

No. 63519-1-I

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

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Kirk R. Hogle, Appellant

v.

Arca Fishing Company, L.L.C., Respondent

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REPLY BRIEF OF APPELLANT

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**III. Summary of Reply**

Under the controlling authority of *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942) Arica was in the position of a fiduciary in and bore the burden of proving the fairness of enforcing its Release against Mr. Hogle. It never did so to the exclusion of issues for trial.

Was Arica’s failure to either spell out the uncertainties in consideration or to verbally disclose those uncertainties at the time of making the Release (if parol evidence is allowed) a fatal omission of material facts rendering the initial release void? If so did Arica separately establish all requirements for enforcement of a new seaman’s release and settlement consummated after 2/12/07 up to the time Mr. Hogle negotiated the final \$7,700 payment?

Was the initial Release also unenforceable because in obtaining it Arica took advantage of a seaman under the influence of medications and yet fully healed for a grossly inadequate consideration to compensate a career ending injury due to the fault of Arica? If so did Arica establish all

requirements for enforcement of the Release and settlement at some point between 2/12/07 and the time Mr. Hogle negotiated the final \$7,700 payment?

Alternatively<sup>1</sup>, when Mr. Hogle deposited the final \$7,700 payment did he understand and accept that by doing so he was electing to ratify a claimed Release the fairness of which was Arica's burden to prove, and to accept a \$7,700 payment in lieu of continuing to pursue claims potentially worth a hundred times that amount or more?

Taking all permissible inferences in Mr. Hogle's favor these are all issues for trial.

**IV. Counterstatement of the case based on facts and inferences supporting Mr. Hogle.**

Mr. Hogle didn't just claim he was injured on Arica's vessel, the captain of the vessel signed an accident report stating that Mr. Hogle hurt his knee in an 8/31/06 accident caused by another worker. CP 313-314. About two and a half months after knee surgery while he was still limping and not fully healed Mr. Hogle made his first attempt to return to work on the vessel, stopping at the Arica office on his way up to Alaska to sign a

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<sup>1</sup> Mr. Hogle's primary position is that if defendants did not initially satisfy the maritime requirements for enforcement of the Release then they must establish them at some point thereafter. As such the issue is less about ratification of the old Release and more about satisfying the *Garrett* factors at some time before the last payment.

crew contract. CP 14, 15, 17; (limping) CP 257 (para 5), 284 (para 5), 547 (p.16 line 7) and 548 (p. 41 lines 7-25). At that time Arica apparently got Mr. Hogle to fill out and sign a Release[CP 515 (p. 58 -59)] at a time when he was so medicated that he has no memory of it. CP 264-268 (para 16, 25-30, 40-41); CP 258 (para 7-9), CP 294 (ln. 3-5), CP 546 (p. 17 lines 5-11).

On 2/12/07 Mr. Hogle was a 51 year old chief engineer making \$125,000 per year who intended to work to 60 or 65. CP 262 (para 22, 23), 268 (para 40). Although Arica knew from long experience that it was problematic for a person of Mr. Hogle's age to return to the physically demanding job of chief engineer after a serious knee injury (CP 609 ln 16-18), the Release consideration included nothing for future wage loss, and was limited to wages from two fishing trips lost to date. Mr. Hogle's future wage loss if the injury proved career ending would be \$487,000 to \$732,000. CP 273, para 3 c.

The Release provided that the consideration was the 2 trips' wages paid "in the usual course", but didn't explain that it was doubtful that wages from the first trip would ever be paid due to a government seizure of the catch known to Arica at the time. A trier of fact could reasonably find that the Release failed due to the omission of a material term

regarding the uncertainty of consideration, and could also disbelieve Ms Little's claim (if allowed over objection) of verbal explanation.

After it was clear that he couldn't return to sea Mr. Hogle sued Arica in November 2007. In February 2008 Mr. Hogle learned of the Release when Arica sent a copy to his lawyer. In July 2008, two and a half years after the government seizure and eight months after they had been sued, Arica sent Mr. Hogle a check of ~ \$7,700 for the wages from the first 2007 trip.

Arica asserts that it was not until June of 2008 that they were "allowed to pay" these wages (Resp. Brief at 14), but a finder of fact could reject this assertion, since Arica settled the government claim for ~ 38% of the value of the seized product in June 2008 (CP 150, 152), and then sent Mr. Hogle a check for his crew share base on 100% of the product value in July 2008. CP 230 (para 10), 237<sup>2</sup>. There is nothing in the record to explain why Arica couldn't have paid 100% of the value of the seized product in the customary manner within two months of the fishing trip, and the trier of fact could reasonably find that Arica decided to pay Mr. Hogle's wages on the un-discounted trip value as a litigation tactic and

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<sup>2</sup> Mr. Hogle has no knowledge that the rest of the crew was settled at 100%, but notes that his check (CP 155) is approximately the amount noted in CP 237 as an undiscounted settlement for a 1.75 % crew share.

that the payment was not “in the usual course” as required under the Release agreement.

Mr. Hogle denies all of Arica’s assertions about supposed conversations and understandings between Mr. Hogle and Arica agents on 2/12/07 and other claimed conversations leading up to that date. This includes the alleged advance telephone agreement to settle the claim for the two trips’ wage (Resp. Brief at 6); that Mr. Hogle’s 2/12/07 trip to Arica office was for purpose of closing his injury claim (Id 6,8); that Little explained the government seizure issue to Mr. Hogle on 2/12/07 before he signed the Release (Id. p. 8, 9, 24, 25) and he was fine with it (Id. p. 25); that Ms. Olson carefully explained the terms of the settlement and Release (Id p. 10); that Ms. Olson didn’t notice Mr. Hogle’s medicated state (Id); that Mr. Hogle told her he wasn’t under influence of medication on 2/12/07 (Id); and that Ms. Olson’s didn’t observe Mr. Hogle limping (CP 517 dep p. 67 ln 14-15).

A trier of fact could reasonably reject all the aforementioned testimony as self serving and biased, and could draw support for their conclusion from Arica’s failure to go on record regarding these claimed discussions with Mr. Hogle until after they knew he had no memory of certain events; and from the fact that non-party witnesses who observed

Mr. Hogle both before and after his 2/12/07 meeting could see he was limping<sup>3</sup> and medicated<sup>4</sup>.

Rejection of the self serving Arica testimony could gain further support if other claimants testified to experiences at variance with Ms. Olson's claimed customary protectiveness towards claimants' rights. There is presently a Motion for Discretionary review of a sanction imposed on another fishing company as a result of Ms. Olson's breach of an express agreement to refrain from ex parte contact with a seaman/claimant's treating physician beyond gathering of records. See Petition of Alaska Beauty v. Holloway, Court of Appeals No. 64365-7-I, particularly Respondent's Motion on the Merits, p. 1-10 (attached), especially underlined portions.

## **V. Reply to Arica Arguments**

### **A. Contract issues and parol evidence rule.**

Arica's argument avoids the real issue. While it is true that extrinsic evidence must be relied upon to value the product, the issue is whether the express term relating to how and when the product value will be determined, "calculated and paid **in the usual course**", can be completely altered by parol evidence. Arica would have "calculated and

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<sup>3</sup> CP 257 (para 5), 284 (para 5), 547 (p.16 ln 7), and 548 (p.41 ln 7-25)

<sup>4</sup> CP 258 (para 7-9), 294 (ln. 3-5), 546 (p. 17 ln 5-11)

paid **in the usual course**” encompass the following: “trip one product has been seized by the government and wages will not be paid until Arica resolves issues with the government over that seizure. At best such resolution will result in some payment after a substantial delay. At worst it will result in no wages from trip one.”

Although fishing contracts may contemplate some delays and even certain potential contingencies (e.g. quality adjustments) before the wages are paid, the difference here is that this was not a reasonably contemplated potential contingency, but a known failure of half the consideration which was not disclosed by Arica. None of the cases cited by Arica would allow such a significant change to an express written contract term based on parol evidence.

A case cited by both parties makes clear that Arica’s actions do not pass muster under maritime law. *Thorman v. American Seafoods Co.*, 421 F.3d 1090 (9th Cir. 2005) held that owners had no affirmative duty to reveal internal methodology for calculating wages based on pre-season product value estimates at the time of contracting with their crews, but contrasted this with the owner’s duty in negotiating a release, where all relevant information must be disclosed. Clearly under *Thorman* Arica had an affirmative duty to reveal all relevant information about the seizure without the need for any formal or informal request by Mr. Hogle.

Arica fails to respond to the second part of Mr. Hogle's argument: assuming either that the parol evidence isn't admitted or is admitted and not believed would Arica's failure to disclose the uncertainty regarding trip 1 wages "be seen by a reasonable person as a material omission rendering the contract void". Appellant's Brief at 33. Arica argued (regarding the parol evidence rule) that maritime law follows the general principles of the Restatement (2<sup>nd</sup>) of Contracts. Resp. Brief at 22. Following those same principles, if an agreement is not reasonably certain as to its material terms there is a fatal indefiniteness and the agreement is *void*. Restatement (2<sup>nd</sup>) Contracts Sec 32 (1981). A finder of fact could reasonably find the uncertainty as to half the consideration was fatal to the agreement and rendered it void.

Arica's assertion that Mr. Hogle's endorsement of the \$7,700 check mooted the parol evidence issue is incorrect for two reasons. First, Mr. Hogle could not ratify a void contract, but would have to make a new agreement meeting the *Garrett* requirements for enforcement of Releases at or before the time of his negotiation of the \$7,700 check. Second, contrary to Arica's claim that all relevant information had been provided to Mr. Hogle by his attorney before he deposited the \$7,700 check (Resp Brief at 25), there is no direct evidence that this occurred.

### **B. Medical status and advice**

Arica argues that Mr. Hogle's medical clearance without restrictions before 2/12/07 settles the issue of Mr. Hogle's medical fitness on the date of the Release (Resp. Brief at 5), but this ignores the substantial evidence that Mr. Hogle was limping with a swollen knee and in pain when he arrived at the vessel the next day. CP 548 ( p. 40 ln 7-23). Ms. Olson testified that "[i]f [Mr. Hogle's] ... knee was still bothering him at the time of signing that release, I would have asked him more questions and we may have found that it was not appropriate to execute that release." CP 517 (p. 68 ln 1- 3). The trier of fact could reasonably find that the Arizona physician's work release before 2/12/07 was a product of his insufficient understanding of Mr. Hogle's job requirements, which were only clarified by Arica after Mr. Hogle had to leave the vessel again due to his knee. CP 326. None of the cases discussed by Arica would preclude a finder of fact from considering Mr. Hogle's premature return to the vessel before he was fully healed as a relevant factor in deciding the fairness of enforcing the Release under *Garrett v. Moore-McCormack Co.*, supra and *Orsini v. O/S Seabrooke*, 247 F.3d 953 (9th Cir. 2001).

### **C. Adequacy of consideration**

Arica mischaracterizes *Orsini v. O/S Seabrooke*, supra. While consideration amounting to less than what was already owed the seaman

for no-fault maintenance cure presents a very strong case of inadequate consideration, so does the illusory consideration Arica dangled in front of Mr. Hogle in the form of wages paid “in the usual course” for a trip that was not expected to be paid in the usual course. Moreover, inadequate consideration was approved as the primary factor in Judge Dwyer’s refusal to enforce a Release in *Resner v. Arctic Orion Fisheries*, 83 F.3d 271 (9th Cir. 1996) even though there was no maintenance and cure owing.

#### **D. Mental competency and coercion**

Arica speciously claims that Mr. Hogle can’t claim coercion if he can’t remember what happened. Resp. Brief at 29. However, if Mr. Hogle was not in his right mind on 2/12/07 due to the effect of medications then Arica’s actions were per se coercive in the same way it would be coercive for a guardian to engage in a self dealing transaction with a mentally retarded ward.

#### **E. Ratification**

##### **1. Facts relating to ratification**

Before the Reconsideration motion the only direct evidence of Mr. Hogle’s understanding and intent when he negotiated the \$7,700 check was what he said in his Declaration. Because defendants had not demanded that he repudiate his lawsuit before negotiating the check Mr. Hogle considered it a down payment on a much larger claim, and never

intended to ratify and accept the inadequate settlement in lieu of proceeding with his lawsuit. CP 269-270, para 47.

While Mr. Hogle “suspected” that “Arica was contending that [the check] was consideration for a settlement” (Resp. Brief at 19) he never testified that he understood the effect of negotiating the check, and his Declaration in support of reconsideration providing more details about his information and understanding was not a contradiction, but a clarification of what could have been reasonably inferred by the trier of fact from his earlier statement and other evidence.

Although Arica repeatedly claims that when he deposited the \$7,700 check Mr. Hogle had “fully informed advice from competent legal counsel” (Resp. Brief 1, 2, 30) there is no direct support for that in the record. Previous to Reconsideration Mr. Hogle had mentioned his attorney’s advice<sup>5</sup> in deposition without ever providing specifics about what the advice had been (See Resp. Brief 17-19). Although Mr. Hogle was represented by counsel at the time he cashed the check that attorney had done nothing from the point when he became aware of the Release in February, 2008, until he withdrew in October 2008. CP 29 (ln 3-4), 270

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<sup>5</sup> In each referenced portions of his deposition Mr. Hogle also attempted to claim the attorney client privilege. CP 176 (dep ln 22-24), 405 (dep p. 282 ln 2-5, 19-20; p. 284 ln 13-15), and 406 (dep p. 300 ln 4-6). He also moved to strike Arica’s attempts to admit the arguably privileged material in evidence,. CP 292-300

(para 49), 624. A trier of fact could reasonably conclude Mr. Hogle's first attorney lost interest in the case after learning of the Release in February 2008 and would not necessarily have provided adequate advice.

Mr. Hogle's fully informed consent based on attorney advice was central to the trial Court's dismissal based on ratification, but the trial Court's only basis for this finding was an *inference* against Mr. Hogle because he had an attorney.

I don't think there's any issue that he was represented at the time that the two checks were sent by defendant to plaintiff. **The Court certainly can draw reasonable inferences without getting to the issue of what is or is not covered by the attorney privilege** and also what has been waived or has not been waived or now relinquished as a waiver.

RP 15(emphasis added).

I'm going to grant the motion for summary judgment. I think the ratification is the thing that this Court looked at. Most significantly, if there had not been the negotiation of that final settlement check, I don't think we would be here today. Even considering all the facts in the light most favorable to Mr. Hogle, **there's no question he had advice of counsel for quite some time before that third and final check was issued.** ...

Mr. Bratz couldn't have been more straightforward in writing that letter [of 9/8/08, CP \_\_\_], and **certainly Mr. Stacey, a known maritime lawyer, is well aware of what that very concise paragraph meant, and I don't even think I need to get into attorney-client privileged communications.** The facts speak for themselves. I'll sign the order.

RP 49 (emphasis added).

While such an inference might be permissible at trial, it is not the only inference from the record and it was clearly an error for the trial court erred to make such an inference against Mr. Hogle on summary judgment. Jurors who have experienced less than stellar legal representation may conclude that a busy lawyer with other things on his mind might not give Mr. Hogle thoroughly reasoned or comprehensive legal advice.

The record also doesn't support Arica's claims that Mr. Hogle "had all the relevant facts" when he negotiated the \$7,700 check. Resp. Brief p. 33, 38. Mr. Hogle didn't know any details of the government seizure until February 2009 after his second lawyer moved to compel discovery. See, e.g. CP 230, 237. See also CP 33 – 42. Contrary to Arica's assertion that a full explanation of the last payment was provided by its attorney's letter of 9/8/08 (Brief at 16) that letter (CP 185) said nothing about the discounted settlement with the government and Arica's subsequent decision to settle Mr. Hogle's trip 1 wages based on the full catch value. Mr. Hogle also didn't know in September 2008 what Arica claimed had been said to him on 2/12/07 about the government seizure and other matters until Olson and Little made their Declarations in February 2009 and were deposed in March of 2009.

As discussed supra, a reasonable finder of fact could deem the delay in distribution coupled with the discounted settlement with the government (the details of which were unknown to Mr. Hogle when he negotiated the check) coupled with the final undiscounted wage distribution supported the conclusion that 1) Arica lied when it claimed it had to delay distribution until the government claim was settled shouldn't be trusted about anything; and 2) Arica did not pay the trip 1 crew settlement in the ordinary course in breach of the express terms of the Release agreement.

## **2. Argument re ratification**

Arica repeatedly argues that ratification moots other issues concerning the enforceability of the Release. The flaw in this argument is that there is no applicable maritime case that says that if the seaman is represented the owner no longer has to prove that the Release was "fairly made .... and fully comprehended by the seaman" and "was executed freely, without deception or coercion, and with full understanding of his rights. " as required by *Garrett v. Moore-McCormack Co.*, supra. Lack of representation is a factor weighing against enforcement of a Release under *Orsini v. O/S Seabrooke*, supra, and other cases. However, there is no rule that a seaman's legal representation at the time of execution of a Release dispenses with the owner's burden under *Garrett*, which is why all the

cases cited by Arica which uphold Releases executed by represented seamen discuss the other factors besides representation that establish fairness, full disclosure by the owner and full understanding and knowing agreement by the seaman.

Contrary to Arica's argument *Sea-Land Service, Inc. v. Sellan*, 64 F. Supp.2d 1255 (SD FL 1999), affd on other grounds 231 F.3d 848 (11 Cir. 2001), is distinguishable on the facts and procedure and lacks any persuasive value. After bench trial the court found that following negotiations covering a year's time Mr. Sellan settled his back injury claim for \$364,500 and an agreement not to seek reemployment at Sealand, but never returned the executed Release to Sealand. A true scoundrel, Mr. Sellan started with an attorney, but fired him near the end of negotiations to cut the attorney out of his fee. Although he knew at the time of the settlement that his back injury rendered him permanently unable to return to sea, Mr. Sellan subsequently lied about his medical history to get a doctor's fit for duty, got re-hired by Sealand, and then tried to make another back injury claim against Sealand. While the trial judge included ratification and estoppel arising out of Mr. Sellan's retention of the settlement funds as one of many grounds for enforcing the oral settlement agreement, ratification and estoppel were not even mentioned in the appellate ruling upholding enforcement of the oral agreement.

Clearly the differences in between *Sellan* and the case at bar outweigh any similarities. While *Sellan* involved a full trial with the presumption that the trial court's findings against Mr. Sellan would be upheld if supported by any evidence, at bar Mr. Hogle was entitled to all permissible inferences in his favor in determining whether he was entitled to a trial. Mr. Sellan got substantial compensation for a career ending injury while Mr. Hogle got about a sixth of one year's compensation. Mr. Sellan settled after lengthy negotiations (most with the benefit of counsel) while Mr. Hogle engaged in no negotiations before executing the purported Release on 2/12/07 [CP 307 ln 9-10; CP 409 ln 1-2; CP 50 (p. 127 ln 17 to p. 128 ln 1)] and none between receipt and negotiation of the \$7,700 check. Mr. Sellan's settlement took place after he knew he was medically unable to return to sea, while Mr. Hogle's signed his Release before his first attempt to return to sea. Finally, while Mr. Sellan knowingly took the benefit of the settlement and then refused to return the funds, while Mr. Hogle denies knowing that taking the last payment would bind him to a settlement, and offered to pay the funds into the registry of the Court if he were allowed to proceed with his action, including placing funds in his attorney's trust account ready to perform<sup>6</sup>. CP 617 (para 13-16), 641.

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<sup>6</sup> Arica criticizes Mr. Hogle for not actually paying the funds into the

Not only has *Sea-Land Service, Inc. v. Sellan*, supra, never been cited by the Ninth Circuit, a review of the Ninth Circuit decisions overturning seamen's releases does not reveal any discussion of ratification, even where the claimant accepted the consideration and should have been barred from overturning the release if *Sellan* were the law. See *Orsini v. O/S Seabrooke*, supra; *Schultz v. Paradise Cruises, Ltd.*, 888 F. Supp. 1049 (D. HA 1994); *Resner v. Arctic Orion Fisheries*, supra. For a case directly rejecting the ratification argument as inconsistent with the principles in *Garrett*, supra, see *Pitre v. Penrod Drilling Co.*, 791 F.Supp. 612, 1993 AMC 595 (ED LA 1992).

Arica's other cases are also distinguishable. *Borne v. A&P Boat Rentals No. 4, Inc.*, 780 F.2d 1254 (5 Cir. 1986) involved a represented seaman who settled after the first day of trial on the recommendation of the trial judge and was not allowed to later back out of the settlement. *Pereira v. Boa Viagem Fishing Corp.*, 11 F. Supp.2d 151 (D MA 1998) involved \$10,000 settlement for a crushed fingertip of plaintiff who was healed and back at work, and where the entire negotiation was transcribed and conclusively demonstrated that *Garret* factors were satisfied. *Durden v. Exxon Corp.* , 803 F.2d 845 (5 Cir. 1986) enforced the result of a trial

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Court registry, but by the time he realized this could be an issue the case was already dismissed. Hence the offer to pay if the case were reinstated on Reconsideration.

which had found that a captain who settled his claim for \$87,000 was fully aware of his medical situation and all other relevant facts at the time. *Sitchon v. American Export Lines, Inc.*, 113 F. 2d 830 (2d Cir. 1940) involved a represented plaintiff and no claim of overreaching. It also predates *Garrett. Simpson v. Lykes Bros. Inc.*, 22 F.3d 601 (5 Cir 1994) involved a represented plaintiff who received \$398,000 for a back injury in 1989 in return for a Release of all known and unknown injuries, who was not allowed to sue the same defendant for hearing loss in 1992 based on the 1989 Release.

While the state law fiduciary cases can't control this maritime law issue, they show that Mr. Hogle's interpretation of maritime law is in keeping with basic principles recognized under our state law in analogous situations. By contrast Arica cites the court to state law cases involving hard bargaining between non-fiduciaries which are of no persuasive or instructive value. See Resp Brief at 36, citing *Barton* and *J-Z Sales* cases.

While *Harrington v. Atlantic Sounding Co., Inc.* (E.D.N.Y. 9-11-2007) 06-CV-2900 (NG) (VVP) involves an arbitration agreement it is analogous and illustrated that an owner dealing with an injured seaman cannot bargain away a valuable right of the seaman without adequate consideration and full disclosure of all relevant facts, and the seaman will

not be held to ratify an election of remedies without full knowledge of his rights and knowing acceptance of the consequences.

A similar principle has been recognized by federal maritime law in the analogous area of election of remedies. *Johnson v. American-Hawaiian S.S. Co.*, 98 F. 2d 847 (9 Cir. 1938) arose under then-existing law imposing an election on an injured longshoreman when he accepted compensation under the Longshore and Harborworkers' Act (LSHWA), such that thereafter only his employer would have the right to sue a third party who caused the injury. The employer's agents had visited the injured claimant in the hospital and provided him with LSHWA compensation without advising that by accepting the compensation he would be making a binding election. After the election was upheld by a trial court the 9<sup>th</sup> Circuit reversed, reasoning

It seems well settled by the weight of authority in cases other than those dealing with workmen's compensation acts, that an election is not valid and binding where the action has been taken by one without knowledge of his rights and where rights of innocent third parties have not been affected adversely. ...

Id at 851. Similarly, in *Kiesling v. United States*, 171 F. Supp. 314 (SD TX 1958), it was held that taxpayers who filed separately due to ignorance of the proper way to claim an oil lease were relieved from their election.

...taxpayers did not know of their antecedent existing legal rights; their accountant likewise did not know of such

rights; they depended upon said accountant and acted upon his misadvice; their action, therefore, did not become their voluntary or intentional decision upon which they would be bound.

Id at 317.

Taking reasonable inferences in his favor, at the time he negotiated the \$7,700 check Mr. Hogle was ignorant of both relevant facts and the legal antecedents of those facts, including Arica's allegations surrounding the making of the Release, Arica's basis for calculating the last payment (including details of the settlement of the government seizure action), and most importantly the right to insist that Arica prove that it would be fair to enforce the Release against him under the circumstances. The trier of fact could infer that Mr. Hogle's lawyer didn't provide thorough or complete advice and could find support for this conclusion by the illogic of Mr. Hogle's actions. Why would Mr. Hogle relinquish an apparently strong claim of high value in return for a \$7,700 payment at a time when he did not particularly need the money unless he did not understand all the facts and his rights thereunder?

Note that there is no undue burden on vessel owners by enforcing the requirements of *Garret* in this instance. For one thing a complicated settlement like this with long-delayed payments would presumably be fairly rare. For another, the owner could easily moot issues like those

presented here by sending along a new release and requiring the seaman/claimant to sign it and to dismiss his lawsuit before sending the delayed final payment check. Arica did not do that, and has offered no explanation why not.

#### **F. Olson deposition**

Arica characterizes the rescheduling of Ms. Olson's deposition on the date Mr. Hogle's Opposition was due as "inexplicable", but the delay was fully explained both in the written record (Appellant's Brief p. 24, 48; CP 487 FN 1) and in open court. RP 25. The two reschedules from 3/4/09 to 3/6/09, and 3/6/09 to 3/9/09, were both at the request of Arica due Ms. Olson's to a claimed illness. The deposition took several days to be transcribed, after which Mr. Hogle filed a supplemental brief.

Ms. Olson's deposition would have been relevant to impeach Ms. Little on a number of points on which she and Little were inconsistent, to impeach Arica's overall credibility regarding the claims about alleged conversations and understandings with Mr. Hogle on 2/12/07, and for her admission regarding the significance of Mr. Hogle's limp, discussed at p. 12 *supra*<sup>7</sup>.

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<sup>7</sup> While Ms. Olson denied seeing the limp, she admitted that settlement might not have been appropriate if Mr. Hogle was limping.

## **G. Reconsideration**

### **1. Relevant facts**

Mr. Hogle initially attempted to claim the attorney client privilege during his deposition<sup>8</sup> and moved to strike Arica's citation to testimony where he had mentioned his attorney's advice (though without getting into specifics) as inadvertent disclosures. CP 291, 300. The trial court ruled that without considering whether there was any waiver of privileged communications she could infer from the fact that Mr. Hogle was represented that he had full and adequate advice and was fully informed about the legal effect of the \$7,700 check when he negotiated it, and therefore Mr. Hogle knowingly chose to ratify the settlement and effected elected to abandon his claim against Arica. See RP 15, 49 quoted at 15 supra.

It was primarily because of the trial court's impermissible inference against him regarding his attorney's presumed advice, which was completely unexpected, that Mr. Hogle waived the privilege on Reconsideration.

Mr. Hogle's evidence on Reconsideration was not inconsistent with his previous testimony and declaration, and with reasonable

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<sup>8</sup> CP 176 (dep ln 22-24), 405 (dep p. 282 ln 2-5, 19-20; p. 284 ln 13-15), and 406 (dep p. 300 ln 4-6)

inferences from the record, but it did make clear that the actual advice provided to him didn't square with what had been presumed or inferred by the trial Court. Mr. Hogle's attorney had advised that if the \$7,700 check was a correct accounting of his final crew share from the first 2007 trip bringing defendants' bargained for consideration current, then it wouldn't change anything for him to deposit the check. CP 609 para 9 and email at CP 625. There was nothing in the emails between Mr. Hogle and his attorney (CP 615-617, 619, 624, 625) to indicate that Mr. Hogle was advised that Arica had the "burden of sustaining the release as fairly made with [him] and fully comprehended by [him]" under *Garrett*, supra, or that there was any discussion about the legal problems with Arica's lack of full disclosure about the trip 1 seizure.

## **2. Argument**

Arica does not dispute Mr. Hogle's assertion in his opening brief (at 50) that the cases are more charitable toward reconsideration based either on evidence that could not be considered at the initial hearing or on an incorrect legal standard. It is indisputable that Mr. Hogle had a basic right based on sound policy considerations not to waive attorney client privilege. To borrow Arica's phrase, it is "hornbook law" that the trial judge should not make inferences against Mr. Hogle where a contrary inference in his favor was permissible. The trial judge's clearly erroneous

inference against Mr. Hogle regarding his first attorney's presumed advice was a surprise which Mr. Hogle sought to counter with evidence that he had previously believed would not be necessary. , as was the case here with the inference about the first attorney's advice. Mr. Hogle's new evidence should have been allowed to reinforce and support the conclusion that the trial court erred in its presumption about the advice of Mr. Hogle's first lawyer. CR 59 a) 4) should not be held to absolutely bar introduction of evidence withheld under a proper claim of privilege where it was only due to an unanticipated and erroneous ruling that it became necessary to waive the privilege. While *State v. Marks*, 71 Wn. 2d 295 (1967) involved hindsight of the trial court about admission of evidence rather a necessary change in strategy by the attorneys the case does illustrate that there can be some flexibility under CR 59 for highly unusual evidence situations.

While Arica argues that previously withheld material regarding Mr. Hogle's attorney's advice should not be considered regarding the details of the advice (Resp. Brief at 34), Arica inconsistently asserts that Mr. Hogle's Declaration in support of Reconsideration is relevant to prove "he and his attorney were in communication about this very matter at the time and still, Hogle chose to cash the check. Resp Brief at 37. While perhaps not rising to the level of a judicial estoppel, Arica's use of the

Reconsideration evidence is one more factor favoring admission of the previously withheld privilege material.

Arica fails to directly respond to Mr. Hogle's secondary ground for Reconsideration, that Arica's moving papers did not include authority directly supporting its argument that negotiation of the check mooted claims that the Release was defective due to lack of competence/understanding at the time of its making. Arica's assertion at oral argument that this was "hornbook law" (RP 19 ln 4-9), didn't satisfy the due process requirement that a motion, particularly a summary judgment involving maritime substantive law which may be unfamiliar to the trial court, should be fully supported by legal citations supporting propositions of law. King County Local Rule 7 b) 5) B) iv). Only with such advance notice does a non-movant have a fair opportunity to respond and in this case perhaps to educate the trial court about the unique aspects of maritime law which render the "hornbook law" proposition inapplicable to this situation. Arica's citation of court opinions which have used the shorthand "hornbook law" in explaining their decision misses the point, which is the failure of due process when a Motion for Summary Judgment is based on a legal point not raised or supported in the moving papers.

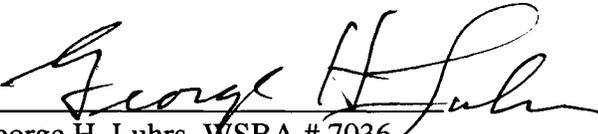
**VI. Withdrawal of cost issue**

In light of recent decision of the Supreme Court confirming defendants' right to demand a jury in a state court Jones Act case Mr. Hogle withdraws this issue.

**VII. Conclusion:**

Mr. Hogle has demonstrated that the summary judgment and denial of Reconsideration were in error. The dismissal of his action should be overturned and the case remanded for trial.

DATED January 11, 2010

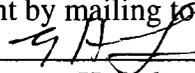
  
George H. Luhrs, WSBA # 7036  
Attorney for Appellant

**VIII. Appendix**

Petition of Alaska Beauty v. Holloway, Ct. App. No. 64365-7-I,  
Respondent's Motion on the Merits, p. 1-10. .... vi - xv.

Certificate of Service

I certify that on 1/11/10, the undersigned served a copy of the foregoing document on David Bratz, LeGros Buchanan & Paul, 701 Fifth Avenue, #2500, Seattle, WA 98104 by depositing it in the US mail and filed the document by mailing to this Court on the same date.

  
George H. Luhrs

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2010 JAN 13 AM 10:14

## **Appendix**

Petition of Alaska Beauty v. Holloway, Ct. App. No. 64365-7-I,  
Respondent's Motion on the Merits, p.1-10. .... vi - xv

No. 64365-7-I

STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION I

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ALASKA BEAUTY, LLC, AND UNITED STATES SEAFOODS, LLC,

Petitioners

v.

RICHARD HOLLOWAY, JR.,

Respondent,

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RESPONDENT'S MOTION FOR AFFIRMANCE ON THE MERITS  
AND FOR ATTORNEY FEES AND COSTS

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George H. Luhrs  
701 Fifth Avenue., Suite 4600  
Seattle, WA 98104  
(206) 632-1100  
WSBA # 7036  
Attorney for Respondent

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2010 JAN 13 AM 10:14

## A. INTRODUCTION

Mr. Holloway is a disabled seaman who had multi-level back surgery at the end of December 2008. In spring 2009 after they had discontinued maintenance and cure benefits Petitioners asked the impecunious Mr. Holloway to obtain information at his expense from his treating physician regarding expected future medical treatment and Mr. Holloway declined, suggesting formal deposition. Petitioners never attempted formal discovery procedures and instead directly contacted the physician through their claim adjuster who had been paying the physician's bills. In answer to Petitioner's leading inquiry suggesting the desired answer the physician made a written statement which Petitioner sought to use in support of motions seeking relief in this litigation.

Not only was the ex parte contact unauthorized, but it was in direct violation of an express agreement by Petitioner not to engage in verbal or written ex parte contact with Mr. Holloway's medical treaters. Mr. Holloway promptly moved for Protective Order barring further ex parte contact and Sanction Order excluding use of the statement, barring Petitioners from calling the physician as a witness on the subject of the statement, and imposing monetary sanction, which Orders were granted.

The trial court was fully within its discretion and within established precedent in granting the requested Orders. Said Orders

should be affirmed on the merits and attorney fees and costs for proceedings before this Court awarded to Mr. Holloway.

**B. IDENTITY OF RESPONDENT**

Respondent is Richard Holloway, Jr.

**C. STATEMENT OF DECISION BELOW**

The two decisions below as to which Petitioner sought Discretionary Review are a 9/28/09 Protective Order providing that defendants may not engage in ex parte contact with Mr. Holloway's medical providers (Ex Parte Protective Order, Petitioners' Appendix p. 1-2), and a 9/28/09 Order imposing sanctions arising out of an improper ex parte contact with one of Mr. Holloway's medical treaters (Sanction Order, Petitioners' Appendix p. 3-5). The complete Findings and Order from the Sanction Order are quoted below.

[T]he Court ... FINDS

1. That defendants engaged in highly improper ex parte contact with plaintiff's treating physician on 8/31/09 which was clearly without legal basis.
2. That defendants' attempt to use the fruits of their improper ex parte contact to circumvent the clear directive of this Court's 8/27/09 Order compelling payment of past due maintenance was improper and contemptuous.
3. That the improper ex parte contact caused adverse impact to plaintiff in his relationship with his treating physician

4. That the improper ex parte contact necessitated plaintiff's motion seeking this relief and necessitated plaintiff spending time contacting his treaters to prevent further ex parte contacts
5. That plaintiff's motion was also necessary for plaintiff to compel payment of maintenance which was willfully and wantonly withheld.
6. That absent order prohibiting defendants from any use of the fruits of the improper ex parte contact (both by exclusion of evidence and prohibition of defendants from calling the improperly contacted medical witness) defendants will have obtained an unjustified advantage in this case
7. That due to defendants' improper ex parte contact plaintiff has a substantial need for the testimony of defense examiner John Burns justifying their calling him as a witness.
8. That the Court has considered less burdensome sanctions (i.e. other than the exclusion of evidence and prohibition of defendants from calling the witness in question) and found them inadequate to accomplish the Court's purposes herein, the COURT hereby

ORDERS the following SANCTIONS:

1. Defendants may not use for any purpose (i.e. evidence, impeachment, showing to witnesses, etc.) the unauthorized 8/31/09 ex parte communication between defendants' representatives and Dr. Noonan and any fruits thereof
2. Defendants may not call Dr. Noonan's as a witness on the issue of Maximum Medical Improvement of plaintiff (MMI) or use his testimony on that issue.
3. Plaintiff may call defense examiner John Burns, M.D. as a witness on the issue of MMI.

4. Defendants shall pay plaintiff the amount of \$2000. This amount represents both punishment and deterrence to defendants for their improper and contemptuous conduct, compensation to plaintiff for the adverse impact on his case, attorney fees to plaintiff for preparation of this motion, and compensation to plaintiff for time spent contacting medical providers, all caused by defendants' improper conduct.

9/28/09 Order Granting Sanctions.

#### **D. ISSUES FOR DECISION ON THE MERITS**

1. Was the Protective Order a matter of judicial discretion clearly within the discretion of the trial court and/or a matter clearly controlled by settled law?
2. Was the Sanction Order a matter of judicial discretion clearly within the discretion of the trial court and/or a matter clearly controlled by settled law?
3. Should Respondent be awarded attorney fees and costs expended in obtaining affirmance of said Orders before this court either on the legal basis which justified fees below or based on RAP 18.9?

#### **E. RESPONDENT'S STATEMENT OF CASE**

Anissa Olson of Polaris Adjusters had been operating as Petitioner's claim adjuster on Mr. Holloway's claim and paying Mr. Holloway's medical bills from the time of a 6/08 injury during crew service on Petitioner's fishing vessel. After Mr. Holloway retained

counsel he insisted that if he were to permit Ms. Olson to continue to directly contact his treating physicians to pay bills and obtain chart notes she would have to refrain from any ex parte communications with his treating physicians, including written communications, and she agreed.

this confirms our agreement that Polaris will continue to collect needed medical records ..., but will not engage in **ex parte communication with treaters by any means** (e.g. **written** or mail **questions**, verbal conversations).

8/6/08 ltr from Luhrs to Olson, Exhibit 4 to Reply to Opposition to Motion for Sanctions, Respondent's Appendix, p. RA 51(**emphasis added**). In Response Ms. Olson had confirmed

**I did agree to refrain from communicating with doctors or their staff other than as necessary to obtain medical records...**

8/6/08 ltr from Olson to Luhrs, Exhibit 5 to Reply to Opposition to Motion for Sanctions, Respondent's Appendix, p. RA 52. (**emphasis added**).

On 8/27/09 the trial court Ordered Petitioners to pay plaintiff \$4,010 in maintenance covering the period from 4/16/09 to 8/27/09, implicitly finding that Petitioners failed to establish that Mr. Holloway's treater, Dr. Noonan, had pronounced him at maximum cure, which was a

prerequisite to discontinuing the maintenance and cure ordered on 12/12/08<sup>1</sup>. See Petitioner's Appendix p. 8-9.

The undersigned counsel for Mr. Holloway received the trial court's mailed copy of the 8/27/09 Order on 8/31/09 and expects that was the day Petitioner also received the Order, since both offices are in downtown Seattle within a few blocks of each other. 9/4/09 Luhrs Decl, Respondent's Appendix, p. RA 31, para 1.

On 8/31/09 at 9:00 a.m. plaintiff attended Petitioner's CR 35 examination, conducted by Dr. Burns. At the end of the ~ one hour exam Dr. Burns stated his opinions for the benefit of Mr. Holloway while being voluntarily audio taped by CR 35 ) 2) observer Marie Wendel, RN.

It appears that your treating doctor has not yet reached a date for your maximum medical improvement. I don't like to interfere with treating doctors on these things - but they will declare that you have reached maximum medical improvement within a few months.

Excerpt of 9/4/09 Decl. of Marie Wendle, RN (including transcription of audio recording). Respondent's Appendix p. RA 35, ln 24-26. Presumably Dr. Burns made this statement after review of Mr. Holloway's treatment records, which had been provided to him before the exam per

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<sup>1</sup> The 12/12/08 Order provided "[t]hat defendants shall pay ... further maintenance (paid directly to plaintiff) at the \$30/d rate *until plaintiff is pronounced at maximum cure by his treating physician*". (*emphasis added*). See Petitioner's Appendix p. 7, para d.

standard practice. Thus, contrary to Petitioner's statements in its Motion for Discretionary Review (p. 6, 1<sup>st</sup> incomplete para), it was not clearly implied in Dr. Noonan's chart notes that Mr. Holloway was at maximum cure. The evidence supports the inference that by the afternoon of 8/31/09 Petitioners knew Dr. Burns had not declared Mr. Holloway at MMI or interpreted Dr. Noonan's record to include an MMI pronouncement<sup>2</sup>.

Mr. Holloway suggested to the trial court that it was a reasonable to infer that it was Petitioners' 8/31/09 receipt of these two pieces of information (the 8/27/09 Order, and the news that Dr. Burns had not provided an MMI opinion) that precipitated Petitioners to contact Mr. Holloway's treating physician without permission to try to obtain a favorable MMI opinion. Reply to Opposition, etc, p. 1, Respondent's Appendix p. RA 44, ln 22-24. This unauthorized ex parte contact by Petitioners resulted in the Sanction which is the subject of this Motion.

At 4:05 p.m., 8/31/09, Petitioner's claim adjuster Anissa Olson faxed a note to the office plaintiff's treating physician, Dr Noonan stating

It appears from the [5/20/09] chart note that Mr. Holloway may have reached maximum medical improvement, but the

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<sup>2</sup> Petitioner made no denial in response to Mr. Holloway's counsel's averment that it would be typical practice for the defense CR 35 examiner to share his preliminary opinions with the defense counsel by phone shortly after the exam. See 9/4/09 Luhrs Decl, Resp Appdx, p. 31, para 2; See also 9/14/09 Holloway Decl., Resp. Appdx. p. RA 38, para 5.

note does not state so clearly. A copy of the note is attached for your convenience.

Thank you for passing this on to Dr. Noonan for comment.

Motion for Sanctions Ex 2 (p. 1 and 3), Respondent's Appendix, p. RA 27,

29. Ms. Olson faxed a second page directly to Dr. Noonan asking him to

Please complete the following statement ... Mr. Holloway reached/will reach maximum medical improvement on \_\_\_\_\_.

Motion for Sanctions Ex 2 (p. 2 3), Respondent's Appendix, p. RA 28.

(note that Mr. Holloway has no unsigned copy of this statement) In response to Ms. Olson's request Dr. Noonan apparently followed Ms. Olson's suggestion and filled in 5/20/09 for the MMI date, signing and dating the statement 9/1/09 and faxing it to Ms. Olson. Id.

Petitioner attempted to use Dr. Noonan's statement to justify payment of \$1,200 in maintenance (M. for Sanctions Ex 1, Respondent's Appendix, p. RA 26) and as a basis for attempted Reconsideration of the 8/27/09 Order on Second Motion to Compel Maintenance and Cure. Mr. Holloway filed Motions for Protective Order barring ex parte contact, and for Sanctions, including an Order prohibiting use of the improperly obtained statement of Dr. Noonan for any purpose and barring Petitioner from calling Dr. Noonan as a witness regarding MMI.

As recited above, Petitioners were under an express agreement not to engage in this specific type of ex parte contact. Neither Ms. Olson nor Petitioner's counsel requested or obtained Mr. Holloway's advance consent to Ms. Olson's 8/31/09 communication with his treating physician. See 9/4/09 Luhrs Decl, Respondent's Appendix, p. RA 32, para 5-7. Although Mr. Holloway had suggested in May 2009 that Petitioner should depose Dr. Noonan if they wanted his MMI opinion, Petitioner made no attempt to do so at any time.

Mr. Holloway was last seen by Dr. Noonan on 5/20/09. Before Petitioners' ex parte contact Dr. Noonan had not rendered an express MMI opinion. See 8/13/09 Pif Decl, Respondent's Appendix, p. RA 6, para 4 Dr. Burns' CR 35 examination was the most recent medical examination of plaintiff, and as of 9/1/09 Dr. Burns' verbal estimate quoted at p. 7 supra was that Mr. Holloway would be declared at MMI within a few months of 8/31/09, and was the only medical opinion regarding Mr. Holloway's MMI date.

Mr. Holloway through counsel submitted evidence in support of the Motion for Sanctions and without objection that:

- As a result of Petitioners' claimed right of ex parte contact with Mr. Holloway's treaters it was necessary to contact current and former treaters advising that they were not authorized to engage in ANY ex