IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIRK R. HOGLE, Appellant, v. IQUIQUE U.S., LLC; IQUIQUE U.S. I, INC.; REBECCA IRENE FISHERIES, LLC, Defendants, ARICA FISHING COMPANY, LLC, Respondent.	)	NO. 63519-1-I DIVISION ONE UNPUBLISHED OPINION FILED: September 27, 2010

Leach, A.C.J. — Kirk R. Hogle appeals the dismissal of his maritime claims against Arica Fishing Company, LLC, on summary judgment.[1] Because Hogle ratified a prior release of all of his claims against Arica by negotiating checks he received for the release after he filed this lawsuit, we affirm.[2] We also

[1] Hogle brought his action in state court under the "saving to suitors" clause in 28 U.S.C. § 1331(1). "The 'saving to suitors' clause gives plaintiffs the right to sue on maritime actions in state court provided that the state court proceeds in personam . . . and not in rem." Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878-79, 224 P.3d 761 (2010) (citing Madruga v. Superior Court, 346 U.S. 556, 560-61, 74 S. Ct. 298, 98 L. Ed. 290 (1954)). "Such suits are governed by substantive federal maritime law." Endicott, 167 Wn.2d at 879 (citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10, 74 S. Ct. 202, 98 L. Ed. 143 (1953)).

[2] Because Hogle ratified the release, we do not address whether the release satisfied the test set forth in Garrett v. Moore-McCormack Co., 317 U.S.

affirm the superior court's rulings on Hogle's untimely surreply and his motion for reconsideration.

FACTS

On August 31, 2006, Hogle injured his right knee[3] while working as the relief chief engineer aboard the F/T Arica.[4] He continued to work and completed his duties aboard the Arica. After returning to his home in Arizona, Hogle was diagnosed with a torn meniscus and underwent surgery in November 2006. The operating physician, Dr. Robert Kersey, recommended in a report, dated January 3, 2007, that Hogle, who was still experiencing some discomfort, be returned to "regular work on 02/05/07." Kersey prescribed Vicodin for knee pain.

During his recovery in December 2006 and January 2007, Hogle was in contact with Jackie Little, Arica's Human Resources Manager, and Anissa Olson, a maritime claims adjuster. The parties dispute the substance of these discussions. In his declaration, Hogle testified that he and Little talked about his return to work after the medical release date. According to Little, she and Hogle not only discussed his return to work but also closing and settling his injury claim. She testified in her declaration that, in a telephone conversation, they

---

239, 248, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

[3] Hogle was lying on a conveyer belt while performing repairs in the Arica's fish processing factory. The accident occurred when the factory foreman accidentally turned on the conveyer belt.

[4] Hogle worked seasonally as a chief engineer for fishing vessels managed by Iquique U.S., LLC, since 2000. He worked as the regular chief engineer aboard the vessel F/T Rebecca Irene.

had agreed to settle the claim for the amount of wages Hogle would have earned on the F/T Rebecca Irene on the first two trips in 2007.

On January 29, 2007, Olson asked that Hogle see Kersey for another examination. Kersey confirmed in a report on February 2, 2007, that Hogle "occasionally gets some discomfort, but . . . [he] may return back to unrestricted work on 02/05/07." Arica paid Hogle's maintenance and medical bills through the date of the medical release. Arica then arranged for Hogle to resume his duties as chief engineer on the Rebecca Irene. When Hogle traveled from Arizona to Seattle to sign the crew contract, he began experiencing more knee pain, so he took Vicodin regularly during his stay in Seattle. Hogle was also taking an increased dosage of Atenolol for high blood pressure at this time. The combined effect of these medications allegedly blunted Hogle's awareness. The parties consequently give different accounts of the events occurring on February 12, 2007.

On that day, Hogle signed the crew contract. Hogle also signed a release of claims. The release included the following language:

> I declare that I forever release and discharge . . . Arica Fishing Company [and] the F/T "ARICA" . . . from all legal claims of any kind that I may have for any and all loss or damage, including injury to my right knee, whether presently known or discovered in the future, arising out of or connected with my employment on the F/T "ARICA" on or about August 31, 2006, and any and all other claims that could be brought by me arising out of or related to my employment on the F/T "ARICA" up to and including the date of this Release of All Claims.
>
> . . . .

> I acknowledge also that I know that in signing this Release of All Claims I am taking the risk that I may be more seriously injured [than] my physicians or I know, and that I may have injuries that are presently not known to me.

The release recited as its consideration "the amount of wages I would have earned on trips RI 07-01 + 07-02, if I had been onboard the 'REBECCA IRENE' in the position of Chief Engineer. These wages will be calculated and paid in the usual course as the trips settle and crewshare is determined." The release also contained a section titled "RIGHTS OF SEAMEN" which explained Hogle's maritime rights to maintenance and cure, as well as his right to bring actions for negligence and unseaworthiness.

Hogle testified in his declaration that he has "no recollection of signing a release" since he had taken two Vicodin pills and 50 to 75 milligrams of Atenolol that morning. In her declaration, Little stated that Hogle appeared coherent and informed her that he was not taking any medication except Atenolol. Little confirmed the settlement amount and informed Hogle that wages for trip 07-01 could be delayed. She explained that the National Oceanic and Atmospheric Association (NOAA) was preventing the Rebecca Irene from distributing proceeds from the sale of fish caught on that trip because the Rebecca Irene had fished in a closed area. Hogle indicated that he understood and still wanted to settle his knee claim and return to work. Little then called Olson to prepare a release and meet with Hogle in her office. Olson testified in her declaration that she and Hogle reviewed the entire release, including the section "RIGHTS OF

SEAMEN." Olson confirmed that Hogle understood the settlement amount and that those amounts had yet to be determined. She further stated that Hogle appeared coherent when he signed the release before a notary public.

Traveling to Alaska, Hogle reported to the Rebecca Irene on February 13, 2007. He was unable to perform his duties due to his knee injury and left. According to Arica, Hogle was paid unearned wages, maintenance, and cure.[5]

Hogle received the first settlement check, dated February 22, 2007, in the amount of $12,092.11. Nothing on this check indicated that it was part of the consideration for Hogle's release.[6] Hogle deposited the check, believing it was unearned wages.

Around May 2007, Hogle attempted a second time to resume his duties as Rebecca Irene's chief engineer but was again forced to leave due to his knee injury. According to Arica, Hogle was paid unearned wages, maintenance, and cure.

In April 2007, Olson contacted Kersey, inquiring about Hogle's fitness to return to work. In his August 13, 2007, report, Kersey imposed restrictions that

[5] See Lipscomb v. Foss Maritime Co., 83 F.3d 1106, 1109 (9th Cir.1996) ("Under the general maritime law, a seaman who falls ill or becomes injured while in the service of a ship is entitled to 'maintenance and cure' by his employer. This right includes (1) 'maintenance'—a living allowance for food and lodging to the ill seaman; (2) 'cure'—reimbursement for medical expenses; and (3) 'unearned wages' from the onset of injury or illness until the end of the voyage.") (citation omitted).

[6] Little explained in her declaration that this amount reflected Hogle's "gross preliminary settlement, i.e., there were no payroll deductions."

prevented Hogle from returning to work.[7] Hogle e-mailed Olson, requesting further compensation. When he received no response, Hogle retained maritime attorney Joseph Stacey and, on November 1, 2007, sued Arica under the Jones Act and general maritime law, seeking damages, as well as maintenance, cure, and unearned wages.[8]

After filing suit, Hogle received the second settlement check, dated November 9, 2007, in the amount of $2,363.13.[9] Nothing on this check indicated that it was part of the consideration for Hogle's release. Hogle deposited the check, believing it was unearned wages.

In December 2007, Arica filed an answer to Hogle's complaint, denying liability and damages and stating that it had paid maintenance, cure, and unearned wages. Among its affirmative defenses, Arica asserted that Hogle's claims were "barred by prior settlement and release." Around February 2008, Arica provided Stacey with a copy of the release.

Hogle received the third settlement check, dated July 11, 2008, in the amount of $7,738.19.[10] This check had "Full and Final Settlement" written in the

---

[7] These restrictions permitted "[n]o kneeling, squatting, crawling, or riding on a boat." At the same time, Kersey reported, "[Hogle] still gets persistent pain. . . . We discussed the fact that this sometimes can become a chronic situation and he may not be able to return back to these activities, but as his pain allows, I would decrease his restrictions." Hogle started work as a construction electrician in April 2008.

[8] Hogle named other defendants, who were later dismissed from the action.

[9] Little stated in her declaration that this amount was the "final" crew share settlement for the two trips. No deductions were taken.

lower left corner. When Hogle received the check, he contacted Stacey.[11] Stacey wrote to Arica asking if the check was consideration for Hogle's release. In a letter dated September 8, 2008, Arica's attorney, David Bratz, explained,

> The $7,738.19 forwarded to Kirk Hogle constituted supplemental settlement consideration for the Receipt and Release he signed on February 12, 2007. The consideration for the Receipt and Release were the earnings Mr. Hogle would have made as Chief Engineer on the REBECCA IRENE for the first two trips of the 2007 A season. There was an issue with the government over Atka Mackerel caught on trip 0701, preventing the company from distributing proceeds from Atka Mackerel caught that trip. When the dispute was resolved, the REBECCA IRENE's owners issued supplemental crew settlements to that trip's crew. Mr. Hogle received a supplemental payment corresponding to what his supplemental crew settlement would have been for the Atka Mackerel, consistent with and as supplemental consideration for the Receipt and Release.

Hogle deposited the third check on September 22, 2008. He admitted that before receiving the check he was aware that he had signed the release. Hogle also admitted that, based on his conversations with Stacey, he "suspected" that the check constituted the remaining consideration for the release. Hogle explained that he deposited the checks "to offset a small part of the substantial damages defendant caused me."

In October 2008, Stacey withdrew from the case, and maritime attorney George Luhrs substituted as Hogle's counsel. In February 2009, Luhrs filed a

---

[10] According to Little, this amount was a "supplemental" crew share payment from trip 07-01. No deductions were taken.

[11] Hogle moved to strike portions of his deposition related to his conversations with Stacey, asserting attorney-client privilege. The superior court did not address this issue in its ruling since it relied primarily on the September 2008 letter.

motion to compel discovery regarding the government seizure of proceeds from trip 07-01.[12]

Arica moved for summary judgment, arguing, in part, that Hogle had ratified the release by accepting the settlement checks. In support of this defense, Arica relied on the declarations of Olson and Little, excerpts of Hogle's deposition, and Bratz's September 2008 letter. Hogle filed a response and cross motion for summary judgment, claiming that the release did not meet maritime law requirements. As support, Hogle submitted his own declaration, pointing out that he had earned $124,899 in wages and unemployment compensation in 2005.[13] Hogle also submitted the declaration of maritime attorney George Knowles, who estimated Hogle's "actual damages" to be between $487,000 and $732,000. Hogle also provided declarations from friends who witnessed his medicated state and an expert who testified about the effects of Vicodin and Atenolol. Arica filed a reply, relying on excerpts of the depositions of Olson and Little to dispute Hogle's contention that he was heavily medicated when he signed the release.

Two days before the summary judgment hearing, Hogle filed a surreply

[12] Hogle claims that at this time he first learned that "the seizure had been compromised for 37.6% of the catch value in a settlement finalized on 6/17/08 but that . . . defendants had apparently opted not to pass the discount along to plaintiff and other crewmembers."

[13] Hogle was 51 years old at the time of the accident and testified that he intended to work until age 60 or 65. Hogle also testified that the consideration did not include compensation for 45 to 60 days of lost shipyard work.

and a third declaration by Luhrs. Attached to the declaration were documents and excerpts from the depositions of Little and Olson showing that they had discussed advancing payment funds to Hogle without a release. Arica moved to strike the surreply and attached documents as untimely.

On March 20, 2009, the court granted Arica's motion to strike the surreply and attached documents. The court also granted summary judgment to Arica based on the events happening after the release was signed. The court decided that these undisputed events, particularly Hogle's deposit of the third check, established that he had ratified the release.

Hogle filed a motion for reconsideration. In support of this motion, Hogle partially waived attorney-client privilege and submitted e-mails from February and December 2008 of his conversations with Stacey about the third check. Hogle also offered to pay the full amount of the consideration and any interest into the court's registry. The court denied this motion.

Hogle appeals the court's summary judgment order, the striking of his surreply, and the denial of his motion for reconsideration.

STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo.[14] Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[14] Retired Pub. Employees Council v. Charles, 148 Wn.2d 602, 612, 62 P.3d 470 (2003).

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[15] All facts and reasonable inferences must be taken in the light most favorable to the nonmoving party.[16]

ANALYSIS

Release of Claims

While ratification is the primary issue concerning Hogle's release of claims, we preliminarily address Hogle's argument that Arica's failure to include language in the release stating that the wages from trip 07-01 would be delayed due to the government seizure constitutes a "material omission" that renders the release void. Hogle further argues that Arica's attempt to introduce evidence—namely testimony that Hogle was informed about the possible delay in paying wages—to cure this omission rule violates the parol evidence rule by modifying the language "wages will be calculated and paid in the usual course." This argument fails, even assuming that there is a "material omission" in the release.

Under the parol evidence rule, "parol or extrinsic evidence is not admissible for the purpose of adding to, modifying, contradicting, or varying the terms of a written contract, in the absence of fraud, accident, or mistake."[17] This

---

[15] CR 56(c).

[16] Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

[17] Lehrer v. Dep't of Soc. & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000); see also St. Paul Travelers Ins. Co. v. M/V MADAME BUTTERFLY, 700 F. Supp. 2d 496, 505 (S.D.N.Y. 2010) ("Under federal maritime law, a party

rule "only applies to a writing intended by the parties as an 'integration' of their agreement; i.e., a writing intended as a final expression of the terms of the agreement."[18] "If, however, the court finds that the parties intended the writing to be a final expression of the terms it contains but not a complete expression of all terms agreed upon—i.e., partially integrated—then the terms not included in the writing may be proved by extrinsic evidence only insofar as they are not inconsistent with the written terms."[19] Determining whether an agreement is integrated is usually one of fact, but it may be decided on summary judgment when reasonable minds could reach but one conclusion.[20]

On its face, this release is partially integrated. The written terms plainly state that the amount of wages for the trips 07-01 and 07-02 would be determined and paid at a future date. In addition, the release does not contain an integration clause. The presence of an integration clause "strongly supports a conclusion that the parties' agreement was fully integrated."[21] Here, the absence of such a clause further supports the conclusion that the release was not the complete agreement between the parties. Moreover, the testimony

---

cannot rely on extrinsic or parol evidence to modify the plain terms of an admiralty contract."); F.W.F., Inc. v. Detroit Diesel Corp., 494 F. Supp. 2d 1342, 1356 (S.D. Fla. 2007) ("[G]eneral federal maritime law has adopted the general rules of contract interpretation and construction.").

[18] Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986).

[19] Emrich, 105 Wn.2d at 556.

[20] Lehrer, 101 Wn. App. at 516.

[21] Olsen Media v. Energy Sciences, Inc., 32 Wn. App. 579, 584, 648 P.2d 493 (1982).

submitted by Arica is consistent with the written terms of the release. The "paid in the usual course" language emphasized by Hogle is followed by the sentence: "I acknowledge that I have not yet received payment of these lost wages . . . and that I will be paid these lost wages at the time that the settlements are calculated." Since this plain language does not state that payment must occur within a specified period, extrinsic evidence showing that Arica informed Hogle about the government seizure and possible delay of wages is admissible and cures any omission.

The central issue is whether the court erred in holding that Hogle ratified the release. "A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract's benefits."[22] The ratifying party must have acted voluntarily and with full knowledge of the facts.[23] Ratification may be express or implied.[24] The relevant inquiry in determining whether implied ratification has occurred is whether the facts demonstrate an intent to affirm or approve the contract.[25] While ratification is ordinarily a question for the jury, it may be decided as a matter of law if the evidence is undisputed.[26]

---

[22] Snohomish County v. Hawkins, 121 Wn. App. 505, 510-11, 89 P.3d 713 (2004) (citing Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 433, 754 P.2d 120 (1988)).

[23] Hawkins, 121 Wn. App. at 511 (citing Ward, 51 Wn. App. at 433).

[24] See Barnes v. Treece, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976).

[25] See Barnes, 15 Wn. App. at 443-44.

[26] See Ward, 51 Wn. App. at 428, 433.

Here, the undisputed facts, particularly the circumstances surrounding the deposit of the third check, establish that ratification occurred. Sometime in July 2008, Hogle received the third check, which had "Full and Final Settlement" written on it. Upon receiving this check, Hogle contacted Stacey, and Stacey asked Arica whether the check was consideration for the release. In his September 8, 2008, letter, Bratz not only explained that it was but also that the government seizure of proceeds from trip 07-01 had delayed distribution. Based on his conversations with Stacey, Hogle deposited the check on September 22, 2008. These undisputed facts demonstrate Hogle accepted this final check after becoming fully aware of the material facts.

Hogle responds with three arguments. First, he argues that the ratification doctrine does not apply. Citing Smith v. Pinell,[27] Pitre v. Penrod Drilling Corp.,[28] and Harrington v. Atlantic Sounding Co.,[29] Hogle contends that "[e]nforceability of a seaman's release is a matter of substantive maritime law, and cannot be limited or altered by state law contract ratification principles." Smith and Pitre addressed whether a seaman had to disgorge settlement proceeds as required by Louisiana law before he could pursue his claim under the Jones Act.[30] In both cases, the court held that a seaman's rights under the

[27] 597 F.2d 994 (5th Cir. 1979).

[28] 791 F. Supp. 612 (E.D. La. 1992).

[29] No. 06-CV-2900, 2007 WL 2693529 (E.D.N.Y. September 11, 2007). Although unreported, GR 14.1(b) permits citation to such opinions. GR 14.1 (adopted effective September 1, 2007).

[30] Smith, 597 F.2d at 996; Pitre, 791 F. Supp. at 613.

Jones Act could not be qualified by Louisiana law.[31] Because Smith and Pitre stand for the proposition that the tender back requirement does not apply to plaintiffs under the Jones Act and do not address the right to accept future payments tendered after the commencement of a claim, they are distinguishable.

Harrington similarly does not advance Hogle's position. The Second Circuit vacated Harrington on April 16, 2010.[32] Furthermore, the Second Circuit held that the Garrett test did not apply to the agreement at issue, which was an agreement to arbitrate, and ordered the district court on remand to reconsider the ratification issue.[33]

On the other hand, the case cited by Arica, Sea-Land Services, Inc. v. Sellan,[34] supports its position that ratification principles apply here. In that case, Sellan was employed by the Seafarer's International Union as a chief steward aboard Sea-Land's vessel when he injured his back.[35] Sea-Land paid all of his medical expenses as well as maintenance.[36] Based on a determination that Sellan was permanently unfit for duty, Sea-Land and Sellan entered into a settlement agreement under which Sellan agreed to release Sea-Land from all

---

[31] Smith, 597 F.2d at 996; Pitre, 791 F. Supp. at 614.

[32] Harrington v. Atl. Sounding Co., 602 F.3d 113, 115 (2d Cir. 2010).

[33] Harrington, 602 F.3d at 115, 124. The other cases cited by Hogle—Johnsen v. Am. -Hawaiian S.S. Co., 98 F.2d 847 (9th Cir. 1938) and Kiesling v. United States, 171 F. Supp. 314 (S.D. Tex. 1958)—are distinguishable since they addressed whether plaintiffs were bound by their election in the context of different statutes.

[34] 64 F. Supp. 2d 1255 (S.D. Fla. 1999).

[35] Sellan, 64 F. Supp. 2d at 1258.

[36] Sellan, 64 F. Supp. 2d at 1258.

claims for damages and agreed to never sail or work again for Sea-Land in exchange for $364,500.[37] Although Sellan agreed to the settlement and deposited the check in his account, he did not sign the agreement.[38] Sometime later, Sellan violated his agreement by working aboard another vessel owned by Sea-Land, where he suffered another back injury.[39] The district court held that the agreement to not sail or work was enforceable under Garrett.[40] It further held that, even though Sellan did not sign the agreement, his negotiation of the check ratified the agreement.[41] Hogle attempts to distinguish Sellan, pointing out that (1) the settlement was the product of negotiations that took place after the full extent of Sellan's injury was known, (2) Sellan received substantial compensation, and (3) Sellan received a full trial. These differences do not render Sellan inapposite. Sellan persuasively supports the application of ratification doctrine in this case.

Second, Hogle contends that ratification never occurred because he did not intend to ratify the release. Hogle maintains that, in depositing the checks, he only intended to "offset" the damages on a much larger claim. This argument ignores that the intent to ratify may be inferred from the voluntary acts taken by the party once that party has full knowledge of the facts that potentially make the

[37] Sellan, 64 F. Supp. 2d at 1258-59.
[38] Sellan, 64 F. Supp. 2d at 1259.
[39] Sellan, 64 F. Supp. 2d at 1259-60.
[40] Sellan, 64 F. Supp. 2d at 1261.
[41] Sellan, 64 F. Supp. 2d at 1262-63.

underlying contract invalid.

Finally, Hogle contends that he did not have full knowledge of the facts at the time he deposited the checks. He claims that "there is no direct support" that he had "fully informed advice from competent legal counsel" since "[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." Hogle further argues that he was fully informed only when he learned the details of the NOAA settlement from declarations and depositions taken in February and March 2009. These arguments are unpersuasive. Hogle's contention that the evidence supports only an inference that he was fully knowledgeable of the facts is undermined by his own declaration that from his conversations with Stacey he "suspected" that the third check was consideration for the release. Hogle's contention that he was unaware of the details of the negotiations between Arica and NOAA, such as the discount percentage, also fails since these facts are immaterial. At best, the evidence suggests that Stacey offered him flawed legal advice, which has no bearing on the issue of implied ratification.

Striking of Surreply

Both CR 56(c) and King County Local Rule (KCLR) 7(b)(4)(F) require the party opposing a motion for summary judgment to file any responding documents no later than 11 days before the summary judgment hearing.[42] If the adverse

party states in an affidavit why it is unable to present facts essential to its opposition, the court may, among other things, "order a continuance to permit affidavits to be obtained or depositions to be taken."[43] A trial court's ruling "on whether to accept an untimely response or to strike it as untimely is reviewed for an abuse of discretion."[44] In this case, Hogle submitted working copies to the court only two days before the summary judgment hearing. While Hogle blames the delay on the rescheduling of Olson's deposition due to her illness, he did not move for a continuance.[45] The trial court did not abuse its discretion by denying Hogle's untimely surreply.

Motion for Reconsideration

Hogle filed a motion for reconsideration on the following CR 59 bases: newly discovered evidence, accident or surprise, and lack of substantial justice.[46] The denial of a motion for reconsideration is reviewed for an abuse of discretion.[47] Here, there was no abuse of discretion in denying Hogle's motion.

---

[42] CR 56(c) states that the party opposing a motion for summary judgment "may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing." KCLR 7(b)(4)(F) provides that "[w]orking copies of the motion and all documents in support or opposition shall be delivered to the hearing judge, commissioner, or appropriate judicial department no later than on the day they are to be served on all parties."

[43] CR 56(f).

[44] Davies v. Holy Family Hosp., 144 Wn. App. 483, 499, 183 P.3d 283 (2008).

[45] See Davies, 144 Wn. App. at 500 (ruling that the trial court correctly struck the adverse party's summary judgment response as untimely when the party did not move for a continuance of the hearing to obtain an affidavit).

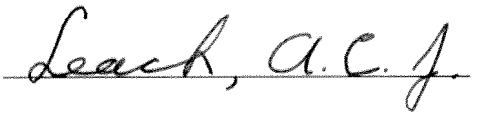
[46] CR 59(a)(3), (4), (9).

[47] Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 777, 37 P.3d 354

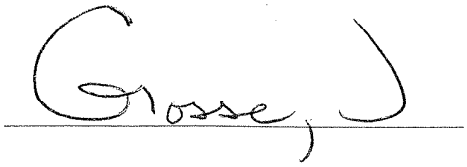
First, the e-mails of Hogle's conversations with Stacey are not "newly discovered evidence" but rather information available to Hogle that he strategically chose not to submit in response to Arica's summary judgment motion. Second, Hogle contends that there was "surprise warranting consideration" when Arica stated in oral argument that "hornbook law" supported its ratification argument. This contention has no merit since ratification was argued in both parties' summary judgment briefs. Hogle's final argument, that substantial justice was not done, also fails. A new trial based on lack of substantial justice is rarely granted due to the eight other broad grounds under CR 59(a).[48] Considering that the uncontroverted evidence before the superior court supported the conclusion that Hogle ratified the release, substantial justice has been done.

CONCLUSION

Because the record establishes that Hogle ratified the release of claims by accepting the benefits from that release, we affirm. We also affirm the denial of Hogle's untimely surreply and his motion for reconsideration.



WE CONCUR:



(2002).

[48] Knecht v. Marzano, 65 Wn.2d 290, 297, 396 P.2d 782 (1964).

Spearman, J.