NO. 43698-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR,

Respondent,

v.

THE WASHINGTON STATE DEPARTMENT OF CORRECTIONS and the STATE OF WASHINGTON,

Appellants.

APPELLANT'S OPENING BRIEF

ROBERT W. FERGUSON
Attorney General

Patricia D. Todd, WSBA #38074
John C. Dittman, WSBA #32094
Assistant Attorneys General
Michael P. Lynch, WSBA #10913
Senior Counsel
Attorneys for Appellant State of Washington
PO Box 40126
Olympia, WA 98504
(360) 586-6300

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I. INTRODUCTION

Plaintiff Scott Maziar worked as a correctional officer for the Department of Corrections (DOC) at the McNeil Island Corrections Center (MICC). He claims he was injured when he fell off a bench while being transported as a passenger on the DOC MICC ferry. He brought this lawsuit in state court asserting a maritime claim alleging that DOC was negligent. The only relief he sought was monetary damages. Shortly after filing his complaint in 2005 Mr. Maziar demanded a jury trial. On the eve of trial, he moved to strike the jury demand arguing that general maritime law precluded a jury. The State vigorously opposed Mr. Maziar's motion to strike arguing that state law and the state constitution provided a right to trial by jury in this case. Judge Beverly Grant struck the jury and following a bench trial awarded Mr. Maziar $585,000.

The issue on appeal is whether the State was entitled to a jury trial. This is a question of law subject to de novo review. In *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 878, 224 P.3d 761, 764, *cert. denied*, 130 S. Ct. 3482 (2010), the State Supreme Court held that the Washington State Constitution guarantee of a right to trial by jury applied in a Jones Act maritime case.

The Court's analysis in *Endicott* governs the resolution of this matter. Originally, federal courts had exclusive jurisdiction over

admiralty and maritime claims. However, under the "saving to suitors" clause (28 U.S.C. § 1333), Congress granted maritime plaintiffs the right to bring maritime claims in state court. Such claims are governed by state procedural rules, including the right to trial by jury. The trial court's error in striking the jury in this case requires a new trial.

II. ASSIGNMENTS OF ERROR

1. Washington State Constitution art. I, § 21 guarantees the right to a jury trial in actions centered on negligence. Mr. Maziar's claims were based on negligence. Accordingly, the trial court erred in striking the jury in this case.

2. The trial court erred in deciding the amount of damages when DOC was entitled to have that issue decided by a jury pursuant to RCW 4.40.060.

3. The trial court erred in deciding issues of witness credibility and other factual questions where the DOC was entitled to have those issues decided by a jury pursuant to RCW 4.44.090.

4. The trial court erred in entering judgment against the DOC following a bench trial, when the State was entitled to a trial by jury.

5. The trial court erred in entering Findings of Fact 1-40. Each of these Findings of Fact was entered in violation of DOC's right to trial by jury.

6. The trial court erred in allowing Mr. Maziar to withdraw his demand for a jury trial after allowing the DOC to rely upon that jury demand for six years.

III. STATEMENT OF ISSUES

1. Did the trial court err in striking the jury in a maritime lawsuit centered on negligence when Washington State Constitution art. I, § 21 guarantees a right to trial by jury in such a case.

2. Did the trial court err in striking the jury in a maritime lawsuit centered on negligence when RCW 4.40.060 entitled DOC to have the issue of damages decided by a jury.

3. Did the trial court err in striking the jury in a maritime lawsuit centered on negligence when RCW 4.44.090 entitled DOC to have issues regarding witness credibility and all other factual questions be decided by a jury.

4. Did the trial court err in entering a judgment against DOC following a bench trial when the state was entitled to have a trial by jury.

5. Did the trial court err in entering Findings of Fact 1-40 when DOC was entitled to have each of these factual determinations made by a jury.

6. Did the trial court err in allowing Mr. Maziar to withdraw his jury demand on the eve of trial when DOC had relied upon that jury demand throughout the proceeding six years of litigation.

IV. STATEMENT OF THE CASE

A. Factual Background

On January 13, 2003, plaintiff, Mr. Maziar, was employed by DOC as a correctional officer on McNeil Island. CP at 2. Mr. Maziar alleges that while he sat aboard the McNeil Island ferry on a bench the DOC ferry captain pulled a chair out from under his propped up feet. CP at 3. Mr. Maziar further alleges that he fell off the bench injuring his back, left ankle, left shoulder, and neck. CP at 3. He returned to work after the incident for a day. CP at 131. Mr. Maziar thereafter took leave, applied for L&I benefits, and received L&I benefits. CP at 270-71.

In March 2003, he returned to work in a light duty position. CP at 131. However, in October 2003, Mr. Maziar chose not to take a light duty job on McNeil Island. CP at 140, 132-33. Despite being capable of performing light duty work, Mr. Maziar claimed to be unable to work since and collected L&I until 2011, and social security disability benefits. Verbatim Report of Proceedings (RP) (10-18-11) at 138; CP at 136-37, 140.

B. Procedural History

Plaintiff filed his complaint in Pierce County Superior Court on June 30, 2005. CP at 1-7. Plaintiff requested a jury trial on August 11, 2005. CP at 12-13.

Four years later, this case came before this Court regarding the interplay between state workers' compensation laws and an employee's federal maritime claims. *Maziar v. State, Dep't of Corr.*, 151 Wn. App. 850, 216 P.3d 430 (2009). Defendants successfully moved the trial court on summary judgment to dismiss the case based on the State's interpretation that the Industrial Insurance Act (IIA), title 51, RCW, barred Mr. Maziar's federal maritime claim. *Maziar,* 151 Wn. App. at 851.

This Court reversed the summary judgment ruling holding that the IIA did not bar plaintiff's case and remanded the case. *Id.* This Court held, "that Maziar's federal maritime claim against DOC survives even if he is also covered under the IIA, we need not decide whether the legislature intended to exclude him from IIA coverage." *Id.* at 853.

This Court further found that, "Mazair's claim falls within maritime jurisdiction." *Id.* at 854. This Court reasoned, "Maziar was on the ferry for the sole purpose of being transported from work" which "fits directly within the pure maritime activities." *Id.* at 859-60. This Court, "therefore concluded that Washington's IIA does not bar Maziar's federal

maritime claims against the DOC." *Id.* at 860. This Court also noted "[b]ut maritime jurisdiction does not necessarily exclude state law." *Id.* at 854 (internal citations omitted).

On remand, Judge Beverly Grant scheduled the jury trial for October 2011. On September 15, 2011, plaintiff filed a motion to strike the jury. CP at 209. Plaintiff sought to strike the jury asserting this case is a maritime case which under federal law garners no right to a jury trial. CP at 209, 213. Plaintiff specifically argued there is no basis in law to have a jury trial because the maritime claims were tried without juries prior to the enactment of both the United States Constitution and the Washington State Constitution. CP at 214. The State objected asserting that a right to jury trial applies to maritime cases brought in state court based on the Washington Constitution and *Endicott.* CP at 24-25. The State argued that *Endicott* stands for the proposition that "'[o]nce the plaintiff has chosen a suit at law in state court, state procedural law determines whether the parties may demand a jury trial.'" CP at 35 (quoting *Endicott,* 167 Wn. 2d at 887). On October 6, 2011, the trial court heard arguments and struck the jury. CP at 238.

On October 18, 2011, a bench trial began. RP (10-18-11) at 1. On December 12, 2011, a month-and-a-half after trial concluded, the court, in an oral ruling, awarded $585,000.00 in damages. RP (12-12-11) at 1. At

this time, the court did not attribute any specific amounts for the damages awarded. RP (12-12-11) at 1. However, the court did indicate the evidence supported no award for medical expenses. *Id.*

On June 25, 2012, nearly seven months later, the court entered findings of facts and conclusions of law. CP at 128-41. In these findings, the court awarded no damages for medical expenses. CP at 141. The court awarded $12,487.50 in lost wages. CP at 133, 140. The court subtracted the lost wage award from its original oral award of $585,000.00 to reach the amount of general damages of $572,512.50[1]. CP at 133, 140-41. This total represents an undifferentiated total between damages attributable to pain and suffering, emotional distress, and loss of enjoyment of life. CP at 133, 140-41.

The findings of fact in this case contain numerous irregularities. Specifically, the findings of fact and conclusions of law contradict each other on significant issues of disputed fact. For example, the court found that none of the doctors who performed the surgeries could attribute their treatment of Mr. Maziar to the alleged injury aboard the ferry. CP at 137-38. Yet, the court simultaneously found Mr. Maziar has been in pain since the moment of injury, needs help putting groceries in his car, cannot shop fully at the mall with his daughters, and is entitled to a lump sum amount

[1] The two different figures that appear in the trial court's award are scrivener's errors.

of $572,251.25 for pain and suffering, loss of enjoyment of life, and emotional distress. CP at 133.

Another significant contradiction exists between the court's decisions at trial and the court's final decision. During the trial in October 2011, the court admitted, over the objection of DOC, the amount of L&I payments into evidence. CP at 270-71. Later in January 2012, the court ruled it would not consider the L&I payments as evidence. RP (1-23-12) at 14, 18-19. However, in June 2012, in its findings the court specifically outlined each payment amount that Mr. Maziar received from L&I. CP at 132. It is DOC's position that the trial court's ruling that it would not consider the L&I payments and its later inclusion of that evidence in the findings of fact is inconsistent at best, and clearly improper. CP at 128-41.

On July 18, 2012, the State filed its timely notice of appeal and assigned error to the denial of a jury trial. CP at 147.

V. SUMMARY OF ARGUMENT

There is nothing unusual or improper about affording the parties in a maritime lawsuit, in either state or federal court, the right to a trial by jury. While the parties to a case that is brought under federal admiralty jurisdiction in federal court do not have a right to trial by jury, maritime claims that are brought in federal or state court under the "saving to

suitors" clause (28 U.S.C. § 1333) do. Pursuant to Wash. Const. art. I, § 21; RCW 4.40.060 and 4.44.090, the parties in a Washington state maritime lawsuit seeking money damages are entitled to a jury trial. In federal court, maritime claims brought under diversity of citizenship jurisdiction, are treated as cases of common law to which a Seventh Amendment right to jury attaches. In addition federal court maritime cases arising on the Great Lakes enjoy a statutory right to trial by jury under 28 U.S.C. § 1873. For maritime lawsuits brought in state court under the "saving to suitors" clause, substantive federal law applies but procedural rules are governed by state law, including the right to trial by jury. *Endicott,* 167 Wn.2d at 884-86.

The trial court erroneously applied the body of law applicable to cases that are brought in federal court under admiralty jurisdiction to this case, ignoring the fact that this lawsuit was brought in state court through the "saving to suitors" clause. The procedures federal courts apply to maritime cases brought in federal court under federal jurisdiction are irrelevant and inapposite to a correct determination of whether a right to trial by jury exists under Washington state law. The proper analysis is set forth in *Endicott*—the State Constitutional right to a jury trial attaches in a maritime case. Defendant DOC is entitled to a new trial with a jury.

VI. LAW AND ARGUMENT

A. Standard Of Review

Whether a party is entitled to a right to trial by jury is a question of law which is governed by a de novo standard of review. *Endicott,* 167 Wn.2d at 880.

B. Argument

1. Overview Of Maritime Jurisdiction In State And Federal Court

The U.S. Const. art. III, § 2 extends the judicial power of the federal court "to all cases of admiralty and maritime jurisdiction." Congress has given the federal court exclusive jurisdiction over all cases 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) (emphasis added),[2] *Endicott,* 167 Wn.2d at 878-89. There are two types of maritime actions: *in rem* and *in personam.* The federal courts have exclusive jurisdiction of *in rem* maritime actions. *Kilfoil v. Ullrich*, 714 N.Y.S.2d 737, 739, 275 A.D.2d 53 (2000), citing *Knapp, Stout & Co. Company v. McCaffrey*, 177 U.S. 638, 641-42, 177 U.S. 638, 20 S. Ct. 824, 44 L. Ed. 921 (1900).

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[2] 28 U.S.C. § 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil action of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Pursuant to the "saving to suitors" clause (28 U.S.C. § 1333), *in personam* actions may be tried as ordinary civil actions in state court or in federal court under non-admiralty rules. *Kilfoil*, 714 N.Y.S.2d at 739, citing *Panama R. Co. v. Vasquez*, 271 U.S. 557, 46 S. Ct. 596, 70 L. Ed. 1085 (1926).

The effect of the "saving to suitors" clause essentially is to provide a plaintiff who has an *in personam* claim the choice of preceding in an ordinary civil action in state or federal court, rather than bringing an admiralty action in federal court. *See* 14 C. Wright & A. Miller, *Federal Practice & Procedure: Jurisdiction* § 3672 n.4 (3rd ed. 2007). A claimant who invokes federal admiralty jurisdiction under the grant of original subject matter jurisdiction over admiralty, does not need to show diversity of citizenship or minimum amount in controversy. But if alternative bases of federal subject matter jurisdiction exist, such as diversity jurisdiction, the plaintiff must affirmatively plead the claim as an admiralty or maritime claim for purposes of Fed. R. Civ. P. 9(h), 14(c), 38(e), and 82.

A claim that is brought in federal court outside of the court's exclusive admiralty jurisdiction, such as a claim where jurisdiction is based on diversity of citizenship, entitles the parties to a right to trial by jury under the Seventh Amendment. In such an action the plaintiff is entitled to a jury trial in federal court. *Kilfoil*, 714 N.Y.S.2d at 739, citing

Complaint of Great Lakes Dredge & Dock Co., 895 F. Supp. 604, 609 (S.D.N.Y. 1995). Curiously, if a maritime cause of action arises on the Great Lakes, Congress has provided the parties a right to a federal court jury trial. *See* 28 U.S.C. § 1873.

A maritime plaintiff also has the right to pursue remedies under the "saving to suitors" clause in an action brought in state court. All admiralty actions brought in state court must be brought under the "saving to suitors" clause. *Hebert v. Diamond M. Co.,* 367 So.2d 1210 (La. App. 1978); *Scudero v. Todd Shipyards Corp.,* 63 Wn.2d 46, 385 P.2d 551 (1963) (state courts derive *in personam* admiralty jurisdiction from 28 U.S.C. § 1331(1)). If a jury trial is a remedy generally afforded in the state court, the right to trial by jury is one of the remedies to which the parties in a state court maritime action are entitled. *See Lewis v. Lewis & Clark Marine Inc.,* 531 U.S. 438, 454-55, 121 S. Ct. 993, 1004, 148 L. Ed. 2d 931 (2001) (trial by jury is an example of the remedies available to suitors in state court maritime actions pursuant to the saving to suitors clause.) *Endicott*, 167 Wn.2d at 885. When a plaintiff proceeds under *in personam* jurisdiction under the "saving to suitors" clause in state court, there is similarly no bar to a jury trial. *Id. See also Kilfoil*, 714 N.Y.S.2d at 739, citing *Maxwell v. Olsen*, 468 P.2d 48 (Alaska 1970); *In re Estate of Grandy*, 432 F. Supp. 2d 630, 633 (E.D. Va. 2006).

While plaintiffs in a federal court maritime action must make a designation of the jurisdiction under which they are proceeding (e.g. admiralty versus diversity of citizenship) Washington state law contains no similar provision. *Compare* Fed. R. Civ. P. 9(h) and 38 with CR 9 and 38.

Substantive federal law limits the liability of vessel owners to the value of the vessel and the pending freight. *See* 46 U.S.C. §§ 181-96. Any attempt to impose liability on a ship owner above that amount in a state court proceeding can be enjoined by federal district court. However, in this case that liability limit was never at issue so there was never any need for concursus limitation procedure. Regarding this limitation procedure, in *Lake Tankers Corp. v. Hen*, 354 U.S. 147, 153, 77 S. Ct. 1269 (1957), the Supreme Court noted that Congress had created the limitation procedure as part of the "saving to suitors" process to protect common law remedies in state courts, holding:

> The respondent must not be thwarted in her attempt to employ her common-law remedy in state court where she may obtain trial by jury.

As noted in 2 Am. Jur. 2d *Admiralty* § 217 (2012) "Effect where right to jury trial arises in state court admiralty action":

> If a trial by jury is a remedy generally afforded in state court, the right to trial by jury is one of the remedies to which a suitor is otherwise entitled pursuant to the "saving

> to suitors" clause [3] when an in personam suit is based upon the general maritime law is brought in state court.[4] Because a jury trial is a procedural and not a substantive matter, holding such a trial does not modify or displace the applicable substantive admiralty law, which is federal law which is a federal law.

2 Am. Jur. 2d *Admiralty* § 217 (2012).

In short, a "plaintiff with *in personam* maritime claims has three choices: (1) file suit in federal court under the federal court's admiralty jurisdiction; (2) file in federal court under non-admiralty jurisdiction, such as diversity jurisdiction if the parties are diverse and the amount in controversy is satisfied; or (3) bring suit in state court to pursue state statutory and/or common law remedies. The difference between these choices is mostly procedural; of greatest significance is that there is no right to jury trial in a federal court maritime case where admiralty jurisdiction is invoked. Yet a right to trial by jury is preserved for federal claims based in diversity or for maritime claims brought in state court." *Ghotra by Ghotra v. Bandila Shipping, Inc.,* 113 F.3d 1050, 1054 (9th Cir. 1997), *cert. denied, Bandila Shipping, Inc. v. Ghotra,* 522 U.S. 1107, 118 S. Ct. 1034, 140 L. Ed. 2d 101 (1998). *See also Neal v. McGinnis, Inc.*, 716 F. Supp. 996, 998 (E.D. Ky. 1989) ("The most important difference to

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[3] Citing *Lewis v. Lewis and Clark Marine Inc.,* 531 U.S. 438, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001) (referring to 28 U.S.C. § 1333).

[4] Citing *Lavergne v. Western Co. of North America, Inc.*, 371 So. 2d 807 (La. 1979).

a litigant when bringing an action in federal court between the court's admiralty and its diversity jurisdiction is that in an action at law, the plaintiff has a right to trial by jury, even when the case is maritime in nature." (citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S. Ct. 780, 784, 7 L. Ed. 2d 798 (1962)).

The trial court erroneously struck the jury in this case through its conflation of argument and authority that a plaintiff who invokes federal admiralty jurisdiction in a federal court maritime action has no right to trial by jury. CP at 45, 209-17, 230-37. The trial court failed to understand that in a state court lawsuit that is brought *in personam* through the "saving to suitors" clause to afford Mr. Maziar the common law remedies that he has under state law to recover tort or contract damages, state not federal procedural rules apply. *Endicott,* 167 Wn.2d at 884. This includes a right to trial by jury. There is no legal basis whatsoever to deny either a plaintiff or defendant in a maritime action in Washington State court their right to trial by jury.[5] *Endicott,* 167 Wn.2d at 885.

C. The Parties To A Maritime Case Brought In Washington State Court That Is Based Upon A Theory Of Negligence Have A Right To Trial By Jury

In *Endicott,* 167 Wn.2d 878-79, the Washington Supreme Court has already held that a seaman seeking a maritime remedy under the Jones

[5] *See* George J. Koelzer, 34 J. Mar. L. & Com. 159. Attached as Appendix (App.) 1.

Act who elects a state court forum under the "saving to suitors" clause, is entitled to trial by jury under Wash. Const. art. I, § 21; when the action is centered on negligence, because such a case analogous to basic tort theories that existed when the State Constitution was adopted.

> Once a plaintiff has chosen a suit at law in state court [under the Jones Act], state procedural law determines whether the party may demand a jury trial. The Washington State Constitution affords Jones Act litigants a jury trial because the Jones Act is rooted in negligence and so fits with the jury trial right.[6]

More recently, in a case involving both general maritime and Jones Act claims, our Supreme Court again noted that it is the jury's role to determine the appropriate amount of damages, including punitive damages, based upon a jury's determination that a defendant engaged in willful or callous behavior. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, 82, 272 P.3d 827 (2012). In *Clausen* the court rejected the argument under general maritime law that a jury, rather than the court, should calculate the award of attorney fees, but upheld the jury's damage

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[6] In n.3 the court noted that the parties in *Endicott* had assumed that if Icicle had a right to jury trial on *Endicott's* Jones Act claim, the right necessarily extended to *Endicott's* unseaworthiness claim. However, because the parties briefs had not addressed the right to jury trial on general maritime cases, the Court did not specifically decide that issue. However, as the briefing herein demonstrates, the analysis of a party's entitlement to jury trial on a negligence based Jones Act claim is the same for determining a right to trial by jury on a negligence based maritime claim. Notably, the trial court found in favor of Mr. Maziar based upon his negligence theory, but entered no findings of fact on his unseaworthiness claim. Further, plaintiff's struck his seaworthiness expert, a maritime engineer, because the testimony would not aid the trier of fact. CP at 118 (Order re: Motions in Limine).

amount. When read together, there is no doubt that both *Endicott* and *Clausen* stand for the proposition that in Washington state courts, a jury determines issues of liability and damages in general maritime lawsuits that are centered on a theory of negligence.

1. Washington State Constitution Gives Defendants A Right To A Trial By Jury

The only distinction between the Jones Act negligence claim that was at issue in *Endicott* and Mr. Maziar's claim in the case at bar is that at the time of his injury, Mr. Endicott was working as seaman aboard the vessel and therefore was entitled to bring a statutory claim under the Jones Act (46 U.S.C. § 30104), while Mr. Maziar was a passenger at the time of his alleged injury and therefore maritime law afforded him a general common law negligence claim for damages. *Maziar*, 151 Wn. App. 850, 216 P.3d 430 (2009).

Endicott established that once the party choses to file in state court then state procedural law determines whether the parties have a right to a jury trial. The Washington Constitution provides:

> 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."

Art. I, § 21.

> The right of jury trial: 'is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125, 136 (2007) (citing *State v. Evans*, 154 Wn.2d 438, 445, 114 P.3d 627 (2005) (quoting *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

The Constitution guarantees the right to trial by jury that existed at the time of the adoption of the constitution: "We have long interpreted article I, section 21 as guaranteeing those rights to trial by jury that existed at the time of the constitution's adoption in 1889." *Bird v. Best Plumbing Group, LLC*, 287 P.3d 551, 557 (Wash. Oct. 25, 2012) (citing *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980)). At the time the constitution was adopted, the parties had a right to a jury trial for negligence actions. *Endicott,* 167 Wn. 2d at 873.

Here, Mr. Maziar had the option of suing "in Admiralty" in federal court, but instead has sued "at law" in the superior court. This choice of jurisdiction triggered the application of state procedural law, including a right to trial by jury. *Id.*

As long ago as 1927, the Washington State Supreme Court upheld a jury verdict in an *in personam* action at law for damages based on maritime negligence. *Peterson v. Pacific S.S. Co.,* 145 Wash. 460, 261 P. 115 (1927), *affirmed,* 278 U.S. 130, 49 S. Ct. 75, 73 L. Ed. 220 (1928). The trial court erred in striking the jury in this case. Therefore, the judgment should be reversed and the case remanded for a new trial before a jury.

2. The Right To Trial By Jury In Washington Predates The Constitution. RCW 4.40.060 And 4.44.090 Embody Washington's Long Tradition Of Having Juries Decide Issues Of Damages, Credibility, And Questions Of Fact

Territorial statutes that remain the law of Washington have, by virtue of art. XXVII, § 2,[7] specific constitutional sanction. *State v. Estill*, 55 Wn.2d 576, 582, 349 P.2d 210 (1960) ("territorial statutes have a specific constitutional sanction and approval which subsequent state statutes do not have.") *See generally Gerberding v. Munro*, 134 Wn.2d 188, 208-09, 949 P.2d 1366 (1998) (noting that RCW 43.10.010, which added qualifications to the office of the state attorney general, beyond those set forth in art. III § 25, was not unconstitutional because those qualifications exited at the time of statehood).

RCW 4.40.060 directs that:

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[7] The relevant portion of art. XXVII, § 2 provides: All laws now enforce in the territory of Washington, which are not repugnant to this constitution shall remain in force until they expire by there own limitation, or altered or repealed by Legislature: . . ."

> **An issue of fact, in an action for the recovery of money only**, or a 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. (emphasis added)

RCW 4.40.160 was originally enacted in 1854 and has not been amended since 1893.

RCW 4.44.090 provides:

> **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**. (emphasis added)

RCW 4.44.090 was originally enacted in 1869 and was last amended in 1881, prior to statehood. Both of these statutes provide context for the adoption of the right to trial by jury in civil cases that was enacted at the time of statehood, Wash. Const. art. I, § 21. These statutes are interwolven into the fabric of the State Constitution. Article XXVII § 2.

3. DOC Had A Right To Have A Jury Determine The Amount Of Damages Pursuant To RCW 4.40.060

The only remedy sought by the plaintiff in this case was the recovery of money and compensatory damages. The plaintiff's claims, and the judge's findings of fact sounded negligence. CP at 139. Pursuant to RCW 4.40.060 DOC had a right to have a jury determine the amount of damages in this case. Based on Mr. Maziar's testimony, the trial court

found that he had been in constant pain since the moment of his injury, that he needs help to put his groceries in and out of his car and that when he goes to the mall with his daughters he has to sit on a bench while they shop and cannot fully participate with activities with his daughters. *See* Findings of Fact 21 and 23; CP at 133. However the objective facts demonstrated that he was not that badly injured. Following his alleged injury in January 2003, he was employed in the Records Division for DOC for six-months, from March through August. Based on the testimony of his physicians, the trial court found that plaintiff was capable of light-duty work and that he had not mitigated his damages by seeking employment. *See* Finding of Fact 51, CP at 140. Nonetheless, the trial judge awarded Mr. Maziar $572,251.25 as compensation for general damages. Because this was an action for the recovery of money only, DOC had a right to have a jury decide the amount of damages under RCW 4.40.060. That right was denied when the trial court struck the jury. DOC is entitled to a new trial before a jury in accordance with the direction of RCW 4.40.060.[8]

4. DOC Was Entitled To Have All Questions Of Fact, Including Witness Credibility Determined By A Jury Under The Mantle Of RCW 4.44.090

The nature and extent of Mr. Maziar's injuries were highly contested. He claimed that as a result of falling off of a bench he had

[8] *See also Sofie v. Fiber Board Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989) (statute placing limit on non-economic damages violates right to trial by jury).

injured his back, left ankle, knee, left shoulder, and wrist and had been in constant pain since January 16, 2003, the date of the incident. His testimony was that of an interested witness and therefore the weight and credibility to be afforded that evidence was critical, a matter DOC was entitled to have a jury decide. *Moore v. Roddie*, 103 Wash. 386, 174 P. 646 (1918) (weight and credibility of interested witness is for a jury to determine).

Mr. Maziar's own testimony draws into question the credibility of the nature and extent of his injuries. Mr. Maziar testified he cannot bend, do anything of value, and needs help with daily activities. RP (10-18-11) at 131. Yet at trial, Mr. Maziar contorted himself into the position he claims to have been during the slip off the bench. RP (10-18-11) at 104. During this self-imposed demonstration to the court, he possessed enough strength and flexibility to kick his head back and hold the position so it could be described and photographed. RP (10-18-11) at 105.

Contrary to Mr. Maziar's claim of disability following his alleged injuries he travelled regularly. Mr. Maziar enjoyed himself at Disneyland partaking in the amusement rides, sojourned on an Alaskan cruise, embarked on road trips to Arizona and southern California, and helped a friend move. RP (10-20-11) at 31-32, (10-18-11) at 139. One of these trips, Mr. Maziar drove alone from Los Angeles, California to Spanaway,

Washington in approximately seventeen and a half hours. RP (10-19-11) at 77.

Mr. Maziar also admitted to possessing enough vigor and strength in July 2010 to kick a dent in a roommate's vehicle resulting in charges for domestic violence related malicious mischief. RP (10-20-11) at 4. DOC is entitled to have a jury decide if Mr. Maziar's claims of physical limitations were credible given his high activity level.

Testimony from three independent witnesses also directly controverted Mr. Maziar's assertions that he experiences "pain since the moment of injury" and needs help with "household duties." CP at 133. At trial Mr. Maziar testified that he has not performed any auto repair work since his injury because he is "not able to lift anything." RP (10-18-11) at 134. Three witnesses directly disputed those claims. One witness, now a commissioned law enforcement officer, testified that he considered Mr. Maziar to be a bad influence because Mr. Maziar performed auto repair work while collecting L&I benefits and incredulously had the nerve to joke about it. RP (10-24-12) at 10-11. A former roommate testified that he witnessed Mr. Maziar hunching over car engines, wielding car repair tools, hoisting an engine out of a car, digging landscaping holes, unloading shovels full of gravel, and utilizing a paint roller to paint a ceiling. RP (10-26-12) at 32, 44, 47, 50, 53, 57, 74. Anne Maziar, Mr. Maziar's

former spouse, testified she had personal knowledge of Mr. Maziar shoveling a truckload of beauty bark, installing a home irrigation system, painting a high ceiling, driving to Spokane, sitting through volleyball tournaments, taking a weekend fishing trip, performing car repair work, driving to California with their children, and unloading an all terrain vehicle and pushing it up an incline. RP (10-26-12) at 7, 10, 14, 18, 21, 25, 27. Mr. Maziar's claimed inability to lift anything or do household chores is in stark contrast to extensive evidence of his physical labor and travel.

Questions of fact also arose regarding Mr. Maziar's performing work under the table. Mr. Maziar testified he survives solely on L&I benefits and Social Security benefits and did not have "any kind of business on the side." RP (10-18-11) at 127-28. However, Mr. Maziar admitted to accepting over three thousand dollars for working on a church's van and refinishing church pews. RP (10-20-11) at 39-42. He also admitted to receiving over a thousand dollars from people to purchase auto parts. RP (10-20-11) at 39-42. DOC was entitled to have a jury determine the veracity of Mr. Maziar's claims he was not working under the table.

Factual issues also arose regarding Mr. Maziar's credibility surrounding an insurance claim and his use of a business permit to evade

sales tax. Mr. Maziar made flood and theft insurance claims totaling more than $70,000.00 that were suspicious requiring investigation. RP (10-19-11) at 69. A Department of Revenue Field Audit Manager testified that Mr. Mazair's former auto repair business reseller permit was a complete falsification. RP (10-26-11) at 9. Mr. Maziar made unsubstantiated claims he was allowed to continue using his former auto repair business to buy auto parts without paying sales tax. RP (10-19-11) at 76. Evidence demonstrated that Mr. Maziar bought thousands of dollars of auto parts and knew others were using his reseller permit to purchase auto parts without paying sales tax. RP (10-20-11) at 36-39; RP (10-18-11) at 129. Yet, inconceivably Mr. Maziar claimed to do no auto repair work for others stating he cannot "bend or doing anything of value." RP (10-18-11) at 131. The believability of this highly questionable explanation should have been decided by a jury.

Again, Mr. Maziar's overall credibility was brought to light when he feigned not remembering the name his physical therapist in a lame effort to conceal the evidence he performed landscaping for Mr. Ford. Mr. Maziar first testified he did not know the identity of Chris Ford. RP (10-20-11) at 9. Later, on cross-examination, Mr. Maziar conceded he did remember Chris Ford, as a physical therapist, stating he knew him only as one of the many therapists he saw. RP (10-24-11) at 18, 20. Mr. Maziar

attempted to conceal evidence of his physical labor by disavowing knowledge of Chris Ford initially. However, trial testimony revealed the fact that Mr. Maziar performed landscaping work at Chris Ford's home. Mr. Maziar planted a tree, shoveled top spoil, dug out a grass area, and laid down a rock driveway. RP (10-26-11) at 48, 50-51, 53. These are all examples of credibility issues a jury should have determined. Credibility questions are also present in the trial court's ruling.

The trial court's findings of fact are not a model of clarity. Although Judge Grant found Mr. Maziar was injured aboard the ferry, none of Mr. Maziar's treating doctors could relate their treatment to that incident. Regarding the left shoulder, the trial court found the doctor "could not relate to a reasonable degree of medical probability or certainty that any of the problems that plaintiff had with his shoulders that required the operations were caused by the January 16, 2003, incident aboard the ferry." *See* Findings of Fact 38; CP at 137-38. Yet, the court found as to the shoulder that "Mr. Maziar's injuries were consistent with the mechanics of his fall aboard the vessel." *See* Findings of Fact 31; CP at 134-35.

Regarding the ankle, the doctor, "could not attribute the surgery to the incident aboard the ferry." The court found, "that his absence of proof mandates a finding that Mr. Maziar's ankle surgery was not caused by

defendant's actions." *See* Findings of Fact 39; CP at 138. Finally, regarding the back, again the doctor "was not able to attribute the surgery to the incident aboard the ferry." *See* Findings of Fact 40; CP at 138. The trial court also made a specific finding that "no amount is awarded for medical costs." Findings of Fact 53; CP at 141.

In short, the trial court found Mr. Maziar was significantly injured when he fell off the bench on the MICC ferry, but none of his surgeries or medical treatment was related to those injuries. CP at 133. These contradictory findings are likely the result of the credibility issues surrounding Mr. Maziar's implausible testimony. These material inconsistencies should be determined within the purview of a jury. Const. art. I, § 21, RCW 4.40.060 and 4.44.090.

D. The Trial Court Erred In Usurping The Role Of The Jury And Entering Findings Of Fact 1 Thru 40

Here again, pursuant to Const. art. I, § 21; RCW 4.40.060 and 4.44.090, DOC was entitled to have a jury determine whether Mr. Maziar was seriously injured, the nature and extent of his injuries, his credibility and the credibility of all of the other witnesses at trial, the amount of his damages, and all other factual questions in this case. The trial court erred in striking, on the eve of trial, the jury demand that Mr. Maziar had made in the case that it had been in effect for six years. The findings of fact in

this case are not verities on appeal, they are null and void. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 804, 828 P.2d 549, 551 (1992). DOC is entitled to have a jury determine each of the aforementioned disputed matters. The judgment in this case should be reversed and the case remanded for a new trial before a jury in accordance with the laws of the State of Washington. *Endicott,* 167 Wn.2d at 876.

E. The Trial Court Erred In Allowing Mr. Maziar To Withdraw His Jury Demand Without Consent Of DOC

Regarding **JURY TRIAL OF RIGHT, CR 38(a) provides:**

> **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**. (emphasis added).

Further, CR 38(d) requires:

> [a] demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

As professor Tegland has aptly observed:

> If a party has made a demand for a trial by jury of an issue, then all parties in the action may rely on that demand and do not have to file a separate jury demand for trial of the same issue by a jury.

15 Karl V. Tegland, *Washington Practice: Civil Procedure,* 10 Wash. Prac., Civil Procedure Forms § 39.1 (2d ed. 2012).

Here, Mr. Maziar filed his jury demand in August 2005. CP at 12-13. Mr. Maziar brought a motion to strike the jury trial six years later on

the eve of trial in September 2011. CP at 209-17. Defendant strongly opposed Mr. Maziar's motion to strike the jury trial. CP at 218-29. According to the straightforward application of CR 38 the trial court should have denied Mr. Maziar's request to strike the jury because DOC did not consent to Mr. Maziar's motion to withdraw his jury demand. DOC is entitled to a new trial before a jury in accordance with CR 38.

VII. CONCLUSION

Consistent with the Supreme Court's holding in *Endicott,* 167 Wn.2d at 885 and pursuant to the mandates of Wash. Const. art. I, § 21; RCW 4.40.060 and 4.44.090 defendant DOC was entitled to have this maritime lawsuit, based upon a theory of negligence tried by a jury. The trial court's error in striking the jury in this case requires a new trial. *Id.*

RESPECTFULLY SUBMITTED this 17th day of January, 2013.

ROBERT W. FERGUSON
Attorney General

PATRICIA D. TODD, WSBA #38074
JOHN C. DITTMAN, WSBA #32094
Assistant Attorneys General
MICHAEL P. LYNCH, WSBA #10913
Senior Counsel
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the Appellants' Opening Brief was electronically filed with the Court of Appeals as follows:

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And that one copy was served by electronic mail and US Mail to:

Respondent's Attorney:

eric@edickman.com and kathleen@edickman.com
Eric Dickman
E. DICKMAN LAW FIRM
PO Box 66793
Seattle, WA 98166-0793

DATED this 17th day of January, 2013 at Tumwater, Washington.

Hilary Sotomish

Hilary Sotomish

Appendix 1

C

Journal of Maritime Law and Commerce
January, 2003

Fourth Newport Symposium

"The Use of Evidence in Admiralty Proceedings" [FNa1]

*159 SHOULD WE TRUST JURIES WITH ADMIRALTY CASES?

George J. Koelzer [FNa2]

I have been asked to take a side on the question of whether we should trust juries with admiralty cases. I cheerfully accepted the assignment to speak for the pro side.

First, a disclosure of interest. I have been trying cases, mainly jury cases, for over thirty-eight years, and a great many of these have been admiralty and maritime cases. Of course, I have also tried a fair number of non-jury admiralty cases in federal courts. Finally, over the past thirty years or so, the large majority of my work has been representing Lloyd's and London market underwriters, mostly in maritime matters but also with regard to aviation, non-marine and other classes of policies.

As my English friends like to put it, "for the avoidance of doubt," let me state up front and directly that I am a strong believer in the jury system. I will take a jury trial any time over a bench trial. There are several reasons. First, I would far sooner trust the collective judgment of six—or eight or twelve—laymen, than the individual judgment of one judge. Over the years, and in hundreds of trials, I have, with but rare exception, found juries to be fair and open-minded. There are techniques for appealing to a juror's sense of fairness and justice. It is a very rare case, in my experience, where this appeal does not work.

If things go badly at trial, an appeal from a judgment based on a jury verdict is much less difficult than one based upon a bench trial. Whether in admiralty or otherwise, it is extremely rare for a judge in a bench trial to be reversed afterward because of a mistake or error in findings of fact.

Outside, perhaps, of the United States District Courts for the Southern District of New York, the Eastern District of Louisiana, and the Southern District of Texas, you will rarely find a judge, federal or state, who knows much about, and has any experience in, maritime cases and admiralty law. In a maritime case, it is just as arduous a task (and sometimes a far more delicate*160 one) to "educate" the judge about the facts, or the law, or both, than it is to "educate" a jury.

In more than thirty years of working in London for underwriters, both marine and non-marine, I have heard so often the phrase, "Oh, those U.S. juries!" that I now hear it in that market as a sort of mantra. I seldom if ever heard it before the late 1970's. I have thought about the trend since, but cannot deduce why U.S. juries should have become regarded as a serious problem at that time and since. An answer must lie elsewhere.

The Seventh Amendment to the United States Constitution provides for trial by jury of all cases at common law valued at more than $20. [FN1] Many admiralty and maritime cases, however, are not "at common law," so that the Seventh Amendment does not apply to them. [FN2] In certain maritime cases, the only way in which to guarantee a plaintiff trial by jury in federal court is to plead jurisdiction based on diversity of citizenship. [FN3] As elsewhere in

maritime law, there is an exception to the rule that trial by jury is not generally a party's right when the case is within admiralty's jurisdiction. By statute, if the cause of action arises on the Great Lakes, a party has a right in federal court to trial by jury. [FN4]

One cannot discuss productively this subject, that is, jury trials for admiralty and maritime cases, without discussing the "saving to suitors" clause. [FN5] The clause first appeared in the Judiciary Act of 1789, so the proviso it embodies has been part of the statutory law of the United States from the very beginning. The pertinent part of section 1333 of the Judicial Code today provides for federal jurisdiction in "Any civil case of admiralty or maritime ***161** jurisdiction, saving to suitors in all cases all the remedies to which they are otherwise entitled." [FN6]

Over more than two centuries, this clause has spawned many cases of great interest to those lawyers drawn to matters procedural. For example, an action to enforce a maritime lien is an action *in rem*, to which the saving to suitors clause does not apply. [FN7] So is an action to foreclose a preferred ship mortgage. Actions *in rem* of this sort may only be brought in federal court, where there is, according to the Constitution, admiralty jurisdiction. [FN8]

On the other hand, most cases arising from personal injury or wrongful death in a maritime setting may be brought otherwise as actions *in personam*, to which the saving to suitors clause does apply. Here, things get interesting. [FN9]

Under the saving to suitors clause, the typical case of maritime personal injury or wrongful death may be brought in a state court of general jurisdiction, and there the parties can demand trial by jury. This sort of maritime case includes those with claims under the Jones Act, [FN10] for which state courts have original jurisdiction. [FN11]

To recap: where a case is before a federal court only because it is a case "of admiralty or maritime jurisdiction," neither party has a right to jury trial (except when the case arises on the Great Lakes). Jury trials in admiralty cases are available, however, where there is also federal jurisdiction based on diversity of citizenship. Maritime actions *in rem* must be brought in federal court. State courts have jurisdiction over disputes governed by maritime ***162** law in actions *in personam* otherwise recognized by the common law, *i.e.*, suits to recover tort or contract damages.

So we come to the heart of the matter. Assuming the option of a jury trial is available in a maritime action, the choice belongs to counsel. Each such decision is no doubt idiosyncratic. It turns upon the experience of counsel in prior jury trials, the venue, the nature and facts of the case, and other such criteria. I cannot give you an ironclad rule for the exercise of such an option; nor can anyone else. I can only refer to my experience, exercise my judgment and then explain to you why I prefer a jury.

In my experience, a group of jurors seldom gets it wrong. Naturally, jury trials are more complex and perhaps challenging than bench trials. But, if it were plain that a jury got it wrong on the facts, contrary to the evidence or to the law instructed by the court, then there is a reasonable prospect for appeal, which is rarely, if ever, the case after a bench trial. In the hands of a jury, the fate of your case does not depend upon the views of but one person. In my experience, the influence of sympathy and bias on jury verdicts is vastly over-estimated; criticism of trial by jury on such a basis fails to take into account the sympathies and prejudices, entirely and naturally human, to be found in a judge.

So my recommendation is, whenever possible, try your admiralty case before a jury.

[FNa1]. Co-sponsored by the Marine Affairs Institute of the Roger Williams University School of Law.

[FNa2]. Coudert Brothers LLP (Los Angeles). A.B., J.D., Rutgers, the State University of New Jersey.

[FN1]. "In suits at common law, where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law."

[FN2]. See Fitzgerald v. United States Lines Co., 374 U.S. 16, 20, 1963 AMC 1093, 1096-97(1963) (citing Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847)). See also Fed. R. Civ. P. 38(e) ("[The Federal Rules of Civil Procedure] shall not be construed to create a right of trial by jury of the issues in a maritime or admiralty claim within the meaning of Rule 9(h).").

[FN3]. See, e.g., Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 1996 AMC 330 (4th Cir. 1995). According to the pertinent part of Fed. R. Civ. P. Rule 9(h):

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the federal court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14 (c), 38(e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims.

[FN4]. According to 28 U.S.C. § 1873:

> In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

[FN5]. 28 U.S.C. § 1333.

[FN6]. Id.

[FN7]. The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1866); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866). Compare Madruga v. Superior Court, 346 U.S. 556, 1954 AMC 405 (1954).

[FN8]. U.S. Const. Art. III, § 2, cl. 1.

[FN9]. Over my years at the bar, I've watched the number of maritime personal injury and wrongful death cases shrink dramatically. For this, there are several reasons. One is the decline, not only of the United States merchant marine, but of commercial shipping elsewhere in the world. Next, and perhaps more importantly, has been the substitution, beginning in the late 1960's, of containerized carriage of cargo for breakbulk carriage. This revolution in the practice of the shipping industry itself has profoundly changed the practice of maritime law. Ships now make outturns at ports in a matter of hours, where once they took days. Stevedore gangs are perhaps one-fifth or less of what they once were. The growth of super ships that exist only to carry containers has reduced both the number of ships and the number of port calls each year, and so forth. As the occasions for accident have been reduced, so have the casualties, and thus the occasions for practicing the maritime law of personal injury, wrongful death, and marine cargo damage or loss. Plaintiff's lawyers have to be more ingenious these days.

[FN10]. 46 U.S.C. § 688.

[FN11]. Engel v. Davenport, 271 US 33, 1926 AMC 679 (1926); Panama R.R. Co. v. Vasquez, 271 U.S. 557, 1926 AMC 984 (1926). Note that the Jones Act is a federal statute (essentially extending the remedies for workers afforded by the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to crewmembers of vessels. Jones Act cases in state court are *not* removable to federal court, sitting as an admiralty court or otherwise. 46 U.S.C. § 688(a) (incorporating 28 U.S.C. § 1445(a)).

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