No. 90377-8

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 03, 2014, 11:01 am
BY RONALD R. CARPENTER
CLERK

E CRF
RECEIVED BY E-MAIL

THE SUPREME COURT
OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR,

Respondent / Cross Appellant / Plaintiff

v.

The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS,

Appellants / Cross Appellees / Defendants

ANSWER TO THE PETITION FOR REVIEW AND CROSS PETITION FOR REVIEW

Eric Dickman
WSBA # 14317
Attorney for Appellant

Eric Dickman
E. Dickman Law Firm
P.O. Box 66793
Seattle, Washington 98166
(206) 242-3742

ORIGINAL

TABLE OF CONTENTS

Table of cases (Washington):

Table of cases (other):

Constitutional Provisions:

Table of statutes (Washington):

Table of Statures (other)

Table of Court Rules:

Table of other authorities:

IDENTITY OF RESPONDING PARTY

Mr. Scott Maziar, respondent, respectfully submits the following answer and cross petition to Washington State's and the Washington State Department of Corrections' (State's) Petition for Discretionary Review.

COURT OF APPEALS DECISION FOR REVIEW

Mr. Maziar requests the State's Petition for Discretionary Review be denied, Additionally, Mr. Maziar requests the Court review the portions of the Court of Appeals decision Maziar v. Washington State Dept.of Corrections, (Maziar II), ___ Wn.App. ___, ____ P.3d ____, 2014 WL 1202985 (March 24, 2014, No. 71068-1-I)(Dwyer J.) that affirms the trial court's denial of prejudgment interest and severely limits Mr. Maziar's lost wages.

The decision of the Court of Appeals (No. 71068-1-I) is dated March 24, 2014. The State's Motion to Reconsider was denied on May 7, 2014. Copies of the decisions are attached in Appendix A.

ISSUES PRESENTED FOR REVIEW

1. Whether the State's Petition for Review Discretionary should be denied.

2. Whether the Court of Appeals erroneously denied Mr. Maziar prejudgment interest against the State in a maritime claim.

3. Whether the Court of Appeals erroneously denied Mr. Maziar lost future wages because he did not ride a ferry to a mail room job that he

believed he was unable to perform, and attempt the job, thereby risking further bodily injury.

STATEMENT OF THE CASE

This is the second appeal in Mr. Maziar's case. The first is reported at Maziar v. Department of Corrections (Maziar I), 151 Wn.App. 850, 216 P. 3d 430, 2009 AMC 1999 (2009).

At a bench trial following the first appeal, Mr. Maziar was awarded $585,000.00 for the injuries he suffered on January 16, 2003, when the captain of the ferry Mr. Maziar was riding on yanked a chair out from underneath Mr. Maziar. CP 128-42. When injured, Mr. Maziar was a prison guard on his way from McNeil Island Penitentiary to the mainland on a ferry. CP 130 ¶¶ 5-7. The ferry was owned and operated by the Washington State Department of Corrections and the State of Washington (hereinafter State). The captain was a State employee. CP 130 ¶ 5.

When Mr. Maziar first brought his general maritime claim for relief, he asked for a jury trial. CP 186-191. However, following the decision in Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 224 P.3d 761, cert. denied __ US __, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010), where this Court pointed out the distinction between common law and general maritime claims, and noted the latter had no right to a jury trial, it became clear Mr. Maziar's general maritime claim should be tried to the bench. The trial court agreed. CP 238.

Following the bench trial, the State appealed. The Court of Appeals affirmed the decision of the trial court. Maziar II, in Appendix A.

On the issue of the State's right to a jury trial, both the trial court and the Court of Appeals are correct.

On the other hand, the Court of Appeals erred in not awarding Mr. Maziar prejudgment interest on his general maritime claim for relief. Prejudgment interest is a substantive maritime remedy (damage), which under RCW 4.92.090, the State should be required to pay in this case.

Additionally, the Court of Appeals erred in finding Mr. Maziar did not mitigate his damages when Mr. Maziar applied for and followed up on light duty jobs with the State that were open and for which he was qualified. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57. Mr. Maziar also tried other jobs and schooling that were outside the Department of Corrections. RP 10-18-2011 at 83; RP 10-18-2011 at 113-15; RP 10-18-2011 at 115-16. Nevertheless, the Court of Appeals incorrectly held Mr. Maziar did not sufficiently mitigate his loss.

ARGUMENT

The State misapprehends that the State of Washington is not an individual or a corporation. It is a sovereign: A unique entity under the law.

The State claims it should be treated like any other defendant, individual or corporate. However, because of the "express constitutional authority in article II, section 26 for the legislature to direct 'in what

manner, and in what courts, suit may be brought against the state'" the State is often treated very differently than other defendants.[1] McDevitt v. Harborview Medical Center, 179 Wn.2d 59, ¶ 1, 316 P.3d 469, 471 (2013).

A. There is No Constitutional Basis to Support the State's Petition.

The State argues it has a right to demand a jury trial under Article I, section 21 of the State Constitution. As detailed in the Court of Appeals decision Maziar II, attached in Appendix A, at 13-19, Article I of the Washington Constitution, the Declaration of Rights, does not guarantee the State as a sovereign the right to a jury trial. "The Declaration addresses the 'rights of a Washington citizen,' not the rights of the State." Maziar II, at 14 (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitution and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 524 (1984)).

> As Justice Utter noted "state constitutions were originally intended as the primary devices to protect individual rights." Utter & Spitzer, [The Washington State Constitution: A Reference Guide 15] at 3 [(2002)]. "[T]he fundamental purpose of our state's constitution" is "to protect and maintain individual rights." Utter, supra, at 507. Accordingly, the Washington Constitution delineates a set of limitations on state power, not a set of powers granted to the State. Utter and Spitzer, supra, at 2. It would require a strained reading of our Declaration of Rights to find one of its provisions grants the State any rights enumerated therein. Accordingly, article I, section

---

[1] E.g., compare Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010)(90-day presuit notice against non-State medical malpractice defendants found invalid), and McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 316 P.3d 469 (2013)(90-day presuit notice against State medical malpractice defendants found valid.)

> 21 of the Washington Constitution does not grant the State a right to a jury trial.

Maziar II, at 14.

The State argues that under article IV, section 24 of the State Constitution, the same rules must apply to all defendants. If not, the State argues, "two different classes of tortfeasors, government and non-government" would be created, and this is "the type of unequal treatment that this Court rejected in Hunter v. North Madison High Sch., 85 Wn.2d 810, 539 P.2d 845 (1975)." State petition at 13. However, treating the State differently than other defendants is allowed, and "subsequent cases have indicated that Hunter's reach is limited to legislation that essentially shortens the statue of limitations for suits against state defendants." McDevitt v. Harborview Medical Center, 179 Wn.2d 59, ¶15 (71), 316 P.3d 469, 475 (2013); McDevitt, 179 Wn.2d at 71 fn 8 and cases cited therein.

The Washington Constitution does not provide the State with the right to a jury trial for its tortious conduct.

B. There Is No Statutory Basis to Support the State's Petition.

As a sovereign, the State determines if, how and when it could be sued for its tortious conduct. The State waved its sovereign immunity for

its tortious conduct in RCW 4.92.090.[2] The State mistakenly argues RCW 4.92.090 provides the State with the right to a jury trial.[3]

The State misinterpreted RCW 4.92.090 before. Maziar I, 151 Wn.App. at ¶¶ 22-23 (860-61), 216 P.3d at 435. Here again, the text of the statute does not support the State's argument.

As noted in Maziar I, RCW 4.92.090 addresses the extent to which the State is liable or the scope of the State's liability for damages due to its tortious conduct. Id. RCW 4.92.090 does not address the procedural form the proceeding to recover those damages will take.

RCW 4.92.090 states:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its

---

2 We start with the proposition that the abolition of sovereign immunity is a matter within the legislature's determination. Haddenham v. State, 87 Wash.2d 145, 149, 550 P.2d 9 (1976). This is not because the court says so, but because the constitution so states. Article 2, section 26, of our constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

Coulter v. State, 93 Wn.2d 205, 207, 608 P.2d 261, 262 (1980)(upholding RCW 4.92.100); McDevitt, 179 Wn.2d at ¶6 (64), 316 P.3d at 472.

3 The State also argues the Court of Appeals held that the State has no right to a jury trial because the State did not waive its sovereign immunity until 1961. State's petition at 16. In fact, the Court said the State did not get a jury trial because,"It is clear that, in 1854 and 1869, the legislature that passed these statues was not granting a right to a jury trial to the State of Washington. This is clear because - in 1854 and 1869 - there was no State of Washington." Maziar II, at 20 (emphasis in original). The signing of the Constitution created the State of Washington.

> tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090, as amended, Laws of 1963, ch 159, § 2 (emphasis added).

Looking at the plain meaning of the language in RCW 4.92.090, the place to start in statutory interpretation, RCW 4.92.090 does not give the State the right to a jury trial.

"Liability for damages" is defined as:

> Liability for an amount to be ascertained by trial of the facts in particular cases.

Black's Law Dictionary 823 (5th ed. 1979).

Liable for damages as used in RCW 4.92.090 means the State is not immune from being required to pay damages for its tortious conduct.

And "extent" is defined as:

Amount; scope; range; magnitude.

Black's Law Dictionary 524 (5th ed. 1979).

The plain meaning of RCW 4.92.090 is that the State may be required to answer for its tortious conduct in damages in the same amount, or to the same magnitude, as a private person or corporation.

Nothing in RCW 4.92.090 indicates the procedural process to follow when the State answers for its tortious conduct.[4] The State, as a sovereign, has elsewhere set its own procedures that must be followed

---

[4] Compare the Massachusetts Torts Claim Act, G.L. c. 258, s 2, which does provide for the manner in which a claim may be made against the State of Massachusetts to RCW 4.92.090 which does not. Below at pages 14-15.

before the State can be held liable for damages. Those State procedures do not apply to other defendants. McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 316 P.3d 469 (2013). The State is a unique entity under the law, a sovereign, which may set whether it can be, and the terms under which it may be, sued for damages. McDevitt, id. The conditions the State of Washington set for it to be sued do not include a right for the State to demand a jury trial.

Not finding the right to a jury trial in the words of the current RCW 4.92.090, the State turns to RCW 4.92.090 before it was amended in 1963:[5]

> The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: Provided, that this section shall not affect any special statute relating to the procedures for filing notice of claims against the state . . . .

Prior RCW 4.92.090, Laws of 1961, ch 136, § 1.

The State focuses on the use of the words "maintaining" and "maintained" in the prior version of RCW 4.92.090. The State argues that "maintaining" a suit or action against it contains the State's right to a jury trial. However, the plain meaning of "maintaining" a suit or action has nothing to do with the right to a jury trial, or other procedures:

---

[5] The Legislature amended the language of RCW 4.92.090. Therefore, even if the State's right to a jury trial was contained in the prior RCW 4.92.090, which it was not, the Legislature took that right away when it amended RCW 4.92.090, which does not mention or imply the State's right to a jury trial.

> To "maintain" an action is to uphold, continue on foot, and to keep from collapse a suit already begun, or to prosecute a suit with effect. George Moore Ice Cream Co. v. Rose, Ga., 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265 [(1933)]. To maintain an action or suit may mean to commence or institute it: the term imports the existence of a cause of action. Maintain, however, is applied to actions already brought, but not already reduced to judgment. Smallwood v. Gallardo, 275 U.S. 56, 48 S.Ct. 23, 72 L.Ed. 152 [(1927)]. In this connection it means to continue or preserve in or with; to carry on.

Black's Law Dictionary 859 (5th ed. 1979).[6]

This meaning can be seen again in the second use of "maintained" in RCW 4.92.090. The two variants of "maintain" used in RCW 4.92.090 have the same meaning, which includes the ideas of continuing, prosecuting with effect, commencing or instituting suit against the State. Id. However, "maintain" does not import the idea of any procedural aspect of that suit, such as the existence, or not, of a jury trial.

The State next focuses on the use of the phrase "as if [the State] was a person or corporation" taken completely out of context from RCW 4.92.090. The State incorrectly argues use of the phrase "as if it was a person or corporation" shows the Legislature's intent that the State would have the right to a jury trial, just like a person or corporation.[7] However, the State's argument belies the context of the phrase. The sentence is

---

[6] Black's Law Dictionary contains many definitions for "maintain," but none of them suggests the idea of the inclusion of a jury trial.

[7] If the Legislature had intended the State to have the right for a jury trial it would have used plain language to say that, not hide that intention in other words and phrases.

talking about the extent, amount or measure of damages applicable to a private person or corporation.

> The state of Washington, . . . shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090 (emphasis added).

Use of the word "extent" cannot be ignored. "Extent" is defined as:

Amount; scope; range; magnitude.

Black's Law Dictionary 524 (5th ed. 1979).

So, RCW 4.92.090 addresses the amount, scope or range of damages for which the State may be held liable due to the State's tortious conduct, such as in this case where the skipper of the State's ferry pulled the chair out from under Mr. Maziar's feet causing significant and lasting personal injury to Mr. Maziar. Maziar II, at 2. RCW 4.92.090 does not address the State's right to jury trial.

The State next cites to RCW 4.84.170, which uses the language "liable ... to the same extent as private parties," making an ill-founded argument that RCW 4.84.170 provides the State with the right to a jury trial.

> In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, and in any action brought against the state or any county, and on all appeals to the supreme court or the court of appeals of the state in all actions brought by or against either the state or any county, the state or county shall be liable for costs in the same case and to the same extent as private parties.

RCW 4.84.170 (emphasis added).

However, that statute has nothing to do with the right to a jury trial. RCW 4.84.170, as the plain words say, addresses the obligation of the State or County to pay costs in certain cases to which the state is a party.

> RCW 4.84.170 was construed by this court in State ex rel. Hamilton v. Ayer, 194 Wash. 165, 77 P.2d 210 (1938), which held the State is liable to pay a filing fee to Thurston County upon commencing a civil action in the Superior Court of said county. The court therein said, in part at [194 Wash. at] page 168, 77 P.2d [at] page 611:
>
> > Rem.Rev.Stat. s 491, expressly places the State in the same position as private litigants insofar as its liability for costs and filing fees payable to the clerk of the superior court is concerned, except as otherwise provided by statute.

Thurston County v. Gorton, 85 Wn.2d 133, 135, 350 P.2d 309, 311 (1975) (emphasis added).

RCW 4.84.170 addresses the obligation to pay costs in certain cases brought by the State. It does not provide the State with a right to a jury trial.

The State then mistakenly argues that RCW 4.40.060 and 4.44.090 provide both individuals and the State with the right to a jury trial. As seen in Maziar II, neither statute provides the State with the right to a jury trial:

> Viewed in the context of the times, there is little doubt that neither the 1854 territorial legislature nor the 1869 territorial legislature was contemplating the statutes at issue [RCW 4.40.060 and 4.44.090] being applied to tort claims against the sovereign.

Maziar II, at 23.

There is no statutory basis for the State's claim that the Legislature provided the State with the right to a jury trial.

C. Cases Cited by the State.

The State next turns to Sofie v. Fiber Board Corp., 122 Wn.2d 636, 771 P.2d 711 (1989). This case does not help the State's argument. First, the Sofie court is clear that its analysis hinges on the same arguments adopted by the Court of Appeals in Maziar II.

> The second issue we must address is the determination of which causes of action the right to trial by jury attaches to. We have held in the past that the right attaches to actions in which a jury was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury.

Sofie, 122 Wn.2d at 648, 771 P.2d at 718.

A cause of action against the State is not a common law action, as under the common law the sovereign cannot be sued. Maziar II, at 21. And a claim against the State of Washington did not exist at the enactment of the State Constitution. Maziar II at 20-21. Further, the Legislature did not create a right for the State to a jury trial. Maziar II, at 23. So, under Sofie, there could not be a right for a jury trial in Mr. Maziar's case, because there was no action against the State in which the right to a jury was available at common law as of 1889, or by statutes then in force.

The Sofie court expanded the right to a jury trial to include a modern variant of an existing common law claim for negligence:

> Ultimately, there is not even an issue whether the right to a jury attaches to the Sofies' case. While they asserted "newer" tort theories in their complaint, the heart of the appellants' cause of action centered on negligence and willful or wanton misconduct resulting in personal injury. See Plaintiff's Summons and Complaint,

> at 4–5. These basic tort theories are the same as those that existed at common law in 1889. [Cases.] Subsequent cases and statutes have recognized newer theories of recovery within the framework of these basic tort actions, but the basic cause of action remains the same. Therefore, the right to trial by jury—with its scope as defined by historical analysis—remains attached here.

Sofie, 122 Wn.2d at 649-50, 771 P.2d at 718-19.

Sofie does not help the State because the State's argument falls outside the framework of existing basic tort actions. The State asks the Courts to create a new procedural mechanism for a tort claim, a procedure the Legislature did not create, for a claim against the sovereign which has no parallel at common law. Maziar II, at 21.

Next the State mistakenly argues that Oda v. State, 111 Wn.App. 79, 4 P.3d 8 (2002), provides the basis to create a right to a jury trial for the State. Oda does not help the State. The Oda court applied the plain language of RCW 4.92.090, and found the extent or scope of liability for damages the State has for its tortious behavior is the same as that of a private person or corporation. The Oda court did not address any procedural aspect of such a claim.

The State also cites to Dep't of Natural Res. v. Little John Logging Inc., 60 Wn.App. 671, 806 P.2d 779 (1991), which, as explained in Maziar II, at 18-19, "in no way assists with the inquiry in which we are engaged."

D. Massachusetts Law.

In prior briefing, the State cited to the Massachusetts Torts Claims Act to support its claim that Washington State's wavier of sovereign immunity, RCW 4.92.090, provides Washington State with the right to a jury trial. However, the Massachusetts Torts Claims Act demonstrates why RCW 4.92.090 does not provide the State with the right to a jury.

> The Massachusetts Tort Claims Act provides in pertinent part that "public employers shall be liable in the same manner and to the same extent as a private individual under like circumstances." G.L. c. 258, s 2.

Beurklian v. Allen, 385 Mass. 1009, 432 N.E.2nd 707 (1982)(the full text of G.L. c. 258, s 2 is set out in Appendix B).

Compare RCW 4.92.090:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

It is the phrase "in the same manner" that distinguishes the Massachusetts Torts Claim Act from RCW 4.92.090. The phrase "in the same manner" is absent from RCW 4.92.090.

"Manner" is defined as:

> A way, mode, method of doing anything, or mode of proceeding in any case or situation. See also Custom.

Black's Law Dictionary 868 (5th ed. 1979).

The fact RCW 4.92.090 does not contain the phrase "in the same manner" makes all the difference in statutory interpretation. Had the

Washington Legislature wanted to provide the State with the right to a jury trial it could have done so by adding the phrase "in the same manner" to RCW 4.92.090, just like in the Massachusetts Tort Claims Act. But the Washington Legislature did not do that. Instead, the Washington Legislature limited RCW 4.92.090 to the extent (amount, scope) of damages for which the State may be liable due to its tortious conduct.

RCW 4.94.090 did not include any indication as to the "way, mode, method of doing anything, or mode of proceeding in any case or situation" against the State of Washington. If the Legislature would like to amend RCW 4.92.090 to include such language, it may do so under its constitutional powers, but unless, or until, the Legislature acts, the State does not have a right to a jury trial in Mr. Maziar's case.

E. Court Rules.

The State incorrectly argues CR 38 creates the right to a jury trial for the State. However, CR 38(a) states:

> The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.

By its own terms, CR 38 does not create the right to a jury trial. It merely preserves that right if it already existed. Maziar II, at 23, fn 16.

Black's Law Dictionary defines preservation as:

> . . . . It is not creation, but the saving of what already exists, and implies the continuance of what perviously existed.

Black's Law Dictionary 1066 (5th ed. 1979)

As seen in Maziar II, the State had no right to a jury to be preserved.

The State argues further that CR 39 creates a right for the State to a jury trial. Again, the words belie that claim. CR 39(a)(1) provides in part:

> When trial by jury has been demanded as provided in rule 38, the action shall be designated upon the docket as a jury action.

Emphasis added.

Since CR 38 does not create a right to a jury trial for the State, CR 39 cannot do so either. The State's reliance on CR 38 and 39 is misplaced.

Therefore, the State's Petition for Discretionary Review should be denied. If the Legislature would like to act, it may do so, but the decision of the Court of Appeals, Maziar II, does not require additional review on this issue.

CROSS PETITION FOR DISCRETIONARY REVIEW

Prejudgment Interest.

The Court of Appeals erred in not awarding Mr. Maziar prejudgment interest on his general maritime claim for relief under RCW 4.92.090. This was in error because the State waived sovereign immunity for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. Maziar I, 151 Wn.App. at ¶ 22 (860), 216 P.3d at 435; RCW 4.92.090. Prejudgment interest is a substantive remedy in general maritime claims, which is to be awarded to the plaintiff in cases of

a private person's or corporation's tortious conduct. Endicott v. Icicle Seafoods, Inc., 167 Wn.2d at ¶ 31 (888), 224 P.3d at 769.

> [RCW 4.92.090] makes the State presumptively liable for its tortious conduct in all instances for which the legislature has not stated otherwise. Savage v. State, 127 Wash.2d 434, 445, 899 P.2d 1270 (1995). The statute does not limit the State's liability to a particular area of law; rather, it covers any remedy for the State's tortious conduct.

Maziar I, 151 Wn.App. at ¶ 22 (860), 216 P.3d at 435

Therefore, Mr. Maziar should have been awarded prejudgment interest for the State's tortious conduct as the State waiver of sovereign immunity has no direct statutory exemption form prejudgment interest. The decision of the Court of Appeals on the issue of prejudgment interest should be heard by this Honorable Court on discretionary review.

Lost Wages.

The Court of Appeals erred in not reversing the trial court's failure to award lost wages after the State offered Mr. Maziar a job in the mail room.

Mr. Maziar tried to return to work as a prison guard, but could not keep performing that job. CP 131-32 ¶ 13. For some months, Mr. Maziar worked light duty for the State. RP 10-18-2011 at 82; 10-18-2011 at 110-12. There were also other open light duty jobs with the State that Mr. Maziar felt he could perform, and that he applied for. RP 10-18-2011 at 111-12.

In November 2003, the State offered Mr. Maziar a job in the mailroom, back on McNeil Island. Mr. Maziar did not feel it was safe to

attempt that job. RP 10-18-2011 at 109-10. Mr. Maziar believed the mailbags he would be required to move weighed 50 pounds and there was no equipment to help him move them. Id.

Although he did not take the job in the mailroom, a job he thought was too physical (RP 10-19-2011 at 58), Mr. Maziar applied for other jobs with the State that were open and for which he was qualified. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57.

Despite Mr. Maziar's multiple attempts to mitigate his lost wages, the trial court found that because Mr. Maziar did not try the mailroom job "even if it's for five minutes" Mr. Maziar could not collect lost future wages. RP 1-13-2012 at 12; and 26, and CP 140 at ¶ 51.

The trial court erred when it found Mr. Maziar had not mitigated his wage loss. CP 140 ¶ 51.

Mr. Maziar had an obligation to mitigate his damages. Cobb v. Snohomish County, 86 Wn.App. 223, 230, 235 P.2d 1384, 1398 (1997). He did that by working light duty and applying for other light duty jobs. But,

> It must be remembered that the respondent was forced into the dilemma by the negligence of the appellant. After the accident, respondent had the choice of two courses of conduct. He chose the one which seemed the more reasonable to him at the time. The wrongdoer cannot now complain that one alternative rather than the other was chosen.
>
> . . .
>
> '* * * the party injured is not under any obligation to use more than ordinary diligence. Prudent action is required, but 'not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.'

> The amount of care required is not to be measured by 'ex post facto wisdom'; and the plaintiff is not bound at his peril to know the best thing to do.' 1 Sedgwick on Damages 415, 9th Ed., § 221.

Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099, 1102 (1956) (emphasis in original).

Mr. Maziar used ordinary diligence to both work and not suffer further injuries. Therefore, the decision of the trial court and Court of Appeals denying Mr. Maziar future wages after November 2003 is in error and should be heard by this Honorable Court on discretionary review.

CONCLUSION

The Court of Appeals decision on whether the State has the right to a jury trial is correct. If the State wants the right to a jury trial, the State should ask the Legislature for a change in RCW 4.92.090 to include language like that used in the Massachusetts waiver of sovereign immunity. The issue of the State's right to a jury trial regarding its tortious conduct does not require additional review. Therefore, the State's Petition for Discretionary Review should be denied.

On the other hand, the failure to award prejudgment interest is a violation of RCW 4.92.090 and this Court's holding in Endicott v. Icicle Seafoods, Inc., 167 Wn.2d at ¶ 31 (888), 224 P.3d at 769. Since individuals and corporations are liable in damages for prejudgment interest in a maritime claim, the State should also be liable under RCW 4.92.090.

Additionally, when an injured plaintiff uses ordinary diligence to mitigate his lost wages, but does not take a job offered to him that he does not believe is safe to perform, he should not be denied lost wages.

Therefore, Mr. Maziar respectfully requests the State's Petition for Discretionary Review be denied, and Mr. Maziar's Cross Petition for Review for the failure to award prejudgment interest and additional lost wages be granted.

RESPECTFULLY SUBMITTED this 3 day of July 2014.

Eric Dickman, Attorney for Respondent
Scott Maziar
eDickman Law Firm
PO Box 66793
Seattle, Washington 98166
(206) 242-3742 / eric@edickman.com
Alaska Bar Number 9406019
Washington Bar Number 14317
Also admitted in New York

PROOF OF SERVICE

CERTIFICATE OF DELIVERY

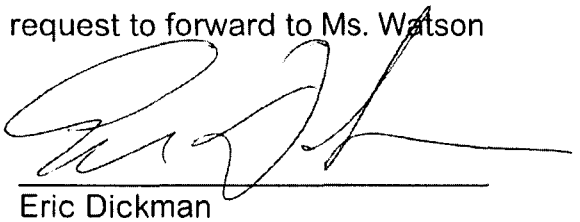
I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 3 day of July 2014, I had a copy of this document mailed to the attorney of record for the appellee/ defendant, first class postage pre-paid to:

Ms. Patricia D. Todd
Mr. John C. Dittman
Michael P. Lunch
Laura Watson
Assistant Attorney Generals
Torts Division
P.O. Box 40126
Olympia, Washington 98504-0126

and emailed to the same at:

PatriciaT2@ATG.WA.GOV
JohnD2@ATG.WA.GOV
MikeL@atg.wa.gov

with a request to forward to Ms. Watson



Eric Dickman
Signed at Seattle, Washington.
No Notary was readily available.

OFFICE RECEPTIONIST, CLERK

To: eric@edickman.com
Subject: RE: Sup. Ct. No.: 90377-8, Maziar v. Dep't of Corrections - Answer to Petition for Discretionary Review w/ attachments

Received 7-3-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Eric Dickman [mailto:eric@edickman.com]
Sent: Thursday, July 03, 2014 11:00 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Sup. Ct. No.: 90377-8, Maziar v. Dep't of Corrections - Answer to Petition for Discretionary Review w/ attachments

Dear Clerk of Court,

Attached for filing is the original of respondent Mr. Maziar's Answer to the Petition for Review and Cross Petition for Review, to assure it would be filed timely. Just the brief is attached. I was told when I called the Clerk's Office that if the attachments are more than 20 pages, which they are, the attachments should be sent via US mail separately and the Clerk's Office would match them up.

Since I believe, but am not certain, that being mailed today, the brief and attachments will arrive timely, I am mailing the complete answer to the petition today, via priority mail.

Please call me if you have any questions.

Eric Dickman
Attorney for the Respondent, Mr. Scott Maziar
206-242-3742

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR, Respondent/Cross-Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS and the STATE OF WASHINGTON, Appellant/Cross-Respondent.	)	DIVISION ONE No. 71068-1-I PUBLISHED OPINION FILED: March 24, 2014

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 24 AM 10:44

DWYER, J. — Generally, when a plaintiff brings a maritime claim in state court pursuant to the "saving to suitors" clause,[1] article I, section 21 of the Washington Constitution[2] establishes the parties' rights to a jury trial. That constitutional provision, however, does not grant such a right to the State of Washington, the party against whom the claim at issue in this case was asserted.

Plaintiff Scott Maziar initially requested a jury trial. He later moved to strike his jury request, contending that the jury trial right was inapplicable to his cause of action. The State opposed this motion, arguing that Maziar was wrong

---

[1] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

[2] "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

regarding the application of a state law jury right to his maritime cause of action. The State further alleged that it possessed the right to a jury trial in this matter, premising its assertion on article I, section 21 and RCW 4.40.060 and 4.44.090.[3] Although the State was correct that article I, section 21 applied to Maziar's cause of action, conferring upon him such a right, it was incorrect in contending that either the state constitution or the cited statutes confer upon it such a right. Because the State did not cite to the trial court applicable authority establishing its right to a jury trial in this matter, the trial court did not err by striking the jury upon Maziar's request.

With regard to further issues raised herein, we hold that the trial court did not err either by declining to award Maziar prejudgment interest on his damages recovery or by finding that Maziar failed to mitigate his damages. Accordingly, we affirm the judgment.

I

Maziar was employed by the State Department of Corrections (DOC) as a correctional officer at the McNeil Island Corrections Center. On January 16, 2003, at approximately 10:40 p.m., after having finished his shift, Maziar boarded the DOC ferry from McNeil Island to Steilacoom. Maziar sat down on a bench, put his feet up on a loose chair, and closed his eyes. Thereafter, the captain of the ferry pulled the chair out from under Maziar's feet, causing Maziar to fall off the bench. Maziar sustained injuries to his back, left ankle, knee, and left shoulder.

[3] These statutes are set forth and discussed in section II, subsection D, infra.

Maziar was unable to return to work as a correctional officer. From March 2003 through August 2003, Maziar worked in DOC's records division. In November 2003, the State offered Maziar a position in the mailroom at McNeil Island. Maziar's physician, Dr. Stephen Settle, did not believe that Maziar could perform that job due to his mistaken belief that ferry transportation required passengers to wear seatbelts. With respect to the mailroom position itself, Dr. Settle opined that "[t]he actual job duties appear appropriate." Nonetheless, Maziar believed that he would not have been able to perform the mailroom job. Maziar stated that he would not have taken the mailroom position because,

> [I]t's a permanent position that was only three or four people. There was heavy lifting in that job. I watched them as I sat down there as an officer. They do lift very large bags. There is tedious amounts of sorting. The three people that I saw there had been there over 20 years, and there were no positions that I could see that were permanent at any time while I worked there at McNeil Island. I didn't see any permanency there.

On June 30, 2005, Maziar filed a general maritime negligence claim against DOC, seeking compensation for the injuries he sustained when the ferry captain removed the chair. At that time, Maziar requested that his case be tried to a jury. On February 22, 2008, the trial court granted a motion for summary judgment brought by DOC, dismissing the lawsuit. Maziar appealed, and on August 25, 2009, Division Two reversed the trial court's ruling. Maziar v. Dep't of Corr., 151 Wn. App. 850, 216 P.3d 430 (2009) (Maziar I).[4]

[4] In Maziar I, Division Two addressed whether the Industrial Insurance Act, Title 51 RCW, precluded Maziar's claim and whether his claim was barred by sovereign immunity. 151 Wn. App. at 852. The court held in Maziar's favor on both issues, and remanded the case for trial. Maziar I, 151 Wn. App. at 860-61.

On September 15, 2011, Maziar, relying on the Washington Supreme Court's recent opinion in Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 224 P.3d 761 (2010), moved to strike the jury request. DOC opposed the motion. The trial court granted the motion and the parties tried the case to the bench.

The trial court found in favor of Maziar, and awarded $572,251.50 for pain and suffering and loss of enjoyment of life. However, the trial court found that Maziar had failed to mitigate his damages because "he did not attempt" the mailroom position "even for 10 or 15 minutes." Hence, the trial court awarded lost wages for only the periods of January to February 2003 and September to November 2003, for a total of $12,487.50. In total, the trial court awarded to Maziar $585,000[5] in damages. The trial court declined to award prejudgment interest on the damage amount.

DOC appeals from the judgment, assigning error to the trial court's order granting the motion to strike the jury. Maziar cross-appeals, challenging both the trial court's ruling that he failed to mitigate his damages and its decision not to award prejudgment interest.

II

DOC contends that the trial court erred by striking the jury and conducting a bench trial on Maziar's claim. This is so, it asserts, because the Washington Constitution and two state statutes guarantee to it the right to trial by jury in civil

[5] The judgment entered by the trial court states that the total principal judgment amount is $585,000. We are unaware of the source of the $261 not incorporated in the awards for lost wages and pain and suffering. Nevertheless, neither party assigns error to the trial court's calculation of damages. We thus do not disturb the trial court's calculation of Maziar's damages, as set forth in the judgment.

actions, including maritime cases. We agree that the right to a jury trial generally applies to maritime actions. We do not agree that DOC established that it possesses such a right.

A

Maritime causes of action are exclusively within the realm of federal law. Maziar I, 151 Wn. App. at 854. Nonetheless, an in personam maritime claim may be brought in state court pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333(1). Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 445, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001). This statute states, in relevant part, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333.

Generally, state courts deciding a case brought pursuant to the "saving to suitors" clause must apply substantive federal maritime law. Endicott, 167 Wn.2d at 879. However,

> a state court may "'adopt such remedies, and . . . attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'" Madruga v. Superior Court of Cal., County of San Diego, 346 U.S. 556, 561 [74 S. Ct. 298, 301, 98 L. Ed. 290] (1954) (quoting Red Cross Line [v. Atlantic Fruit Co., 264 U.S. 109,] 124 [44 S. Ct. 274, 68 L. Ed. 582 (1924)]). That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 [37 S. Ct. 524, 61 L. Ed. 1086] (1917).

Am. Dredging Co. v. Miller, 510 U.S. 443, 447, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994).

Although, historically, jury trials were not available in admiralty suits, nothing in federal maritime law forbids the use of a jury. Fitzgerald v. U.S. Lines Co., 374 U.S.16, 20, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963). Instead, the possibility of trial by jury is one of the "remedies" saved to suitors by 28 U.S.C. § 1333.[6] Lewis, 531 U.S. at 454-55 ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors."). As such, whether a party possesses the right to trial by jury in a maritime action is a question of state law. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1487 (5th Cir. 1992). Thus, whether the parties in this case have the right to a jury trial is a question to be answered by application of Washington law.

Pursuant to the Washington Constitution, the right to a jury trial generally exists for common law actions but not for equitable actions. Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 769, 287 P.3d 551 (2012). However, maritime actions are neither legal nor equitable. Waring v. Clarke, 46 U.S. 441, 460, 5 How. 441, 12 L. Ed. 226 (1847); Phelps v. The City of Panama, 1 Wash.Terr. 518, 536 (1877) ("The constitution recognizes, in the language it employs, a triple distribution of jurisdiction into law, equity and admiralty. A suit in one of these jurisdictions is not a suit in another." (citation omitted)). Accordingly, we undertake a historical inquiry to determine whether there is a constitutional right to a jury in a maritime suit:

> [Washington courts] have long interpreted article I, section 21 as guaranteeing those rights to trial by jury that existed at the time of

[6] "Suitors" includes both the plaintiff and the defendant. Waring v. Clarke, 46 U.S. 441, 461, 5 How. 441, 12 L. Ed. 226 (1847).

> the constitution's adoption in 1889. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 365, 617 P.2d 704 (1980). Under this historical approach, "the court examines (1) whether the cause of action is one to which the right to a jury trial applied in 1889, and (2) the scope of the right to a jury trial." Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 266, 956 P.2d 312 (1998).

Bird, 175 Wn.2d at 768-69.

In 1889, admiralty jurisdiction was governed by the Judiciary Act of 1789. Chappell v. Bradshaw, 128 U.S. 132, 134, 9 S. Ct. 40, 32 L. Ed. 369 (1888). The Act stated, in relevant part, "[T]he district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (footnote omitted). Although a maritime suit brought in state court was not (and is not) a common law action, the "saving to suitors" clause provided plaintiffs with all remedies that would otherwise be available in a common law action. Knapp, Stout & Co. Co. v. McCaffrey, 177 U.S. 638, 644, 20 S. Ct. 824, 44 L. Ed. 921 (1900); see also The Moses Taylor, 71 U.S. 411, 431, 18 L. Ed. 397, 4 Wall. 411 (1866) ("It is not a remedy in the common-law courts which is saved, but a common-law remedy."). "Remedy" was defined at the time as "[t]he means employed to enforce a right or redress an injury." BOUVIER'S LAW DICTIONARY 2870 (8th ed. 1914). In 1889, a jury trial was one of the "means employed to enforce a right or redress an injury" in common law actions in the Washington Territory. Dacres v. Or. Ry. & Navigation Co., 1 Wash. 525, 529, 20 P. 601 (1889). Thus, in 1889, parties in maritime actions had the right to a jury

trial in suits brought pursuant to the "saving to suitors" clause. Therefore, upon statehood, article I, section 21 of the Washington Constitution continued to guarantee that right.

This conclusion is consistent with federal law. Although the federal constitution's Seventh Amendment does not apply to state court proceedings, the Washington Supreme Court has found Seventh Amendment jurisprudence to provide insight into the state jury trial guarantee. See e.g., Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 267-68, 956 P.2d 312 (1998); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 647, 771 P.2d 711, 780 P.2d 260 (1989). Pursuant to federal court jurisprudence, the "saving to suitors" clause allows a plaintiff to sue in diversity, instead of admiralty, so long as the statutory requirements for so doing are met.[7] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 362, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). The United States Supreme Court has held that when a plaintiff brings a maritime claim under diversity jurisdiction, the Seventh Amendment right to a jury trial attaches. Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360, 82 S. Ct. 780, 7

---

[7] The statute establishing federal diversity jurisdiction reads, in relevant part, as follows:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).

L.Ed.2d 798 (1962). As the Supreme Court of Louisiana has articulated, "There simply is no apparent conceptual difference between an admiralty In personam claim brought under the saving to suitors clause as an ordinary civil action in federal court and one brought under the same clause as an ordinary civil action in state court." Lavergne v. W. Co. of N. Am., Inc., 371 So.2d 807, 810 (La. 1979). Thus, federal law supports the conclusion that the right to a jury trial is available in maritime actions brought in state court pursuant to the "saving to suitors" clause.

B

Maziar relies extensively on the Phelps decision for his assertion that there is no right to a jury trial in maritime actions, but that opinion does not compel the result he envisions.[8] In Phelps, the Supreme Court of the Washington Territory declared that "[n]either in the court below nor in this court, could [the plaintiff's admiralty suit] be tried by a jury." 1 Wash.Terr. at 536. However, the plaintiffs in Phelps did not bring their action pursuant to the "saving to suitors" clause. Rather, the territorial trial court heard the case in the same manner as would a federal district court sitting in admiralty.

Some history of the jurisdiction exercised by Washington's territorial courts is necessary to explain why this was so. In 1828, the United States Supreme Court was called upon to answer the question of whether a territorial court could

[8] Maziar also relies heavily on footnote 3 in Endicott for his assertion that there is no right to a jury trial in maritime actions. However, in that footnote, the court actually states that it would not decide the question, because the issue was not adequately briefed by the parties. Endicott, 167 Wn.2d at 886 n.3.

exercise jurisdiction over admiralty cases. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 7 L. Ed. 242 (1828). In an opinion by Chief Justice John Marshall, the Court held that a territorial court had jurisdiction over admiralty claims. 356 Bales of Cotton, 26 U.S. at 546. The Court noted that the territorial courts, while not established as Article III courts, did possess such subject matter jurisdiction as was conferred by Congress. 356 Bales of Cotton, 26 U.S. at 546. As Chief Justice Marshall explained, "Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories." 356 Bales of Cotton, 26 U.S. at 546.

Congress's power over territories of the United States is established in Article IV, section 3, of the United States Constitution, which states, in relevant part, "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In 1853, Congress exercised this power in creating the territory of Washington. In "An Act to Establish the Territorial Government of Washington," otherwise known as the Organic Act, Congress created the territorial judiciary, vesting its power in "a supreme court, district courts, probate courts, and in justices of the peace." Organic Act, ch. 90, § 9, 10 Stat. 172 (1853). Congress therein conferred the jurisdiction of the courts as follows:

> [E]ach of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution of the United States and the laws of said Territory, as is vested in the circuit and district courts of the United States; writs of error and appeal in all such cases shall be made to the supreme court of said Territory the

> same as in other cases. Writs of error, and appeals from the final decision of said supreme court, shall be allowed and may be taken to the supreme court of the United States in the same manner as from the circuit courts of the United States.

Organic Act, ch. 90, § 9, 10 Stat. 172. As the grant of jurisdiction decreed it to be the same as that exercised by Article III courts, a territorial court in Washington operated not only as would a state court, but also as would a federal court. See Barbara Bintliff, *A Jurisdictional History of the Colorado Courts*, 65 U. COLO. L. REV. 577, 588-89 (1994) ("In addition to being territorial courts, with jurisdiction like that of state courts, the supreme and district courts of Colorado Territory also served as the federal courts for the territory. Their jurisdiction was 'the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States.'" (quoting Organic Act, ch. 59, § 9, 12 Stat. 172 (1861))).

In Phelps, the territorial Supreme Court held that it and the trial court were acting with the jurisdictional authority of federal courts in deciding that dispute. In determining whether it had jurisdiction over admiralty claims, the court recognized that there were two possible bases for its jurisdiction:

> 1. . . . [A]dmiralty and maritime law remains a law of the Territory, and a case arising under it properly arises under the laws of the Territory. [Or],
>
> 2. . . . [A]dmiralty and maritime law is now operative within the Territory as a law of the United States, and a case arising under it arises under the laws of the United States.

Phelps, 1 Wash.Terr. at 529. The court determined the second basis to be the correct one for admiralty cases. Phelps, 1 Wash.Terr. at 529. Specifically, the

court held, "All cases here, therefore, which now arise under admiralty, or maritime law, are correctly to be styled cases arising under the laws of the United States. Of all such cases, the Territorial, District and Supreme courts have undoubted jurisdiction." Phelps, 1 Wash.Terr. at 529.

The trial court in Phelps was sitting not as a common law state court, but as a federal court in admiralty. Thus, it had no need to invoke the "saving to suitors" clause. As the trial court was exercising the equivalent of admiralty jurisdiction,[9] the Territorial Supreme Court was correct in its conclusion that the parties therein had no right to a jury trial. See Waring, 46 U.S. at 460 (Seventh Amendment does not apply to admiralty actions). The Pierce County Superior Court in this case, however, was not exercising federal admiralty jurisdiction.[10] Rather, it was exercising the authority conferred upon it by the "saving to suitors" clause. Therefore, contrary to Maziar's urgings, the Phelps decision does not support the position he asserts.

As the "saving to suitors" clause contemplates that the parties have access to common law remedies, and the right to a jury trial was a common law

---

[9] What today would be jurisdiction for claims brought pursuant to Federal Rules of Civil Procedure 9(h). This rule states:

(1) ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

[10] Nor could it. "[A] true 'admiralty' claim is never cognizable in state court." Linton, 964 F.2d at 1487.

remedy recognized in the Washington Territory in 1889, the constitutional right to a jury trial set forth in article I, section 21 is generally available to the parties in a maritime action brought in superior court.

C

The discussion in the preceding section does not resolve the issue presented, however. Establishing that Maziar, contrary to his belief, was entitled to a jury's resolution of his claim does not end our inquiry. Maziar, of course, was free to choose to not avail himself of the jury trial opportunity. The trial court erred in striking the jury, DOC contends, because *it* had a right to a jury trial and it objected to Maziar's request.

Both in the trial court and in its briefing on appeal, DOC contended that its right to a jury trial is guaranteed by article I, section 21 of the Washington Constitution and two nineteenth century statutes. We examine the constitutional question first.

The Washington Constitution provides that,

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

CONST. art. I, § 21.

Article I of the Washington Constitution is entitled "Declaration of Rights." Section 21, guaranteeing the right of trial by jury, is a part of this Declaration. "In many states, including Washington, the Declaration of Rights is a source of *individual* protection that is the equal of the federal [Bill of Rights]. Not merely a

restatement of its national counterpart, Washington's Declaration of Rights contains unique and additional protections of *individual* rights." ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 15 (2002) (emphasis added). In fact, "[t]he Washington Declaration of Rights is the primary guarantor of the rights of Washingtonians." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 524 (1984). The Declaration addresses the "rights of a Washington citizen," not the rights of the State. Utter, supra, at 524.

Moreover, the Declaration of Rights itself provides that the state government is "established to protect and maintain *individual* rights." CONST. art. I, § 1 (emphasis added). As Justice Utter noted, "state constitutions were originally intended as the primary devices to protect individual rights." UTTER & SPITZER, supra, at 3. "[T]he fundamental purpose of our state's constitution" is "to protect and maintain individual rights." Utter, supra, at 507. Accordingly, the Washington Constitution delineates a set of limitations on state power, not a set of powers or rights granted to the State. UTTER & SPITZER, supra, at 2. It would require a strained reading of our Declaration of Rights to find that one of its provisions grants to the State any of the rights enumerated therein. Accordingly, article I, section 21 of the Washington Constitution does not grant the State the right to a jury trial.

Following oral argument in this court, DOC submitted an uninvited pleading, purportedly in response to a question from the panel concerning

whether our Supreme Court has ever held that *any* section of the Declaration of Rights granted a right to the State.[11] In this postargument filing, DOC cited to article I, section 16 of the state constitution and a Division Three opinion, Dep't of Natural Res. v. Littlejohn Logging, Inc., 60 Wn. App. 671, 806 P.2d 779 (1991), for the proposition that the State had been granted rights by the Declaration of Rights. In fact, neither citation supports DOC's assertion.

DOC's citation to, and reliance upon, article I, section 16 is off the mark. This provision reads:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or

---

[11] Maziar timely moved to strike DOC's pleading, contending that it consisted of impermissible argument in violation of RAP 10.1(h) and 10.8 and was essentially an unsolicited supplemental brief. Maziar's contention is well taken. To the extent that DOC included argument in its submittal, Maziar's motion is granted.

However, with respect to DOC's citations to article I, section 16 and Dep't of Natural Res. v. Littlejohn Logging, Inc., 60 Wn. App. 671, 806 P.2d 779 (1991), Maziar's motion is denied. These two citations are at least tangentially related to the court's question at oral argument.

With respect to all other authorities cited by DOC in its late-filed pleading, Maziar's motion is granted. DOC cites to these authorities in an apparent effort to advance a new theory of its case. Neither these authorities nor this theory (which does not raise a constitutional question) were presented to the trial court (either in briefing or in oral argument), included in DOC's opening appellate brief, included in DOC's reply brief, or mentioned at oral argument. In a civil case, under circumstances in which a constitutional right is not at issue, an appellant cannot seek reversal of a trial court decision based on a legal theory not presented to the trial court. Fuqua v. Fuqua, 88 Wn.2d 100, 105, 558 P.2d 801 (1977). A corollary of this rule is that an appellant must include all theories upon which reversal is sought (accompanied by proper argument and citations to authority) in its opening brief on appeal. Dickson v. U.S. Fid. & Guar. Co., 77 Wn.2d 785, 787, 466 P.2d 515 (1970); In re Estates of Foster, 165 Wn. App. 33, 56, 268 P.3d 945 (2011). A legal theory that is raised for the first time in a reply brief is raised too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Dykstra v. County of Skagit, 97 Wn. App. 670, 676, 985 P.2d 424 (1999). The same rule applies to legal theories raised by an appellant for the first time at oral argument in this court. State v. Johnson, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992). Obviously, a legal theory advanced by an appellant for the first time *after oral argument* completely deprives the respondent of any opportunity to defend the trial court's decisions, and comes too late to warrant consideration by the appellate court. Rafel Law Grp. PLLC v. Defoor, 176 Wn. App. 210, 225, 308 P.3d 767 (2013), review denied, 179 Wn.2d 1011 (2014).

> paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

CONST. art. I, § 16.

Contrary to DOC's apparent belief, this provision did not *grant* the State the power of eminent domain. To the contrary, it gives individuals rights against the State's exercise of that power. Indeed, upon statehood, the State of Washington possessed the power of eminent domain independent of any express grant from any source:

> The power of eminent domain is inherent in sovereignty and does not depend for its existence on a specific grant in the constitution. The provisions found in a state constitution *do not by implication grant the power to the government of a state*, but limit a power which otherwise would be without limit.

State ex rel. Eastvold v. Yelle, 46 Wn.2d 166, 168, 279 P.2d 645 (1955) (emphasis added) (citing State ex rel. Eastvold v. Superior Court, 44 Wn.2d 607, 609, 269 P.2d 560 (1954)); accord State v. King County, 74 Wn.2d 673, 675, 446 P.2d 193 (1968) ("The power of eminent domain is an attribute of sovereignty; it is an inherent power of the state.").

This view is in accord with similar pronouncements from the courts of sister states. Over 100 years ago, the Idaho Supreme Court declared, "When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction." Hollister v. State, 9 Idaho 8, 71 P. 541, 543 (1903), overruled in part on other grounds by Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970). More recently, the Alabama Supreme Court held, "The power of eminent domain does not originate in Article I, § 23 [of the Alabama Constitution]. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain." Gober v. Stubbs, 682 So.2d 430, 433 (Ala. 1996). Indeed, it is widely accepted that the power of eminent domain is not conferred by constitution or statute, but rather is an inherent attribute of state sovereignty. See Sys. Components Corp. v. Fla. Dep't of Transp., 14 So.3d 967, 975 (Fla. 2009); Mayor & City Council of Baltimore City v. Valsamaki, 397 Md. 222, 241, 916 A.2d 324 (2007); R.I. Econ. Dev. Corp. v. The Parking Co., LP, 892 A.2d 87, 96 (R.I. 2006); Dep't of Transp. v. M.M. Fowler, Inc., 361 N.C. 1, 5, 637 S.E.2d 885 (2006); Norwood v. Horney, 110 Ohio St.3d 353, 363-64, 853 N.E.2d 1115 (2006); State by Dep't of Natural Res. v. Cooper, 152 W.Va. 309, 312, 162 S.E.2d 281 (1968); State Highway Dep't v. Smith, 219 Ga. 800, 803, 136 S.E.2d 334 (1964); People ex rel. Dep't of Pub. Works v. Chevalier, 52 Cal.2d 299, 304, 340 P.2d 598 (1959); State, by Burnquist v. Flach, 213 Minn. 353, 356, 6 N.W.2d 805 (1942); Liddick v. City of Council Bluffs, 232 Iowa 197, 215, 5 N.W.2d 361

(1942); Phila. Clay Co. v. York Clay Co., 241 Pa. 305, 310, 88 A. 487 (1913); Bd. of Water Comm'rs of City of Norwich v. Johnson, 84 A. 727, 731 (Conn. 1912); People v. Adirondack Ry. Co., 160 N.Y. 225, 237, 54 N.E. 689 (1899), aff'd, 176 U.S. 335, 20 S. Ct. 460, 44 L. Ed. 492 (1900); Brown v. Beatty, 1857 WL 4130, at *9 (Miss.Err. & App.); In re State, 325 S.W.3d 848, 858 (Tex.App.-Austin 2010); City of Sunland Park v. Santa Teresa Servs. Co., 134 N.M. 243, 252, 75 P.3d 843 (N.M.App. 2003); County Highway Comm'n of Rutherford County v. Smith, 61 Tenn.App. 292, 297-98, 454 S.W.2d 124 (1969); State by State Highway Comm'r v. Union County Park Comm'n, 89 N.J.Super. 202, 211, 214 A.2d 446 (1965).

Contrary to DOC's present assertion, "[t]he *sole purpose* of [article I, section 16] is to define the limitations placed upon the inherent power of a governing body in dealing with the governed in this regard." Arnold v. Melani, 75 Wn.2d 143, 151, 449 P.2d 800, 450 P.2d 815 (1968) (emphasis added). Properly understood, article I, section 16 grants rights to Washington citizens in order to ameliorate the harshness of the State's unfettered power of eminent domain. It does not grant rights to the State.

DOC's citation to the Littlejohn Logging decision is similarly unavailing. The question now before us was not addressed in that case. Rather, in Littlejohn Logging, Division Three held that because "DNR's action was legal in nature," "the parties had a right to a jury trial." 60 Wn. App. at 674. From the decision it is clear that each party in Littlejohn Logging assumed that it possessed a right to a jury trial, so long as the cause of action asserted therein was subject to that

right. The Court of Appeals merely determined that it was. Moreover, the right to a jury trial was asserted on appeal by Littlejohn Logging, not by the State. Littlejohn Logging, 60 Wn. App. at 673. The decision of the appellate court in that case in no way assists with the inquiry in which we are presently engaged.

Article I of the Washington Constitution does not grant jury trial rights in civil cases to the State. [12]

D

Therefore, if DOC has a right to a jury trial in this matter, it must be a right provided by statute. In the trial court and in its appellate briefing, DOC contended that two territorial statutes, now codified as RCW 4.40.060[13] and 4.44.090,[14] both grant it the right to a jury trial. RCW 4.40.060, a territorial statute originally enacted in 1854, states in relevant part, "An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury." RCW 4.44.090, a territorial statute originally enacted in

---

[12] In State v. Oakley, 117 Wn. App. 730, 734, 72 P.3d 1114 (2003), we held that RCW 3.66.010 and 10.04.050 unambiguously granted the State a right to a jury trial in a criminal case. A corollary of that holding is that only the individual, and not the State, is granted the right to trial by jury in article I, section 22 of the state constitution, which deals with criminal trials.

[13] "An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees." RCW 4.40.060.

The subsequent statute states, "Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred." RCW 4.40.070.

[14] "All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them." RCW 4.44.090.

RCW 4.44.080 states, "All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it."

1869, states, "All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them."

It is clear that, in 1854 and 1869, the legislature that passed these statutes was not granting a jury trial right to the State of Washington. This is clear because—in 1854 and 1869—there *was* no State of Washington.

Moreover, in 1854 and in 1869, there was no such thing as a civil tort claim against the State. "A familiar and fundamental rule for the interpretation of a statute is that it is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it." Kelso v. City of Tacoma, 63 Wn.2d 913, 917, 390 P.2d 2 (1964). For example, in 1902, our Supreme Court held that a statute passed in 1895 dictating the proper forum for claims against the State did not create any new causes of action against the State. Billings v. State, 27 Wash. 288, 291-93, 67 P. 583 (1902). In Billings, the plaintiff had attempted to assert a negligence claim against the State pursuant to a statute which provided that, "'[a]ny person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county.'" Billings, 27 Wash. at 291 (quoting Bal. Code § 5608). Our Supreme Court held that this statute did not abrogate the State's sovereign immunity. Billings, 27 Wash. at 293. Rather, the State "has not consented, either expressly or impliedly, to become responsible for the misconduct or negligence of its officers or agents; and, in the absence of a statute making it liable in damages therefor, no such action as the present one can be maintained against the state." Billings, 27 Wash. at 293. Similarly, RCW

4.40.060 and 4.44.090 were enacted at a time when the sovereign enjoyed immunity against civil tort claims. Both statutes must be read in light of this fact.

Our Supreme Court has previously interpreted one of the inter-related statutes cited by DOC. In Dexter Horton Building Company v. King County, 10 Wn.2d 186, 116 P.2d 507 (1941), the court clarified the scope of Rem. Rev. Stat., § 314, now codified as RCW 4.40.060. In that case, the court found authoritative the Laws of 1873, chapter 15, § 206, which declared that "*nothing in* the civil practice act," including Rem. Rev. Stat., § 314, "*shall be* so *construed* as *to restrict* the *chancery powers of the judges, or* to *authorize* the *trial of any issue by a jury when* the *relief sought is predicated upon* a *doctrine* which is *inherently in equity*." Dexter Horton, 10 Wn.2d at 193. Hence, the court held that "[i]n the light of that declaration it is clear that the provision for jury trial on issues of fact for the recovery of money only applies to common-law actions." Dexter Horton, 10 Wn.2d at 193. There was, of course, no such thing as a civil tort claim against the sovereign at common law. "The doctrine of governmental immunity springs from the archaic concept that 'The King Can Do No Wrong.'" Kelso, 63 Wn.2d at 914. This doctrine has long been considered part of the common law of Washington. See Billings, 27 Wash. at 293. Thus, although generally a negligence claim is a common law action, a civil tort action against the sovereign was *not* an action available at common law. Nineteenth century statutes must be construed with this in mind.

As the Dexter Horton case demonstrates, Washington's statehood and the adoption of the Washington Constitution did not expand RCW 4.40.060 and

RCW 4.44.090 beyond their then-existing reach. Rather, the constitution provided for the continuation of those statutes as they were then understood. CONST. art. XXVII, § 2; State v. Ellis, 22 Wash. 129, 133, 60 P. 136 (1900) overruled in part on other grounds by State v. Lane, 40 Wn.2d 734, 738, 246 P.2d 474 (1952). At the time these statutes were enacted, neither applied to the State of Washington in civil tort actions, both because the State of Washington did not then exist and because sovereign governments then enjoyed immunity from such suits. Statehood and its concomitant adoption of the Washington Constitution did not change these statutes' application and the legislature has never amended them so as to provide a right to jury trial to the State in civil tort cases.

Moreover, in 1854 and 1869, it is implausible that the territorial legislature intended, by statute, to grant the right to a jury trial in tort claims against a sovereign. "A court's goal in construing a statute is to determine and give effect to the legislature's intent." TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010) (citing Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). The relevant inquiry is directed to the intent of the legislature that passed the act in question. Pasado's Safe Haven v. State, 162 Wn. App. 746, 754 n.6, 259 P.3d 280 (2011). During the territorial period, the territorial legislature was sworn to uphold and subject to

only one constitution—the federal constitution.[15] Organic Act, ch. 90, § 6, 10 Stat. 172. The federal constitution's Seventh Amendment did not then, and does not now, provide the right to a jury trial for civil tort claims against the sovereign. Indeed, "[i]t hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign." Galloway v. United States, 319 U.S. 372, 388, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943). "Neither the Amendment's terms nor its history suggest it was intended to extend to such claims." Galloway, 319 U.S. at 388 n.17.

Viewed in the context of the times, there is little doubt that neither the 1854 territorial legislature nor the 1869 territorial legislature was contemplating the statutes at issue being applied to tort claims against the sovereign. Such a state of affairs would have been unknown to legislators of that era. If the right to a jury trial in a tort case was to be extended to the State by statute, it must have been the act of some later legislature. But DOC pointed to no such later enactment in its trial court briefing, nor in its opening or reply briefs on appeal.[16]

As the Washington Constitution's Declaration of Rights does not grant rights to the State, and DOC did not identify a statutory basis for its asserted right to a jury trial in an action of this type, the trial court did not err by striking the jury

---

[15] Additionally, all territorial laws were subject to approval by Congress. Organic Act, ch. 90, § 6, 10 Stat. 172.

[16] DOC also cites to Civil Rule 38(a) for the proposition that the trial court erred by striking the jury in this case. However, CR 38(a) is a court rule, not a statute. Further, CR 38(a) states, "The right of trial by jury as declared by article I, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate." This rule does not grant a right to a jury trial; rather, it protects such rights as are provided by the constitution or by statute. Because DOC did not establish that it had either a constitutional or statutory right to a jury trial, CR 38(a) did not compel the trial judge to deny Maziar's motion to strike the jury.

upon Maziar's request.[17] The case was properly tried to the bench.

III

In his cross appeal, Maziar contends that the trial court erred by declining to award prejudgment interest. This is so, he asserts, because federal maritime law compels the award of prejudgment interest. DOC defends the trial court's decision, arguing that prejudgment interest is not permitted in this case because the State has not waived its sovereign immunity against claims for prejudgment interest. The trial court ruled properly.

We review the award or denial of prejudgment interest for an abuse of discretion. Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 790, 189 P.3d 777 (2008). "[A] ruling based on an erroneous legal interpretation is necessarily an abuse of discretion." Endicott, 167 Wn.2d at 886 (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

"Prejudgment interest in maritime cases is substantive and so is controlled by federal law." Endicott, 167 Wn.2d at 886 (citing Militello v. Ann & Grace, Inc., 411 Mass. 22, 576 N.E.2d 675, 678 (1991)). In admiralty cases,

> "prejudgment interest must be granted unless peculiar circumstances justify its denial." Dillingham Shipyard v. Associated Insulation Co., 649 F.2d 1322, 1328 (9th Cir.1981). . . . When a district court "fail[s] to articulate any reason why" prejudgment interest was denied, "the district court abuse[s] its discretion in

[17] In this case, we resolve the questions presented by the issues as litigated by the parties based upon the authorities properly presented to the trial court and to us. Nothing herein should be read to foreclose future arguments premised upon statutes not presented to us in this case.

> refusing to award prejudgment interest." Edinburgh Assurance Co. v. R.L. Burns Corp., 669 F.2d 1259, 1263 (9th Cir. 1982).

Vance v. Am. Haw. Cruises, Inc., 789 F.2d 790, 795 (9th Cir. 1986) (alterations in original). Here, the trial court denied prejudgment interest without giving a reason. Although the trial court should have articulated a reason for its decision, it did not abuse its discretion by declining to award prejudgment interest.

In Norris v. State, 46 Wn. App. 822, 825, 733 P.2d 231 (1987), Division Two held that, "[t]he State has not consented to prejudgment interest on tort claims against it." Eighteen years later, Division Two extended this holding to apply to a suit brought under the Jones Act and federal maritime law. Foster v. Dep't of Transp., 128 Wn. App. 275, 279, 115 P.3d 1029 (2005).

The court in Foster declined to consider whether federal maritime law superseded the State's sovereign immunity, finding instead that prejudgment interest is not awardable in mixed maritime and Jones Act suits.[18] 128 Wn. App. at 279. We take up the question that Foster left open and hold that federal maritime law does not supersede a state's sovereign immunity. The United States Supreme Court has previously held that states are immune under the Eleventh Amendment from admiralty and maritime suits brought in federal court. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-73, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987). The United States is also immune from admiralty suits, unless it has waived its immunity. See 46 U.S.C. § 742 (waiving sovereign immunity for in personam admiralty suits). Therefore, sovereign

[18] This portion of Foster was later overruled by our Supreme Court in Endicott. 167 Wn.2d at 888.

immunity is not incompatible with federal maritime law. As such, federal maritime law does not supersede state sovereign immunity.

Because the State has never waived its sovereign immunity in this regard, the trial court did not abuse its discretion by declining to award prejudgment interest.

IV

Maziar additionally contends that the trial court erred by finding that he had failed to mitigate his damages. This is so, he asserts, because he reasonably believed that he would be unable to perform the mailroom job. The trial court's ruling is amply supported by the record.

Whether a party has mitigated damages is a question of fact. TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 134 Wn. App. 819, 826, 142 P.3d 209 (2006). "Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge." In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). Substantial evidence is defined as

> a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently. Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 314 P.2d 622 (1957).

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). We will "'not substitute [our] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.'" Rockwell, 141 Wn. App. at 242 (quoting In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)).

"The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts." Cobb v. Snohomish County, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997) (citing Kloss v. Honeywell, Inc., 77 Wn. App. 294, 301, 890 P.2d 480 (1995)). Where the plaintiff claims lost wages, such damages are "not recoverable to the extent plaintiff reasonably failed to mitigate his damages by earning whatever he could at another occupation." Kubista v. Romaine, 87 Wn.2d 62, 67, 549 P.2d 491 (1976). The burden of proving a failure to mitigate is on the party who caused the damages. Cobb, 86 Wn. App. at 230 (citing Bernsen v. Big Bend Elec. Coop., 68 Wn .App. 427, 435, 842 P.2d 1047 (1993)).

In this case, the trial court found that Maziar did not mitigate his damages because he declined to attempt to perform the functions of a mailroom clerk at DOC. Based on the evidence presented at trial, a rational person could conclude that Maziar did not reasonably attempt to mitigate his damages because he declined to take the mailroom job. Although Dr. Settle advised Maziar not to take the job, his advice was based on the mistaken belief that ferry passengers were required to wear seatbelts. In fact, Dr. Settle believed that Maziar could perform the functions of a mailroom clerk. Maziar's reasons for turning down the job were based solely on his personal observations. This evidence sufficiently supports the trial court's finding that Maziar acted unreasonably by turning down the mailroom position. The trial court did not err by concluding that Maziar failed to mitigate his damages.

Affirmed.

We concur:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR, Respondent/Cross-Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS and the STATE OF WASHINGTON, Appellants/Cross-Respondents.	)	DIVISION ONE No. 71068-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants/cross-respondents Washington State Department of Corrections and the State of Washington, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 7th day of May, 2014.

For the Court:

Deny, J.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY -7 PM 2:22

Appendix B

APPENDIX B

The Massachusetts Torts Claims Act, G.L. c. 258, s 2:

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a $100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment

against such public employer or public employee by reason of the same subject matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.