

JOHN B. KUZOFF

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NO. 2002-CA-0845

VERSUS

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COURT OF APPEAL

TIDEWATER MARINE, INC.

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-12086, DIVISION "K-14"
HONORABLE LOUIS A. DIROSA, JUDGE PRO TEMPORE

JAMES F. MCKAY III
JUDGE

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris,
Sr., Judge Michael E. Kirby)

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REVERSED AND REMANDED

The plaintiff, John B. Kuzoff, appeals the trial court's judgment granting defendant's exception of res judicata and motion for summary judgment.

The plaintiff contends that the trial court erred when it determined that the plaintiff's present claim for damages is barred by a release and settlement executed in another matter between the plaintiff and the defendant.

The defendant employed plaintiff as a ship captain. In 1996, he allegedly injured his back while on board one of the defendant's vessels. It was determined by plaintiff's physicians that he needed back surgery. In preparation for the surgery, numerous pre-operative tests were run, including blood tests. The blood tests revealed that the plaintiff was infected with Hepatitis C. This diagnosis was made in 1997. The plaintiff filed suit against defendant in July of 1998 seeking damages for the back injury he sustained in 1996. The parties reached a settlement of plaintiff's claim in November of 1998 and plaintiff received \$100,000.

In March of 2000, the plaintiff allegedly learned that he had contracted Hepatitis C as a result of an inoculation he received in Egypt. The plaintiff filed suit against the defendant in August of 2000 alleging that

the defendant had hired Egyptian physicians to give their employees inoculations and that the Egyptian physicians had used improperly sterilized re-usable needles. The defendant filed an exception of res judicata and alternatively a motion for summary judgment arguing that plaintiff's claims are barred as a result of the release that he executed in the prior suit. After a hearing on the exception and motion, the trial court rendered judgment in favor of the defendant, granted defendant's exception and dismissed the plaintiff's case.

The plaintiff now appeals arguing that the release executed in the prior suit did not encompass the present action. The plaintiff contends that he could not have intended to include any remedies or actions he had against defendant as a result of having Hepatitis C, as he did not know at the time he executed the document that the Hepatitis C was related to his employment with the defendant.

It is well established that seamen are the wards of admiralty and that releases and settlements involving seaman's rights are subject to careful scrutiny. The burden is upon the party claiming settlement as a defense to prove that it was entered into by the seaman with a full understanding of his rights. Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed.2d 239 (1949); Wink v. Rowan Drilling Co., 611 F.2d 98 (5th Cir.

1980). “The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.” Garrett v. Moore-McCormack, 317 U.S. at 248, 63 S.Ct. at 252. Garrett established a two-part test in determining the enforceability of a seaman’s release: (1) whether the release was executed freely, without deception or coercion; and (2) whether it was made by the seaman with full understanding of his rights. To apply the second part of the test, a court must consider (1) the adequacy of the consideration; (2) the nature of the medical advice available to the seaman at the time of the signing of the release; and (3) the nature of the legal advice available to the seaman at the time of the signing of the release. Id.; Orsini v. O/S Seabrooke O. N., 247 F.3d 953, 959 (9th Cir. 2001).

In Orsini, the court concluded that the plaintiff did not waive his claims as to the defendant’s future conduct. The plaintiff sustained injury to his right arm while working on defendant’s ship. The plaintiff was initially treated by a physician’s assistant and informed that he had carpal tunnel syndrome. Believing that his injury was not work-related, as he had only been working on defendant’s vessel for less than two weeks when he sustained the injury, plaintiff signed a release and received five hundred dollars. After departing the ship, the plaintiff was examined by an

orthopedic surgeon who diagnosed plaintiff's condition as ulnar nerve entrapment at the elbow. The physician indicated that the plaintiff could have sustained this injury within the time that the plaintiff worked on defendant's vessel. The appellate court noted that

Orsini's inaccurate understanding of his medical condition is a factor weighing strongly against the Release's enforceability. . . The misdiagnosis may have led Orsini to undervalue his claims against the ship. . . More importantly, Orsini reasonably could have believed that the cause of his injuries, if from overuse and repetitive stress, was other than his recent service aboard the ship. In contrast, if the injury was an ulnar nerve disorder, it more likely was caused by work aboard the ship. The misdiagnosis was critical to Orsini's understanding of his rights and could have discouraged a claim against the ship.

Orsini, 247 F.2d at 963.

In Miles v. American Seafood Co., 197 F.3d 1032 (9th Cir. 1999), the appellate court held that the release executed by the plaintiff concerning a shoulder injury did not bar plaintiff's claims for another shoulder injury. The court held that the release protected the defendant from claims for complications from or a recurrence of the original injury. However, the release did not prevent the plaintiff from pursuing claims for new trauma which occurred to the same shoulder. The release provided that the plaintiff released the defendant from

Each and every right or claim which I now have, or may hereafter have, because of any matter or thing which happened before the signing of this paper; including every claim for damages, maintenance, wages, cure, transportation, reimbursement, or expense . . . whether or not now in existence

or known to me in the future, which in any way arises out of or is connected with my employment on the SS “American Champion.”

Miles, 197 F.3d at 1033.

The appellate court concluded that any ambiguities or doubts in the interpretation of a seaman’s release for claims for injury against the owner of a vessel must be decided in favor of the seaman.

In the present case, the release executed by the plaintiff provided that:

I, John B. Kuzoff, in exchange for and in consideration of the sum of ONE HUNDRED THOUSAND AND NO/100 DOLLARS, cash in hand to me paid, which I acknowledge that I have received, which sum is in addition to payments previously made to me or on my behalf as maintenance and cure, do hereby RELEASE and forever discharge Tidewater Marine, Inc., Gulf Fleet Supply Vessels, Inc., Pental Insurance Co., Ltd., Tidewater Inc., its officers, directors, owners, parent, affiliated, subsidiary or related companies, successors, assigns, employees, agents, charterers, lessees, managers, and insurers, and the M/V GULF FLEET NO. 51, and/or any other vessels having any connection with my accident, their engines, tackle, apparel, etc., owners, agents, operators, charterers, lessees, managers, insurers, masters, officers and crewmembers, and any and all other persons or entities having any liability or responsibility whatsoever for my accident, all of which and whom are hereinafter collectively referred to as the “above mentioned parties”, from any and all rights or causes of action, suits, liens, debts, damages, and claims whatsoever, including, but not limited to, all rights or causes of action under the statutes and/or laws of the State of Louisiana or any other state; 46 U.S. Code 688, The Jones Act; 45 U.S. Code 51, et seq., The Federal Employers’ Liability Act; 33 U.S. Code 901, et seq., The Longshoremen’s and Harbor Workers’ Compensation Act; The Admiralty and Maritime Laws of the United States of America, and any other laws which might have afforded me **a cause or right of action for damages** for unseaworthiness, punitive damages, damages for negligence, strict liability, absolute liability, wages and/or maintenance and cure, workmens’ compensation, and any other

compensation or reimbursement whatsoever, with or without a jury trial, **which I have ever had, now have or may hereafter have, growing out of or in any way directly or indirectly connected with the injuries received, incapacity and/or disability sustained by me as a result of an accident in which I was involved while I was employed by Tidewater Marine, Inc., or any other company, corporation or person whatsoever, on or about March 26, 1996, which caused injury to my mind or body, including, but not limited to, my low back.** I am releasing the above mentioned parties for all of these injuries and disabilities, including the aggravation of any condition resulting from these injuries, and/or other ailment, disease, injury or illness, including any emotional and/or mental disorders, cognitive difficulties, depressive reactions, anxiety, and any accompanying pain and suffering which I suffered or may hereafter suffer as a result of these injuries, and any other illness, incapacity or disability of any other portion or portions of my body and/or mind, in any way relating to or resulting from this accident or any other accident or illness.

* * * * *

I warrant that I am the sole and only party entitled to assert any and all claims hereinabove mentioned, and I agree to protect, defend, save and hold harmless, the above mentioned parties released herein in the event any such claims, or any possible claims arising from or in any way related to my alleged injury described hereinabove, are asserted by or on behalf of anyone, against any of the above mentioned parties, regardless of any fault on the part of the above mentioned parties. Furthermore, I agree that the above mentioned parties shall be entitled to plead this release and indemnification agreement in complete defense of any claims by any person for alleged damages arising from or in any way related to my injuries described above, and the above mentioned parties shall be entitled to full exoneration with costs and reasonable attorney's fees (to be paid by me) by virtue of my executing the release and indemnification agreement.

Furthermore, in consideration of the payment of the aforesaid sums, I hereby covenant and agree that I will never hereafter institute or file any suit, complaint, or action at law, admiralty, or otherwise against the parties and the vessels released by me in this receipt and release of all claims and indemnification agreement. This covenant not to sue includes my accident aboard the M/V GULF FLEET NO.

51 on or about March 26, 1996, and all other accidents or illnesses or injuries of whatever nature or kind arising out of my employment with Tidewater Marine, Inc., including any claims for future maintenance and/or cure.

* * * * *

I, John B. Kuzoff, further acknowledge that by signing this release I give up any rights or causes of action relating to my employment, including, but not limited to any cause of action for employment discrimination or wrongful discharge and any cause of action under the U.S. Americans with Disabilities Act (ADA), the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), 42 U.S.C. 12101, et seq. and/or the Louisiana Civil Rights Act for Handicapped Persons, La. R.S. 46:2251, et seq. and/or the Jones Act, 46 U.S.C. 688, or any other law or laws which might have afforded me a remedy for same. I further fully understand and acknowledge that I am giving up any right to any damages or other compensation relating to my employment with Tidewater Marine, Inc., including, but not limited to, any right to unemployment compensation benefits and any right to any damages or other compensation benefits and any right to damages or other remedies under the U.S. ADA, 42 U.S.C. 12101, et seq. and /or the Louisiana Civil Rights Act for Handicapped Persons, La. R.S. 46:2251 et seq. and/or the Jones ct, 46 U.S.C. 688, or any other law or laws which might have afforded me a remedy for same. I also covenant and agree that I will never hereafter seek employment with Tidewater Marine, Inc., its related companies and successors. I also covenant and agree that I will never hereafter institute or file any suit, complaint, or other action against the parties released by me arising in any way out of my employment and termination with Tidewater Marine, Inc., except that I am specifically reserving my rights under any pension plan or disability plan in connection with my employment. (emphasis added).

The document was signed after plaintiff’s counsel reviewed the document and requested that the provision be placed in the document stating that the plaintiff reserved his rights concerning his retirement plan. While the plaintiff was adequately represented by counsel, no one knew, not even

the defendant, that the plaintiff could have incurred Hepatitis C as a result of his employment with the defendant. Neither plaintiff's nor defendant's medical experts were aware of the connection at the time the release was executed. Further, the amount of the settlement is adequate for a back injury but could not begin to satisfy the cost of the medical treatment the plaintiff will need to treat Hepatitis C. As both plaintiff and defendant note, the plaintiff is in need of a liver transplant. Thus, there is no evidence to suggest that the parties contemplated that the plaintiff would have such a claim at the time the release was executed. Further, the release itself is ambiguous concerning the claims which the plaintiff intended to release. In one section of the release, the plaintiff makes reference only to the claims arising out of his injuries sustained as a result of the accident which occurred on March 26, 1996. Then, towards the end, the language suggests that the plaintiff is intending to release the defendant against all future claims. Such an ambiguity must be resolved in favor of the seaman and against the defendant. Miles.

Thus, in light of the jurisprudence cited above, the trial court erred when it granted the exception of res judicata and motion for summary judgment. The evidence presented reveals that there is a question of fact of whether the plaintiff intended to release defendant from its alleged liability

for plaintiff's contraction of Hepatitis C. The trial court's judgment is reversed and the matter remanded.

REVERSED AND REMANDED