

1 RICHARD LEE SAX (SBN 81429)
2 AUDREY POWERS THORNTON (SBN 118870)
3 Attorneys at Law
4 2192 Palomar Airport Road, 2d Floor
5 Carlsbad, CA 92008
6 Tel. (760) 431-9631
7 Fax (760) 931-9800

8 Attorneys for Plaintiff
9 RICK A. HOLLIFIELD

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SAN DIEGO
12 NORTH COUNTY JUDICIAL DISTRICT

13 RICK A. HOLLIFIELD, an individual

14 Plaintiff,

15 vs.

16 RICHARD M. BRAUN, M.D., KVAAS
17 CONSTRUCTION CO., OLSEN STEEL,
18 INC., ARGONAUT INSURANCE CO. and
19 Does 1 through 25, inclusive

20 Defendant.

Case No.:

FIRST AMENDED COMPLAINT FOR
1. Professional Negligence
2. Fraud
3. Rescission - Mistake
4. Damages and Attorney's Fees

21
22 Plaintiff RICK A. HOLLIFIELD alleges:

23 **INTRODUCTORY ALLEGATIONS**

- 24 1. Plaintiff, RICK A. HOLLIFIELD, ("HOLLIFIELD") is an individual and is now,
25 and at all times mentioned in this complaint was, a resident of San Diego County, California.
26 2. Defendant, RICHARD M. BRAUN, M.D. ("BRAUN"), and DOES 1 though 10,
27 are physicians and surgeons, licensed by the State of California to practice medicine and surgery in
28

1 California, with their principal place of practice located in San Diego County, California.

2 3. Defendant, OLSEN STEEL, INC., ("OLSEN ") is a corporation doing business in
3 San Diego County, California.

4 4. Defendant, KVAAS CONSTRUCTION CO. ("KVAAS ") is a corporation doing
5 business in San Diego County, California.

6 5. Defendant, ARGONAUT INSURANCE CO. ("ARGONAUT ") is a corporation
7 doing business in San Diego County, California, and was the insurance company which insured
8 defendant, KVAAS CONSTRUCTION CO. for workers compensation liability.

9 6. The true names and capacities, whether individual, corporate, associate or
10 otherwise, of defendants DOES 1 through 20, inclusive, are unknown to Plaintiff who therefore
11 sues said defendants by said fictitious names. Plaintiff is informed and believe, and based on that
12 information and belief, allege that each of the defendants sued herein under a fictitious name was in
13 some manner negligently and legally responsible for the events and happenings alleged in this
14 complaint and for plaintiff's injuries and damages. When the true names, capacities and
15 involvements of said Defendants are ascertained, Plaintiff will seek leave to amend this Complaint
16 accordingly.

17 7. At all times mentioned herein, Defendants, and each of them, were the agents,
18 servants and employees of their fellow Co-defendants and in doing the things herein alleged were
19 acting within the course and scope of such agency and with the permission and consent of his/her
20 Co-defendants.

21 8. On August 28, 1996 plaintiff HOLLIFIELD, was employed by KVAAS working as
22 a laborer (steel worker) on the Metropolitan Waste Water Treatment Center site located at 5240
23 Convoy Street, San Diego, California. KVAAS was the general contractor on site and defendant
24 OLSEN was a subcontractor on this job site. OLSEN delivered the steel and moved the steel
25 around the job site as necessary with their cranes and lifts. HOLLIFIELD's duties included
26 attaching the steel channels to the concrete walls. Plaintiff HOLLIFIELD was injured in an
27 accident on the job site when he and a fellow worker, Danny Privett, were attaching a twenty-foot
28

1 steel channel to a wall. HOLLIFIELD had his hand on the channel to allow him to move it into the
2 proper position, however, due to a slack in the steel cable which was lowering the channel, the
3 channel dropped two to four feet causing HOLLIFIELD to lose his balance and fall. This accident
4 and plaintiff's subsequent injuries were caused by the negligence of defendants OLSEN and
5 KVAAS. Plaintiff HOLLIFIELD severely fractured his left wrist joint.

6 9. On or about September 18, 1996 defendant BRAUN and Does 1 through 10 began
7 treating the plaintiff for a broken wrist. Defendant BRAUN and Does 1 through 10 were employed
8 by defendants OLSEN, KVAAS, and ARGONAUT to diagnose, prescribe medicine, treat, care
9 for, and perform any necessary surgery in the treatment of this problem. Defendants compelled
10 plaintiff to use BRAUN as his treating physician. Since the accident plaintiff HOLLIFIELD had
11 more than eleven surgical procedures.

12 10. On or about October 2, 1996 plaintiff HOLLIFIELD filed a claim for his damages
13 with the Workers Compensation Appeals Board against defendants KVAAS, ARGONAUT and
14 OLSEN alleging that he had suffered injuries and consequential damages due to the defendant's
15 negligence. Plaintiff HOLLIFIELD filed an action in superior court against OLSEN, San Diego
16 Superior Court Case No.EC015235, for personal injury.

17 11. On or about August 18, 1998, defendant BRAUN prepared and submitted to
18 plaintiff and to defendants OLSEN, KVAAS, and ARGONAUT a final report of the plaintiff's
19 condition in which he concluded that the fracture to the distal radius in plaintiff's wrist had healed,
20 that plaintiff had healed the radius to carpal row fusion, he predicted that HOLLIFIELD would be
21 off temporary disability "in 3-4 months", and that his forearm had "improved to the point where he
22 has very little pain in his wrist or forearm, and will allow him to return to work using his left hand
23 for grasping and holding activities." BRAUN further stated in his final report that "Mr. Hollifield
24 has never required a total wrist fusion. A total wrist fusion would carry extra morbidity and
25 increased disability for Mr. Hollifield." Plaintiff discovered subsequently that this was a
26 misdiagnosis of the plaintiff's condition.

27 12. In reasonable and good faith reliance upon BRAUN's diagnosis that he had healed
28

1 the fracture in his wrist, HOLLIFIELD entered into a settlement with defendants OLSEN,
2 KVAAS, and ARGONAUT in his pending claim and action for personal injury and accepted a
3 recovery for the damages caused by the injury to his wrist for a lesser amount than his true
4 damages. The settlement agreement and mutual release are attached hereto as Exhibit "A".

5 13. Subsequent to BRAUN's final report and subsequent to the settlement which
6 HOLLIFIELD accepted, HOLLIFIELD suffered further problems with his wrist. In December
7 1998 the plaintiff was informed that the plate that had been placed in his wrist had broken. After
8 further treatment and diagnosis in March 11, 1999 HOLLIFIELD was informed by a subsequent
9 health care provider that, contrary to BRAUN's final report, the fracture of the distal radius in his
10 wrist had never healed and that he continued to have a non-union, which caused his plate to break.

11 14. On June 8, 1999 HOLLIFIELD underwent a left wrist midcarpal joint fusion and
12 repair of the distal radial nonunion resulting in a total wrist fusion and placement of a new plate.
13 The old broken plate is still in the plaintiff's arm and further surgery will be necessary to remove it.

14 15. HOLLIFIELD now suffers from a permanent disability he now has in his left arm
15 due to his fused wrist.

16 **FIRST CAUSE OF ACTION**

17 (Professional Negligence)

18 (Defendant BRAUN only)

19 16. The allegations set forth in paragraphs 1 through 15 inclusive are incorporated into
20 this cause of action by reference as though set forth in full.

21 17. Plaintiff has no medical background, education or training and had no means to
22 discover any misconduct, negligence or culpability of defendants during the time that plaintiff was
23 their patient. Plaintiff had x-rays taken of his left wrist and examinations by defendant BRAUN
24 who reported to plaintiff that such x-rays and examinations showed that his wrist had healed. Such
25 x-rays were reported to plaintiff as normal and plaintiff had no reason to know or suspect that
26 these reports were incorrect until on or about March 11, 1999, when plaintiff underwent further
27 physical examinations and obtained a medical opinion that the fracture of his wrist joint had never
28

1 healed, that he continued to have a non-union, and that he would require a total wrist fusion.

2 18. At all times mentioned in this complaint, defendant BRAUN and Does 1 through
3 10, negligently failed to possess and exercise, in their diagnosis and treatment, that reasonable
4 degree of knowledge and skill that is ordinarily possessed and exercised by other physicians and
5 surgeons in the same or similar locality in similar circumstances, in that, among other things,
6 defendant BRAUN and Does 1 through 10, misdiagnosed the status of plaintiff's injury, misread
7 the plaintiff's x-rays and further misdiagnosed the success of the reconstruction of plaintiff's wrist,
8 giving an incorrect prognosis on the grounds that the fracture of the bones in his wrist had healed,
9 when they had not.

10 19. As a direct result of the negligence of the defendants BRAUN and Does 1 through
11 10, plaintiff has sustained the following injuries: plaintiff has accepted a recovery in settlement of
12 his personal injury action for an amount lower than his true damages which now include a
13 permanent disability in his left arm due to his fused wrist. BRAUN's report, containing its
14 misdiagnosis and erroneous prognosis, eliminated the plaintiff's need for future medical treatment,
15 including a total wrist fusion, and eliminated future arm and shoulder problems, and subsequent
16 complications stemming from a fused wrist, from settlement, and eliminated such factors from any
17 computation of the plaintiff's damages. Plaintiff now suffers from these damages and others arising
18 from the non-union in his wrist. Plaintiff has sustained a loss of earnings and a loss of future
19 earning capacity, increased medical expenses, physical pain and suffering, and emotional distress.

20 20. On August 12, 1999 plaintiff served notice pursuant to Code of Civil Procedure
21 section 364, to defendant BRAUN of his intention to sue him for professional negligence.

22 **SECOND CAUSE OF ACTION**

23 (Fraud - Rescission and Damages)

24 (All Defendants)

25 21. The allegations set forth in paragraphs 1 through 15 inclusive are incorporated into
26 this cause of action by reference as though set forth in full.

27 22. Plaintiff would not have executed the settlement agreement and mutual release had
28

1 he been aware of the fact that the fracture in his wrist had not healed. Plaintiff was induced to enter
2 into the settlement agreement by the misrepresentations of the defendants that led him to believe
3 that he had healed the fracture in his wrist. This misrepresentation was material to the settlement
4 agreement. Plaintiff's consent to be bound by the agreement was induced by a misrepresentation of
5 material fact by BRAUN and defendants OLSEN, KVAAS, and ARGONAUT.

6 23. When defendants and their agents made the representations that the fracture in the
7 plaintiff's wrist had healed, they knew them to be false, and made them with the intent to induce
8 plaintiff to enter into a settlement with defendants and dismiss his claim.

9 24. Plaintiff HOLLIFIELD believed the statements of BRAUN and the defendants
10 regarding the healed fracture in the plaintiff's wrist. Plaintiff's non-expertise in the field of
11 medicine gave him no reason to believe that the statements were false. Plaintiff had x-rays taken of
12 his left wrist and examinations by BRAUN who reported to plaintiff that such x-rays and
13 examinations showed that his wrist had healed. Such x-rays were reported to plaintiff as normal
14 and plaintiff had no reason to know or suspect that these reports were incorrect until on or about
15 March 11, 1999, when plaintiff underwent further physical examinations and obtained a medical
16 opinion that the fracture of his wrist joint had never healed, that he continued to have a non-union,
17 and that he would require a total wrist fusion.

18 25. BRAUN had a fiduciary duty to the plaintiff as his treating physician. BRAUN's
19 fiduciary duty to the plaintiff and all knowledge of BRAUN was imputed to the defendants
20 OLSEN, KVAAS, and ARGONAUT. Defendant BRAUN's fiduciary duty further required
21 defendants to disclose all material information to the plaintiff, to act in good faith towards the
22 plaintiff, and in his best interests. Defendants breached this fiduciary duty when they failed to
23 disclose the non-union of the plaintiff's wrist.

24 26. Due to the misrepresentations by defendants plaintiff was prevented from obtaining
25 compensation for plaintiff's further complications and total disability arising from the non-union
26 and subsequent total wrist fusion, and has accepted a recovery in settlement of his personal injury
27 claim for an amount lower than his true damages which now include a permanent disability in his
28

1 left arm due to his fused wrist. Plaintiff has sustained damages and will sustain further damages
2 from future arm and shoulder problems, subsequent complications stemming from a fused wrist, a
3 loss of earnings and a loss of future earning capacity, increased medical expenses, physical pain and
4 suffering, and emotional distress in an amount to be proven at trial.

5 27. Plaintiff seeks rescission of the settlement agreement and mutual release based on
6 fraud and misrepresentations, because said settlement agreement and mutual release was the
7 product of such fraud and misrepresentations.

8 28. Because the acts of defendants OLSEN, KVAAS, and ARGONAUT were
9 despicable and fraudulent, as well as oppressive, malicious and vexatious, plaintiff is entitled to
10 punitive damages against OLSEN, KVAAS, and ARGONAUT in an amount according to proof at
11 trial.

12 THIRD CAUSE OF ACTION

13 (Rescission Based on Mutual Mistake)

14 (All Defendants)

15 29. The allegations set forth in paragraphs 1 through 20 inclusive are incorporated into
16 this cause of action by reference as though set forth in full.

17 30. Plaintiff would not have executed the settlement agreement and mutual release had
18 he been aware of the fact that the fracture in his wrist had not healed. Plaintiff executed the
19 settlement agreement under a mistake of fact that he had healed the fracture in his wrist. This was
20 a mistake of fact that was material to the settlement agreement. Plaintiff's consent to be bound by
21 the agreement was induced by a misrepresentation of material fact by BRAUN.

22 31. Due to the mistake of fact under which plaintiff entered into the settlement
23 agreement plaintiff has sustained the following injuries: plaintiff has accepted a recovery in
24 settlement of his personal injury action for an amount lower than his true damages which now
25 include a permanent disability in his left arm due to his fused wrist. BRAUN's misdiagnosis and
26 erroneous prognosis eliminated the need for future medical treatment, including a total wrist
27 fusion, and eliminated future arm and shoulder problems, and subsequent complications stemming
28

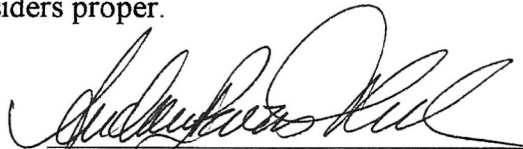
1 from a fused wrist. Plaintiff has sustained a loss of earnings and a loss of future earning capacity,
2 increased medical expenses, physical pain and suffering, and emotional distress.

3 32. Plaintiff seeks rescission of the settlement agreement and mutual release based on
4 mutual mistake, because said settlement agreement and mutual release was the product of such
5 mutual mistake.

6 WHEREFORE, plaintiff demands judgment against defendants, and each of them, or as to
7 the defendants as specifically set forth below, for the following:

- 8 1. General damages according to proof;
- 9 2. Damages for medical and related expenses according to proof;
- 10 3. Damages for loss of past and future earnings according to proof;
- 11 4. Rescission of the settlement agreement and mutual release;
- 12 5. Punitive damages against OLSEN, KVAAS, and ARGONAUT in an amount according
13 to proof at trial;
- 14 6. Interest according to law;
- 15 7. Costs of this action and attorney's fees; and
- 16 8. Any other and further relief that the court considers proper.

17
18 Dated: 5/5/00

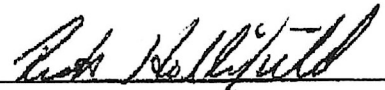

Richard Lee Sax
Audrey Powers Thornton
Attorneys for Plaintiff
Rick A. Hollifield

VERIFICATION

I, Rick Hollifield, am a plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Carlsbad, California.

DATED:

5/5/2000


RICK HOLLIFIELD

1 PROOF OF SERVICE BY FACSIMILE AND MAIL

2 I, Audrey P. Thornton, declare:

3 That I am, and was at the time of service of the papers herein referred to, over the age of
4 eighteen years, and not a party to the action; and I am employed in the County of San Diego,
5 California, within which county the subject mailing occurred. My business address is 6343 Paseo
6 Corono, Carlsbad, CA 92009. I served the following document(s):

7 Hollifield v. Braun

8 Case No. GIN003700

9 1) FIRST AMENDED COMPLAINT

10 by placing a copy thereof in a separate envelope for each addressee named hereafter,
11 addressed to each such addressee respectively as follows:

- 12
- 13 1. Dan H. Deuprey
14 Wingert, Grebing, Brubaker & Ryan
15 600 West Broadway, Seventh Floor
16 San Diego, CA 92101-3370
- 17 2. J. Michael Nolan
18 General Counsel
19 Argonaut Insurance Company
20 250 Middlefield Road
21 Menlo Park, CA 94025
- 22 3. Susan Olsen
23 Olsen Steel
24 10932 Avenida Playa Veracruz
25 San Diego, CA 92124

26 I then sealed each envelope and, with the postage thereon fully prepaid, deposited each
27 in the United States mail at Carlsbad, California, on May 8, 2000.

28 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

Executed on: May 8, 2000


Audrey P. Thornton