IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

F/V PREDATOR, INC., Appellant, v. HOLMES WEDDLE & BARCOTT, P.C., an Alaska professional corporation, and PHILIP W. SANFORD, Respondents.	)	No. 68205-9-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINON
	)	FILED: December 24, 2012

Becker, J. — The owner of a sunken fishing boat sued his attorneys for legal malpractice and breach of fiduciary duty, claiming they failed to go after additional insurance proceeds that would have helped recover the vessel. The trial court granted summary judgment for the attorneys. We affirm.

We review an order of summary judgment de novo, engaging in the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); Versuslaw, Inc. v. Stoel Rives LLP, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005), review denied, 156 Wn.2d 1008 (2006).

F/V Predator Inc. sued attorney Philip Sanford and the law firm of Holmes Weddle & Barcott P.C. for their work after the 2005 sinking of the F/V Milky Way off the coast of LaPush, Washington. For its claim of malpractice, Predator must prove four elements by a preponderance of the evidence: (1) the existence of an attorney-client relationship which gives rise to a duty of care; (2) an act or omission by Sanford and Holmes Weddle that breaches their duty of care; (3) damages; and (4) proximate causation between the breach of duty and the damages incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). There is no dispute here about the existence of an attorney-client relationship, but the attorneys have put the other three elements at issue.

Predator claims Sanford overlooked available "sue and labor" insurance coverage of $700,000. Predator contends the extra money could have been used to raise the sunken vessel and put it back into service, thereby sparing Predator's loss of three seasons' worth of fishing profits and valuable catch histories. Sanford responds that Predator cannot establish the elements of legal malpractice because Predator's "sue and labor" coverage was not triggered and, in any event, Predator's evidence is too conclusory to prove that the vessel could have been raised and repaired for less than the agreed value.

FACTS

On September 14, 2005, the Milky Way sank in nearly 200 feet of water in the Olympic Coast National Marine Sanctuary. An estimated 2,500 gallons of diesel fuel were onboard, along with

miscellaneous fuel oils.

The National Oceanic Atmospheric Administration (NOAA) was notified of the sinking. The agency responded on September 15, 2005, with an email demanding removal of the vessel:

> As you are aware, the F/V Milky Way sank in the Olympic Coast National Marine Sanctuary yesterday. Its current presence in the Sanctuary constitutes a violation of Sanctuary regulations as well as the Marine Sanctuaries Act itself. In addition, the discharge of diesel fuel from the vessel . . . violates the Oil Pollution Act. The Vessel must be removed from the Sanctuary as soon as is practicable with the least possible injury to Sanctuary resources. The vessel, its owner, and operator are subject to civil penalties as well as natural resources damages liability under the Marine Sanctuaries Act and natural resource damages under the Oil Pollution Act. I am advised that a marine salvage firm will be evaluating the salvage situation tomorrow. Please keep me advised regarding that effort.[1]

On September 16, 2005, Global Diving & Salvage Inc. performed a survey of the wreck with a remote operated vehicle. Three days later, Predator entered into a "wreck removal agreement" with Global for a "controlled lifting attempt with the intent of placing the vessel in a position that the vessel can be pumped off and re-floated." The agreement provided that mobilization costs *alone* would be $309,000, with an additional estimated rate of *at least* $46,400 per day, for "two days onscene at the casualty site." From October 1 to October 3, 2005, Global tried to raise the Milky Way but was unable to do so before the weather and seas deteriorated. Global billed Predator $641,717 for this attempt.

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[1] Clerk's Papers at 946.

Predator looked to its insurers for payment of Global's bill. On October 18, 2005, Predator hired J.D. Stahl, an experienced maritime litigator, to provide advice on its insurance claims. Predator had three types of marine insurance coverage for the vessel that are relevant to this case. Federal Insurance Company provided hull and machinery coverage, with a limit of $700,000 and a deductible of $500,000. Federal also provided protection and indemnity insurance, covering liability for wreck removal, with a limit of $1,000,000. Great American Insurance Company of New York covered liability for actual or threatened pollution, with a limit of $1,000,000.

Predator's owner Andrew Blair received payment of $700,000 under the hull policy for the total loss of the Milky Way. That was the insured and agreed value of the vessel. Federal paid $200,000 of this sum. Coastal Marine Fund paid the remaining $500,000 deductible. Coastal is an unincorporated pool of fishing vessel owners organized to help pay marine losses. Predator was a member of Coastal, which was a named insured on the hull policy along with Predator.

Federal and Great American could not agree who was responsible for paying Global for the unsuccessful salvage attempt. On February 6, 2006, Global sued Predator for the unpaid invoices. Stahl turned over the defense of Global's suit to Holmes Weddle, where attorney Philip Sanford took the case. On March 13, 2006, Predator, represented by Sanford, filed a third party complaint against Federal and Great American to enforce payment for Global's

bill.

In June 2006, Predator settled with Global. Global's bill of $641,717 was paid in part by Federal from the wreck removal coverage and in part by Great American from the pollution coverage. Under Sanford's representation, Predator continued to litigate its third-party claims against the two insurers, seeking to have the insurers fund a second attempt at wreck removal. U.S. Coast Guard officials told Predator that oil was still leaking from the Milky Way and failure to remove the discharge subjected Predator to a penalty of $32,500 per day.

On December 20, 2006, Predator, still advised by Sanford, reached a preliminary settlement with Federal and Great American through mediation. The two insurers agreed to pay for a second attempt to raise the Milky Way, plus an additional $25,000 in attorney fees for Blair, Predator's owner, beyond insurance policy limits.

Predator and its insurers signed a final settlement on May 25, 2007, dictating that Federal and Great American would fund a second effort to raise the Milky Way until Predator's policy limits of $1,000,000 for *each* policy were exhausted. In return, Predator released any claims against the insurers that arose through December 20, 2006. Predator's third-party suit against Federal and Great American was dismissed with prejudice on June 12, 2007.

In August 2007, Titan Salvage Co. and Global began a second attempt to remove the Milky Way, funded by Federal and Great American. After nearly $1.3 million had been spent, Federal and Great American's policy limits were exhausted and the operation was called

off. Sanford persuaded the concerned government agencies to allow the vessel to remain at the bottom of the marine sanctuary with its fuel vents sealed.

In February 2008, Predator (represented by Sanford) sued the insurers in federal court for bad faith, breach of fiduciary duties, and violations of Washington's Consumer Protection Act, chapter 19.86 RCW. Sanford and Holmes Weddle withdrew from representing Predator in February 2009. In October 2009, new counsel for Predator filed a second amended complaint in federal court. The district court dismissed the suit for lack of subject matter jurisdiction, finding the claim did not have the necessary nexus to maritime activities, and Predator could not establish its damages exceeded $75,000 to invoke diversity jurisdiction.

In 2010, Blair purchased a replacement fishing vessel for about $1,000,000.

On December 2, 2010, Predator brought the present suit against Sanford and Holmes Weddle for legal malpractice and breach of fiduciary duty.

On December 13, 2011, the court granted Sanford and Holmes Weddle's motion to dismiss the suit on summary judgment. This appeal followed.

MALPRACTICE CLAIM

Predator claims Sanford breached his duty of care by allowing the settlement to go through without insisting that Global's bill for the first attempt at raising the Milky Way be paid out as sue and labor costs, from that coverage in Federal's hull policy. Sanford responds

that the coverage was not available under the circumstances.

Predator's hull policy contained the industry standard "Sue and Labor" clause, which obligated Predator to incur reasonably necessary expenses to protect the Milky Way from further damage. A sue and labor clause is considered separate insurance, in the sense that reimbursement to the insured is "in addition to, and over and beyond, the amount payable under or the dollar limits of, the named perils coverage." Reliance Ins. Co., 280 F.2d at 489, n.11. The insurance company pays for reasonable sue and labor expenses even if the ship is ultimately declared a total loss. The underlying rationale for the coverage is to encourage diligence in preventing excessive liability or loss. Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500, 503 (2nd Cir. 1972). Thus, if the sue and labor clause of the hull policy had been triggered, Predator could have received up to $700,000 more, in addition to the $700,000 it received as a result of the vessel being declared a total loss.

But to qualify for sue and labor coverage, the expenses must have been incurred for the purpose of avoiding or minimizing a loss for which the insurer would have been liable. Reliance Ins. Co. v. The Escapade, 280 F.2d 482, 488 n.11 (5th Cir. 1960). According to Sanford, Global's first attempt to raise the Milky Way was for the purpose of removing the wreck, not to minimize a loss under Federal's policy. Sanford claims sue and labor coverage was not available because (1) the Milky Way was deemed a total loss shortly after sinking and (2) the wreck had to be removed from the marine sanctuary to comply with NOAA's order. If the vessel

was a total loss and had to be removed to comply with a government order for wreck removal, it was appropriate that Global's costs were paid out under the coverages for wreck removal and liability for pollution. It would not have been appropriate to pay Global from the sue and labor coverage.

Several cases are instructive. In Quigg Bros., two construction barges broke from their moorings during a storm and landed on First Beach within the Quileute Indian Reservation, adjoining the Olympic Coast National Marine Sanctuary. Quigg Bros.-Schermer, Inc. v. Commercial Union Ins. Co., 223 F.3d 997, 998 (9th Cir. 2000). The owner acted swiftly to secure, repair, and tow the barges back to the Quigg Brothers' yard, incurring nearly $53,800 in expenses.

The owner maintained protection and indemnity insurance for the two barges, but not hull insurance covering "sue and labor" expenses. Quigg Bros., 223 F.3d at 998-99. Lacking sue and labor coverage, the owner tried to have its expenses classified as wreck removal and therefore eligible for coverage under the protection and indemnity policy as the cost of avoiding possible fines for oil pollution or presence in the sanctuary. This was not permitted. It was undisputed that the expenses were incurred to safeguard the barges, render them seaworthy, and tow them back to the repair yard. Quigg Bros., 223 F.3d at 1001. Reversing the district court, the Ninth Circuit Court of Appeals held, "Even if the intent were to avoid liability, the expenses are collectible as sue and labor." Quigg Bros., 223 F.3d at 1001.

In Jocharanne, a barge carrying 50,000 barrels of gasoline ran aground in Lake Ontario and began leaking gasoline

near the shoreline of Oswego, New York. Jocharanne, 461 F.2d at 502. Jocharanne had three policies covering the barge: a hull policy issued by Lloyd's of London, a cargo liability policy through Phoenix Assurance, and a protection and indemnity policy from Oceanus Mutual Underwriting Association, Ltd., covering compulsory wreck removal. Jocharanne, 461 F.2d at 502-04. Lloyd's paid for the salvage operations, which included unloading the usable gasoline cargo remaining on the barge and working to refloat the hull that continued to pose an explosion hazard. Jocharanne, 461 F.2d at 502. The issue at trial was whether Oceanus had to reimburse Lloyd's.

The district court found that the damaged condition of the ship threatened the distinct interest of each insurer and that the towing and removal expenses served not only to protect the hull but also to save the cargo and prevent explosion. Accordingly, the court ordered that Oceanus would bear one-third of the cost. The Second Circuit Court of Appeals reversed, concluding that Oceanus was not liable. No government order mandated the removal. Jocharanne, 461 F.2d at 504. "All the costs were essential to any attempt to save the hull and cargo, so any benefit to Oceanus was in a sense incidental." Jocharanne, 461 F.2d at 504-05. It was the hull policy, issued by Lloyd's, that covered sue and labor expenses.

Quigg Bros. and Jocharanne illustrate that sue and labor coverage will be triggered when it objectively appears that efforts have been made to save the vessel to prevent loss to the hull insurer. Sue and labor coverage will not be triggered when the vessel is a wreck and

the government orders it removed. A case with similar facts is Zurich Ins. Co. v. Pateman, 692 F. Supp. 371 (1987). In Zurich, the F/V Liberty capsized and sank in the Manasquan Inlet along the coast of New Jersey. The next day, the U.S. Coast Guard issued a letter stating, "'the owner is responsible to mark the wreck as a hazard to navigation, and then to remove the wreck from that channel and restore that channel for safe navigation. In addition, the owner is responsible for preventing an oil pollution discharge from occurring and if one occurs, he is responsible for the clean-up.'" Zurich, 692 F. Supp. at 376. The Liberty was righted a week after sinking. The sole issue in court was whether the costs of removing the vessel were covered under the sue and labor provision of the hull policy, or under the protection and indemnity policy. Zurich, 692 F. Supp. at 372. The court found the costs were not recoverable as sue and labor. Zurich, 692 F. Supp. at 374. Distinguishing Jocharanne, the district court found:

> Zurich did not raise the vessel "in the vain hope of salvaging the hull." In addition, the activities of Zurich were in fact spurred on by the Coast Guard. The costs incurred in the removal of the vessel are protection and indemnity expenses.

Zurich, 692 F. Supp. at 380.

The circumstances of the Milky Way's sinking and first salvage attempt are more like Zurich and less like Quigg Bros. and Jocharanne. The Milky Way sank completely in nearly 200 feet of water and discharged fuel into marine sanctuary waters. NOAA ordered its removal the day after the sinking. Predator's claim that the e-mail from NOAA did not constitute a government order is unpersuasive. And as discussed

below in connection with the issue of proximate cause, Predator does not show that the vessel was worth trying to save from the standpoint of the hull insurer.

We conclude the evidence is insufficient to show that the first salvage attempt by Global triggered sue and labor coverage. Predator fails to establish that the first attempt was an effort to mitigate the insurer's loss under the hull policy.

In addition, Predator lacks evidence of proximate cause. To establish proximate cause, Predator must demonstrate that but for the attorneys' negligence, it would have obtained a better result. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), review denied, 161 Wn.2d 1011 (2007). Proximate cause is usually the province of the jury, but the trial court can decide it as a matter of law if reasonable minds could not differ. Smith, 135 Wn. App. at 864. In the case within the case, the "second trier of fact" decides what a reasonable jury would have done but for the attorney's negligence. Daugert v. Pappas, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985).

Even at this late date, Predator's theory of causation remains murky. Even if Sanford had filed a sue and labor claim when he assumed representation nearly five months after the sinking, the record does not show that Federal would have been obligated to accept the claim or that an additional $700,000 would have resulted in the Milky Way being raised, let alone repaired.

Federal's claims adjuster, Edgar Rochelson, testified the vessel was a total loss shortly after sinking.

> Q. . . . [B]ased on your

> knowledge of the loss and your experience as a claims adjuster, would a sue and labor claim have been properly made under the policy?
>
> . . . .
>
> A. It would have had to have been made rather quickly and promptly, considering that it did not take us long to figure out that this was, in fact, a total loss.
>
> Q. . . . Okay. Why would a sue and labor claim have to have been made rather promptly?
>
> A. Once we determined that the vessel was a total loss and that there was no economic way to bring it up and repair it, there would have been nothing to sue and labor over.
>
> Q. Why do you say that?
>
> A. There was no way to mitigate the loss.
>
> Q. Going back to my questions earlier about the wreck removal, were the Global Diving Salvage invoices paid pursuant to the wreck removal provisions of the P&I policy?
>
> A. Yes.
>
> Q. Okay. Only that provision of the policy?
>
> A. I don't recall exactly, but I would see no reason where what other portion of the policy they would be paid under.
>
> Q. Okay. Not sue and labor.
>
> A. No.
>
> Q. And why not sue and labor?
>
> A. They were hired to remove the wreck. We knew by that time it was a total loss.

As controverting evidence, Predator offers Blair's testimony as a career commercial fisherman accustomed to performing self-repairs. Blair's declaration estimates the Milky Way could have been raised and repaired for $580,051, less than the agreed value of $700,000. Blair's estimate necessarily depends on his unsupported understanding that Global's first salvage effort would cost only $309,000 and be done in one day. The very contract Blair signed contradicts this: mobilization costs alone were $309,000, and Global expected to spend at least two days trying to raise the vessel.

Predator also points to the

declaration of Donald P. Roinestad, an expert in claim litigation, who opines that Rochelson did not follow proper procedures in making his total loss determination. Roinestad does not claim expertise in marine insurance or ship repairs. He relies on Blair's testimony and the survey conducted by a remote operated vehicle after the Milky Way's sinking. Predator's citation to the survey is to a summary included in Global's first salvage plan:

> The vessel is sitting on the sea floor in 195' of sea water with a 5 degree list to Port. The hull and keel appear to be intact. No damage can be visually seen. The hull is sanded in to the bottom approximately 1'.

Notably, the survey says nothing about the internal condition of the vessel. By itself, it does not support Blair's impressionistic claim that the vessel was in good shape and could have been raised in a single day for $309,000 on the first attempt.

Predator claims that with the money Sanford should have obtained under the sue and labor coverage, Predator could have raised the Milky Way on its *second* salvage attempt. To support this contention, Predator cites Blair's declaration that on the final day of the second attempt, he "was informed by a Global representative that Global could have raised the F/V Milky Way for an additional $700,000."

The first attempt to raise the Milky Way cost nearly $642,000. It was called off when the weather and the seas deteriorated. The second salvage attempt, also unsuccessful, cost $1.3 million. A hearsay statement from an unidentified speaker does not prove that

another $700,000, if available, would

have resulted in raising the boat and making it seaworthy. This is wishful thinking, not proof. Success on the second attempt depended not just on money, but on a host of unknowns, such as the weather and the seas allowing for a perfect salvage operation and the extent of the damage to the boat. The evidence is insufficient to permit a jury to find "but for" causation.

Breach of Fiduciary Duty

Predator sued Sanford and Holmes Weddle for breach of fiduciary duty as well as malpractice. Predator contends genuine issues of material fact should have precluded summary judgment on its claim that the firm had a conflict of interest when it simultaneously represented Predator and Coastal Marine Fund.

A plaintiff claiming breach of a fiduciary duty must prove: "(1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

Predator's breach of fiduciary duty claim fails. The claim of conflict of interest is virtually unsupported, and Predator presents no evidence of injury caused by the alleged ethical violation.

Affirmed.

WE CONCUR:

Becker, J.

Leach, C.J.

Schindler, J.