIS DOCUMENT IS A LEGALLY BINDING CONTRACT BETWEEN YOU AND US. THE WORD "YOU" REFERS TO ALL PERSONS TRAVELING UNDER THIS CONTRACT INCLUDING THEIR HEIRS, SUCCESSORS IN INTEREST AND PERSONAL REPRESENTATIVES.

HAL Ans. to Pet. for Rev. at 3. This definition qualifies a subsequent contract provision which references "ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT." See *id.* Taken as a whole, the cruise ship contract should only apply to claims brought by persons who fall within the definition of "YOU." See *Flores*, 335 F.3d at 910 (requiring written contracts to be read as a whole).

The Court of Appeals failed to recognize this limiting language when it bound Susan Oltman to the cruise ship contract. See *Oltman*, 136 Wn.App. at 126. Susan Oltman was not a signatory to the contract, nor a passenger, heir, successor in interest, or personal representative of an estate, as specified by the contract.⁷

If the cruise ship contract language is not controlling, then the question is whether there is anything about the nature of the loss of consortium claim that itself binds Susan Oltman under the contract.

⁷ Holland America's reliance on *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464, 466-67 (5th Cir. 1972), for dismissal of the loss of consortium claim is misplaced. See HAL Br. at 15. In *Miller*, both spouses signed the contract. See 467 F.2d at 465.

2) Under Washington Law, Susan Oltman's Loss Of Consortium Claim Is Free-Standing And The Court Of Appeals Erred In Dismissing The Claim Based On *Condradt*.

In Washington, loss of consortium is a free-standing, non-derivative claim of a spouse when there is a predicate tort against the other spouse. Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 776, 733 P.2d 530 (1987); Green v. A.P.C., 136 Wn.2d 87, 101, 960 P.2d 912 (1998). The rights of the spouse bringing the claim "should not be restricted by or contingent on the rights of the impaired spouse." Reichelt, 107 Wn.2d at 774-75 (footnote omitted). Despite recognizing the non-derivative nature of loss of consortium, the Court of Appeals found Susan Oltman's claim rises or falls in accordance with her husband's negligence claim, relying upon Condradt v. Four Star Promotions, Inc., 45 Wn.App. 847, 728 P.2d 617 (1986). See Oltman, 136 Wn.App. at 126.

Condradt is not controlling here because in that case the predicate tort for the loss of consortium claim *did not exist*. The tortfeasor was relieved of any duty to the other spouse by virtue of a contract release. See Condradt, 45 Wn.App. at 852-53. Here, Jack Oltman did not agree to relieve Holland America of liability.

If Susan Oltman is not foreclosed from asserting a loss of consortium claim under the cruise ship contract or Washington state law, then the next question is whether federal maritime law precludes this claim, as contended by Holland America. See HAL Supp. Br. at 7.

3) Overview Of Federal Maritime Law And When State Law May Apply.

Federal maritime law is comprised of statutes and common law, which form an incomplete legal system that does not account for every eventuality. 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 4-2 at 163 (4th ed. 2004). Maritime law has traditionally accommodated state law, permitting supplementation where appropriate to create a complete body of law. Id.; Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202 (1996).

The federal common law of admiralty, referred to as “general maritime law,” recognizes a negligence cause of action and imposes a duty of “reasonable care under the circumstances.” See Schoenbaum, §5-2 at 198; Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 813 (2001). However, general maritime law did not initially recognize wrongful death and loss of consortium causes of action. Miles v. Apex Marine Corp., 498 U.S. 19, 23 (1990). Instead, state law applied in territorial waters; and occasionally on the high seas, when needed to provide a means of recovery. Id. at 24-25.⁸

Eventually Congress took steps toward aligning federal admiralty law with state statutory schemes by enacting the Jones Act, 46 U.S.C. App § 668, and Death on the High Seas Act (DOHSA), 46 U.S.C. App §§ 761-67. See id. at 23. The Jones Act provides a cause of action for seamen

⁸ “Territorial waters” are those waters within three nautical miles from the shore of a state or territory; non-territorial waters are considered the “high seas.” Yamaha, 516 U.S. at 207 n.4.

who are injured or killed as a result of negligence. Id. at 23-24. DOHSA allows a similar cause of action for personal representatives of nonseafarers, but only when death occurs on the high seas. Id. at 24.⁹ Neither statutory scheme allows for non-pecuniary damages, such as loss of consortium. Id. at 31-32.

Federal maritime statutes are generally preemptive and carefully adhered to by courts in fashioning remedies for plaintiffs. See id. at 27. The United States Supreme Court recognized this preemptive effect in Miles, at 32-33. There, loss of society damages were not allowed under general maritime law for the death of a seaman covered by the Jones Act because the act provided the exclusive remedy and expanding the damages available would be contrary to Congressional intent. See id. at 27 (acknowledging supplementation is allowed to achieve uniform policies, but concluding courts “must also keep strictly within the limits imposed by Congress”).

However, where federal statutes are inapplicable, courts may rely upon state remedies that are not adverse to admiralty jurisprudence. See Yamaha, 516 U.S. at 215-16. In Yamaha, the U.S. Supreme Court applied state law in allowing recovery for the death of a nonseafarer in *territorial* waters. Id. at 201-02. It determined that neither the Jones Act nor DOHSA precluded a state cause of action for wrongful death and loss of society. Id. at 216 (holding state law may provide a remedy unless

⁹ The term “nonseafarers” includes any person who does not belong to a ship’s crew as a seaman or is a longshoreman. See Yamaha at 205 n.2.

Congress has prescribed a comprehensive statutory scheme defining the scope of relief). Yamaha also held that general maritime law did not preclude state remedies in territorial waters. Id. at 202.

The teachings of Yamaha allow state remedies to supplement maritime law in furtherance of the maritime principle that “it better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy, when not required to withhold it by established and inflexible rules.” Id. at 213 (quoting Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970)).

4) Washington Law On Loss Of Consortium Should Supplement General Maritime Law Under These Circumstances.

Navigating federal maritime law is not smooth sailing. The law is an amalgam of federal common law and statutory enactments, and state supplementation. It is built upon principles and goals that sometimes conflict or overlap. Compare Moragne, at 401-02 (explaining maritime law should promote federal policies and operate uniformly nationwide), with Sea-Land Servs. v. Gaudet, 414 U.S. 573, 588 n.22 (1974) (noting legislative history shows that federal admiralty statutes were never meant to displace general maritime law or state remedies that are deemed appropriate by the Court). This Court is placed in the difficult position of trying to decipher this maritime system and predict how the U.S. Supreme Court would answer the question presented here - whether a state loss of

consortium claim is cognizable when the predicate tort is a general maritime claim for injury, occurring on the high seas.

The tension in “maritime-law federalism” arises when guidelines for applying state law in a maritime context are not clearly defined. David W. Robertson, The Applicability of State Law in Maritime Cases after *Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L.J. 81, 83 (1996/97). While supplementation by state law is historically recognized, the U.S. Supreme Court has acknowledged the difficulty of reconciling its jurisprudence and discerning when supplementation is permissible. See *Yamaha*, 516 U.S. at 210 n.8 (acknowledging that the Court is not undertaking a “grand synthesis” of the interface between general maritime law and state law). When the Court does take an affirmative step in defining the scope of general maritime law, it tends to limit the scope of its holding. See e.g. *Yamaha* at 216 (holding state wrongful death statutes apply to deaths of nonseafarers in territorial waters).

Nonetheless, there is a discernible trend toward upholding state law in maritime claims. See Robertson 21 Tul. Mar. L.J. at 97-99 (showing last 30 years of U.S. Supreme Court jurisprudence has promoted application of state law); Marva Jo Wyatt, The Loss of Loss of Society in the Ninth Circuit: Should State Courts Follow Suit?, 18 U.S.F. Mar. L.J. 201, 217 (2005/06) (concluding *Yamaha* reaffirmed the traditional practice of filling the gaps of maritime law with state law); Schoenbaum at 243 (noting since *Yamaha* the prevailing trend is to apply state law in

territorial waters); see also Lizabeth L. Burrell, Application of State Law to Maritime Claims: Is there a Better Guide than *Southern Pacific Co. v. Jensen?*, 21 Tul. Mar. L.J. 53, 56, 75-76 (1996) (advocating limiting application of state law in admiralty to “extraordinary circumstances” in order to preserve uniformity, but acknowledging trend of supplementing general maritime law with state law).

Susan Oltman’s claim presents an issue similar to that confronted in Yamaha - whether the injury should be deemed to fall outside the ambit of federal maritime law. See 516 U.S. at 215-16. Neither DOHSA nor the Jones Act applies to an injury sustained by a nonseafarer on the high seas. Nor is this a situation where the U.S. Supreme Court has disallowed a loss of consortium claim under general maritime law. Hoddevik v. Alaska Arctic Fisheries Corp., 94 Wn.App. 268, 280-81, 570 P.2d 828 (holding, in absence of judicially fashioned admiralty rule on point, that state discrimination law applies), *review denied*, 138 Wn.2d 1016 (1999). Absent controlling federal law, this Court must consider whether, based upon the analysis in Yamaha, the U.S. Supreme Court would uphold a state loss of consortium claim under these circumstances. The answer should be yes. See Robertson at 102 (concluding Yamaha is “a ringing call for state-law applicability to a wide range of maritime injury and death cases”).¹⁰

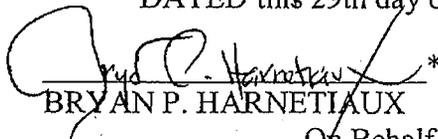
¹⁰ The “saving to suitors” clause in 28 U.S.C. § 1333(1) does not expand or detract from this argument. While the clause creates a basis for concurrent state court jurisdiction, state courts must abide by what has been described as the “reverse-*Erie*” principle. This principle provides that when federal maritime law specifically defines the remedies

The decision relied upon by Holland America, Chan v. Society Expeditions, Inc., 39 F.3d 1398 (1994), denied a loss of consortium claim for injuries to a cruise ship passenger on the high seas under *general maritime law*. See HAL Supp. Br. at 7.¹¹ This is not the question before this Court. The Ninth Circuit did not address whether a *state* claim for loss of consortium exists based on a tort committed upon a nonseafarer on the high seas. Considering the historical use of state law to supplement certain remedies on the high seas, and the endorsement in Yamaha of state law remedies in territorial waters, these sensibilities should extend to the present context. Susan Oltman's state-based loss of consortium claim should be allowed when the predicate tort is an injury to a nonseafarer on the high seas, grounded in general maritime law. In this sense, the Court is not sailing "in occupied waters." Miles, 498 U.S. at 36.

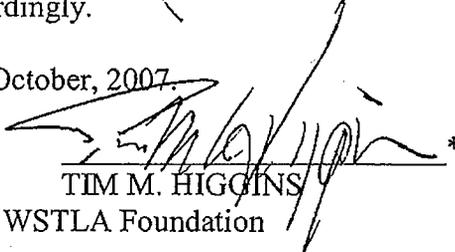
VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve the issues addressed accordingly.

DATED this 29th day of October, 2007.


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On Behalf of WSTLA Foundation


TIM M. HIGGINS *

*Brief transmitted for filing by e-mail; signed original retained by counsel.

available, state courts are bound by such determinations. See Robertson at 85-86. (The text of 28 U.S.C. § 1333 is reproduced in the Appendix to this brief.)

¹¹ The holding in Chan has been criticized and may be incorrect. Marva Jo Wyatt, 18 U.S.F. Mar. L.J. at 216 (urging Chan extended Miles beyond its statutory underpinnings and is implicitly overruled by Yamaha); see also Schoenbaum at 242 (contending Chan is among a small group of cases that misinterpreted Miles to preclude loss of consortium claims under general maritime law). If Chan is indeed incorrect, general maritime law may provide a remedy for Susan Oltman.

APPENDIX

Court Rule 1
Scope of Rules

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

[Amended effective September 1, 2005.]

Court Rule 9
Pleading and Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Condition Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Pleading Existence of City or Town. In pleading the existence of any city or town in this state, it shall be sufficient to state in such pleading that the same is an existing city or town, incorporated or organized under the laws of Washington.

(i) Pleading Ordinance. In pleading any ordinance of a county, city or town in this state it shall be sufficient to state the title of such ordinance

and the date of its passage, whereupon the court shall take judicial notice of the existence of such ordinance and the tenor and effect thereof.

(j) Pleading Private Statutes. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof.

(k) Foreign Law.

(1) United States Jurisdictions. A party who intends to raise an issue concerning the law of a state, territory, or other jurisdiction of the United States shall set forth in his pleading facts which show that the law of another United States jurisdiction may be applicable, or shall state in his pleading or serve other reasonable written notice that the law of another United States jurisdiction may be relied upon.

(2) Other Jurisdictions. A party who intends to raise an issue concerning the law of a jurisdiction other than a state, territory or other jurisdiction of the United States shall give notice in his pleading of the foreign jurisdiction whose law he contends may be applicable to the facts of the case. The following matters need not be pleaded, but may be discovered pursuant to rule 26:

- (i) the party's contentions as to which issues of law are governed by the foreign law;
- (ii) the substance of such foreign law;
- (iii) the expected effect of such foreign law on the legal issues and on the outcome of the case being tried;
- (iv) the specific foreign statutes, regulations, judicial and administrative decisions, documents and other nonprivileged written materials and translations thereof upon which the party intends to rely.

(3) Application of Foreign Law. Issues of foreign law may be simplified pursuant to rule 16 and determined in advance of trial pursuant to rule 56.

(4) Failure To Plead Foreign Law. If no party has requested in his pleadings application of the law of a jurisdiction other than a state, territory or other jurisdiction of the United States, the court at time of trial shall apply the law of the State of Washington unless such application would result in manifest injustice.

(l) Burden of Proof. Nothing in this rule shall be construed to shift or alter the burden of proof.

[Amended effective September 1, 1983; September 1, 1985.]

Court Rule 12
Defenses and Objections

(a) When Presented. A defendant shall serve his answer within the following periods:

- (1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;
- (2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);
- (3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person,
- (3) improper venue,
- (4) insufficiency of process,
- (5) insufficiency of service of process,
- (6) failure to state a claim upon which relief can be granted,
- (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse

party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived

(A) if omitted from a motion in the circumstances described in section (g), or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

[Amended effective January 1, 1972; January 1, 1980; September 18, 1992]

28 U.S.C. § 1333
Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.
- (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.)

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